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

MS Brighton, LLC,
Petitioner,

v

MTT Docket No. 345507

City of Brighton,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, MS Brighton, LLC, appeals ad valorem property tax assessments levied by Respondent, City of Brighton, against Parcel Nos. 4718-24-300-016 ("Parcel 016") and 4718-24-300-019 ("Parcel 019") for the 2008, 2009, 2010, 2011 and 2012 tax years. Steven P. Schneider, Attorney, represented Petitioner, and Bradford L. Maynes, Attorney, represented Respondent.

A hearing on this matter was held on August 19, 2013, August 20, 2013, September 24, 2013 and September 25, 2013. Petitioner's witnesses were Gary J. Tressel, engineer, and David J. Lieberman, Michigan Certified General Real Estate Appraiser. Respondent's witnesses were Gary Markstrom, P.E. and Jack J. Johns, Michigan Certified General Real Estate Appraiser.

Based on the evidence, testimony, and case file, the Tribunal finds that the true cash values ("TCV"), state equalized values ("SEV"), and taxable values ("TV") of the subject property for the 2008 through 2012 tax years are as follows:

Parcel No.	Year	TCV	SEV	TV
4718-24-300-016	2008	$253,000	$126,500	$126,500
4718-24-300-016	2009	$253,000	$126,500	$126,500
4718-24-300-016	2010	$253,000	$126,500	$126,500
4718-24-300-016	2011	$253,000	$126,500	$126,500
4718-24-300-016	2012	$253,000	$126,500	$126,500

Parcel No.	Year	TCV	SEV	TV
4718-24-300-019	2008	$264,000	$132,000	$132,000
4718-24-300-019	2009	$264,000	$132,000	$132,000
4718-24-300-019	2010	$264,000	$132,000	$132,000
4718-24-300-019	2011	$264,000	$132,000	$132,000
4718-24-300-019	2012	$264,000	$132,000	$132,000

PETITIONER'S CONTENTIONS

Petitioner contends that the evidence presented in this case strongly supports a determination that the true cash value of the subject property on the assessment rolls is substantially overstated. Specifically, Petitioner contends that its appraisal evidence supports a value for Parcel No. 016 of $140,000 for the 2008 tax year and $120,000 for the 2009 through 2012 tax years and a value for Parcel No. 019 of $240,000 for the 2008 through 2012 tax years. Petitioner further contends that (i) Parcel Nos. 016 and 019 require extraordinary development costs before these Parcels can be developed, (ii) the subject Parcels are adversely impacted by severe changes in elevation and easements, (iii) to provide access to Parcel 019 in anticipation of development, a loop road rather than a driveway is required because of Respondent's cul-de-sac ordinance limiting driveways to 500 feet, (iv) development of Parcel 016 requires construction of retaining walls, (v) the cost of the extraordinary developments identified by Petitioner's appraiser exceeds the

value of the subject Parcels, (vi) given the extraordinary development costs identified by Petitioner's appraiser, the highest and best use of the subject property is as speculative-recreational type land, (vii) the subject property's research/manufacturing ("R/M") zoning does not allow commercial, office or residential development, (viii) the planned urban development ("PUD") provision of the R/M zoning ordinance is restrictive to the property owner and Respondent's argument that PUDs are routinely granted has not been proven, (ix) the only way to make sense of Respondent's interpretation of the ordinance is that any development in the R/M class needs to be 50% R/M, and at most 35% commercial, and 15% something else, (x) the property has to be valued for tax purposes under its current zoning, pursuant to case law, (xi) Respondent's appraiser has overstated the amount of useable acreage for both Parcels 016 and 019, (xii) Respondent's appraiser's comparable sales are not realistic as they do not have the same zoning or topography challenges as the subject, (xiii) the subject Parcels have to be valued without regard to who owns it and without examining the impact of any development on the 018 Parcel, (xiv) Petitioner split what became the 018 Parcel from the 019 Parcel because there was an interested buyer; the split was not made to destroy the value of the 019 Parcel, and (xv) putting a road through the 018 Parcel would destroy its value, which is not practical.

As determined by Petitioner's appraiser, the TCV, SEV, and TV for the subject property for the tax years at issue should be as follows:

Parcel No.	Year	TCV	SEV	TV
4718-24-300-016	2008	$140,000	$70,000	$70,000
4718-24-300-016	2009	$120,000	$60,000	$60,000
4718-24-300-016	2010	$120,000	$60,000	$60,000

4718-24-300-016	2011	$120,000	$60,000	$60,000
4718-24-300-016	2012	$120,000	$60,000	$60,000

Parcel No.	Year	TCV	SEV	TV
4718-24-300-019	2008	$240,000	$120,000	$120,000
4718-24-300-019	2009	$240,000	$120,000	$120,000
4718-24-300-019	2010	$240,000	$120,000	$120,000
4718-24-300-019	2011	$240,000	$120,000	$120,000
4718-24-300-019	2012	$240,000	$120,000	$120,000

PETITIONER'S ADMITTED EXHIBITS

P-1 Appraisal, Woodbank Group, dated June 18, 2013.

P-2 Hubbell, Roth & Clark, Inc. aerial photograph of subject Parcels.

P-3 Hubbell, Roth & Clark, Inc. aerial photograph of subject Parcels.

P-4 Photographs, Parcel 019, loop road topography.

P-5 Photographs, Parcel 016, topography.

P-6 Aerial photographs of Petitioner's appraiser's comparable properties.

P-7 Excerpt, City of Brighton site plan standards.

P-10 Gary Tressel resume.

P-12 Aerial photographs of Respondent's appraiser's comparable properties.

P-13 Information regarding subsequent sale of property located at 8000 Newburgh.

P-21 Survey dated January 17, 1997.

P-22 Hubbell, Roth & Clark, Inc. Parcel 016 useable acreage.

P-23 Hubbell, Roth & Clark, Inc. Engineer's Opinion of Cost.

PETITIONER'S WITNESSES

Gary J. Tressel

Gary J. Tressel is qualified as an expert in site planning and municipal development. He testified that (i) although he is not a professional engineer, he is a certified engineering technician, and he has performed municipal engineering and site development services for 47 years and has been employed by Hubbell, Roth & Clark, Inc. since 1988, (ii) he prepared Appendices H and I to the appraisal prepared by Mr. Lieberman, (iii) Appendices H and I estimate the cost to build a loop road around Parcel 019, (iv) exhibits P-2 and P-3 were prepared at his direction and reflect, among other things, elevation changes of approximately 80 feet on Parcel 019 and 50 feet on Parcel 016, (v) the loop road to provide access to Parcel 019 is 42 feet wide and approximately 4,520 feet long, with drainage to the lake on Parcel 016, (vi) a loop road was considered rather than a driveway because of the 500 foot cul-de-sac requirement in Respondent's ordinances, and because of fire safety requirements, (vii) a cul-de-sac road to service a building in the northwest corner of Parcel 019 would be approximately 2,800 feet, (viii) the Urban Land Institute recommends a maximum road length before a cul-de-sac of 800 feet, (ix) variances on cul-de-sac lengths are not typical unless there is a second means of ingress and egress for police and fire, (x) he estimated the cost of the loop road to be $750 per lineal foot, (xi) his estimated cost of the loop road does not include fill needed for the northeast corner of Parcel 019, street lighting, sidewalks, and normal costs of development, (xii) his cost estimate for the loop road would not be reduced if a PUD was allowed for Parcel 019, (xiii) a "stub" street could be built to provide access to Parcel 019 rather than a loop road, but he would not recommend it to a developer, (xiv) if the loop road was 34 feet wide rather than 42 feet wide,

