

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

Chilson Commons, LLC,  
Petitioner,

v

MTT Docket No. 16-002711

Hamburg Township,  
Respondent.

Tribunal Judge Presiding  
Preeti Gadola

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Chilson Commons LLC, appeals ad valorem property tax assessments levied by Respondent, Hamburg Township, against Parcel Nos. 4715-22-402-002, 4715-22-402-003, 4715-22-402-004, 4715-22-402-005 and 4715-22-402-006 for the 2016 and 2017 tax years. H. Adam Cohen and John Scheibelhut, Attorneys, represented Petitioner, and Peter Goodstein, Attorney, represented Respondent.

A hearing on this matter was held on April 17, 2018. Petitioner's witnesses were Peter Gikas and Kevin Kernen, Appraiser. Respondent's witnesses were Mark MacDermaid and Susan Murray, Assessors.

The subject property is a one-story neighborhood shopping center with five buildings on five adjacent real property parcels. Two of the buildings are aligned together and the other three are part of a "main street" concept and are separate in terms of circulation and traffic. The total net rentable area of the improvements is 48,848 square feet and seven out of ten acres of real property are under appeal in this matter. There is also a Kroger store adjacent to the properties, with its own parcel number, which is not part of this appeal.

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 2016 and 2017 tax years are as follows:

Parcel No.	Year	TCV	SEV	TV
4715-22-402-002	2016	\$743,400	\$371,700	\$371,700
4715-22-402-002	2017	\$792,000	\$396,000	\$375,045

Parcel No.	Year	TCV	SEV	TV
4715-22-402-003	2016	\$1,654,800	\$827,400	\$827,400
4715-22-402-003	2017	\$1,773,000	\$886,500	\$834,846

Parcel No.	Year	TCV	SEV	TV
4715-22-402-004	2016	\$604,800	\$302,400	\$302,400
4715-22-402-004	2017	\$648,000	\$324,000	\$305,121

Parcel No.	Year	TCV	SEV	TV
4715-22-402-005	2016	\$600,600	\$300,300	\$300,300
4715-22-402-005	2017	\$643,500	\$321,750	\$303,002

Parcel No.	Year	TCV	SEV	TV
4715-22-402-006	2016	\$596,400	\$298,200	\$298,200
4715-22-402-006	2017	\$643,500	\$321,750	\$300,883

#### PETITIONER'S CONTENTIONS

Petitioner contends that the subject properties are over assessed for the tax years in question. Petitioner contends that it retained the services of a professional appraiser who concluded in a lower true cash value for the properties than those represented by the assessments on the tax roll. Petitioner claims Respondent did not hire an appraiser, did not put forth any details about its comparables in its valuation disclosure, did not adjust its comparables, and did not provide written information about the source of its vacancy and capitalization rates and expense calculations in its income approach to value, in order for Petitioner and the Tribunal to consider the accuracy of the information. Petitioner alleges Respondent did not provide details about its lease comparables, including dates of inception. Finally, Petitioner contends Respondent did deduct lease-up costs from its contentions of value.

#### PETITIONER'S ADMITTED EXHIBITS

P-1: Real Estate Appraisal Report, prepared by Kevin A. Kernen, MAI, of 9540-9682 Chilson Commons Circle, Hamburg Township, Michigan 48169, dated August 18, 2017.

P-2: Appraisal Report, prepared by Donald D. Wieme, MAI, SRA, of 9540-9731 Chilson Commons Circle, Hamburg Township, Michigan 48169, dated January 12, 2015.

PETITIONER'S WITNESSES

Peter Gikas

Mr. Gikas, Vice President, First Commercial Realty, was and is, the manager of Chilson Commons LLC since its development in 2004 and 2005. His company was also involved in the construction of the project, of which two, of twenty retail spaces remain unfinished. The property was zoned residential and to construct it, a hardship PUD was applied for and received. Pursuant to the PUD, however, Petitioner is required to maintain a natural feature, consisting of trees and shrubs, which block visibility to the center from M-36, where the property is located, and also from patrons of the Kroger store.

Mr. Gikas described Petitioner's various tenants for which it had to reduce rent in order to keep them viable, including Dollar Treasure, which comprised 25% of the leasable space and eventually left the property, Fantastic Sam's, Subway, Troy Cleaners, and Rosy Nails. Laptop Express left the property, but two new leases were signed in 2015 and 2016, with ATI and Biggby. ATI rented 4000 square feet but received a tenant allowance of \$40,000 and tenant build-out of \$160,000. As such, Petitioner spent \$200,000 to secure a rental rate of \$17.00 per square foot. Biggby rents 1,100 square feet at a rate of \$18 per square foot, triple net, but received 120 days of free rent in order to secure the lease. Dollar Treasure was replaced by Dollar Tree in 2017.

