STATE OF MICHIGAN

IN THE SUPREME COURT

MENARD, INC.,

Petitioner-Appellant,

Supreme Court Case No. 154062

vs.

Court of Appeals Case No. 325718

CITY OF ESCANABA,

Michigan Tax Tribunal
Docket Nos. 441600 and 14-001918
(consolidated)

Respondent-Appellee

_____/

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 4

A. Michigan Real Property Tax Assessments Have, For a Century and a Half, Been Based on "True Cash Value" Not on "True Value" or Some Other "Value" Definition. 4

B. Michigan Constitutional "True Cash Value" is Market Value. 6

C. The Concept of "Highest and Best Use" is Actual Market Based and Indicates the Use for Which the Property Will Bring the Highest Market Price. 9

D. Michigan Assessments Are Statutorily Required to Be Based On "Usual Selling Price." 12

E. The Menard Big Box Structure is NOT a "Special Purpose Property." 17

F. Thin Market Properties. 19

G. The Menard Decision Ignores the Statutory Usual Selling Price Market Value Requirement. 20

H. Highest and Best Use In the Menard Appeal. 21

I. The Deed Restriction Issue in Menard 23

J. The Menard Court of Appeals Cost Approach. 27

K. Manufacturing Facilities. 29

L. The Court of Appeals Should Not Have "Second Guessed" the Tax Tribunal's Application of Its Expertise. 35

M. The Court of Appeals Erred In Ignoring the Tribunal's Finding of Credibility. 36

N. The Court of Appeals Ignored the Tribunal's Finding of Fact and Made Its Own Contradictory Finding That Was Totally Without Record Support. 37

Cases

22 Charlotte, Inc v Detroit,
294 Mich 275; 393 NW2d 647 (1940) 27, 35

Antisdale v City of Galesburg,
420 Mich 265; 362 NW2d 632 (1984) ..... passim

Chicago, B & Q Ry Co v Babcock,
204 US 585; 27 S Ct 326; 51 L Ed 636 (1907). 27, 36

Clark Equipment Co v Twp of Leoni,
113 Mich App 778; 317 NW2d 586 (1982) ..... passim

Cleveland Cliffs Co v Republic Twp,
196 Mich 189; 163 NW 90 (1917) 15

Congregation B'Nai Jacob v Oak Park,
102 Mich App 724 (1981) 12

Edward Rose Building Co v Independence Twp,
436 Mich 620; 462 NW2d 325 (1990) ..... passim

First Federal Savings & Loan Association v Flint,
415 Mich 702; 329 NW2d 775 (1982) ..... passim

First Federal Savings & Loan Association v Flint,
104 Mich App 609; 305 NW2d 553 (1981) 2, 20

Fisher-New Center Co v STC,
380 Mich 340; 157 NW2d 271 (1968) 12

Great Lakes Div of Nat Steel Corp v Ecorse,
227 Mich App 379; 576 NW2d 667 (1998) 5, 37

Helin v Grosse Pte Twp,
329 Mich 396; 45 NW2d 338 (1951) 29

Home Depot USA, Inc v Twp of Breitung,
23 MTT 468 (2012) 24

Ikea Property, Inc v Twp of Canton,
22 MTT 190 (2012) 22, 24

John Hogelskamp v William C Weeks,
37 Mich 422 (1877) 5

Jones & Laughlin Steel Corp v City of Warren,
193 Mich App 348; 483 NW2d 416 (1992) 13

Kern v Pontiac Twp,
93 Mich App 612; 287 NW2d 603 (1976) 36

Kingsford Chemical Co v Kingsford,
347 Mich 91; 78 NW2d 587 (1956) 16

Kohl's Department Stores, Inc v Twp of Frenchtown,
24 MTT 278 (2013) 22, 24

Kohl's Department Stores, Inc v Twp of Kochville,
23 MTT 498 (2012) 22, 24

Kotmar, Ltd v Liquor Control Comm
207 Mich 687, 525 NW2d 921 (1994) 37

Lochmoor Club v Grosse Pointe Woods,
23 MTT 320 (2013) 9

Lowe's Home Centers, Inc v Twp of Marquette,
23 MTT 248 (2012) 22

Matter of Great Atlantic & Pacific Tea Co, Inc v Kiernan,
42 NY2d 236; 366 NE2d 808 (1977) 33

Meadowlanes Ltd Dividend Housing Assn v Holland,
437 Mich 473; 473 NW2d 636 (1991) 7

Meijer v City of Midland,
240 Mich App 1; 610 NW2d 242 (2000) 28

Merrill v Humphrey, Auditor General
24 Mich 170 (1871) 35

Mid Mich Gas Storage Co v Twp of Austin,
14 MTT 287 (2003) 9, 17

Moran v Grosse Pointe Twp,
317 Mich 248; 26 NW2d 763 (1947) ..... passim

Newport Mining Co v City of Ironwood,
185 Mich 668 36

Pantlind Hotel Co v Michigan State Tax Commission,
3 Mich App 170; 141 NW2d 699 (1966) 15

Perry v Big Rapids,
67 Mich 146; 34 NW 530 (1887) 7, 8

SS Kresge Co v Detroit,
276 Mich 565; 268 NW 740 (1936) 29, 36

Safran Printing Co v Detroit,
88 Mich App 376; 276 NW2d 602 (1979) 11, 21, 32

SGOS Investment Co v Twp of Orion,
9 MTT 395; 403-404 (1996) 9

Target Co v City of Auburn Hills,
21 MTT 514 (2012) 22

Target Co v Twp of Benton,
21 MTT 514 (2012) 24

Teledyne Continental Motors v Muskegon Twp,
163 Mich App 188; 413 NW2d 700 (1987) 9, 13, 16, 36

Thrifty Royal Oak v Royal Oak,
130 Mich App 207; 344 NW2d 305 (1983) 17, 32, 33, 35

WPW Acquisition Co v Troy,
250 Mich App 287; 646 NW2d 487 (2002) 1, 5

Constitutional Provisions

Mich Const of 1963, art 6, §28 35

Mich Const of 1963, art 9, §3 ..... 1, 5

Mich Const of 1963, art 9, §§24-34 1

Rules and Regulations

MRE 201 30

MCR 7.215(C) 20

MCR 7.215(J)(1) 20

MCR 7.305(B)(2) 1

MCR 7.305(B)(3) 3

Statutes

MCL 211.27 ..... 1, 5, 7

MCL 211.27(1) 5

MCL 211.27(6) 12, 13

MCL 211.34c 3

Public Acts

Public Act 19 of 1843 4

Public Act 206 of 1893 4

Treatises

Ballinger Publishing Co, *Boyce Real Estate Appraisal Terminology* (Cambridge Mass, 1975) 9

The Appraisal Institute, *The Appraisal of Real Estate, 13th Ed* (Chicago, 2008) 6

The Appraisal Institute, *The Appraisal of Real Estate*, 14th Ed (Chicago, 2013) ..... passim

Other Authorities

1 Michigan State Tax Commission, Assessor's Manual (1972) 6, 9, 28

American Institute of Real Estate Appraisers, *Dictionary of Real Estate Apprasal* (1984) 9

Black's Law Dictionary (4th Ed. 1957) 5

Webster's Ninth New Collegiate Dictionary (1987) 5, 12
Webster's Ninth New Collegiate Dictionary (1987) 12
Webster's Ninth New Collegiate Dictionary (1987) 1

INTRODUCTION

The published and precedential decision of the Court of Appeals in this matter can be likened to having opened the proverbial Pandora's Box of Greek legend.[1] Fortunately, unlike in the legend, this Court can "close the box" by granting leave to appeal and reversing.

Not many legal issues of a commercial nature attract more public interest than Michigan's real property tax. All property owners, who pay this tax once or twice a year, are very much concerned with both the amount of tax imposed and, equally important, with the assurance that property tax assessments are fair and uniformly levied. This was evidenced by the public outcry which led to the Headlee constitutional amendments[2] and also to the property tax reform which introduced the constitutional concept of "taxable value" to prevent rapid increases in the basis for the real property tax.[3] Issues involving the fundamental fairness and uniformity of the Michigan property tax are of "significant public interest,"[4] both to the taxpayers and to the many governmental units which rely on property tax revenues to survive and which must go to the public seeking approval of millage renewals and increases.

For well over 140 years[5] the Michigan real property tax has been based on assessments which were constitutionally required to reflect "true cash value,"[6] legislatively defined as the "usual selling price" of the property to be taxed.[7] Most recently this approach to the property taxation has met with grudging approval, for all were assured that tax increases based on market value increases would be limited. A small part of the good fortune of the owner of property which had increased in value would then be shared with the governmental units levying the tax on that value. Critical to public acceptance of the property tax is the

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[1] Pandora's Box: When opened the box "loosed a swarm of evils on mankind…a prolific source of troubles. (*Webster's Ninth New Collegiate Dictionary, 1987*, p 850, App A hereto.)
[2] Mich Const 1963, art 9, §§ 24-34.
[3] See, generally, *WPW Acquisition Co v Troy*, 250 Mich App 287; 646 NW2d 487 (2002).
[4] MCR 7.305(B)(2), "the issue has significant public interest and the case is one by or against the state or one of its…subdivisions."
[5] See pp 4-6, below.
[6] Currently, Mich Const 1963, art 9, § 3.
[7] Currently, MCL 211.27.

understanding that it is based on market value and all taxpayers are only paying their fair share based on the market value of their real property.

