

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL
PROPERTY TAX APPEAL

Somerville Saginaw LP,
Petitioner,

v

MTT Docket No. 324145

Township of Kochville,
Respondents.

Tribunal Judge Presiding
Victoria L. Enyart

OPINION AND JUDGMENT

Introduction

Petitioner, Somerville Saginaw LP, appeals ad valorem property tax assessments levied by Respondent Township of Kochville (also “Township”) against the real property owned by Petitioner for the 2008 and 2009 tax years. Jeffrey M. Stefan and C. David Bargamian, attorneys, appeared on behalf of Petitioner. David B. Meyer, attorney, appeared on behalf of Respondent. Witnesses appeared on behalf of both parties. They include: Petitioner’s valuation expert, Terrell R. Oetzel, MAI, CRE, SGA appraiser; Franklin John Roenicke, Respondent’s CMAEIII assessor; Elizabeth Volker Sargent, commercial real estate broker; and Terrence Gregory Webber, certified general appraiser.

The proceedings were brought before this Tribunal on December 7, 2009, to resolve the real property assessment dispute.

At issue before the Tribunal is the determination of true cash value of Petitioner’s real property for the 2008 and 2009 tax years. The value on the assessment roll is as follows:

Parcel No. 18-13-4-35-3003-400

Year	TCV	AV/SEV	TV
2008	5,437,600	2,718,800	2,472,201
2009	5,386,000	2,693,000	2,693,000

Petitioner contends the values are:

Parcel No. 18-13-4-35-3003-400

Year	TCV	AV/SEV	TV
2008	3,130,000	1,565,000	1,565,000
2009	3,030,000	1,515,000	1,515,000

The Tribunal finds:

Parcel No. 18-13-4-35-3003-400

Year	TCV	AV/SEV	TV
2008	3,130,000	1,565,000	1,565,000
2009	3,030,000	1,515,000	1,515,000

Background and Introduction

At issue for the tax years at issue is the true cash value for a shopping center located at 5202 Bay Road in Kochville Township, Saginaw County. The property is zoned commercial. The subject property was constructed as a 94,000 square foot Builders Square and was subdivided into two units slightly under 50,000 square feet each. Petitioner believes, that based on market rents and vacancy, the true cash value of the subject property should be reduced.

Respondent believes that the assessments are reflective of 50% of market value.

Petitioner’s Arguments

Petitioner argues that the true cash value of the subject property is overstated due to lack of income, poor market conditions, and increased cost of operating and maintaining the property.

Petitioner's Exhibits:

P-2 Oetzel appraisal as of December 31, 2007 and December 31, 2008.

P-5 November 19, 2009 Detroit News was not admitted.

Terrell R. Oetzel, MAI, testified that he prepared the appraisal for the subject property as of the effective tax dates. He explained that the property was constructed around 1985 and converted in 1995 to two separate spaces. Media Play and Circuit City each leased one half of the property in 2006. The property is currently vacant. The property's location is north of Fashion Square Mall, close to I-75, zoned commercial, and close to other commercial properties. The highest and best use as vacant would be to hold for future development; however, as improved the property is suited for smaller 10,000 to 15,000 square foot units for commercial retail. Oetzel concluded that a national firm such as Peebles or a Dunhams could lease the already established property. Local businesses do not require 50,000 square feet. One of the negative issues with the subject property is that it is not visible from Bay Road; however, it has easy ingress/egress, and is close to Fashion Square Mall.

Oetzel opined that no service exists to determine if local business is looking to rent space and to determine what the level of occupancy and vacancy is, thus he drove up and down the streets in the area. He found that out of 1,626,366 square feet, 53% or 865,184 square feet was available for rent. Oetzel took out of his survey all buildings that were 100% vacant, reducing the vacancy rate to 32%. Oetzel opined that it is a buyers market or a tenants market. Oetzel testified that he interviewed 7 to 9 brokers trying to rent in Saginaw, but the telling point is the market is the worst market in his 40+ years as an appraiser. According to Oetzel, one million residents are leaving the state, they are without jobs, and the recession is deep and long.

Oetzel did not utilize the cost approach because he felt it simply would not be reflective of the market. He did look at the sales comparison approach and the income approach.