Kevin Kernen

Mr. Kernen was qualified as an expert in Real Estate Appraisal by the Tribunal and he prepared an appraisal of the subject properties as of December 31, 2015 and December 31, 2016, relative to the 2016 and 2017 tax years. Mr. Kernen testified that the property improvements consist of 57,564 square feet, of which 48,848 square feet are rentable. The calculation of net rentable square footage was related to the two unfinished suites in the properties which consist of dirt floors and exposed framing, which he determined were empty boxes with no value.<sup>1</sup> Mr. Kernen testified a buyer would not attribute any value to the empty boxes given there was never

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<sup>1</sup> Transcript ("Tr.") at 57.

any demand for those spaces, and the properties are already struggling with vacancy rates<sup>2</sup> of about 25%, while his stabilized occupancy analysis puts forth an average vacancy rate of about 10%.

Mr. Kernen determined the highest and best use of the property, as improved, to be continued use of the existing improvements, which is greater than its highest and best use as vacant. Mr. Kernen considered all three approaches to value the property, the cost-less-depreciation, market and income approaches, but concluded not to prepare a cost approach because the property is over ten years old and thus depreciation is difficult to calculate.

Pursuant to the sales approach, Mr. Kernen chose four sales of neighborhood shopping centers, comparable to the subject property. The sales consisted of comparable one, Chelsea Shopping Center, comparable two, Highland Town Center, comparable three, Hartland Plaza and comparable four, Grand River Plaza. He considered adjustments to the comparables for property rights conveyed, financing terms, conditions of sale, expenditures after purchase, market conditions, location, building size, condition, quality of construction, land to building ratio and other economic factors, including occupancy issues and contract rent.

Comparable one has a superior location, consisted of more square footage, has an inferior condition, superior occupancy, but inferior net operating income. After adjustments, its value per square foot is \$66.27. Comparable two was adjusted for its superior location and inferior condition. Its adjusted value per square foot is \$106.64, which Mr. Kernen determined was an outlier. Comparable three has a superior location, inferior condition, larger land to building ratio, and inferior occupancy to the subject. Its adjusted value per square foot is \$79.87. Comparable four has a superior location, larger building size, inferior condition as it was built in 1991; higher occupancy, but lower net operating income per square foot. The adjusted sale price of comparable four is \$56.81 per square foot. The range of adjusted sale prices is \$56.81 to \$106.64 per square foot and Mr. Kernen reconciled his value conclusion of the subject property at \$75 per square foot for the 2016 tax year, or \$3,700,000.<sup>3</sup> Mr. Kernen noted that after completion of his appraisal, he discovered that comparable two had a Rite-Aid store which

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<sup>2</sup> Tr. at 75.

<sup>3</sup> See Tr. at 69-71, 76, P-1 at 39

occupied 11,000 square feet. As such, his conclusion that comparable two is an outlier was confirmed, and his application of less weight to that comparable was reinforced.

For the 2017 tax year, Mr. Kernen utilized the same four comparable properties, but adjusted them for other economic factors by an additional 5%, as vacancy was reduced given two new tenants were acquired, ATI and Biggby. As such, his range of unit rates is \$59.17 to \$111.97 per square foot, which he reconciled at \$80 per square foot. Mr. Kernen's conclusion of true cash value for the subject property under the market approach is \$3,900,000 for the 2017 tax year.<sup>4</sup>

Mr. Kernen also prepared an income approach to value, which he summarized as such,

The main steps would be determining the income to the property, so in this case rental income to the property, so determine rental rates and apply that to the square footage. You want to look at the market vacancy and credit loss and you would apply that in the approach. The next step would be to look at any other income such as reimbursable operating expenses and so that would be added as an additional income item, that'll give you effective gross income. From there you deduct or project and deduct operating expenses to get to net operating income and you capitalize that to get to a value estimate.<sup>5</sup>

For the 2016 tax year, Mr. Kernen chose seven small, inline space, market rentals, comparable to the subject properties' inline space. The rentals were all triple net leases where the tenant is responsible for reimbursing operating expenses to the landlord. He adjusted those comparables to make them consistent with the characteristics of the subject properties for factors such as, overall market conditions, location, tenant size, condition, quality of construction and other relevant factors that might not fit in the aforementioned categories.<sup>6</sup>

Comparable one is located at the Oaks Shopping Center in Saline, which under cross-examination, Mr. Kernen agreed was about 28-30 miles from the subject property. The Center has 53,000 square feet and was built in 2007. The leased area is 1,034 square feet and rented for \$14 per square foot in February 2017. The comparable was adjusted for superior location and

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<sup>4</sup> Tr. at 76-77.

<sup>5</sup> Tr. at 78.