The Court of Appeals' precedential decision in this matter has effectively abandoned the "true cash value" market basis for property tax assessments, adopting instead a theoretical hypothetical purchaser approach. It would assess the commercial "big box" real property at issue not at its actual market value, but rather at its value to its owner, regardless of the fact that it may have sold for much less had its owner put it on the market. This decision held the "usual selling price" definition of "true cash value" can be based on "value in use" "…even if, in fact, no such buyer (and therefore no such market) actually exists."[8]

This radically different construction of constitutional and statutory provisions which have been in effect since before the turn of the last century, was based on *Clark Equipment Co v Twp of Leoni*, 113 Mich App 778, 782-783; 318 NW2d 586 (1982). *Clark Equipment* had applied an identical radically different hypothetical assessment approach to large industrial real property facilities where the market evidence established there was likely no purchaser for the property to put it to its existing use. The *Clark* decision, which was not appealed, was in turn based on the Court of Appeals decision in *First Federal Savings & Loan Ass'n v Flint*, 104 Mich App 609; 305 NW2d 553 (1981),[9] which this Court subsequently, in lieu of granting leave to appeal, reversed on December 23, 1982, six months after the Court of Appeals' decision in *Clark*, on March 3, 1982, but 34 years before the *Menard* decision.[10]

Indeed, this Court's decision in *First Federal Savings & Loan*, flatly rejected the approach of the *Menard* decision here at issue, stating, "Because the constitution and the General Property Tax Act require

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[8] CofA Op'n, p 9; see, pp 20-21, *infra*.

[9] *Clark* stated its decision, "…is in accordance with *First Federal Savings, supra*, 619-620, wherein the Court states: 'In summary, we find that unwavering adherence to the 'cost on the open market' approach would consistently undervalue those buildings which are especially suited to a particular use, are not obsolete, and are being used for the particular use for which the building was designed…" *Clark Equipment Co* 113 Mich App at 785-786.

[10] *First Federal Savings & Loan Assn v Flint*, 415 Mich 702; 329 NW2d 755 (1982).

that property tax assessments be based on market value, not value to the owner, we reverse."[11] The *Menard* Court of Appeals decision ignored this Court's unambiguous and unanimous rejection of the "value to the owner" approach, and made no mention of this Court's controlling *First Federal Savings & Loan* decision.

The rejection by the *Menard* decision of the longstanding established market base for real property tax assessments in favor of setting value based on what a hypothetical buyer which does not exist might pay, trashes what had been a longstanding "legal principle of major significance to the state's jurisprudence."[12] For this reason *Menard* should be granted leave to appeal.

The *Clark* decision has been seldom followed, probably because most recognize that it was based on the later reversed Court of Appeals decision in *First Federal Savings & Loan*. The instant *Menard* decision would both breathe new life into *Clark*, and extend its rule that market value can be ignored with respect to commercial real property, as well as the industrial property covered by *Clark*. Obviously, if this is now the law, this Court's emphatic prohibition in *First Federal Savings & Loan* notwithstanding, there is no reason why the Tax Tribunal would not follow this precedential decision and extend the hypothetical purchaser "value in use" approach to other classes of real property, such as residential, developmental, timber cutover and agricultural.[13] The *Menard* decision has truly opened "Pandora's Box." It will indeed, unless reversed, be a "prolific source of troubles."

When the fact that the Court of Appeals in *Menard* improperly substituted its judgment for that of the Michigan Tax Tribunal[14] is added to its refusal to acknowledge and follow this Court's decision in *First Federal Savings & Loan*, instead adopting a non-market approach to determine "true cash value;" it is clear

[11] *First Federal Savings & Loan*, 415 Mich at 703; see pp 6-7, *infra*.
[12] MCR 7.305(B)(3)
[13] See MCL 211.34c, establishing classes of real property.
[14] See pp 27-29, *infra.*

that the Court of Appeals' decision will do great harm unless leave to appeal the *Menard* decision is granted, and this totally unsupported and radically wrong decision is reversed.

ARGUMENT

A. Michigan Real Property Tax Assessments Have, For a Century and a Half, Been Based on "True Cash Value" Not on "True Value" or Some Other "Value" Definition.

An *ad valorem* (by the value) real property tax has been imposed in Michigan for over 170 years.[15] This tax, always imposed on the "true cash value" of the taxable property, has been measured by the "usual selling price" of the particular property for over 160 years, since Public Act No. 186 of 1853. This Court, nearly 140 years ago, emphasized the wisdom behind the legislative language imposing the tax on true cash value:

> Now it appears quite impossible to say that in respect to the valuation of lands by assessing officers for taxation, an assessment at the "true value" must be considered as the same as an assessment at the "true cash value." The Legislature were rightly of opinion that the use of the word "cash" in the expression was adapted to mark a criterion to fix more definitely the standard of valuation and to tend to hinder unjust discriminations and other abuses committed under pretended "true" valuations. It is very common to make a distinction between "value" or "true value" and "cash value" or "true cash value," and it may make a great difference to tax-payers and to the revenue whether the terms of the statute are permitted to be superseded by the expression rejected by the court below.
>
> The policy of the State is to secure uniformity and equality, and this accords with justice. The "cash" standard favors uniformity and equality. It contemplates a limit which the assessor may not exceed or fall short of, and it is a limit which can be more readily and more clearly and certainly apprehended, as a general rule, than any other which could be devised. By means of it, the chances for committing injustice and creating ill-feeling against our revenue system are diminished. The opportunity to assess the property of some much above, and that of others much below the cash rate, and hence the same rate, is reduced.[16]

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[15] Public Act No. 19 of 1843. The General Property Tax Act currently in effect was enacted by Public Act No. 206 of 1893.

[16] *John Hogelskamp v William C Weeks*, 37 Mich 422, 426-427 (1877). "Cash" has been defined as, "2. Money or its equivalent paid promptly after purchasing." *Webster's Ninth New Collegiate Dictionary* (1987),

The instant case represents an attempt to abandon "true cash value," or "usual selling price," as the basis for the real property tax in favor of some other unspoken "fair value,"[17] based not on the true cash value of commercial property in the existing market, but rather on some hypothetical price which a hypothetical purchaser would pay in a hypothetical market. This is not "true cash value."

This attempt in *Menard* relates to a commercial building with "166,196 square feet on 18.35 acres. It is a big box construction built to suit for the Menard's store model."[18] This is not a unique or single purpose structure. It could be put to many uses by other "big box" retailers, by other retailers occupying together, even for light manufacturing or warehouse uses.[19]

Since 1966, the Michigan Constitution has required that property tax assessments be established at 50% of "true cash value," leaving it to the Legislature to define the term.[20] The Legislature for over 150 years has defined the term "true cash value" as relating to the "usual selling price" at the place where the property is on the valuation date. This price is statutorily required to be "obtained for the property at private sale…", and not (with exceptions) at forced or auction sale.[21]

The term "true cash value" has been held to be "synonymous with fair market value."[22] "Market value" has been correctly defined by the Tax Tribunal as "the most probable price, as of a specified date, in cash, or in terms equivalent to cash…for which the specified property rights should sell after reasonable

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p 211 (App A), and "money or its equivalent; usually ready money," *Black's Law Dictionary* (4th Ed. 1957), p 272 (App B).

[17] The use of the hypothetical market here at issue was justified in *Clark Equip Co v Leoni Twp*, 113 Mich App 778, 785; 318 NW2d 586 (1982) because, "[t]o 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." (Emphasis in original.) What seems "fair" to some may not reflect the harshness of market reality.

[18] MTT Op'n, p 2.

[19] See, pp 17-19, *infra*.

[20] Mich Const 1963, art 9, § 3, as amended.

[21] MCL 211.27(1).

[22] E.g., *WPW Acquisition Co v Troy*, 250 Mich App 287, 298; 646 NW2d 487 (2002) and *Great Lakes Div of Nat Steel Corp v Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998).

exposure in a competitive market under all conditions requisite to a fair-sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress."[23]

B. Michigan Constitutional "True Cash Value" is Market Value.

There are three accepted methods to establish "true cash value" for assessment purposes: the "market" (or sales comparison) approach,[24] "cost" (depreciated replacement cost) approach and "income" (capitalized income) approach.[25] These three-standard valuation methods therefore each respond to the basic question: "If the subject property had been offered for sale on the valuation data (reasonable exposure to market, etc.), what would it usually have sold for?" The appraiser's answer to this question establishes the property's "true cash value ("fair market value"), the price it would bring – had it been offered for sale – in the market.

The definition of this "market value" in the current edition of the Appraisal Institute, *The Appraisal of Real Estate* is:

> Market Value.
>
> The most probably price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.[26]

Michigan's "true cash value" upon which property tax assessments must be based is this "market value." "…[T]he Constitution and the General Property Tax Act require that property tax assessments be

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[23] *Kohl's Dep't Stores, Inc v Twp of Kochville*, 23 MTT 498, 508, *fn* 12 (2013) (citing Appraisal Institute, *The Appraisal of Real Estate,* Chicago: 13th ed., 2008), p. 23).

[24] "…The market data approach is the most direct, the best understood, and the only one directly reflecting the balance of supply and demand for a whole property in actual market place trading." *Antisdale v City of Galesburg*, 420 Mich 265, 276-277, *fn* 1; 362 NW2d 632 (1984) (citing 1 State Tax Comm Assessor's Manual, Ch. VI, pp 1-2).

[25] E.g., *Antisdale*, 420 Mich at 276-277.

[26] Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), p 58.

based on market value, not value to the owner…"[27] "Regardless of the valuation approach employed, the final value determination must represent the usual price for which the subject property would sell."[28]

In determining the value of property in the market, its "market value," it is necessary to hypothesize that the property had been offered for sale to the highest bidder, reasonable exposure, arms-length, no duress, with a well-informed buyer and seller, etc. This is because the property being valued is not actually for sale. Since no actual offer or sale took place, the appraiser must hypothesize a buyer which would pay the highest price from the appraiser's market study and analysis.[29] If the subject property were to be hypothetically viewed as "vacant and available" for sale in the market, the actual owner and occupant for which the property may be well suited cannot be considered as a hypothetical purchaser, "…assessments must be based on market value, not value to the owner…"[30] Indeed, the identity of the owner of the subject real property is not even relevant to the true cash value inquiry.[31] "Value to the owner," as prohibited in the *First Federal Savings & Loan* decision, can mean "use value." The Appraisal Institute, *The Appraisal of Real Estate* states, *inter alia*,

> Use Value.
>
> In stark contrast to market value…use value is the value a specific property has for a specific use. In estimating use value, an appraiser focuses on the value the real estate contributes to the enterprise of which

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[27] *First Federal Savings & Loan Assn v Flint*, 415 Mich 702, 703; 329 NW2d 755 (1982).
[28] *Meadowlanes Ltd Dividend Housing Assn v Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).
[29] The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed.* (Chicago 2013), p 300.
[30] *First Federal Savings & Loan Assn v Flint*, 415 Mich 702; 329 NW2d 755 (1982).
[31] *Edward Rose Building Co v Independence Twp*, 436 Mich 620, 640-641; 462 NW2d 325 (1990) confirmed: "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, quoting *Perry v Big Rapids*, 67 Mich 146, 147; 34 NW 530 (1887). Emphasis in original."

