

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

Suburban Properties-Macomb LLC,
Petitioner,

v

MTT Docket No. 347318

Township of Macomb,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

OPINION AND JUDGMENT

INTRODUCTION

Petitioner, Suburban Properties-Macomb LLC (“Suburban”), appeals ad valorem property tax assessments levied by Respondent, Township of Macomb, against the real property owned by Petitioner for the 2008, 2009 and 2010 tax years (Parcel No. 08-09-200-017). Steven P. Schneider, attorney, represented Petitioner; and Lawrence W. Dloski, attorney, represented Respondent.

A hearing on this matter was held on May 2, 2011 and May 3, 2011. Petitioner’s witnesses were Tom Anastos, owner and operator of Suburban Properties-Macomb LLC., and Kevin Kernen, MAI, MRICS. Respondent offered Respondent’s Assessor, Phyllis Sharbo, as its only witness. Respondent filed a “Post-Hearing Memorandum” on June 14, 2011. Petitioner filed a “Post-Trial Brief” on June 15, 2011.

Based on the evidence, testimony and case file, the Tribunal finds that the true cash values (“TCV”), the state equalized values (“SEV”) and the taxable values (“TV”) of the subject property for the years under appeal are as follows:

Parcel Number: 08-09-200-017

	TCV	SEV	TV
2008	\$3,844,500	\$1,922,250	\$1,922,250
2009	\$3,267,800	\$1,633,900	\$1,633,900
2010	\$3,104,400	\$1,552,200	\$1,552,200

PETITIONER’S CONTENTIONS

Petitioner contends that the evidence presented in this case strongly supports a determination that the true cash value of the subject property as determined by Respondent is substantially over-stated. Petitioner further contends that in its analysis of the market information provided by Petitioner, the Tribunal should give the most weight to the three sales of Michigan ice rinks identified by Petitioner, all of which have two sheets of ice, are slightly older than the subject, have similar amenities and have similar rental rates. (Petitioner’s Post-Trial Brief, p. 1)

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

Parcel Number: 08-09-200-017

	TCV	SEV	TV
2008	\$5,200,000	\$2,600,000	\$2,600,000
2009	\$4,400,000	\$2,200,000	\$2,200,000
2010	\$3,300,000	\$1,650,000	\$1,650,000

As contended by Petitioner in its Post-Trial Brief, the True Cash Value of the subject property for 2008 should be based on \$50 per square foot derived from market information relating to three sales of ice arena properties in Michigan, which would result in a true cash value of \$3,495,000; for 2009 and 2010, the true cash values of the subject property should be based on the deterioration of the market.

Petitioner contends that its market evidence clearly demonstrates that Respondent has over-assessed the subject property. Respondent determined that the

true cash value of the subject property is in excess of \$110 per square foot for the 2008 tax year, in excess of \$93 per square foot for the 2009 tax year, and in excess of \$88 per square foot for the 2010 tax year. Petitioner contends that all of the comparable sales identified by Petitioner's appraiser reflect sale prices per square foot, after appropriate adjustments, in the range of \$75 per square foot for 2008, in the range of \$63 per square foot for 2009, and in the range of \$47 per square foot for 2010. More important, sales of ice rinks located in Michigan during the period 2004 through 2010 reflect an average per square foot sale price of approximately \$32 with the highest per square foot sale price of approximately \$43. (Brief, pp. 1, 2). Further, the market for ice rinks has been adversely affected by the recession, as hockey participation has decreased dramatically since 2005 in Michigan and in Macomb County. (Brief, p. 6).

Petitioner also takes exception to Respondent's cost approach primarily because that approach is not reflective of the market. Specifically, rental rates for the subject property have not increased since completion of its construction in 2005 and general market conditions in Michigan have steadily declined since 2005. Further, Petitioner notes that Respondent's assessor has not previously assessed an ice rink before assessing the subject property for the 2010 tax year, did not assess the subject property for 2008 and 2009, cost information was derived from the State Tax Commission cost manual, and an ECF factor was applied based on Macomb County information and analysis that did not include any ice rinks. (Brief, pp. 3, 4). Petitioner further contends that Respondent has failed to properly determine the depreciation appropriate to the subject property, given market conditions. (Brief, p. 5). Given the substantial difficulty in determining depreciation, including both physical and economic, for the subject

property, Petitioner contends that the Tribunal should give no weight to the cost approach, which was the conclusion reached by Petitioner's appraiser, and which was solely relied upon by Respondent. (Brief, p. 7).

