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

Lakeshore Properties (McDonald's),
a.k.a. Lakeshore Partnership,
Petitioner,

v MTT Docket No. 416430

Fruitport Township,
Respondent.

Tribunal Judge Presiding
Preeti Gadola

ORDER DENYING REPONDENT'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

Introduction

Petitioner, Lakeshore Properties (McDonald's), a.k.a. Lakeshore Partnership ("Lakeshore"), appeals the ad valorem property tax assessment levied by Respondent, Fruitport Township, against the real property owned by Petitioner for the 2011 and 2012 tax years. The property under appeal is a McDonald's restaurant located at 1696 East Sternberg Road, Fruitport Township, Michigan. Petitioner was represented by L. Rider Brice III, attorney, and Edward U. Blanchard of Diversified Property Solutions, and Respondent was represented by Bradley J. Fisher, attorney. Petitioner's witness was Marc Nassif, MAI (Member, Appraisal Institute), and Respondent's witness was Lesli Lehner, Assessor, Fruitport

Township. The hearing of this matter occurred on August 7, 2013. The issue before the Tribunal is to determine the true cash value, assessed value and taxable value of the subject property.

Respondent's contentions of true cash value ("TCV"), state equalized value ("SEV"), and taxable value ("TV"), on the tax roll for the 2011-2012 tax years, are as follows:

Parcel Number: 61-15-122-100-0009-70

	Respondent		
Year	TCV	SEV	TV
2011	$972,200	$486,100	$486,100
2012	$971,800	$485,900	$485,900

Petitioner's contentions of TCV, SEV, and TV for the tax years in question are as follows:

Parcel Number: 61-15-122-100-0009-70

	Petitioner		
Year	TCV	SEV	TV
2011	$470,000	$235,000	$235,000
2012	$450,000	$225,000	$225,000

Based on the evidence, testimony, and case file, the Tribunal finds that the TCV, SEV, and TV of the subject property for the years under appeal are as follows:

Parcel Number: 61-15-122-100-0009-70

Year	TCV	SEV	TV
2011	$695,000	$347,500	$347,500
2012	$622,000	$311,000	$311,000

RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AT THE HEARING OF THIS MATTER

At the hearing of this matter, Respondent moved for Summary Disposition of Petitioner's appeal on the grounds that Petitioner lacked standing to pursue the subject appeal. The parties prepared short, post-hearing briefs on the issue, and Respondent alleged that the property is owned by Archland Property II, LP ("Archland") (and not Petitioner), which is not a party to this action. Respondent alleged that Petitioner contended at the hearing of this matter that it occupies the property and pays the taxes pursuant to a written lease with Archland. However, Respondent asserts that Petitioner did not provide a copy of a lease with Archland, or any other documentation, indicating that it was authorized to bring the instant appeal.

Petitioner alleges that it operates a McDonald's restaurant on the property that is the subject of this appeal under a franchise agreement with McDonald's. "Petitioner is the owner of the restaurant building and uses the land under a ground lease. As the lessee/owner of the property, Petitioner is responsible to pay all property taxes levied against the property, and is a proper party to challenge the assessment determined by the Respondent." (Petitioner's brief, p. 1)

MCL 205.735a(6) provides that "the jurisdiction of the Tribunal in an assessment dispute . . . . is invoked by a party in interest, as petitioner, filing a written petition . . . ." Lakeshore filed a Petition with the Tribunal on May 26, 2011. Pursuant to a Purchase and Sale Agreement dated December 4, 2006, (attached as Exhibit 3 to Petitioner's brief) and Assignment Agreement (attached at Exhibit 4 to Petitioner's brief), Lakeshore acquired all rights, title and interest to the McDonald's franchise that is part of the subject property, and it became the owner of the building and lessee of the underlying land. Lakeshore Partnership became responsible to pay all property taxes assessed to the subject property on that date. Its responsibility came from ownership of the building and the lease of the land under the original franchise agreement between McDonald's and Arthur Scott /Jaar, Inc., which eventually was assigned to Petitioner. See Petitioner's Exhibits 3, p. 25, and 4. The franchise agreement permits the tenant "to contest and appeal property tax assessments on the demised Land . . . ." (Petitioner's brief, exhibit 2, p. 7)