> it is a part or the use to which it is devoted, without regard to the highest and best use of the property or the monetary amount that might be realized from its sale.
>
> Real property has both a use value and a market value, which may be the same or different depending on the property and the market. For example, an older manufacturing plant that is still used by the original owner may have considerable use value to that owner but only a nominal market value for another use. Use value may vary depending on the management of the property and external conditions such as changes in business operations. For example, a factory designed around a particular assembly process may have one use value before a major change in assembly technology and another use value afterward.[32]

Obviously, where a specific property (for example, a gas station on a busy intersection) has the same value to other would-be purchasers as to its owner, the value in use and market value would be the same. However, where a specific property was designed and constructed (or remodeled) to suit the particular needs of its owner-occupant, and where the particular needs or other potential purchasers are different, its "market value" would not be the same as its "value to the owner, or "use value."[33]

In *Edward Rose Bldg Co v Independence Twp*, the Court stated,

> The Constitution requires assessments to be made on property at its cash value. This means not only what may be put to the valuable uses, but what has *a recognized pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it*. (Emphasis in original.)[34]

This is the "true cash value" or market value on which the assessment of real property should be based. This is not the value on which the Court of Appeals in this matter ordered the Tax Tribunal to base its true cash value determination via the cost approach.

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[32] The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed.* (Chicago 2013), p 62.
[33] See p 31, *fn* 55, infra.
[34] *Edward Rose Bldg Co*, 436 Mich 620, 640-641; 462 NW2d 325 (1990), citing *Perry v Big Rapids*, 67 Mich 146, 147; 34 NW 530 (1887) (internal citations omitted).

C. The Concept of "Highest and Best Use" is Actual Market Based and Indicates the Use for Which the Property Will Bring the Highest Market Price.

It is well-established that fundamental to any appraisal of real property is the determination of its highest and best use. This is a market-based concept.[35] The Court in *Edward Rose Bldg Co, supra,* stated, at p 633,

> "Highest and best use" is a concept fundamental to the determination of true cash value. It recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay. Land is appropriately valued "as if available for development to its highest and best use, that most likely legal use which will yield the highest present worth." 1 Michigan State Tax Commission, Assessor's Manual, ch VI, p 5 (1972). See also, *Teledyne Continental Motors v Muskegon Twp*, 163 Mich App 188, 413 NW2d 700 (1987), *lv den* 429 Mich 889 (1987), *The Dictionary of Real Estate Appraisal* (Chicago: American Institute of Real Estate Appraisers, 1984), p 152, and Boyce, *Real Estate Appraisal Terminology* (Cambridge, Mass: Ballinger Publishing Co, 1975), p 107.

The commonly accepted definition of highest and best use is,

> "…[T]he reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value."[36]

As stated in *The Appraisal of Real Estate*, in order to be reasonably probable, the use must meet certain conditions:

> 1. The use must be *physically possible* (or it is reasonably probable to render it so).
> 2. The use must be *legally permissible* (or it is reasonably probable to render it so).
> 3. The use must be *financially feasible*.
>
> Uses that meet the three criteria of reasonably probable uses are tested for economic *productivity,* and the reasonably probable use with the highest value is the highest and best use.[Emphasis in original.][37]

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[35] E.g., *Lochmoor Club v Grosse Pointe Woods*, 23 MTT 320, 332 (2013); *Mid Mich Gas Storage Co v Twp of Austin*, 14 MTT 287, 298-299 (2003) and *SGOS Investment Co v Twp of Orion*, 9 MTT 395, 403-404 (1996).

[36] The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013) at p 333.

A potential use of a property must be physically possible, legally permitted and financially feasible. If the potential use meets the first two physical and legally feasible tests, but the potential use in the existing market is not financially feasible or if it is not maximally productive, that cannot be the property's highest and best use.

It is normally true that a property's present use is its highest and best use, because its owner is presumed to have acted logically and put its capital to best use. However, because highest and best use is a market-derived concept it is not necessarily based on current use if there is either no market for that property to be put to that use or if there were a market for that use but it would not bring the best price. Highest and best use looks to market value, not to value in use unless it is coincidentally the same as market value. Therefore, the highest and best use determination must be based on market analysis and the conclusion that the use selected is physically possible, legal and financially feasible and is the most productive use in terms of market value.

Consider a manufacturing structure specially designed to accommodate the manufacture of buggy whips, which is still being so used by a last survivor of the declining buggy whip industry. There are no recent sales of similar facilities to be put to buggy whip manufacturing. If its current use were determined to be its highest and best use, then there would be no recent sales to demonstrate the value a purchaser would pay for a buggy whip factory. So, under the *Clark* and *Menard* analysis, one would hypothesize a purchaser wishing to purchase the specially designed property to manufacture buggy whips. And the assessor would argue that the replacement cost approach would be applicable because, in the absence of comparable sales, under the principle of substitution it would establish what the purchaser would be willing to pay for the existing facility, rather than itself build a new buggy whip factory.[38]

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[37] The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013) at p 332.
[38] See, e.g., *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 637; 462 NW2d 325 (1990).

This hypothetical arrives at an absurd value because, from the beginning, it ignores the actual real market in which the true cash value should have been established. If there was no market demand for a buggy whip factory, the owner and occupant's use notwithstanding, the facility would bring the highest price in the market for a different highest and best use, such as a warehouse, or would be demolished to put the underlying land to a more valuable (productive) use.[39] Put simply, if there is no market demand for a particular property to be put to a specific use, that use cannot be its market derived highest and best use.[40]

This is a fundamental appraisal principle. As this Court implicitly held in *First Federal Savings & Loan*, because assessments are not based on value in use, then the owner-occupant cannot even hypothetically be considered to be in the market as a potential purchaser wishing to purchase to continue to put the property to the existing use.[41] Therefore, the true cash value, or market value, of the property is obviously what the owner-occupant could sell it for. Its highest and best use would be determined in the market by the highest bidder's projected use.

Assume two "big box" stores, on opposite sides of a large town or township, both built at the same time and operated by the same retailer. After a few years, perhaps due to increasing competition in the area, the retailer decides to close one store and consolidate its operations in the other. Both stores were equally productive but overall sales had been falling in each due to competition. The *Clark/Menard* approach would value the surviving store at its value in use and the other at what it would sell for, its market value, as it was no longer in use. Identical properties, but two very different highest and best uses

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[39] "Demolition of the improvements can be considered the most extreme form of modification to the current use of the property as improved. If the value of the property as improved is greater than the value of the site as though vacant less demolition costs, the existing improvements contribute value to the property's highest and best use, and the improvements should not be demolished at that time. When the improvements no longer contribute to value, demolition and redevelopment of the ideal improvement would be economically supportable." The Appraisal Institute: *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), p 346.

[40] See, e.g., *Safran Printing Co v Detroit*, 88 Mich App 376, 382-383; 276 NW2d 602 (1979).

[41] See also, *Edward Rose Bldg Co,* 436 Mich at 637.

and values. Yet had they both been vacant even that owner would have, in the market, paid no more for one than for the other.

D. Michigan Assessments Are Statutorily Required to Be Based On "Usual Selling Price."

The statutory definition of the constitutional term "true cash value" refers to the "usual selling price."[42] The qualification of the term "selling price" by the adjective "usual" was intentional and cannot be ignored.[43]

The word "usual" has been defined, when used as an adjective, as, "1. Accordant with usage, custom or habit: NORMAL. 2. Commonly or ordinarily used (followed his ~ route). 3. Found in ordinary practice or in the ordinary course of events: ORDINARY."[44]

Accordingly, Michigan tangible property must be assessed at 50% of its normal selling price, its ORDINARY *SELLING PRICE*. One sale does not "true cash value" make.[45]

The words "selling price" necessarily refer to what would be received by the seller of the property from its sale to another. The term cannot by any argument be construed to mean the value to the owner in use.

This statutorily explicit "usual selling price" mandate as to assessed true cash value of the subject, must be distinguished from the use of the sales comparison appraisal approach by which the normal/ordinary true cash value selling price of the subject can be estimated from the price received from the sale of comparable properties. The statutory definition of "true cash value" expressly provides, "…the purchase price paid in a transfer of property is not the presumptive true cash value of the property

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[42] See p 6, *supra.*

[43] Effect must be given to every word in the statutory provision. (See, e.g., *Congregation B'Nai Jacob v Oak Park*, 102 Mich App 724, 729-730 (1981) ("Correct and proper interpretation means giving effect to every word of the statute. Every effort must be made to avoid declaring any portion of the Legislature's language to be surplusage." (internal citations omitted)).

[44] *Webster's Ninth New Collegiate Dictionary (1987),* p 1299. (App A)

[45] See, e.g., *Fisher-New Center Co v STC*, 380 Mich 340; 157 NW2d 271, on rehearing 381 Mich 713; 167 NW2d 263 (1969); see also Section 27 of the GPTA (MCL 211.27(6)) which provides, "…the purchase price paid in a transfer of property is not the presumptive true cash value of the property transferred."

transferred."[46] The sales comparison approach to value, while preferred as a measure of market realities, is only used "…when there are sufficient recent, reliable transactions to indicate value patterns or trends in the market. …When data is available, sales comparisons can be the most straightforward and simple way to explain and support an opinion of market value.[47]

In *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 353; 483 NW2d 416 (1992), the Court of Appeals reiterated,

> The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading. *Antisdale, supra*, 420 Mich at 277-278, n 1, 362 NW2d 632; *Teledyne Continental Motors, supra*, 163 Mich App at 193, 413 NW2d 700.