his cost estimate would be reduced by 5% - 8%, (xv) the useable portion of the northeast corner of Parcel 016 is 1.79 acres, and once you net out the setback of .81 acres, the net useable land area is .98 acres, (xvi) the cost to achieve 1.79 useable acres on the northeast corner of Parcel 016 would be approximately $1.4 million, (xvii) 2.13 useable acres could not be achieved in this section due to the storm water drainage easement, (xviii) he agrees with Petitioner's appraiser that a retaining wall would be required to develop Parcel 016 and he further agrees with Petitioner's appraiser's cost estimate, (xix) Respondent's witness Markstrom understates the required width of a boulevard to provide access to Parcel 019 rather than a loop road, (xx) Respondent's witness Markstrom fails to reflect the actual width of the ditch that would be necessary as a part of the boulevard, (xxi) Respondent's witness Markstrom's proposed boulevard, with all necessary ditches, medians, and other needed space would be 110 feet wide to the outside edges, which could not fit on the lower southwest corner of Parcel 019 that would connect to Brighton Interior Drive, and (xxii) Respondent's witness Markstrom underestimates the cost of a boulevard by approximately $500,000. [Transcript, Vol. 1, pp. 44 – 187; Vol. 4, pp. 75 – 130.]

David J. Lieberman

David J. Lieberman is a licensed real estate appraiser in Michigan and was Petitioner's valuation expert. He testified that (i) he prepared an appraisal of the subject Parcels for the 2008 through 2012 tax years, (ii) the economic downturn beginning in 2008 adversely affected the true cash value of vacant parcels, (iii) Parcel 018 is generally flat and more easily developable than Parcels 016 and 019, (iv) to develop the subject Parcels, a road is needed to provide access to Parcel 019 and a retaining wall is needed for Parcel 016, (v) the northeast corner of Parcel 016

cannot be developed because of its topography, as well as the location of the forebay and its easement on that portion of the Parcel, (vi) approximately 3.62 acres located at the southwest corner of Parcel 016 can be developed only if a retaining wall is constructed, (vii) the cost of the retaining wall needed to develop Parcel 016 would be a minimum of approximately $371,600, and is considered an "extraordinary development cost" in concluding to the highest and best use of the Parcel, (viii) if not considered to be "extraordinary costs" then the cost of the access road and the cost of the retaining walls would need to be considered as a functional utility adjustment in applying the sales comparison approach, (ix) his highest and best use analysis of each of the subject Parcels identified comparable sales and made market adjustments and ultimately concluded that it was not financially feasible to develop either of the subject Parcels given current zoning, market conditions, and development challenges such as topography (except for Parcel 016 in 2008), (x) he relied on conversations with Amy Cyphert at the City of Brighton to conclude that rezoning, either of the subject Parcels or developing these Parcels as a PUD, would be very difficult, (xi) based on his reading of the zoning ordinance, at least 50% of the Parcel must be used for research and manufacturing, (xii) as a result of the pond and the pipeline easement located on Parcel 019, approximately 26.56 acres is usable, with the area located between the proposed loop road and the pond included as usable, although it may not be realistic for anyone to build there, (xiii) a loop road is necessary to provide access to Parcel 019, (xiv) the cost of the loop road, including sewer and water, is an extraordinary expense, (xv) he developed the cost of a loop road based on Marshall Valuation Service cost information as well as on the work product of Gary Tressel, (xvi) his conclusion of the cost of the loop road was $650 per linear foot, with a

projected 4,520 linear feet of roadway, not including lighting, sidewalks and other "soft" costs, (xvii) given his conclusion that development of Parcels 016 and 019 was not financially feasible, he concluded that the highest and best use of the subject Parcels was as recreational/speculative land, and (xviii) he applied the sales comparison approach, identified five comparable sales, made market adjustments to account for differences between the subject Parcels and the comparables, and concluded to a value of $5,000 per acre for Parcel 016[1] and $4,500 per acre for Parcel 019. [Transcript, Vol. 1, pp. 188 – 275; Vol. 2, pp. 6 – 210.]

RESPONDENT'S CONTENTIONS

Respondent contends that the true cash, assessed, and taxable values initially determined by Respondent for Parcel 016 should be reduced for all tax years at issue, and Parcel 019 should be increased for all tax years. Specifically, Respondent contends that (i) Petitioner has not met its burden of proof given Petitioner's implausible theory of value, (ii) the R/M zoning of the subject property was at the request of Petitioner for the express purpose of establishing a PUD development, (iii) the subject Parcels are master planned for mixed use, to include office and commercial uses, (iv) the subject Parcels are located just west of one of the most densely developed commercial areas in the city, (v) Respondent has a history of working with, rather than opposing, property owners seeking zoning variances, (vi) because Petitioner owns Parcel 018 in addition to Parcels 016 and 019, any consideration of extraordinary development costs, if any, should include Parcel 018, (vii) the development of the subject Parcels as a PUD eliminates many of the barriers to development, and if all three Parcels, 016, 018, and 019 are

[1] The $5,000 per acre for tax year 2008 had an additional value of $40,000 for the industrial pad on the Parcel. [Exhibit P-1 at 112]

included, there is no need for a loop road, (viii) the granting of a variance by Respondent to avoid construction of a loop road to provide access to Parcel 019 is likely, (ix) what Petitioner's appraiser characterizes as "extraordinary development costs" are actually normal costs of developing a parcel and should not be treated any differently in determining the true cash values of the subject Parcel from any other developable parcel, (x) the subject Parcels are valuable land, abutting one of the busiest roads and the most valuable commercial land in Livingston County, (xi) virtually all of the barriers to development were created by Petitioner, and under the case law, you cannot self-create barriers to artificially depress the value for tax purposes, (xii) there is nothing in the zoning ordinance that explicitly states there has to be some R/M use; it can be 100% commercial for the useable acreage, (xiii) the reference in the zoning ordinance to 50% R/M, 35% commercial and 15% something else relates to the total site, not just the useable acreage, and (xiv) Respondent's appraiser has reached a highest and best use that makes sense given the realities of development and what the City of Brighton permits.

As determined by Respondent's appraiser, the TCV, SEV, and TV for the subject property for the tax years at issue should be:

Parcel No.	Year	TCV	SEV	TV
4718-24-300-016	2008	$985,000	$492,500	$492,500
4718-24-300-016	2009	$870,000	$435,000	$435,000
4718-24-300-016	2010	$840,000	$420,000	$420,000
4718-24-300-016	2011	$580,000	$290,000	$290,000
4718-24-300-016	2012	$580,000	$290,000	$290,000

Parcel No.	Year	TCV	SEV	TV
4718-24-300-019	2008	$2,800,000	$1,400,000	$1,221,035
4718-24-300-019	2009	$2,625,000	$1,312,500	$1,274,760
4718-24-300-019	2010	$2,450,000	$1,225,000	$1,225,000
4718-24-300-019	2011	$2,275,000	$1,147,500	$1,147,500
4718-24-300-019	2012	$2,100,000	$1,050,000	$1,050,000

RESPONDENT'S ADMITTED EXHIBITS

R-3 Appraisal, Jack J. Johns Appraisal Company, Inc. dated April 21, 2013.

R-4 Property Record Cards, Parcels 016 and 019, 2008.

R-5 Property Record Cards, Parcels 016 and 019, 2009.

R-6 Property Record Cards, Parcels 016 and 019, 2010.

R-7 Property Record Cards, Parcels 016 and 019, 2011.