Furthermore, Respondent had notice of Petitioner's ownership of the property as its property record card lists Lakeshore as an owner (see Exhibit 5 to

Petitioner's brief), and the subject property tax bills were addressed to Petitioner's corporate address in Zeeland, Michigan. Additionally, all property taxes assessed to the subject property were paid by Lakeshore. See Exhibit 6 to Petitioner's brief for Lakeshore's paid invoices for property tax in 2011 and 2012.

The Tribunal finds that Petitioner is a party in interest under MCL 205.735a(6), the owner of the subject property improvements, and the lessee of the land upon which the improvements stand. Under its ownership and the franchise agreement with McDonald's corporation, it has standing to bring this appeal. Therefore, Respondent's Motion for Summary Disposition is denied.

PETITIONER'S ADMITTED EXHIBITS

P-1 Appraisal Report by Marc Nassif

P-2 Taco Bell Budget

PETITIONER'S CONTENTIONS

Petitioner contends that Respondent has overstated the true cash value of the subject property on the tax roll. Petitioner's basis for the allegation of overstatement is an appraisal prepared by its witness, Marc Nassif, MAI. Mr. Nassif prepared an appraisal of the subject property using the three approaches to value: cost-less-depreciation approach, sales or market approach, and income approach.

The subject property is a McDonald's restaurant which is considered a "fast-food" establishment. It consists of 3,765 square feet on 1.63 acres of land. Mr. Nassif, Petitioner's appraiser, determined the highest and best use of the property to include the continued use of the long-lived items which were defined to be the property's structural components. He also stressed the eventual obsolescence of branding elements that are required during construction and continued operation of the McDonald's. Mr. Nasiff defined branding as the recognition of a structure when, among other things, driving by it (for example, the McDonald's "Golden Arches"). Branding contains the short-lived items that a secondary user would modify. Mr. Nassif prepared a fee-simple appraisal, which he defined to be, "an ownership interest where the owner has the full bundle of rights, full ability to use the property subject to some governmental restrictions." (Transcript, p. 17)

For 2011, Mr. Nassif presented five sales comparables that he adjusted to be consistent with the characteristics of the subject property. The sales are as follows:

2011 Sales	Sale 1	Sale 2	Sale 3	Sale 4	Sale 5	subject
Prior Use	Burger King	Little Caesar's	Steak and Shake	Wendy's	Popeyes	Fruitport Twp
Location	Grand Rapids	Dowagiac	Okemos	Grand Rapids	Kalamazoo	
Sale Date	07/10	6/10	10/09	5/08	5/08	
Sale Price	$485,000	$140,000	$775,000	$525,000	$325,000	
SP/SF	$121.25	$83.33	$210.03	$183.05	$157.54	
Use	Razed Auto	Dominos Pizza	Razed Gordon Food Service	Coney Island	unknown	
Sq Feet	4,000	1,680	3,690	2,868	2,063	3,765
Lot Size	2 acres	.73 acre	2.04 acres	1.0 acre	1 acre	1.63 acres

Adjustments:	Location Actual age Market conditions	Location Building size Site size Conditions of sale (short sale) Market conditions	Location Market conditions	Location Site size Market conditions	Location Building size Site size Conditions of sale (bank sale) Market conditions
Value:	**$123.83**	**$77.63**	**$179.57**	**$140.04**	**$123.19**

The 2012 sales are as follows:

2012 Sales	Sale 1	Sale 2	Sale 3	Sale 4	Sale 5	Sale 6	subject
Prior Use	Quizno's	Burger King	Little Caesar's	Steak and Shake	Wendy's	Popeyes	Fruitport Twp
Location	Stevensville	Grand Rapids	Dowagiac	Okemos	Grand Rapids	Kalamazoo	
Sale Date	02/12	07/10	6/10	10/09	5/08	5/08	
Sale Price	$300,000	$485,000	$140,000	$775,000	$525,000	$325,000	
SP/SF	$153.06	$121.25	$83.33	$210.03	$183.05	$157.54	
Use	Honey Ham	Razed Auto	Dominos Pizza	Razed Gordon Food Service	Coney Island	unknown	
Sq Feet	1,960	4,000	1,680	3,690	2,868	2,063	3,765
Lot Size	1.05 acres	2 acres	.73 acre	2.04 acres	1.0 acre	1 acre	1.63 acres

Adjustments: Building size
Site size
Conditions of sale
(short sale)

(The adjustments for sales 2-6 are the same as in 2011, other than the percentage of adjustment for market conditions increased in 2012. Mr. Nassif utilized sales 2-6 in both 2011 and 2012.)

Value: $149.62 $110.79 $69.00 $159.62 $123.56 $108.70

All of Mr. Nassif's chosen sales were vacant at the time of sale. Mr. Nasiff indicated that the new users of the properties would either raze the structures or tear out the existing interior design and layout the property to suit their own brand. All of the sales, except 2012 sale one, utilized by Mr. Nassif in valuing the property for the 2011 and 2012 tax years, were adjusted for market conditions and location. Mr. Nassif also wrote in his appraisal for 2012: “Sale one netted an upward adjustment due to being a short sale which is considered a distressed sale . . . . Sale three was also a short sale . . . . Sale [six] was a bank-owned sale which typically sells at a discounted price.” In 2011, “Sale five was a bank-owned sale and sale two was a short sale; both of which typically sell at a discounted price.” (P-1, pp. 45, 51) Mr. Nassif also wrote for both tax years, “No expenditures immediately after the sale were noted for any of the comparable[s]. No adjustments were warranted. Any expenditures that were made were for tenant or user specific build-out, and therefore not considered in this analysis.” (P-1, pp. 45, 52)

Mr. Nassif also prepared an income approach to value by utilizing five rental comparables of fast-food restaurants. The comparables Mr. Nassif utilized for both 2011 and 2012 are as follows:

Leases	Name	Location	Date of Lease	Age	Sq Ft	Term of Lease	$ / SF
1	Arby’s	Freemont	08/05	2005	2,974	20 yrs.	$34.78
2	KFC	Grand Blanc	11/08	2008	2,528	20 yrs.	$30.85
3	Burger King	Ithaca	05/10	1998	3,350	10 yrs.	$17.38
4	Burger King	Houghton Lake	12/10	2004	3,135	10 yrs.	$19.25
5	Wendy’s	Muskegon	9/12	2001	4,400	20 yrs.	$22.50

Mr. Nassif made market-condition adjustments to all but comparable four, location adjustments to all comparables except comparable two, and an actual age adjustment to comparable two. In 2012, he made market-condition adjustments to all five comparables, location adjustments to all but comparable two, and an actual age adjustment to comparable two. As a result of Mr. Nassif's rental analysis, he determined a $23.00 per square foot potential gross income for 2011 and a $21.00 per square foot potential gross income for 2012. For 2011, reimbursements at $1.40 were added and ($2.68) vacancy and collection loss (11%) was deducted for an effective gross income of $21.72 per square foot. Expenses included insurance, common area maintenance, and management and structural reserves totaling $2.20 per square foot to equal a net operating income of $19.51 per square foot. For 2012, reimbursements at $1.40 were added and ($2.46) in vacancy and collection loss (11%) was deducted for an effective gross income of $19.94 per square foot. Expenses once again included insurance, common area maintenance, and management and structural reserves totaling $2.15 per square foot which results in a net operating income of $17.79 per square foot.

Mr. Nassif utilized an Investor's Survey, RealtyRates.com, for a mortgage equity analysis with 60% and 70% loan-to-value ratio. Interest rates for a 25-year amortization were 8% for 2011 and 2012. Capitalization rates were extracted from restaurant sales and were tax-loaded to determine a tax-adjusted overall rate. For 2011 and 2012, the tax-adjusted overall rate was determined to be 9.47%.

