Lowe's Home Centers Inc (#1750),
Petitioner,

v

Scio Township,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 17-001076

Presiding Judge
Preeti P Gadola[1]

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Lowe's Home Centers Inc., appeals ad valorem property tax assessments levied by Respondent, Scio Township, against Parcel No. H-08-21-100-022 for the 2017 tax year. Daniel Stanley and Mark Hilpert, both of Honigman LLP, represented Petitioner. Derk Beckerleg of Secrest Wardle represented Respondent.

A hearing was held on April 15, 16 and 17, 2019. Petitioner's witnesses were Laurence Allen, MAI and David M. Heinowski, MAI as an adverse witness. Respondent's sole witness was David M. Heinowski.

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 2017 tax year are as follows:

Parcel No.	Year	TCV	SEV	TV
H-08-21-100-022	2017	$5,620,000	$2,810,000	$2,810,000

PETITIONER'S CONTENTIONS

Petitioner contends that the subject's true cash value is $5,620,000 based upon Allen's appraisal at roughly $38 per square foot. Petitioner contends that the subject consists of 34.07 acres of land and a big-box store that was constructed in 2003 by

[1] The hearing of this matter was conducted by Tribunal Judge, David Marmon. Judge Marmon is no longer with the Tribunal. As a result, after careful consideration of the transcripts, admitted evidence, and the case file, this Final Opinion and Judgment is rendered by the above-noted Tribunal Judge.

Petitioner for Petitioner's retail use, and that the building is a warehouse discount store of Class C construction. The parties are close in percentage of total depreciation and agree that leased fee shopping centers are not appropriate for comparable sales. The difference, per Petitioner, is that Respondent's appraisal contains some errors, and correcting those errors results in a revised value that is equal to or lower than Petitioner's contention.[2]

Petitioner contends that Respondent's use of square footage of the building's footprint including fenced in areas, canopied areas loading docks, and garden areas as part of its unit of comparison is erroneous, along with other errors concerning its comparable sales, adjustments, land value, site improvements along with major mathematical errors.

PETITIONER'S ADMITTED EXHIBITS

P1 Appraisal Report prepared by Laurence Allen dated September 18, 2018.

P3 Declaration and other documents related to conservation easement on subject.[3]

P4 Photographs of subject property.[4]

P5 BSA documents and Google Street view of 24800 Haggerty.[5]

P6 Photos of MDEQ signage stating, "wetland conservation easement."[6]

P7 List of numerical occupancy codes used by MVS/CoreLogic.[7]

P8 Photos of subject's loading area.[8]

PETITIONER'S WITNESSES

Petitioner called two witnesses. Its first witness was Respondent's appraiser, David Heinowski, called as an adverse witness.

<u>David Heinowski</u>

David Heinowski acknowledged that the sales adjustment grid offered as R-2 was not contained in his appraisal.[9] He agreed that approximately 10 acres of the

[2] T1 at 5-9.
[3] T1 at 158.
[4] T1 at 87.
[5] T3 at 75.
[6] T3 at 34.
[7] T3 at 49.
[8] T3 at 54.
[9] T1 at 15.

subject's 34.07 acres are subject to conservation easements, although he did not become aware of this fact until after valuation exchange.[10] He agreed that the subject site does not include excess land or surplus land.[11] Heinowski did not agree that 146,400 SF on page 20 of his appraisal[12] was the gross building area, but did label it as the "primary building."[13]

Heinowski agreed that the subject consists of land, land improvements and building improvements, and does not include inventory or personal property.[14] He also agreed that as of the relevant tax date, the subject was not leased, but was owned and used by Lowe's to house its retail business, and that the improvements were constructed for Lowe's use as a retail store, and that big-box stores like the subject could be used by various retailers to house their retail business operations.[15] He further agreed that who owns or uses the subject property does not affect its true cash value, and that it would be the same regardless of who owns or used it, "all things else equal."[16] He acknowledged that in his cost approach he determined that the subject had 80% overall depreciation, including physical depreciation, functional obsolescence and economic obsolescence.[17]

Heinowski agreed that using sales of property that are not leased "creates a better analysis of market activities."[18] He agreed that a leased fee interest and a fee simple interest are two different things, and that a fee simple interest excludes any business value associated with the business being conducted within the subject.[19] Heinowski elaborated as to why big box stores are not built to be sold or leased, as follows:

> That, I think, would be in response to the build-to-suit nature of the buildings. That they are built, as we just went through the questioning on,

[10] T1 at 16.
[11] *Id*.
[12] Exhibit R-1.
[13] T1 at 17-18.
[14] T1 at 23.
[15] T1 at 24-25.
[16] T1 at 26-27
[17] T1 at 31-32.
[18] T1 at 38.
[19] T1 at 40-42.

> for that building. And that would deplete possible sales of the building or reduce it. So it's not going to occur as a normal market function.[20]

Laurence Allen

Petitioner's main witness was Laurence Allen. Allen testified that he holds and has held the MAI (member, appraisal institute) designation for approximately 40 years.[21] He also holds the designation of CFA (chartered financial analyst) and has appraised real estate for approximately 45 years. He has appraised stores used by Cabela's, Bass Pro, Meijer, Target, Kmart, Lowe's, Kohl's, Home Depot, Menard's, Wal-Mart, and Sam's Club.[22] Allen testified that he considers a big-box store as 80,000 SF or larger, and he had appraised close to 200 big-box stores in the last 10 years.[23] He stated, "probably 15 times" in answer to the question of how many times he has testified before a state board or tribunal as to the value of a big-box store.

Allen had the following exchange on direct examination regarding the interest appraised:

> Q. Can the value of a given property be vastly different depending on whether you value the fee simple interest or some other interest, such as a leased fee interest in the same property?
>
> A. Yes, it can.
>
> Q. Why?
>
> A. Because an investor purchasing a fee simple interest will need to locate a tenant and negotiate a lease and probably pay leasing commissions, maybe make some tenant improvements and have some lost income while it's being leased up. Whereas, an investor buying the property that's already leased can buy it as a passive investment and buy it to collect the existing rent payments and doesn't need to go to find a tenant or negotiate a lease or experience downtime while the property is being leased and set up for a tenant.[24]

Allen also testified that there are differences between discount stores such as the subject and department stores or for smaller store buildings. He explained:

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[20] T1 at 32-33.
[21] T1 at 59.
[22] T1 at 61-62.
[23] T1 at 64.
[24] T1 at 72.

> Well, the market for big-box stores is different than small -- smaller stores, which are sometimes called junior boxes or small boxes, because there's a lot more users for junior box stores and smaller box stores than there are for big-box stores.[25]

He also explained why the size and depth make it difficult for other retailers to re-use big-box stores:

> The size and depth make it difficult to reuse for other retailers. For instance, there's strong demand for small box stores and quite often big-box stores are purchased to divide into smaller boxes. But the depth is -- of the store and the overall size makes it difficult and makes it necessary to partition the store and divide the utilities and change the loading. So it's adaptable for multi-tenant, but because of the depth and the size it's an expensive adaptation.[26]

Allen next explained why the market was different for leased fee interests in big-box stores than for non-leased stores:

> The leased fee interest in a big-box store are sold nationally on the national investment market, and there are a multitude of potential purchasers who would buy the property for the income stream. Whereas in an existing unleased big-box store the buyer would not be a passive investor, it would be a user of the property or an investor who would – who would need to find a tenant and negotiate a lease and put the tenant in place so it eventually could be sold as a passive investment on the investment market.[27]

Allen testified that the subject's land size of 34.07 acres includes neither excess land that can be sold off separately, nor surplus land that can be used for expansion. He also testified that a little over 10 acres of the property was subject to conservation easements, and thus not developable.[28]

After describing the building and stating its square footage is 146,400, he explained why Petitioner and other big box stores build to their individual model: "Because their primary goal in building the store is not to build it for resale but to build it to conform to their business plan and to maximize their retail sales and profits for their business."[29]

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[25] *Id*.
[26] T1 at 72-73.
[27] T1 at 73-74.
[28] T1 at 78.
[29] T1 at 83.

After explaining why another retailer would make modifications to the store, and how expensive it is to convert the subject to multi-tenant, Allen opined that the sales comparison approach was the best valuation method to value the property. He explained that "the sales comparison approach is the most reliable approach, because there are a lot of sales of big-box stores and there's a demonstrative market for big-box stores and demonstrative pricing for big-box stores, and so it becomes the most direct way to value the property."[30]

Regarding the income capitalization approach, Allen explained why it is less applicable to the subject:

> Well, number one, I'm valuing the fee simple interest, so income approach is most applicable when valuing a leased property. Second, there's less activity in the market for leasing of big-box stores, so the data is not as prevalent or as reliable as the sales. And another reason is since there's no tenant in place, if you were going to buy it as an income property you would have to find a tenant and negotiate a lease and probably reconfigure the store for a new user. And all those costs are additional costs you would have in doing an income approach in the store. And further, the capitalization process is much clearer when you have a lease. And typically, a capitalization rate is based on the characteristics of the leases and we know that capitalization rates are varied, along with lease terms for big-box stores. And that if you have a 20-year lease you're going to have one capitalization rate, if you're going to have a five-year lease -- remaining lease you're going to buy it at a much higher capitalization rate because you know that there's a much higher probability at the end of the lease term you're going to have to find another tenant or do something with the property. So the capitalization rate depends upon the lease term and there's no lease terms. That's an additional risk because there's an unknown tenant and unknown lease in the property.[31]

As to why he did not rely upon the cost approach, Allen stated that it is typically not applied because while it provides an indication of replacement cost, it does not indicate what the property can be sold for.[32]

In his sales approach, Allen determined that the unit of comparison is the sale price per square foot of the building area, noting that the sales price also includes land and site improvements. Allen testified that his choice is the "typical unit of

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[30] T1 at 92.
[31] T1 at 93-94.
[32] T1 at 94.

comparison."[33] On cross examination, Allen testified that he used "the square foot of building area, not counting canopy areas, not counting garden areas, just per square foot of building."[34] When pressed on the definition of building area, Allen had the following exchange on cross examination:

> Q. Shouldn't you value the building as the building exists, whether it's 146,400 or whether it's 190,150 and then found comparables that fit what you actually had in the subject property in terms of building?
>
> A. I think the comparables are comparable to this building and the unit of comparison is the price per square foot of building, which considers the fact that you can have canopies, you could have garden areas, you could have parking lots, you could have loading docks. But the price per square foot of building is a unit of comparison.
>
> Q. And isn't it really -- you're certified by the state and you're certified by the Appraisal Institute. Isn't it important that when you use definitions in your appraisal that it complies with books like The Dictionary of Real Estate Appraisal -- or, Real Estate, rather?
>
> A. No, it's important it complies with the market and how the things are done in the market.[35]
>
> * * *
>
> Q. And in the instant case you keep calling them unenclosed areas, but in fact that entire area, which is shown on your aerial on page 30, is all enclosed by a permanent front that says, garden area, permanent wall, and a permanent back wall. It's all enclosed by permanent walls, aren't they?
>
> A. Yeah, my house has a fence around it, but that doesn't mean my backyard is a building. And my fence is permanent and, in fact, it's concrete block and it's not going anywhere, but that doesn't mean my backyard is part of my building.[36]