R-8 Property Record Cards, Parcels 016 and 019, 2012.

RESPONDENT'S WITNESS

Jack J. Johns

Jack J. Johns, Michigan Certified Real Estate Appraiser, was admitted as Respondent's valuation expert in this matter. Mr. Johns testified that (i) he appraised the subject property as of December 31, 2007, December 31, 2008, December 31, 2009, December 31, 2010 and December 31, 2011, (ii) it was not necessary to develop a cost or income approach since it is a vacant land appraisal, (iii) he reviewed the zoning ordinance and spoke with City of Brighton officials regarding what could legally be done on the site, which factored into his highest and best use analysis, (iv) he concluded to a highest and best use as vacant to hold for further permitted commercial development, (v) this determination of highest and

best use is based in part on his review of the city ordinance and discussion with Amy Cyphert, that there was a high possibility for a PUD, (vi) his assumption for highest and best use is that the legally permissible use under the R/M zoning through the PUD would be for commercial development, (vii) he did not independently determine the net useable acreage, but based on the information he was provided, Parcel 019 is approximately 35 useable acres and Parcel 016 is approximately 7.19 useable acres, (viii) with respect to Parcel 019, there is a pipeline easement running along the northern portion just south of I-96, which would probably be able to be constructed over with drives or parking, (ix) the topography and pipeline easement do create some usability and development issues, (x) there is no cost for a retaining wall for Parcel 016 in his appraisal, (xi) he prepared a sales comparison approach, with adjustments based on his experience for location, size, zoning, functional utility, and market conditions, (xii) the functional utility adjustment made to both Parcels was based on the challenges with their development, (xiii) the challenges presented by constructing a road on Parcel 019 were not separately analyzed in the appraisal, but were addressed in the functional utility adjustment, (xiv) comparable #3 for the 016 Parcel was set as available use as a hotel and was a pad site, and was used to build the Holiday Inn next to the Tanger Outlet Mall in Howell, and (xv) the size adjustment made for the 016 Parcel comparables would change if the usable acreage was 3 instead of 5.79. [Transcript, Vol. 3, pp. 124 – 234; Vol. 4, pp. 4 – 74.]

Gary Markstrom

Gary Markstrom, engineer for the City of Brighton, was admitted as Respondent's civil engineering and development expert. Mr. Markstrom testified that (i) he works closely with the city planner and assistant city manager, (ii) his

experience with the city is that it has been pro-development during the tax periods at issue, (iii) he was responsible for the design of Brighton Interior Drive, and was asked by Magna to put the roadway as far east as possible, and the road was stopped short because that was as far as Magna needed to have the roadway, (iv) Parcel 018 does not need construction of an additional road, just interior roadway access, (v) to develop the large portion of Parcel 019 "you would need to construct at least a driveway up to the northern boundary of Parcel 18, then you have interior drives and such to whatever type of development happens on Parcel 19" [Transcript at 32], (vi) in his opinion, you would look at some type of common roadway for Parcels 018 and 019 with a cul-de-sac on it, which given the length, would be more to the east of the Parcel, (vii) to develop Parcel 019 only, he would recommend construction of a road very similar to Brighton Interior Drive with a boulevard section and a wider asphalt section, terminating with a cul-de-sac at the northern property line of Parcel 018, (viii) in his opinion, Petitioner's proposed loop road is a possibility but is not necessary to develop Parcel 019, but it depends on what type of development is on the Parcel and whether it is one use or multiple uses, (ix) a boulevard would require twice as much curbing as a road of otherwise similar size, (x) the natural features provisions of the zoning ordinance are applied to balance between what is planned for development versus what can be preserved, which factors into the analysis of whether to utilize a loop road or cul-de-sac, (xi) there are differences in the cost of constructing road Petitioner is proposing versus what he is proposing, (xii) the cost to construct his proposed road, after applying the same contingencies and engineering costs, is $794,000, for 1,400 feet of roadway, or approximately $567 per lineal foot, (xiii) his proposed cul-de-sac is in excess of 500 feet and is not permitted under a strict reading of the zoning ordinance, but is something that he, as the city

engineer, would recommend a variance for, (xiv) an alternative to a variance is constructing another access point, probably through Parcel 018, or through a loop road, but if looking at Parcel 019 alone, these options would be both cost prohibitive and detrimental to the natural features on the east side of the site, (xv) he does not believe a retaining wall would be necessary to develop Parcel 016, but would require some mass grading, with a setback variance for parking or access, (xvi) he does not believe there is anything necessary for development of Parcels 016 and 019 that are beyond what is normally seen for parcels of this size, and (xvii) he admits that Parcel 019 is not a typical configuration, but is something he has seen before. [Transcript, Vol. 3, pp. 5 – 123.]

FINDINGS OF FACT

1. The subject properties consists of two parcels of property located along Brighton Interior Drive, Brighton, Michigan, Livingston County.
2. Parcel 016 is a vacant, irregularly shaped parcel of approximately 23.99 acres.
3. Present on Parcel 016 is a large pond separating two areas for development.
4. Parcel 019 is a vacant, irregularly shaped parcel, of approximately 52.79 acres.
5. Present on Parcel 019 is a storm water retention pond and a pipeline easement across the northern portion.
6. Both Parcels have “rolling” topography that includes steep slopes, with elevation changes of approximately 50 feet for Parcel 016 and approximately 80 feet for Parcel 019.

7. The subject properties were assessed for the tax years at issue as follows:

Parcel No.	Year	TCV	SEV	TV
4718-24-300-016	2008	$1,200,000	$600,000	$600,000
4718-24-300-016	2009	$1,090,000	$545,000	$545,000
4718-24-300-016	2010	$965,100	$482,550	$482,550
4718-24-300-016	2011	$781,740	$390,870	$390,870
4718-24-300-016	2012	$703,560	$351,780	$351,780

Parcel No.	Year	TCV	SEV	TV
4718-24-300-019	2008	$2,442,080	$1,221,040	$1,221,040
4718-24-300-019	2009	$2,131,560	$1,065,780	$1,065,780
4718-24-300-019	2010	$1,875,760	$937,880	$937,880
4718-24-300-019	2011	$1,519,380	$759,690	$759,690
4718-24-300-019	2012	$1,367,440	$683,720	$683,720

8. The subject properties are zoned R/M (Research Manufacturing District).
9. The subject properties are master planned for mixed use.
10. Under the City of Brighton zoning ordinance, in effect for the tax years under appeal, permitted uses include a PUD.
11. In order to get PUD approval, the site plan must clearly identify and demonstrate how the existing topography and vegetation will be preserved.
12. The subject properties were purchased on January 24, 2004. The purchase also included other property not under appeal in the present case (Parcel 018).
13. Parcel 018 was originally part of Parcel 019, and is 10.5 acres that was split due to a 2004 purchase agreement that was never completed.
14. In 2004, Petitioner entered into a purchase agreement to sell Parcel 018 at a price of $139,400 per acre; however, the transaction was never closed.