Mr. Nassif then divided the net operating income by the overall rate, for each tax year, which resulted in an indication of value of $780,000 (rounded) for 2011 and $710,000 (rounded) for 2012. (Mr. Nassif made corrections to his appraisal at the hearing of this matter that resulted in the aforementioned values; Transcript, p. 73) Mr. Nassif, however, determined that a leasing commission of 6%, six months lease up costs (lost rents), and $250,000 of tenant finish should be deducted from the $780,000 and $710,000 values to result in a final value of the fee simple interest of $430,000 for 2011 and $370,000 for 2012.

With regard to determining the tenant finish component, Mr. Nasiff utilized two budgets for the actual construction costs of two Taco Bell restaurants (located in Novi and Allen Park, Michigan) to determine the value of the long-lived components that potential new users will see utility in. Mr. Nassif testified that, "Taco Bell is very representative of, for lack of a better word, average level of build out." (Transcript, p. 74)

Mr. Nassif utilized a 2008 Proposal Commitment Sheet for the Taco Bell in Allen Park. He selected certain cost items that he testified would be specific to branding. Those items were:

Branding Cost P-2		
Misc. finish	p 4	$8,575
Int. Doors	p 5	$2,935
Ext windows	p 5	$11,600
Security door	p 5	$1,740
Into ceiling	p 5	$4,800
Gypsum walls	p 5	$6,500
Into Plywood	p 5	$5,000
Floor Tile	p 5	$23,995
FRP	p 6	$7,400
Paint Into	p 6	$8,000
Bath Partitions	p 6	$3,200
Fire Ext	p 6	$244
Louver	p 6	$254
Equ Install	p 6	$4,800
Décor Install	p 6	$4,800
SS corners	p 7	$1,318
Plumbing	p 7	$36,250
Fire/Ansul	p 7	$1,815
Electrical	p 8	$60,798
Total		$194,024

In his testimony at the hearing of this matter, Mr. Nasiff indicated that the Novi Taco Bell build-out of short-lived branded tenant finish costs was estimated to be $193,000, and the Allen Park Taco Bell build-out was estimated to be $252,625. (At the end of the Taco Bell Proposal Commitment Sheet for Allen Park it indicates, “Entrepreneurial and interior build out for a bathroom” which adds an additional dollar amount to the amount in the chart above to result in a total of $252,626 in build-out costs). (Transcript, pp. 75-76; P-2) In addition to build-out costs, as stated above, Mr. Nassif took a deduction for leasing fees at 6% and six months lost rent of $43,298 for 2011 and $39,533 for 2012. (P-1, p. 67)

Mr. Nasiff also prepared a cost approach to value the subject property. For 2011, he found three commercial land sales. Sale number one was located at 216 West Clay Avenue in Muskegon, sale number two was located at 4323 Airline Road in Muskegon, and sale number three was located at 12705 Riley in Holland. The sales ranged in adjusted sale price per square foot between $.95 and $6.19. (P-1, p. 74) Based on the sales, the subject land value was estimated at $2.15 per square foot for 2011. The comparables were adjusted for location and land size, and they sold in August 2010, December 2009, and November 2009. The land size of the comparables was 15,682, 29,621, and 41,382 square feet, and the subject property is 70,919 square feet. (P-1, p. 74) In cross-examination, Mr. Fisher, Respondent's attorney, questioned Mr. Nassif regarding the vacant land sales. With regard to the sale at 216 West Clay Avenue, Mr. Nassif was questioned and answered in the affirmative that the sale was a REO sale. (Transcript, p. 112)

For 2012, Mr. Nassif found three commercial land sales. Sale number one was located at 2341 Riley in Hudsonville, sale number two was located at 480 W. 17th Street in Holland, and sale number three was located at 1207

