

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

Max ERA, Inc.,
Petitioner,

v

MTT Docket Nos. 441277
and 441278

City of Midland,
Respondent.

Tribunal Judge Presiding
Preeti P. Gadola

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Max ERA, Inc. appeals the ad valorem property tax assessments levied by Respondent, City of Midland, against Parcel No. 42-08-32-601 for the 2012 tax year. Such parcel consists of the building and improvements located at 2820 Schuette Drive or the former Evergreen Solar Facility (“Evergreen”). Parcel No. 14-23-40-380 includes only the land located at 2820 Schuette Drive, and the assessment of the land is in dispute for tax years 2012 and 2013. A hearing on this matter was held on August 20th, and 21st, 2014. Scott D. McDonald and Lawrence S. Gadd, attorneys appeared on behalf of Petitioner, and Francis J. Keating, attorney, appeared on behalf of Respondent. Petitioner’s witness was Timothy Eisenbraun, appraiser, and Respondent’s witnesses were Andrew Reed, appraiser and Robert Kucinski, former facilities and production equipment manager, Evergreen.

The subject property consists of a two-story industrial building of 54,172 square feet. The improvements were completed in 2009. The building is currently vacant and was constructed for use as a facility to manufacture a part of a solar wafer, used in solar panels, by applying chemicals to a filament. The building has an atypical layout with a first floor area of 31,269 square feet and a second floor area of 22,903 square feet. The property is situated on a 4.77 acre parcel of land. It is located in the Eastwick Industrial Plaza (“Eastwick”).

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 properties for the tax years at issue are as follows:

Parcel Number: 42-08-32-601

Year	TCV	AV	TV
2012	\$3,769,800	\$1,884,900	\$1,884,900

Parcel Number: 14-23-40-380

Petitioner			
Year	TCV	SEV	TV
2012	\$190,800	\$95,400	\$95,400
2013	\$196,500	\$98,250	\$98,250

PETITIONER'S CONTENTIONS

Parcel No. 42-08-32-601, building and improvements

Petitioner contends that the subject property is assessed in excess of 50% of its true cash value.

Petitioner's contentions of TCV, SEV, and TV are as follows:

Parcel Number: 42-08-32-601

Petitioner			
Year	TCV	SEV	TV
2012	\$1,520,000	\$760,000	\$760,000

PETITIONER'S ADMITTED EXHIBITS

P-1: Appraisal Report prepared by Timothy Eisenbraun, MAI, SRA

P-2: Excerpt from Marshall Valuation Service

PETITIONER'S WITNESS

Timothy Eisenbraun

Petitioner presented testimony from its appraiser, Timothy Eisenbraun. Based on his experience and training, the Tribunal accepted Mr. Eisenbraun as an expert in the valuation of real property. Mr. Eisenbraun prepared and communicated an appraisal of the subject property.

The appraisal sets forth a sales comparison analysis for parcel no. 42-08-32-601. The cost and income approaches were considered but not developed. Mr. Eisenbraun wrote in P-1 at 31, “Typical purchasers do not generally rely on the Cost or Income Capitalization Approaches when purchasing a property such as the subject of this report.” The sales comparison approach was conveyed on the foundation of a fee simple interest.

Mr. Eisenbraun’s sales comparison analysis examines seven sales that were adjusted to be consistent with the characteristics of the subject property. A sales grid and photographs of each comparable are included in the appraisal report. A summary of the sales is as follows:

Sale #	1	2	3	4	5	6	7
Location	Midland	Novi	Saginaw	Orion Twp.	Wixom	Novi	Auburn Hills
Sale Date	12/13	9/12	4/12	1/12	8/11	12/10	3/10
Sale Price	\$1,740,000	\$2,800,000	\$1,625,000	\$2,100,000	\$3,813,000	\$3,387,000	\$4,900,000
Building Area (SF)	50,000	49,704	73,800	39,435	76,000	45,095	82,185
Land Area (Acres)	4.52	7.90	4.37	7.49	3.54	7.52	6.20
Year Built	2008	2010	2000	2001	2005	2009	2000
Quality	Inferior	Superior	Similar	Superior	Superior	Superior	Superior
Condition	Similar	Superior	Inferior	Inferior	Inferior	Superior	Inferior
Clear Height	23	22	20-24	22	23	24	24
No. of Stories	1	2	1	2	2	2	2
Office Percentage	4%	48%	5%	35%	21%	20%	38%
Market Conditions	-4.6%	-1.6%	-0.6%	none	1%	2.7%	4.6%
Price Per Square Foot	\$34.80	\$56.33	\$22.02	\$53.25	\$50.17	\$75.11	\$59.62
Adjusted Sale Price	\$29.88	\$16.63	\$24.08	\$29.29	\$27.87	\$30.85	\$37.42
Net Adjustments	-10%	-70%	10%	-45%	-45%	-60%	-40%
Gross Adjustments	44.6%	71.6%	60.6%	75%	66%	62.7%	84.6%

The individual attributes of each sale were analyzed and compared to the subject, and adjustments were made to account for differences between the properties. Various economic elements of comparison included property rights conveyed, conditions of sale, financing and market conditions, with the only economic adjustment necessary for market conditions. Various

property characteristic adjustments included location, size, quality, age and condition, loading facilities, clear height, percent office, utility, land to building ratio and economics. After analyzing the comparable sales and adjusting for differences in amenities, Mr. Eisenbraun concluded to a final true cash value indication as follows: \$28.06/SF or \$1,520,000, rounded, as of December 31, 2011. Mr. Eisenbraun's gross adjustments were from 44.6% to 84.6%.