The "market approach" or sales comparison approach looks to the sales of comparable properties to persons putting the real property improvements similar to those at the subject to the same use as the subject's highest and best use. If there are sales of similar comparable properties, but no sales to persons wishing to put them to that highest and best use, then the subject's highest and best use conclusion must be adjusted to refer to the use for which such similar properties are being purchased for the highest price. An opinion as to market value obviously requires that there be a market for the property. If there are no buyers for the subject property to be put to its current use, its highest and best use would be that alternative use for which similar ("comparable") properties are being purchased in the market,

> If…no sales are available, the appraiser must question whether a market for the subject property exists at all. The common definitions of *market value* all assume a sale of the subject property, which implies the existence of a market. The market for a specific property may not be for the property as it is currently improved or configured.[48]

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[46] MCL 211.27(6).
[47] The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), p 380.
[48] The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), p 380 (emphasis in original).

Accordingly, if the market analysis establishes that there is no market demand to purchase the subject to put it to its current use, one does not simply shift the value analysis to the replacement cost approach. Instead one looks to the market to establish the use for which similar properties are being purchased. The usual selling price of the subject will be determined from sales or comparables to be put to that highest and best use.

The cost approach to value is also based on the market, albeit one step removed, but the appraiser must still conclude to the market-based highest and best use of the subject, the use for which it will bring the highest price. The appraiser then determines the cost to replace the utility for which the market indicates the subject would be purchased "…with a new structure with optimal utility (i.e., the ideal improvement identified in highest and best use analysis.)"[49]

If in the market there is no demand for the facility to be put to the use for which it was designed, constructed and is being used, then the replacement cost approach must be based on the cost to replace only the utility for which there is market demand. For example, if cold storage warehouses are in the market being purchased for dry storage warehouse use, the replacement facility for a cold storage facility would not include refrigeration features and would be much less costly. The buyer of the subject would not pay for utility it neither needs nor wants.

There are Michigan precedents which use the replacement cost approach to value certain unusual facilities for which there is a thin or no market. The decisions often state that, in the absence of comparable sales, the real property not being income producing, the cost approach is the only available approach with which to determine market value. Some decisions simply rely on the expertise of the assessor in selecting and applying the cost approach. They assume that the assessor based the assessment determined by the

[49] "The principle of substitution is basic to the cost approach. This principle affirms that a knowledgeable buyer will pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay." The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), p 563-564.

cost approach on market realities.[50] These decisions do not state that the cost approach based on a depreciated replacement (or reproduction) cost can be used where there is no market demand for such a facility. *Moran* stated, "It was the duty of the assessors to consider the factors which motivate buyers and sellers to exchange their interests [citation omitted] and to exercise their judgment in an honest effort to determine at what point the inertia to trade is overcome."[51]

Some other older decisions apply the oft-cited rule of thumb that the cost approach must be used to value a single-purpose non-income producing property, for which there are no comparable market sales. This rule of thumb states the obvious. The other two appraisal approaches could not be used. It does not and cannot, however, establish that such real estate can be assessed at other than its true cash or market value. These are constitutional and statutory limits which cannot be ignored. They do not state that market based highest and best use can be ignored. The rationale for this old application of this rule of thumb must have been that, if such a single purpose property were offered for sale, it would usually be purchased for the value reflected by its depreciated replacement/reproduction cost. But this is frequently simply not the case, not what the market reflects. For example, if a homeowner constructed a large costly concrete sculpted structure in the front yard of his/her home, one that no potential purchaser would want or value (other than the consider the cost of demolition and removal), the replacement/reproduction cost of that home should not include the cost of the sculpture, as it would have no value in the market, and the principle of substitution (a buyer would pay what it would cost to construct the sculpture new) would not apply.[52] Indeed, The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), pp 355-356, states,

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[50] E.g., *Moran v Grosse Pointe Twp*, 317 Mich 248, 258; 26 NW2d 763 (1947); *Cleveland-Cliffs Iron Co v Republic Twp,* 196 Mich 189, 203; 163 NW 90 (1917); *Pantlind Hotel Co v Michigan State Tax Commission,* 3 Mich App 170, 196; 141 NW2d 699 (1966), affd 380 Mich 390; 167 NW2d 273 (1968).

[51] *Moran*, 317 Mich at 255.

[52] One test for whether a property is being assessed at its "usual selling price" is whether a financial institution would be willing to accept a mortgage lien on the property to secure a loan to its owner. The acid test is whether, if the owner did not have good credit, a "low credit score" as it were, the bank would lend money on the basis of the value of the real property improvements. If the bank were to ascertain that there

> Whenever multiple highest and best uses are analyzed, an appraiser must be careful to develop each value opinion appropriately and be very clear in reporting the assignment results. An opinion of market value requires that there be a market for the property. If there are no buyers for the subject property in its current use, an alternative use must be considered. Using the cost approach to value a special-use property where no market exists will usually overstate the market value of the property unless a deduction is made to reflect the lack of a market.

The *Clark Equipment* decision, which was not appealed, and the current *Menard* decision based on the reversed Court of Appeals *Clark* decision, go one giant step further, and conclude that if there is no market demand to put the real property improvements to the use for which they were designed and constructed to suit their owner-occupant's specific use, then the statutory and constitutional usual selling price market value requirements can be ignored and the property valued on its "value in use," the presumed value to the user. This simply cannot be permitted.

There are instances when the Tax Tribunal, in order to meet its statutory duty to reach its own determination as to true cash value,[53] has relied on a properly prepared and credible cost approach where there is evidence of a market at the subject's highest and best use, but the sales comparison approach comparables offered in evidence are so incomparable as to preclude their use in such a sales comparison approach.[54]

In these instances evidence pertinent to the cost approach is the only basis for the required tribunal value determination. Even then, the assessor (or Tax Tribunal) has a duty "to consider the factors which motivate buyers and sellers to exchange their interests…and to exercise their judgment in an honest effort

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was no market for the facility to be put to the use for which it had been designed and constructed, the bank would value the improved real property at what it could be sold for in the market. It would certainly not value the facility at what a hypothetical purchaser, who wished to purchase a facility to accomplish precisely what its owner-occupant had designed and constructed it to do, would be willing to pay for the property. This sort of "pie in the sky" theoretical valuation could never meet the scrutiny of such a lender, which would be interested simply in market realities. Assessors should only be interested in market realities. Assessments must be based on the "usual selling price."

[53] See, e.g., *Teledyne Continental Motors v Muskegon Twp*, 163 Mich App 188, 193; 413 NW2d 700 (1987).

[54] See, e.g., *Kingsford Chemical Co v Kingsford*, 347 Mich 91, 103-104; 78 NW2d 587 (1956).

to determine at what point the inertia to trade is overcome."[55] The Court of Appeals may have incorrectly determined that if 4 of 8 of the *Menard* appraisers' comparable sales could not be used, because they had not been "adjusted" for the value impact of the use restrictions,[56] [57] it could order that the cost approach be used. However, the cost approach testimony of the City had been found to lack credibility,[58] ordering that it be used to find "value in use" was error.[59] The Court of Appeals' finding that an adjustment must be made for restrictions was error[60] and, critically, there was ample other evidence offered that there was a market for big box stores, scores of them, which contradicted the rationale for any "value-in-use" conclusion.[61]

There is a critical difference between reverting to the cost approach to attempt to reflect market realities in the absence of sales or comparable properties in the market, and reverting to a "value-in-use" cost approach which has no market support whatsoever.

E. The *Menard* Big Box Structure is NOT a "Special Purpose Property."

The improved real property "big box" construction at issue is not a so-called "special purpose property."[62] Even had there been no demand in that location for a single owner "big box" retail facility, there would be demand for the space it offers for multiple retail occupant use or for light industrial or warehouse use. The cost of modifying the "big box" structure, which is, as its characterization implies, just a "big box,"

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[55] *Moran v Grosse Pointe Twp*, 317 Mich 248, 255; 26 NW2d 763 (1947).

[56] See pp 27-28, *infra*.

[57] In *Thrifty Royal Oak, Inc v Royal Oak*, 130 Mich App 207, Judge Bronson, with whom Judge Wahls concurred on this point, differed, writing that neither party had "presented any evidence of sales of properties which were comparable in size or use," concluding, "Given the parties' complete inability to produce relevant "comparables," the Tribunal acted property in characterizing the subject property as unique 'in light of the proofs presented.'" (130 Mich App at 231.) Judge Bronson quoted this Court's *First Federal Savings & Loan* decision as supporting his conclusion, where it held, "Absent more persuasive evidence, such as comparable sales, historical cost or reproduction cost can be considered in arriving at the usual selling price…" (130 Mich App at 232)(Emphasis in original.)

[58] See pp 36-37, *infra*.

[59] See pp 27-28, *infra*.

[60] See pp 18-19, *infra*.

[61] See pp 17-18, *infra*.

[62] "…[S]pecial-purpose properties are appropriate for only one use or for a limited number of uses…" The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago, 2013), p 355. See, e.g., *Mid Mich Gas Storage Co v Twp of Austin*, 14 MTT 287, 299 (2003).

would not preclude it from being purchased for other uses for which there is market demand. They may not utilize all the utility of the size and one owner retail occupant design, but they would pay for the utility it does provide them. Indeed, that would determine its highest and best use.