<sup>6</sup> Tr. at 80-81.

tenant size, noting smaller spaces demand higher rental rates,<sup>7</sup> and the concluded adjusted rental rate was \$12.60 per square foot. Comparable two is located in the same center, consists of 1,077 square feet and rented for the rate of \$12 per square foot in December 2016. The comparable had an inferior location, relative to comparable one, due to its placement in the middle of the shopping center, so no location adjustment was necessary. Further, the comparable was adjusted for tenant size and its adjusted rental rate was \$11.40 per square foot.<sup>8</sup>

Comparable three is in the Howell Grand Plaza in Howell, Michigan. It is a 16,745 square foot building and was constructed in 1985. The leased space consists of 3,120 square feet and rented for \$15 per square foot in November 2015. The adjustments applied were for superior location and condition, given its older age than the subjects' which were built in 2004-2005. The adjusted rental rate was \$15 per square foot as the location and condition adjustments cancelled each other out. Comparable four is the Wallace Building which is a neighborhood shopping center in Dexter, Michigan. The building size is 12,331 square feet and it was built in 1962 with an extensive renovation in 2007. The comparable lease was for a 1,475-foot space which rented at a rate of \$12.67 per square foot in November 2015. The comparable was adjusted for condition resulting in a rental rate per square foot of \$13.94. Comparable five is Fountain Square in Hartland Township, which was constructed in 1997. It consists of 26,301 square feet and the rental space is 1,616 square feet. The lease was signed in October 2015 at \$16.50 per square foot and adjustments made for location and condition, which resulted in an adjusted rental rate of \$15.68 per square foot.<sup>9</sup>

Comparable six is also located in Fountain Square, consists of 2,002 square feet and the lease was signed in August 2015, with three months free rent. The rental rate of \$16.50 per square foot, was adjusted for location, condition, and "other relevant factors," due to the comped rent, which results in an adjusted rental rate of \$14.85 per square foot. The final comparable, comparable seven, is located in Country Creek Village, in Saline. It consists of 30,000 square feet and was built in 1999. The comparable lease was signed in January 2015 for \$12 per square

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<sup>7</sup> Mr. Kernen testified, "Essentially you have economies of scale here, so if you have a larger building, an owner can spread out a lot of costs and management and a lot of things over the larger square footage and so a larger property, they're willing to pay [take] less per unit than a smaller property, all else equal." See Tr. at 68-69.

<sup>8</sup> Tr. at 81-83, P-1 at 47.

<sup>9</sup> Tr. at 83-84. P-1 at 47.

foot. The rental rate was adjusted for location, tenant size, condition, and tenant improvement allowance, another of the “other relevant factors,” for an adjusted rental rate of \$12 per square foot. The range of adjusted rental rates was \$11.40 to \$15.68 per square foot, which Mr. Kernen reconciled at \$14.00 per square foot, triple net.

For large inline space, because of the Dollar Treasure/Dollar Tree tenant, Mr. Kernen prepared a separate analysis. He analyzed the original Dollar Treasure gross lease rate of \$10.00 to \$10.50 per square foot, noted it was reduced to \$5.00 per square foot, on a month-to-month basis, then vacated and re-rented to Dollar Tree for \$10.50 per square foot, gross. Mr. Kernen determined that a \$10.50 gross rental rate equated to \$7.00 per square foot, triple net, and also noted \$7.00, triple net, reflected the market rental rate for large inline space. As such, Mr. Kernen valued the 11,110-foot rental space at \$7.00 per square foot. Mr. Kernen testified he made the same rental analysis for the 2017 tax year. <sup>10</sup>

Though the property is not actually stable in occupancy, for a market income analysis, Mr. Kernen utilized a stabilized vacancy rate of 10% and credit loss of 1%. Those numbers were deducted from gross rental income of \$14 per square foot to calculate net rental income at a rate of \$11.04 per square foot for 2016. Expense reimbursement revenue, for triple net leases, was added to calculate effective gross income. Operating expenses were projected from expense comparables and the subject properties’ historical performance, which included property insurance, common area maintenance, management fees and nonrecoverable [expenses](#). Net operating income (“NOI”) was calculated by deducting total operating expenses from effective gross income for a NOI of \$445,535. An overall capitalization (“cap”) rate derived from eight market transactions, investor surveys and a band of investment analysis, put forth a reconciled cap rate of 10.25%. Property taxes were not included in operating expenses, so an effective tax rate was added to the overall capitalization rate of .25%, for a tax loaded cap rate of 10.5%. After applying the tax adjusted cap rate to net operating income, the resulting value for 2016 was determined to be \$4,200,000. Because the subject properties are 25% vacant, Mr. Kernen deducted \$390,000 in lease-up costs for rent loss, expense recovery loss from triple net leases,

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<sup>10</sup> Tr. at 87-89, P-1 at 56,58.

free rent, tenant improvements and leasing commissions. As such, his final value conclusion for 2016 is \$3,810,000.

