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

Eight Mile & Haggerty Land Company,
Petitioner,

v

MTT Docket No. 363342

City of Novi,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Eight Mile & Haggerty Company, appeals ad valorem property tax assessments levied by Respondent, City of Novi, against Petitioner's ownership interest in Parcel No. 50-22-36-476-003 for the 2009, 2010, and 2011 tax years. William R. Connolly, attorney, and James E. Brammer, attorney, represented Petitioner, and Stephanie Simon Morita, attorney, represented Respondent.

A hearing on this matter was held on November 30, 2011, and December 1, 2011. Petitioner's witnesses were Donald Wieme, Wieme, Rende & Associates, P.C., Victor Ansara, Ansara Restaurant Group, and Michael T. Bailey, Bailey Schmidt & Associates, Inc. Respondent's witnesses were Raymond Bologna, Terzo & Bologna, and D. Glenn Lemmon, City of Novi. Post-Hearing Briefs were filed by the parties on January 23, 2012.

Based on the evidence, testimony, and case file, the Tribunal finds that Petitioner has failed to meet its burden of proof in establishing the subject property's true cash value, and further finds the true cash values ("TCV"), the state equalized values ("SEV"), and the taxable values ("TV") of the subject property for the years under appeal are as follows:

Parcel Number: 50-22-36-476-003

	TCV	SEV	TV
2009	$1,120,000	$560,000	$560,000
2010	$1,070,000	$535,000	$535,000
2011	$1,020,000	$510,000	$510,000

PETITIONER'S CONTENTIONS

Petitioner contends that the evidence presented in this case strongly supports a determination that the true cash value of the subject property as determined by Respondent is substantially overstated. Petitioner further contends that in determining the true cash value of the subject property: (i) the highest and best use of the subject property is its current use and not as redeveloped vacant land, (ii) the income approach to value using Petitioner's actual revenues for the tax years at issue is the most appropriate method to value the subject property, and (iii) Respondent's appraiser fails to adequately consider the existence of the MDOT easement, the lack of adequate ingress and egress to and from the subject property, and the limited zoning of the property.

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

Parcel Number: 50-22-36-476-003

	TCV	SEV	TV
2009	$740,000	$370,000	$370,000
2010	$560,000	$280,000	$280,000
2011	$515,000	$257,500	$257,500

PETITIONER'S ADMITTED EXHIBITS

P-1 Appraisal of subject property.

P-2 Petitioner's Answers to Respondent's Second Set of Interrogatories (excluding response nos. 7, 8 and 19).

P-3 Declaration of Taking.

P-8 Plan Review Center Report dated March 3, 2008.

P-9 Planning Review Summary Chart.

P-10 Plan Review Center Report dated March 7, 2008.

P-11 Plan Review Center Report dated March 12, 2008.

P-12 Façade Ordinance Letter dated March 6, 2008.

P-13 Letter from Fire Marshal dated March 8, 2008.

PETITIONER'S WITNESSES

Victor Ansara

Mr. Ansara is President and CEO of Ansara Restaurant Group, the parent company to Petitioner. Mr. Ansara testified that: (i) the subject property was purchased by Mr. Ansara's company in 1984, a week before the Big Boy restaurant located on the subject property opened for business, (ii) the current operation of the subject property as a Big Boy restaurant is adversely affected by the small size of the site, the lack of appropriate ingress and egress, including lack of access to Eight Mile Road, and the increasing negative image of Big Boy restaurants over the past ten to fifteen years caused by the bankruptcy filing of Big Boy, (iii) annual gross sales peaked at $1.8 million in 2006 and were approximately $1.1 million for 2011 with increased operating costs, (iv) a Michigan Department of Transportation highway easement along the eastern edge of the subject property includes approximately twenty percent of the subject land, (v) the easement allows the Michigan Department of Transportation to "take" that portion of the subject property for highway purposes, (vi) negotiations to sell the subject property to a Walgreen's preferred developer for $3.3 million did not ultimately result in the sale of the subject property because of the existence of the highway easement and anticipated development costs, (vii) the highway easement has not affected Petitioner's ability to operate the subject property as a Big Boy restaurant, and (viii) the subject property is properly sized for a family style sit-down restaurant, but is "too small for a casual dining concept," given ingress and egress issues and the need for drive-through capabilities. (Transcript, Vol 1, pp. 24 – 70)

Michael Thomas Bailey

Mr. Bailey is a real estate developer and a partner in MTB Partners, LLC, which develops properties and also owns interests in various properties, including restaurants. Mr. Bailey testified that: (i) his company entered into a purchase agreement with Petitioner to purchase the subject property for $3.3 million for redevelopment of the site as a Walgreen's drug store, and (ii) the subject site was ultimately determined to be inappropriate for a Walgreen's drug store because the current freeway service zoning did not allow for a drive-through, because of the existence of a highway easement on a substantial portion of the site held by the Michigan Department of Transportation, because the size of the site limited access and building size, and because of the costs associated with redevelopment of the site. (Transcript, Vol 1, pp. 70 – 114)