Allen was also asked in direct examination if any of the big box store appeals he was involved in did he, or the other side's appraiser or the Tribunal use the square footage attributable to a garden area, loading area, pick-up area or canopied area as the unit of comparison, to which he replied "no" and indicated that the square footage of the building was the unit of comparison used.[37] Also on this subject, in response to

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[33] T1 at 97.
[34] T2 at 77.
[35] T2 at 76-77
[36] T2 at 80.
[37] T1 at 125

inquiries from the bench, Allen testified that the garden area is typically closed off during winter and not accessible to customers, and that when CoStar reports square footage of a building in a sale, it does not include garden areas or canopies, only the building itself.[38]

On redirect examination, Allen was again asked about his unit of comparison, and had the following exchange:

> Q. Sir, have you spoken to market participants who were involved in the market to either buy, sell, lease or rent big-box stores?
>
> A. Yes.
>
> Q. What -- what type of market participants have you spoken with?
>
> A. The major big-box retailers, Wal-Mart, Lowe's, Home Depot, Target, Kohl's, as well as brokers involved with selling big-box stores and buyers involved with purchasing big-box stores.
>
> Q. And in your discussions with those market participants have you discussed what unit of comparison those people use?
>
> A. It's not really a matter of discussion. Everyone uses price per square foot of building. The sellers use it, the buyers use it, the brokers use it.
>
> Q. Do -- are you aware of any market participant that uses a unit of comparison that includes areas of canopied areas?
>
> A. No, they don't include canopy areas in the building square footage.
>
> Q. Do you know any market participant who uses the square footage or adds to the square footage that they use as a basis of comparison the square footage of fenced-in garden areas?
>
> A. No, I've never seen that used as part of the unit of comparison.
>
> Q. When sales of big-box stores are reported by reporting services such as LoopNet or CoStar, what square footage is reported?
>
> A. The price per square foot of building excluding canopies and garden area square footages.
>
> Q. What types of big-box store properties typically have canopy areas and garden -- or, fenced-in garden areas?
>
> A. Lowe's stores do, Home Depot stores do, Menard's, Meijer stores, Super Kmart stores, Bass Pro stores, Cabela's stores.
>
> Q. Have you -- have you reviewed -- I'm sorry. How many appraisals have you performed of big-box stores?

[38] T2 at 157-158.

> A. Close to 200.
>
> Q. Have you ever used the unit of comparison for a big-box store that included the areas of canopy -- canopied areas or fenced-in garden areas?
>
> A. No.
>
> Q. Okay. Have you reviewed appraisals reviewed by other appraisers?
>
> A. Yes.
>
> Q. Other than the appraisal in this case, have you ever seen an appraisal of a big-box store that used as a unit of comparison a square footage for the sales comparison approach that included the either canopied areas or fenced-in garden areas?
>
> A. No.[39]

Allen next testified to the seven sales he used in his sales comparison approach. In answer to a question regarding the use of leased fee sales for valuing big box stores, Allen gave the following testimony:

> They sell for a much higher price. Typically because it's a different market, it's a passive investment market. It's typically an institutional investor who is buying the income stream based on the credit of the tenant. And typically they're sold with build-to-suit leases, they're above-market rent, and the purchase is based on what the remaining lease term is and how strong the credit of the tenant is.[40]

He testified that in the last 10 years there is a relatively narrow range of selling prices for fee simple interest sales of big-box stores in the Midwest, between $20 and $45 per square foot.[41]

Allen testified regarding each of his seven improved sales comparables.[42] Regarding improved sale number 3, which he had in common with Respondent, he was questioned on cross regarding his negative adjustment for demographic attributes, since this property, located in Detroit at Telegraph Rd, south of Eight Mile Rd has a median household income of roughly half of the subject. Allen replied that here were 286,000 people within five miles of Sale 3, as opposed to 59,000 persons within 5 miles of the subject. Allen further testified that $47,000 per year average household income

[39] T2 at 141-143.
[40] T1 at 100.
[41] T1 at 100-101.
[42] T1 at 104-110

near Sale 3 is not far from the median income for the state of Michigan and metropolitan Detroit, and for a discount warehouse property, having 5 times the population within 5 miles as the subject requires a downward adjustment, even though the population is not nearly as affluent.[43]

Allen also testified that sale 7 in Elgin, Illinois was the only comparable he used that had a deed restriction. He opined that the deed restriction did not negatively impact the sale because the sale price was negotiated without a deed restriction, the restriction was very short term, and the buyer was excluded from the restriction.[44]

On cross examination, Allen was questioned concerning sale 7. When questioned as to why he used this out-of-state comparable, Allen stated, "Because it was a Lowe's store that sold close to the date of valuation and it was located in a fairly affluent area . . . ."[45] He also stated that the demographics of the area were similar and the size of the store was similar. When asked whether it was correct that the deed restriction placed on this property did not affect the purchase price, Allen answered:

> Yes, particularly with Lowe's. I met with Lowe's real estate people in North Carolina and went through the whole process of how that works in terms of setting forth the deed restrictions, how they get an offer, get approved by the board and then go back and negotiate a deed restriction that won't affect the purchase price or kill the deal.[46]

Allen also testified regarding additional sales referenced in his appraisal to demonstrate the market for big-box stores. He also testified that he included 15 sales of Lowe's stores between 2010 and 2014, which ranged in price of $18-$40 per square foot of building area, exclusive of loading areas or canopy areas or fenced garden areas, which are typical for Lowe's properties.[47] Finally, as to the sales comparison approach, he concluded to $38 square foot of building area, applied to the subject's 146,400 SF for a value rounded to $5,560,000.[48]

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[43] T2 at 58-62.
[44] T1 at 109-110.
[45] T2 at 44.
[46] T2 at 48.
[47] T1 at 123.
[48] T1 at 126.

Allen next testified regarding his income capitalization approach. He stated that the data for this approach is not as good as the sales comparison approach because "there are not a lot of leases of big-box stores."[49] Allen also had the following exchange on direct examination regarding the valuation of big box stores based upon leases:

> Q. Does the value of a big-box store leased at market rent equal the value of a fee simple interest in a big-box store?
>
> A. No.
>
> Q. Why not?
>
> A. Because the fee simple interest is without a tenant in place and once -- once the property is leased it would have a different value. Then the value would be based on the lease and not -- not just the property.
>
> Q. Was the subject building an existing building as of the valuation date of your appraisal?
>
> A. Yes.
>
> Q. Is there a market for the rental of existing big-box store buildings?
>
> A. Yes.
>
> Q. Is there also a market for the rental of big-box store buildings that do not yet exist?
>
> A. Yes.
>
> Q. Are those two markets two separate markets?
>
> A. Yes.
>
> Q. Generally describe for the Tribunal those two different rental markets for big-box store buildings.
>
> A. Well, one, I would call the build-to-suit market, and that's when a big-box retailer wants to go in a location and doesn't want to spend the money to build their own building. They'll hire a developer to build the building and they'll pay a rent to that developer based on the developer's cost plus the profit to the developer. And that's what -- what I would call a build-to-suit lease because the building was built to the specifications of the particular retailer and not -- not for the general market.[50]

Allen went on to testify that he used rents from five existing big-box stores, which he adjusted, and concluded to a rent of $5.00 per square foot.[51] He also concluded to a vacancy and credit loss of 7.5%, (6.5% being vacancy only) looking at the Washtenaw

[49] T1 at 127.
[50] T1 at 127-128.
[51] T1 at 131-132.

County market. When asked on cross as to why he would have a vacancy rate that high when the rate in a 5-mile radius from the subject is 1.7%, Allen answered:

> Well, the reason I would use a higher vacancy is because as of the date of the appraisal if the property was put up for lease it would be a hundred percent vacant. So it would take time to find a tenant, to negotiate a lease and to configure the space for the tenant, so you're going to have an initial vacancy of the subject property. And also for big-box stores, as you previously demonstrated, there's not a lot of tenants looking to lease a big-box store, so it takes a longer period of time to find a tenant. So when you have turnover there's a larger downtime than for small retail, which those vacancies reflect small retail. So you're going to have a higher initial vacancy and higher long-term vacancy for big-box store, and that's why six and a half percent is higher than the 1.7 percent.[52]

He also discussed CAM reimbursement and his expense estimates on a triple net lease and concluded to a NOI of $577,320.[53]

Allen next discussed capitalization rates and agreed that leased fees have lower rates than fee simple interests, with no lease in place. The reason is "there's a higher risk because it's not known who the tenant will be, how long it will take to find the tenant and how much rent loss you're going to incur before you get a tenant in place and then how long the lease term and how strong the credit is."[54] He then concluded to a 9.5% cap rate considering several investment surveys.

On cross examination, Allen was asked why he did not rely on the Boulder Group, which only reports big-box cap rates. He explained:

> The Boulder Group data number is asking prices for big-box -- big-box stores. It doesn't represent sold cap rates. Number two, it's a national average, and if you look at the Boulder Group for Midwest it's higher rates than the national average. Number three, it's based on average lease term. If you look at shorter lease terms or larger lease terms, the rates vary and for the subject property we have no lease term. And so the Boulder Group is based on a property that is already leased on a long-term basis, typically to a credit tenant and then it represents an asking price. So we don't have an existing lease and we don't have a long-term lease and we don't know who the tenant would be, so there's higher risk than if you bought a Boulder Group property.[55]

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[52] T2 at 96-97.
[53] T1 at 135.
[54] T1 at 135-136.
[55] T2 at 99.

Allen was next asked about why he used sales with older leases to help determine his capitalization rate. Allen answered, "When you have a big-box store with a short remaining lease term you're going to have a high capitalization rate because the buyer will anticipate having to lease the property, like a buyer would have to lease the subject property if it were put on the market."[56]

Allen's final step under the income approach was to deduct a leasing commission based upon 5 year's rent from his value to conclude to a value of $5,860,000 via the income approach.[57] On cross-examination, Allen was asked about this commission of $219,600, rather than subtracting one year's worth of commission of $43,920. His response was that a broker is going to want to be paid for the commission on the closing of the lease for 5 years.[58] When further challenged on this point, Allen stated:

> That wouldn't be correct appraisal procedure . . . . If you're going to treat the leasing commission as an annual expense, you would take the 43,000 off the 577 [$577,320 NOI amount] and then you'd capitalize the net income after leasing commission, and that's how some appraisers do it. And if that would have been done here, it would be a $5.6 million value instead of a $6 million value.[59]

On cross-examination, Allen acknowledged that finding current and relevant lease information is difficult because the information is often private and not reported. When asked why he would do an income approach if the information was not reliable, Allen answered, "the same reason you do a cost approach that's not very relevant, in that it is one of the traditional approaches to value. And it's an approach that is typically used by appraisers and most clients want to see the income approach."[60] He added that multiple approaches are checks and balances against each other.