The thrust of Mr. Eisenbraun's argument is that the subject property would most likely be purchased by a buyer interested in using the property as a light industrial building as it was not a special purpose property, as alleged by Respondent. Respondent contends that the property's market value is based on its availability as a facility involved in the use of chemicals in manufacturing, research and development or as a laboratory. Mr. Eisenbraun's opinion of a special purpose property, on the other hand, included the examples, "shipyard, a jail, a mine, where it really has few alternative uses besides what it is." P-1 at 171. He testified at the hearing of this matter that the highest and best use of this building was light industrial and that many kinds of manufacturers could use this vacant facility. 8/20/14 Tr. at 130. Six out of seven sales presented by Mr. Eisenbraun were of light industrial buildings. Mr. Eisenbraun indicated that all of the sales were at arm's length.

The property was built in 2009 by its previous owner, Evergreen, to produce silicon filaments which are components of its solar panel products which were assembled in a facility in Devens, Massachusetts. Evergreen used chemicals in the manufacturing process; therefore, the building was constructed with curbs, containment areas, two HVAC systems and without floor drains. It was also constructed of steel sandwich panels and had a concrete floor. The building has a second floor which accommodated equipment used in the manufacturing process. Again, while Respondent valued the property under the cost approach based on the theory that it was a special purpose property, Mr. Eisenbraun concluded that the property was one that could be used by numerous purchasers for other purposes.

With regard to the cost approach to value, Mr. Eisenbraun declined to utilize it, after consideration, because of the large adjustments required for external obsolescence. 8/20/14 Tr. at 142. He researched the status of the solar industry, as of the valuation date, and determined

that it was essentially defunct due to “a downturn in solar panel demand, lower manufacturing cost in Asia and subsidies paid to European solar panel manufacturers.” P-1 at 2.

In fact, Evergreen filed for bankruptcy protection in August, 2011, closed its doors in October, 2011 and was purchased by Petitioner for \$2,000,000 on November 16, 2011, which price was well below its estimated cost to construct. Petitioner further indicated to Mr. Eisenbraun that the purchase price of \$2,000,000 included personal property equipment and intellectual property (“IP”). P-1 at 2. Mr. Eisenbraun did agree that “[d]ue to the bankruptcy, the seller is likely to have sold the property, equipment and IP under conditions that are not typical based on the definition of True Cash Value.” P-1 at 2. Mr. Eisenbraun testified that the Evergreen Solar Headquarters in Devens, Massachusetts also filed for bankruptcy protection. 8/20/14 Tr. at 210-211.

RESPONDENT’S CONTENTIONS

Pursuant to its valuation disclosure, Respondent agrees that the subject property is assessed in excess of 50% of its true cash value. Respondent contends, however, that the assessment is not excessive to the extent asserted by Petitioner.

The property’s TCV, SEV, and TV as established by the Board of Review for the tax years at issue are as follows:

Parcel Number: 42-08-32-601

Year	TCV	AV	TV
2012	\$24,169,200	\$12,084,600	\$12,084,600

Respondent’s revised contentions of value per its valuation disclosure:

Parcel Number: 42-08-32-601

Year	TCV	AV	TV
2012	\$12,000,000	\$6,000,000	\$6,000,000

RESPONDENT'S ADMITTED EXHIBITS

R-1, pp 1-84, Appraisal Report prepared by Andrew M. Reed, SR/WA

R-2 Warranty Deed for the purchase of the subject property

R-3 Property Transfer Affidavit

RESPONDENT'S WITNESSES

Robert Kucinski

Mr. Kucinski is the former facilities and production equipment manager of Evergreen. He began work in June 2009 when construction was nearly complete and continued working there, in some capacity, until the doors closed on October 15, 2011. 8/21/14 Tr. at 8. With regard to the building and improvements, Mr. Kucinski testified that they were specially designed to house a chemical vapor deposition plant that constructed silicon carbide high temperature filament. 8/21/14 Tr. at 11. Mr. Kucinski testified that the chemical manufacturing design unit of CH2M Hill Engineering manufactured the building. 8/21/14 Tr. at 9.

Mr. Kucinski testified that applying the silicon carbide to the filament involved hazardous chemicals; therefore, the building was specially constructed with the same in mind. He testified that it had "a robust air handling system" to keep the chemical fumes away from employees; it had "a sealed epoxy floor with full curbing and containment in the production area. There were no floor drains so that there was no chance of any of the chemistry to make it into the city sewer system." 8/21/14 Tr. at 15. In the back of the plant there was a hazardous waste storage tank and the piping was designed to minimize leaks. Also, there was no air return for production and it was entirely outside air. There was a chemical process fire retardant system and high flow water sprinkle system designed for chemical processing fires. The silicon carbide application started from the second floor and moved downward. Mr. Kucinski testified that the subject building was a "Butler Building" which had insulated metal interior and exterior walls. He did concede that the property could be utilized for other purposes, but might be "overkill."

Mr. Kucinski testified that the subject property supplied silicon coated filament to its headquarters in Devens, Massachusetts for solar panel production and also testified that he was

under the understanding “that it could be used for Department of Defense uses.” He testified, “And we did understand that this was - a second source of this material from the supplier based in Massachusetts that developed this technology for this high temperature filament, and their market before Evergreen Solar was selling to the Department of Defense.” 8/21/14 Tr. at 23.