Donald Wieme

Donald Wieme, MAI, a licensed general real estate appraiser was Petitioner's valuation expert. He testified that (i) he has been an appraiser since 1964, (ii) he has appraised 15 to 20 Big Boy restaurants during his career, (iii) he determined the highest and best use of the subject property to be its continued use as a sit-down family restaurant such as Big Boy, Bob Evans, Ram's Horn, Denny's, and IHOP and not used for a fast-food restaurant, (iv) the restaurant industry is overdeveloped in the Haggerty Road corridor, (v) the highest and best use of the subject property is not "as vacant" because the subject site is adversely affected by the "MDOT easement area," by the lack of ingress and egress, is not suitable for use by a financial institution because of zoning issues and because of the proliferation of financial institutions in the Haggerty Road corridor, (vi) the income approach to value was the "reasonable and appropriate" approach in valuing the subject property, (vii) relying on the Restaurant Industry Operations Report, a review of the Big Boy leases and other leases that have been structured as a percentage of gross sales, rent based on five to seven percent of gross sales is typical for restaurants such as the subject, (viii) a capitalization rate of 11.35 percent (excluding property taxes) was developed using a 60 percent loan to value ratio, a mortgage interest rate of 7.25 percent and a 12 percent cash-on-cash return, (ix) the capitalization rates he used in valuing the subject property are higher than the rates developed from two comparable sales in his report (Transcript, Vol 1, pp 81, 83), (x) none of the rent comparables that he identified actually relied on a percentage of gross sales method to determine actual rent, (xi) his income conclusions were based entirely upon financial statements provided by Petitioner, (xii) if he used actual income, a 7 percent factor for lease rate, and cap rates of 8.2% and 10%, values would be $1.0 and $1.2 million, respectively, (xiii) the sales comparison approach was not utilized to value the subject property because of the specialized nature of the property and the necessity to make "pure guesses" in determining appropriate adjustments to the comparable sales, which results in an "exercise in futility," (Transcript, Vol 1, pp. 164, 165), (xiv) the proposed sale of the subject property to Walgreen's did not conclude because of the MDOT easement and the credit crisis of 2008, (xv) the sales comparison approach value was determined without specific analysis since no clearly comparable sold properties were found, and (xvi) he did not apply a cost approach to value the subject property because "the age of the property and locational characteristics make a cost approach unreliable." (Transcript, Vol. 1, pp. 115 – 235, Vol. 2, pp. 243 – 258)

RESPONDENT'S CONTENTIONS

Respondent contends that the true cash, assessed, and taxable values determined by Respondent for the subject property for the tax years at issue should be reduced for the 2009 and 2010 tax years and slightly increased for the 2011 tax year based on the value conclusions made by its appraiser. Specifically, Respondent contends that Petitioner's appraiser has failed to properly determine the highest and best use of the subject property and has applied an incorrect methodology to value the subject property, a methodology that has been repeatedly rejected by the Tribunal.

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

Parcel Number: 50-22-36-476-003

	TCV	SEV	TV
2009	$1,120,000	$560,000	$560,000
2010	$1,070,000	$535,000	$535,000
2011	$1,020,000	$510,000	$510,000

RESPONDENT'S ADMITTED EXHIBITS

R-1 Respondent's Valuation Disclosure.

R-1A Revisions to Respondent's Valuation Disclosure.

R-5 Definitions – Section of Zoning Ordinance.

RESPONDENT'S WITNESSES

<u>Raymond V. Bologna</u>

Mr. Bologna is a licensed real estate appraiser and was qualified as an expert witness. Mr. Bologna testified (Transcript, Vol. II, pp. 267 – 432) that (i) a review of his appraisal identified numerous errors and typos that did not change his value conclusions (see Exhibit R-1A), (ii) although he was actively involved in the valuation of the subject property, he did not "technically write the report," (Transcript, Vol 2, p. 339), (iii) he concluded a true cash value for the subject property of $1.12 million for tax year 2009, $1.07 million for tax year 2010, and $1.02 million for tax year 2011, (iv) a determination of a property's "highest and best use" is extremely important as it is dependent upon a determination of the maximum value that a property could generate, (v) the highest and best use of the subject property as vacant would be to develop the subject property as a sit-down restaurant or financial institution, (vi) the highest and best use of the subject property, as improved, is "redevelopment to highest and best use as if vacant," (vii) the current use of the subject property as a sit-down restaurant is not its highest and best use, as "the improvements to the land are not adding value to the underlying land. They are a detriment, and it's time to tear them down," (viii) the location of the subject property is very desirable and would support redevelopment as a restaurant or financial institution, (ix) the 40-foot easement held by MDOT does not render the land useless, as the restaurant was constructed after the easement was in place, Petitioner continues to use the land subject to the easement for parking, etc., and there is no reason to expect any major change in the ability to use the land, (x) the age and condition of the subject improvements and the difficulty in attempting to determine functional and economic obsolescence rendered application of the cost approach to value the subject property inapplicable, (xi) the income approach to value was not determined to be reliable in valuing the subject property because of the lack of market restaurant leases, (xii) Petitioner's appraiser's reliance on the income approach was flawed because the "property as currently used is not what we call an income-generating property, because it's not being looked at from the perspective of the investor . . . [a]nd to value it based on a percentage of current – of their current operation is certainly not how an investor would be looking at this property," (Transcript, Vol. II, p. 379), (xiii) he relied on the sales comparison approach to determine the value of the subject property for the tax years at issue, (xiv) all comparable sales identified were either vacant land sales consistent with his highest and best use determination or sales of comparable improved properties, (xv) of the two comparable sales methods, he relied upon vacant land sales in determining the true cash value of the subject property, (xvi) in applying the sales comparison approach, no adjustments were made for zoning differences between the subject property and the comparable properties because he concluded that the comparable properties all fall within flexible zoning categories similar to the subject, (xvii) a time adjustment was not made to the comparable sales because "the lack of observations during this period did not give us a comfort level to make a quantitative adjustment," (Transcript, Vol II, p. 384), and (xviii) the easement on the subject property would not affect a prospective purchaser's opinion of the value of the property because the "property by virtue of the easement and by virtue of the fact that for the last 27 years has been able to utilize that for setback requirements, landscaping and improvements, I would presume that the property can continue to do that . . . ." (Transcript, Vol II, p. 394)