Allen also prepared a cost approach, which he did not give any weight to. He explained as follows:

> One, it's not the approach that's used by the market participants in buying these properties. Second, it involves determining a lot of depreciation, which makes it less reliable. And third, in order to approximate the depreciation you need to go to one of the other approaches to extract it

[56] T2 at 101.
[57] T1 at 135-138.
[58] T2 at 103
[59] T2 at 106.
[60] T2 at 94.

> from the market so that your cost approach value does, in fact, represent market value or usual selling price.[61]

Allen then went through his cost approach, starting with the value of the land. He testified that he looked for recent large commercial land parcels, preferably purchased for big-box development and found four land sales comparables. He used the former Gibraltar Trade Center site which sold in June 2015 for $3.78 per foot, a purchase by Menards in 2013 “down the street” from the subject for $2.63 a foot, a Menard’s cite on Van Dyke Ave in Warren for $6.36 per foot, and a Cabela’s store site in Chesterfield Township for $6.32 a square foot.[62] He testified that he adjusted the parcels upward for size, and made demographic adjustments, had a range of $165,000 - $254,000 per acre and concluded to $175,000 per acre. He then applied that to 20.37 acres of the subject. He did not place any value on the remaining 13.7 acres because the rest of the site had a conservation easement or wetlands and cannot be used for any type of development.[63]

On cross examination, Allen was asked whether it was true that he did not value 13.7 acres. He responded, “I valued the entire 34 acres. It's just the 13 acres didn't have any significant contributing value to the property.”[64] When pressed further about the value of the wetland and conservation easement acreage, Allen stated:

> I wouldn't say it has no value. It has such a nominal value -- for instance, I've appraised land with conservation easements. And if it was located in an area where people could use it for recreation or hunting it would typically have a value in the range of $1,500 an acre. So for this property it would be like 15 or $20,000, potentially, but no one would want to buy it for hunting.[65]

As to the actual amount of wetlands or the size of the conservation easement, Allen could not say. However, he picked 20 acres as having more than nominal value because approval was obtained from Respondent for the development of 20 acres, by allowing conservation easements on the rest. As part of mitigating a loss of wetlands

[61] T1 at 139.
[62] T1 at 140-141.
[63] T1 at 141-143.
[64] T1 at 154.
[65] T1 at 156.

Allen testified that he did not believe that the balance of the land could be developed any further.[66]

As to the contributory value of the wetland, which were set up to mitigate the loss of other wetlands to build the building, Allen had the following exchange on cross examination:

> Q. So if you couldn't build on the wetlands or the conservation easement that had the -- that apparently is on most of the wetlands, without having that conservation easement why wouldn't the conservation easement have some contributory value to the subject property?
>
> A. Well, a retailer buying the subject property is not going to pay anything for the conservation easement. He can't do anything with it. He'll pay for the -- for the building and the improvements and the location, but the conservation easement doesn't add value to the subject property for the typical purchaser.[67]

On redirect examination, Allen added that a typical big-box store of this size would usually need about 15 acres to accommodate retention, parking and building.[68]

As to the building and improvements, he testified that he used Marshall Valuation Service to determine a replacement cost new, and then calculated depreciation and obsolescence. For physical depreciation, he determined that the building had a 30-year economic life and was 13 years old at the valuation date.[69]

As to functional and economic obsolescence, he testified that big-box stores are built to specifications of the specific user, and that another user is not going to pay for the specific design features. Regarding buyers of big box store buildings, he stated:

> And in fact, they will typically modify the design features for -- for their particular business and change the facade, the layout, the lighting, whatever needs -- needs to be done to make it look like and function like one of their stores. So that they're not going to pay full depreciated replacement cost, they're going to pay something less that reflects the fact that it's not an ideal size or ideal layout and configuration for the typical purchaser.[70]

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[66] T1 at 173, 175, 177.
[67] T2 at 8.
[68] T2 at 136.
[69] T1 at 144.
[70] T1 at 144-145

Allen further testified that he is not aware of a big-box store being constructed for the purpose of leasing or selling the building.[71]

Allen was next asked what he did to quantify obsolescence. He answered as follows:

> Well, I used several methods to demonstrate obsolescence. One is the difference between build-to-suit leases and market leases. And as I mentioned, market leases generally don't support the cost new. I also looked at and analyzed a number of Source Club sales which were a big-box chain that Meijer set up at one time and then built the buildings, then got out of the market and sold the buildings. And these were brand new buildings that Meijer -- or, Source Club used for a few months or in some cases not at all. And they sold for a substantial discount from the Source Club, the cost of -- that Source Club had in land acquisition and building construction. I also looked at extractions from sales of big-box stores and also looked at the capitalized rent loss.[72]

Under the cost approach, Allen concluded to a value of $6,180,000.[73]

As to reconciliation of the three approaches, Allen gave the most weight to the sales comparison approach, with less weight to the income capitalization approach, and no weight to the cost approach. His final conclusion of value was $5,620,000.[74]

On cross-examination, Allen was asked if it were true that under *Menard v Escanaba*,[75] that where the building is built to suit and there is little to no secondary market, the strict application of the sales approach would undervalue the property, and the cost less depreciation approach would be more appropriate. Allen responded, “No. There’s an active market — for the sale of big-box stores.”[76] Allen was next challenged on his highest and best use, as to whether it was retail or a big-box store. After questions from the bench, Allen stated that the highest and best use was retail use for the property.[77] He further elaborated in terms of his sales comparables that he was

[71] T1 at 145.
[72] T1 at 146-147.
[73] T1 at 150.
[74] T1 at 151-152.
[75] *Menard v Escanaba,* 315 Mich App 512; 891 NW2d 1 (2016).
[76] T2 at 118-119.
[77] T2 at 120-121.

able to find properties that sold for big-box use, but many of the big-box properties are sold for conversion to multi-tenant use.[78]

Allen also testified on rebuttal regarding whether two of Heinowski's comparables which he was familiar with had fenced in garden areas, to which he answered yes, and whether that square footage was included in CoStar's write up as part of the building area, to which he answered no.[79] He also testified that Heinowski's Sale 6 in Port Huron had an existing lease with Kmart, which he also reported in his own appraisal.[80] He further testified regarding Heinowski's sale #4 and indicated that the sale included a Burger King lease and 1.5 acres for out lot development.[81]

RESPONDENT'S CONTENTIONS

Respondent contends that the subject building's square footage should include the outer perimeter, which includes fenced in and partially covered garden areas, a loading dock, and a canopied area for contractor pick up, totaling 190,150 SF. It also contends that Allen failed to value all of the 34 acres and follow *Menard Inc v City of Escanaba.*[82] Respondent contends that the values on the roll should be affirmed, as Petitioner failed to meet its burden, and the subject's true cash value for 2017 is $10 million true cash value, $5 million assessed value and $3,677,503 taxable value.

RESPONDENT'S ADMITTED EXHIBITS

R-1 Heinowski appraisal of subject property.[83]

R-2 Sales grid prepared by Heinowski but omitted from appraisal[84]

R-4 Scio Twp Zoning Ordinance.[85]

R-6 Section 36-75 Scio Twp Zoning Ordinance re: setback requirements, lot coverage, height, etc.[86]

R-17 Arizona Conservation Easement Guideline.[87]

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[78] T2 at 121.
[79] T3 at 125-126.
[80] T3 at 126.
[81] T2 at 126-127.
[82] *Menard Inc v City of Escanaba,*315 Mich App 512; 891 NW2d 1 (2016).
[83] T2 at 171
[84] T2 at 171.
[85] T1 at 177.
[86] T2 at 16.
[87] Admitted over objection, T1 at 170. The Tribunal agreed to admit it and give it whatever weight is appropriate.

R-21 Photos of garden area of subject.[88]

Exhibits R-7 and R-8 were introduced and not admitted. R-7 was the record card in another township for another Lowe's store, and R-8 was a stipulation for entry of judgment of that other Lowe's store's tax appeal. The Tribunal held that they are not relevant to the valuation of the subject.[89]

RESPONDENT'S WITNESSES

David Heinowski

David Heinowski was called by Respondent as its valuation witness. He testified that he is licensed in Michigan and holds the MAI designation from the Appraisal Institute.[90] As to big-box stores, Heinowski mentioned his appraisal of the IKEA store in Canton Township, a Target store in Farmington Hills, and a Kmart store in Bath Township. The Tribunal found him qualified as an expert in real estate appraisal.[91] He agreed that his failure to include the sales grid in Exhibit R-2 was inadvertent.[92]

When asked about errors he subsequently discovered in his appraisal, he admitted that after the appraisal was prepared, his statement on page 19 that "We are not aware of any easements, encroachments, or other legal restrictions that would adversely influence the site's marketability, use, or value" was incorrect, as there is a conservation easement.[93] He also admitted on direct examination that his statement on page 18 of a second access point to the subject on Staebler Road is incorrect.[94] He also agreed that his improved comparable 4 at 1100 Rochester Road was located in Rochester Hills rather than Farmington Hills or Leonard as stated in the appraisal. As to his cost chart on page 45, he admitted that in his first of two (or three) columns labeled "Section iv", his square footage of 86,000 should have been 8,695 and the total of $1,685,000 (which was included in his total for the chart) should have been $169,291.[95] At the top of the same chart, the loading area was listed at 47,500 SF,

[88] T2 at 67.
[89] T2 at 132.
[90] T2 at 161.
[91] T2 at 167.
[92] T2 at 170.
[93] T2 at 172.
[94] T2 at 173.
[95] T2 at 174.

when it was actually 4,750 SF. He also testified that the building size of 182,080 SF was misstated and should be 190,150 SF.[96] As to his sales comparison approach he testified that his reconciled unit rate should be $52.00 rather than $53.71, and his statement that 2% should be added twice to arrive at his indicated value was mistaken and should be deleted.[97]

Heinowski then went through his appraisal. He justified his building square footage number, stating:

> Well, my opinion was that they are all real property in nature. They were all permanent structures. They all describe or help to describe the improvements, building improvements, and structural improvements as they were as of date of appraisal. And that they represent what was there as of date of appraisal.[98]

Heinowski used the sales comparison approach and cost approach. He did not use the income capitalization approach because he did not believe that this approach reflected market activities or market participants and their thinking.[99]

While describing his improved sales comparables, the bench questioned whether 34800 Haggerty was the same comparable as 24800 Haggerty used by Allen, even though the purchase price did not match. Heinowski confirmed it was the same comparable and testified that he went back to verify the sales price.[100] Also discussed was comparable 3 on Telegraph Road, which Heinowski and Allen had in common. Heinowski adjusted this comparable plus 5% because he believed it was in inferior condition to the subject. Heinowski disagreed with Allen's finding that the demographics of this comparable were superior relative to the subject. He based this on household incomes being approximately one half of the incomes within 5 miles of the subject. [101] He also took a plus 15% adjustment for land-to-building ratio to account for the subject's 34+ acres. He also testified that he made a 4% time adjustment.[102] Finally, Heinowski reconciled his sales approach at $9.9 million and his cost approach at $11,000,000 and

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[96] T2 at 175.
[97] T2 at 176.
[98] T2 at 181-182.
[99] T2 at 192.
[100] T2 at 207-208, 212.
[101] T2 at 210-211.
[102] T2 at 213.