On the *Menard* facts, the appraiser determined there were purchasers wishing to purchase such structures, willing to pay for the utility it offered them. There would be no need to attempt to, through the cost approach, invent a hypothetical non-existent potential purchaser who would pay an amount equal to the property's value to its owner, its value in use. In the *Menard* record there was ample evidence of sales of "big box" type stores comparable to the Menard facility. The only issue taken with those sales by the Court of Appeals was whether the sale price of four of the comparables should be adjusted to reflect use restrictions.[63] There was no reason in Menard to default to the cost approach to value because the parties had not produced evidence of market sales of comparable "big box" facilities. Where there is, as in *Menard*, ample evidence of the sale of comparable properties in the market, it was error to suggest that the property should be valued by hypothesizing a purchaser which would purchase the facility at its "value in use" to Menard, when there was no evidence that such a purchaser existed. To the contrary, there was much evidence of comparable sales which showed that in the actual market this approach would seriously over-value the facility.

The large so-called "big box" type retail facility is not one for which, if offered on the market the day it was completed, or 8 years later, there would be no purchasers wishing to purchase it. The comparables used by *Menard* showed purchases of similar "big box" facilities, some wishing to put them to the use for which they were constructed, i.e., large, big box commercial retail. There is no need to attempt to theorize an approach to valuation for property tax assessment purposes which is unrelated to the actual market, because there was an identified market for the *Menard* property. The mere fact that the market may not return to the owner-occupant of the property an amount equal to what the owner-occupant spent to design

[63] See pp 27-28, *infra*.

and build a property for its own specific approach to retailing, does not mean that one must ignore market realities and theorize a hypothetical purchaser who would pay more than the property could be sold for in the existing market.[64]

F. Thin Market Properties.

It seems well-established in Michigan, as discussed above, that property tax assessments are based on market value, which market value cannot be based on the use value of the particular property to its owner-occupant, who cannot be considered as a hypothetical potential purchaser. How then is the true cash value (usual selling price) of that particular property to be determined where in the market, demand for that property to be put to its current use, located where it is, cannot be established because there are few, if any, sales of comparable properties and few, if any, examples of the construction of comparable facilities?

The focus on this inquiry must be narrowed by a study of the market. First, the absence of comparable sales for the particular use for which the property was designed and constructed does not necessarily mean there is no market demand for a facility to be put to that use, if there have been no offerings. In that circumstance the assessor must study the actual market. If there were offerings of similar properties, but only purchases to be put to different and less valuable uses, lack of demand for the original design use is established in that market. And market demand for such properties to be put to an alternative use has been established, and the highest and best use conclusion must be modified to reflect the market.

On the *Menard* facts there was evidence of sales of comparable property. The only problem raised by the Court of Appeals with their use was that four were subject to use restrictions which might preclude

[64] The architecture of special-purpose buildings often tends to limit them as a practical matter to the single use for which they were designed. Although they can be converted to other uses, the conversion is disproportionately costly. Special-purpose structures include many churches, theatres, sports arenas, and generating plants. If there is market demand for the use for which they are designed, this is usually their highest and best use. If not, then market-based highest and best use would be for an alternative use, if any (which would not value much of the design utility and consider modification costs), or possibly demolition to permit the land to be purchased for a more valuable use. See, generally, The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), pp 269-270.

some of the potential big box users from bidding to purchase. But the record showed there was a clear market for such "big box" facilities. There is no reason to reject the market sales comparison approach and devise a cost approach looking to a hypothetical purchaser which did not exist to purchase the property at its value in use to its owner.

G. The *Menard* Decision Ignores the Statutory Usual Selling Price Market Value Requirement.

The Court of Appeals' *Menard* decision stated, "…this case is governed by *Clark*."[65] The 1987 Court of Appeals decision in *Clark* cited only one Court of Appeals precedent for its pertinent holding, and that decision in *First Federal Savings & Loan v Flint*, 104 Mich App 609; 305 NW2d 553 (1981), was later reversed by this Court.[66] Unfortunately, unlike the Court of Appeals' *First Federal Savings & Loan* decision, *Clark* was not appealed and under MCR 7.215(C) has acquired *stare decisis* precedential effect. Under MCR 7.215(J)(1), because issued in 1982, the *Clark* decision was not binding upon the *Menard* panel of the Court of Appeals. However, the *Menard* decision, unless reversed by this Court, will be binding precedent and it adds commercial real property to the industrial real property assessments which *Clark* had authorized assessors to assess at value in use, rather than the constitutionally and statutorily mandated true cash (market) value. *Menard* and *Clark*, if allowed to stand as precedents, will have judicially re-written the fundamental market oriented basis for much of Michigan's real property tax system which has been in effect for over 150 years. *Clark* was not appealed, depriving this Court of the opportunity to correct its fundamental error. *Amicus curiae* respectfully requests that this Honorable Court grant leave, reverse *Menard* and overturn *Clark* to return Michigan's largest tax to the market basis which had been required by the Constitution and statutes for over 150 years.

This Court in 1982, in reversing the Court of Appeals' *First Federal Savings & Loan* decision, explicitly held, in absolutely clear and unambiguous language, "Because the constitution and the General

[65] CofA Op'n, p 10.
[66] *First Federal Savings & Loan v Flint,* 415 Mich 702 (1982).

Property Tax Act require that property tax assessments be based on market value, not value to the owner, we reverse."[67] *Menard*, relying only on *Clark*, which had been decided 9 months before the *First Federal Savings & Loan* decision in the Court of Appeals was reversed, totally ignored this Court's subsequent *First Federal Savings & Loan* decision and instead held, citing *Clark*, "The usual selling price can be based on value in use."[68]

H. Highest and Best Use In the *Menard* Appeal.

The Tribunal, which was not bound by the parties' experts' opinions as to the "highest and best use" of the *Menard* real property, did not make a highest and best use finding.[69] The Court of Appeals, however, somehow concluded that it was "implied in the Tribunal's decision," and that the Tribunal recognized that "[t]he parties agree that the highest and best use of the property is as an owner-occupied freestanding retail building."[70]

The conclusion as to highest and best use, as improved, is critical to the application of all three approaches to determining market value.[71] Often the existing use of improved real property, particularly of newer construction, is indicative of its highest and best use, that is to say, the use for which it would bring the highest price. However, given that the GPTA looks to usual selling price, not value in use, this would only be true if there were potential purchasers in the market wishing to put the subject property to that use. If there were none, regardless of the reasons for their absence, then the existing use would not determine the highest and best use.[72] The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), pp 355-356, states, "An opinion of market value requires that there be a market for the property. If there are no buyers for the subject property in its current use, an alternative use must be considered. Using the

[67] 415 Mich 703.
[68] See pp 22-23, *infra*.
[69] "The analysis of highest and best use is at the heart of appraisals of the market value of real property…" The Appraisal Institute, *The Appraisal of Real Estate, 14th Ed* (Chicago 2013), p 332.
[70] Op'n, at p 6 and *fn* 4. There was no stipulation in *Menard*, as there often is, as to the property's HBU.
[71] See pp 9-10, *supra*.
[72] See, e.g., *Safran Printing Co v Detroit*, 88 Mich App 376, 382; 276 NW2d 602 (1979).

cost approach to value a special purpose property where no market exists will usually overstate the market value of the property unless a deduction is made to reflect the lack of a market." (Emphasis added.)

While the subject is not a special purpose property,[73] the basic principle is the same. Here the Court of Appeals, concluded (incorrectly) that the Tax Tribunal erred in determining the market value of the Menard "big box" facility at its current use highest and best use, by the usually preferred comparable sales approach. The Court of Appeals then suggested a default to the replacement cost approach, which is universally recognized as a much less reliable indicator of market value, to determine "value-in-use."[74] Critical to the Court of Appeals' analysis is its assumption that the Tribunal's Opinion "implied" that it had concluded to an "owner-occupied freestanding retail building" highest and best use. There was no testimony by anyone that the subject would bring a greater price in the market because it was "freestanding." Nor is it necessarily logical to assume this is true. Likewise, there having been testimony that such "big box" retail facilities were sometimes rented by the retailer, there was no evidentiary basis for the implied conclusion that it must be "owner occupied" rather than being occupied by the same retailer as a lessee.[75]

In several of the other recent Tax Tribunal "big box" opinions, the appraisers and tribunal had determined to a much broader "retail use" highest and best use.[76]

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[73] See pp 17-19, *supra*.

[74] See *First Federal Savings & Loan, supra*.

[75] See, e.g., *Target Corp v City of Auburn Hills*, 21 MTT 514, 521 (2012) (discussion of former K-Mart and Mervyn's big box stores, leased to Burlington Coat Factory).

[76] See, e.g., *Lowe's Home Centers, Inc v Twp of Marquette*, 23 MTT 248, 251 (2012) ("Allen determined the highest and best use of the subject property was a retail use"); *Kohl's Department Stores, Inc v Twp of Kochville*, 23 MTT 498, 504 (2012) ("The highest and best use of the subject property, as improved, is retail use"); *Kohl's Department Stores, Inc v Twp of Frenchtown*, 24 MTT 278, 283 (2013) ("[t]he highest and best use of the subject property, as improved, is retail use… ."); and *Ikea Property, Inc v Canton Twp*, 22 MTT 190, 198 (2012) ("The highest and best use of the subject property as improved to be its current use"). (In *fn* 5, the Tribunal noted, Petitioner's appraiser concluded the highest and best use of the subject property as improved was for "retail building as currently improved" and Respondent's appraiser concluded the highest and best use of the subject property was as a "big box retail building or similar use.")

A broader highest and best use finding is reasonable, given the fact that different size retail users often purchase or lease big box type stores, some occupying the entire store, some occupying different portions of the structure. The location, parking arrangements, etc., suitable for a single tenant occupancy are also usually suitable for several retail tenants. For this broader "retail use" highest and best use, building and use restrictions limiting the use to particular size or type occupancy would not require "evidence to account for the impact of the deed-restricted properties being sold for purposes other than" the "owner-occupied freestanding retail building" highest and best use of the subject property.[77] There was no real reason for the *Menard* opinion to reject the market comparable approach the Tax Tribunal had found to be the best indicator of market value.