Beechtree in Grand Haven. The sales ranged in adjusted sale price per square foot of $1.48 to $2.93. (P-1, p. 73) The subject land value was also estimated at $2.15 per square foot in 2012 or $150,000, rounded, in both years. (Transcript, pp. 81-82) Comparables one, two, and three in 2012 were adjusted for location, and comparables two and three were adjusted for land size. The comparables sold in July 2011 (comparables two and three) and August 2011. The land size of the comparables was 29,621, 43,560, and 63,162 square feet. (P-1, p. 73)

The Marshall Valuation Service Cost Manual, Fast-Food Restaurant section, was utilized to determine the base replacement cost for the subject property. To that cost, other direct costs based on the actual Taco Bell budgets were added. Mr. Nassif subsequently added indirect costs, or "soft costs," related to carrying the land with financing and entrepreneurial profit, among other things. (Transcript, pp. 83-85; P-1, pp. 76-78) Accrued depreciation was subtracted, land value was added and a replacement cost was determined for 2011 of $740,000 and for 2012 of $750,000. Again, Mr. Nassif subtracted leasing commissions, tenant finish, and six months lost rent for an adjusted value of $390,000 for 2011 and $410,000 for 2012. (P-1, p. 79)

RESPONDENT'S ADMITTED EXHIBITS

R-1 Township Maps

R-2 Assessment Record Cards

R-4 Warranty Deed, Harvey Sternberg

R-5 Warranty Deed and Property Transfer Affidavit, Harvey St. Village Condos

R-6 Warranty Deed, Garfield Road

R-9 Covenant Deeds

R-18 Quit Claim Deed Clay Ave.

R-19 Sherman Blvd. Muskegon

R-20 Norton Shores

RESPONDENT'S CONTENTIONS

Respondent called Lesli Lehner, Assessor, Fruitport Township, as its witness. Ms. Lehner testified that the assessment on the roll for the subject property for 2011 was $486,100, or a true cash value of $972,200, and the assessment on the roll for 2012 was $485,900, or $971,800 true cash value. Ms. Lehner testified that the subject property is located in a thriving area near a Meijer grocery store and a regional mall with Sears, JC Penney, and Younkers department stores. It is also near a Menards, Best Buy, Target, and Goodwill store. There is an Arby's, Burger King, and several family-style restaurants nearby. Ms. Lehner testified that the "Burger King is [valued] right around $324 a square foot, and Arby's around $317 and that is for both 2011 and 2012." (Transcript, pp. 143-144) She also testified that the subject property is valued at $258 per square foot. (Transcript, p. 144)

Ms. Lehner prepared a cost-less-depreciation approach to value the subject property which was displayed on the property record card. She did not testify with any detail regarding her cost approach of the improvements on the property, but testified that she utilized the "State manual as of tax day." (Transcript, p.142) Ms. Lehner added land value to the cost of the improvements on the property. She testified at length regarding certain land sales in the subject property area that Mr. Nassif didn't consider in his appraisal that were included in a supplemental valuation disclosure ("SVD") presented at the prehearing of this matter. At the prehearing conference, upon questioning by the Tribunal, Petitioner did not object to the entrance of the SVD into the case file, and the Tribunal, therefore, admitted it. The SVD consisted of 2013 Property Record Cards for commercial vacant land sales, including a sale to Texas Roadhouse Holdings on January 25, 2007, for $800,000 and a sale to Harvey Sternberg, LLC on September 20, 2010, for $1,000,000. The SVD also included a Property Record Card and Property Transfer

Affidavit, dated March 28, 2013, for a sale to Lake Michigan Credit Union for $550,000 and a Property Transfer Affidavit and Property Record Card displaying a sale on March 12, 2013, to First General Credit Union for $950,000 (two parcels).