valued the subject at $10 million.[103] Heinowski ended his direct examination with a critique of various items found in Allen's appraisal.[104]

On cross-examination, Heinowski either backed off most of his criticisms of Allen's appraisal, or admitted he did the same thing in his own appraisal.[105] Regarding his criticism that Allen failed to value the entire acreage, Heinowski admitted he was unaware of the conservation easements when he valued the land under both his sales and cost approaches.[106]

As to his lack of awareness of the conservation easement, he was asked about whether he saw one of the 40 signs on the property indicating the existence of conservation easements. His answer was, "I saw the signs and, quite honestly, I didn't – I did not pay any attention to them or give them weight."[107] Heinowski then admitted that despite seeing the signs he made no investigation as to the existence or extent of any conservation easement.[108]

Heinowski was next asked about his land sales used as part of his cost approach. Heinowski admitted that he did not use the two comparables that had the lowest price per square foot.[109] He admitted that his largest sale, comparable 4 at 17.76 per acre was an assemblage of 13 parcels, and land sale 6 was an assemblage of 3 parcels. He admitted that in actuality, the purchases he used for land sales ranged from 1.4 acres to 4.67 acres to determine the value of a parcel in excess of 34 acres.[110] He also admitted as "a true statement" that "a buyer who purchases a site with the intent to assemble it with other parcels might have to pay a higher-than-market value for that site, particularly for properties acquired near the end of the assemblage period."[111]

As to land sale adjustments, he admitted that there was no discussion of his topography or utilities adjustments and that he did not know how many houses were demolished when he made his 15% demolition adjustment for land sale #4. He

[103] T2 at 219.
[104] T2 at 221-226.
[105] T3 at 6-34.
[106] T3 at 24.
[107] T3 at 31.
[108] T3 at 34.
[109] T3 at 36.
[110] T3 at 36-37.
[111] T3 at 38.

acknowledged that the 15% adjustment translated into almost a million dollars.[112] He acknowledged that his gross adjustments were quite high, even though he only reported net adjustments.

He also admitted that his statement was not true that all of his land sales were arm's length. Sale 4 and 6 had conditions of sale adjustments that were unexplained, and for which Heinowski could not recall the basis of the adjustments.[113] He also admitted that his positive 15% size adjustment for Sale # 6 should have been a negative adjustment.[114] The land sales portion of cross-examination ended with the following exchange:

> Q. So your appraisal contains a significant error with regard to size adjustment, doesn't it?
>
> A. Apparently, yes, sir.

Later, Heinowski acknowledged that his land value of $7.4 million was larger than the assessor's land estimate of $3,147,000.[115]

Heinowski was next quizzed about his calculations for replacement cost new. As to the pick-up area calculation, Heinowski acknowledged that his multipliers came out to .9702 when mathematically, the number should be .5742, and that it overstates the replacement cost new of the pick-up area.[116] As to the loading dock area, Heinowski determined that the base cost was $48 per square foot for what is nothing more than a concrete pad. He admitted that "logically it doesn't make any sense to have something that expensive with such little improvement."[117] He agreed that this was a huge error.[118] He agreed that he understated the cost of the garden area which should have been $66,420 replacement cost new rather than $12,330.[119] Heinowski admitted that the main store area is 146,400 SF, so the add on areas were 43,750 SF combined. Using Heinowski's base cost of these areas at $14.31 per square foot and obsolescence and depreciation of 80%, values the add on areas at $2.86 per square foot, which he agrees

[112] T3 at 39-40.
[113] T3 at 42.
[114] T3 at 42-45.
[115] T3 at 68.
[116] T3 at 51.
[117] T3 at 55-56.
[118] *Id*.
[119] T3 at 57.

with. He found no logical inconsistency in this same area being valued at $52 per square foot under his sales comparison approach, which includes these add-on areas in the square footage of the building itself.[120] Finally as to costing the vertical improvements, Heinowski admitted he used mall anchor department store base costs from Marshall Valuation Service, rather than Class C warehouse discount store used by Allen. The former lists the costs as $79.32 per square foot while the latter uses base costs of $44.13 per square foot. He used the larger number despite agreeing that he intended to value the big-box store building as a warehouse discount store.[121] After these admissions however, he inexplicably stood by his base cost of $79.32 per square foot.[122]

Next, he was asked about the 124,604 lineal feet of curb he costed, which when asked, testified that was approximately 23 miles worth of curbing. He agreed that it was "highly unlikely" that one could physically put 23 miles of curb on the subject property. He conceded that his lineal feet of curbing was "very apparently" incorrect.[123] He also agreed that his $1.4 million worth of curbing was not correct.[124]

Heinowski was then cross-examined regarding his sales comparison approach. He was again asked about his comparable #2 located in Farmington Hills and agreed that the proper address was 24800 Haggerty Rd rather than 34800. He reiterated that he verified this comparable.[125] After comparing the information for his Sale #2 and a listing of other sales which includes 24800 Haggerty, counsel and Heinowski had the following exchange:

> Q. So this comparable is like a mix tape of all sorts of different things, and we don't know what the blue stuff is, do we?
>
> A. It's a combination of apparently a couple sales, yes, sir, but clearly there is a mistake in it someplace.
>
> Q. Sure. And in fact, when I looked for 34800 Haggerty Road on Google maps, I couldn't find it. Does 34800 Haggerty Road exist?

[120] T3 at 59-60.
[121] T3 at 61-63.
[122] T3 at 64.
[123] T3 at 67.
[124] T3 at 68.
[125] T3 at 70-71.

A. As far as I know it did, because when I took the picture I believe the street sign was on two different corners and I think I picked up two different numbers that way.[126]

After being shown Google Earth photograph and the BSA write-up contained in P-5, and a CoStar write-up for 2051-2325 18 Mile Rd, Windmill Plaza retail community center in Sterling Heights (P-9), Heinowski agreed that the sales date, sales price, acreage, year built and buyer listed on his sales grid for 38400 Haggerty was in fact taken from the Windmill Plaza sale, rather than the sale of 24800 Haggerty. While not recognizing the Windmill Plaza sale, Heinowski still insisted that the Tribunal should consider comparable #2.[127] After Heinowski conceded that the sale price for his Comp 2 was $4.55 million rather than $9.2 million, counsel and Heinowski had the following exchange:

Q. Sir, yesterday you were adamant that you verified the $9.2 million sale price for 24800 Haggerty. Do you recall that testimony?

A. Yes, I do.

Q. Was that testimony false?

A. Apparently, yes.[128]

Heinowski was next asked about his 2% per annum market adjustment. He conceded that he adjusted the sales to 12/31/17 rather than the valuation date of 12/31/16, and each of his market adjustments were off by 2%.[129]

As to sale #4 at 1100 Rochester Rd, counsel and Heinowski had the following exchange:

Q. When you visited the property did you notice a Burger King on the property?

A. I do not recall, sir.

Q. Didn't this parcel when it sold have a Burger King on a ground lease on a portion of the parcel?

A. I do not recall, sir.

Q. Okay. Did you investigate that?

A. No, sir.

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[126] T3 at 74-75.
[127] T3 at 78-79.
[128] T3 at 81.
[129] T3 at 82-83.

> Q. Didn't this parcel -- it was marketed with both the Burger King ground lease and a 1.5-acre outlot that could be developed; do you recall that?
>
> A. No, sir, if I didn't remember the Burger King, the rest would be sort of moot, because if I can't remember part of it how would I remember the other part?
>
> Q. Okay.
>
> A. So I didn't consider it, yes, sir.
>
> Q. Well, did you know about it?
>
> A. No.[130]

On redirect, Heinowski was not asked about this comparable.

Heinowski was next asked about comparable 6 located at 1179 32nd Street in Port Huron. He admitted that he knew it was sold with an active lease to Kmart that he neither disclosed in his appraisal, nor adjusted for.[131] He then had the following exchange with counsel:

> Q. Sir, you testified not more than two minutes ago that to use that sale you would have to properly adjust it. Do you recall that testimony?
>
> A. Yes, I do.
>
> Q. So now your testimony is you suspected this was a leased fee but made no investigation as to the lease terms; is that your testimony?
>
> A. Yes.[132]

Regarding his location adjustments, Heinowski explained what he did in the following exchange:

> Q. And I believe we've already discussed on cross-examination that you have no write-up at all that explains your methodology for making location adjustments; is that correct?
>
> A. I do not recall, sir. I know there was a method I used but --
>
> Q. What was that method?
>
> A. Putting the sale down, adjusting them with the idea of getting the DC -- the standard deviation as low as possible by a combination of adjusting, and -- I'm trying to think of the term they use. It's the same type of -- your HP 2c, it goes through a process of reiteration and it was basically using that process on the sales to come up to the point where the standard

[130] T3 at 83-84.
[131] T3 at 85-86.
[132] T3 at 87-88.

> deviation was as low as possible, so that means that we were getting away from any central line of tendency --
>
> THE COURT REPORTER: I'm sorry?
>
> THE WITNESS: Central distribution. And so what we're trying to do is if we have a line of tendency, making sure that everything is coming as tight to a central line of tendency as possible.[133]

The discussion continued regarding Heinowski's inconsistency between each comparable's relative size and the amount of adjustments, as well as the fact that he made size adjustments using 190,000 SF rather than 164,400. His methodology was summed up in the following exchange:

> Q. And in fact, I believe what you testified was you were trying to make your adjustments to have the smallest standard deviation among your adjusted sale prices; is that correct?
>
> A. That is correct.
>
> Q. So you're not only comparing your comparable sales to the subject, you're comparing the sales to each other and adjusting them to try to get them in a narrow range; is that correct?
>
> A. Well, you put them on a scattergram and they can show market -- how they relate in the marketplace and market activities, yes.
>
> Q. But is what I characterized as your approach correct? Let me -- could you --
>
> A. I don't see fault in how you characterize it.
>
> Q. And is there any appraisal text ever written that says that's the correct method to perform adjustments to comparable sales?
>
> A. Actual thesis or treatise I can't think of one right offhand.[134]

Next, Heinowski's 15% positive adjustment for land to building for comparables 1,3, and 4 and 10% adjustment for comparable 6 were examined. He admitted that the ratio shown towards the bottom of the grid as 3.38:1 was wrong, and that he actually used the ratio towards the top of 8.1508:1.[135] He then admitted that he should have used 9.72:1, but instead used between 4.5 and 6 to 1.[136] He was then asked about the purpose of adjusting for land to building ratio and had the following exchange:

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[133] T3 at 88-89.
[134] T3 at 95-96.
[135] T3 at 96-97.
[136] T3 at 97-98.