Oetzel explained how to arrive at market rent when there is no market. He interviewed brokers and he looked at listings plus a few current rents. His conclusion was \$5.00 per square foot, not \$8.00, because there is no demand for the space. However, Oetzel believes that the subject property would be lucky to achieve \$3.00 per square foot rent.

The subject's \$474,455 potential gross income is based on \$5.00 per square foot rent. The 30% vacancy is deducted for an effective gross income of \$322,119. A charge for management of the property is 3% of the effective gross income at \$9,964. The remaining charge is reserves for replacement at \$.20 per square foot or \$18,978. The net operating income is \$303,177.

Oetzel considered a loan assumption of 6.75% interest rate, 20 year amortization, 12.5% equity dividend and 75% loan-to-value ratio. The result is a 10.0% overall rate using the band of investment. Oetzel also considered overall rates from RealtyRates.com at 9.01% and 9.81%. He then extracted a 9.89% overall rate from sales. The result was Oetzel utilized a 10.0% overall rate. This resulted in a value of \$3,030,000 from the income approach for December 31, 2006. The 2007 income approach resulted in \$3,130,000 value.

Oetzel used five comparable sales in the Sales Comparison Approach. Sale 1 and 2 are Kmart shopping centers, Sale 3 and 4 are Wal-Mart buildings Sale 5 is a Toys R Us building and

included three active listings. He adjusted the sale dates a negative 3%. Sales 1, 3, 4, 6, and 7 were adjusted upward for their inferior locations 10% and 15%. Adjustments were made for differences in square footage. Sales 2 and 8 are larger and were adjusted upward 5% and 10%. Sale 5 is smaller and adjusted a negative 20%. Sales 6 and 8 are adjusted a negative 5% due to their superior condition. Sales 1, 2, 3, and 7 were considered inferior to subject and were adjusted upward from 5% to 30% for their age and condition. The adjusted sale prices per square foot ranged from \$18.89 to \$41.50 with a mean of \$30.00 per square foot. Oetzel concluded to a 2008 market value for subject property of \$2,900,000, and for 2009 the market value for subject property was concluded to be \$2,850,000.

Respondent's Argument

Respondent believes that the subject property's assessment does not exceed the applicable ratio of the property's true cash value, and therefore the property's assessment is, valid under Michigan Law. Respondent has submitted an independent appraisal.

Respondent's exhibits:

P-4 Webber appraisal as of December 31, 2007 and December 31, 2008.

R-2 Property record card.

R-5 May 2009 Report on rent comparables.

Franklin John Roenicke, Respondent's CMAEIII assessor, testified that he was not employed by Respondent until the 2009 assessment year. He did not prepare the value for 2008, but utilized the 2008 value to add the current year's economic condition factor ("ECF"). The cost approach is used throughout the unit of government to be consistent. Roenicke did not do a sales comparison approach or an income approach; however, he did have a discussion with another

appraiser in a bordering area and was told that rent ranged from \$7.00 and \$13.00 per square foot.

Roenicke testified that the lack of sales in the past couple of years does not indicate that the market was depressed. He also stated that a distressed market may be defined as more sellers than buyers. He then explained, “If you view the sales and compare the sales to what the assessments, you would—it would be a stable market; if you want to look at it that way.” TR, p 118. He also testified that Saginaw County Equalization calculates the ECF for commercial properties, but was not aware of how many sales were used.

Elizabeth Volker Sargent, commercial real estate broker for twenty years, described the market area for subject as the central shopping hub for all of Saginaw County due to the proximity of Fashion Square Mall, Home Depot, and other anchor stores. She then continued to explain which stores were vacant and the length of time they were unoccupied. She was of the opinion that when properties are not exposed to local brokers they take longer to sell. She did not recall marketing any properties in the subject’s area.

Terrence Gregory Webber, certified general appraiser, testified that he has been appraising for 34 years, with 15 concentrated in Saginaw County. He performed an appraisal of the subject property. He does about 60%-70% of his work for lenders, attorneys, and CPAs.