Mr. Kucinski identified Petitioner’s application¹ for an industrial facilities tax exemption (“IFT”) as summarizing the estimated cost of construction of the subject property to be \$30,000,000. 8/21/14 Tr. at 27-29. Mr. Kucinski did not have the actual costs of construction. He also read from the IFT application that the “cost of machinery, equipment and fixtures was \$7,030,000.” 8/21/14 Tr. at 27.

Andrew M. Reed

Respondent presented testimony from its appraiser, Andrew Reed, SR/WA. Based on his experience and training, the Tribunal accepted Mr. Reed as an expert in the valuation of real property. Mr. Reed prepared and communicated an appraisal of the subject property. The appraisal sets forth two cost analyses for the year at issue which are conveyed on the foundation of a fee simple interest.

Mr. Reed valued the subject property as a special purpose property, a chemical manufacturing facility, in part as a result of his discussions with Robert Kucinski. Mr. Reed noted that Midland is a chemical friendly city and the property is in close proximity to Dow Chemical, even sharing a property line. 8/21/14 Tr. at 86. He testified that if the property was marketed correctly, a potential buyer could be a chemical manufacturer, looking for a specialized building, for purchase at half of its construction costs. 8/21/14 Tr. at 89-90. Mr. Reed contended, “The technology used and product manufactured in the subject process can be utilized in other industrial applications.” R-1 at 37. Further he contends, “[T]he construction, layout and condition of the subject improvements easily lend themselves to alternation for another industrial uses such a laboratory, research and development, or other chemical manufacturing uses.” *Id.*

¹ Evergreen applied for an IFT in June 2008 and Petitioner in May 2012. Both applications put forth the same cost estimates. R-1 at 78, 82.

Because it was a special purpose property and relatively new, he prepared two cost approaches to value the property. The first approach utilized the estimated cost of construction associated with the IFT application by Evergreen. Mr. Reed verified the project budget costs with Mr. Kucinski (\$30,119,000) and concluded in a deduction of \$10,800,000 for personal property² and \$119,000 attributable to the purchase of the land. R-1 at 39. Mr. Reed therefore calculated a known construction cost new of \$19,200,000, which he adjusted for time and depreciation to result in a replacement cost new less physical depreciation of (2%) and functional obsolescence of (20%) to determine a replacement cost new less depreciation of \$15,272,524 as of December 31, 2011. R-1 at 39-40. He did note, “This [IFT] application provides known **cost estimates** for construction of the subject property including land acquisition, site cost, and building and process construction information.” [Emphasis added]. R-1 at 18. Mr. Reed also performed a second replacement cost using the Marshall Valuation Service (“MVS”), testifying,

There’s a couple of reasons that I needed to do that. These are considered known costs, but I wasn’t able to verify other than through Mr. Kucinski that it was actual hard costs in terms of the document that was provided through the City of Midland for the tax exemption. And also when you’re dealing with special purpose property, you have to determine if there’s a market for that use. I felt there was a market for the use that the subject was put to but also as a check you have to consider alternative uses. 8/21/14 Tr. at 65.

In his second cost approach to value, Mr. Reed concluded that the subject building was most similar to the industrial laboratory cost category so he utilized those replacement costs from MVS to value the building at \$11,529,960.52, or \$199.82 base cost per square foot. The building was given an effective age of three years, (2%) incurable depreciation, 0% economic obsolescence and (5%) functional obsolescence³ for estimated depreciation from all causes of (\$807,097.24). The site improvements (parking area, asphalt paving, concrete paving, landscaping, exterior lighting and fencing) were calculated to cost \$595,644.93 less (\$196,562.83) in incurable depreciation for a total replacement cost of the site improvements of

² Mr. Reed testified that the personal property was termed “process and controls” on the IFT application attachment per Mr. Kucinski. R-1 at 39.

³ “[I]t is my opinion that only a minimum amount of functional obsolescence deduction is required, as the building construction would meet modern specifications, and not have some of the specially adapted features of the subject, as built.” R-1 at 41. “Lastly, it is my opinion that the subject location within the City of Midland and Eastwick Industrial Subdivision requires no downward adjustment for economic obsolescence.” *Id.*

\$399,082.10. The estimated value of the building and improvements was rounded to \$11,120,000. R-1 at 42. Mr. Reed reconciled his conclusions from the two cost approach analyses at \$12,000,000. R-1 at 43. Mr. Reed trended toward his MVS value testifying, “But again, the uncertainty of the known costs and my inability to verify the actual costs, I felt that I needed to trend more towards the Marshall Valuation Service analysis of replacement cost.” 8/21/14 Tr. at 66.

On cross-examination, Mr. Reed testified that the building was approximately 54,000 square feet, has office space of less than 4,000 square feet and laboratory space of 1,000 to 1,200 square feet. 8/21/14 Tr. at 98. He testified that in his appraisal he included 100 photos of the subject property and only two were of the laboratory. 8/21/14 Tr. at 100. As previously noted, Mr. Reed valued the subject property under the cost approach as an industrial laboratory. Mr. Reed did concede on cross-examination that “the building could be converted probably to any number of permitted uses within that industrial district that it was zoned.” 8/21/14 Tr. at 80. He was questioned regarding calculating the replacement cost of the property under the category of light industrial under the Marshall Valuation Service Cost Manual and agreed, that if Petitioner’s math was correct, the property’s true cash value would be much less.

