

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

JC Penney Corporation, Inc,
Petitioner,

v

MTT Docket No. 14-001797

Fruitport Township,
Respondent.

Tribunal Judge Presiding
Steven H Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, J.C. Penney Corporation, Inc., appeals ad valorem property tax assessments levied by Respondent, Fruitport Township, against Parcel No. 61-15-122-300-0001-15 for the 2014 and 2015 tax years. Laura M. Hallahan, Attorney, represented Petitioner, and Bradley J. Fisher, Attorney, represented Respondent.

A hearing on this matter was held on January 20 and 21, 2016. Petitioner's sole witness was Lawrence T. Allen, MAI, Michigan Certified General Real Estate Appraiser. Respondent's witnesses were Jumana Judeh, MAI, Michigan Certified Real Estate Appraiser, and Justin B. George, Muskegon County Equalization Department.

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 2014 and 2015 tax years are as follows:

Parcel No.	Year	TCV	SEV	TV
61-15-122-300-0001-15	2014	\$3,480,000	\$1,740,000	\$1,740,000
61-15-122-300-0001-15	2015	\$3,650,000	\$1,825,000	\$1,825,000

PETITIONER'S CONTENTIONS

Petitioner contends that the evidence presented in this case supports a determination that the true cash value of the subject property on the assessment rolls is overstated, that Respondent's contention of true cash value as evidenced by its appraisal would increase that overstatement of value and, therefore, the true cash value of the subject property for the tax years at issue should be substantially reduced. Specifically, Petitioner contends that: (i) the subject

property is a 106,731 square foot anchor department store located on 10.03 acres, (ii) the cost approach is not a factor in the valuation process for this property, but the income and sales approach should be considered, with primary reliance on the income approach, (iii) the most appropriate method to use in valuing the subject property is the income approach, based on market information, (v) Respondent's appraisal ignores Tribunal precedent, common sense, and appraisal guidelines, contains numerous mistakes, and intentionally misleads the Tribunal, and (vi) the true cash value of the subject property, based on Petitioner's revised appraisal, is \$3.45 million for 2014 and \$3.62 million for 2015.

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

Parcel Number: 61-15-122-300-0001-15

Year	TCV	SEV	TV
2014	\$3,450,000	\$1,725,000	\$1,725,000
2015	\$3,620,000	\$1,810,000	\$1,752,600

PETITIONER'S ADMITTED EXHIBITS

- P-1 Appraisal prepared by Lawrence T. Allen, dated August 3, 2015.
- P-6 Respondent appraiser's work file for Respondent's Virginia Beach comparable (Pembroke Mall).
- P-7 Executive Summary, 3020 44th Street S.W., Grandville, MI.
- P-8 Respondent's Columbus, OH comparable profile.
- P-9 Executive Summary, 5690 Harvey, Muskegon, MI.
- P-10 Executive Summary, Capitola, CA.
- P-11 Executive Summary, Coral Springs, FL.
- P-12 Executive Summary, Doral, FL.
- P-13 Executive Summary, Columbus, OH.
- P-14 Executive Summary, Palmdale, CA.
- P-15 Executive Summary, Portage, MI.
- P-16 Lease Comparables, 9850-9860 Telegraph Road.
- P-17 Lease Comparables.
- P-18 Rent as a Percentage of Retail Sales.

- P-19 Lease Agreement, NW-Taylor Farmer Jack and Ollie's Bargain Outlet.
- P-20 Lease Agreement, NW-Taylor Farmer Jack and Salvation Army.
- P-21 Building Improvement/Tenant Improvement.
- P-22 Muskegon County/Kent County Comparisons.

PETITIONER'S WITNESSES

Lawrence T. Allen

Lawrence Allen, MAI, Michigan Certified Real Estate Appraiser, was admitted as Petitioner's valuation expert in this matter. Mr. Allen testified that: (i) he has previously valued anchor department stores and regional and super-regional malls, (ii) the subject property is an anchor department store building built in 2001 at the Lakes Mall, constructed on an approximate 10-acre parcel which Petitioner purchased for \$10, (iii) the cost approach was not a reliable approach to value for an anchor department store, (iv) both the sales comparison approach and the income approach were relevant and reliable methods to determine the value of the subject property, (v) the Grand Rapids area is not located in the same "trade area" or "market area" as the subject, (vi) proper identification of the "trade area" for the subject property is important as the composition of the trade area defines the desirability of that market, (vii) the highest and best use of the subject property, as improved, is as an anchor department store, (viii) the direct capitalization income approach was appropriate, and in that process, (a) he determined a market lease rate by identifying lease comparables consisting of anchor stores at regional or super-regional malls within Michigan and making adjustments to reflect other than gross leases and tenant improvement allowances, and by performing an occupancy cost ratio, and b) he determined a vacancy rate, collection losses, expenses, and a capitalization rate by reviewing market information, (ix) he determined that the sales comparison approach was appropriate as a check against the income approach valuation, and in that process, concluded that lease fee sales were not relevant, that there were few comparable sales, and ultimately relied upon a 2006 sale and two current listings, (x) in selecting rent comparables, Respondent's appraiser failed to properly reflect relative markets, and failed to adjust her rent comparables for tenant improvements, (xi) Respondent's appraiser's occupancy ratio cost test was simply a mathematical check of her calculations and provided no substantive analysis, (xii) Respondent's

appraiser utilized leased fee sales in her sales comparison approach, and (xiii) Respondent's appraiser erroneously compared Muskegon County to Kent County with respect to population, household income, unemployment, retail trade and growth potential.