Finally, Petitioner contends that substantial weight should be given to the sales of Michigan ice rinks identified by Petitioner, which reflect an even lower true cash value for the subject property than that determined by Petitioner's appraiser, who relied primarily on non-Michigan sales. Specifically, Petitioner contends that the Tribunal's primary focus should be on the three Michigan rinks (Kalamazoo, East Lansing and Chelsea), all of which were sold during the period December 2004 through July 2010, were constructed between 1998 and 2001, and have two sheets of ice, as does the subject. (Brief, p. 9). Without adjustments, the per square foot sale prices of the Kalamazoo rink were in the range of \$ 37 - \$38 per square foot, the per square foot sale price of the East Lansing rink was approximately \$37 per square foot, and the per square foot sale price of the Chelsea rink was approximately \$35 per square foot. After adjustments for location, rental rates, dates of constructions, etc., Petitioner contends that the true cash value of the subject property as of the December 31, 2007 assessment date should be no more than \$50 per square foot. Further, the true cash values for the subsequent years should decline by a percentage consistent with the assessments determined by Respondent for the subject property for those tax years. (Brief, pp. 12, 13).

PETITIONER'S ADMITTED EXHIBITS

P-1 Profile of Tom Anastos from Michigan State University website, Hockey Dept.

P-2 Suburban Sports Group Leadership Team (from company website).

P-3 Summary Appraisal for subject property.

P-4 Aerial photographs of subject property and surrounding area.

P-5 Aerial photograph of Wings West Arena, Kalamazoo. (Sales comparable 3).

P-7 Photographs.

PETITIONER'S WITNESSES

Tom Anastos

Tom Anastos, owner and operator of Suburban Properties-Macomb LLC, was Petitioner's first witness. He explained that his company is a group of companies that own or manage more ice rinks within the state than any other company or individual. (Transcript, p. 17). Mr. Anastos testified that in addition to the subject property, his company also owns a rink in Farmington Hills and another rink in East Lansing. The company also manages a rink in Rochester, the City of Novi's municipal rink, and just began to manage the municipal rink in Royal Oak. (Transcript, p. 17)

Mr. Anastos explained his extensive background with hockey and ice rinks as a college athlete, as a board member of USA Hockey, as Commissioner of the Central Collegiate Hockey Association, as a hockey coach at various levels of organized hockey, including his recent appointment as the hockey coach for Michigan State University, and as an owner and manager of ice rinks throughout the State of Michigan. (Transcript, pp. 18 – 25).

Mr. Anastos further testified that the cost to construct the subject ice rink, including personal property, was approximately \$7.6 million. (Transcript, p. 43). He further testified that as a result of the downturn in the Michigan economy, certain projections regarding population growth, discretionary income, construction of the

Macomb Township Center, and normal hourly rental rate increases, did not materialize. (Transcript, pp. 43 – 46). Therefore, the facility has never achieved its initial income projections used to support the construction cost. (Transcript, pp. 48, 49).

Mr. Anastos discussed certain of the ice rinks located in Michigan that were identified in the appraisal prepared by Mr. Kernen. For example, he has knowledge of Petitioner's appraiser's Improved Sale No. 3 (Kalamazoo ice arena), stating that he has been in the facility many times and that it is very similar to the subject property as it has two sheets of ice, was built in 2001, and its rental rates are slightly higher than the subject (although its construction is different and it does have a restaurant/bar). (Transcript, pp. 56, 57). Mr. Anastos also has knowledge of the East Lansing property (identified by Petitioner's appraiser on p. 53 of Petitioner's Exhibit P-3) as Petitioner (or a related company) purchased the property in December 2004. The East Lansing property had been offered for sale by a financial institution for approximately three years prior to its purchase by Petitioner (or a related company). (Transcript, pp. 59-61). Petitioner paid approximately \$2.35 million for the East Lansing property. (Transcript, p. 64). Petitioner testified that the East Lansing ice rink is larger than the subject, has essentially the same amenities as the subject, and receives rental rates equivalent to the subject. (Transcript, p. 71). Mr. Anastos further testified that the Chelsea Michigan ice rink has two sheets of ice, it has a bar and restaurant, and has ice rental rates similar to the subject. (Transcript, pp. 75 – 77).

Finally, Mr. Anastos testified that he was familiar with each of the fifteen (15) properties identified by Respondent (Exhibit R-1, page 13) and provided testimony regarding each of these properties. (Transcript, pp. 80 – 86).

Kevin Kernen

Kevin Kernen, MAI, the Director and head of the real estate appraisal group in Michigan for Stout Risius Ross, was Petitioner's valuation expert. He testified that he has been an appraiser for twelve years and has appraised 25-35 recreational and entertainment related properties. (Transcript, pp. 197, 198).