PETITIONER’S CONTENTIONS

Parcel No. 14-23-40-380, land

Petitioner’s contentions of TCV, SEV and TV for the subject property for the 2012 and 2013 tax years are as follows:

Parcel Number: 14-23-40-380

	Petitioner		
Year	TCV	SEV	TV
2012	\$119,250	\$59,625	\$59,625
2013	\$119,250	\$59,625	\$59,625

At the hearing of this matter, Mr. Eisenbraun testified that the subject property fair market value is \$25,000 per acre. He noted that Evergreen paid \$119,000 (\$25,000 per acre) for the land in 2008 and the comparable parcels were being marketed within Eastwick for \$25,000 per acre as of December 31, 2011, until present. 8/20/14 Tr. 176. Mr. Eisenbraun gave an oral

opinion of value for the subject property land. He did not include this analysis in the body of his appraisal. On cross examination he testified “Q: Sir, does your appraisal P-1 have a conclusion of the true cash value of the subject land on 12/31/11?” “A: For the subject property itself?” “Q: Yes sir.” “A: No, it doesn’t.” 8/20/14 Tr. at 178. He also testified that his appraisal didn’t contain a conclusion of value for the subject land on 12/31/12. *Id.*

RESPONDENT’S CONTENTIONS

Respondent’s contentions of TCV, SEV and TV for the subject property for the 2012 and 2013 tax years are as follows:

Parcel Number: 14-23-40-380

	Petitioner		
Year	TCV	SEV	TV
2012	\$190,800	\$95,400	\$95,400
2013	\$196,500	\$98,250	\$98,250

Mr. Reed presented a sales comparison approach to value the subject property land. He put forth three sales comparables to determine a unit rate for the subject property. The first comparable was located at 4203 Ashman and sold on 12/20/11 for \$300,000. It had 9.18 acres, sold for \$32,580 per acre and was used for industrial purposes. The second comparable was located at 102 Fast Ice Drive, sold on 9/19/08 for \$157,500 and consisted of 5.55 acres. Its sale price per acre was \$28,378, and its use was industrial. Sales comparable three was located at 3535 Ashman, sold for \$280,000 on October 15, 2012 and consisted of 6.07 acres. Its per acre price was \$46,129 per acre and its use was industrial. R-1 at 44.

Mr. Reed’s conclusion of value per acre for the subject property was \$40,000 per acre or \$190,800 for 2012. For 2013, Mr. Reed applied a 3% market increase in value to conclude in a true cash value for that year of \$196,500. R-1 at 44.

FINDINGS OF FACT

1. The subject property is located at 2820 Schuette Drive, Midland, MI.

2. The subject property is identified as Parcel No. 42-08-32-601 for the 2012 tax year. Such parcel consists of the building and improvements. Parcel No. 14-23-40-380 includes only the land in dispute for tax years 2012 and 2013.
3. The subject property was built in 2009 by its former owner, Evergreen. Evergreen filed for bankruptcy protection in August 2011 and closed its doors on October 15, 2011. It was purchased by Petitioner on November 16, 2011 for \$2,000,000 out of bankruptcy. Petitioner alleges that the purchase price included equipment and intellectual property. The subject property was vacant as of December 31, 2011, and was vacant at the time of hearing.
4. The subject property is classified as industrial and located in the Eastwick Industrial Park. The subject building has 54,172 square feet including a second story. The first floor area has 31,269 square feet of which 3,765 are office space. 1,100 to 1,200 square feet consist of laboratory space. The second story consists of 22,903 square feet. The building is located on a 4.77 acre parcel of land. There are improvements to the property consisting of parking area, asphalt paving, concrete paving, landscaping, exterior lighting and fencing. The building is located in close proximity to Dow Chemical, even sharing a property line.
5. Evergreen constructed silicon carbide high temperature filament used in the solar industry. The process of applying silicon carbide to the filament involved hazardous chemicals that required containment. The silicon carbide coated filament was utilized by Evergreen Solar in Devens, Massachusetts for the manufacturing of solar panels. The Devens, Massachusetts headquarters of Evergreen also filed for bankruptcy. Mr. Kucinski testified that it was his understanding that the silicon coated filament also had Department of Defense uses.
6. Mr. Kucinski, former facilities and production manager of Evergreen, testified that the property had “a robust air handling system” to keep the chemical fumes away from employees; it had “a sealed epoxy floor with full curbing and containment in the production area. There were no floor drains so that there was no chance of any of the chemistry to make it into the city sewer system.” 8/21/14 Tr. at 15. In the back of the

plant there was a hazardous waste storage tank and the piping was designed to minimize leaks. Also there was no air return for production and it was entirely outside air. There was a chemical process fire retardant system and high flow water sprinkle system designed for chemical processing fires. The silicon carbide application started from the second floor and moved downward. Mr. Kucinski testified that the subject building was a “Butler Building” which had insulated metal interior and exterior walls.