RESPONDENT'S CONTENTIONS

Respondent contends that the true cash, assessed, and taxable values initially determined by Respondent for the 2013 and 2014 tax years at issue should be increased, based on the submitted appraisal. Specifically, Respondent contends that: (i) Petitioner's sales comparison approach is flawed because it identifies a 2006 sale and two listings as comparable sales, (ii) Petitioner's income approach is flawed because market rent comparables are not reflective of the subject market and other market information used by Petitioner's appraiser is dated, and (iii) although credible market information was not readily available, Respondent's appraiser credibly supported her value determinations with testimony and work papers.

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

Parcel Number: 61-15-122-300-0001-15

Year	TCV	SEV	TV
2012	\$6,300,000	\$3,150,000	\$2,609,470
2013	\$6,400,000	\$3,200,000	\$2,651,221

RESPONDENT'S ADMITTED EXHIBITS

R-1 Appraisal prepared by Jumana Judeh, dated July 31, 2014.

RESPONDENT'S WITNESSES

Jumana Judeh

Jumana Judeh, MAI, Michigan Certified Real Estate Appraiser was admitted as Respondent's appraisal expert. Ms. Judeh testified that: (i) the highest and best use of the subject property as improved is as an anchor department store, (ii) the subject property is located in a "very strong market¹," with population growth, major development, and minimal vacancies, (iii)

¹ Transcript, p. 102.

she developed a vacant land value because of the “tremendous demand for retail”² in the area, but did not utilize this value in her determination of the TCV of the subject property, (iv) her sales comparison approach identified comparable sales based on market strength and date of sale, (v) although five of the six comparable sales are located outside Michigan, she concluded that the California and Florida markets are comparable to Michigan, (vi) in developing the income approach, she (a) identified four comparable leases of department stores and determined market rents based on triple net leases, and (b) developed a capitalization rate using national and local market information, loaded to reflect a property tax component based on vacancy rate, (vii) she placed the greatest weight on the income approach because her selected comparable leases were located in Michigan, and (viii) she determined an occupancy cost ratio to test the reasonableness of her weighted market rent, but did not test the reasonableness of her occupancy cost ratio.

Justin B. George

Justin B. George is a licensed attorney and appraiser in the State of Michigan, employed by the Muskegon County Equalization Department. Mr. George testified that the area surrounding the Lakes Mall is continuing to be commercially developed, with sufficient vacant land to encourage development.

FINDINGS OF FACT

1. The subject property, known as a J.C. Penny anchor store, is located at 5690 South Harvey, Fruitport Township, Michigan, Muskegon County.
2. The subject property was assessed for the tax years at issue as follows:

Parcel Number: 61-15-122-300-0001-15

Year	TCV	SEV	TV
2014	\$5,573,000	\$2,786,500	\$2,609,470
2015	\$5,919,400	\$2,959,700	\$2,651,221

3. The subject property is zoned PUD-Planned Unit Development District.
4. The subject property’s highest and best use, as improved, is its continued existing use as an anchor department store.
5. Construction of the improvements to the subject property were completed in 2000.

² Transcript, p. 109.

6. The subject property is a single-story, owner-occupied, anchor department store at a regional mall known as The Lakes Mall, on a 10.03 acre parcel.
7. Petitioner purchased the subject land for \$10 in 2000.
8. Neither appraiser utilized the cost approach to value, concluding that accrued depreciation and obsolescence was too difficult to determine.
9. Respondent determined a value for the subject land based on a sales comparison analysis, but did not utilize this land value in its determination of the TCV of the subject property, other than as an indicator of the strength of the local market.
10. Although Petitioner's appraiser fully developed a sales comparison approach to value, the lack of recent comparable sales made such approach less reliable.
11. Petitioner's appraiser developed a sales comparison approach that identified one comparable sale and two listings.
12. Petitioner's appraiser prepared an income approach utilizing anchor store lease comparables located in Michigan on a gross rent basis and market information for vacancy rates, collection, losses, expenses and capitalization rate.
13. Petitioner's appraiser's reconciliation of value primarily relied on the income approach because it "is concluded to most accurately represent the actions of market participants."³
14. Petitioner's appraiser determined the TCV of the subject property to be \$3.45 million for 2014 and \$3.62 million for 2015 using the income approach to value.
15. Respondent's appraiser relied primarily on the income approach (direct capitalization method) in determining the true cash value of the subject property, concluding that this approach "was given the greatest weight with the sales comparison approach utilized as a test of reasonableness . . ."
16. Respondent's appraiser developed a sales comparison approach that identified three sales from 2010, one from 2012 and two from 2013. Further, two of the sales were located in California, two were located in Florida, one was located in Ohio, and one was located in Michigan.