At the hearing of this matter, Ms. Lehner testified regarding the five land sales mentioned above that were situated in the subject property area. With regard to the Texas Roadhouse sale, Ms. Lehner testified that it sold for $12.16 per square foot of land. (Transcript, p. 147) Ms. Lehner testified regarding the sale to Harvey Sternberg, LLC that it sold for $12.68 per square foot of land and that it was in a better spot than the subject property as it is on a "corner piece with the most visibility." (Transcript, p. 149) With regard to the land sale to First General Credit Union, Ms. Lehner testified that two parcels sold as one unit for $6.88 and $6.91 per square foot. With regard to the sale to Lake Michigan Credit Union for $550,000, Ms. Lehner testified that the sale price per square foot of land was $6.55. (Transcript, pp. 151-152) She also testified that the sale to Lake Michigan Credit Union was inferior to the Sternberg sale because it "was a half mile south, and it is not getting the visibility." (Transcript, p. 152)

Given that the aforementioned sales occurred in 2007, 2010, and 2013, Ms. Lehner adjusted each sale for market conditions to make the sales relevant to 2011 and 2012 values by plotting the sales and determining the decrease in the market.

"[T]hat came to about seven percent per year. Then I divided that by the number of months and it came out to .6 percent per month." (Transcript, p. 155) After Ms. Lehner adjusted the 2007 Texas Road House sale, she came to an adjusted value of $8.73. After she adjusted the 2010 Sternberg sale, she came to an adjusted value of $12.46 per square foot. After she adjusted the 2013 First General Credit Union sale for time of sale, she came to a value of $7.99 and $8.03 per square foot, per parcel. Finally, after she adjusted the Lake Michigan Credit Union sale, she came to an adjusted value of $7.61 per square foot. (Transcript, pp. 155-158) After Ms. Lehner considered the adjusted dollar per square foot value of the sales mentioned above, she came to a reconciled value of $8.00 per square foot in 2011, or $495,300, in land value alone. For 2012, the reconciled value per square foot was $7.50 or $464,400, in land value. (Transcript, pp. 158-159) Ms. Lehner indicated that the Township valued the subject property land at $471,400 for both years as is listed on the property record card. (Transcript, p. 162)

FINDINGS OF FACT

1. The subject property consists of a McDonald's restaurant located at 1696 East Sternberg Road, Fruitport Township, Muskegon County, Michigan.

2. The subject property building has 3,765 square feet and is situated on 1.63 acres of land.
3. The subject property is classified as commercial, real.
4. Petitioner presented an appraisal of the subject property, prepared by Marc Nassif, utilizing a sales comparison approach to value, an income approach to value, and a cost-less-depreciation approach to value to determine the subject property's fair market value as of December 31, 2010, and December 31, 2011.
5. Mr. Nassif presented five sales comparables for his 2011 valuation. One sale was a bank sale and another was a short sale.
6. Mr. Nassif presented six sales comparables for his 2012 valuation. Two sales were short sales and a third was a bank sale.
7. Mr. Nassif's sale number three for 2011 and sale number four for 2012 had the most similar square footage and lot size to the subject property.
8. Respondent did not prepare a market approach to value the subject property, including land and improvements.
9. Mr. Nassif presented five leased property comparables in his income approach to value.

10. From his unadjusted value calculations for the property for each tax year, Mr. Nassif subtracted leasing commissions, lost rent, and branding costs.
11. Respondent did not prepare an income approach to value the subject property.
12. Both Mr. Nassif and Respondent prepared cost-less-depreciation approaches to value the subject property. Mr. Nassif used Marshall Valuation Service to calculate the cost of improvements, and Respondent used the State Tax Commission Cost Manual.
13. Both Mr. Nassif and Respondent presented vacant land sales in their cost approaches to value. Mr. Nassif presented three land comparables for 2011 and three land comparables for 2012.
14. Mr. Nassif's land comparables were not located in Fruitport Township, five were much larger than the subject parcel, and the sixth sale was an REO sale.
15. Respondent presented five land sales in its cost approach to value. The sales were in Fruitport Township, and one was sold in 2007, another in 2010, and the last three in 2013.

16. No information was provided regarding days on the market of the land sales, written mathematical calculations of sale price per square foot, or written calculations of market condition adjustments.

ISSUES PRESENTED AND CONCLUSIONS OF LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value. See MCL 211.27(a).

> 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%.... 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); MSA 7.27(1).

