STATE OF MICHIGAN

IN THE SUPREME COURT

MENARD, INC.,

Petitioner-Appellant,

v

CITY OF ESCANABA,

Respondent-Appellee.

Supreme Court No. 154062

Court of Appeals No. 325718

Michigan Tax Tribunal Docket Nos. 441600 and 14-0001918 (consolidated)

_____/

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AMICUS CURIAE BRIEF OF THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

The Amicus Curiae Michigan Manufacturers Association concurs in the Statement Identifying Order Appealed From and Relief Sought set forth on page iv of the Application for Leave to Appeal of Petitioner-Appellant Menard, Inc. ("Menard"). Page vi of the Respondent/Appellee City of Escanaba's Answer to Application for Leave to Appeal ("Appellee's Answer"), purports to describe the order on appeal, but omits critical errors of law.

QUESTIONS PRESENTED

1. Should this Court grant Appellant's Application for Leave to Appeal and, on appeal, reverse the Court of Appeals holding that the subject property's true cash value be based upon value in use and not its usual selling price where the Court of Appeals Opinion:

   a. involves an issue of significant public interest regarding the appropriate standard of valuation of property for property tax purposes and applies to a subdivision of the state;

   b. involves a legal principle of major significance to the state's jurisprudence;

   c. is clearly erroneous and will cause material injustice to taxpayers of this state; and

   d. conflicts with this Court's decision in *First Federal Savings & Loan Ass'n of Flint v Flint*, 415 Mich 702; 329 NW2d 755 (1982) and *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 640-41; 462 NW2d 325 (1990), and other published decisions of the Michigan Court of Appeals, including *Meijer, Inc v Midland*, 240 Mich App 1, 7; 610 NW2d 242 (2000)?

   Petitioner/Appellant answers, "Yes."

   Respondent/Appellee answers, "No."

   Amicus Curiae Michigan Manufacturers Association ("MMA") answers, "Yes."

   The Court of Appeals below answered, "No."

   The Tax Tribunal below did not address this issue.

2. Does the Court of Appeals decision below constitute error of law because it:

   a. holds that, when determining true cash value under the General Property Tax Act, value in use (a non-realizable value) may be substituted for the statutorily and uniformly required usual selling price (a realizable value in the marketplace);

   b. is inconsistent with and violates this Court's prior decisions; and

   c. violates MCR 7.215(J)(1) because it is inconsistent with the Court of Appeals published decision in *Meijer, supra*, which was issued after November 1, 1990, and required true cash value be based on usual selling price consistent with this Court's decision in *First Federal*?

   Petitioner/Appellant answers, "Yes."

   Respondent/Appellee answers, "No."

   Amicus Curiae MMA answers, "Yes."

   The Court of Appeals below answered, "No."

   The Tax Tribunal below did not address this issue.

I. INTRODUCTION AND SUMMARY

A. The Type Of Value Required In Property Taxation Is Of Major Importance To Michigan Property Taxpayers And This State's Jurisprudence.

The General Property Tax Act, MCL 211.1 *et seq.*, ("GPTA") is the statutory basis for Michigan property taxation. The GPTA codifies property taxation based on true cash value ("TCV"). GPTA section 27; MCL 211.27, defines TCV as "usual selling price," a value that is realizable in the market (i.e., can be achieved) and equivalent to market value.

As this case illustrates, the GPTA's most fundamental concept is the type of value used to determine TCV. *The Appraisal of Real Estate* states: "One essential task that the appraiser must complete *at the very onset of the valuation process* is identifying and defining the type of value that will be the focus of the appraisal assignment." Appraisal Institute, *The Appraisal of Real Estate*, 14th ed (Chicago, 2014), p 57 (emphasis added).

The Court of Appeals Opinion below, *Menard Inc v Escanaba*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325718) (the "Opinion") (Exhibit A to Petitioner-Appellant's Application for Leave to Appeal), ordered a valuation based on value in use. Value in use is not "usual selling price." This is a monumental error of law affecting every property taxpayer and all taxing units, including Appellee City of Escanaba (the "City" or "Appellee"), a State subdivision. As a result, this case is of significant public interest and of major significance to the State's jurisprudence.

B. The Opinion Provides For Property Taxation Based On Value In Use.

The Opinion's holding is based on *Clark Equipment Co v Leoni Twp*, 113 Mich App 778; 318 NW2d 586 (1982), which involved the valuation of a large industrial plant. After analyzing *Clark*, the Opinion concludes that, "this case is governed by *Clark*." Opinion, p 10. The Opinion, p 9, includes a lengthy quote from *Clark* that endorses value in use and provides a

purported justification for this judicially substituted value standard. A key part of the quote from *Clark* follows:

> [A]s we construe MCL 211.27; MSA 7.27, to the extent that an industrial plant is not so obsolete that, if a potential buyer did exist who was searching for an industrial property to perform the functions currently performed in the subject plant, said buyer would consider purchasing the subject property, ***the usual selling price can be based upon value in use***. . . . To construe MCL 211.27; MSA 7.27, as requiring the taxing unit to prove an *actual* market for a property's existing use would lead to absurd undervaluations. Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. . . . It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost ***premised on value in use*** because, in actuality, such industrial facilities are rarely bought and sold. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists. [*Id*. at 784-785. . . .] [Opinion at 9 (emphasis added).]