15. Petitioner's appraiser reached a conclusion that the highest and best use of the subject Parcels is as speculative/recreational use.
16. Petitioner's highest and best use determination is based in part on what it terms "extraordinary development costs" necessary to develop the subject Parcels, ultimately concluding that it was not financially feasible to develop either Parcel (except Parcel 016 for the 2008 tax year).
17. Due to the pond and steep slopes on Parcel 016, Petitioner's appraiser determined a net useable acreage of approximately 3.62 acres, located in the southwest corner of the Parcel, which would require construction of an eight foot retaining wall.
18. Approximately 2.53 acres of Parcel 016 would be useable without construction of a large retaining wall.
19. Based on a review of Marshall Valuation Service, published costs and input from Petitioner's engineer, Petitioner's appraiser determined the "extraordinary development costs" relative to the retaining wall for Parcel 016 to be $34 per square foot as of December 31, 2012, decreased by 3% per year, with an additional 20% for soft costs and 15% for entrepreneurial incentive.
20. Petitioner's appraiser's projected costs of the retaining wall on the southwest portion of Parcel 016, for the tax years under appeal are $319,111 (2008), $328,980 (2009), $339,155 (2010), $349,644 (2011), and $360,458 (2012).
21. Petitioner's engineer projected a cost of $1,392,939 for the retaining wall for the northeast portion of Parcel 016 as of September 20, 2013, which includes $242,000 for mass grading, 15% for contingencies, and amounts for design and construction engineering.

22. Due to the large pond and pipeline easement along the northern border of Parcel 019, Petitioner's appraiser determined a net useable acreage of 26.56 acres.
23. Based on Marshall Valuation Service reports and consideration to the input from Petitioner's engineer, Petitioner's appraiser determined the "extraordinary development costs" for Parcel 019 related to the 4,520 foot loop road and related expenses to be $650 per lineal foot as of December 31, 2012, decreased by 3% per year, with an additional 15% for entrepreneurial incentive.
24. Petitioner's appraiser's projected costs of the loop road, for the tax years under appeal are $3,481,686 (2008), $3,589,367 (2009), $3,700,378 (2010), $3,814,823 (2011), and $3,932,807 (2012).
25. Petitioner's engineer projected a cost of $3,383,790.36 for the loop road as of May 17, 2013, which includes 15% for contingencies, 8% for design engineering, and 12% for construction engineering.
26. Based on the highest and best use determination as speculative/recreational, Petitioner's appraiser prepared a sales comparison approach utilizing the total acreage of each Parcel (23.99 for Parcel 016 and 52.79 for Parcel 019).
27. Petitioner's appraiser selected 5 vacant land comparables, used for both Parcels and for all tax years under appeal.
28. Petitioner's appraiser made adjustments, including financing terms, conditions of sale, marketing conditions, location, functional utility, and size.
29. Respondent's appraiser reached a conclusion that the highest and best use of the subject Parcels is to hold for future permitted commercial development.

30. Respondent's appraiser did not independently determine the net useable acreage for either Parcel; he relied on information Petitioner had provided to Respondent's counsel.
31. Due to the pond on Parcel 016, Respondent's appraiser utilized a net useable acreage of approximately 5.79 acres.
32. Due to the pond and pipeline easement on Parcel 019, Respondent's appraiser utilized a net useable acreage of approximately 35 acres.
33. Based on the highest and best use determination, Respondent's appraiser prepared a sales comparison approach for each of the tax years at issue utilizing a total of 8 comparables for Parcel 016, and a total of 5 comparables for Parcel 019.
34. None of the comparable sales identified by Respondent's appraiser were comparable to the subject Parcels in terms of location and topography.
35. Respondent's appraiser made adjustments to the comparables including location, size, zoning, functional utility, and market conditions, but failed to explain these adjustments in his appraisal.
36. Respondent's appraiser made a functional utility adjustment of negative 10% to most of the comparables, taking into consideration the overall utility of the subject sites, the development challenges, and the topography.
37. The sales comparison approach prepared by Respondent's appraiser does not arrive at a value for the additional non-useable acreage on either Parcel.
38. Respondent's engineer testified that construction of a common roadway between Parcels 18 and 19 terminating with a cul-de-sac would be necessary to develop Parcel 019.

39. Respondent's engineer, using the same contingencies and engineering costs as Petitioner, estimated a cost of $794,000, for his 1,400 foot roadway with a cul-de-sac.

40. Respondent's engineer testified that his proposed 1,400 feet of roadway is not permitted under a strict reading of the zoning ordinance, but is something he would recommend a variance for.

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. See MCL 211.27a.

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. 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 . . . . Const 1963, art 9, sec 3.

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. MCL 211.27(1).

The Michigan Supreme Court has determined that "true cash value" is synonymous with "fair market value." See *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

Under MCL 205.737(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. See *Alhi Dev Co v Orion Twp*, 110

Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal is not bound to accept either of the parties' theories of valuation. See *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (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. See *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485-486; 473 NW2d 636 (1991).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735a(2). The Tribunal's factual findings are to be supported by competent, material, and substantial evidence. See *Antisdale v Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

"The petitioner has the burden of proof in establishing the true cash value of the property." MCL 205.737(3). "This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin* at 354-355. 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." MCL 205.737(3).

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. See *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). The market approach is the only appraisal method that directly reflects the balance of supply and demand for property in marketplace trading. See *Antisdale*. 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. See *Antisdale* at 277. In this regard, given that the subject Parcels are unimproved, the Tribunal finds that the cost and income approaches to value are not appropriate; the Tribunal further finds that both parties appropriately relied solely upon the market approach in determining the true cash value of the subject Parcels for the tax years at issue. However, any similarity or consistencies between the respective appraisals submitted into evidence by the parties ends with their conclusions that the only appropriate method of valuation for the subject properties is the market approach. For example, the parties disagree regarding (i) the highest and best use of the subject properties, including application of existing zoning, the likelihood of variances PUDs being granted, and the financial feasibility of possible uses, (ii) the amount of "useable" acres associated with each Parcel, (iii) the nature and cost of developing the subject properties and whether such costs are "extraordinary" or can be appropriately reflected as a "functional inutility" adjustment to comparable sold properties, (iv) the identification of comparable sold properties, and (v) appropriate adjustments to be made to the

comparable sold properties to account for differences between the subject property and the comparable properties.

Highest and Best Use

Because the parties' respective appraisers substantively disagree on the highest and best use of the subject properties, and therefore apply different valuation methods in determining substantially different values for the subject properties, the Tribunal must first make a determination regarding the subject properties' highest and best use for the tax years at issue. As discussed above, Petitioner determined that because of the topography and other issues associated with the subject Parcels requiring extraordinary development costs, the highest and best use of the Parcels is as speculative/recreational. Petitioner's appraiser utilized the total approximate size of both Parcels in determining value (rather than an estimate of net useable acreage)[2]. On the other hand, Respondent determined that the highest and best use of the property is to hold for future permitted commercial development, utilizing the approximate net useable acreage of both Parcels. The danger in both parties' conclusions of highest and best use is that each party's entire case is conditioned upon its appraiser's highest and best use. If either alternative highest and best use is flawed, then that party is essentially left without a value premise or supporting evidence.

In this regard, the Appraisal Institute states that an appraiser charged with developing a market value opinion must include a highest and best use analysis that identifies "the most profitable, competitive use to which the subject property

[2] The Tribunal acknowledges that Petitioner's appraiser did determine the highest and best use as industrial development for parcel 016 for 2008 only, indicating a value of $140,000.

can be put." Appraisal Institute, *The Appraisal of Real Estate* (Chicago: 14th ed, 2013), at 331.

In all valuation assignments, opinions of value are based on use. The highest and best use of a property to be appraised provides the foundation for a thorough investigation of the competitive position of the property in the minds of market participants. Consequently, highest and best use can be described as the foundation on which the market value rests.

Highest and best use may be defined as "[t]he reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value." *Id* at 333.

As stated in *The Appraisal of Real Estate*, in order to be reasonably probable, the use must meet certain conditions:

- The use must be *physically possible* (or it is reasonably probable to render it so).
- The use must be *legally permissible* or it is reasonably probable to render it so).
- The use must be *financially feasible*.