I. The Deed Restriction Issue in *Menard*.

The Court of Appeals held the Tax Tribunal erred in "considering" but not requiring evidence as to the market impact of what were identified by uncontradicted testimony as common deed restrictions.

The only specific deed restriction referenced by the Court of Appeals *Menard* opinion related to the sale of three Walmart stores, comparables numbered 3, 5 and 8, and the Home Depot store, comparable No. 1. Walmart had prohibited their use for a grocery store over 35,000 square feet or a discount store over 50,000 square feet. The Home Depot store sold in 2014 and had "deed restrictions" which "limit its ability to be used as a retail space." Comparable No. 8, the 130,626 square foot Walmart store in Monroe, Michigan was purchased for use by two large retailers, Dunham's Sports and Hobby Lobby.[78]

The expertise of the Tax Tribunal extends well beyond the valuation theory testimony of the experts in each particular case. While its findings of fact must be supported in each instance in the record by competent, material and substantial evidence,[79] 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 true cash value, utilizing the

[77] Op'n, p 8.
[78] Op'n, p 2.
[79] E.g., *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984).

approach that it believes provides the most accurate valuation in the circumstances.[80] The Tribunal had heard a number of "big box" assessment appeals. It was very familiar with this market.

In *Kohl's Department Stores, Inc v Twp of Frenchtown*, 24 MTT 278, 284 (2013), the Tribunal had relied upon both the income and market approaches to determine the usual selling price of a 68,727 square foot, single story, owner occupied commercial building. It identified five comparable sales, including the sales of (i) a former Super K-Mart (K-Mart) store, 192,000 square feet constructed in 1993, which was converted to a Wal-Mart retail store; (ii) a former Super K-Mart store, 193,446 square feet constructed in 1994, which was converted in 2004 to a Meijer retail store; and (iii) a former Circuit City store, 94,284 square feet constructed in 1984 converted to a Cabela's retail store. In *Kohl's Department Stores, Inc v Twp of Kochville*, 23 MTT 498, 505 (2012), the Tribunal made findings of facts as to five market comparables, including numbers (i) and (iii) above, and added the sale of a former Target retail store, 103,106 square feet constructed in 1989, which was converted to a Value City Furniture store with approximately 68,000 square feet, with the remaining area converted to house a big box baby retail store. In both *Target Corp v Twp of Benton,* 21 MTT 514, 523 (2012) and in *Home Depot USA, Inc v Twp of Breitung*, 23 MTT 468, 485 (2012), the Tribunal noted, "Mr. Allen [Petitioner's appraiser] provided extensive listings and sales of big box stores throughout the Midwest (Michigan, Wisconsin, and Minnesota)."

In the Target Corp v *Twp of Benton* decision the Tribunal noted at p 519, the petitioner's appraiser had included "a summary of 32 big box stores throughout the state that were listed and sold from 2000 to 2010." It also noted the Respondent Township had introduced evidence as to the rental of a former K-Mart store remodeled in 2004 to be a Burlington Coat Factory store and a second former K-Mart store leased to become a Burlington store. In *Ikea Property, Inc v Twp of Canton*, 22 MTT 190, 199, 207-208 (2012), the Tribunal identified other former "big box" stores that had sold for similar retail use, (i) a former Walmart store, 86,543 square feet, constructed in 1998 sold in 2008 to J.C. Penney, notwithstanding a "deed

[80] *Antisdale*, 420 Mich at 277.

restriction prohibiting use of this property as a grocery store, wholesale club, discount department store, or pharmacy." (ii) a former Home Depot retail store, 467,834 square feet, constructed in 2003, sold in 2009 to a developer which purchased and renovated for lease to Pack N Save; and (iii) a former Target retail store of 103,240 square feet, built in 1997, sold in 2010 to Hobby Lobby, which planned to itself use approximately 50% of the floor space.

In *Menard* the Tribunal, with an understanding gained from the many "big box" cases which had come before it, exercised that expertise in correctly accepting *Menard's* appraiser's testimony that he "considered" the use restrictions on several of his comparables, but concluded it was not necessary to also adjust their sales prices for this reason to better reflect their comparability.[81]

If the Tribunal, which did not state its highest and best use finding, had concluded in its analysis that the highest and best use of the subject was for "retail sales," as the Tribunal had concluded in the several very recent big box valuation opinions referenced above, then the impact of the use restrictions pertaining to the three Walmart comparable sales must be evaluated differently.[82] The sales would support such a highest and best use conclusion. The City appraiser in *Menard* testified that, there already being a Walmart in town, she was not certain that there would be another single tenant big box user in the Escanaba market.[83] On the other hand, the City's appraiser also testified there are many smaller retailers serving the public in the Michigan Upper Peninsula, many of whom might find Menard's store's location, parking arrangements, etc., highly favorable.[84] As was true of Petitioner's No. 8 comparable in this matter,[85] and as has been found to be true in other big box decisions by the Tribunal, such big box facilities are

[81] CofA Op'n, pp 7-8.
[82] Indeed, would it not be "implicit" from the Tribunal's consideration of, but having given no weight to, the "common" big box use restrictions, that the Tribunal had concluded to the broader "retail use" highest and best use it had used in so many other big box opinions?
[83] TR p 189.
[84] TR p 189.
[85] CofA Op'n, p 3.

frequently purchased to be divided into two or more retail outlets. Such purchases are entirely consistent with a "retail sale" highest and best use.[86]

It is important to note that Petitioner's three Walmart comparables analyzed by the Court of Appeals, which imposed use restrictions, did not restrict many, probably most, potential purchasers from operating a typical big box stores in these locations. The restriction forbade the use of the store structure for a "grocery store" exceeding 35,000 feet, or a "discount store" exceeding 50,000 feet. A potential purchaser of the Menard's store by, for example, Lowe's or Home Depot for which it would be best suited, would not be precluded by such restrictions, as neither operates either grocery stores or discount stores on their premises.[87] This court can take judicial notice that the same would be true of numerous other potential big box single occupant Michigan purchasers such as Target, J.C. Penney, Kohl's, Dunham's, MC Sporting Goods, Cabela's, Gander Mountain, Harbor Freight, Tractor Supply, Sears Roebuck, Macy's, among others, to which nothing approaching 25,000 square footage is usually devoted to groceries. Indeed the only likely local potential big box purchasers who might be concerned about (although perhaps able to live with) such restrictions would be, in addition to Walmart itself, Super K and Meijer facilities.

In that context, given a "retail sales" highest and best use, the Tribunal's statement that it "considered" but did not give weight to such grocery and discount store use restrictions is eminently reasonable. Similarly, Petitioner's appraiser, who had studied the markets: local, Michigan, and national, given the identity and nature of the most frequent purchasers of big box stores (build to suit purchases

[86] The CofA in *Menard*: "…there is evidence of a market for big-box stores when they are sold for secondary purposes, there is limited evidence as to whether there is a market for big-box stores at the subject property's [incorrectly inferred] HBU." (CofA Op'n, p 9.)

[87] The City assessor acknowledged the Home Depot and Lowe's Home Improvement supply stores are "great examples of people who would use that [Menard] building." The use restrictions would not matter to them: "Q. I see. And so as a retail use you don't think there was functional obsolescence? A. No. Because there are other retail uses that would use the components of that building. Q. Okay. Can you think of anyone other than a Menard's, a Home Depot or a Lowe's that would use that type of building? A. Those are great examples of people that would use that building. Q. Can you think of anyone else that would use it? A. I don't see why – we already have a Wal-Mart in town, but, you know, Wal-Mart, or maybe another -- Q. Okay. A. – home goods sale."

excluded) could also reasonably have concluded after deliberate "consideration," that such restrictions did not merit, having been considered, a market sales price adjustment.

If this were not so, then the Tribunal, and expert appraisal witnesses, in evaluating big box purchases for single or multiple retail sale use, would have to consider that a few of the potential big box purchasers would not have been interested in purchasing because they already had a retail location too close to the subject being evaluated and would not be interested in purchasing another, such as Walmart, in Escanaba.[88] Whether precluded by use restrictions or by proximity of an already operating store, in virtually every instance some of the potential big box purchasers would be precluded, but most others would not. The impact of such preclusion given the number of potential big box purchasers who would not be precluded would be *de minimis*. The Court of Appeals erred in finding that the Tribunal erred in "considering" but not requiring an adjustment to the four "big box" sales comparables with such use restrictions. The Tribunal and the Menard appraiser had a great deal of pertinent experience in this area that the Court of Appeals did not.[89] That is why courts do not substitute their judgments as to appraisal approaches for that of the Tax Tribunal.[90]

J. The *Menard* Court of Appeals Cost Approach.

As discussed above, the Court of Appeals suggested cost approach analysis, including its adoption of the hypothetical purchaser value in use approach, must essentially be premised on its incorrect conclusion that there was no evidence introduced as to potential purchasers of the subject consistent with the Court of Appeals' overly narrow highest and best use inference conclusion. To reach this conclusion it

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[88] TR p 189.

[89] "…we are not to probe the mental processes of the assessors or of the administrative reviewers. The determination of the weight to be given each factor is not arbitrary, 'except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions, -impressions which may lie beneath consciousness without losing their worth.' Holmes, J. in *Chicago, B & Q Ry Co v Babcock*, 204 US 585; 27 S Ct 326, 329; 51 L Ed 636. …Courts decline to disturb assessments for taxation unless shown clearly to transgress reasonable limits." *22 Charlotte, Inc v Detroit*, 294 Mich 275, 287; 393 NW2d 647 (1940).