As will be explained below, there are multiple ways this value in use standard misguides the valuation process, and violates the Michigan Constitution of 1963 (the "Constitution") and the GPTA's TCV definition. Nothing demonstrates this more than the Opinion's conclusion that the subject property has no deficiencies because "the same building would be built by Menard [the owner] if it were to build a new store." Opinion, p 11.[1] Thus, based on the Court of Appeals decision in *Clark*, the Opinion adopted value in use as the value standard.

C. The Opinion's Reliance On *Clark* Constitutes Error Because *Clark* Was Based On A Court Of Appeals Decision That This Court Reversed.

Critically, the Opinion omits from the above lengthy *Clark* quote, the very next sentence where *Clark* states: "*This is in accordance with First Federal Savings*, *supra*, 619-620, 305 NW2d 553. . . . *Clark*, 113 Mich App at 785 (emphasis added). This omission is significant

[1] As examples below will show, with a value standard of usual selling price and market value, functional obsolescence and other property deficiencies are not determined based on whether a property owner would construct the same existing building, if it were to build a new one.

because (1) *Clark's* value in use holding was based on the Court of Appeals decision in *First Federal Savings & Loan Ass'n of Flint v Flint*, 104 Mich App 609; 305 NW 2d 553 (1981), and (2) this Court reversed and repudiated that decision. *First Federal Savings & Loan Ass'n of Flint v Flint,* 415 Mich 702; 329 NW2d 755 (1982). Indeed, the Court of Appeals decision in *First Federal* was the only authority cited in *Clark* for the proposition that value in use may substitute for usual selling price. Thus, this Court overturned the basis for the *Clark* decision and the basis for the Opinion.

The City claims that the Opinion "did not adopt a 'value in use standard'" (Appellee's Answer, p 23). The City also asserts that *Clark* both represents good law and is consistent with this Court's decision in *First Federal* (Appellee's Answer, pp, 25-26). These claims are untrue.

D. The Opinion's Value In Use Holding Is Contrary To The Constitution, The GPTA, And This Court's Holding In *First Federal.*

Const 1963, art 9, § 3 unambiguously mandates uniformity in property taxation. The GPTA, MCL 211.27(1), unambiguously defines TCV as "usual selling price," a realizable value in the market. In rejecting value in use in *First Federal*, this Court enforced the unambiguous language in the Constitution and the GPTA, pursuant to which TCV must be based upon and limited to the usual selling price. As this Court concluded, "the constitution and the General Property Tax Act require that property tax assessments be based on market value. . . ." *First Federal*, 415 Mich at 703. By adopting the value in use standard as a substitute for usual selling price, the Opinion violated unambiguous constitutional and statutory language and this Court's *First Federal* decision.

E. Conceptually, Value In Use Is Different From Usual Selling Price.

Value in use is not based on what potential purchasers may be willing to pay in the open market. Therefore, value in use analysis is an aberration of the usual selling price value standard set forth in the GPTA. As this Court observed in *First Federal*, 415 Mich at 706 n 6, "[a]

greenhouse, a gazebo, a tennis court, or a hot tub, while of value to the owner, do not necessarily add dollar-for-dollar to the usual selling price." Indeed, an owner's expenditures can reduce property values. A new long and narrow swimming pool in a residence's front yard or a new office building constructed with orange and gray tiled flooring and pink and purple Formica cabinets, are examples. *In all of the foregoing examples, the owner's cost may very well reflect the value in use* (value to the owner). Yet, the improvements' realizable value in the market, as established by the usual selling price, may be relatively modest or even negative.[2]

F. The Lawful Value Standard Directly Affects Property Valuations And Taxation Under The GPTA.

As discussed above, the type of value must be identified at the outset of the valuation process. This is because the valuation process is different for different types of value. The Opinion orders reconsideration of both the sales comparison approach and the cost approach (Opinion, p 12). A cost approach valuation, the approach Appellee champions, is not per se an invalid approach to determining TCV (usual selling price). "Depending on the purpose of the appraisal assignment, the cost approach can be used to develop an opinion of market value [usual selling price] or use value. . . ." *The Appraisal of Real Estate*, p 567. However, the GPTA's unambiguous value standard requires that cost approach methodology be applied to determine usual selling price.

When using a cost approach to determine usual selling price (market value), all losses in value must be deducted from replacement cost. The above examples, including those described in *First Federal*, show that to determine usual selling price, the loss in value reflected in the market must be deducted from replacement cost. Without such deductions, the cost approach

[2] These examples show why the Opinion erred in adjudicating functional obsolescence based on whether "the same building would be built by Menard if it were to build a new store." Opinion, p 11. The market, and not value to the specific property owner who constructs an improvement, is the source for determining whether functional obsolescence exists and its amount.

valuation is incomplete, leaving a legally irrelevant and unrealizable indicated value. The Opinion unlawfully authorizes this.