> Uses that meet the three criteria of reasonably probable uses are tested for economic *productivity*, and the reasonably probably use with the highest value is the highest and best use. *Id* at 332. [Emphasis in original.]

The Appraisal of Real Estate further states:

> The analysis of land as though vacant focuses on alternative uses, with the appraiser testing each reasonably probable use for legal permissibility, physical possibility, financial possibility, and maximum productivity. *Id* at 337.

Finally, *The Appraisal of Real Estate* (p. 42) states that "[a]lthough highest and best use analysis is an essential part of the valuation process, it is often one of the weakest areas in an appraisal. It is too often viewed as a necessary, but fruitless exercise, when it is really the heart of the assignment in an analysis of market value." The contrasting approaches taken by the respective appraisers in concluding to a highest and best use for the subject Parcels clearly reflects the recognition by Petitioner's appraiser of that principle and the failure of Respondent's appraiser to similarly recognize that principle. Specifically, although Respondent's appraiser included boilerplate language in his highest and best use analysis recognizing the four criteria to be met in determining highest and best use, he actually devoted just four sentences of his 100+ page appraisal to what should constitute the "heart" of his appraisal. As will be discussed in greater detail, Respondent's appraiser simply concluded, with little supporting evidence, that the highest and best use of the subject Parcels "would be to hold for future permitted commercial development." (Respondent's Appraisal, p. 29). On the other hand, the Tribunal finds that Petitioner's appraiser recognized the importance of identifying the highest and best use of the subject Parcels by providing a thorough analysis of each of the conditions identified by *The Appraisal of Real Estate.*

a. Legally permissible.

In this case, one of the key determinations to be made is whether the appraisers' conclusions as to the highest and best use are legally permissible. Generally, factors such as private restrictions, zoning, building codes, and environmental regulations, may preclude many potential uses of the property; "[t]o apply the test of legal permissibility, an appraiser determines which uses are

permitted by current zoning, which uses could be permitted if a zoning change were reasonably probable, and which uses are precluded by private restrictions on the site." *Id* at 338. (Emphasis added)

With regard to the probability of a zoning change, *The Appraisal of Real Estate* states:

> In investigating the reasonable probability of a zoning change, an appraiser considers zoning trends and the history of rezoning requests in the market area as well as documents such as the community's comprehensive plan (or master plan) . . . . Even if there is no current market evidence of a zoning change, documented interviews with officials and discussions of zoning practices and histories can be helpful in evaluating the possibility of a zoning change. These interviews may, however, not be "proof" of a likely change or the denial of a change in zoning. Decisions on zoning ordinances are made by elected officials, and the processes are often heavily contested, costly, and time consuming. The outcomes are not known until official actions are taken. *Id* at 339.

Here, Respondent's appraiser concluded, without further explanation other than a reliance on discussions with, and an Affidavit from, Amy Cyphert[3], Respondent's

[3]Although the Tribunal recognizes that a party presenting a case before the Tribunal has every right to call, or not call, a witness identified on their Prehearing Statement, it is extremely troublesome to the Tribunal that Respondent did not call Amy Cyphert as a witness in this case. Not only did Respondent specifically identify Ms. Cyphert in its opening statement as a potential witness to be offered in its presentation of its case (Transcript, Vol. 1, p. 6), to present testimony regarding the ease with which a PUD would be granted under the existing R/M Zoning, the "business-friendly nature of the city, the likelihood that a "loop road" would not be needed to access parcel 019, and the interest shown by others in developing the subject property. (Transcript, Vol. 1, pp. 41, 41, 43), but Respondent's appraiser relied on an Affidavit provided by Ms. Cyphert stating that (i) the subject properties are zoned RM, (ii) the subject properties are planned in the City's Master Plan for mixed use, (iii) the current zoning of the subject properties permits mixed use development through a PUD, (iv) the City is "business-friendly," and is very supportive of development, and (v) in her opinion, a developer seeking a PUD "for a commercial/office/research/manufacturing development," which met all other ordinance requirements, would not have any difficulty obtaining PUD approval. Further, during testimony

Planning and Zoning Director, that use of the subject Parcels for future commercial development was legally permissible because the Parcels were Master Planned for mixed use commercial development and a PUD allowing for commercial development was allowed under current R/M Zoning.

Petitioner argues that the properties have to be valued for tax purposes under the current zoning pursuant to case law. Petitioner relies upon *Kensington Hills Development Co v Milford Twp and Milford Village*, 10 Mich App 368; 159 NW2d 330 (1968), which Petitioner claims is the "key" case. In that decision, the Court of Appeals stated "[z]oning restrictions are real and, during their duration, limit the use of the property as much as deed restrictions. Just as it is error to fail to consider deed restrictions in establishing assessments, it is error to assess noncommercial property on the proposition that it will ultimately be zoned commercially." *Id* at 372, referencing *Lochmoor Club v City of Grosse Pointe Woods*, 3 Mich App 524; 143 NW2d 177 (1966). This position was also taken by the Court of Appeal in *Gannon v Cohoctah Twp*, 92 Mich App 445; 285 NW2d 323 (1979). Respondent contends that all of Petitioner's cited cases are off point; Respondent's appraiser was not saying that a zoning change was necessary, but he did do an analysis of the subject's zoning and permitted use. Respondent argues that PUD approval is not a rezoning and there is a right to a PUD as long as the standard under the ordinance

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from Respondent's appraiser, he referred at least 12 times to discussions he had with Ms. Cyphert that led him to conclude that the useable acreage of the subject parcels would be allowed to be used 100% for commercial purposes. Interestingly, and equally troubling to the Tribunal, was testimony (approximately 16 separate references) received from Petitioner's appraiser that he also discussed the potential use or uses for the subject parcels with Ms. Cyphert and she stated that the mixed use requirements for a PUD could not be accommodated by the subject parcels given their size and the presence of regulated wetlands.

is met. The Tribunal finds that the subject Parcels are both zoned R/M and must be valued based on what is permitted under that zoning, which includes a PUD.

The R/M zoning ordinance provides that a PUD is a permitted use. The zoning ordinance further provides that:

> The planned unit development (PUD) is intended to encourage innovative, mixed land use, site design, and traffic management that preserves and incorporates existing topography, vegetation and open space . . . .
>
> (1) . . . Any proposed use or combination of uses not ordinarily in the R/M zoning district but approved as part of a PUD, shall not occupy for any purpose, more than 50 percent of each lot or 50 percent of the overall research/manufacturing park site, except commercial uses, which may account for no more than 35 percent of the overall research/manufacture. Commercial uses may account for 35 percent . . . .
>
> (2) . . . In order to obtain PUD approval, the site development plan shall clearly identify and demonstrate how existing, natural topography and vegetation is proposed to be preserved, identify innovative combination of land uses and site design techniques, and identify areas of preserved, significant open space. . . .

According to Petitioner's appraiser, he was told in conversations with Amy Cyphert that "there wasn't enough . . . land area on either Parcel to accomplish a PUD because the ordinance calls for a mixture of uses." [Transcript, Vol. 1, p. 238.] He testified that it was his understanding from a reading of the ordinance that at least 50% of the site or any buildings on the site have to be used for R/M, with the remaining 50% then allowed for some other use, except that commercial use is limited to only 35%.

Respondent contends that the city interprets the language as having no requirement for building any R/M, because there is nothing in the ordinance that explicitly says you must have some R/M uses. Respondent further states whatever

buildings are on the site that have commercial uses can take up no more than 35% of the site.