³ P-1, p. 79

17. Respondent's appraiser prepared an income approach utilizing as lease comparables Burlington Coat Factory, Ollie's and Dick's Sporting Goods businesses located in Michigan on a triple net basis and market information for vacancy and collection loss, variable expenses, and capitalization rate.
18. Respondent's appraiser determined the true cash value of the subject property to be \$6.3 million for 2014 and \$6.4 million for 2015.

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.⁴ The Michigan Legislature has defined "true cash value" to mean:

[T]he 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.⁵

"True cash value is synonymous with fair market value."⁶ The Tribunal is charged with finding a property's true cash value to determine its lawful assessment.⁷ Determination of the lawful assessment will, in turn, facilitate calculation of the property's taxable value as provided by MCL 211.27a. A proceeding before the Tax Tribunal is original, independent, and de novo.⁸ The Tribunal's factual findings must be supported "by competent, material, and substantial evidence."⁹ "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."¹⁰

"The petitioner has the burden of proof in establishing the true cash value of the property."¹¹ "This burden encompasses two separate concepts: (1) the burden of persuasion,

⁴ "The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not . . . exceed 50 percent . . ." Const 1963, art 9, sec 3.

⁵ MCL 211.27(1).

⁶ *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 353; 483 NW2d 416, 419 (1992).

⁷ *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).

⁸ MCL 205.735a(2).

⁹ *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990).

¹⁰ *Jones & Laughlin*, 193 Mich App at 352-353.

¹¹ MCL 205.737(3).

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.”¹² However, “[t]he assessing agency has the burden of proof in establishing the ratio of the average level of assessments in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question.”¹³

The Tribunal is not bound to accept either of the parties' theories of valuation.¹⁴ “It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of each case.”¹⁵ In that regard, the Tribunal “may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination.”¹⁶ “Regardless of the valuation approach employed, the final value determination must represent the usual price for which the subject property would sell.”¹⁷ 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.¹⁸ “The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading.”¹⁹

Cost Less Depreciation Approach

The Tribunal finds that the cost approach to value is not appropriate to determine the true cash value of the subject property for the tax years at issue. Not only did the appraisers for both Petitioner and Respondent fail to prepare a cost analysis given the difficulty in determining accrued depreciation, but the Appraisal Institute cautions appraisers that the cost approach is less likely to yield a reliable value conclusion from an investment perspective, and is subject to difficulty in estimating physical depreciation, functional obsolescence and external obsolescence, and in determining land values.²⁰ Further, although Respondent’s appraiser did utilize a sales comparison approach to determine the TCV of the subject land, her testimony established that

¹² *Jones & Laughlin*, 193 Mich App at 354-355.

¹³ MCL 205.737(3).

¹⁴ *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985).

¹⁵ *Meadowlanes Ltd Dividend Housing Ass’n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

¹⁶ *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).

¹⁷ *Meadowlanes*, 437 Mich at 485.

¹⁸ *Id.*

¹⁹ *Jones & Laughlin*, 193 Mich App at 353.

²⁰ *The Appraisal of Real Estate*, Appraisal Institute 14th ed, 2013) at 566 -568.

she did not utilize said land values in determining the TCV of the subject property for the tax years at issue. Although Respondent's appraiser included a valuation of the subject land, she did so only to provide an indicator of the strength of the local market, which the Tribunal finds of no value in concluding to a TCV for the subject property for the tax years at issue.

Sales Comparison Approach

Although the sales comparison approach is often preferred by the Tribunal in determining the true cash value of a property, the Tribunal finds that this approach is not the most reliable valuation method in this case, given the difficulty both appraisers experienced in locating comparable sold properties and in making adjustments to account for differences between the comparables and the subject property. Respondent's appraiser primarily relied on comparable sales of properties located outside the state of Michigan, with the majority of sale dates in 2010 and 2012, and Petitioner's appraiser was able to identify just one comparable sale from 2006, and two active listings. Neither party's methodology for determining adjustments for changes in market conditions is particularly persuasive, with Petitioner's being derived from reported changes in national capitalization rates for regional mall properties and retail rental rate and vacancy rate trends for major Michigan metropolitan areas, and Respondent's stemming from outdated and irrelevant statistics for the Grand Rapids metropolitan area, an area Petitioner's counsel spent a significant amount of time establishing is not relevant or comparable to the subject market.²¹ Further, the Tribunal is not persuaded that properties like those utilized by