D. Glenn Lemmon

Mr. Lemmon is the Assessor for the City of Novi. Mr. Lemmon testified regarding the receipt, handling, and content of Property Tax Affidavits by the City of Novi. (Transcript, Vol 2, pp. 433 – 437)

FINDINGS OF FACT

1. The subject property consists of an approximate 1.17-acre parcel of property located at 20800 Haggerty Road, Novi, Michigan, with approximately 150 feet of frontage along 8 Mile Road and approximately 250 feet of frontage along Haggerty Road.
2. Ingress and egress to the subject property is from Haggerty Road only.

3. The subject property was used as a Big Boy Restaurant for the tax years at issue.
4. The subject property was assessed for the tax years at issue as follows:

Parcel Number: 50-22-36-476-003

	TCV	SEV	TV
2009	$1,345,400	$672,700	$672,700
2010	$1,141,800	$570,900	$570,900
2011	$982,400	$491,200	$491,200

5. The subject property is improved with a 6,253 square foot commercial building constructed in 1984.
6. The subject property is encumbered by a 40-foot easement for public highway purposes that runs along the east property line, which does not allow any building improvements to be constructed over the easement, but can be utilized for parking and/or landscaping.
7. The subject property is zoned FS, Freeway Service District.
8. The Freeway Service District is intended to "serve the needs of automobile traffic at the interchange areas of feeder roads and freeway facilities, to avoid undue congestion on feeder roads, to promote safe traffic flow at an interchange area, and to protect adjacent properties in other zones from adverse influences of traffic." (Novi, Michigan, Code of Ordinances, Part II – Code of Ordinances – Appendix A – Zoning Ordinance - Section 18., FS Freeway Service Districts)
9. Permitted uses included in the Freeway Service District include gasoline service stations and automobile repair centers, retail establishments, including gift shops and restaurants (not including drive-ins), motels, and hotels. (*Id.*)
10. Petitioner's appraiser determined the highest and best use of the subject property as vacant to be land available for future development.
11. Petitioner's appraiser determined the highest and best use of the subject property as

improved to be the continued use of the subject property as a sit-down restaurant.

12. Petitioner's appraiser utilized the income and direct sales comparison approaches to value for the 2009 tax year, but used only the income approach for the 2010 and 2011 tax years.
13. Petitioner's appraiser did not use the cost approach to value the subject property because it "is not considered a reliable indicator of value . . . given age of existing improvements and locational characteristics." (Petitioner's Appraisal, p. 64)
14. Petitioner's appraiser included the sales comparison approach for the 2009 tax year, but did not apply this approach for 2010 and 2011 because of "[a] total absence of sales involving truly comparable facilities." Petitioner's sales comparison approach analysis for 2009 was "included to supplement the value indications formulated within the section of this report titled Income Approach to Value." (Petitioner's Appraisal, pp. 80 – 86)
15. Petitioner's appraiser primarily relied on the income approach to value the subject properties for the 2009 tax year and solely relied on that approach for the 2010 and 2011 tax years. (Petitioner's Appraisal, pp. 105, 106)
16. In applying the income approach, Petitioner relied on the Restaurant Industry Operations Report 2008, as well as an analysis of ten comparable leases to determine an annualized rental rate of 6%. (Petitioner's Appraisal, pp. 65 – 69)
17. Petitioner's appraiser again relied on the Restaurant Industry Operations Report 2008, as well as actual gross sales volume reflected by Petitioner on unaudited financial statements ($1,621,538 for the fiscal year ending December 28, 2008, $1,335,169 for the fiscal year ending December 27, 2009, and $1,177,144 for the fiscal year ended December 26, 2010) to determine stabilized gross revenue of $1,575,000 for 2008, $1,200,000 for 2009, and $1,100,000 for 2010. (Petitioner's appraisal, pp. 69, 70)
18. Petitioner's appraiser determined market rent by applying the 6% rental rate to estimated "stabilized gross revenue" and then reduced this "market rent" by a 5% vacancy rate to

determine Effective Gross Income ("EGI"), and then reduced EGI by management expenses of 3%, replacement reserve of 1%, and maintenance of $0.20 per square foot to determine Net Operating Income ("NOI"). (Petitioner's appraisal, pp. 70 – 73)