G. This Brief's Focus Is On The Lawful Value Standard.

While Menard's Application raises other issues, this Brief addresses (1) the standard of valuation or type of value, and (2) whether that standard or type of value can vary based on the property or property owner involved. There are multiple value standards and types of value, such as market value (usual selling price, value-in-exchange or realizable value), insurable value, and value in use (use value or value to the owner). There are also multiple valuation methods that can be used to determine the value sought (e.g., sales comparison approach, income approach, and cost approach).

This Brief's focus is on the appropriate standard or type of value and not the valuation methods or related issues. **It is critical to understand that (1) the standard of value or type of value and (2) the valuation methods that may be used to determine that value are two totally different concepts. Regardless of what valuation methods are used, those valuation methods must be applied to determine the legally required standard of value. In determining TCV, the legally required standard of value is usual selling price (market value), a realizable value in the market.** Value in use has no relevance in Michigan property tax law. Because the Opinion provides for a value standard other than usual selling price, the Opinion constitutes error of law. [3]

[3] The Tax Tribunal has repeatedly recognized and discussed the significant difference between an objective usual selling price standard and the "value in use" or "use value" ordered in the Opinion. For example, in *Thrifty Royal Oak, Inc v Royal Oak,* 4 MTT 455 (Docket No. 33945), issued September 4, 1986; 1986 WL 20538 at * 6 (Exhibit 1 hereto), the Tax Tribunal held:

> MCL 211.27 . . . requires use of the cash value, being "the usual selling price . . . which could be obtained at private sale. . . ." Value in use simply does not

II. STATEMENT OF INTEREST OF THE AMICUS CURIAE

The MMA is an association of Michigan businesses. The MMA is organized and exists to promote the interests of Michigan businesses and of the public in the proper administration of laws, to study matters of general interest to its members, and otherwise to promote the general business and economic climate of the State of Michigan. A significant aspect of the MMA's activities involves representing its members' interests before state and federal courts, legislatures, and administrative agencies.

Through effective representation of its membership before the judicial, legislative, and executive branches of government on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan. The MMA appears before this Court as a representative of approximately 2,500 private business concerns, all potentially affected by the dispute in this case.

The interests of manufacturers are coextensive with the interests of the citizens of Michigan. Simply put, manufacturing is the backbone of Michigan's economy. Manufacturing

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> measure this definition of value. Value in use and the statutory standard are two distinct concepts of value.

In *Amway Grand Plaza Hotel v Grand Rapids*, 11 MTT 496; 2001 WL 1557496 (Docket No. 237807), issued November 26, 2001 (Exhibit 2 hereto), the Tax Tribunal again upheld this Court's requirement that TCV not be based on value in use or the identity of the owner, citing this Court's decisions in *First Federal* and *Edward Rose Building v Independence Township*, 436 Mich 620; 462 NW2d 325 (1990):

> The legal standard relative to ownership and market value was well stated by the Michigan Supreme Court in *First Federal Savings & Loan v City of Flint*, 415 Mich 702, 703; 329 NW 2d 755 (1982): "The Constitution and the General Property Tax Act require property assessments be based on market value, not value to the owner. . . ." The same concept was stated in a later case, *Edward Rose Building Company v Independence Township*, 436 Mich 620, 640-641; 462 NW 2d 325 (1990), where the Michigan Supreme Court wrote: "In other words, the fact of ownership is not a germane consideration in determining value." [*Id.* at * 75.]

generates 15.1% of the gross state product, comprises 13.9% of total nonfarm employment, and employs 602,500 people in Michigan. Furthermore, Michigan manufacturing has been growing. From June 2009 through April 2016, employment in Michigan's manufacturing sector rose by 169,600 jobs (39.2%), and 34.4% of nonfarm jobs added in Michigan since the recession ended have been in the manufacturing sector. Michigan has been the national leader in new manufacturing job creation since the recession ended, outpacing neighboring states by more than 50%.

Manufacturing has always contributed substantially to Michigan job growth and economic output. The promotion of a thriving manufacturing sector in Michigan is of the utmost importance to the future economic prosperity of this State. The issues in this case therefore substantially affect not only the manufacturing sector, but also the economy of the State of Michigan as a whole.

The issues before the Court are extremely important issues for Michigan businesses, including the MMA's members. The MMA's members will be directly and adversely affected by the Opinion, which endorsed property taxation based upon an inflated "value in use" concept rather than the constitutionally and statutorily required standard of usual selling price. Virtually all of the MMA's members are GPTA taxpayers and will be directly affected by the Opinion. The MMA has a vital interest in ensuring that the constitutional and statutory scheme for determining a property's TCV is correctly applied.