²¹ Adjustments were applied at an approximate rate of 3% per year based apparently not on the market analysis contained in Respondent's appraisal, but on discussions Ms. Judeh had with different brokers. Transcript, p. 206. Respondent's appraisal nevertheless identified the subject property as being located in the Grand Rapids / Holland / Muskegon Combined Statistical Area ("CSA") and the Grand Rapids Metropolitan Statistical Area ("MSA"), despite Ms. Judeh's acknowledgement that the subject property is closer to Muskegon than Grand Rapids, and that the latter is well outside its primary trade area. The Forbes article cited in the appraisal was from 2014 or 2015, CSA and MSA data was from 2010, West Michigan and Grand Rapids vacancy data covered years 2009-2013, West Michigan industry data was from 2006, and CSA industry and employment data was from 2011. An MLive article was indicated as being within Ms. Judeh's research parameters, "which was probably between 2012 and the time I was doing my research, 2015." Transcript, p. 189. And in stark contrast to the "strong and growing market" suggested by these analyses for the combined and metropolitan statistical areas, data for the subject township showed a slight decline in population between 2010 and 2013, industries from 2012-2013, and an unemployment rate 3% higher than the state average as of December 2013. Comparing Kent and Muskegon counties, Mr. Allen testified that "Muskegon County has a much lower population, 172,000 versus 600,000, has much lower population growth, negative growth versus a positive 3% growth over 2010 and 2015 estimates . . . [S]ame with households. Much smaller household base in Muskegon County. Median income is significantly lower in Muskegon County. Unemployment rate is definitely higher in Muskegon County. Total retail trade, much lower in Muskegon County."

Respondent are sufficiently similar to properly be considered comparable to the subject, particularly when said properties are located in Florida and California.²² Even if the properties could be considered comparable, Respondent's economic characteristics adjustments are severely flawed.²³ In that regard, it was established at the hearing that the demographic information used in making these adjustments was varied and inconsistent, as well as largely irrelevant to the tax years at issue. Notably, the information for the subject's five- and ten-mile radius was from 2015, while the data for the five- and ten-mile radii of the comparables was from 2012 and 2013. Trade area data was taken from mall websites, and Ms. Judeh could not testify as to the age of that information; she indicated only that it was the most recent available. As to the parameters of the trade areas for the subject and comparable properties, each was defined by the mall owner. There was no indication as to how specifically the trade areas were defined, and Ms. Judeh, despite her acknowledgement of the importance of comparing "apples to apples," testified that they could differ from mall to mall.²⁴ Given the lack of any evidence from which the Tribunal can determine that the established parameters provide accurate comparisons, Respondent's adjustments have no credibility. Mr. Allen testified as to the importance of the trade area for these types of properties, and specifically indicated that miscalculations could result in above-market value determinations.²⁵ Consequently, even Comparable 4, the only out-

Transcript, p. 316. Mr. Allen testified that in fact, retail trade in Kent County is approximately five times higher than in Muskegon County. *Id.* at 316-317.

²² Notwithstanding repeated assertions that the markets are comparable, Respondent's own appraisal indicates that the markets in California and Florida are significantly different from the Michigan market. Ms. Judeh's regional analysis of capitalization rates establishes that California's market is superior to Michigan, while Florida's is inferior to both Michigan and California, and Ms. Judeh acknowledged as much in her testimony. See R-1, p. 109; Transcript, p. 118, 142-143.

²³ Respondent's economic characteristics adjustments purport to account for differences in mall size, median household income, surrounding land use, property stability, population count, household count, visibility, market participant's anticipation of the future and level of retail. The appraisal states that "[t]he demographics studied for this analysis was limited to a five-mile radius around the subject and the comparables . . . Adjustments under this category are heavily swayed by the above elements, some more than others. Some markets which include a lower median household income may also include stores that price their products accordingly. One needs to keep in mind that different markets are designed around a variety of elements not just demographics." R-1, p. 74.

²⁴ Ms. Judeh also acknowledged that the trade area of a regional mall is typically 5 to 15 miles, while a super-regional mall has a trade area of 5 to 25 miles. R-1, p. 18. See also Transcript, p. 175, 181.

²⁵ Mr. Allen testified that while the subject property is located in the Grand Rapids/Holland/Muskegon CSA, Grand Rapids is not part of its trade area: "Grand Rapids, Wyoming are served by competitive regional shopping centers that have the same anchor stores plus additional anchor stores, and have many more—have similar small retailers, national retailers, but also have many more retailers. So there are larger malls in the Grand Rapids area that offer the same and further choices than the subject property." Transcript, p. 22-23. He also testified that including Grand

of-state property inspected by Respondent's appraiser, and one of two given most weight in her value estimate, cannot be deemed reliable on the issue of true cash value. Ignoring that this property sold in September 2012, the mall where the comparable is located is a super-regional mall with 913,248 more square feet than the subject mall.²⁶ Ms. Judeh acknowledged that a super-regional mall would attract more customers than a regional mall, i.e., provide a better location, and yet she made no attempt to adjust it for economic characteristics, however flawed any such attempt may have been. The same is true of Comparable 6, a Michigan mall anchor that sold in what is known as a sale-leaseback or leased-fee transaction.²⁷ Though located in a regional mall, the property was encumbered by a long-term lease when it sold in September 2013, to the then-current tenant. The lease, in addition to being a 2006 pre-recession lease, had step-up provisions built into the agreement, and also included a \$25/SF tenant improvement allowance.²⁸ Considering all of the facts and circumstances, and Respondent's utter lack of an attempt to adjust for the various factors influencing this sale, the Tribunal is not persuaded that it is a proper comparable for purposes of a sales comparison analysis. As explained by Mr. Allen, "It's a leased fee sale, so the sale price reflects the value of Burlington Coat in addition to the value of the property. Second, it was purchased by the mall (sic), which has an interest in that property that is more than a normal market interest, and third, the rent was an above-market rent because it had increased during the lease when market rents had decreased, and the lease included a TI allowance, so the effective rent was lower than the actual rent."²⁹ Respondent's argument that adjustments were not necessary because the rent was purportedly at market, a determination that its appraiser made based solely on the opinion statement of one of the brokers involved in the transaction, defies logic and is not supported by any credible or reliable evidence