19. Petitioner's appraiser determined the true cash values for the subject property for the tax years at issue by applying capitalization rates of 11.4799%, 11.4815%, and 11.4822% to the calculated NOI's for tax years 2009, 2010, and 2011, respectively. (Petitioner's appraisal, pp. 74 – 79)
20. Respondent's appraiser determined the highest and best use of the subject property as vacant to be as a site for a "modern sit-down restaurant or financial institution." (Respondent's appraisal, p. 36)
21. Respondent's appraiser determined the highest and best use of the subject property as improved to be "a vacant site consistent with the highest and best use as vacant." (Respondent's appraisal, p. 36)
22. Respondent's appraiser did not use the cost approach to value the subject property since "the property is relatively old and the typical purchaser would not utilize this approach as a measure of the property's value." (Respondent's appraisal, pp. 5, 6)
23. Respondent's appraiser did not use the income approach to value the subject property because "the property is owner-occupied and the typical purchaser would more than likely be another owner user." (Respondent's appraisal, p. 6)
24. Respondent's appraiser relied on the sales comparison approach to determine the true cash value of the subject property, both as vacant land and as a restaurant, although primary consideration was given to the value determination of the subject property as vacant.
25. In determining a vacant land value for the subject property for the tax years at issue, Respondent's appraiser identified comparable sales (four for 2009, three for 2010, and

four for 2011), determined qualitative adjustments for location, size and frontage, and concluded a land value of $23, $22 and $21 per square foot, respectively, giving emphasis to comparable #1 for 2009, to comparable #4 for 2010, and to comparable #3 for 2011, because of proximity and comparability to the subject property. Demolition costs estimated to be $50,000 were deducted by the appraiser from his vacant land value determination. (Respondent's appraisal, pp. 37 – 41, 47 – 50, 55 -58)

26. In applying the sales comparison approach to the subject improved property, Respondent's appraiser identified comparable sales (four for 2009, four for 2010, and five for 2011), determined quantitative and qualitative adjustments for market conditions, location, age, and condition, land-to-building ratio, and concluded a value per square foot of $160, $155, and $145, respectively, for the tax years at issue. (Respondent's appraisal, pp. 41 – 45, 50 – 54, 59 – 62)

27. Petitioner entered into a Purchase Agreement with TRZ Investments, Inc. dated March 9, 2007, to sell the subject property for $3.3 million. Ultimately, the subject property was not sold and continues to be operated by Petitioner as a Big Boy restaurant.

ISSUES AND CONCLUSIONS OF LAW

a. General. 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.

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not...exceed 50%.... Const 1963, art 9, sec 3.

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

> ...the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. MCL 211.27(1); MSA 7.27(1).

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

Under MCL 205.737(1); MSA 7.650(37)(1), the Tribunal must find a property's true cash value in determining a lawful property assessment. *Alhi Development Co v Orion Twp,* 110 Mich App 764, 767; 314 NW2d 479 (1981). The Tribunal is not bound to accept either of the parties' theories of valuation. *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 754; 377 NW2d 908 (1985). The Tribunal may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination. *Meadowlanes Limited Dividend Housing Association v City of Holland,* 437 Mich 473, 485- 486; 473 NW2d 636 (1991).

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735(1); MSA 7.650(35)(1). The Tribunal's factual findings are to be supported by competent, material, and substantial evidence. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Dow Chemical Co v Department of Treasury,* 185 Mich App 458, 462-463; 452 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 and Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

"The petitioner has the burden of establishing the true cash value of the property . . . ." MCL 205.737(3). This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party. *Jones and Laughlin,* pp. 354-355. However, "[t]he assessing agency has the burden of proof in establishing the ratio of the average level of assessment in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question." MCL 205.735(3).

b. Highest and Best Use. Because the parties' respective appraisers disagree regarding the highest and best use of the subject property, and therefore presumably apply different valuation methods in determining substantially different values for the subject property, the Tribunal must first make a determination regarding highest and best use for all of the tax years at issue. This determination is especially critical where Respondent is advancing an alternative highest and best use (the subject property should be valued as vacant land available for development as a modern sit-down restaurant or financial institution) to its present use as a sit-down Big Boy restaurant. The danger in Petitioner's conclusion of highest and best use is that its entire case is conditioned upon its appraiser's continuation of its existing use as its highest and best use and, accordingly, reliance on unaudited financial information to develop an income approach to value. If this highest and best use determination is flawed, Petitioner is essentially left without a value premise or supporting evidence.

In this regard, the Appraisal Institute states that an appraiser charged with developing a market value opinion must include a highest and best use analysis that identifies "the most profitable, competitive use to which the subject property can be put." Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2008), p. 277.