The MMA submits that the Opinion is clearly erroneous and contrary to the Constitution, the GPTA, and this Court's decisions. Therefore, the MMA respectfully requests that this Court grant Appellant's Application For Leave To Appeal and reverse the Opinion.

III. STATEMENT OF FACTS

The MMA relies on the Statement of Facts contained in Appellant's Application For Leave To Appeal. Noteworthy is that that there is no dispute that: (1) what must be valued here is what would actually be sold; i.e., the subject land and buildings-not the business using the building; and (2) the fee simple interest in the owner-occupied subject property must be valued vacant and available. (Opinion, p 9, n 5.)

IV. ARGUMENT

A. The Standard Of Review On Appeal In Property Tax Cases Is Well Settled And Applies To Each Argument In This Brief.

The roles of the appellate courts in Michigan property tax cases have been clearly defined. Property tax decisions are subject to appeal and reversal for fraud, error of law, or the adoption of wrong principles. *Port Huron & Detroit R Co v Treasury Dep't*, 106 Mich App 413, 417; 308 NW2d 237 (1981).

The legal issues and errors of law in this appeal are subject to *de novo* review. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006). See also *Smith v Globe Life Ins Co*, 460 Mich 446, 458; 597 NW2d 28 (1999); *Putkamer v Transamerica Insurance Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997); *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995); *DeKoning v Dep't of Treasury*, 211 Mich App 359, 361; 536 NW2d 231 (1995); and *Vugterveen Systems, Inc v Olde Millpond Corp*, 210 Mich App 34, 39; 533 NW2d 320 (1995), rev'd in part on other grounds, 454 Mich 119 (1997).

The Opinion held that the subject property's TCV must equal the property's value in use, a judicially dictated standard, as a substitute for the property's usual selling price, the constitutionally and statutorily mandated standard. Accordingly, the Opinion should be reversed.

B. This Court Should Grant Leave To Appeal Because This Case Is Against A State Subdivision, Presents An Issue Of Significant Public Interest, And Involves Legal Principles Of Major Significance To The State's Jurisprudence.

Pursuant to MCR 7.305(B), an Application for Leave to Appeal must demonstrate grounds for review, including one of the following:

> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
>
> * * *
>
> (5) in an appeal of a decision of the Court of Appeals,
>
> > (a) the decision is clearly erroneous and will cause material injustice, or
> >
> > (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. . . .

In this case, Appellant's Application for Leave to Appeal meets each of the grounds enumerated in MCR 7.305(B)(2), (3), and (5).

This case involves a taxpayer action against the City, a state subdivision. Also, the Opinion substitutes a "value in use" standard for the required standard of "usual selling price," which, as this Court confirmed in *First Federal*, 415 Mich at 703, the Constitution and the GPTA require. The Opinion is clearly erroneous, will cause material injustice to taxpayers and conflicts with decisions of this Court and the Court of Appeals.

The Opinion casts a cloud of doubt and uncertainty as to the State's lawful standard of valuation for property taxation. Indeed, the Tax Tribunal has held cases in abeyance pending the final resolution of this matter, perhaps because the Tribunal is unsure whether it is to follow the Opinion or this Court's *First Federal* decision. See Exhibit 3 hereto, a copy of a Tribunal Order placing a case in abeyance.

In Michigan, property tax collections are approximately $11 billion per year, more than is collected under the State's personal income tax, corporate income tax, sales tax or use tax.[4] Thus, the appropriate standard of value for property taxation is a legal principle of major significance to the State's jurisprudence and an issue with significant public interest. Critically, the Opinion will discourage construction of manufacturing and other commercial and industrial properties due to the fear of taxation without regard to usual selling price, but rather value in use or some other judicially created standard.

C. This Court Should Grant Leave To Appeal Because The Court Of Appeals Decision Below Is Clearly Erroneous, Would Result In Manifest Injustice, And Is Contrary To Prior Opinions Of Both This Court And The Court Of Appeals.

1. Michigan Property Tax Law Unambiguously Requires Tangible Property To Be Uniformly Assessed Based On Its Usual Selling Price.

The only authority to impose property taxes arises from the Michigan Constitution and the GPTA. The Michigan Constitution, art 9, § 3, provides, in relevant part:

> 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, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. [Emphasis added.]

The Michigan Constitution requires uniform taxation, i.e. taxation based on a single standard. In *Edward Rose Building Co v Independence Twp*, 436 Mich 620, 647; 462 NW2d 325 (1990), this Court held: "Lack of uniformity cannot arise from valuing property at its usual selling price/true cash value."

In the GPTA, the legislature set the lawful TCV standard as the "usual selling price." "'[T]rue cash value' means the usual selling price at the place where the property to which the

[4] See Citizens Research Council of Michigan's Outline of the Michigan Tax System 2016 Edition, available online at: http://crcmich.org/PUBLICAT/2010s/2016/Tax_Outline_2016.pdf.

term is applied is at the time of the assessment, being the price that could be obtained for the property at private sale. . . ." MCL 211.27(1). This means market value. *First Federal*, 415 Mich at 703 and *Edward Rose*, 436 Mich at 632.