Webber observed that the area has approximately 20 big box stores similar to subject and subject was the only vacancy. Initially he believed that management of the property was somewhat

lacking, because he did not see a broker sign on the property.

Webber stated that the structure is too large, and would have to be broken into smaller units to rent to the local market. Because he is familiar with the market area, Webber proffered that a 15% vacancy rate which he stated was a turnover rate. Webber stated that the Kochville Township area would require from six months to twelve months to lease up. If a property is still on the market, after that time Webber goes back to management. He looks at factors such as whether the property is listed with a local competent real estate broker; fairly priced; and accessible. Subject property is located on the two highest traffic count areas in the county. Webber stated he believes that under any economic conditions there is no reason why a property would take six months to rent.

Webber did a sales comparison approach using a sale from Fenton and Midland and a listing in Flint Township. Sale 1 sold for \$2,850,000 in September 2007, with 44,348 square feet. He adjusted Sale 1, a retail space in Fenton, negative 10% for time, and a negative 10% for building size for a final value of \$52.06 per square foot. Sale 2 is an Office Max, which sold for \$1,750,000 in November 2006, with 24,360 square feet. It had an existing 1997 lease for \$6.66 a square foot. Webber adjusted negative 15% for time, minus 5% for age, 5% adjustment for location, and a 15% deduction for size for a final value of \$51.29 per square foot. Webber's third comparable was an offering of a former Best Buy property for \$2,640,000 April 2006 with 36,700 square feet.¹ He adjusted the property a negative 15% for time and minus 10% for building size for a final value of \$55.03 per square foot.

¹ He neglected to disclose that deferred maintenance was estimated at \$390,000.

Webber made adjustments on his sales grid for building size, however, he state “The comparables were chosen to match the subject unit sizes, therefore no adjustment is awarded.”

P-4 p 24.

Webber estimated the value of subject property was \$53.31 per square foot or \$5,100,000 for 2008 and \$60.90 per square foot or \$5,800,000 for 2009.

Webber also performed an income approach for subject property. He used rent comparables² from other communities. They are:

A December 1997 lease in Portage at \$9.57 for 90,112 SF.

A December 1996 lease in Kentwood at \$13.83 for 39,263 SF.

A lease in Lansing from unknown time at \$12.75 for 29,540 SF.

A 1996 lease in Muskegon at \$9.00, \$13.47 and \$9.32 for 93,993 SF.

Webber testified:

When I have in my marketplace in a distressed period only one or two rents, this cannot be contrived as a statistical trend. The sample is too small. You know one at \$4 or \$5 or one at \$6, it doesn't tell me what the market rents for. Those are -- the sample is too small. So I have to expand and go to the rest of the State of Michigan and say, okay, the big-box study tells me that the majority of the renters for properties like this, in this same situation, are between nine and \$10 per square foot. Tr, pp 168, 169.

Webber took into consideration the historical rent of subject property and what it would have been with a step-up lease with Circuit City. He determined that the future rent may have been \$8.50 and discounted to \$7.02 per square foot. Webber thought that the \$7.02 was conservative based on his comparables where the majority of the rents were \$9 to \$10 a square foot. The \$7.02 reflects the economic downturn.

² Webber did not list the rent comparables on a grid. The Tribunal extracts the information from his addendum.

Webber testified on cross that he did not verify the accuracy of the lease information contained in the addendum of the appraisal. He agreed that the rent comparables are approximately twelve years old, but they were all that were available to him.

Webber testified that the appraisal does not contain any source or information to support a 15% vacancy rate.

Webber testified that he drove around to look at the big box stores and conducted estimates on vacancy. He also did an initial survey that includes a sample of some of the rental rates.

Webber's income approach uses \$7.02 per square foot for rent with a 15% vacancy for an effective gross income of \$562,592. He determined that expenses include \$4,500 for legal and accounting, \$5,000 for insurance, \$16,878, for management (3%), and reserves for replacements are \$16,878 for total expenses of \$43,256. The net operating income is \$519,336. He uses a band of investment using 8% financing for 15 years with a 75% mortgage to equity ratio. The annual constant is .116830. The equity position requires a 7% return. This appears as follows:

$$\begin{array}{r} .75 \times .116830 = .0876225 \\ .25 \times .070000 = \underline{.0175000} \\ .1051225 \text{ rounded to } 10\% \text{ overall capitalization rate} \end{array}$$

The result of Webber's income approach is a 2008/2009 value of \$5,200,000.