For 2017, Mr. Kernen analyzed the same small inline rental spaces and made no additional adjustments. He also utilized the same large inline rental space rate because he determined rental rates were relatively flat between the 2016 and 2017 tax years. He did apply a stabilized vacancy rate of 9%, given he determined occupancy was improving slightly. His operating expenses were calculated to be \$243,065, a little more than the prior year due to slight pricing increases, and NOI was concluded to be \$451,132. The same overall cap rate of 10.25% was utilized, but the tax adjusted rate differed slightly because vacancy went down and the base millage rate changed. As a result, the tax adjusted rate was 10.48%. Lease-up costs of \$130,000 were less than in 2016, because two tenant spaces were occupied, for a total conclusion of true cash value for the subject property for the 2017 tax year of \$4,170,000.<sup>11</sup>

Mr. Kernen reconciled his market an income approaches to value, placing the most emphasis on the income approach and concluded in the final true cash value for the subject properties of \$3,800,000 for 2016 and \$4,100,000 for 2017.<sup>12</sup>

On cross-examination, Mr. Kernen was questioned about his sales comparables, including, among other factors, the traffic count and visibility of comparable one and visibility and average household income surrounding comparable two. Comparable three was foreclosed upon and then resold by Fifth/Third Bank and Respondent challenged Mr. Kernen's determination that it had better visibility than the subject property. Comparable four's anchor tenant, Carson's has gone into bankruptcy, but was not in bankruptcy on tax day and the retail store is still presently in that location. Comparable four had tenants such as Dunham's, T.J. Maxx, and Big Lots, which are not small inline tenants, and as such, Respondent contends comparable four is not truly comparable to the subject property. In essence, Respondent was questioning the appropriateness and reliability of Mr. Kernen's comparables and adjustments.

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<sup>11</sup> See P-1 at 44-58. Tr. at 78-106.

<sup>12</sup> Tr. at 107. P-1 at 61.

With regard to income comparables, Mr. Kernen noted that only comparables three, five and six are in Livingston County, such as the subject property. He further noted that there is a neighborhood shopping center in close proximity to the subject, which was not utilized, because he was unable to obtain rental information from that center.<sup>13</sup> Mr. Kernen utilized four comparables located in Saline and Dexter, Michigan, in the alternative. Mr. Kernen agreed that residents of Hamburg Township have higher potential spending than the Detroit/Livingston Metropolitan Statistical Area (MSA).<sup>14</sup> He admitted that he did not visit rental comparables one and two, but he did inspect all his sales comparables.

There were many questions concerning Mr. Kernen's comparables in relation to factors such as road frontage, distance from roads, and points of access, and Mr. Kernen testified on redirect, that all those factors are incorporated into the rental rate received for a property.<sup>15</sup> He further testified that another appraisal of the subject properties prepared for the 2015 tax year put forth a market value for the subject properties, of \$3,700,000. Finally, a refinancing appraisal done weeks after the date of valuation concluded in a market value of \$4,350,000.<sup>16</sup> These value conclusions are much less than Respondent's approximately, six-and-a-half million-dollar contention.

#### RESPONDENT'S CONTENTIONS

Respondent contends that the difference between the two parties' valuation conclusions comes down to market rent. Respondent claims its comparables all originate from Livingston County in Townships such as the subject, and as such, the comparables require no adjustments. Respondent contends that Petitioner chose comparables not truly comparable to the subject properties, including four rental comparables in Washtenaw County, when local Livingston County comparables were available.

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<sup>13</sup> Tr. at 151.

<sup>14</sup> Tr. at 115.

<sup>15</sup> Tr. at 183.

<sup>16</sup> Tr. at 182, P-2.

#### RESPONDENT'S ADMITTED EXHIBITS

- R-1: Respondent's Valuation Disclosure
- R-2: Chelsea Shopping Center offering brochure
- R-5: Grand River Plaza tenant index
- R-11: Sketches of 2780-2880 E. Highland, PID11-24-126-013
- R-12: Google Earth pictures of Highland Town Center
- R-14: Google Earth pictures of Hartland Plaza
- R-15: Hartland Plaza signage
- R-16: Google Earth pictures of Grand River Plaza

#### RESPONDENT'S WITNESSES

##### Mark MacDermaid

Mr. MacDermaid is an assessor and is retained by Livingston County to do commercial appraisal studies, including vacancy and rent studies.<sup>17</sup> He testified that Petitioner's rental comparable three has been in that location for over ten years, and as such, the lease is not recent.

##### Susan Murray

Ms. Murray, the Assessor for Hamburg Township, was qualified as an expert in assessing by the Tribunal. She testified that the subject properties consist of five parcels of land that may be sold separately.

Ms. Murray testified she prepared a valuation disclosure regarding the properties including the cost-less-depreciation, sales and income approaches to value, though she placed the most emphasis on her income and sales approaches. She determined the highest and best use of the property to be commercial.

Pursuant to her cost approach, she prepared a vacant land study to determine the value of the land under the improvements.

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<sup>17</sup> Tr. at 190.

Ms. Murray testified that in her sales approach, she did not apply adjustments to her comparables because,

I set parameters for my sales comparables, and the parameters were, I wanted inline tenants in Livingston County without large rental space, without big boxes, as everyone calls them, I wanted them on main roads with similar economic rents, similar size, if possible, and because this subject can be sold as parts or all, I found sizes that were comparable.