> Q. And I believe a minute ago you testified the reason to do that is to account for the value of excess or surplus land; is that true?
>
> A. That's one of many reasons, yes, or one of the reasons, primary reasons, yes.
>
> Q. And the subject property has no excess land; is that true?
>
> A. That's true.
>
> Q. The subject property has no surplus land; is that true?
>
> A. Yes.[137]

He eventually admitted that his appraisal stated that the subject had no surplus land and no excess land.[138] Counsel then compared the wildly different land to building ratios of the comparables and noted that they had the same +15% adjustment. Heinowski finally conceded that he would do it differently now, and that he would most likely come to a different value.[139]

Heinowski was also asked about what was included in the square footage figures found in his comparables:

> -- well, where did you get the square footage that you used for the building areas of your comparable sales?
>
> A. Most of them CoStar.
>
> Q. Okay. Does CoStar report the square footage of canopied areas?
>
> A. I do not know, because I've never seen it separated out or specifically added.
>
> Q. Does CoStar report the areas of fenced-in garden areas?
>
> A. Same answer. I do --
>
> Q. You don't know?
>
> A. I have never seen it separated out. It's not to say that they haven't, but to say either way I cannot —

FINDINGS OF FACT

1. The subject property is identified as Parcel No. H-08-21-100-022.
2. The subject property is a located at 5900 Jackson Road, Scio Township, Washtenaw County, Michigan.

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[137] T3 at 98-99.
[138] T3 at 101.
[139] T3 at 104.

3. The subject property is classified as 201-Commercial and zoned I-1, Limited Industrial and C-2, General Commercial.
4. The subject site has a total land area of 34.07 acres. Approximately 10 acres are subject to conservation easements and cannot be developed. There is no excess land that could be sold or surplus land that can be used for expansion.
5. The subject conservation easements are on all sides of the property except for the immediate area behind the store.
6. Site improvements consist of asphalt paving with parking for approximately 616 vehicles, concrete car stops, curbing, approaches, sidewalks, and pole lighting.
7. The subject property is improved with a free-standing, single-tenant commercial building originally constructed as a build-to-suit for Lowes in 2003.
8. The subject building is a single-story class C warehouse discount store with steel framing and concrete block/brick exterior. It is 146,400 SF exclusive of garden areas, canopied areas, and loading docks.
9. The subject building has a garden area that is enclosed by permanent walls and/or fences and covered by a canopy. There are several greenhouses in this area that are roofed structures with no walls.
10. The subject building has an open loading dock area and a pickup area that is covered by a canopy.
11. The subject building is owner-occupied.
12. The highest and best use of the subject property is retail use.
13. Petitioner's appraiser utilized the cost ($6,180,000), income ($5,860,000), and sales comparison ($5,560,000) approaches to value in his appraisal, and giving most weight to the sales comparison approach, concluded to the true cash value of $5,620,000 for the subject property. Petitioner's appraiser did not give any weight to the cost approach.
14. Respondent's appraiser utilized the cost ($11,000,000) and sales comparison ($9,900,000) approaches to value in his appraisal, and giving most weight to the sales comparison approach, concluded to a true cash value of $10,000,000 for the subject property.

15. Both appraisers agreed that the sales comparison approach is the primary approach in which to value the subject property.
16. Both appraisers determined significant depreciation and obsolescence for the subject property in their cost approaches to value.
17. For his sales comparison approach, Petitioner's appraiser identified and examined the sales of seven properties that sold between September 2014 and January 2018. The sales have unadjusted prices ranging between $23.82/SF and $44.05/SF and adjusted prices ranging between $31.94/SF and $42.44/SF.
18. Petitioner's improved comparable 1 is a former Big K with 119,220 SF that was sold to Farm & Fleet. The site consists of two parcels, one of which is leased from the Jackson County Airport. Farm and Fleet assumed the rights to the existing land lease, which expired in 2018, but contained 7 more extensions for 10 years each. Petitioner's appraiser capitalized the annual rent payment for the land lease and added the indicated $300,000 to the $2.54 M purchase price for a total purchase price of $2.84M.
19. Petitioner's improved comparable 2 is a former Super Kmart with 174,758 SF that was purchased by Kroger for conversion to a Kroger Marketplace. Kroger is using approximately 140,000 SF and the remainder is being marketed for lease.
20. Petitioner's improved comparable 3 is a former Kmart with 142,508 SF that was purchased by U-Haul for use as a showroom for selling moving and packing supplies as well as truck and trailer rentals. The building will also be built-out to include approximately 1,200 climate-controlled, mini-storage rooms. The sale price was adjusted upward by $500,000 to account for deferred maintenance associated with damage to the roof-top HVAC units and a PVC system on the roof as a result of vandalism. This sale was also utilized by Respondent's appraiser.
21. Petitioner's improved comparable 4 is a former Sam's Club with 103,298 SF that had been unoccupied but leased by Walmart for more than 10 years. The lease expired on April 1, 2016. The property was purchased by an owner/user and approximately 58,000 SF will be converted to a Harley Davidson dealership. The remaining space is being marketed for lease.

22. Petitioner's improved comparable 5 is a former Kroger with 63,511 SF that was purchased by Planet Fitness who will occupy approximately 27,000 SF. The remaining space being offered for lease.
23. Petitioner's improved comparable 6 is a former Kmart with 119,396 SF that was purchased by U-Haul for use as a showroom for selling moving and packing supplies as well as truck and trailer rentals.
24. Petitioner's improved comparable 7 is a former Lowe's with 139,410 SF that was purchased for use as a Blain's Farm and Fleet. The property is located in Elgin, Illinois. The total land size included in the sale was 16.26 acres but a little over 4 acres is storm water mitigation lowlands that is shared with the neighboring shopping center. The property sold with a restrictive covenant limiting the property from being utilized for retail use similar to Lowe's, Home Depot, Menard's 84 Lumber, etc. for a period of 5 years following the sale. The specific use as a Blain's Farm and Fleet was included as a permitted use although the buyer's use is similar to the aforementioned uses.
25. Petitioner's improved comparable 7 is the only comparable that sold with a deed restriction.
26. Petitioner's appraiser adjusted his comparable sales for property rights, financing terms, conditions of sale, market conditions, size/configuration, arterial attributes, demographic attributes, submarket trends, and age/condition.
27. Petitioner's improved comparables 2, 4, and 7 sold closest to the December 31, 2016 valuation date. Comparables 3 and 7 were closest in size. Comparable 7 is most similar in arterial attributes. Comparables 3, 5, and 7 were the most similar in age/condition. Comparables 1 and 5 had the least overall adjustments.
28. Petitioner's appraiser identified five additional comparables that sold for the subject property's highest and best use. These sales were not used directly to derive the indicated value but to demonstrate and active marketplace and the range in sale prices and offering prices for fee simple interest properties.
29. Petitioner's appraiser reviewed and considered a national study on big-box sales that was completed in 2016. The study included 202 sales that occurred between January 2011 and June 2016, of which 106 sales were the transfer of

fee simple estates. The fee simple sale prices ranged from $8.72/SF to $66.84/Sf and averaged $27.73/SF.

30. Petitioner's appraiser reviewed sales of Lowe's stores around the country. Between 2010 and 2014, Lowe's sold 15 existing stores. The sales indicate a similar but lower range and average compared to the comparable sales utilized in the appraisal.
31. From the adjusted sale prices of the selected comparable sales and supplemental market data, Petitioner's appraiser concluded to a market value of $38/SF for the subject property.
32. For his income analysis, Petitioner's appraiser identified and examined five existing big-box buildings that were leased. These comparables have unadjusted prices ranging between $3.60/SF and $6.80/SF and adjusted prices ranging between $2.85/SF and $6.00/SF.
33. Petitioner's appraiser also identified and examined 3 build-to-suit leases. These comparables have unadjusted prices ranging between $6.16/SF and $9.55/SF and adjusted prices ranging between $6.16/SF and $9.55/SF.
34. Petitioner's existing lease comparables were built between 1960 and 1993, range in size from 81,072 SF to 120,650 SF, and have lease dates ranging from August 2006 and September 2016.
35. Petitioner's appraiser adjusted each lease comparable for market conditions, size, arterial, demographic, retail submarket, and age/condition.
36. From the adjusted lease rates of the lease comparables, Petitioner's appraiser concluded to final (triple net) market rent rates of $5.00/SF.
37. Petitioner's appraiser reviewed vacancy levels for the subject area as surveyed by CoStar and CBRE and concluded to a vacancy and credit loss factor of 7.50% for the subject property.
38. Petitioner's expenses included CAM, insurance, property taxes, management fee, and reserve for replacement.
39. Petitioner's appraiser reviewed market-derived rates, band of investment-derived rates, the subject's attributes and investment surveys and concluded to a capitalization rate of 9.50% for the subject property.

40. After capitalizing the net operating income, Petitioner's appraiser deducted leasing commissions of $219,600 to arrive at his final true cash value indication.
41. For his cost approach, Respondent's appraiser identified and examined the sales of six vacant parcels that sold between June 2015 and March 2018. The sales have unadjusted prices ranging between $4.04/SF and $8.12/SF, and adjusted prices ranging between $4.50/SF and $5.85/SF.
42. Respondent's vacant land comparables range in size from 1.81 to 17.76 acres.
43. Respondent's vacant land Comparable 4 (17.76 acres) is an assemblage of 13 parcels that average a little over an acre individually.
44. Respondent's vacant land comparable 6 (7.09 acres) is an assemblage of 3 parcels that average a little over two acres individually.
45. Respondent's appraiser did not adjust or give any weight to vacant land comparables 2 (backland) and 5 (backland sold to adjacent owner).
46. Respondent's appraisal states that all vacant land comparables were arm's length transactions and therefore no adjustments were warranted for "conditions of sale," but its appraiser made negative 10% adjustments to vacant land comparables 4 and 6 for this element of comparison.
47. Respondent's appraiser made a positive 15% adjustment to vacant land comparable 6 for size that should have been negative.
48. Respondent's vacant land sales have gross adjustments of 45%, 53.5%, 60%, and 80%, respectively.
49. Respondent's appraiser mislabeled several columns in his cost grid as "Section iv" and repeated lines 36 and 37.
50. Respondent's appraiser determined that the subject building most closely corresponded to a Marshall Valuation Services' warehouse discount store but costed it as a mall anchor department store at a base rate of $79.32/SF, which includes value for elevators and escalators.
51. Respondent's appraiser acknowledged that the subject building does not have the same fit and finishes as an anchor department store.
52. Respondent's appraiser valued the 13,850 SF garden area as a Marshall Valuation Services' Greenhouse Shade Shelter. The 12,330 SF garden area

was valued as a Greenhouse, Straight Wall, Small (under 4,500 SF). The values for the 8,695 SF garden area, loading docket and pickup area were derived from the segregated cost portion of Marshall Valuation Service.