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

Highest and best use may be defined as follows:

> The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value. (*Id*., pp. 277, 278)

The theoretical focus of highest and best use analysis is on the potential uses of the land as though vacant. In practice, however, the contributory value of the existing improvements and any possible alteration of those improvements are also important in determining the highest and best use and, by extension, in developing an opinion of market value of the property. *Id*., p. 278

In addition to being reasonably probable, the highest and best use . . . must meet four implicit criteria. That is, the highest and best use must be:

1. Legally permissible (which speaks to eliminating from consideration those uses which are not thought likely to be legal);

2. Physically possible (which speaks to eliminating from consideration those uses to which it is not likely the property may reasonably be adapted);

3. Financially feasible (which speaks to eliminating from consideration those uses which are not thought likely to be financially feasible from a profitability standpoint); and

4. Maximally productive (which speaks to eliminating from consideration those uses which are not thought likely to return the maximum profitability to the land, once considerations for labor, capital and coordination are satisfied).

Highest and best use analysis builds on the conclusions of market/marketability analysis. The analysis of land as though vacant focuses on alternative uses, with the appraiser testing each reasonably probable use for legal permissibility, physical possibility, financial feasibility, and maximum productivity. In contrast, the appraiser applies the four tests in the analysis of the property as improved, but the focus is not on alternative uses but on three possibilities:

continuation of the existing use, modification of the existing use, or demolition and redevelopment of the land. (Emphasis added) (*Id*., pp. 281, 287.)

Here, Petitioner's appraiser contends that the maximum productive use of the subject property would be to continue the existing improvements. Critical to Respondent's appraiser's conclusion of highest and best use of the subject property as improved is his assumption that current Freeway Service District zoning and the existing MDOT easement on the land would allow the demolition of the existing Big Boy restaurant and the construction of a modern sit-down restaurant or a financial institution.

Petitioner contends that Respondent's determination of highest and best use as vacant land available for development fails these tests. Specifically, Petitioner contends that redevelopment of the subject property as a financial institution as proposed by Respondent is not permissible under existing FS zoning and because rezoning would require city approval, it is improper to consider such anticipation of zoning changes in valuing the property. (*Kensington Hills Development Company v Milford Township*,10 Mich App 368, 372; 159 NW2d 330 (1968). Petitioner's Post Hearing Brief, p. 2) Petitioner further contends that redevelopment of the subject property is not physically possible and is cost prohibitive given the MDOT easement, the need to change zoning, the cost of redevelopment, and the limited egress and ingress to and from the subject property. (Petitioner's Post Hearing Brief, p. 3) Petitioner further contends that redevelopment of the subject property is not financially feasible given its existing use, limited parking, limited access, and the presence of the MDOT easement. Finally, Petitioner contends that redevelopment does not maximize the productive use of the subject property as any other alternative use is limited by the size of the parcel as restricted by the easement.

Respondent contends that the highest and best use of the subject property is as a vacant lot ultimately redeveloped as either a modern sit-down restaurant or a financial institution. Respondent contends that Petitioner's appraiser erroneously relies on a non-existent "licensing agreement" with MDOT that seemingly precludes alternative uses of the subject property. Further, Respondent takes exception to Petitioner's appraiser's failure to even consider the highest and best use of the subject property as vacant. (Respondent's Post Hearing Brief, p. 3) Simply, Respondent contends that Petitioner's appraiser fails to provide any substantive analysis to support his conclusion of highest and best use.

The Tribunal finds that the highest and best use of the subject property is as vacant, available for development as a sit-down restaurant or financial institution. The Tribunal generally agrees with Respondent that Petitioner's appraiser has failed to provide even a simple analysis of alternative values of the subject property as vacant by which to determine whether his conclusion regarding a continuation of current use is valid. Further, the Tribunal finds that Petitioner's appraisal contradicts Petitioner's argument in its Post-Hearing Brief regarding highest and best use. For example, in discussing highest and best use as vacant, Petitioner's appraiser concludes that "[g]iven the subject's configuration, extensive road frontage, overall site area, visibility and zoning, there are a broad variety of uses which could be accommodated by the subject site." (Petitioner's appraisal, p. 56) Petitioner's appraiser further states that "[l]egally, the subject is currently zoned FS, Freeway Service District, which allows for a broad variety of retail and commercial type uses . . . it is anticipated that a prospective purchaser of the site (as if vacant) would recognize the versatility offered this property by virtue of its current FS zoning classification" (Petitioner's appraisal, p. 56), that "it is concluded that there a number of potential users who may be equally interested in development of the subject site," (Petitioner's appraisal, p. 57) and, finally, "[o]bviously, the potential for future development in the subject's immediate area is good given the positive influences exerted by the ease of access to the nearby I-96/I-275 Freeway coupled with the significant development involving retail/commercial type properties . . . [s]hould the subject property be vacant and available for this type of development, it is anticipated that it would appeal to a broad segment of the market given the variety of potential uses to which it could be placed." (Petitioner's appraisal, p. 57) In spite of what the Tribunal considers several very positive comments made by Petitioner's appraiser regarding future development of the site as vacant, Petitioner's appraiser abruptly concludes that "[g]iven market conditions which have prevailed since the third quarter of 2008, it is further concluded that any type of speculative development would be ill advised." (Petitioner's appraisal, p. 57) Given the above contradictions, the Tribunal finds Petitioner's appraiser's failure to provide any vacant land sales analysis to support his ultimate highest and best use conclusion coupled with inconsistent conclusions regarding highest and best use as vacant, raises credibility issues with this portion of the appraisal. Credibility issues also arise with Petitioner's highest and best use determination, given the appraiser's reliance on a "license agreement" with MDOT that has not been produced or confirmed by Petitioner.[1] Finally, the Tribunal does not accept Petitioner's argument that the existence of the MDOT easement, zoning restrictions, and limited egress and ingress preclude the future development of the subject property as concluded by Respondent's appraiser. Petitioner has provided no evidence that would allow the Tribunal to conclude that the MDOT easement is anything but a red herring. The easement has been in place since 1973 and Petitioner has operated the subject restaurant since 1984 without any substantive adverse impact from the easement other than some reduction in the availability of parking. In reaching this conclusion, the Tribunal relies, in part, on the testimony of Mr. Ansara, who stated that there have not been "any issues with respect to parking on the easement," and that he is not aware of a license agreement regarding the parking on the portion of the land affected by the easement. (Transcript, p. 58) Further, the Tribunal has reviewed the ordinance and finds no specific