The Michigan Supreme Court has determined that "true cash value" is synonymous with "fair market value." See *CAF Investment Co v State Tax Commission*, 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 Development 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 City of 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 City of 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 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 assessment 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 205.735(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 Commission*, 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 the matter before us, the Tribunal finds that the sales comparison approach, with some support from the income approach, is the correct approach to apply when determining the fair market value of the subject property for the 2011-2012 tax years.

As noted in Petitioner's contentions above, Petitioner's appraiser, Mr. Nassif, prepared market, income, and cost approaches to value the subject property.

Sales Comparison Approach

The Tribunal finds that three of Mr. Nassif's sales were not probative to its independent determination of the true cash value of the subject property as they were not subject to normal market pressures. For 2011, sale number two was a short sale and sale number five was a bank sale. Mr. Nassif testified "Sale five was a bank-owned sale and sale two was a short sale; both of which typically sell at a discounted price." (P-1, p.51) For 2012, sales comparables one and three were short sales and sale number six was a bank-owned sale (2011 sales two and five were 2012 sales three and six). Mr. Nassif testified, "Sale one netted an upward adjustment due to being a short sale which is considered a distressed sale . . . .Sale three was also a short sale . . . .Sale [six] was a bank-owned sale which typically sells at a discounted price." (P-1, p. 45)

The Tribunal finds that, for 2011, Mr. Nassif's sales one, three, and four are probative. Sale one's adjusted sales price is $123.83 per square foot, sale number three has an adjusted sale price of $179.57 per square foot, and sale number four has an adjusted sale price of $140.04 per square foot. The Tribunal finds that the value per square foot of the subject property should be $180.00 based on the adjusted sale price of comparable three. The subject property is most similar to Petitioner's comparable three in square footage and lot size and therefore also has the least number of adjustments to make it consistent with the characteristics of the subject property. The subject property consists of 3,765 square feet multiplied by $180.00 per square foot or $677,700 in true cash value for 2011.

For 2012, the Tribunal finds that Mr. Nassif's sales two, four, and five are probative. It should be noted that the same sales persuasive to the Tribunal are utilized by Mr. Nassif for both years under contention; however, the sales are given a market adjustment for 2012 (except comparable one which sold in February 2012) to make them applicable to determining the 2012 market value of the property. Sale number two was given an adjusted sales price of $110.79 per square foot, sale number four was given an adjusted value of $159.62 per square foot, and sale number five was given an adjusted value of $123.56 per square foot. The Tribunal finds that sale number four is the most probative to it in determining the true cash value of the property for 2012; therefore it finds that the subject property's value in 2012 is $160.00 per square foot. The subject property consists of 3,765 square feet and that amount multiplied by $160.00 per square foot equals $602,400 in true cash value for 2012. It should be noted that Respondent did not complete a sales approach to value for the entire property (it did prepare a market approach to value for vacant land).

Income Approach to Value

With regard to Mr. Nassif's income approach to value, the Tribunal finds it troubling that he took an "under-the-line adjustment" to his value determination for the property for each tax year. In 2011, Mr. Nassif made adjustments for leasing commissions, tenant finish, and lost rent. The Tribunal finds that the leasing commission deduction is appropriate; however, it also finds that tenant finish and lost rent are inappropriate. Mr. Nassif deducted $250,000 for tenant finish from his value indication under the income approach for both years based on his submitted Taco Bell build-outs. (P-2) In his 2008 Proposal Commitment Sheet for the Taco Bell in Allen Park, he selected certain cost items that he testified would be specific to branding (see chart above); however, the costs of drywall, painting, and electrical, for example, would be typical of a build-out for any type of commercial property. The only item that may be specific to a new owner or tenant of the property would be the "Décor Install" for $4,800, which is a far cry from $250,000. Furthermore, there was no market evidence provided that any new user would need to expend $250,000 to rebrand the subject property. Mr. Nassif states in his appraisal, "No expenditures immediately after the sale were noted for any comparable. No adjustments were warranted." (P-1, pp. 45, 52)

As far as six months lost rent as a deduction from Mr. Nassif's value indication for the subject property, it should be noted that he already took an 11% deduction for vacancy and credit loss. The Tribunal finds that it makes no sense that a deduction was made to account for a vacant property and then again to account for the loss of rent due to having a vacant property. Mr. Nassif has "double-dipped" or taken the same adjustment twice in his analysis.