Petitioner provided the De Bene Esse deposition transcript for Thomas Mirandi, current listing agent for subject property. He is employed by RD Management in New York, and markets

properties all over the United States. He believes that the Saginaw market fares worse in comparison to other markets in the country.

Mirandi testified that the main effect of the Michigan economy is the shrinking of the automotive industry. He does direct marketing to tenants and real estate brokers through e-mail blasts. The subject property is included in trade shows. Trade journal advertising as well as brochures is part of the marketing techniques used to lease subject property.

When questioned why the subject property has not been leased, Mirandi explained:

Well, I think it's directly attributable to the weak state of the State economy, and the – the very soft and weak state of the national economy. It has an impact on tenants wanting to make moves into – into various markets, and has – has halted expansions across the board. TR, p 18.

Mirandi could only recall one lease in Michigan for 2008 for 2,500 square feet. He discussed the management of a dozen properties in Michigan.

Tribunal's Findings of Fact

Subject property is an income-producing property that, due to corporations closing, lost both of their tenants. The Tribunal agrees with Petitioner that the subject property is overvalued, based upon the facts that Petitioner's appraisal considered. Petitioner's appraisal was transparent; Oetzel provided the background data and explained where the information that was utilized in both considering the income, vacancy and expenses came from. He also used contemporary information upon which to base his opinion. Properties in different markets provide information upon which to base total square footage, rental comparables, as well as vacancy. The Saginaw

market did not have that information, thus Oetzel drove the community and listed 24 large properties and calculated the square footage and the space available to initially determine that out of 1,626,366 square feet, 865,184 square feet was vacant, or 53%. Next he extracted all of the properties that were 100% vacant and took them out of the equations. The result was a total square footage of 1,122,788 with 361,733 square feet vacant for an estimated 32% vacancy, which Oetzel rounded to 30% vacancy. The Tribunal finds that this is more appropriate than Respondent's estimate of 15% vacancy without any documentation. In fact, Respondent did a pre-appraisal inventory that included 2,232,342 square feet with 973,555 square feet or 43.61% vacant. R-5. However, Respondent did not consider that in its appraisal. The carte blanc assumption by Webber that the vacancy was 15% was based on what he believed was the vacancy for big box stores; however, he found that the subject property was the only vacancy. However, Respondent's exhibit 5 tells an entirely different story.

Petitioner used current listings and one actual lease to determine the rent. Respondent used leases that were in excess of ten years old, unverified, and unsure if they were still in existence. The Tribunal finds that Respondent's use of old leases in a better economic climate unfounded as to the market rent of subject property. Respondent did not discuss the difference in location between Portage, Kentwood, Muskegon and Lansing with the Saginaw market.

Respondent's appraisal has little basis for the Tribunal to accept it as market value. The appraisal has large flaws in the income approach and in the assumption that stale leases in other communities would have any bearing on what subject property would lease for in his appraisal. The actual calculation is a method which the Tribunal is unfamiliar. Webber used old rents from

Circuit City, increased them up (for inflation), and then discounted to a present day estimate.

The Tribunal finds this novel concept not appropriate and certainly not based on rental rates for the tax years at issue.

The Appraisal Institute states:

Older sales, occurring prior to the onset of the depressed economy should be used with great caution because they may not reflect the problems associated with the depressed economy. Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 12th ed, 2001), p 434.

Respondent's sales approach included two sales and one "offering." Webber did not check back to determine if or when the April 2006 offering actually sold. The three sale comparables were all approximately equal to one half of subject property's square footage or less. The use of sales where the square footage is substantially less does not appear to the Tribunal to be of great value in determining the value of subject property. The sales comparison approach and lack of specifics lead the Tribunal to not accept Respondent's appraisal as market value of subject property for the tax years at issue.

Respondent's assessment relied on the cost new less depreciation approach. Respondent provided property record cards for the years at issue and did not consider the sales comparison approach or the vacant commercial properties located within the community or lack of sales as a sign that the market is depressed. The Tribunal does not accept the assessment as an alternative presented by Respondent.