I tried to find something with a shadow anchor, not an anchor tenant but a shadow anchor, and then I put my parameter at parcels between 6,000 and 70,000 square feet and I wanted them built within a certain amount of time, so I set the parameter at 2000 to 2010, in good condition, buildings similar to the subject with brick or block, good storefront exposure, similar millage rates and properties that sold for cash or cash equivalent.<sup>18</sup>

Ms. Murray presented the Tribunal with three sales. Her comparable one is located at 2394 Genoa Business Park in Livingston County, thirteen miles from the subject property. It consists of 20,926 square feet, but no adjustment was made for size, because, “[i]t’s an inline tenant without a big box.”<sup>19</sup> It was built in 2008 with similar construction as the subject properties and sold in December 2014 for \$2,110,000 or \$100.83 per square foot. Though not a rental comparable, Ms. Murray testified that its economic rents were from \$15 to \$19.25. Comparable two is in Livingston County at 9290 Lee Road, sold in April 2014 for \$3,000,000 or \$165.34 per square foot, has a traffic count of 18,900 cars, and is seven-and-a-half miles from the subject properties. It is on a main road, has inline stores and the silent anchors, Kohl’s and Costco. It consists of 18,144 square feet and its economic rents are \$18 per square foot. Comparable three is located on 1000 West Highland Road in Livingston County, has a traffic count of 21,600 cars, and sold in 2014 for \$1,185,000 or \$80.18 per square foot. It is 14.7 miles from the subject property, has inline stores, consists of 14,780 square feet, was built in 2006, and its economic rents are \$15 per square foot.<sup>20</sup> Ms. Murray’s range of values under the sales approach for both tax years was \$80 to \$165 per square foot, which she reconciled at \$117 per square foot. As such, her contention of value for the subject properties, under the sales approach, is \$6,735,000, or 57,564 gross square feet multiplied by \$117 per square foot, for 2016 and 2017.

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<sup>18</sup> Tr. at 201-202.

<sup>19</sup> Tr. at 205.

<sup>20</sup> Tr. at 203-208, R-1 at 4.

Ms. Murray testified that the subject property has a traffic count of 25,757 cars and all traffic counts were extracted from SEMCOG, Southeast Michigan Council of Government.<sup>21</sup> She testified that she did not make time adjustments from the 2016 to 2017 tax years, because “there’s been not a whole lot of difference between the two years.”<sup>22</sup> Ms. Murray did not provide any property record cards, sales listings, communications with brokers, or written SEMCOG information in her valuation disclosure regarding her comparables.

Ms. Murray’s income approach consisted of fourteen comparables located in the subject property neighborhood shopping center, Chilson Commons, and two comparables in a strip center across the street. She testified she consulted the subject properties’ website and found asking rents of \$16-\$20 per square foot. After sending discovery requests, Ms. Murray determined 70% of the leases in Chilson Commons were for \$17 or higher, taking out Dollar Treasure. With regard to the two properties across the street from the subject, comparable fifteen, a dry cleaner, rented for \$18.21 per square foot and comparable sixteen, a dog grooming shop, rented for \$18.46 per square foot. Ms. Murray testified that the dry-cleaning shop located in Chilson Commons rented for \$18 per square foot. After considering her inline rental comparables, Ms. Murray determined a market rental rate of \$17 per square foot.<sup>23</sup> She also reconciled common area maintenance charges at \$3.00 per square foot, “from a study of leases,”<sup>24</sup> for a total rental rate of \$20 per square foot.

With regard to the Dollar Treasure lease, Ms. Murray consulted two leases in Howell for larger properties, PetSmart, which is 20,373 square feet leased for \$10.50 per square foot and Gold’s Gym, which is 10,000 square feet leased for \$14.90 per square foot. Ms. Murray reconciled the two leases at \$12 to \$12.70 per square foot.<sup>25</sup> Ms. Murray extracted a vacancy rate of 24% from Petitioner’s comparables and a county vacancy study, and 25% for an expense rate, which “came from the county study, they send out RPS statements, it’s called 4182, and

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<sup>21</sup> Tr. 203-204.

<sup>22</sup> Tr. at 208.

<sup>23</sup> Tr. at 210-212.

<sup>24</sup> R-1 at 2.

<sup>25</sup> Tr. at 216.

they gather all that information.”<sup>26</sup> From her sales and income approaches to value, Ms. Murray’s reconciled value was \$6,445,000 for both tax years.<sup>27</sup>

On cross examination, Ms. Murray testified the narrative in her valuation disclosure consisted of about two pages, and her sales parameters were not included. She also testified regarding her sales approach, though her comparable properties were one-third the size of the subject properties, she did not make size adjustments. Ms. Murray testified that two of her three sales comparables were on prominent roads in Livingston County: Grand River Avenue and M59, while the subject property is located on M-36; however, she made no adjustment for location. Further, her sales occurred in 2014, but no adjustments were made for date of value and she did not discuss the parties to the transactions. In fact, she did not disclose that half of comparable one is owned by a church, she did not know comparable two sold as part of a portfolio sale and she wasn’t aware that comparable three was sold with an excess piece of land that it being independently developed. She also failed to discuss the occupancy of the comparables.<sup>28</sup>

With regard to her income approach to value, Ms. Murray testified that she did not identify her large inline space rental comparables in her valuation disclosure, did not provide the lease inception dates, and did not include the calculations underlying her conclusion to utilize \$17 per square foot as her small, inline, reconciled rental rate, minus CAM. She also did not identify the properties utilized to conclude in a 24% vacancy rate and did not include lease-up costs in her income approach. Ms. Murray testified she provided no support in her valuation disclosure for her conclusion of 25% in expenses, or her tax loaded capitalization rate of 10.182%.