The Tribunal agrees with the interpretation set forth by Respondent. The PUD provision of the zoning ordinance allows for no more than 50% of each lot or overall R/M park site to be of a use not ordinarily in the zoning district *except* that any commercial use is limited to 35% "of the overall research/manufacture." The Tribunal finds that the ordinance does not mandate that any development of the site must be 50% R/M before any other uses can be made. As applied to the subject Parcels, this would mean that 35% of the entire 23.99 acres of Parcel 016 and 52.79 acres of Parcel 019 could be used for a commercial use. Thus, the Tribunal finds that applying the 35% commercial use PUD standard to Parcel 016 equates to 8.39 acres that could be commercial; for Parcel 019 it would be 18.48 acres permitted for commercial use. However, the Tribunal also finds that the ordinance clearly would allow development of the subject property as research/manufacture, which was not considered as a possible use by either appraiser.

b. Financially feasible.

In the present case, Petitioner's ultimate determination of highest and best use as speculative/recreational is largely based on its determination that the extraordinary costs necessary to develop the Parcels exceed the value and, therefore, development under the current zoning is not financially feasible. For Parcel 019, those extraordinary costs are essentially the cost of constructing a loop-road to provide ingress and egress to that Parcel because a cul-de-sac road providing access to this Parcel is prohibited by ordinance. For Parcel 016, those extraordinary costs are essentially the cost of constructing retaining walls to allow development of the southwest portion of the Parcel.

With respect to the provisions of the ordinance or Municipal Code regarding construction of a roadway, Respondent recognizes that its ordinance requires that dead-end streets, drives, or cul-de-sacs must be no longer than 500 feet. However, Respondent contends that variances could be granted regarding this restriction and, in fact, have been granted in the past. Respondent has cited no case law or other authority to support its position that the subject Parcels can be valued based on *the likelihood* that variances will be approved by the city. While the city may be pro-development with a history of working with property owners, as Respondent asserts, there are no approved variances in place for the subject Parcels for the tax years under appeal and there is no information that confirms with any certainty that they would be granted. The restrictions under the ordinance applicable to Parcel 019 for the tax years under appeal limit the potential uses and must be considered when determining how the Parcels can be valued for tax purposes. The Brighton Municipal Code, Sec. 82-100 (Exhibit P-7) provides that:

> Dead end streets, drives, or cul-de-sacs designed to remain so permanently shall not be longer than 500 feet and shall be provided at the closed end with a turnaround having an outside traveled roadway diameter of at least 60 feet. If a dead end street is of temporary nature, a similar turnaround shall be provided and provision made for future extension of the street to adjoining areas. Sec. 82-100(a)(2).

Respondent's proposed roadway of 1,400 feet admittedly does not comply with the 500 foot limitation in the ordinance. The Tribunal does not find Respondent's argument that a variance would likely be granted given the challenges presented by Parcel 019 to be persuasive. Under the ordinance in place for the tax years under appeal, any proposed cul-de-sac drive cannot be in excess

of 500 feet and there is no indication that a variance has ever been requested or approved to deviate from this for the subject Parcels.

Respondent further argues that nearly all of the barriers to development were created by Petitioner and under the case law, Petitioner cannot self-create barriers to artificially depress value for tax purposes. Respondent cites both *NeBoShone Ass'n v State Tax Commission*, 58 Mich App 324; 227 NW2d 358 (1975) and *Canada Creek Ranch Ass'n, Inc v Montmorency Twp*, 206 Mich App 498; 522 NW2d 690 (1994) in support of its position. Both cases include a determination by the Court of Appeals that self-imposed restrictions contained in the articles of incorporation and/or by-laws could not be considered in determining the value of the property. The present appeal does not relate to restrictions in Petitioner's articles of incorporation or by-laws that would relate to the use or development of the subject Parcels. Respondent has cited no case law relating to the splitting of Parcels as a self-created barrier to depress value. Further, the Tribunal finds that Petitioner's splitting out of Parcel 018 in 2004, based on a potential purchaser of that property, was not a self-created barrier employed by Petitioner to depress the value of either Parcel 016 or 019 for the tax years under appeal.

Respondent further contends that there are less costly alternatives to development of the Parcels, which include utilizing Parcel 018. Respondent's engineer indicated that he would look at some type of common roadway for Parcels 018 and 019 terminating with a cul-de-sac at the northern property line of Parcel 018. Petitioner asserts that the subject Parcels must be valued without examining the impact of any development on the 018 Parcel that Petitioner also owns.

In *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620; 462 NW2d 325 (1990), the Michigan Supreme Court held that is does not matter that similar parcels are owned by the same person, but that "[a]s a general rule, different parcels of land in the same ownership are to be regarded as separate units for tax purposes and, as such, must be separately valued and assessed." *Id* at 632, referencing 72 Am Jur 2d, §743, p 72. In *Great Lakes Div of Nat Steel Corp v City of Ecorse*, 227 Mich App 379, 411-412; 576 NW2d 667 (1998), the Court of Appeals stated:

> There are exceptions to and limitations upon the general rule of separate assessment of separate and distinct parcels of land. In the first place, statutes may expressly require, or be interpreted to require, the assessment as a whole of land in one ownership. Also, according to some cases, contiguous lots or tracts in one ownership may be assessed as a unit, although it is to be noted that the authorities are divided upon this point. The unit assessment of contiguous lands or lots has been permitted even though the unit of assessment has been subdivided by the owner. It has also been held that the question of what is a parcel of land within the meaning of the tax laws is to be determined rather from the situation, use, and occupation of the land than from technical description, and that where two or more tracts of land adjoin each other and are used and occupied as one tract, they may be taxed as a unit. **It seems that where the parcels of land are so situated as to be incapable of separate valuation, a joint assessment will be upheld.** [Emphasis added.]

The Tribunal finds that the subject Parcels and Parcel 018 do not present an exception to the general rule that different parcels under the same ownership must be separately valued and assessed. Respondent has failed to establish that the subject Parcels and Parcel 018 are incapable of separate valuation. Respondent has also failed to present any evidence that would support a finding that its engineer's theory of constructing a road that includes Parcel 018 is necessary, financially

feasible, or permitted under the zoning ordinance, which does not allow the cul-de-sac Respondent is proposing. Respondent has further failed to establish how utilizing Parcel 018 to benefit Parcel 019 would impact the value or salability of Parcel 018. Accordingly, the Tribunal finds that the subject Parcels must be valued as distinct parcels of land, without consideration of Parcel 018.

As discussed above, Petitioner's contention of value is based on a determination that it was not financially feasible to develop the subject Parcels due to what Petitioner terms "extraordinary development costs." For Parcel 019, Petitioner's appraiser stated that there is a provision in the zoning that if the roadway exceeds 500 feet it has to have a loop which is the "main driver of [his] extraordinary expenses . . . ." [Transcript, Vol. 2, p. 12] For Parcel 019, Petitioner's appraiser calculated extraordinary development costs for his proposed loop road of approximately $3.5 million for 2008, $3.6 million for 2009, $3.7 million for 2010, $3.8 million for 2011 and $3.9 million for 2012 based on Marshall Valuation Service and input from Petitioner's engineer. Petitioner's engineer projected a similar cost of $3.4 million for the loop road as of May 17, 2013.

For Parcel 016, Petitioner's appraiser concluded that 3.62 acres located in the southwest corner of the Parcel could be developed if an eight foot retaining wall was constructed at a cost of approximately $319,000 for 2008, $329,000 for 2009, $339,000 for 2010, $360,000 for 2011 and $371,000 for 2012.