The Tribunal finds that just as Mr. Nassif wrote in his appraisal, "The Income Capitalization Approach is generally more reliable for properties that are leased and was given secondary consideration in this analysis due to the fact that the subject is **owner occupied**." (P-1, p. 80) [Emphasis added.] The secondary weight afforded by the Tribunal with regard to Mr. Nassif's income approach would require the subtraction of only leasing commissions from his unadjusted values rather than leasing commissions, branding, and lost rent. For 2011, the true cash value of the property, under the income approach, would be $780,000 in unadjusted value, minus $51,957 in leasing commissions, or $728,043. For 2012, the unadjusted value of the property is $710,000, minus $47,439 in leasing commissions, or $662,561. It should be noted that Respondent did not complete an income approach to value.

<u>Cost-Less-Depreciation Approach to Value</u>

Both Petitioner and Respondent prepared cost approaches to value the subject property. In his appraisal, Mr. Nassif states:

> The Cost Approach is based on the premise that **the value of a property can be indicated by the current cost to construct a** reproduction or **replacement** for the improvements minus the amount of depreciation evident in the structures from all causes plus the value of the land and entrepreneurial profit. (P-1, p. 41) [Emphasis added.]

In Appraisal Institute, *The Appraisal of Real Estate* (Chicago: Appraisal Institute, 13th ed, 2008), p 142, it states:

> The cost approach is based on the understanding that market participants relate value to cost. In the cost approach, **the value of a property is derived by adding the estimated value of the site to the current cost of constructing a reproduction or replacement for the improvements** and then subtracting the amount of depreciation (i.e., deterioration and obsolescence) in the structures from all causes. (Emphasis added)

In his cost approach to value, Mr. Nassif used Marshall Valuation Service to compute the replacement cost of the improvements on the property and, as indicated above, that is all a cost approach does. It does not consider leasing commissions, lost rent, or branding. If branding, for example, is to be included as a **cost** to replace, it would be added in a fee simple appraisal, not subtracted.

With regard to the land comparables presented by Mr. Nassif, the Tribunal finds that the sales are not probative, given that they are not in Fruitport Township, five out of the six sales are much larger than the subject property, and one is an REO sale. Ms. Lehner has also indicated, though her testimony and the SVD, that the subject property is in a booming area and land sales in that vicinity are at a much higher dollar amount per square foot than as indicated by Mr. Nassif. Ms. Lehner, in her land value analysis, utilized one sale from 2007, one sale from 2010, and three sales from 2013. Although she attempted to adjust the sales for market conditions, the Tribunal was troubled by the lack of knowledge regarding the terms of the sales (other than “arm’s length” written on the property record cards), the days on the market, and whether market-condition adjustments were properly made, mathematically or otherwise, among other things. For the aforementioned reasons, the Tribunal does not place any reliance on the cost approach to value presented by either party.

In this case, the Tribunal concludes that the evidence, testimony, and case file indicate that the subject property is assessed in excess of 50% of market value. The Tribunal finds that Mr. Nassif's sales approach, with secondary support from the income approach, is the appropriate techniques of valuation and utilized the same in making its independent determination of the true cash value of the subject property for the tax years in question. The Tribunal is charged in this valuation appeal to determine the true cash value of the property as of each tax year at issue. Petitioner was able to prove by a preponderance of the evidence that the assessment of the subject property should be modified.

JUDGMENT

IT IS ORDERED THAT the subject property's true cash value, state equalized value, and taxable value for the tax years at issue are as stated in the Introduction section above.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax year at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable value 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 as required by the Final Opinion and Judgment within 28 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue 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, and (iv) after June 30, 2012, through December 31, 2013, at the rate of 4.25%.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is DENIED.

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

By: Preeti Gadola

Entered: Oct. 07, 2013