#### FINDINGS OF FACT

1. The subject property is a neighborhood shopping center consisting of five buildings situated on ten of acres of land. The true cash and taxable values of only seven of the ten acres are under contention in this matter. The improvements’ net rentable square footage is 48,848.

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<sup>26</sup> Tr. at 217.

<sup>27</sup> Tr. at 219.

<sup>28</sup> Tr. at 225-237.

2. The properties are located at 9540-9682 Chilson Commons Circle, along the south side of M-36, in Hamburg Township, Livingston County, Michigan. They are in the Detroit Metropolitan Statistical Area/Howell-Brighton submarket.
3. The properties had thirteen tenants as of December 31, 2015 and fifteen tenants as of December 31, 2016. The properties have two vacant shells with dirt floors and exposed framing. The overall occupancy as of December 31, 2015 is 75.8% and for December 31, 2016, 86.5%.
4. Petitioner presented an appraisal of the properties with income and market approaches to value but based its conclusions of value pursuant to the income approach, supported by the market approach. The cost approach was considered before the preparation of the appraisal, but rejected.
5. Petitioner put forth four comparable sales, adjusted to be consistent with the characteristics of the subject property. Petitioner put forth seven small, inline rental comparables in neighborhood shopping centers, and also determined a large inline space rental rate. The properties have small inline rental space of 37,738 square feet and large inline rental space of 11,110 square feet. Petitioner's rental comparables were adjusted to be consistent with the characteristics of the subject property. Three of the comparables were located in Livingston County and four in Washtenaw County.
6. Respondent presented a valuation disclosure which included cost-less-depreciation, income and market approaches to value. Respondent contends that it relied on its income and market approaches to value.
7. Respondent presented three sales comparables that were unadjusted.
8. Respondent presented sixteen unadjusted small, inline rental comparables, fourteen of which were located in Chilson Commons. Respondent verbally provided two large, inline rental leases, however, no lease inception date was provided. The sales and rental comparables were all in Livingston County.

## 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.<sup>29</sup>

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. . . .<sup>30</sup>

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.<sup>31</sup>

The Michigan Supreme Court has determined that “[t]he concepts of ‘true cash value’ and ‘fair market value’ . . . are synonymous.”<sup>32</sup>

“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.”<sup>33</sup> The Tribunal is not bound to accept either of the parties' theories of valuation.<sup>34</sup> “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.”<sup>35</sup> 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.”<sup>36</sup>

A proceeding before the Tax Tribunal is original, independent, and de novo.<sup>37</sup> The Tribunal's factual findings must be supported “by competent, material, and substantial

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<sup>29</sup> See MCL 211.27a.

<sup>30</sup> Const 1963, art 9, sec 3.

<sup>31</sup> MCL 211.27(1).

<sup>32</sup> *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).

<sup>33</sup> *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).

<sup>34</sup> *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 378 NW2d 590 (1985).

<sup>35</sup> *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

<sup>36</sup> *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).

<sup>37</sup> MCL 205.735a(2).

evidence.”<sup>38</sup> “Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence.”<sup>39</sup>

“The petitioner has the burden of proof in establishing the true cash value of the property.”<sup>40</sup> “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.”<sup>41</sup> 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.”<sup>42</sup>

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.<sup>43</sup> “The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading.”<sup>44</sup> 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.<sup>45</sup>

Regardless of the valuation approach employed, the final valuation determined must represent the usual price for which the subject would sell.<sup>46</sup> The Tribunal finds the income approach is the best method of valuing the subject income-producing properties.

The subject property is a neighborhood shopping center. It has rent-paying tenants which are the source of Petitioner’s income. When determining the “usual price for which the subject would sell,” a potential purchaser would consider the income it could generate from the properties, especially persuasive when both valuation experts determined the highest and best

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<sup>38</sup> *Dow Chemical Co v Dep’t of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990).

<sup>39</sup> *Jones & Laughlin Steel Corp*, 193 Mich App at 352-353.

<sup>40</sup> MCL 205.737(3).

<sup>41</sup> *Jones & Laughlin Steel Corp*, 193 Mich App at 354-355.

<sup>42</sup> MCL 205.737(3).

<sup>43</sup> *Meadowlanes*, 437 Mich 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).