The Tribunal finds that the testimony and evidence provided by Petitioner's appraiser does not necessarily establish that Petitioner's calculated cost for its proposed retaining wall on Parcel 016 and loop road on Parcel 019 is the only option available to a developer. The Tribunal further finds that while the retaining

wall and loop road are deemed "extraordinary" costs by Petitioner's appraiser, no frame of reference has been provided as to what "ordinary" development costs for an access road or some form of retaining wall would be for parcels of similar size and zoning that do not face the topography challenges present at the subject Parcels.

More importantly, Petitioner has offered no support for its methodology of subtracting the costs for development of the Parcels from the conclusion of value reached by its sales comparison approach. Further, the Tribunal finds no support in case law or *The Appraisal of Real Estate* for the approach taken by Petitioner's appraiser to subtract from the conclusion of value based on the sales comparison approach the amount attributed to extraordinary development costs. Specifically, the Tribunal finds that such costs, over and above what may be considered "normal" costs for development, should be reflected as an adjustment to the sale comparables for functional utility, if it is possible to calculate such adjustment.

c. Physically Possible.

Respondent's appraiser did not make an independent determination of useable acreage for either Parcel; instead, Respondent's appraiser relied on information received from Respondent's counsel, who in turn received the information from Petitioner[4]. Based on the information provided, Respondent's appraiser determined that 5.79 acres of the total 23.99 acres for Parcel 016 was useable and 35 acres of the total 52.79 acres for Parcel 019 was useable.

[4]"I didn't perform a survey, I didn't hire a surveyor. I requested the information from Mr. Maynes . . . [a]nd I was informed that he was provided those figures from the Petitioner. I did not independently come up with a net useable conclusion." [Transcript,Vol. 3, p. 169] The information Respondent's appraiser received is a 2010 aerial photograph of the subject Parcels, R-3 p 22.

Respondent's useable acreage for Parcel 016 is split up into 2.13 acres in the northeast corner and 3.66 acres in the southwest corner.

Petitioner's appraiser, on the other hand, arrived at a total useable acreage of 3.62 for Parcel 016, all of which is located in the southwest corner, and 26.56 acres for Parcel 019. The useable acreage used by Petitioner's appraiser for both parcels was based on information provided by Petitioner, with consideration for the irregular shape, steep slopes, and the financial feasibility of development. Petitioner's appraiser did not consider any useable acreage for the northeast corner of Parcel 016 due to the "very unusual topography, wetlands, and a forebay." [Transcript, Vol.1, p. 225.] Petitioner's appraiser explained that a forebay is not that unusual, but its location on the Parcel may be. Due to the severe slope and the easement for the forebay he determined that it was not financially feasible to develop the north portion of Parcel 016. In order to achieve 3.62 useable acres on the southwest portion of Parcel 016, Petitioner's appraiser determined that a retaining wall would need to be built which, in his opinion, constitutes an extraordinary cost to the developer. If a large retaining wall was not considered, his projection is that the 3.62 useable acres would be reduced by 30%, to approximately 2.53 acres, however, this would still require a retaining wall, just smaller in size than what was projected in his appraisal.

Petitioner's engineer testified that he reviewed the information provided for Parcel 016 and determined that it was not possible to achieve 2.3 useable acres in the northeast corner due to the storm water drainage easement. His determination of useable acreage for this portion of Parcel 016 is 1.79 acres, based on the north and east property lines, the storm water easement and the pond. This was further

explained to include .98 buildable acres, with the remainder of the 1.79 acres used for setback purposes.

The Tribunal finds that Respondent has failed to put forth any evidence as to the useable acreage for either Parcel. Respondent's appraiser admitted he did not independently determine a net useable area. Petitioner's appraiser determined a net useable area for both Parcels, based on the information Petitioner provided and the appraiser's review of Google Earth and the measurements he made. While the Tribunal finds the useable area determined by Petitioner's appraiser to be supported by some type of independent analysis and review, the Tribunal does not necessarily agree with the useable area determined by Petitioner's appraiser for each parcel. For Parcel 016, Petitioner's appraiser acknowledged that the northeast section had useable acreage, but did not indicate how much because he decided that it would not be financially feasible to develop that portion. The only reliable information regarding the useable acreage for this northeast portion was provided by Petitioner's engineer, who performed a useable acreage analysis reflected in Exhibit P-22. Based on his analysis and testimony, the Tribunal finds the available acreage for the northeast portion of Parcel 016 of 0.98 acres is not persuasively established as something that would be financially feasible to develop given the minimal amount of acreage that would be available for use in this area of the Parcel. The Tribunal further finds the useable acreage on the southwest portion of Parcel 016 to be 2.53 acres, which the Tribunal finds does not necessitate a determination of extraordinary costs for an eight foot retaining wall, as the smaller retaining wall required, if any, would be considered in the functional utility adjustment to the comparable sales.

Regarding Parcel 019, the total area of 52.79 acres was reduced by Petitioner's appraiser by 9.97 acres for the pond, 11.9 acres for the pipeline easement, and 4.36 acres for the access drive. Petitioner's appraiser subtracted both the area of the pipeline easement and the land to the north of the easement, since it cuts off the access to that portion of the Parcel. He also subtracted his estimated portion that would be necessary for the loop road, but did not subtract the land area between the proposed loop road and the pond, even though he does not realistically think that anybody could build in that area[5]. The Tribunal agrees with the deductions from total acreage made by Petitioner's appraiser for the pond and the pipeline easement, as those portions of the Parcel could not be developed. Further, given the Tribunal's finding that a loop road to provide access to Parcel 019 is the only legally permissible option, the Tribunal agrees with Petitioner's appraiser that a deduction of 4.36 acres for Petitioner's proposed loop road is also appropriate. Accordingly, the Tribunal finds the total useable acreage for Parcel 019 to be 26.56 acres.

Valuation

Having determined that the highest and best use is permitted under the R/M zoning to include a PUD that could include 18.48 acres for commercial development for Parcel 019 and 8.39 acres for commercial development for Parcel 016, and having further determined the useable acres of each Parcel (26.56 useable acres for Parcel 019 and 2.53 useable acres for Parcel 016), the Tribunal finds that the highest and best use of the subject property is for commercial development of 2.53 acres for Parcel 016, and either for commercial development of 18.48 acres for Parcel 019 or for recreational/future development, depending upon the size of

[5] No information or estimate of the acreage between this proposed road and pond was provided.

the functional utility adjustment required to be made to the comparables . As discussed above, the income approach and cost less depreciation approach were not developed by the parties and are not considered by the Tribunal to be appropriate in determining the true cash value of the subject Parcels for the tax years at issue, as the Parcels are vacant land and not income producing. Based on the testimony and evidence presented in this matter, the Tribunal finds that the appropriate method of determining the true cash value of the subject property for the tax years at issue is the sales comparison approach.