2. Fundamental Rules Of Construction Require That Tangible Property Be Uniformly Assessed Based On Its Usual Selling Price.

As noted above, art 9, § 3 of the Michigan Constitution unambiguously mandates uniformity in property taxation. Such unambiguous constitutional provisions are enforced as written. *National Pride At Work, Inc v Governor of Michigan*, 481 Mich 56, 80; 748 NW2d 524 (2008).

The GPTA unambiguously requires that TCV be based upon "usual selling price." MCL 211.27(1). The foremost rule of statutory construction is that unambiguous statutes are enforced as written. "If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citations omitted).

Moreover, the consideration and construction of the constitutional and statutory provisions regarding authority to tax property are governed by three familiar and well-settled legal principles: (1) tax statutes are to be strictly construed, (2) ambiguities and doubtful language are to be construed in favor of the taxpayer, and (3) the assessing officer has the burden to identify "*express*" language authorizing the tax sought to be imposed.[5]

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[5] *Ford Motor Co v State Tax Comm'n*, 400 Mich 499, 506; 255 NW2d 608 (1977) (point 1); *Ecorse Screw Machine Prods Co v Michigan Corp & Securities Comm'n*, 378 Mich 415, 418; 145 NW2d 46 (1966) (point 2); *Garavaglia v Department of Revenue*, 338 Mich 467, 470-71; 61 NW2d 612 (1953) (point 3); *Ready-Power Co v Dearborn*, 336 Mich 519, 525; 58 NW2d 904 (1953) (points 2 and 3); *Standard Oil Co v Michigan*, 283 Mich 85, 88-89; 276 NW 908 (1937) (points 1, 2 & 3); *In re Dodge Bros Inc*, 241 Mich 665; 217 NW 777 (1928) (points 1, 2 & 3); *Detroit v Norman Allan & Co*, 107 Mich App 186; 309 NW2d 198 (1981) (points 1 & 2) lv den 417 Mich 892 (1983).

There is no ambiguity in GPTA's TCV definition and there is no express authority to tax property based on its value in use. Thus, the foregoing fundamental construction rules require that, under the GPTA, values be determined uniformly based on usual selling price.

3. This Court Has Consistently Upheld The Lawfully Mandated Usual Selling Price Standard And Rejected Value In Use.

Under Michigan law a property's "usual selling price," i.e., a property's value-in-exchange and not its value in use, is the only legal basis for a GPTA assessment. MCL 211.27. The foremost case on this issue is *First Federal*, *supra*. *First Federal* involved the valuation of an office building in downtown Flint. In succinctly summarizing the case and its decision this Court said:

> The Tax Tribunal and the Court of Appeals, 104 Mich App 609, 305 NW2d 553, approved the assessment, reasoning that the improvements had value to First Federal because they enhanced its image. Because ***the Constitution and the General Property Tax Act require that property tax assessments be based on market value, not value to the owner,*** we reverse. [415 Mich at 703 (emphasis added).]

In elaborating on the Tribunal and Court of Appeals decisions at issue, this Court said:

> A Tax Tribunal hearing officer upheld Flint's use of the cost approach, reasoning that the improvements **had value to First Federal because they enhanced a financial institution's image of stability and success**. The Tax Tribunal adopted the decision of the hearing officer.
>
> The Court of Appeals affirmed the judgment of the Tax Tribunal and held that the income approach was inappropriate **because the property had a unique value to First Federal**. [415 Mich at 704 (emphasis added).]

Thus, in *First Federal* the Court of Appeals affirmed that value in use could be substituted for usual selling price in determining TCV.

This Court, however, reversed and rejected property taxation based upon value in use. This Court made crystal clear that the value standard must be the market-based usual selling price:

> [T]he constitutional and statutory standard is market-based.
>
> The Tax Tribunal erred in adopting the hearing officer's reasoning that the value should include amounts expended for physical improvements that the hearing officer found were made to enhance the bank's "image" or "business", without regard to whether the expenditures added to the "cash" or "usual selling price" of the property. ***The law does not tax expenditures that merely enhance the image or business of the owner, only expenditures that add to the cash value or selling price of the property***.
>
> It can be anticipated that, if a bank puts fine hardwood and marble throughout a building, those expenditures may not enhance the selling price of the building in an amount equal to their cost.
>
> * * *
>
> A building is sometimes worth less the day after completion of construction than its cost of construction. . . .[5]
>
> > [5] ***Merely because the owner may have constructed an improvement that cost more than the improvement is worth on the market should not subject the owner to higher ad valorem tax***.
>
> * * *
>
> The Constitution and statute do not authorize a tax on the value of lumber or marble incorporated into a building, but on the market value of the completed structure and land.
>
> * * *
>
> ***[W]e reject the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance plaintiff's image and business without regard to whether they add to the selling price of the building***. [415 Mich at 705-707 (emphasis added).]