53. Respondent's appraiser misstated the square footage of the covered greenhouse area as 86,550 SF rather than 8,695 SF, resulting in an erroneous replacement cost of $1,685,0000 rather than $169,291.
54. Respondent's appraiser misstated the square footage of the loading dock area as 47,500 SF rather than 4,750 SF and used an incorrect combined height and size multiplier of .9702 rather than .5742, resulting in an erroneous replacement cost of $52.75/SF ($250,000) rather than $30.28/SF ($125,000).
55. Respondent's appraiser acknowledged that costing the loading dock area, which consists of a 27-foot concrete wall with no roof at $48/SF was erroneous.
56. Respondent's appraiser misstated the square footage of the pickup area as 4,750 SF rather than 4,125 SF and used an incorrect combined height and size multiplier of .9702 rather than .5742, resulting in an erroneous replacement cost of $19.62/SF ($93,200) rather than $10.33/SF ($50,000).
57. Respondent's appraiser's calculations for the garden area are incorrect. Application of the indicated $5.44/SF rate to the 12,330 SF indicates a value of $67,075, not $12,335 as stated in the appraisal.
58. Respondent's appraiser costed 124,604 lineal feet (23miles) of curb at a cost of $10.22 per lineal foot ($1,371,126.85) but acknowledged that it was highly unlikely that you could physically put 23 miles of curbing on the property.
59. Respondent's record card identifies 10,180 lineal feet of curbing for the subject property valued at a rate of $8.47 per lineal foot.
60. For his sales comparison approach, Respondent's appraiser identified and examined the sales of six properties that sold between December 2013 and July 2017. The sales have unadjusted prices ranging between $15.71 and $58.02/SF and $21.99 and $72.41/SF.
61. Respondent's improved comparable 2, identified as 34800 Haggerty Road in Farmington Hills, has the sale date, sale price and square footage from one comparable (identified as 34800 Haggerty Road), and incorporates the seller,

buyer, year built, acreage, and photograph of a different comparable (identified as 24800 Haggerty Road).

62. The property identified by Respondent's appraiser as 34800 Haggerty Road is actually the Windmill Plaza 3-Star Retail Freestanding Community Center in Sterling Heights, Michigan.
63. Respondent's appraiser did not adjust or give any weight to improved comparable 5, which was a former Walmart that sold in 2009 and was subsequently redeveloped and turned into smaller units and leased out prior to selling again in 2013.
64. Respondent's appraiser determined that a market conditions adjustment of 2% per annum was appropriate.
65. Respondent's appraiser applied a 4% market conditions adjustment to improved comparables 2, 3, 4, which sold in late 2015 and 2016, and an 8% adjustment to improved comparable 6, which sold in 2013.
66. Respondent's improved comparable 4 included the sale of a Burger King on a ground lease and a 1.5 acre out lot.
67. Respondent's improved comparable 6 was leased to Kmart at the time of sale.
68. Respondent's appraiser stated in his appraisal that improved comparable 4 (misidentified as comparable 5) was the only property that required a size adjustment, but he also made a size adjustment to improved comparable 6.
69. Respondent's appraiser made a negative 5% size adjustment to improved comparable 4 for a difference of 72,953 SF and a positive 5% size adjustment to improved comparable 6 for a difference of 3,067 SF.[140]
70. Respondent's appraiser did not make size adjustments to improved comparables 1-3, which have differences of 88,307, 27,662, and 47,642 SF, respectively.
71. Respondent's appraiser identified the subject as having a land to building ratio of both 8.1508 and 3.38 in his adjustment grid.
72. Respondent's appraiser testified that he used a land-to-building ratio of 9.72.

[140] Square foot differences are based on the 190,150 SF Respondent's appraiser testified he used for the subject, notwithstanding the 182,080 SF identified in the adjustment grid.

73. Based on the 190,150 SF Respondent's appraiser indicated that he utilized in his analyses, the subject property would have a land to building ratio of 7.80.
74. Respondent's appraiser made positive 15% adjustments to improved comparables 1, 3, and 4, which have land-to-building ratios of 6.0265, 4.6553, and 4.8170, and a positive 10% adjustment to comparable 6, which has a land-to-building ratio of 5.8752. He did not adjust improved comparable 2, which has a land-to-building ratio of 2.6004.
75. Respondent's appraiser obtained square footage information for his improved comparable sales from CoStar.
76. CoStar does not report square footage of garden or canopied areas.
77. With the exception of comparable 5, All of Respondent's improved comparables included fenced in garden areas.

CONCLUSIONS OF LAW

Pursuant to Section 3 of Article IX of the State Constitution, the assessment of real property in Michigan must not exceed 50% of its true cash value.[141] The Michigan Legislature defined "true cash value" as "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."[142] The Michigan Supreme Court has held that "true cash value" is synonymous with "fair market value." [143]

The Tribunal is charged with finding a property's true cash value to determine the property's lawful assessment.[144] The determination of the lawful assessment will, in turn, facilitate the calculation of the property's taxable value as provided by MCL 211.27a. Fundamental to the determination of true cash value is the concept of "highest and best use." It recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay.[145]

[141] Const 1963, art 9, sec 3.
[142] See MCL 211.27(1).
[143] *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).
[144] See *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).
[145] See *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 623; 462 NW2d 325 (1990).

A proceeding before the Tax Tribunal is original, independent, and de novo.[146] The Tribunal's factual findings must be supported by competent, material, and substantial evidence.[147] "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."[148]

MCL 205.737(3) provides that "the petitioner has the burden of proof in establishing the true cash value of the property."[149] The Michigan Court of Appeals has held that "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."[150] Nonetheless, the tribunal *must* make an independent determination of true cash value.[151] The Tribunal is also obligated to select the valuation methodology that is accurate and bears a reasonable relation to the property's true cash value.[152] The Tribunal is not, however, "bound to accept either of the parties' theories of valuation. It may accept one theory and reject the other, it may reject both theories, or . . . utilize a combination of both in arriving at its determination."[153] Regardless of the valuation approach employed, the final valuation determined must represent the usual price for which the subject property would sell.[154]

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.[155] In the instant appeal, both parties' appraisers indicated that the sales comparison approach is most relevant in determining true cash value or "usual selling price" within the meaning of MCL 211.27 for the tax year at issue. The Tribunal agrees,

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[146] MCL 205.735a(2).
[147] 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).
[148] *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).
[149] *Id*.
[150] *Jones & Laughlin, supra* at 354-355.
[151] *Id.* at 355.
[152] See *Safran Printing Co v Detroit*, 88 Mich App 376; 276 NW2d 602 (1979).
[153] *Jones & Laughlin, supra* at 356.
[154] See *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473; 473 NW2d 636 (1991).
[155] *Meadowlanes, supra* at 484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170, 176; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968).

as this approach "is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading."[156] The income approach is generally considered the most accurate method for valuing income-producing properties and the subject property is owner-occupied.[157] Allen also testified that data for leases of big-box properties is not as prevalent, "so the data is not as good as data for the . . . sales comparison approach,"[158] and Heinowski did not utilize the income approach because he did not believe that it "reflected market activities or market participants, the actual people doing the transactions."[159] As for the cost approach, Allen testified that it is not typically processed by appraisers of big-box store properties:

> It's not typically applied because it's not -- it doesn't provide you with an indication of market value of the property. It provides an indication of what it would cost to replace but it doesn't indicate what it could be sold for. Market value and true cash value and usual selling price are based on what you can sell the property for in the market. So the value conclusion needs to reflect the usual selling price of the property, which is not based on a cost approach.[160]

As noted above, however, Allen did perform a cost approach to value, to which he gave no weight. He explained:

> One, it's not the approach that's used by the market participants in buying these properties. Second, it involves determining a lot of depreciation, which makes it less reliable. And third, in order to approximate the depreciation you need to go to one of the other approaches to extract it from the market so that your cost approach value does, in fact, represent market value or usual selling price.[161]

Indeed, both appraisers determined substantial depreciation and obsolescence for the subject property, with Allen concluding to 43% physical depreciation for the building improvements, 47% for the site improvements, and 33% functional and external obsolescence, and Heinowski concluding to an 80% combined loss. In that regard, Heinowski acknowledged that to conclude to true cash value, you must look at how the

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[156] *Jones & Laughlin*, 193 Mich App at 353-354.
[157] *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 476; 302 NW2d 164 (1981).
[158] T1 at 151.
[159] T2 at 192.
[160] T1 at 94.
[161] T1 at 139.

property would be used by market participants after the property is exposed to the market,[162] and that functional obsolescence is a factor once the property is exposed to the market for other users.[163] He further acknowledged that big-box retailers build-to-suit buildings that fit their specific architectural prototype and business models,[164] and that first generation users of retail big boxes usually look to potential build-to-suit opportunities rather than buying or leasing from the stock of other big boxes that are available to maintain a desired corporate image.[165] Allen's testimony established that big-box retailers are not motivated by resale value.[166] Stores are specifically constructed to conform to the retailer's business plan and to maximize their retail sales and profits for their business.[167] Specific aspects of the subject that were constructed to conform to Lowe's specific image and business model include the front facade and the canopy over the contractors area, as well as the three loading docks.[168] The amount of backroom storage area and office space, location of the restrooms, and the lighting configuration are also all designed and typical of a Lowe's store.[169] Further, while the subject is capable of being used without modification by other retailer's for retail use,[170] it is typical for buyers to make changes.[171] Allen explained:

> Well, big-box retailers want their customers to be comfortable with their store and know that it's their store and it looks like their stores, lays out like their store, they can lay out their merchandise in a way that's consistent with their other stores. And so they'll typically want to make it look and lay out and function as much as possible to a store that they built themselves for their own use and with their own specifications.[172]

The result is a type of functional obsolescence that must be considered in accordance with the Court of Appeals decision in *Meijer, Inc v Midland*.[173]

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[162] T1 at 28.
[163] T1 at 30.
[164] T1 at 28-29.
[165] T1 at 31.
[166] T1 at 83.
[167] T1 at 83.
[168] T1 at 82-83.
[169] T1 at 83.
[170] T1 at 82.
[171] T1 at 83.
[172] T1 at 84.
[173] *Meijer, Inc v Midland*, 240 Mich App 1; 610 NW2d 242 (2000). Allen testified that functional obsolescence exists in big-box stores immediately after construction is completed: "Big-box stores are

Heinowski acknowledged that the substantial depreciation reflected in his cost approach reduces the reliability of that approach,[174] and that he weighed that approach at less than 10% in arriving at his final value conclusion.[175] Respondent argued nonetheless that Allen erred in rejecting the cost approach, noting that one of the key takeaways from *Menard, Inc v City of Escanaba*[176] is that "when the HBU of the property is its existing use and (2) when, because the property was built-to-suit, there would be little to no secondary market for the property to be used at its HBU, then the strict application of the sales-comparison approach would undervalue the property, so the cost-less-depreciation approach is more appropriate."[177] As has been previously noted, however, *Menard* was decided on its specific facts and circumstances.[178] And unlike that case, there is no evidence in the instant appeal establishing the lack of a market for properties with the subject's highest and best use. Respondent argued that Petitioner's own appraisal establishes that there is a limited market for big-box properties, and Allen did concede as much.[179] He also testified, however, that there is in fact a market: "There's an active market. Even though there's a limited number of buyers there's an active market – for the sale of big-box stores."[180] As such, and inasmuch as this testimony is supported by the market evidence on record, including that utilized by Respondent's appraiser, the Tribunal cannot conclude that Allen erred in determining that the cost approach should not be given any weight in his reconciliation of the various approaches and final estimate of value. It is notable that in addition to the seven improved comparables utilized in his direct comparison analysis, Allen identified five additional comparables that sold for the same highest and best use as the subject

built to the specifications of the specific user, and if they're put on the market for sale to another user then the other user isn't going to pay for all the specific design features, that it was built for that user. And in fact, they will typically modify the design features for -- for their particular business and change the facade, the layout, the lighting, whatever needs -- needs to be done to make it look like and function like one of their stores. So that they're not going to pay full depreciated replacement cost, they're going to pay something less that reflects the fact that it's not an ideal size or ideal layout and configuration for the typical purchaser." T1 at 144.