7. Mr. Kucinski testified that the property could be used for other purposes, though it might be “overkill.”
8. Mr. Eisenbraun prepared an appraisal utilizing the sales approach to value. He presented seven sales that were adjusted to be consistent with the characteristics of the subject property. Six of the sales presented by Mr. Eisenbraun were light industrial buildings. Mr. Eisenbraun indicated that all of the sales were at arm’s length. Mr. Eisenbraun testified that a likely purchaser of the subject property would utilize it for light industrial purposes. Mr. Eisenbraun’s gross adjustments to the comparables ranged from 44.6% to 84.6%.
9. Mr. Reed prepared two cost approaches to value the subject property. The first approach used estimated construction costs from Evergreen’s application for an IFT, and the second utilized MVS with a base cost assigned per square foot of \$199.82 under the industrial lab classification. Under the first approach, Mr. Reed estimated construction costs of \$19,200,000 as he alleged that Mr. Kucinski told him \$10,800,000 was the cost of personal property and \$119,000 was the cost of land (out of total project costs of \$30,119,000). The IFT application, however, listed construction costs of \$30,000,000 in addition to \$7,030,000 in personal property costs for total project costs of \$37,030,000, not including land. The intricacies of Mr. Reed’s cost approaches are described in the summary of his testimony, above. Mr. Reed prepared cost approaches to value as he determined the property to be a special purpose, new, building.
10. Mr. Eisenbraun put forth verbal testimony regarding the subject property 4.77 acre parcel of land. He did not reach conclusions of value for the subject property land in his appraisal for tax years 2012 or 2013.

11. Mr. Reed presented three comparable sales of vacant land to conclude in a dollar per acre value for the subject property.

CONCLUSIONS OF LAW

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

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

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

The usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. MCL 211.27(1).

The Michigan Supreme Court has determined that “[t]he concepts of ‘true cash value’ and ‘fair market value’ . . . are synonymous.” *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

“By provisions of [MCL] 205.737(1) . . . , the Legislature requires the Tax Tribunal to make a finding of true cash value in arriving at its determination of a lawful property assessment.” *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal is not bound to accept either of the parties' theories of valuation. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985). “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.” *Meadowlanes Ltd Dividend Housing Ass’n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991). 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.” *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735a(2). The Tribunal's factual findings must be supported “by competent, material, and substantial evidence.” *Dow Chemical Co v Dep’t of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990). “Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence.” *Jones & Laughlin Steel Corp, supra* at 352-353.

“The petitioner has the burden of proof in establishing the true cash value of the property.” MCL 205.737(3). “This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party.” *Jones & Laughlin Steel Corp, supra* at 354-355. However, “[t]he assessing agency has the burden of proof in establishing the ratio of the average level of assessments in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question.” MCL 205.737(3).

The three most common approaches to valuation are the capitalization of income approach, the sales comparison, or market, approach, and the cost-less-depreciation approach. *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). The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale, supra* at 277.

Regardless of the valuation approach employed, the final valuation determined must represent the usual price for which the subject would sell. See *Meadowlanes Ltd Dividend Housing Ass’n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991). After considering all three approaches to value, the Tribunal finds that the cost approach is the correct valuation technique to be utilized in determining the true cash value of the subject building and improvements for the

2012 tax year. The Tribunal finds the sales approach is the correct valuation approach with regard to the subject property land for the 2012 and 2013 tax years.

Parcel No. 42-08-32-601, building and improvements

Here, the parties' valuation experts were charged with developing and communicating appraisals of the subject property to assist the Tribunal in making an independent determination of its true cash value for the year under appeal. Petitioner's appraiser, Mr. Eisenbraun, developed the sales approach to value based on the premise that a likely purchaser of the property would use it for light industrial purposes. Respondent's appraiser, Mr. Reed, considered two cost approaches to value based on the premise that the property is a special purpose property and was only three years old on December 31, 2011.⁴ Pursuant to the *Appraisal of Real Estate*, (Chicago: Appraisal Institute, 14th ed, 2013), p. 45, "The cost approach may be more applicable to new and special-purpose properties and less applicable in valuing properties with older improvements that suffer from substantial depreciation, which can be difficult to estimate."

As noted above, the subject property is a former manufacturing facility of silicon carbide high temperature filament used in the solar industry, in close proximity to Dow Chemical in Midland, MI. The property was built in 2009 by Evergreen and filed for bankruptcy protection in August, 2011 due to a downturn in the solar industry. The property closed its doors on October 15, 2011 and was purchased out of bankruptcy by Petitioner for \$2,000,000 on November 16, 2011. Petitioner alleges that the purchase price included equipment and IP. Mr. Kucinski, former facilities and production equipment manager of Evergreen, began working at Evergreen in June 2009 when construction was nearly complete and continued working there, in some capacity, until the doors closed. 8/21/14 Tr. at 8-9. With regard to the building and improvements, Mr. Kucinski testified that they were specially designed to house a chemical vapor deposition plant. 8/21/14 Tr. at 11. Mr. Kucinski testified that the chemical manufacturing

⁴ MCL 211.2(2) states: The taxable status of persons and real and personal property for a tax year shall be determined as of each December 31 of the immediately preceding year, which is considered the tax day, any provisions in the charter of any city or village to the contrary notwithstanding

design unit of CH2M Hill Engineering manufactured the building. 8/21/14 Tr. at 9. The Evergreen Solar headquarters in Devens, Massachusetts also filed for bankruptcy protection.

Mr. Kucinski testified that applying the silicon carbide to the filament involved hazardous chemicals; therefore, the building was specially constructed with the same in mind. He identified Evergreen's application for an industrial facilities tax exemption as summarizing the estimated construction costs to be \$30,000,000 (total project costs to be \$37,030,000 not including land). 8/21/14 Tr. at 26-27; R-1 at 72, 82, 84. However, Mr. Reed indicated that Mr. Kucinski told him that construction costs were \$19,200,000 as \$10,800,000 was attributed to personal property and \$119,000 to land (total costs of \$30,119,000). R-1 at 39. Mr. Kucinski testified that it was his understanding that the silicon carbide coated filament might have Department of Defense ("DOD") uses.