In accord, see *Meijer, Inc v Midland*, 240 Mich App 1, 7; 610 NW2d 242 (2000) and *Safran Printing Co v Detroit*, 88 Mich App 376, 383; 276 NW2d 602 (1979) (holding that property must be valued based on its usual selling price, not the value in use to the owner, even where the value

to the owner was much greater than its value-in-exchange).[6] These decisions require that TCV be based on and limited to usual selling price, not value in use.

In *Edward Rose*, 436 Mich at 640-41, after reviewing the applicable constitutional and controlling statutory provision, this Court held:

> The uniformity requirement of the Michigan Constitution compels the assignment of values to property upon the basis of the true cash value of the property and not upon the basis of the manner in which it is held. Noticeably absent from the statutory definition of 'cash value' and those enumerated factors which an assessor must consider is any reference to the identity of the person owning an interest in the property or whether there are other parcels which are owned by the same taxpayer. MCL 211.27; MSA 7.27. In other words, the fact of ownership is not a germane consideration in determining value:
>
> > 'The Constitution requires assessments to be made on property at its cash value. This means not only what may be put to valuable uses, but what has a recognizable pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it.' *Washtenaw Co, supra*, p. 370, n. 4, 373 NW 2d 697 quoting *Perry v Big Rapids*, 67 Mich 146, 147; 34 NW 530 (1887).

This holding is identical to this Court's decision in *Washtenaw Co v State Tax Comm'n*, 422 Mich 346, 370, n 4; 373 NW2d 697 (1985). These foregoing decisions are consistent with this Court's prior decisions. See, e.g., *CAF Investment Co v State Tax Comm'n*, 392 Mich 442, 450; 221 NW2d 588 (1974), *Hudson Motor Car Co v Detroit*, 282 Mich 69, 77; 275 NW 770 (1937), and *Perry v Big Rapids*, 67 Mich 146, 147; 34 NW 530 (1887). Thus, for over 100 years, this Court has repeatedly and consistently held that TCV cannot legally be enhanced or diminished according to the person who owns or uses the property, i.e., in this case, Menard.

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[6] On September 8, 2016, the Michigan Municipal League, the Michigan Townships Association, the Public Corporation Law Section of the State Bar of Michigan, and the Michigan Association of Counties, filed a brief amicus curiae, which on page 21, claims that *Safran Printing* "determined that a 'value-in-use'" approach was appropriate." This is absolutely false. Equally untrue are many other claims, such as that *Clark* did not adopt value in use and that *Clark is* consistent with this Court's decision in *First Federal*. This brief fully refutes such incorrect claims.

4. The Opinion Erroneously Followed The *Clark* Decision And Adopted A Value In Use Approach, Instead Of Applying The Required Usual Selling Price.

(a) The *Clark* Decision.

Understanding the Court of Appeals decision in *Clark*, and that decision's momentous error of law, makes it easy to see how the Opinion has replicated that same enormous mistake of law. *Clark* involved the valuation of industrial property. Based on the Court of Appeals decision in *First Federal*, the Court of Appeals in *Clark* upheld a value in use standard:

> The problem with valuing large industrial plants is a problem with the statutory standard itself. The reality is that these types of industrial plants are rarely bought and sold, so that a determination of "usual selling price" constitutes a metaphysical exercise which puts the Tax Tribunal in the position of having to resolve a question somewhat akin to how many angels can dance on the head of a pin. Petitioner may well be correct in its assertion that there is no market for its industrial plant at its current use. However, as we construe M.C.L. § 211.27; M.S.A. § 7.27, to the extent that an industrial plant is not so obsolete that, if a potential buyer did exist who was searching for an industrial property to perform the functions currently performed in the subject plant, said buyer would consider purchasing the subject property**, the usual selling price can be based upon value in use**. To apply M.C.L. § 211.27; M.S.A. § 7.27, a hypothetical buyer must be posited, although, in actuality, such a buyer may not exist. To construe M.C.L. § 211.27; M.S.A. § 7.27 as requiring the taxing unit to prove an actual market for a property's existing use would lead to absurd undervaluations. Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. . . . It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost **premised on value in use** because, in actuality, such industrial facilities are rarely bought and sold. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists. **This is in accordance with *First Federal Savings, supra***, 619-620, 305 N.W.2d 553. . . . [*Clark*, 113 Mich App at 784-85 (emphasis added).]

Thus, *Clark* provided for TCV premised on a value in use concept that exceeds usual selling price, i.e., a property's realizable value. Indeed, the subsequently reversed *First Federal*

Court of Appeals decision was the only authority *Clark* cited for substituting the statutory TCV definition with the judicially contrived value in use. However, as described above, in December 1982, about nine months after the March 1982 *Clark* decision, this Court reversed the *First Federal* Court of Appeals decision.[7]

(b) The Opinion Adopted Value In Use Based On *Clark*.