<sup>44</sup> *Jones & Laughlin Steel Corp*, 193 Mich App at 353 (citing *Antisdale v City of Galesburg*, 420 Mich 265; 362 NW2d 632 (1984) at 276 n 1).

<sup>45</sup> *Antisdale*, 420 Mich at 277.

<sup>46</sup> See *Meadowlanes*, 437 Mich at 485.

use of the properties to be commercial with Petitioner's appraiser delving further, and concluding the highest and best use of the property to be continued use of the existing improvements as a neighborhood shopping center.<sup>47</sup> According to *the Appraisal of Real Estate*<sup>48</sup>, "[i]n the income capitalization approach, an appraiser analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value."<sup>49</sup> Further,

The income approach is generally considered the most accurate method for valuing income-producing property.<sup>50</sup> In fact, "[w]hen more than one approach to value is used to develop an opinion of value for an income-producing property, the value indication produced by the income capitalization approach might be given greater weight than that of the other approaches in the final reconciliation of value indications."<sup>51</sup>

Mr. Kernan, Petitioner's valuation expert, an appraiser and a Member of the Appraisal Institute, the highest designation for appraisers, completed a full appraisal of the subject properties with written descriptions of the source of his materials and written calculations regarding his conclusions in each critical component in the appraisal, in a form understandable to any reader. In his income approach, he provided rental comparables of seven small, inline spaces, such as those located at the subject property. He properly adjusted those comparables to make them consistent with the characteristics of the subject property. He also considered the rent rolls for the subject properties thereby appropriately bearing in mind actual income in his market income analysis.<sup>52</sup> He further explained his methodology, including how and why he chose the comparables, and what adjustments were necessary. The Tribunal finds that Mr. Kernan's adjustments were appropriate and adopts them in support of its value conclusions. Mr. Kernan's analysis of market rent for the large space in the subject properties, formerly occupied by Dollar Treasure, is also found to be appropriate.

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<sup>47</sup> See P-1 at 33.

<sup>48</sup> *The Appraisal of Real Estate* is the appraisal profession's, "flagship text, reflects this recommitment to the essential principles of appraisal and the sound applications of recognized valuation methodology." Further, "both appraisers and users of their services can be assured that this volume builds on time-tested foundational knowledge and contains the most up-to-date information and learning on valuation available anywhere." *Appraisal of Real Estate*, Forward, written by Richard L. Borges II, MAI, SRA, 2013 President, Appraisal Institute.

<sup>49</sup> Appraisal Institute, *The Appraisal of Real Estate* (Chicago: Appraisal Institute, 14<sup>th</sup> ed, 2013), p 439.

<sup>50</sup> See *CAF Investment Co.*, 392 Mich 442.

<sup>51</sup> *The Appraisal of Real Estate*, p 441.

<sup>52</sup> P-1 at 50. "Historical income and current income are significant, but the ultimate concern is the future." "Current income is a good starting point, but the direction and expected pattern of income change are critical in the capitalization process." See *The Appraisal of Real Estate*, p 463.

Mr. Kernen explained and supported each step in his income approach to value. As noted above, he supported his potential rental income, for small and large inline spaces. He also supported his stabilized vacancy and credit loss, expense reimbursements, operating expenses, tax loaded capitalization rate. Mr. Kernen's stabilized vacancy rate was appropriately extracted from his analysis of the Detroit MSA/Howell-Brighton submarket.<sup>53</sup> His expense reimbursement revenue, based on triple net leases, "has a direct correlation to the occupancy of a property. Expense reimbursement will increase as occupancy increases."<sup>54</sup> Operating expenses were extracted from expenses for the subject property and market comparables,<sup>55</sup> the overall capitalization rate was derived from the market, investor surveys and the band of investment method,<sup>56</sup> and the effective tax rate calculation was put forth in writing, by multiplying the township total millage rate by the assessment factor of 50% for an effective tax factor, which was then multiplied by vacancy and collection losses and finally added to the market capitalization rate.<sup>57</sup>

Ms. Murray, on the other hand, provided little written explanation relative to her income approach. With regard to the small inline spaces, she considered asking rental rates from the property website and included the actual rental rates of fourteen properties located in Chilson Commons, rather than confirming that they are at market rates. She did include two additional rental rates, for a dry-cleaner and a dog grooming business, in a nearby neighborhood shopping center, but testified she was unaware when the leases were signed. As such, there is no way for the Tribunal to determine if the leases are in any way reflective of the market in the 2016 and 2017 tax years. Ms. Murray's testimony and written valuation disclosure, in relation to small inline comparables, were not persuasive to the Tribunal.

With regard to her large inline, reconciled rental rate, Ms. Murray provided zero explanation of the source of her comparables in her valuation disclosure, but testified she consulted two City of Howell leases for larger properties, PetSmart and Gold's Gym; however, the leases weren't presented, the inception date wasn't provided, and as such, there is no way to confirm the accuracy of the testimony. Further, Ms. Murray extracted her vacancy rate from

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<sup>53</sup> P-1 at 19-22.

<sup>54</sup> P-1 at 52.