As the property is in close proximity to Dow Chemical, the Tribunal queries why Dow, a chemical producer, or in the alternative, another chemical dependent manufacturer, did not purchase the property, at such a reduced price under its construction cost, at the time of purchase by Petitioner? Further, if the silicon coated high-temperature filament was useful to the DOD, why didn't another manufacturer purchase it and pursue a contract with the DOD? Again, the estimated construction costs of the subject property were \$30,000,000 or \$19,200,000 depending on the source, and it was purchased by Petitioner for only \$2,000,000. The Tribunal opines that the property was specialized for the purpose of applying silicon carbide onto filament; however, as the solar industry is defunct due to foreign competition, among other factors, it is more likely that another type of user would purchase the property. Mr. Kucinski testified upon questioning by Mr. McDonald: "Q: "Is there anything special about a Butler Building that would preclude its use by something other than a chemical production facility?" "A: Other than it being a little overkill, no." "Q: You could put a flower shop in it? There's certainly nothing about the building or the material of the Butler Building components that would preclude use by another industry?" "A: "Correct." 8/21/14 Tr. at 30. "Q: But it's fair to say that it is conceivable another business could move into that space, right?" "A: Yes." "Q: Storage, for instance, or light assembly?" "A: Yes. Yes." 8/21/14 Tr. at 36.

Mr. Eisenbraun presented the Tribunal with a sales comparison approach to value. It contained seven sales that were adjusted to be consistent with the characteristics of the subject property. Six of the sales were of light industrial buildings. As noted in the summary of Mr. Eisenbraun's testimony above, the comparable properties received many adjustments, including an adjustment for market conditions to sales that occurred before and after tax day. At the hearing of this matter and in his post-hearing brief, Respondent's counsel alleged repeatedly that it is a violation of USPAP⁵, Statement 3, 2014-2015 Edition to utilize sales after the valuation date of December 31, 2011, however statement 3 indicates:

A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal. Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date. The appraiser should determine a logical cut-off because at some point distant from the effective date, the subsequent data will not reflect the relevant market. This is a difficult determination to make. Studying the market conditions as of the date of the appraisal assists the appraiser in judging where he or she should make this cut-off. In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for data considered by the appraiser. [Emphasis added].

USPAP Statement 3 does not state that it is improper to utilize a sale after the effective date of the appraisal, but that the appraiser "should determine a logical cut-off...." Further, the appraiser should apply adjustments to make the after day sales comparable to the subject.

The defendant in *Heritage Leasing Co, LLC v Joy Rd Holdings, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2007 (Docket No. 273864), made a similar argument, which the Court of Appeals denied. Specifically, the defendant argued that "the arbitrator exceeded the scope of the parties' agreement by considering a lease that began in January 2005. Defendant argues that the lease was not relevant to the property value as of November 2004." The Court held:

The parties agree that pursuant to MCL 339.2605(1), the appraiser was required to follow the Uniform Standards of Professional Appraisal Practice (USPAP), but

⁵ Uniform Standards of Professional Appraisal Practice.

they dispute whether consideration of the lease was consistent with those standards.

Assuming, arguendo, that an alleged error in the application of those standards is within the scope of appellate review of an arbitration award, defendant has not shown that the consideration of the lease violated the USPAP. Defendant relies on the following excerpt of Statement on Appraisal Standards No. 3, which addresses retrospective value opinions.

In quoting the same section of USPAP, the court held:

This Statement indicates that the consideration of information concerning conditions after the effective date of the appraisal is not prohibited in all instances. Whether it is appropriate in particular circumstances depends on the appraiser's evaluation of market conditions, a matter that is not within the scope of "legal error" that is subject to judicial review.

Further, USPAP is not a statute, but a compilation of standards for appraisal practice. In the forward to the 2014-2015 edition it states:

History of USPAP

These Standards are based on the original *Uniform Standards of Professional Appraisal Practice* developed in 1986–87 by the Ad Hoc Committee on Uniform Standards and copyrighted in 1987 by The Appraisal Foundation. The effective date of the original Uniform Standards was April 27, 1987. Prior to the establishment of the ASB in 1989, USPAP had been adopted by major appraisal organizations in North America. **USPAP represents the generally accepted and recognized standards of appraisal practice in the United States.** [Emphasis added].

The Tribunal "is under a duty to apply its expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Jones & Laughlin, supra* at 353. 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." *Jones & Laughlin, supra* at 356. The Tribunal must weigh the evidence presented and use its own expertise in making its independent determination of the true cash of the property for the 2012 tax year and is not bound

by USPAP. TTR 237 indicates that valuation disclosures, not just appraisals, are admissible as evidence of value in a Tax Tribunal proceeding. The Tribunal must independently weigh the appropriateness of Mr. Eisenbraun's before and after tax day sales and their adjustments for market conditions. It should also be noted that Respondent's own appraiser testified on cross-examination, "Q: Right so you got a future value and you adjust it backwards to come up with retrospective valuation?" "A: That's correct." "Q: Okay, All Right. And that's perfectly appropriate in appraising?" "A: Yes." 8/21/14 Tr. at 118.