Mr. Kernen testified that he was requested by Petitioner to prepare an appraisal (Exhibit P-3) to determine the true cash value or market value of the fee simple interest of the subject property. (Transcript, p. 201). Mr. Kernen further testified that the market demand for hockey participation for Michigan over the last five years has decreased while the demand for hockey throughout the United States has increased (Transcript, p. 209). Further, Macomb County has experienced decreasing population growth and increased unemployment during that time period. (Transcript, p. 207). Mr. Kernen also testified that the subject property competes with five other ice arenas with a total of 16 sheets of ice. (Transcript, p. 79).

Although Mr. Kernen calculated the true cash values of the subject property for the tax years at issue using a cost new less depreciation approach, he did not give any weight to the cost approach in rendering his value conclusions. (Transcript, p. 245). Relying on the Marshall Valuation Service cost manual to estimate the replacement cost of the improvements, Mr. Kernen valued the subject property, adjusting for the heating and cooling system, sprinklers, size, location, perimeter, and story height. (Transcript, pp. 246-249). However, Mr. Kernen recognized the inherent problems with the cost approach associated with depreciation (physical and external) of the subject property, in

ultimately concluding that the sales comparison approach was the better approach to value in this case. (Transcript, p. 261).

Mr. Kernen also determined that the income approach was not appropriate in determining the true cash value of the subject property because the scope of the appraisal was not to value the “going concern value of the subject.” (Exhibit P-3, p. 67). However, Mr. Kernen did note in his appraisal that the subject property “has not achieved net operating income levels consistent with the pro forma projections.” (Exhibit P-3, p. 67). Further, “the difference in projected versus actual net operating income seems to support the physical and external obsolescence deductions that are taken in the cost approach.” (Exhibit P-3, p. 67).

Mr. Kernen relied solely on the sales comparison approach in concluding the true cash values of the subject property for the tax years at issue. Specifically, Mr. Kernen identified seven (7) ice arenas that sold during the years 2006 through 2009. Certain of the sales were used by Kernen for more than one tax year at issue.¹

Mr. Kernen was extensively questioned by Respondent’s counsel regarding the location, income level, population and unemployment rates associated with each of the seven comparable sold properties, as well as the number of sheets of ice, availability of lockers, etc. Mr. Kernen acknowledged that he did not physically inspect any of the seven comparable sold properties (Transcript, pp. 22-26) and was not able to respond to many of the questions posed by Respondent’s counsel regarding the comparable sales. Mr. Kernen did testify that Comparable Sale 7, Elmsford, New York, was the only

¹ The comparable numbers utilized by the Tribunal are found on the comparable property detail sheets (Exhibit P-3, pp. 86 – 92). This is due to the multiple use of the same sales for the various years of the appeal, i.e., Sale 4 Colorado was Sale 1 in 2008, Sale 3 in 2009, and Sale 4 in 2010. See also the Statement of Facts, Item 18.

out-of-state sale with two sheets of ice, and income characteristics and population trends comparable to the subject. He also stated, however, that this property was older construction and was adjusted for the superior location and inferior condition of the property. Mr. Kernen further testified that Comparable Sale 3, Kalamazoo, Michigan, was the only other two sheet ice arena of the comparable sold properties used in his sales comparison analysis. The remaining five sales were not close in population, income or sheets of ice.

When questioned by Respondent's counsel as to how he determined the adjustments for differences in amenities for the comparable sale properties, Mr. Kernen discussed the premise for his adjustments, but failed to explain how he arrives at the percentages that he used. When asked "So these adjustments that you made in all of your comparables are purely subjective?" He responded "They're based on my professional judgment." (Transcript 2, p. 45).

Further, when questioned regarding his failure to use three Michigan sales (a 2006 sale of a West Bloomfield facility, and 2004 sales of facilities in East Lansing and Chelsea) in his sales comparison approach, Mr. Kernen referred to discussion at page 53 of his appraisal. (Transcript 2, p. 53). Specifically, the West Bloomfield ice arena was not used because it was not an operating ice arena at the time of sale, the East Lansing ice arena was not used because it had substantial deferred maintenance and the arms length nature of the sale could not be verified, and the Chelsea ice arena was not used because the conditions of the sale could not be verified.