<sup>55</sup> P-1 at 51, 52.

<sup>56</sup> P-1 at 53-54.

<sup>57</sup> P-1 at 55.

Petitioner's comparables and a county study, and her expense rate from that same study, but the study wasn't provided. Ms. Murray, in her valuation disclosure, explained her calculation of the tax loaded cap rate, but no support of the "21 commercial mortgages reviewed,"<sup>58</sup> was provided. Nevertheless, the tax adjusted cap rate determined by Ms. Murray of 10.182% is not too far off the tax loaded cap rates presented by Mr. Kernen, of 10.5% for 2016 and 10.48% for 2017.

Though the Tribunal is most persuaded by Petitioner's income approach to value, there is one issue it has explored that it finds suspect. Mr. Kernen utilized seven inline, small rental comparables; however, four were located outside of Livingston County decreasing his adjusted range of rental values per square foot. Comparables one, two and seven are located in Saline, Michigan in Washtenaw County, which Mr. Kernen estimated to be 28-30 miles from the subject property. Their adjusted rental rates are \$12.60, \$11.40 and \$12.00 per square foot. Comparable four is located in Dexter, Michigan, Washtenaw County, and its adjusted rental rate is \$13.94 per square foot. The comparables in Livingston County, where the subject property is located, however, have adjusted rental rates of \$15.00, \$15.68 and \$14.85 per square foot, from which the Tribunal finds a reconciled market rental rate of \$15.00 per square foot, to be the most accurate determination in calculating the true cash value of the subject property, under the income approach, for the 2016 and 2017 tax years. Mr. Kernen's range of rental rates per square foot led him to conclude in a market rental rate for small inline space of \$14 per square foot.

Utilizing \$15 per square foot as the market rental rate for small inline space and accepting all other values put forth by Petitioner, the Tribunal finds the true cash value of the subject property for the 2016 tax year to be \$4,200,000 and for 2017, \$4,500,000.<sup>59</sup>

The Tribunal also adopts Mr. Kernen's contention of net rental square footage, finding the two empty shells, with dirt floors and exposed framing, have no value to the buyer. Mr. Kernen testified a buyer would not attribute any value to the empty, unfinished spaces given there has never been any demand for those spaces since construction in 2004/2005, and the properties are already struggling with vacancy rates of about 25%, while his Detroit/Howell-Brighton submarket analysis puts forth an average vacancy rate of about 10%.

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<sup>58</sup> R-1 at 3.

<sup>59</sup> Potential rental income for small inline space is revised to \$566,070 for both tax years. (\$15 x 38,738 square feet).

The Tribunal is not persuaded by Ms. Murray's cost approach to value the property. The property was built in 2004-2005, and as such was at least 10-years-old on the first date of value, of December 31, 2015. As Mr. Kernen testified, depreciation is hard to calculate in older properties. "Because cost and market value are usually more closely related when properties are new, the cost approach is important in estimating the market value of new or relatively new construction."<sup>60</sup>

The Tribunal finds Mr. Kernen's market approach to value provides some support for the Tribunal's determination of true cash value for the subject property, however, Ms. Murray's market approach does not. Again, Ms. Murray has not provided adequate written support for her comparables and further, she did not make adjustments to make them consistent with the characteristics of the subject property. Ms. Murray did testify that she applied parameters in searching for her sales comparables, but the parameters were not provided in her valuation disclosure. Most troubling, Ms. Murray's three comparables were 20,926 square feet, 18,144 square feet and 14,780 square feet, less than half the size of the subject property and no adjustments were made. "Proper application of the sales comparison approach involves "comparing similar properties that have recently sold . . . identifying appropriate units of comparison and making adjustments to the sale prices . . . of the comparable properties based on relevant, market-derived elements of comparison."<sup>61</sup> As noted above, the Tribunal finds the income approach to value to be the appropriate technique to utilize in concluding in the true cash value of the subject income-producing properties for the 2016 and 2017 tax years.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that the subject properties are over assessed. 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 years at issue are MODIFIED as set forth in the Introduction section of this Final Opinion and Judgment.

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<sup>60</sup> *The Appraisal of Real Estate*, p 566.

<sup>61</sup> *The Appraisal of Real Estate*, p 377.

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

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

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

#### APPEAL RIGHTS

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

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.<sup>62</sup> Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is \$50.00 in the Entire Tribunal and \$25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.<sup>63</sup> A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.<sup>64</sup> Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.<sup>65</sup>

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."<sup>66</sup> A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.<sup>67</sup> The fee for certification is \$100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.<sup>68</sup>

By Preeti P. Gadola

Entered: July 16, 2018

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<sup>62</sup> See TTR 261 and 257.

<sup>63</sup> See TTR 217 and 267.

<sup>64</sup> See TTR 261 and 225.

<sup>65</sup> See TTR 261 and 257.

<sup>66</sup> See MCL 205.753 and MCR 7.204.

<sup>67</sup> See TTR 213.

<sup>68</sup> See TTR 217 and 267.