With regard to the market approach to value, the sales comparison approach can be described as follows: Proper application of the sales comparison approach involves "comparing similar properties that have recently sold with the property being appraised, identifying appropriate units of comparison, **and making adjustments to the sale prices** (or unit prices as appropriate) of the comparable properties based on relevant, market-derived elements of comparison. Appraisal Institute, *The Appraisal of Real Estate* (Chicago: Appraisal Institute, 14th ed, 2013), p 377. [Emphasis added].

As stated above, Mr. Eisenbraun presented the Tribunal with a market approach to value including seven sales, six of light industrial properties with adjustments to make them consistent with the characteristics of the subject property. The Tribunal finds, however, that the adjustments to the sales comparables are so large that the only logical conclusion is that they are not truly comparable to the subject property. Only two of the sales have a potentially acceptable percentage in property characteristic **net** adjustments. Sale number two in Novi has (70%) in net adjustments, sale number four in Orion Township has (45%) in net adjustments, sale number five in Wixom has (45%) in net adjustments, sale number 6 in Novi has (60%) in net adjustments and sale number seven in Auburn Hills has (40%) in net adjustments. Sales number one and three have (-10%) and 10% in net adjustments, respectively, making them potentially probative to the Tribunal.

The Tribunal finds, however, that while comparables one and three have (-10%) and 10% in net adjustments, their gross adjustments are 44.6% and 60.6%. The Tribunal finds that gross adjustments are more telling regarding the similarity of a comparable to the subject than net adjustments. In *The Appraisal of Real Estate*, supra, pp. 393-394, it states:

The magnitude of net adjustments is often a less reliable indicator of accuracy. The net adjustment is calculated by totaling the positive and negative adjustments. A net adjustment figure may be misleading because the appraiser cannot assume that any inaccuracies in the positive and negative adjustments will cancel each other out. For example, if a comparable property is 20% superior to the subject in some characteristics and 20% inferior in others, the net adjustment amount is zero but the gross adjustment is 40%. Other comparable sales may require several adjustments, all positive or all negative, resulting in a net adjustment of 30%. This property may well be a more accurate indicator of the subject's value than the comparable sale with 0% net adjustment, which has large positive and negative adjustments that cancel each other out mathematically.

Mr. Eisenbraun's gross adjustments to the comparables are 44.6%, 71.6%, 60.6%, 75%, 66%, 62.7% and 84.6%, all adjustments much too high to render the comparables truly comparable with the subject property. The Tribunal thus disregards Petitioner's comparable sales, and its sales approach to value, in determining the true cash value of the subject property for the 2012 tax year, whether or not they occurred before or after tax day.

Mr. Reed presented the Tribunal with two cost approaches to value to the subject property. The first approach rested on the foundation of actual costs to construct based on estimated costs provided in Evergreen's IFT application. 8/21/14 Tr. at 60-61. Mr. Reed verified the estimated costs to construct with Mr. Kucinski, but wasn't able to verify actual costs any other way. Further, the IFT application indicates \$7,030,000 in personal property costs in addition to the \$30,000,000 in construction costs. Mr. Reed alleges, however, that Mr. Kucinski told him \$10,800,000 of the \$30,000,000 was attributable to personal property, therefore decreasing the construction cost estimate to \$19,200,000. As such, Mr. Reed prepared a second cost approach to value using MVS. 8/21/14 Tr. at 65.

As Mr. Reed testified that he based his first cost approach to value on estimated costs to construct and could not verify actual costs, which could be \$30,000,000 or \$19,200,000, the Tribunal is not persuaded by such approach. Further, the Tribunal is not persuaded by Mr. Reed's theory that the subject property is a special purpose property that can only "easily lend itself to alteration for another industrial uses such a laboratory, research and development, or other chemical manufacturing uses." R-1 at 37. The Tribunal finds that the most likely purchaser

of the subject property is a light industrial user, as alleged by Petitioner. No buyer, including Dow Chemical, purchased the property for any specialized use for millions of dollars under its alleged cost to construct, even during a bankruptcy sale. The property was vacant when purchased by Petitioner in November, 2011.

Mr. Reed prepared a second cost approach using MVS which he testified he trended toward. He stated, “But again, the uncertainty of the known costs and my inability to verify the actual costs, I felt that I needed to trend more towards the Marshall Valuation Service analysis of replacement cost.” 8/21/14 Tr. at 66. He also contends “It is my opinion that the more reliable true cash value estimate is the Marshall Valuation Service estimate. The known cost estimates provided did not have great detail. Additionally, the functional obsolescence estimated using known cost estimates is somewhat subjective.” R-1 at 43.

The Tribunal finds that the best evidence presented of the true cash value of the subject property for the 2012 tax year is Mr. Reed’s MVS cost approach, as the property is relatively new. The property, however, should not be valued in the industrial lab category at \$199.82 per square foot. Mr. Reed testified that the subject building was approximately 54,000 square feet, has office space of less than 4,000 square feet and laboratory space of 1,000 to 1,200 square feet. 8/21/14 Tr. at 98. Mr. Reed inspected the property inside and out on July 8, 2013. R-1 at 23. 8/20/14 Tr. at 38. He testified that in his appraisal he included 100 photos of the subject property and only two were of the laboratory. 8/21/14 Tr. at 100. Why Mr. Reed incorrectly utilized a base cost under the industrial laboratory section of MVS is unknown to the Tribunal when the facility had only 1,200 out of 54,000 square feet of lab space.