[1] Petitioner's appraiser states ". . . the appraiser was advised that should the subject property be sold, the new owner would need to apply to MDOT to obtain a new licensing agreement. The appraiser was further advised that in all probability such a licensing agreement would be granted to a new property owner with the understanding that it is <u>cancelable at any time</u> by MDOT, should the need arise." (Petitioner's appraisal, p. 58)

prohibition against use of the property as proposed by Respondent's appraiser. Finally, Respondent's appraiser has supplied the appropriate value determinations sufficient to support his highest and best use conclusion. The Tribunal finds that Respondent's determination of the highest and best use of the subject property as vacant developable is supported by the evidence and testimony provided in this case.

c. Approaches to value.

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*, at 484-485; *Pantlind Hotel Co v State Tax Commission*, 3 Mich App 170; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968). The market approach is the only appraisal method that directly reflects the balance of supply and demand for property in marketplace trading. *Antisdale*, p. 278. 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*, p. 277. The Tribunal finds that the appropriate method of determining the true cash value of the subject property for the tax years at issue is the sales comparison approach.

1. Cost approach.

The Tribunal finds that neither of the parties' appraisers utilized the cost-less-depreciation approach. Generally, the cost-less-depreciation approach is applicable to a newly constructed property. The cost approach values a property based on a comparison with the cost to build a new or substitute property, presumably taking into consideration market influences. As is discussed by The Appraisal Institute, "the cost approach is important in estimating the market value of new or relatively new construction. The approach is especially persuasive when land value is well supported and the improvements are new or suffer only minor depreciation." Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2008), p. 382. Here, given the age of the existing improvements and the location of the subject property, the cost approach is not appropriate in attempting to determine the true cash value of the subject property for the tax years at issue.

2. Income Approach.

As discussed above, the Tribunal has rejected Petitioner's determination that the highest and best use of the subject property as improved is to continue the current use of the subject property as a sit-down restaurant. Further, the Tribunal does not accept Petitioner's sole reliance on the income approach to value the subject property given the appraiser's reliance on unsupported market rental rates applied to negatively adjusted actual revenues reported by Petitioner in unaudited financial statements.

Petitioner contends that the income approach is the recommended value approach for commercial properties. Petitioner further contends that in applying the income approach, Petitioner's appraiser took into consideration the negative impact of the MDOT easement and the lack of ingress and egress for the subject property and, most important, considered the declining revenues generated by Petitioner during the tax years at issue.

Respondent contends that Petitioner's appraiser's income approach is flawed "because he fails to use market rents – or properly utilize any market evidence to support his value conclusions." (Respondent's Post-Hearing Brief, p. 4) Respondent further contends that although Petitioner's appraiser included an analysis of restaurant leases in his report, he ultimately ignored this evidence to instead rely on actual income realized by Petitioner, reduced by a factor to reflect what Petitioner's appraiser concludes is a prospective purchaser's conclusion that the actual revenues generated by the subject property are a "best case scenario." (Petitioner's appraisal, p. 69) In this regard, Respondent relies on the Tribunal's rejection[2] of the

[2] *Dudley Corp v Muskegon*, MTT Docket 237985 (2000).

"non-market based income approach" relied upon by Petitioner as neither credible nor reliable, given the appraiser's "failure to use market based evidence in the income approach analysis." (Respondent's Post-Hearing Brief, p. 5) Respondent further takes exception to Petitioner's appraiser's sole reliance on Petitioner's financial statements, without any attempt to use market data to confirm or support the income numbers reported by Petitioner, and without recognition to Petitioner's witness Ansara's testimony that the Big Boy brand had suffered in recent years. Respondent further criticizes Petitioner's appraiser's reliance on an outdated Restaurant Industry Operations Report and on leases "he has seen" to conclude to a percentage rent conclusion of 6%. (Respondent's Post-Hearing Brief, p. 6) Further, Respondent contends that Petitioner's appraiser's reliance on comparable leases was flawed, given the actual terms of many of the leases based rents on something other than a straight percentage of sales methodology. Finally, Respondent takes exception to Petitioner's appraiser's failure to rely on market information in developing an appropriate capitalization rate.