[174] T1 at 47-48.
[175] T1 at 47.
[176] *Menard, Inc v City of Escanaba*, 315 Mich App 512; 891 NW2d 1 (2016).
[177] *Menard, Inc. v. City of Escanaba*, 315 Mich. App. 512, 528, 891 N.W.2d 1, 11 (2016).
[178] *Zaremba Grp LLC v Livingston Twp,* MOAHR Docket No. 17-001291 (June 5, 2019)
[179] See T2 at 116-117.
[180] T2 at 119.

to demonstrate an active marketplace. Allen also testified that the retail industry is in flux, and that more and more big-box retailers are closing stores and/or downsizing, but additional users are coming on the market and taking up the slack, including U-Haul, At Home, and Farm & Fleet.[181]

Respondent's reliance on the cost approach is misplaced for all the foregoing reasons. Heinowski's analysis was also wrought with errors and flawed methodology that negate both its credibility and reliability. As noted above, Respondent's vacant land comparables range in size from 1.81 to 17.76 acres. Comparables 4 and 6 are assemblages of smaller parcels, however, and the largest individual parcel utilized in the analysis is therefore only 4.67 acres. Most parcels approximate 1-2 acres and given that the subject is 34.07 acres with 20+ developable acres, the Tribunal is not persuaded that the properties are sufficiently similar to properly be considered comparable. This is particularly true in light of Heinowski's acknowledgement that (1) a buyer who purchases a site with the intent to assemble it with other parcels might have to pay a higher-than-market value,[182] and (2) by pure economies of scale, smaller parcels sell for a higher price per unit.[183]

Heinowski also made a positive 15% adjustment to vacant land comparable 6 for size that he admitted should have been negative,[184] and he made negative 10% adjustments to vacant land comparables 4 and 6 for "conditions of sale" even though his appraisal states that all vacant land comparables were arm's length transactions and therefore no adjustments were warranted for that element of comparison.[185] Heinowski could not recall or explain what the basis for those adjustments were.[186] The positive 15% adjustment to vacant land comparable 4 for demolition costs is also problematic given that it amounts to almost $1 million and is completely unexplained and unsupported on the record.[187] Additionally, the sales have gross adjustments of ranging

[181] T1 at 91.
[182] T3 at 38.
[183] T3 at 43.
[184] T3 at 45.
[185] T3 at 41-42.
[186] T3 at 42.
[187] T3 at 39-40.

between 45% and 80%, and Heinowski acknowledged that this suggests that the properties are really not all that comparable to the subject.[188]

Heinowski also applied the indicated price per square foot to the entirety of the subject parcel notwithstanding his acknowledgement of the existence of wetlands and conservation easements. With respect to the former, the appraisal states, "We were not provided with a wetland survey, nor were any wetland information provided during the on-site visit/tour. If subsequent engineering information reveals the presence of regulated wetland area on the subject's site, it could materially affect the property's marketability, use and value."[189] In contrast, Heinowski testified that he was aware of wetlands, but "did not assign an acreage or try to figure out how many acres there was."[190] He testified that he considered the wetlands in the final selection of his rates for land but did not "separate it out and show it in the appraisal."[191] When asked how he could make a proper adjustment without knowing now much of the property was wetlands, Heinowski stated: "I ranked the sales with the wetlands lower than the sales without wetlands."[192] He acknowledged, however, that none of his vacant land comparables were subject to conservation easements, and that the appraisal does not indicate that any of the comparables had wetlands.[193] Absent any support in the record or an ability to independently review and verify the information, Heinowski's contention that he properly considered and accounted for the subject wetlands is not persuasive. The same is true for the conservation easements, which Heinowski initially testified he did not become aware of until after the valuation exchange,[194] but later acknowledged seeing signs indicating the existence of easements when he walked the property during his inspection.[195] He testified, "I saw the signs and, quite honestly, I didn't – I did not pay any attention to them or give them any weight."[196] He then admitted that despite

[188] T3 at 41.
[189] R-1 at 18.
[190] T3 at 25.
[191] T3 at 25.
[192] T3 at 27.
[193] T3 at 28.
[194] T1 at 16. See also T3 at 24.
[195] T3 at 31.
[196] T3 at 31,

seeing the signs he made no investigation as to the existence or extent of any conservation easements.[197]

Heinowski also acknowledged numerous errors in his cost grid, including the mislabeling of several columns and rows, incorrect square footage indications for the loading dock, pickup, and garden areas in various places throughout the grid, and a number of miscalculations.[198] He further acknowledged that he costed the "primary" building as a mall anchor department store at a base rate of $79.32/SF, which includes value for elevators and escalators, notwithstanding that the subject building most closely corresponds to a Marshall Valuation Services' warehouse discount store and does not have the same fit and finishes as an anchor department store.[199] Heinowski also agreed that he erred in valuing the loading dock at a base cost of $48/SF because "it doesn't make any sense to have something that expensive with such little improvement."[200] He further agreed that the indicated cost of $250,000 for this area was overstated.[201] Heinowski also acknowledged that his indicated measurement of 124,604 lineal feet (23 miles) and $1.4M value for curbing was incorrect.[202]

Heinowski's sales analysis was equally flawed, with various typographical errors, incorrect identification of the relevant valuation date and resulting double application of the market conditions adjustment,[203] a comparable sale that was a combination of two different properties in two different jurisdictions,[204] and two comparables that were leased fee sales, one of which also included a 1.5-acre outlot that was being marketed for development.[205] With respect to the leased fee comparables, Allen's testimony established that the value of a property can be vastly different depending on whether you value the fee simple or leased fee interest,[206] and that the market is different for

[197] T3 at 34.
[198] T2 at 174-175; T3 at 45
[199] T3 at 61-64.
[200] T3 at 55-56.
[201] T3 at 56.
[202] T3 at 68.
[203] R-2; T3 at 81-83.
[204] T3 at 70-81.
[205] T3 at 83-88, 126-127.
[206] "Because an investor purchasing a fee simple interest will need to locate a tenant and negotiate a lease and probably pay leasing commissions, maybe make some tenant improvements and have some lost income while it's being leased up. Whereas, an investor buying the property that's already leased can buy it as a passive investment and buy it to collect the existing rent payments and doesn't need to go to

leased fee interests.[207] It also established that leased fee properties sell for a much higher price and that "the purchase is based on what the remaining lease term is and how strong the credit of the tenant is."[208] And as previously noted, Heinowski agreed that using sales of property that are not leased "creates a better analysis of market activities."[209] Heinowski also acknowledged that the leased fee sales would require an adjustment, and that no such adjustments were made in his analysis.[210] He further acknowledged that he suspected that his improved comparable 6 was a leased fee "because of the odd dollar consideration," but failed to investigate it any further, despite the fact that it would need to be adjusted.[211]

Respondent's adjustments for the various elements of comparison are not sufficiently explained or supported in its appraisal and Heinowski was unable to provide any additional insight in his testimony at the hearing. Additionally, the size and land-to-building ratio adjustments are inconsistent and appear to have no logical application.[212] The land-to-building adjustments are also questionable given the numerous discrepancies in Heinowski's appraisal and testimony as to the actual factor utilized,[213] as well as his acknowledgement that the subject property has no surplus or excess land.[214] As noted above, Heinowski testified that his adjustments made sense to him

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find a tenant or negotiate a lease or experience downtime while the property is being leased and set up for a tenant." T1 at 71.

[207] "There's a wide market for leased big-box stores, and that market is passive investors in the form of REETs, life insurance companies, investment companies. The leased fee interest in a big-box store are sold nationally on the national investment market, and there are a multitude of potential purchasers who would buy the property for the income stream. Whereas in an existing unleased big-box store the buyer would not be a passive investor, it would be a user of the property or an investor who would -- who would need to find a tenant and negotiate a lease and put the tenant in place so it eventually could be sold as a passive investment on the investment market." T1 at 73-74.

[208] "They sell for a much higher price. Typically because it's a different market, it's a passive investment market. It's typically an institutional investor who is buying the income stream based on the credit of the tenant. And typically they're sold with build-to-suit leases, they're above-market rent, and the purchase is based on what the remaining lease term is and how strong the credit of the tenant is." T1 at 100.

[209] T1 at 38.

[210] T3 at 86.

[211] T3 at 87-88.

[212] T3 at 91-94, 96-104.

[213] T3 at 96-98.

[214] T3 at 98-99.

when he put the appraisal together, but that he would likely do it differently now.[215] He further testified that he would likely come to a different value now.[216]

A primary point of contention between the parties was the location adjustment made to improved Respondent's comparable 3, which is also Petitioner's improved comparable 3. Allen, who testified that location is generally the biggest factor impacting the sale price of big-box stores,[217] adjusted this property down for superior arterial and demographic attributes and upward for submarket characteristics. He explained:

> It was adjusted downward for its superior arterial attributes because this was located right on Telegraph Road, with extremely heavy traffic and had unobstructed visibility and access -- direct access to Telegraph Road. It was adjusted 5 percent downward for demographic characteristics and then it had very heavy population density within five miles. It's located 5 percent upward for submarket characteristics and it was inferior to the subject in that respect.[218]

Heinowski made a positive adjustment because "Telegraph Road is a very hard road to get on and off. It has limited access in spots."[219] He testified that he did not agree with Allen's demographics adjustment, but his explanation referenced the condition of the property and had nothing to do with its location.[220] Heinowski also testified that he tends "to not use so many demographic adjustments in a report because we're dealing with -- not so much dealing with rooftops and how many there are and what can be sold from them, but we're dealing with particular 'I want' items rather than the 'I need" items.'[221] This explanation is not persuasive, particularly in light of the fact that Heinowski failed to identify any basis for his own adjustments outside of a statistical analysis that seemingly fails to consider or account for the specific attributes and differences between the two locations, notwithstanding his assertion to the

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[215] T3 at 93, 104.
[216] T3 at 104.
[217] T1 at 111.
[218] T1 at 120.
[219] T2 at 210.
[220] Heinowski testified: "I believe he made the adjustment the wrong way or sent it in the wrong direction, in that this facility I thought was in not as good as shape as the subject. So we had to bring it up, which would be a plus adjustment, where he was saying the project was actually in a better condition than the subject so he had to bring his down." T2 at 210-211.
[221] T2 at 211.

contrary.[222] Allen's adjustments, which were broken up into three parts, considered access, visibility, traffic exposure, population, households, median household incomes, and submarket trends, and he credibly testified that the demographics of this and other comparables were inferior to the subject

> Because what a retailer -- especially a discount retailer -- is looking for is population and households, so that's the primary factor. Income is a consideration, but again, too high of an income or too low of income is not as desirable as the median income. So if you look at all those properties, the subject has very low population density. It's on the edge of the metropolitan area and it has about 59,0000 people within five miles, whereas – and 24,000 households. So most of the comps have a lot more, a lot higher population density, a lot more households within the primary trade area.[223]

With respect to improved comparable 3, Allen noted that this specific property has 286,000 people within five miles as compared to the subject's 59,000 people.[224] It is also notable that Heinowksi failed to account for the deferred maintenance identified in Allen's appraisal and testimony for this comparable.[225] He testified that he thought he knew about it and that "it was wrapped up in overall adjustments,"[226] but this testimony is not supported anywhere in the record. Consequently, it is not persuasive or sufficient to establish that the issue was properly accounted for in his analysis.