Respondent prepared a sales comparison analysis valuing the properties at a highest and best use for further permitted commercial development under the zoning ordinance. Although the Tribunal agrees that commercial use is allowed under the PUD in place for the parcels, the Tribunal does not agree with Respondent's selection of comparables as reflective of the subject Parcels. For Parcel 016, all comparables were adjusted based on the appraiser's use of 5.79 useable acres for the parcel, which has already been found by the Tribunal to be unsupported by any independent evaluation. In addition to relying on an incorrect useable acreage, Respondent's appraiser utilized comparables with significantly less topography issues or development challenges. Despite this, the appraiser made no adjustment to either Parcel 016 or 019 for the significant changes in elevation. More importantly, although Parcel 016 and 019 differ in the amount of useable acreage and development challenges, Respondent's appraiser applied the same 10% functional utility adjustment when performing the analysis for both Parcels. This functional utility adjustment was explained to be based on "some of the challenges to the topography and the developable areas . . ." [Transcript, Vol. 3, p. 146] The Tribunal finds that this adjustment does not adequately reflect the

great disparity in functional utility between the subject and the comparables. In addition, Respondent's appraiser testified that all of the comparables for Parcel 016 were level sites. [Transcript, Vol. 4, p. 24] In further illustration of the disparity between the subject and the comparables, Respondent's comparable #3 for Parcel 016 was located near a freeway interchange and next to the Tanger Outlet Mall, located in Livingston County, and was used for a Holiday Inn hotel. This site was a pad site for the Mall development and was all useable with no setbacks and none of the development challenges that face Parcel 016.

For Parcel 019, Respondent's appraiser stated that his value conclusions for 2008 and 2009 were at the lower end of the value range, based on his determination that the comparables relied on at this range gave a better indication of market value, as well as the additional consideration to the physical development challenges present on the subject parcel. [Transcript, Vol. 4, pp. 43 - 44] For tax years 2010, 2011, and 2012, primary weight in the appraisal was given to the mean of the adjusted sale prices and the appraisal does not contain the same language regarding physical development challenges for these years. Respondent's appraiser testified that he did not have an answer as to why that language was not there for 2010 – 2012, and further indicated that the change in comparables used for those years eliminated the outlier and he felt the data gave a better indication at the mean rather than the lower end of the range. [Transcript, Vol. 4, pp. 47, 47]

Given that Respondent's appraiser (i) failed to independently verify the useable acreage (as discussed above), (ii) selected comparables not even remotely similar to the subject, and (iii) failed to make appropriate adjustments for the unique topography and development challenges present on the subject Parcels, the

Tribunal gives no weight and credibility to Respondent's market approach to value.

As a "test" for financial feasibility in determining highest and best use, Petitioner's appraiser selected sales comparables for each parcel.[6] For Parcel 016, Petitioner's appraiser selected 5 comparables, ranging in useable acreage from 1.16 acres to 4.75 acres. Comparable #2 was indicated to also be of irregular shape. This comparable was zoned light industrial. Petitioner's appraiser put the most emphasis on comparables #2 and #5, both of which required the least amount of gross adjustments (exclusive of the time/market conditions adjustment). The Tribunal agrees with Petitioner's appraiser's determination that comparables #2 and #5 are the best comparables with respect to valuing Parcel 016. The Tribunal also finds that the adjustments made to these comparables by Petitioner's appraiser are market based and appropriately supported. Based on this information and analysis, and based on the Tribunal's prior conclusion that Parcel 016 contains 2.53 acres of useable land that does not require extraordinary costs such as an eight foot retaining wall, the Tribunal finds that a per acre value of $100,000 is appropriate for the useable acreage of Parcel 016 for the tax years at issue.[7] As a

[6] Respondent's counsel contends that because Petitioner's appraiser's analysis of comparable sold properties is included in his Highest and Best Use analysis and not in a separate market approach to value, Petitioner's appraiser's market analysis should not be considered by the Tribunal. Because the Tribunal is obligated to make an independent determination of value based on all of the evidence presented, the Tribunal finds it appropriate to consider the market analysis provided by Petitioner's appraiser in making its value determinations, irrespective of where such information is located in the appraisal.

[7] A value of $100,000 is also tangentially supported by Petitioner's ultimate failure to sell the approximate 10 acres comprising Parcel 018 for $139,400 in 2004. Further, no substantive evidence has been presented by either party to allow the Tribunal to conclude that the $100,000 per acre value based on Petitioner's appraiser's analysis of the market for the 2008 tax year should be adjusted for subsequent years.

result, the Tribunal finds that the true cash value of Parcel 016 for the tax years at issue is $253,000.

For Parcel 019, Petitioner's appraiser again selected 5 comparables, ranging in useable acreage from 12.1 acres to 22.32 acres. The Tribunal finds that Petitioner's comparables #3 and #4 are the best comparables with respect to valuing Parcel 019. As it found with Parcel 016, the Tribunal further finds that Petitioner's appraiser has adequately provided analysis that supports a per acre value of $80,000, prior to consideration of the costs of constructing a loop road through the parcel. Thus, given the Tribunal's prior finding that Parcel 019 contains 26.56 useable acres, but only 18.48 acres could be developed for commercial use pursuant to the PUD provision of the ordinance, the Tribunal finds that the true cash value of Parcel 019 for the tax years at issue would be $1,478,400, but for the need for a developer to spend substantial sums of money to construct a loop road to provide access to the Parcel.

Petitioner's appraiser applied a functional utility adjustment to most comparables of a positive 10%, based on the subject Parcels considered to be of average functional utility upon completion of the loop road for Parcel 019, and the comparables to be of inferior functional utility. Even if the extraordinary costs were removed from the "test" comparables, Petitioner's appraiser stated that he does not believe the Parcels have the right functional utility because of the location and this has not been adjusted for in the comparables. [Transcript, Vol. 2, p. 124] The Tribunal finds that it is clear from the testimony and evidence that Parcel 019 has development challenges making it of inferior functional utility as compared to the sales selected, i.e. the comparables are of superior functional utility, thereby requiring some type of negative adjustment to bring the comparables in-line with

the subject Parcels. Accordingly, the Tribunal finds that the proper functional utility adjustment to be applied to the comparables would take into account the additional challenges present at the subject Parcels. In this case, both parties have provided testimony and evidence regarding the cost to construct the loop road that the Tribunal finds is necessary to obtain access to Parcel 019. While cost estimates vary, none of the cost estimates are less than approximately 1.5 million.[8] Thus, because none of the comparable sales identified by Petitioner's appraiser have the topography and location challenges associated with the subject property, the Tribunal finds that any functional utility adjustment made to the comparable sales would exceed 100%. Therefore, the Tribunal finds that the highest and best use of the subject property cannot be for commercial purposes. In this regard, the Tribunal has carefully reviewed the analysis and evidence supporting the conclusion reached by Petitioner's appraiser that the highest and best use for Parcel 019 is as recreational/future development use, and finds that such use does constitute the highest and best use of Parcel 019 for the tax years at issue. The Tribunal further finds that Petitioner's appraiser has appropriately identified five sales of comparable properties, and made appropriate market adjustments to account for differences between the subject and the comparables. After reviewing and analyzing the evidence and testimony presented by Petitioner's appraiser, the Tribunal concludes that a per acre value of $5,000 is appropriate for the 52.79 total acres comprising Parcel 019. Therefore, the Tribunal finds that the true cash value of Parcel 019 for each of the tax years at issue is $264,000.

[8] For example, even if Petitioner's lowest cost estimate for a loop road of $3.4 million is reduced by the 8% adjustment suggested by Petitioner's appraiser for a narrower roadway, the cost of $3.1 million substantially exceeds the Tribunal's conclusion of value for this Parcel.

JUDGMENT

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

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 90 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 as required by this Order within 28 days of the entry of this Order. 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 the Tribunal's order. 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, and prior to July 1, 2012, at the rate of 1.09% for calendar year 2012, (iv) after June 30, 2012, through December 31, 2013, at the rate of 4.25%, and (v) after December 31, 2013, and through June 30, 2014, at the rate of 4.25%.

This Opinion resolves the last pending claim and closes this case.

By: Steven H. Lasher

Entered: Dec. 23, 2013