The Tribunal has substantial concerns with Petitioner's appraiser's failure to develop market information in developing revenue estimates and in developing a capitalization rate. The Tribunal also has concerns with the appraiser's reliance on a flawed percentage of rent analysis that relies on comparable leases that do not base rents solely on that methodology. Petitioner's appraiser's methodology that assumes that an investor would determine a purchase price for the subject property based on actual revenues realized by Petitioner, adjusted downward, without any supporting market evidence, is flawed and has been previously rejected by the Tribunal. For all of these reasons, but primarily because of Petitioner's appraiser's failure to provide any credible analysis of market information, the Tribunal finds that Petitioner's appraiser's income approach is not reliable or credible, and will not be considered in the Tribunal's independent determination of the fair market value of the subject property for the tax years at issue.[3]

3. Sales Comparison Approach.

As stated above, the Tribunal finds that the sales comparison approach is the appropriate methodology to use in valuing the subject property for the tax years at issue. The Tribunal does not accept Petitioner's appraiser's conclusion that the sales comparison approach is not an appropriate methodology to apply in this case because sales sufficiently comparable to the subject were not available. Instead, the Tribunal finds that Respondent was able to identify numerous sales of potentially comparable properties with which to provide an appropriate and credible analysis in making a determination of the true cash value of the subject property.

Petitioner contends that Respondent's sales comparison approach is not appropriate because insufficient sales of properties comparable to the subject were available, given the zoning and easement issues affecting the subject property. Specifically, Petitioner contends that Respondent's methodology is flawed because (i) numerous errors in the report were identified, which "call into question Bologna's conclusions because they suggest that his report was not prepared with even modest attention to detail," (ii) the comparable sales were substantially different from the subject, were generally developed for purposes prohibited under FS zoning, and were not subject to an easement such as the MDOT easement applicable to the subject property, (iii) Respondent's appraiser failed to adjust for the existing MDOT easement, for zoning restrictions, and for dates of sale that include sales from 2006, 2007, and early 2008, (iv) the adjustments made by Respondent's appraiser were unreasonable and inconsistent, and relied

[3] Respondent devotes two pages of its Post-Hearing Brief to an attack on the credibility of Mr. Weime. Respondent principally contends that in his appraisal of the subject property, Mr. Weime utilized methodologies or analysis previously rejected by the Tribunal and requests that Petitioner's evidence be given no weight. Although the Tribunal has rejected Mr. Weime's income approach in this matter, primarily because he failed to provide reliable market information to support his assumptions in applying this approach, the Tribunal does not find, as Respondent seems to suggest, that Mr. Weime's credibility as an appraiser providing testimony and evidence in Tribunal proceedings should be questioned.

on a qualitative analysis in determining vacant land value, while relying on a quantitative analysis in determining the value of the subject property as improved, and (v) Respondent's appraiser's value per square foot conclusions were not supported by his own analysis of his adjusted comparable sales.

The Tribunal agrees with Petitioner that the number of errors identified in Respondent's appraisal that required three pages of explanation and six changed pages to Mr. Bologna's market analysis are disturbing and certainly cause the Tribunal to question the credibility of Mr. Bologna's report. However, the Tribunal has weighed the substance of these corrections (which did not result in a revision of Mr. Bologna's conclusions of value) and the Tribunal's finding that it cannot rely on Mr. Weime's income approach to value, and finds that Mr. Bologna's sales comparison approach provides the best evidence of the true cash value of the subject property for the tax years at issue.

Given the Tribunal's rejection of Petitioner's income approach to value, and the Tribunal's general acceptance of Respondent's sales comparison approach, the Tribunal next must focus on the three primary impediments identified by Petitioner that it contends adversely affect the value of the subject property: (i) the MDOT easement, (ii) zoning restrictions, and (iii) the lack of ingress and egress for the subject property.

The Tribunal rejects Petitioner's reliance on the presence of the MDOT easement as having a substantive negative impact on the true cash value of the subject property. The parties agree that the subject property is encumbered by a 40-foot easement that runs along the eastern boundary of the property. The parties differ substantially, however, on the impact of that easement on the property's value. Petitioner contends that "the easement adversely impacts the property's value because it must be considered by purchasers as a parcel that is closer to 40,000 square feet than 50,000 square feet." (Petitioner's Post-Hearing Brief, p. 10) Petitioner provides no evidence in support of that conclusion. Respondent contends that the easement is "not a complete prohibition of the property owner's use of the property," has had no impact on the utility of the subject property since construction in 1984, and was not the reason for the failure of a proposed sale of the property to IHOP to conclude. (Respondent's Post-Hearing Brief, p. 8)

As discussed above, the Tribunal also rejects Petitioner's contentions that the FS zoning prohibits the use of the subject property for financial institutions. Petitioner's contentions are not supported by Petitioner's appraisal or by the language of the zoning ordinance.