Finally, the Tribunal finds that Respondent's inclusion of the loading dock, garden and pick up areas in the building square footage is erroneous. Allen testified that the standard unit of comparison used by brokers, reporting services, buyers and sellers of big-box stores is price per square foot, exclusive of canopied areas, garden areas, and loading docks.[227] In support of Respondent's contention that inclusion of these areas is proper, Counsel had Allen read the definition of "building" from The Dictionary of Real Estate Appraisal, Sixth Edition. That definition read as follows: "A structure, usually

[222] T3 at 89-91, 94-96.
[223] T2 at 58.
[224] T2 at 60.
[225] T3 at 14.
[226] T3 at 14.
[227] T2 at 141-143.

roofed and walled, that is erected for permanent use."[228] Thereafter, the following exchange took place:

> Q. So the word 'usually' connotates that generally they have roofs; right?
>
> A. Yes.
>
> Q. But it doesn't require it? Does it?
>
> A. Yes.
>
> Q. 'Usually' means -- if it required it, wouldn't it say, a structure, roofed and walled, that is erected for permanent use?
>
> A. A building -- to be a building you need a roof, you need walls.
>
> Q. No, you can't ignore the word 'usually.' You can't -- usually means usually.
>
> A. I mean, you're getting kind of ridiculous, I think. I mean --[229]

Respondent also cited "gross building area," i.e., "the total area of the building, including below-grade space but excluding unenclosed areas, measured from exterior wall,"[230] and "enclosure," i.e., "land enclosed with a visible or tangible obstruction; e.g., a fence, a hedge, a ditch, to protect the premises from encroachment by animals."[231] The Tribunal is unable to find these definitions in the sixth edition of the Dictionary of Real Estate Appraisal, and "building" does not appear to be a term that is defined in that text. The transcript suggests that Petitioner's counsel attempted to correct Respondent's citation to the Dictionary of Real Estate Appraisal, but he did not finish his statement.[232] Respondent's argument is unpersuasive even in light of the foregoing definition, however, as its interpretation of the term essentially renders any permanent structure a "building" regardless of the presence of a roof or walls. Under this definition a cell phone tower would constitute a "building," as would a stadium, a dam, and a permanently attached carport. Allen's fence analogy further demonstrates the absurdity of the argument – "My house has a fence around it, but that doesn't mean my backyard is a building. And my fence is permanent and, in fact, its concrete block and it's not

[228] T2 at 78.
[229] T2 at 78.
[230] T2 at 79.
[231] T2 at 81.
[232] T2 at 77.

going anywhere, but that doesn't mean my backyard is part of the building."[233] Moreover, the current edition of Black's Law Dictionary, which appears to be the text actually referenced by Respondent, provides the following definition for "building": "A structure with walls and a roof, esp. a permanent structure."[234] This definition negates Respondent's argument in its entirety.

Additionally, Heinowski testified that all three of the subject's garden areas are enclosed by permanent walls or fences and the majority have permanent roofs.[235] He also testified that the loading area had a roof.[236] According to Allen's testimony, however, and the photographs provided by both parties, the majority of the garden area isn't covered by a roof but a canopy.[237] There are also several greenhouse structures that Allen described as roofs with no walls.[238] The pickup area is covered by a canopy and the loading dock is open area.[239] The Tribunal also finds it telling that Heinowski valued each of these areas separately and at different rates in his cost approach. If the properties are not valued consistently in this approach, the Tribunal is hard-pressed to find that they are properly included in building square footage and valued at the same price per square foot in the sales comparison approach to value. Allen also valued the areas differently in his cost approach, so the fact that he included 12,820 SF of canopy area in the "base building cost" is of little significance on this issue. The canopy area is properly valued and Allen determined that it should be included in the base building cost because it is attached to the building,[240] but this does not mean that it should be valued the same as the rest of the building or included in the building square footage. They are, as stated by Allen, two separate components, "a building and a canopy."[241] Even assuming that these areas should be included in building square footage as Respondent contends, Heinowski's analysis would not provide a reliable indication of value because all but one of his comparables have canopy and garden areas that are

[233] T2 at 79.
[234] BUILDING, Black's Law Dictionary (11th ed. 2019).
[235] T2 at 182.
[236] T2 at 183.
[237] T2 at 19.
[238] T2 at 73.
[239] T2 at 66, 89.
[240] T2 at 84-86.
[241] T2 at 86.

not included in the square footage identified and utilized in his report.[242] And as correctly noted by Allen, "it's crucial that you use a consistent unit of comparison."[243]

As for Allen's appraisal, most of Respondent's arguments against the same have already been addressed. Respondent's contention that Allen erred in rejecting the cost approach and in miscalculating the building square footage are without merit for the reasons discussed above. As for the allegation that he failed to value all of the subject acreage, Allen testified that he applied the rate indicated by his cost approach to the developed area of the subject property, which is 20.37 acres.[244] Allen further testified that he "valued the entire 34 acres. It's just the 13 acres didn't have any significant contributing value to the property."[245] He testified that a conservation easement doesn't automatically render a parcel of property as having no value, but the subject is not in an area where someone would buy it for recreation or hunting.[246] "It's a wetland area that's not usable for development and it's not desirable for – recreational use."[247] As to what constitutes the disputed 13.7 acres, Allen testified:

> It's land that was used for mitigation when this property was built. When this property was built 20 acres were allowed to be developed, if that 20 acres was mitigated by creating wetlands area on the rest of the property. And so the original development was not allowed to develop more than 20 acres of land.[248]

Allen further testified that the conservation easement doesn't have any contributory value despite being required to build on the lot because "a retailer buying the subject property is not going to pay anything for the conservation easement. He can't do anything with it. He'll pay for the -- for the building and the improvements and the location, but the conservation easement doesn't add value to the subject property for the typical purchaser."[249] This fact was reiterated when Respondent argued that Petitioner would have needed 21.83 acres in order to build the building and

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[242] T2 at 142, T3 at 113, 126.
[243] T2 at 76.
[244] T1 at 143.
[245] T1 at 154.
[246] T1 at 156.
[247] T1 at 156.
[248] T1 at 157.
[249] T2 at 8.

improvements on the subject property so it would meet the 20% lot coverage area required by the Scio Township zoning ordinance,[250] and Allen noted that "we're valuing what exists, not – not what existed 15 years ago."[251] Asked to explain the 3.7+/- acres not included in the conservation easement, Allen testified that there's land around the drains that's not covered by the conservation easement that's not developable also."[252] It was subsequently clarified that he was referencing natural drains, i.e., existing creeks and waterways.[253] Thereafter, Allen reiterated that he valued all 34 acres but didn't assign a positive value contribution to the 13 acres.[254] The Tribunal finds this testimony both credible and persuasive and it is satisfied that Allen's methodology is sound.

The Tribunal is further satisfied that Petitioner's improved comparables are sufficiently similar to the subject to properly be considered comparable. Petitioner's improved comparables 2, 4, and 7 sold closest to the December 31, 2016 valuation date. Comparables 3 and 7 were closest in size. Comparable 7 is most similar in arterial attributes. Comparables 3, 5, and 7 were the most similar in age/condition. Comparables 1 and 5 had the least overall adjustments.

Improved comparable 7 sold with a restrictive deed, but Allen's testimony established that the price was negotiated without the restriction, the restriction was very short-term, and the buyer was excluded from the restriction.[255] As for the out-of-state location, Allen testified that he utilized this property because "it was a Lowe's store, it sold close to the date of value, and was about the same size as the subject Lowe's store, and it was in a similar economic area."[256] Even assuming that this sale should be excluded or given less weight, the Tribunal is not persuaded that it would alter the final value determination, which also considered the income approach. The only issue raised by Respondent with respect to that approach was Allen's treatment of leasing commissions. Respondent argued that it made no sense to deduct five years' worth of leasing commissions in an approach where everything else is on a one-year basis.

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[250] T2 at 21-22.
[251] T2 at 23.
[252] T2 at 12-13.
[253] T2 at 13.
[254] T2 at 14.
[255] T1 at 110.
[256] T2 at 46.

Allen testified, however, that this is "the full commission that a broker would be owed upon signing the lease, and you would have to pay that when the lease is signed. You can't pay it over five years."[257] Allen further testified that there is a different methodology when treating the commission as an annual expense, and that you would not simply deduct $43,920 from the $6,077,049 net operating income:

> You take the five -- if you're going to treat the leasing commission as an annual expense, you would take the 43,000 off the 577 and then you'd capitalize the net income after leasing commission, and that's how some appraisers do it. And if that would have been done here, it would be a $5.6 million value instead of a $6 million value.[258]

Given that Respondent failed to produce any testimony or evidence establishing that Allen's methodology is erroneous outside of Heinowski's testimony that he did not agree with deducting five years of leasing commissions in one year "because it's not realistic to the separate contract the broker has with the agency,"[259] the Tribunal cannot conclude that the indicated value is not supported. And though the data for this approach is admittedly more limited than that available for the sales comparison approach, Allen testified that "it is helpful to have more than one approach," and that "the approaches are checks and balances against each other."[260]

After careful consideration of the testimony and evidence presented in this matter, the Tribunal independently finds, that the subject property is assessed in excess of 50% of its true cash value. The subject property's TCV, SEV, and TV for the tax year at issue are as stated in the Introduction section above.

JUDGMENT

IT IS ORDERED that the property's state equalized 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

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[257] T2 at 104.
[258] T2 at 107.
[259] T3 at 120.
[260] T2 at 94.

this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, through June 30, 2012, at the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (vii) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, (viii) after December 31, 2017, through June 30, 2018, at the rate of 5.15%, (ix) after June 30, 2018, through December 31, 2018, at the rate of 5.41%, and (x) after December 31, 2018 through June 30, 2019, at the rate of 5.9%, and (xi) after June 30, 2019 through December 31, 2019, at the rate of 6.39%.

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

APPEAL RIGHTS

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

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[261] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it

[261] See TTR 261 and 257.

must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[262] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[263] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[264]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[265] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[266] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[267]

By Preeti Sadoo

Entered: August 26, 2019
ppg/ejg

[262] See TTR 217 and 267.
[263] See TTR 261 and 225.
[264] See TTR 261 and 257.
[265] See MCL 205.753 and MCR 7.204.
[266] See TTR 213.
[267] See TTR 217 and 267.