Respondent's reliance on the application of an ECF to allow the mass cost approach to be adjusted for variations in the market year to year is misplaced. The ECF in actuality compares what properties have sold for and what they were assessed as at the time they were sold. It has little to do with whether the market is increasing or decreasing and more to do with the level of assessment. The proper way to determine if a market is increasing or decreasing is to consider the number of sales, what a prior sale price was, the length of time the property was listed on the market, and concessions. This means that the sales would be tracked over time to determine the average length of time of the market, the decrease in actual sales, and if properties are increasing or decreasing. The level of assessment is required in assessing practices to make sure that a neighborhood or class of property is at 50% of market value. However, when an assessment is appealed at the Tribunal the specific property is taken out of the mass appraisal paradigm because the Tribunal's charge is to determine the market value of a specific property as of the tax dates at issue. The assessor has to equalize the properties on a mass basis. The two charges are different. When the assessor appears before the Tribunal, in a valuation matter, the paradigm changes, the question to be answered is what the true cash value of subject property is as of the tax dates at issue.

The Tribunal finds that Petitioner's appraisal was well thought out with sufficient details to allow the Tribunal to clearly understand where the information came from and why data was included or excluded.

Conclusions of Law

Pursuant to Section 3 of Article IX of the State Constitution, the assessment of real property in Michigan must not exceed 50% of its true cash value. The Michigan Legislature has defined true

cash value to mean the usual selling price at the place where the property to which the term is applied is at the time of the assessment, being the price which could be obtained for the property at private sale, and not forced or auction sale. See MCL 211.27(1). The Michigan Supreme Court in *CAF Investment Co v State Tax Commission*, 392 Mich 442, 450 (1974), has also held that true cash value is synonymous with fair market value.

In that regard, the Tribunal is charged in such cases with finding a property's true cash value to determine the property's lawful assessment. *Alhi Development Co v Orion Twp*, 110 Mich App 764, 767 (1981). The determination of the lawful assessment will, in turn, facilitate the calculation of the property's taxable value as provided by MCL 211.27a. A petitioner does, however, have the burden of establishing the property's true cash value. See MCL 205.737(3) and *Kern v Pontiac Twp*, 93 Mich App 612 (1974).

The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law...The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not...exceed 50%....; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. Const 1963 Art IX , Sec 3.

The Tribunal finds that based on sales and the income approach, Petitioner was able to show that the subject property was overassessed for the 2008 and 2009 tax years.

Judgment

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

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

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Order within 28 days of the entry of this Order. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of the Tribunal's order. As provided in 1994 PA 254, being MCL 205.737, as amended, interest shall accrue for periods after March 31, 1985, but before April 1, 1994, at a rate of 9% per year. After March 31, 1994, but before January 1, 1996, interest rate of the 94-day discount treasury bill rate for the first Monday in each month plus 1%. As provided in 1995 PA 232, being MCL 205.737, as amended, interest shall accrue for periods after January 1, 1996 at an interest rate set each year

by the Department of Treasury. Pursuant to 1995 PA 232, interest shall accrue (i) after December 31, 1995 at the rate of 6.55% for calendar year 1996, (ii) after December 31, 1996 at the rate of 6.11% for calendar year 1997, (iii) after December 31, 1997 at the rate of 6.04% for calendar year 1998, (iv) after December 31, 1998 at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999 at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000 at the rate of 6.56% for calendar year 2001, (vii) after December 31, 2001 at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003 at the rate of 2.16% for calendar year 2004, (x) after December 31, 2004 at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005 at the rate of 3.66% for calendar year 2006, (xii) after December 31, 2006 at the rate of 5.42% for calendar year 2007, and (xiii) after December 31, 2007 at the rate of 5.81% for calendar year 2008, (xiv) after December 31, 2008, at the rate of 3.31% for calendar year 2009, and (xv) after December 31, 2009, at the rate of 1.23% for calendar year 2010.

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

MICHIGAN TAX TRIBUNAL

Entered: January 27, 2010

By: Victoria L. Enyart