Rapids in the subject's trade or market area would overstate potential sales for the property: "The market area is an area where most of the customers would come from, most of the sales would come from, and a different market area would result in different potential sales, different potential values for a property." *Id.* at 23-24. He testified that this is because "the characteristics of the trade area provide an indication of the desirability of that market." *Id.* at 26.

²⁶ Comparables 3 and 5 were also identified as being located in super-regional malls.

²⁷ Mr. Allen testified that "lease fee typically reflects the rent that is different than the market, often above market. This is build-to-suit lease. Also, the price is directly reflective of who the tenant is, and the buyer of an anchor store on a long-term lease is buying the credit of that particular tenant, and the price will vary dependent upon who the tenant is." Transcript, p. 59.

²⁸ Speaking of the same comparable, Mr. Allen testified that "leases are less now than they were before the recession. For instance, that Burlington Coat lease that I used was negotiated in 2006, pre-recession, but the rents would be lower today." Transcript, p. 56-57.

²⁹ Transcript, p. 313.

on the record.³⁰ For these reasons, and the reason that neither appraiser substantively relied on the sales comparison approach in reconciling to their ultimate value conclusions, the Tribunal gives it no weight or credibility in determining the true cash value of the subject property for the tax years at issue.

Income Approach

Although both parties primarily relied on the income approach to value, significant differences exist between the respective income approaches.

A comparison of each party’s determination of the TCV of the subject property for the tax years at issue using the income approach is as follows:³¹

2014	Respondent	Petitioner
Gross Rental Income ³²	\$693,752	\$506,972
Less: Vacancy ³³	(\$83,250)	(\$12,674)
Collection Loss		(\$1,267)
Effective Gross Income	\$610,501	\$493,031
Expenses ³⁴		
CAM		\$74,712
Tenant Expenses		\$10,673
Management Fees	\$13,736	\$14,791
Administrative	\$13,736	\$10,673
Replacement Allowance	\$29,885	\$16,010

³⁰ Ms. Judeh testified “[t]hat this is a leased fee sale. However, I spoke—personally spoke to the broker, and I did ask him about the rent. He did tell me that it sold at market. Those are his words, and I took the position that if we in the income approach stabilize the subject property based on market rent and then develop the value, then so can we do so in the sales approach. So if the broker who handled the transaction tells me it’s market rent, then by definition this is an arm’s length transaction.” Transcript, p. 117.

³¹ Comparisons between the respective income approaches are difficult because Petitioner’s appraiser utilized a gross rent analysis while Respondent’s appraiser utilized a triple net lease analysis.

³² The appraisers agree that the subject property consists of 106,731 square feet. Respondent determined a lease rate of \$6.50 per square foot; Petitioner determined a lease rate of \$4.75.

³³ Respondent determined a collective vacancy and collection loss of 12%; Petitioner determined a vacancy loss of 2.5% and a collection loss of .25%.

³⁴ Respondent relied on market information to conclude that variable expenses were 4.5% of effective gross income and reserves were \$.28 per square foot; Petitioner determined operating expenses to be 25.7% of effective gross income.

Total Operating Expenses	\$57,357	\$126,858
Net Operating Income	\$553,144	\$366,172
Capitalization Rate ³⁵	8.85%	10.51%
Final Opinion of Market Value	\$6,250,000	\$3,480,000

2015	Respondent	Petitioner
Gross Rental Income ³⁶	\$693,752	\$517,645
Less: Vacancy ³⁷	(\$83,250)	(\$12,941)
Collection Loss		(\$1,294)
Effective Gross Income	\$610,501	\$503,410
Expenses ³⁸		
CAM		\$76,393
Tenant Expenses		\$10,887
Management Fees	\$13,736	\$15,102
Administrative	\$13,736	\$10,887
Replacement Allowance	\$29,885	\$16,010
Total Operating Expenses	\$57,357	\$129,278
Net Operating Income	\$553,144	\$374,132
Capitalization Rate ³⁹	8.73%	10.26%
Final Opinion of Market Value	\$6,330,000	\$3,650,000

³⁵Respondent determined a capitalization rate based on market elements, ultimately relying on a band of investment method, increased by a tax load rate of .23%, which is developed based on the current millage rate and a vacancy rate of 10%; Petitioner determined a capitalization rate based on investment surveys and other market information, increased by a tax load rate of 2.26%.

³⁶ The appraisers agree that the subject property consists of 106,731 square feet. Respondent determined a lease rate of \$6.50 per square foot; Petitioner determined a lease rate of \$4.85.