With respect to the issue of egress and ingress for the subject property, Petitioner's appraiser states that although "the high traffic volumes can create difficulties as it relates to ingress and egress," the subject property "is well located providing a high level of visibility and exposure to high traffic volumes. . . . Overall, the subject is well located with good access by virtue of its location at a major intersection adjacent to a limited access freeway. It is anticipated that in spite of traffic difficulties, the subject will remain a desirable location into the foreseeable future." (Petitioner's appraisal, p. 52) Although Petitioner's appraiser's testimony at the hearing tended to refute this generally positive conclusion, and although the Tribunal recognizes that the subject property cannot be accessed from Eight Mile Road, the Tribunal finds that Petitioner has failed to provide credible evidence that access to the subject property only from Haggerty Road has a significant negative impact on the true cash value of the subject property.

The Tribunal does not agree with Petitioner's contentions that Mr. Bologna (i) identified one or more comparable sales that were not comparable to the subject property and (ii) was inconsistent in his comparison of comparable sales to the subject. Most of the objections raised by Petitioner to Mr. Bologna's sales comparison approach relate to his analysis of comparable improved sales, which he did not ultimately use in reaching his value conclusions. Further, although the Tribunal has some concerns with the use of a qualitative rather than quantitative approach to reach final conclusions regarding the comparative nature of the comparable sales to the subject, the Tribunal accepts Mr. Bologna's explanation of his use of this method found in his appraisal at pages 41 – 43.

For the 2009 tax year, Mr. Bologna analyzes four comparable sales, makes qualitative adjustments for location, size and frontage differences, and concludes to a range of values between greater than $15.45 per square foot to less than $24.39 per square foot, and concludes to a value of $23 per square foot. Although the Tribunal agrees with Petitioner that an adjustment for market conditions could reasonably have been made to each of the comparable sales identified by Mr. Bologna, such adjustment would actually lower the range of values considered by Mr. Bologna. The Tribunal finds that Mr. Bologna's conclusion of value of $23 per square foot is supported by the evidence and analysis.

For the 2010 tax year, Mr. Bologna analyzes four comparable sales, makes qualitative adjustments for location, size and frontage differences, and concludes to a range of values between greater than $13.92 per square foot to greater than $22.96 per square foot, and concludes to a value of $22 per square foot. Although the Tribunal agrees with Petitioner that an adjustment for market conditions could reasonably have been made for Comparable #4 given its June 2008 sale date, such adjustment would actually lower the range of values considered by Mr. Bologna. The Tribunal finds that Mr. Bologna's conclusion of value of $22 per square foot is supported by the evidence and analysis.

For the 2011 tax year, Mr. Bologna analyzes three comparable sales and a listing, makes qualitative adjustments for location, size and frontage differences, and concludes to a range of values between greater than $21.03 per square foot to $37.23 per square foot, and concludes to a value of $21 per square foot. The Tribunal finds that Mr. Bologna's conclusion of value of $22 per square foot is supported by the evidence and analysis.

Finally, although the Tribunal has generally accepted Respondent's value conclusions, the Tribunal must note that it has concerns with the number of errors/corrections/errata required to be made to the appraisal and encourages Mr. Bologna to carefully review future submissions of appraisal evidence prior to filing with the Tribunal.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that Petitioner did prove by a preponderance of the evidence that the subject property is assessed in excess of 50% of market value. The subject property's true cash values (TCV), state equalized values (SEV), and taxable values (TV) are as stated in the Introduction section above.

JUDGMENT

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

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Order within 28 days of the entry of this Order. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of the Tribunal's order. As provided in 1994 PA 254, being MCL 205.737, as amended, interest shall accrue for periods after March 31, 1985, but before April 1, 1994, at a rate of 9% per year. After March 31, 1994, but before January 1, 1996, interest rate of the 94-day discount treasury bill rate for the first Monday in each month plus 1%. As provided in 1995 PA 232, being MCL 205.737, as amended, interest shall accrue for periods after January 1, 1996 at an interest rate set each year by the Department of Treasury. Pursuant to 1995 PA 232, interest shall accrue (i) after December 31, 1995 at the rate of 6.55% for calendar year 1996, (ii) after December 31, 1996 at the rate of 6.11% for calendar year 1997, (iii) after December 31, 1997 at the rate of 6.04% for calendar year 1998, (iv) after December 31, 1998 at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999 at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000 at the rate of 6.56% for calendar year 2001, (vii) after December 31, 2001 at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003 at the rate of 2.16% for calendar year 2004, (x) after December 31, 2004 at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005 at the rate of 3.66% for calendar year 2006, (xii) after December 31, 2006 at the rate of 5.42% for calendar year 2007, and (xiii) after December 31, 2007 at the rate of 5.81% for calendar year 2008, (xiv) after December 31, 2008, at the rate of 3.31% for calendar year 2009, (xv) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (xvii) after December 31, 2010 at the rate of 1.12% for calendar year 2011, and (xviii) after December 31, 2011 at the rate of 1.09% for calendar year 2012.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: March 2, 2012 By: Steven H. Lasher