Finally, for the 2008 tax year, Mr. Kernen concluded that improved sale 4 was the most similar to the subject, with secondary weight given to improved sale 7. Less

weight was given to improved sales 5 and 6, in concluding that a value of \$75 per square foot is appropriate for the subject property, resulting in a true cash value of \$5.2 million. For the 2009 tax year, Mr. Kernen concluded that improved sales 3 and 4 are the most similar to the subject, with secondary weight given to improved sale 5. Less weight was given to improved sales 2 and 6, in concluding that a value of \$63 per square foot is appropriate for the subject property, resulting in a true cash value of \$4.4 million. For the 2010 tax year, Mr. Kernen concluded that improved sales 3 and 4 were the most similar to the subject, with secondary weight given to improved sale 5. Less weight was given to improved sales 1 and 2, in concluding that a value of \$47 per square foot is appropriate for the subject property, resulting in a true cash value of \$3.3 million.

RESPONDENT'S CONTENTIONS

Respondent contends that the true cash, assessed and taxable values determined by Respondent for the subject property for the tax years at issue should be affirmed by the Tribunal because Petitioner's appraisal "is not credible." (Respondent's Brief, p. 1). Respondent further contends that "both the Petitioner's appraiser and Respondent's assessor utilized the cost approach," and concludes that the only substantive difference between the respective cost approaches is the calculation of depreciation. Respondent contends that "the depreciation rate arrived at by Petitioner's appraiser utilizing the comparable sales is unreliable, unsupported and should be given no weight by the Tribunal." (Respondent's Brief, p. 2). Further, "because Petitioner's appraiser could provide no information regarding the comparables which he used as a

basis to calculate external obsolescence, the external obsolescence calculation utilized by the Petitioner's appraiser is not reliable or supported." (Respondent's Brief, p. 4).

Respondent further contends that "the Tribunal should disregard Petitioner's true cash values based on the sales comparison approach for the reason that the Petitioner's appraiser did not have sufficient information about the comparable sales for a meaningful comparison to the ice arena under appeal." (Respondent's Brief, p. 5). Specifically, Respondent contends that Petitioner's appraiser was not knowledgeable regarding regional demographics, neighborhoods, market areas, and programming related to the comparable sold properties, and therefore could not "meaningfully adjust for conditions attributable to the comparables that the appraiser was not familiar with." (Respondent's Brief, pp. 5, 6).

Respondent further contends that Petitioner's reliance on sales of ice arenas located in Michigan is misplaced, as they "provide little if any assistance to the Tax Tribunal in establishing the true cash value of the subject property utilizing the sales comparison approach." (Respondent's Brief, p. 7). Specifically, Respondent contends that the East Lansing sale was a distressed sale, the Kalamazoo ice rink was not marketed as an ice rink, and Petitioner's appraiser knew nothing about the Chelsea sale. (Respondent's Brief, p. 7).

Finally, although neither party relied on the income approach in valuing the subject property, Respondent contends that because the net operating income realized by Petitioner increased from 2006 to 2008 and was generally stable between 2008 and 2010, "the fact that the ice arena's net operating income was stable for the 2008, 2009 and 2010 tax years supports the Assessor's testimony that the Township suffered very

little in comparison to other communities during the economic decline. This stabilization of income supports a true cash value more in line with Respondent's valuation."

(Respondent's Brief, p. 8).

RESPONDENT'S ADMITTED EXHIBITS

R-1 Valuation disclosure.

R-2 Site Plan.

R-3 Photographs.

R-4 Kalamazoo Ice Hockey listing from Loopnet.

RESPONDENT'S WITNESSES

Phyllis Sharbo

Phyllis Sharbo, Michigan Advanced (3) Assessing Officer ("MAAO"), assessor for Macomb Township, testified that she has been employed in Respondent's assessing department for 24 years and has been the head of the assessing department since 1995. (Transcript, p. 112). Ms. Sharbo further testified that she did not prepare Respondent's valuation disclosure for the 2008 and 2009 tax years, but did prepare the valuation disclosure for the 2010 tax year. (Transcript, p. 113). Ms. Sharbo further testified that the population of Macomb Township increased by 57.7 percent from 2000 to 2010 and that building permits increased from 2008 to 2009 and from 2009 to 2010. (Transcript, pp. 114, 115). Specifically, Ms. Sharbo contends that "our situation is not as dire as most other communities." (Transcript, p. 172).

Ms. Sharbo confirmed that the subject building is 69,900 square feet and then explained how the building's true cash values were determined using the cost-less-depreciation approach for each of the tax years at issue. (Transcript, pp. 116 - 138).