Critically, the Opinion's holding that the TCV of the subject property can be based upon value in use is based on *Clark* and in doing so holds that "this case is governed by *Clark*," (at 10). The Opinion cites *Clark* ten times, and relies upon the following long quote from *Clark*:

> In *Clark Equip Co v Leoni*, 113 Mich App 778, 782-783; 318 NW2d 586 (1982), this Court approached the problem of determining the TCV of an industrial facility . . .
>
> > The reality is that these types of industrial plants are rarely bought and sold. . . . However, as we construe MCL 211.27; MSA 7.27, to the extent that an industrial plant is not so obsolete that, if a potential buyer did exist who was searching for an industrial property to perform the functions currently performed in the subject plant, said buyer would consider purchasing the subject property, ***the usual selling price can be based upon value in use***. . . . To construe MCL 211.27; MSA 7.27, as requiring the taxing unit to prove an *actual* market for a property's existing use would lead to absurd undervaluations. Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. . . . It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost ***premised on value in use*** because, in actuality, such industrial facilities are rarely bought and sold. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer,

[7] The Tribunal decision in *Clark* was appealed to the Court of Appeals on two grounds. The Court of Appeals upheld a value in use standard as a substitute for usual selling price but decided in favor of the taxpayer on the other ground. See *Clark*, 113 Mich App at 788. As a result, the taxpayer did not further appeal.

> even if, in fact, no such buyer (and therefore no such market) actually exists. [Opinion at 9 (emphasis added).][8]

In adopting the *Clark* value in use holding, the Court of Appeals below was apparently unaware of the history and pedigree of the *Clark* case. The Amicus Brief filed below by governmental associations[9] has three lengthy quotations from the *Clark* decision. The last sentence in the paragraphs of all three quotations reference the Court of Appeals decision in *First Federal*, which was subsequently reversed. However, the Amicus Brief fails to disclose that *First Federal* was reversed and Appellee's Answer affirmatively claims *Clark* is still good law. (Appellee's Answer, pp 1 and 25-26). Whether the failure to acknowledge that the *Clark* decision was based on the reversed *First Federal* decision was intentional or not, critically, (1) the Opinion relies upon *Clark* for its support; (2) *Clark* was based on a Court of Appeals decision reversed by this Court; and (3) *Clark* is contrary to this Court's decision in *First Federal*.

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[8] The Opinion recognizes but only pays lip service to the Constitution's uniformity requirements and the GPTA's mandate that TCV means "usual selling price." The Opinion notes:

> TCV 'means 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 . . . or forced sale.' MCL 211.27(1). TCV is the equivalent of the property's fair market value.
>
> * * *
>
> [T]he 'final value determination must represent the usual price for which the subject property would sell' irrespective of the specific method employed. [Opinion at 6-7, (citations omitted).]

However, notwithstanding this quote, the Opinion requires that the subject property's TCV be premised on value in use, a value standard different from, and that may exceed, usual selling price.

[9] See the August 3, 2015 Amicus Curiae Brief on Appeal on Behalf of the Michigan Municipal League, Michigan Townships Association, Michigan Association School Boards [sic], Michigan School Business Officials, Michigan Association of Counties, and Michigan Assessors Association at 32-33.

Appellee's Answer, p 26, confirms that the City seeks to use value in use. Specifically, on that page, the City states:

> Notably, in Clark, the property's current use was its highest and best use – so, a "value in exchange" and "value in use" were equivalent. The market economics that produced the construction of a new building likewise supported the use of the cost approach to reach a market value. *Id*. at 785.

Stripped to its essence, the City's claim regarding "market economics" is a claim that "the property owner incurred that much cost, so market value must be that much." That is contrary to this Court's decision in *First Federal* in which the Court rejected that very claim. A homeowner may pay $50,000 to install a swimming pool that might increase the usual selling price (market value) by only $15,000. The house's residential use is still its highest and best use but the "market economics" and the fact that the homeowner wanted a pool does not support using the pool's replacement cost to determine the house's usual selling price (market value). The same is true where a property owner such as Menard wants each new building it constructs to resemble its buildings at its other locations. The replacement cost may be substantially greater than the building's usual selling price (market value).[10]

Furthermore, for any given property, whether value in use or usual selling price are similar, the same, or vastly different is not relevant. Usual selling price is the only lawful standard when determining TCV. Stating the standard in terms of, or allowing valuation based on, value in use is an error of law. The MMA submits that the appraisals in evidence reflect that

[10] The Appellee errs in heavily relying on the Opinion's highest and best use finding. TCV requires a determination of a property's usual selling price regardless of the property's highest and best use. Furthermore, the Opinion states that the subject property's highest and best use is "an owner-occupied freestanding retail building." Opinion at 8. "Owner-occupied" identifies who occupies the property, but is not a use. Similarly, "freestanding retail building" is not a use but merely describes the building's physical characteristics. It is probable that the highest and best use of the subject property is retail use (i.e., a location in which retail sales are made), but regardless of the highest and best use, the value standard does not change.

the value in use and usual selling price of the subject property are very different amounts. *Regardless, only usual selling price can be the legal basis for a TCV determination.*[11]