The Tribunal finds the subject property’s highest and best use is as a light industrial building. Therefore, the base cost of \$199.82 per square foot for an industrial lab is incorrect. The base cost per square foot under MVS for a light industrial building is \$58.79. P-2.⁶ Under MVS the property is a class S, good (highest) quality and it has insulated metal walls and steel frame. Its effective age is three years and its condition is above average. Using \$58.79 as a base cost and Mr. Reed’s additional replacement cost numbers for improvements, his depreciation, including effective age, incurable depreciation, and only a small percentage of functional

⁶ P-2 is an excerpt from MVS

obsolescence, the Tribunal finds the value of the building and improvements is \$3,769,817, or \$3,769,800, rounded, for the 2012 tax year.

CONCLUSIONS OF LAW

Parcel No. 14-23-40-380, land

At the hearing of this matter, Mr. Eisenbraun testified that the subject property fair market value is \$25,000 per acre. He noted that Evergreen paid \$119,000 (\$25,000 per acre) for the land in 2008 and the comparable parcels were being marketed within the Eastwick Industrial Park for \$25,000 per acre as of December 31, 2011, until present. 8/20/14 Tr. 176.

Mr. Eisenbraun gave an oral opinion of value for the subject property land. He did not include this analysis in the body of his appraisal. On cross examination he testified “Q: Sir, does your appraisal P-1 have a conclusion of the true cash value of the subject land on 12/31/11?” “A: For the subject property itself?” “Q: Yes sir.” “A: No, it doesn’t.” 8/20/14 Tr. at 178. He also testified that his appraisal didn’t contain a conclusion of value for the subject land on 12/31/12. *Id.*

Mr. Reed presented a sales comparison approach to value the subject property land. He put forth three sales comparables to determine a unit rate for the subject property. The first comparable, utilized for industrial purposes, was located at 4203 Ashman and sold on 12/20/11 for \$300,000. It had 9.18 acres and sold for \$32,580 per acre. It was adjusted upward “for the subject’s superior industrial subdivision location and proximity to freeway access and downtown.” R-1 at 45. The second comparable was located at 102 Fast Ice Drive, sold on 9/19/08 for \$157,500 and consisted of 5.55 acres. Its sale price per acre was \$28,378, and its use was industrial. It was adjusted upward for superior location and also adjusted for market conditions. Sales comparable three was located at 3535 Ashman, sold for \$280,000 on October 15, 2012 and consisted of 6.07 acres. Its per acre price was \$46,129 and its use was industrial. R-1 at 44-45. Mr. Reed’s conclusion of value per acre for the subject property was \$40,000 or \$190,800 for 2012. For 2013, Mr. Reed applied a 3% market increase in value to conclude in a true cash value for that year of \$196,500. R-1 at 45. The adjustment was applied “due to the

improved commercial and industrial market in the subject area as of this date of value. Though improved, the increase in land values in the area has been moderate (to stable) at best.” *Id.*

With regard to Mr. Eisenbraun’s contention of value for the subject land, the same is based on the purchase price of the property from a bankruptcy sale and from listing prices. The Tribunal notes, however, that “the selling price of a particular piece of property is not conclusive evidence of that property's value A great many factors enter into the determination of a sale price, such as need or ability to utilize the property, potential income, actual income, age and physical condition, tax considerations, and financing costs.” *First City Corp v City of Lansing*, 153 Mich App 106, 115; 395 NW2d 26 (1986). See also MCL 211.27(5). In order to be accepted as an indicator of value, a property must be proven to have sold “after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, [with] neither . . . under undue duress.” *Appraisal Institute: The Appraisal of Real Estate* (Chicago, Appraisal Institute, 14th ed, 2013), p. 58. Mr. Eisenbraun acknowledged that the sale of the subject property was not at arm’s length. He wrote, [d]ue to the bankruptcy, the seller is likely to have sold the property, equipment and IP under conditions that are not typical based on the definition of True Cash Value.” P-1 at 2.

With regard to the allegation that vacant land in Eastwick Industrial Park was listed from 12/31/11 until the date of hearing at \$25,000 per acre, on cross examination, Mr. Reed answered, “Q: You wouldn’t agree that those lots in Eastwick that are vacant now were vacant in 2011?” “A: Oh, I would agree with that.” “Q: Okay.” “A: “But I would also agree they’re different from the subject.” Further, Mr. Reed testified, “[T]he lots that they are marketing for sale have wetlands issues, so it’s not apples to apples.” 8/21/14 Tr. at 121-122. As Mr. Eisenbraun did not complete an appraisal for the subject property and he rested his contention of per acre value from asking prices of dissimilar properties and the sale price of the subject property, after bankruptcy, the Tribunal is not persuaded by his testimony.

Mr. Reed prepared an appraisal for the subject land using the sales approach to value, however, after making much ado about sales far from tax day, presented a sale from 2008 and a sale from 2012 as evidence of value as of December 31, 2011. The sales however were properly

adjusted to conclude in the appropriate value as of December 31, 2011. Respondent further calculated a 3% market value increase from 2012-2013 which the Tribunal finds to be probative. Therefore, the Tribunal finds the fair market value of the property for the 2012 tax year to be \$190,800 and for 2013 to be \$196,500.

Based on careful, deliberate and independent evaluation of the admitted evidence and testimony, the Tribunal finds that the subject properties' TCV, SEV, and TV for the tax years at issue are as stated in the Introduction section above.

JUDGMENT

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

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the

rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%, and (iv) after June 30, 2012, through December 31, 2014, at the rate of 4.25%.

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

By: Preeti P. Gadola

Entered: Nov 14, 2014