[90] See pp 35-36, *infra*.

necessarily ignored the Petitioner's eight comparable sales of "big box" facilities, because four of them had not also been adjusted for the use restrictions. The Court of Appeals concluded, pretending there was no evidence of likely potential purchasers of the subject who would put it to its (incorrectly inferred) owner-occupied, freestanding retail sale facility "highest and best use," that its "usual selling price" cash value can be determined by hypothesizing a purchaser and using the cost approach to estimate its "value in use." Indeed, the Respondent City's Assessor, using a replacement cost analysis from the State Tax Commission Assessor's Manual, testified that there would be no functional or economic obsolescence because Menard would have built it exactly the same way, with the same materials and the same design on each of the December 31, 2011, December 31, 2012 and December 31, 2013 tax days as it had when it constructed the facility some years earlier in 2008.[91] The Tribunal correctly rejected the City Assessor's rationale for the reason that, properly applied, a replacement cost approach must necessarily deduct as additional functional obsolescence the cost of construction the purchaser did not want and the cost of adding construction to replace that which it removed as unsuitable. The tribunal was bound to apply this analysis, as the same was announced in *Meijer, Inc v City of Midland*, 240 Mich App 1; 610 NW2d 242 (2000), where the Court of Appeals stated, at pp 7-8,

> 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. Petitioner's building contains numerous features, including but limited to signs, facades, truck bays, and interior layouts that would have to be modified before another retailer could operate in that building. The cost of these modifications must be deducted from the replacement cost in order to determine the true cash value of the property. If a buyer could build an equivalent building for an amount equal to the replacement cost, that buyer would not buy a building

[91] MTT Op'n, finding of fact p 8, ¶15; The assessor testified, "Q. Is it your feeling that obsolescence does not exist in this building? A. functional obsolescence doesn't seem to apply because if Menard's was going to build the store tomorrow, they'd build the exact same store. They have the same ceiling height. They've got the same footprint. They've got their plans that they use to build their building, so what – I did not feel that there was a functional obsolescence." TR pp 188-189.

> needing substantial modification unless the selling price were lower than or equal to the replacement cost less the cost to modify the property.

The Tax Tribunal did not err in *Menard* in reaching that conclusion, and rejecting as lacking credibility the Respondent's cost approach analysis because it did not conform to the established requirements for the use of the cost approach in such an appraisal.

The Court of Appeals in *Menard* found the Tribunal had erred by not adjusting several of Petitioner's comparable sales to reflect the impact of use restrictions on potential sale price. The Court of Appeals had no difficulty in finding "implicit" in the Tax Tribunal's opinion an extremely narrow holding of highest and best use, quite different from that actually stated by the Tax Tribunal in several big box decisions in the prior two or three years. The Court of Appeals was not, however, willing to "infer" from the Tribunal's statement that it "considered" these use restrictions and that the Tribunal concluded, under the circumstances that the restrictions were not such an impediment such as would require an adjustment to the comparable sale price to reflect the fact that some few of the many potential purchasers were precluded. The courts are not permitted to substitute their judgment for that of the Tax Tribunal, which has far more expertise in the matters within its jurisdiction.[92]

K. Manufacturing Facilities.

The Court of Appeals now extends the hypothetical purchaser "value in use" approach earlier used by *Clark* for an industrial facility, to large commercial buildings. Not only is the hypothetical industrial facility purchaser rationale seriously flawed, and contradicted by this Court's subsequent holding in *First Federal Savings & Loan v City of Flint*, but even were it a valid approach, it is improperly applied by the Court of Appeals to big box retail facilities.

In essence, the Court of Appeals decision is moving Michigan from a market value based assessment system to a "value in use" based assessment system with respect to large properties. This

[92] E.g., *Helin v Grosse Pointe Twp*, 329 Mich 396, 408; 45 NW2d 338 (1951) and *SS Kresge Co v Detroit*, 276 Mich 565; 268 NW 740 (1936). (See pp 35-36, *infra*.)

approach is applied by first concluding to a very narrow highest and best use conclusion, then finding few if any comparable sales proving that potential purchasers wish to purchase for that specific narrow highest and best use, then concluding that the tax assessor can go to the cost approach and conclude to a "value in use" by creating a hypothetical (non-existent) purchaser for whose purposes the subject facility is ideally suited. This cannot conceivably be deemed a market-based approach. The hypothetical purchaser cost approach can only be used where it is determined that there is an insufficient market from which to extract sales of similar properties purchased to be put to that very specific highest and best use. This incorrectly assumes, of course, an overly narrow highest and best use which is not a correct actual market-based conclusion.[93]

The simple fact is that some real property improvements are not worth in the market what their owner-occupant spent to construct them. This does not mean that such improvements do not necessarily suit their owner-occupant well, satisfy its needs, but rather means that there are no other potential purchasers in the marketplace placing a similar value on the utility offered by those improvements.[94] This was recognized by this Court in *First Federal Savings & Loan*, where it stated, at p 705, "A building is sometimes worth less the day after completion of construction than its cost of construction. Ordinarily overimprovements are built by government, not by private entrepreneurs who, in theory at least, would not construct an improvement unless they thought it was worth at least what it cost to build."

This Court elaborated in *fn* 5, stating,

> This issue can also arise where a private landowner, for personal reasons or simple improvidence, overbuilds for the neighborhood. He constructs a

[93] See pp 27-29, *supra*.

[94] The situation is easily illustrated by the housing market. This Court can take judicial notice (MRE 201) of the frequently published, and often repeated, advice given homeowners contemplating costly home remodeling improvements. One can remodel the kitchen or bathroom, add a basement family room or a swimming pool, but one will almost always not recover the full cost of the improvement when the home is sold. The added value to the homeowner ("value in use") almost always exceeds the added value to potential purchasers ("market value"). (E.g., Realtor Magazine, "2015 Remodeling Cost Values: Less is More".)

> house that costs $150,000 in a neighborhood where all the other houses are worth about $75,000. In the relevant market, the house costing $150,000 may be worth $125,000 or $100,000, but not $150,000. Because it is an overimprovement for the neighborhood, the house, although brand new, should be valued at the market value, not at what it cost.[95]

Under the rationale of the Court of Appeals in this case, the homeowner building the $150,000 house in a neighborhood where the other homes had only cost $75,000 to construct, while determining the value in use of the home he/she had just constructed at exactly its cost, might find no one else willing to purchase a home of that size and cost in that neighborhood. There might therefore be no demonstrable market for purchasers purchasing such large homes twice as costly as all the surrounding homes in the neighborhood. The Court of Appeals' approach would then conclude that there were no purchasers willing to purchase the home to put it to its "single-owner, large, freestanding residential use" and, that being the case, theorize that a hypothetical purchaser existed, looking for the same design, size, construction features as the owner of the home. This hypothetical purchaser would be willing to pay to purchase the home what the owner of the home had paid to construct it. Others who might be willing to purchase the home for somewhat less and, for example, convert it to duplex units would be ignored, notwithstanding this is where the market for the big home might exist.

The approach used by the *Menard* case would have required a different result in the *First Federal Savings & Loan* situation. There the savings and loan had added features to the "bank building" which enhanced its image as a bank type operation. Presumably there was no market in that location/area for attractive bank buildings, so the enhancements which improved the image of the owner, would not have the same value to any potential purchaser. The improvements were therefore not deemed to add to the true cash market value (the "usual selling price") of the building. Under the *Menard* opinion approach, the

[95] In *Antisdale v City of Galesburg*, 420 Mich 265, 284; 362 NW2d 632 (1984), the court noted, "Even the most desirable structure, if, for example, placed in an undesirable location, may be immediately worth much less than its cost to construct. Other factors can lead to the same result."

Supreme Court should, in the absence of a market for attractive bank-type buildings, have created a hypothetical purchaser who wanted an attractive bank-type building and then determine that its use value to its owner was also its hypothetical market value.

Consider, for example, a well-designed, large-sized manufacturing facility, which is now far too large for its owner's diminished production needs? Its value in use to its owner would be a fraction of what it would have been worth had the owner needed a large facility of that size and capacity. If there is no discernable market for a facility of that type and size in that location, the *Clark* analysis would nonetheless imagine a hypothetical purchaser who needed such a facility and would be willing to pay for it, notwithstanding the fact that the facility would be put to a use requiring a less costly structure (e.g., a warehouse). The "value" which results would far exceed both the facility's market value or its use value to its owner, who no longer needs nor wants that large a facility but is "stuck with it." The rationale of the Court of Appeals in *Safran* would not solve this problem for this facility would not be obsolete and, but for the lack of demand for something of its size and capacity, would be well-suited to the manufacturing purposes for which it was designed and constructed.

The concept of a "unique" "special purpose" property was dealt with in *Thrifty Royal Oak, Inc v Royal Oak*, 130 Mich App 207, 221-225; 344 NW2d 305 (1983). At issue was a Meijer Thrifty Acres "big box" store with 247,000 square feet, which the MTT had incorrectly determined was a unique "special use property" ("improved in a manner uniquely suited to [petitioner's] special type business") and, citing the (earlier reversed) Court of Appeals decision in *First Federal Savings & Loan*, used the cost approach. Judge Allen, in the Court of Appeals minority opinion, wrote:

> At no point did the Tribunal attempt to determine whether the property's unique features would affect the market value of the store. Contrary to the city's assertion, the Tribunal did not casually or incidentally refer to this Court's decision in *First Federal*. To the contrary, the language of the Tribunal's opinion was the fulcrum on which the Tribunal posited its cost approach.