(c) The Opinion Constitutes Error Of Law Because It Is Inconsistent With And Violates The Constitution, The GPTA, And This Court's Decisions In *First Federal* And *Edward Rose.*

As just described, undeniably, the Opinion relies upon *Clark* for its holding that the subject property must be valued based on value in use and the cost that Menard would incur, even if that amount is not realizable in the marketplace. Opinion at 10. By now it should be abundantly clear that the Opinion violates the Constitution, the GPTA, and this Court's prior decisions, including *First Federal* and *Edward Rose.*

The Constitution, the GPTA, and this Court's prior decisions mandate that usual selling price be the touchstone of TCV. As explained above, the *Clark* decision quoted at length from, and was based on, the Court of Appeals decision in *First Federal.* On appeal, however, this Court reversed the *First Federal* Court of Appeals decision. Thus, this Court has reversed the very basis for the Opinion's conclusion that the subject property's TCV should be based on value

[11] As noted in the Introduction, this brief focuses on the lawful value standard. Consequently, it does not address the many errors in Appellee's Answer. Nevertheless, the Appellee's misuse of *Fisher New Center Co v State Tax Comm*, 380 Mich 340; 157 NW2d 271 (1968), is too egregious to ignore. Appellee cites this case for multiple propositions that purportedly support its claims. Appellee's Answer at 17, 25, 16, 33. Most of those propositions are not supported by that case. For example, Appellee's Answer, pp 16-17, claims that Michigan courts have required the use of all three valuation approaches. However, that claim is unsupported and false. In *Fisher New Center*, this Court merely described the three traditional approaches (380 Mich 340, 362-363). Appellee's Answer, p 25, also falsely claims that *Fisher New Center* supports the proposition that this Court has repeatedly rejected valuations by the sales comparison approach. Yet, in that case, the subject property's valuation by the sales comparison approach was not even at issue. At issue was the State Tax Commission's valuation using the income approach (380 Mich at 379). Most significant, however, is that Appellee does not inform this Court that the case it cites was overturned. Upon rehearing, the Court reversed its decision in *Fisher New Center*. *Fisher New Center Co v State Tax Comm*, 381 Mich 713; 167 NW2d 263 (1969).

in use. Contrary to the Opinion, which addresses the suitability of the subject property specifically for the owner (Menard), TCV cannot be based upon value in use.

This Court is the highest judicial authority on Michigan law. *Chambers v Trettco, Inc*, 463 Mich 297; 614 NW2d 910 (2000) (holding that a Michigan Supreme Court decision binds the Court of Appeals and all lower courts until that decision is overturned by the Supreme Court); *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005) (same). The Opinion flagrantly defies and contravenes this Court's contrary decision in *First Federal*, which upholds the GPTA's TCV usual selling price standard. Therefore, the Opinion constitutes error of law.

5. The Opinion Violates MCR 7.215(J)(1) By Relying Upon A Published Court Of Appeals Decision Issued Prior To November 1, 1990 And Contradicting A Published Court of Appeals Decision Issued After That Date.

MCR 7.215(J)(1) provides:

> (1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

The *Clark* Court of Appeals decision was issued prior to November 1, 1990 and, therefore, pursuant to MCR 7.215(J)(1), is not binding upon subsequent panels of the Court of Appeals. The *Clark* decision is legal error, as demonstrated by the Court of Appeals published decision in *Meijer*, which was published after November 1, 1990 and therefore is binding not only upon lower courts but also subsequent panels of the Court of Appeals. MCR 7.215(J)(1).

In *Meijer*, 240 Mich App at 7, the Court of Appeals recognized (as the Tribunal repeatedly has done) that the law in the area is as stated by this Court in *First Federal*, holding:

> In *First Federal Savings & Loan Ass'n v City of Flint*, 415 Mich 702, 705; 329 NW2d 755 (1982), the Supreme Court held that expenditures that merely enhance the image or business of the owner should not be included in taxable value, only expenditures that add to the cash value or *selling price* of the property should be included. [Emphasis added.]

Thus, in a published Court of Appeals decision after November 1, 1990, which decision is binding in the Court of Appeals, the Court of Appeals held in *Meijer* that (1) improvements may be reflected in TCV only to the extent that those improvements add to the usual selling price of the improved property and (2) use value, value in use and value to the owner are inconsistent with usual selling price, the required legal standard. Based on the foregoing, the Opinion constitutes yet another error of law because it violates MCR 7.215(J).

V. CONCLUSION AND REQUEST FOR RELIEF

For the reasons discussed above, the Opinion contains multiple legal errors with respect to property tax issues that are of paramount importance to Michigan taxpayers and the State's jurisprudence. The MMA respectfully requests that the Court grant Appellant's Application for Leave to Appeal and reverse the Opinion, which directly contradicts this Court's decision in *First Federal* and the GPTA by permitting the subject property's TCV to be premised on value in use in place of usual selling price.

Respectfully submitted,
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Dated: September 9, 2016

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