³⁷ Respondent determined a collective vacancy and collection loss of 12%; Petitioner determined a vacancy loss of 2.5% and a collection loss of .25%.

³⁸ Respondent relied on market information to conclude that variable expenses were 4.5% of effective gross income and reserves were \$.28 per square foot; Petitioner determined operating expenses to be 25.7% of effective gross income.

³⁹ Respondent determined a capitalization rate based on market elements, ultimately relying on a band of investment method, increased by a tax load rate of .23%, which is developed based on the current millage rate and a vacancy rate of 10%; Petitioner determined a capitalization rate based on investment surveys and other market information, increased by a tax load rate of 2.26%.

Given the differences between the parties' respective income approaches, the Tribunal has analyzed each item of revenue and expense to determine the appropriate Net Operating Income of the subject property for the 2014 and 2015 tax years, and has similarly analyzed the respective capitalization rates, recognizing that Petitioner's appraiser developed an income approach based on gross rents, and Respondent's appraiser developed an income approach based on triple net leases.

Revenue

Both appraisers relied, at least in theory, on two different methodologies for establishing market rental rates: a conventional analysis of lease comparables and an occupancy cost ratio (OCR) analysis. The Tribunal finds Respondent's analyses unreliable for a myriad of reasons, including that its OCR analysis, which utilized the market rents established in its comparable lease analysis, was nothing more than a mathematical check of calculation. Ms. Judeh acknowledged as much in her testimony, and indicated that the analysis should be given no weight by the Tribunal in its value determination. Also problematic is the fact that Respondent's appraiser used the same flawed adjustment techniques reflected in her sales comparison analysis, and only one of its lease comparables was a similarly situated mall anchor.⁴⁰ Ms. Judeh further failed to consider or account for tenant improvement allowances, despite acknowledging that the same impact effective rent. Consequently, Respondent's Comparable 2, also identified as Comparable 6 in its sales comparison analysis, and the only comparable given any significant weight in the appraiser's market rent determination, cannot be deemed a reliable indicator of value. As discussed above, the lease for this property, in addition to being a 2006 pre-recession lease, had step-up provisions built into the agreement, and also included a \$25/SF tenant

⁴⁰ Comparables 1 and 4 are freestanding retail properties and Comparable 3 is located in the center of a commercial strip mall. Mr. Allen testified that these types of properties, which generally have a higher rent per square foot, are not appropriate comparables for an enclosed mall anchor, and the Tribunal finds Respondent's reliance on an overly broad definition of an "anchor" unpersuasive. See Transcript, p. 38, 56, 155-161, 310. Further, Comparable 1 was a 1999 pre-recession lease that expired in 2014, and it was established at the hearing that the square footage included in the lease for Comparable 3 was approximately half of that identified by Respondent's appraiser. Ms. Judeh acknowledged that the 19% adjustment she made to this comparable for size would have been substantially higher using the correct square footage. It was also established that the lease for this property was for a term of less than three years, in stark contrast to the long-term leases typical of mall anchor stores, and handwritten notes from the appraiser's work file indicated that landlord was "in trouble" at the time of its execution. Ms. Judeh eventually conceded that the lease was not comparable enough to assist in determining market rent for the subject property or even support her market rent conclusions.

improvement allowance. Also discussed above, the property is located in a superregional mall, and further compounding the unreliability of Respondent's analysis is the fact that the rental rate used by its appraiser was the one in effect on the date of sale in September 2013, not the 2006 date of execution as indicated in her appraisal.

Petitioner's analyses, on the other hand, are supported by the testimony and evidence provided, and all appropriate considerations were accounted for. As such, and inasmuch as Mr. Allen's application of available data is both logical and persuasive, the Tribunal finds that it provides the best evidence of true cash value or "usual selling price" within the meaning of MCL 211.27 for the tax years at issue. In his comparable analysis, Petitioner's appraiser examined four Michigan mall anchor store leases, with lease dates ranging between August 2006 and September 2014. The comparables provide a range of \$2.40/SF to \$5.80/SF, after converting the non-gross leases and adjusting for tenant improvements and other concessions.⁴¹ All of the comparables were identified second generation leases, which are frequently located in malls that have declining performance, and Petitioner's appraisal indicates that "[t]he noted comparables, except Crossroads Mall, are all reflective of inferior malls in terms of mall shop sales, which is most often used as the primary indicator of mall quality/class. Mall shop sales information was not available for Crossroads Mall." Mr. Allen testified, however, that he accounted for this in his market rent conclusions, and he also indicated that the comparable analysis merely provided a range of values: "I felt the occupancy cost ratio more directly reflected the rent, but the lease comparables also supported it and provided a range of which the subject rent should fall."⁴² For purposes of his OCR analysis, Mr. Allen used the 3.59% average occupancy cost ratio for department stores at regional malls reported by Dollars and Cents for both tax years. He testified that he looked at trends in OCRs at regional malls in the portfolios of major owners and had