> Furthermore, I disagree with the Tribunal that the property was "unique." The features upon which the Tribunal relied in finding that the store was unique were the store's large size and its incorporation of both grocery and general merchandise sales under one roof. The appraisers, including Leo Goldstein, all testified that the store could be subdivided and sold either to petitioners' competitors or as industrial property. Finally, not one witness even suggested the property was unique, and two of the appraisers testified that, in their opinion, the building was both too ordinary a retail store and too flexible a building to be considered unique. The property could be adapted to other uses with the expenditure of only a modest amount of money.[96]

Judge Allen in defining "unique," cited to a New York Court of Appeals decision involving a large A&P warehouse and shipping center, at pp 224-225,

> In *Matter of Great Atlantic & Pacific Tea Co, Inc v Kiernan*…almost identical testimony caused the New York Court of Appeals to reject valuing the subject property ("one of the world's largest food processing plants") as unique. …The court concluded that, although the plant was built to serve the particular purposes of the plaintiff's business, the building was "easily convertible to other industrial uses" and could readily be subdivided into smaller units without heavy expenditures.
>
> From these findings, the New York Court of Appeals distinguished the plant from "unique" property:
>
> "While various definitions have been advanced, a specialty may perhaps be best defined as a structure which is *uniquely* adapted to the business conducted upon it or use made of it *and* cannot be converted to other uses without the expenditure of substantial sums of money. Property has been categorized as a specialty where some intangible element such as the owner's prestige or good will inheres in its value.
>
> "On the other hand, property does not qualify as a specialty where it possesses certain features which, while rendering the property suitable to the owner's use, are not truly unique to his business but, in fact, make the property adaptable for general industrial use. Thus, if no great expense would be entailed in converting the property from the present owner's use to other business and industrial uses and if a market value may be ascertained, property should not be valued as a specialty merely because it contains such features as interior railroad sidings, truck loading docks, or other amenities and fixtures which are not truly unique to the owner's business."

[96] *Thrifty Royal Oak, Inc v Royal Oak*, 130 Mich App at 223-227.

> In conclusion, the New York Court of Appeals held that the plant should be valued by the market data approach.[97]

This definition is almost squarely on point. Judge Bronson, with whom Judge Wahls concurred on this point, differed, writing that neither party had "presented any evidence of sales of properties which were comparable in size or use," concluded, "Given the parties' complete inability to produce relevant 'comparables,' the Tribunal acted properly in characterizing the subject property as unique 'in light of the proofs presented.'"[98] Judge Bronson cited this Court's *First Federal Savings & Loan* decision as supporting his conclusion, where it held, "Absent more persuasive evidence, such as comparable sales, historical or reproduction cost can be considered in arriving at the usual selling price…"[99]

In the *Menard* record there was ample evidence of sales of "big box" type stores comparable to the Menard facility. The only issue taken with those sales by the Court of Appeals was whether the sale price of four should be adjusted to reflect use restrictions.[100] There was no reason in Menard to default to the cost approach to value because the parties had not produced sales of comparable "big box" facilities. Where there is, as in *Menard*, ample evidence of the sale of comparable properties in the market, it was error to suggest that the property should be valued by hypothesizing a purchaser which would purchase the facility at its value in use to Menard, when there was no evidence that such a purchaser existed, and much evidence of comparable sales to show that in the actual market this approach would seriously over-value the facility.

The *Menard* facility is not "unique" or a "special purpose" facility which, because there is no market for such facilities, must be valued by the cost approach because the other two approaches (sales comparison and income) are not feasible.

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[97] *Thrifty Royal Oak, Inc v Royal Oak*, 130 Mich App at 224-225 (internal citations omitted).
[98] *Thrifty Royal Oak, Inc,* 130 Mich App at 231.
[99] *Id*. at 223. (Emphasis added.)
[100] See pp 24-26, *supra*.

Here is where a highest and best use determination can lead to serious overvaluation. If the assessor determines the highest and best use of a property is its current use, even though there is no demand for that specific use, and therefore no comparable sales for that use, the cost approach can lead to serious overvaluation. If the highest and best use is established, as it should be, at a perhaps less valuable different use for which there is a market, then absent available comparable sales data, the cost approach, recognizing functional obsolescence due to utility for which the buyer is not interested in paying, can reach the correct market value.[101]

L. The Court of Appeals Should Not Have "Second Guessed" the Tax Tribunal's Application of Its Expertise.

Article 6, § 28 of the 1963 Michigan Constitution sets the standard for judicial review of the decision of any administrative quasi-judicial tribunal. The review must "include, as a minimum, the determination whether such final decisions…are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Article 6, § 28 continues with special restrictions on appellate review when the property tax is involved,

> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

It has for many years been established that Courts simply do not "second guess" the judgment of the assessor, in this case the Tax Tribunal. This was explained early on in *Moran v Grosse Pointe Twp*, 317 Mich 248, 258; 26 NW2d 763 (1947), quoting from 22 *Charlotte, Inc v City of Detroit*, 294 Mich 275, 281, 282; 393 NW2d 647 (1940):

> "As stated by Mr. Justice Cooley in *Merrill v Humphrey, Auditor General* 24 Mich 170, 171: '…the courts cannot sit in judgment upon supposed errors of the assessor, and substitute their own opinions for the conclusions he has drawn, where it is his judgment, and not theirs, to which the subject has been confided by the law.'

[101] See pp 33-34.

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> "…Courts are slow to interpose their judgment to say that the assessment has transgressed reasonable limits. In *Newport Mining Co v City of Ironwood*, 185 Mich 668, 152 NW 1088, reference was made to the statement of Mr. Justice Holmes in *Chicago, B & Q Ry Co v Babcock*, 204 US 585, 27 S Ct 326, 329, 51 L Ed 636:
>
> "'The board was created for the purpose of using its judgment and its knowledge. … Within its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."

More recently, in *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 632; 462 NW2d 325 (1990), the Court stated,

> It is the province of the Tax Tribunal to apply its expertise to the facts of each case to determine the appropriate method of arriving at the true cash value, or fair market value, of the subject property. The factual findings of the tribunal are final, provided they are supported by competent and substantial evidence.

The Tribunal's decisions are required to be based on competent, substantial and material evidence. However, the weight to be given the evidence is a matter within the tribunal's discretion.[102]

M. <u>The Court of Appeals Erred In Ignoring the Tribunal's Finding of Credibility.</u>

The Court of Appeals totally ignored the tribunal's finding that (a) the Respondent City's "documentary and testimonial evidence has inconsistencies, contradictions and misrepresentations…"[103] and (b) "Respondent's cost approach is given no weight or credibility in the determination of market value for the subject property."[104]

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[102] *Teledyne Continental Motors v Muskegon Twp*, 163 Mich App 188, 191; 413 NW2d 700 (1987); *Kern v Pontiac Twp*, 93 Mich App 612, 622; 287 NW2d 603 (1976).
[103] MTT Op'n, p 12.
[104] MTT Op'n, p 13.

It is well established that the Court of Appeals, "will not assess witness credibility."[105] The Court of Appeals not only ignored this well-established and logical rule, it ignored the Tribunal's finding that Respondent's cost approach evidence had no credibility.

The Tribunal therefore found the cost approach testimony of the Respondent's assessor, its only valuation expert testimony as to the cost approach, to lack credibility. Yet the Court of Appeals ordered that it would, on remand, "allow the parties to submit additional evidence as to the cost-less-depreciation approach."[106] Paraphrasing what the Court established in *Moran*, *supra*, at pp 16-17, the State has placed on the Tax Tribunal the duty and responsibility to be the final agency responsible for the proper administration of the property tax laws. It is the guardian of the people's rights to fair, correct and uniform property taxation. The State has trusted in its "honor and capacity." It has confided, "…the protection of other social relations to the courts of law. Somewhere there must be an end." (Emphasis added.)

N. The Court of Appeals Ignored the Tribunal's Finding of Fact and Made Its Own Contradictory Finding That Was Totally Without Record Support.

The Court of Appeals "held," without any competent evidentiary support in the record, "…because the deed restrictions imposed by other big-box store owners drastically limited the actual market for such properties, it is appropriate to look to the cost-less-depreciation approach."[107]

There was no such competent testimony. Petitioner Menard's appraiser repeatedly testified that his market study and interviews persuaded him that this was not true. Unlike the City's assessor, he was not found to lack credibility.[108] Indeed, Petitioner Menard's appraiser testified, *inter alia*, "The sales that we utilized, they may have had deed restrictions in place, but it wasn't anything that affected sale price."[109] "It's our understanding that these restrictions had no effect on the sales price or the marketing of the

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[105] *Great Lakes Div of Nat Steel Corp v City of Ecorse*, 227 Mich App 379, 407; 576 NW2d 667 (1998)(citing *Kotmar, Ltd v Liquor Control Comm,* 207 Mich App 687, 525 NW2d 921 (1994).
[106] CofA Op'n, p 12.
[107] CofA Op'n, p 8 (emphasis added).
[108] See, e.g., TR 31; 47, ¶63-66; 86-96; 119-121.
[109] TR 66.

property…"[110] The City's assessor had testified, "…I'm not comfortable with making a determination on the value of use restrictions."[111] She elaborated, "I feel it [the deed restrictions] has an effect on the valuation, and without compared sales analysis you don't know what this difference is. And it's not appropriate to use something with use restrictions that do affect the value."[112]

In effect, *Menard's* expert testimony was that, while the 35,000 sq. ft. grocery store and 50,000 sq. ft. discount store restrictions would possibly preclude a few potential purchasers, they would not restrict the vast majority of potential purchasers of a "big box" structure and therefore did not affect the price at which it sold.[113] This was uncontradicted, competent and credible expert testimony. The Court of Appeals' "drastic limit the market for such properties" "finding" was completely false, not to mention without any – not even a scintilla – of support in the record.

Precedential decisions which abandon approaches to determining assessed "usual selling price" which had been established for over 140 years[114] should not be based on a flagrant misrepresentation of record evidence.

WHEREFORE, your Amicus Curiae respectfully requests that the Supreme Court grant the Appellant Menard, Inc.'s Application for Leave to Appeal from the decision of the Court of Appeals on both grounds stated.

Respectfully submitted,

On behalf of Amicus Curiae
The Michigan Chamber of Commerce and
The Michigan Retailers Association

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[110] TR 110. It makes sense that the sale prices would not be affected by the deed restrictions because when these properties are offered for sale, notices or "flyers" are distributed to market participants offering the properties to the highest bidders. The price is determined ***before*** there is any negotiation relating to use restrictions.
[111] TR p 153.
[112] TR 155.
[113] See pp 17-18, *supra*.
[114] See p 4, *supra*.

By: /s/ Joanne B. Faycurry

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