⁴¹ Petitioner's appraisal indicates that the comparables provide a range of \$.80/SF to \$5.80/SF. Its appraiser appears to have erroneously deducted the \$2.45/SF/YR tenant improvement allowance from the actual \$3.25/SF lease rate, as opposed to the \$4.85/SF effective gross rental rate for this triple net lease when preparing the report. Mr. Allen's testimony reflected the correct effective rental rate. See Transcript, p. 40. Conversion adjustments were based on actual reimbursement collections, estimated triple net expenses, or stipulated pass-thru expenses, depending on the Comparable. Comparable 1 included a \$24.54/SF tenant improvement allowance, which equated to \$2.45/SF over the 10-year lease and resulted in an effective rent of \$2.40. Comparable 3 included nine months of free rent, which equated to \$.26/SF over the 10-year lease and resulted in an effective rent of \$4.34 (Page 54 of the appraisal erroneously indicates an effective rental rate of \$3.65/SF for this comparable). Comparable 4 included a \$25.00/SF allowance, which equated to \$2.50 over the 10-year lease and resulted in an effective rent of \$5.80.

⁴² Transcript, p. 43.

discussions with lead analysts to determine what, if any, changes had occurred since 2008, when Dollars and Cents was last published, and that the research indicated that OCRs were stable to declining between 2008 and the relevant valuation dates.⁴³ Application of this rate to the concluded sales levels indicated rental rates of \$4.67 and \$4.77 for the tax years at issue,⁴⁴ and considering the comparable and occupancy cost ratio analyses, Mr. Allen ultimately concluded to market rental rates of \$4.75/SF and \$4.85/SF.

The Tribunal finds Mr. Allen's weighting of the respective approaches appropriate, given the indicated difficulty in finding and adjusting lease comparables.⁴⁵ Application of the concluded market rental rates resulted in base rental revenue of \$506,972 and \$517,645 for the subject property. No expense reimbursements were estimated because conclusions of market rent were on a gross basis. Mr. Allen testified that he used a gross basis in his analysis because "occupancy cost ratios are on gross basis, because what a tenant looks at is the occupancy cost, and the occupancy cost includes his total cost to occupy that particular property, which is equivalent to gross rent. So that is how a tenant normally looks at it."⁴⁶ Mr. Allen also testified

⁴³ Mr. Allen testified that he used Dollars and Cents in his analyses because it "has historically been the best information, the best reporting on market activity in regional shopping centers." Transcript, p. 46. He also testified that he knew of no other publications that report average department store sales for regional malls. *Id.*

⁴⁴ Although Mr. Allen began his OCR analysis by examining sales for Penney stores across Michigan and average department store sales for regional malls, as reported by Dollars and Cents in 2008, and adjusted to the relevant valuation dates using the U.S. Census via Annual Retail Trade Survey, the concluded retail sales levels of \$130/SF and \$133/SF contemplated sales at the subject store, which reported sales of \$106.84/SF and \$109.67/SF in the tax years at issue, and Younkers at Lakes Mall, which reported sales of \$132.27/SF and \$134.85/SF. More weight was given to the Younkers sales because Mr. Allen felt that they were more representative of what a retailer could expect, given that Penney's sales had been depressed the last several years. In that regard, Petitioner's appraisal indicates that "[t]here have been numerous publications outlining the decline of JC Penney (sic) following the hiring of Mr. Ron Johnson as CEO in November 2011. Mr. Johnson served as CEO from November 2011 to April 2013, during which period store sales declined significantly." P-1, p. 54. Mr. Allen testified that Sears' data, which indicated sales of \$90/SF and \$92/SF in the tax years at issue, likely would have resulted in a lower rent conclusion by the OCR analysis, had it been available when the appraisal was prepared. The Tribunal, however, finds that this speculative and unsupported testimony is not sufficient to warrant a reduction in the concluded rates.

⁴⁵ Pursuant to Petitioner's appraisal, locating reliable comparables is difficult because mall anchors are commonly owned by the user, and when a store is leased, the lease is often executed on a build-to-suit basis. Mr. Allen testified that build-to-suit leases are not proper comparables because they "aren't leases of existing stores that were marketed to the general market. It's a lease that is entered into before the store is built to essentially finance the construction of a custom built store for a particular user." Transcript, p. 38. Further, mall anchors are generally contracting, and "the prevailing market rental rate for a mall anchor store is largely dependent on the viability of the overall mall property." P-1, p. 52. Mr. Allen also testified that it is difficult to make reliable comparisons: "There are a lot of differences between malls, and rents are specific to a certain location and in a certain mall, so it's difficult to make specific adjustments for those differences." Transcript, p. 42.

⁴⁶ Transcript, p. 50.

that he did not use the vacancy rate indicated for the primary trade area to determine the appropriate vacancy rate; he used a lower rate derived from typical lease terms and turnover rates for mall anchor tenants.⁴⁷ Based on a typical 10-year lease and high renewal probability, he concluded to a vacancy rate of 2.5%, and a collection loss factor of .25%, for a total vacancy and collection loss of 2.75%.

Expenses

In determining expenses, which included common area maintenance, insurance, management fees, administrative expenses, and a replacement reserve, Petitioner's appraiser reviewed industry operating expense data published by Dollars and Cents, and also looked at expenses of other comparables in enclosed malls and typical reimbursements for other anchor stores.⁴⁸ He identified four mall comparables and nine reimbursement comparables. Some of the data, including the common area reimbursement, came from the subject property itself. It was concluded, however, that the subject reimbursement rate, which was based on a contract executed when the property was constructed in 2001, may not be indicative of current market levels. It was noted that anchor stores are often given preferential treatment and charged much less in terms of operating costs than other mall tenants.⁴⁹ Respondent's appraiser testified that she applied "the typical management fee and leasing commission fee," and that "[t]he reserve comes from Realty Rates." No further support for the figures utilized in its appraisal was provided, but even if it had been, application of Petitioner's expenses is more appropriate given the Tribunal's reliance on its concluded market rental rates and the differences in the appraisers' respective approaches to valuation, i.e., gross vs. triple net basis.

Capitalization Rate

Petitioner's base capitalization rates were established utilizing three separate sources: retail center sales, band-of-investment techniques, and investor surveys. Mr. Allen testified that the classification of the subject mall also factored into his analysis: "The higher the classification, generally the lower the capitalization rate, because like a Class A mall is more

⁴⁷ Mr. Allen testified that the vacancy rate in the primary trade area was approximately 7.3%. He explained that the lower rate was chosen because his analysis "was specific to the type of retailer and type of space in this what is supposed to be general market." Transcript, p. 51.

⁴⁸ Petitioner's appraisal erroneously states on page 57 that real estate taxes were included in operating expenses.

⁴⁹ Transcript, p. 53.

desirably by its institutional investors.”⁵⁰ Respondent’s base rates were similarly determined, and they were relatively similar to those concluded by Petitioner’s appraiser. Petitioner’s tax-loaded rates were much higher than those concluded by Respondent, however, because its conclusions of market rent were presented on a gross basis, with the lessor paying most or all operating expenses, while Respondent’s rents were on a triple net basis. Because the tenant generally pays all expenses under a triple net lease, and the lessor is responsible for those expenses only when the property is vacant, Respondent’s appraiser loaded only the vacancy rate, which she very generously estimated at 10%. Ms. Judeh explained:

One might say that the vacancy—one could argue that the vacancy rate for the subject property is probably a lot less than the 10% that I applied. However, I did want to err on the side of caution in terms of risk and to raise the comfort level of the Tribunal in terms of analyzing my own data. So I did apply a 10% vacancy rate, despite the fact that the Lakes Mall has never had a vacant anchor, and I might add, the immediate area, to the best of my knowledge, has never had a vacant big box since the whole development started in 2001.⁵¹

Although the Tribunal finds Respondent’s approach acceptable for purposes of its valuation, Mr. Allen’s method of tax-loading is more applicable to the Tribunal’s determination of value using his conclusions of market rent. Applying the Tribunal’s analysis with respect to the applicable revenue, expense, capitalization rate and FF&E deduction results in the following income approach calculations for the 2014 and 2015 tax years:

Tribunal TCV Determination	2014	2015
Gross Rental Income	\$506,972	\$517,645
Less: Vacancy	\$12,674	\$12,941
Collection Loss	\$1,267	\$1,294
Effective Gross Income	\$493,031	\$503,410
Expenses		
CAM	\$74,712	\$76,393
Tenant Expenses	\$10,673	\$10,887

⁵⁰ Transcript, p. 55.

⁵¹ Transcript, p. 145. Respondent’s appraisal also states that “[t]he vacancy rate for similar-size properties in the immediate area of the subject is non-existent. All larger buildings/units are occupied and have not experienced a vacancy for several years. However, there is a vacancy rate for smaller units inside the mall and in the immediate area. In the interest of risk management, a 2% collection rate was applied.” R-1, p. 110.

Management Fees	\$14,791	\$15,102
Administrative	\$10,673	\$10,887
Replacement Allowance	\$16,010	\$16,010
Total Operating Expenses	\$126,858	\$129,278
Net Operating Income	\$366,172	\$374,132
Capitalization Rate	10.51%	10.26%
Final Opinion of Market Value	\$3,480,000	\$3,650,000

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that the subject property is assessed in excess of 50% of true cash value, and that the most reliable indicator of value for the 2014 and 2015 tax years at issue is the income approach, as calculated by the Tribunal. The subject property's TCV, SEV, and TV for the tax years 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 years 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 within 20 days of entry of this Final Opinion and Judgment, subject to the processes of equalization.⁵² 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

⁵² See MCL 205.755.

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%, and (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%.

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.⁵³ Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal and \$25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.⁵⁴ 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.⁵⁵ Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.⁵⁶

⁵³ See TTR 261 and 257.

⁵⁴ See TTR 217 and 267.

⁵⁵ See TTR 261 and 225.

⁵⁶ See TTR 261 and 257.

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.⁵⁷ A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.⁵⁸ The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.⁵⁹

By: Steven H. Lasher

Date Entered by Tribunal: April 6, 2016
ejg

⁵⁷ See MCL 205.753 and MCR 7.204.

⁵⁸ See TTR 213.

⁵⁹ See TTR 217 and 267.