Specifically, Respondent utilized the State Tax Commission cost manual to determine rates to be applied to the subject building and related improvements, based on characteristics such as building class, quality of construction, building height, building perimeter, etc. Once a total square foot rate is determined for the building, Ms. Sharbo explained that a county multiplier developed by the State Tax Commission is applied to the rate “to adjust the manual rates to your individual community or county because it costs different to build in one county from another.” (Transcript, pp. 120, 121). As explained by Ms. Sharbo, the next step in the process is to apply a rate of depreciation to the rates developed for the building and each improvement. Again, based on State Tax Commission guidelines for physical depreciation, a “percent good” rate of 93% was determined for the subject property for the 2008 tax year, with corresponding rates of 90% and 88% developed for the 2009 and 2010 tax years (Transcript, pp. 128 - 130), based on an average life of the building of 40 years (Transcript, p. 156). Ms. Sharbo further testified that Respondent determined that no functional obsolescence or economic obsolescence was appropriate for the subject property. (Transcript, p. 158). Finally, Ms. Sharbo explained that an “economic condition factor” or “ECF” is applied to the depreciated square foot rate to represent the cost associated with the “particular neighborhood of the subject property.” (Transcript, pp. 131, 162). Because there were no neighborhood sales of properties comparable to the subject, the ECF for the 2008, 2009 and 2010 tax years was derived from county equalization sales studies, which “randomly selected” the commercial properties to be included in the study. (Transcript, pp. 131, 192). For example, because the ECF for 2009 was .8 and a 5 percent

decrease was applied to all commercial properties for 2010, the ECF for the subject property was decreased to .75 for 2010. (Transcript, p. 136).

Ms. Sharbo further testified that an income approach to value was not “proper” in this instance, as that approach would “value the business, not the physical property.” (Transcript, pp. 153, 154). She also testified that the analysis submitted as Exhibit R-1, page 13, which identified fifteen ice arenas in the State of Michigan and concluded an average assessed value per square foot, fails to support any value conclusions and is irrelevant. (Transcript, p. 190).

FINDINGS OF FACT

1. The subject property consists of one parcel of property identified as Suburban Ice Macomb, located at 54755 Broughton Road, Macomb Township, Michigan.
2. The subject property was assessed for the tax years at issue as follows:

Parcel Number: 08-09-200-017

	TCV	SEV	TV
2008	\$7,711,400	\$3,855,700	\$3,855,700
2009	\$6,518,200	\$3,259,100	\$3,259,100
2010	\$6,183,320	\$3,091,660	\$3,091,660

3. Respondent determined that the subject property experienced a decrease of approximately 15% in true cash value from 2008 to 2009 and a decrease of approximately 5% in true cash value from 2009 to 2010.
4. The subject property has two sheets of ice, an office, restrooms, locker rooms, a small meeting room, a small concession area and does not have a restaurant or bar.
5. The subject ice arena building has 69,900 square feet of gross building area.
6. The subject property was constructed in 2005, is essentially constructed with concrete block and steel-framed walls, and is in good condition.

7. The subject site has 7.94 acres, with no usable surplus or excess land.
8. The parties stipulated to land values of \$595,500 for 2008, \$397,000 for 2009 and \$361,270 for 2010.
9. The subject property was the last ice arena constructed in Michigan.
10. Hockey participation in Michigan has decreased over the past five years, while increasing nationwide.
11. The median income in Macomb Township decreased each year after 2007.
12. Unemployment for Macomb was 8.8% in 2008, 15.7% in 2009, and 14.3% in 2010.
13. The population of Macomb County increased 57.7% from 2000 to 2010.
14. The number of residential building permits in Macomb Township increased from 2008 to 2009 and from 2009 to 2010.
15. Witness Anastos was highly knowledgeable on the subject of ice arenas in Michigan, as a hockey participant and instructor and as an owner and/or operator of several ice arenas.
16. As a general rule, as unemployment rises, discretionary income decreases and, as a result, recreation events have fewer participants.
17. Respondent's cost less depreciation mass appraisal approach to value relied on values derived from the State Tax Commission cost manual.
18. Respondent's economic condition factor ("ECF") for each of the tax years at issue was based upon county equalization sales studies.
19. Petitioner's appraisal relied upon seven (7) sales of ice arena properties located throughout the U.S. during the period 2006 – 2009.

Improved Sale 1: Plattsburgh, New York has one rink and a small concession area and bar and sold for \$14.99 per square foot. It was adjusted for inferior location, condition, quality and land to building ratio. After total adjustments of 95%, the adjusted sale price per square foot for 2010 is \$29.11. This property was sold in December, 2009 and was used for the 2010 tax year only.

Improved Sale 2: Erie, Pennsylvania has one rink, a small snack bar and small locker rooms and sold for \$25.17 per square foot. The sale was adjusted for superior building size and inferior location, condition, quality of construction, and land-to-building ratio. This property was sold in July, 2008 and was used for tax years 2009 and 2010. After total adjustments of 85%, the adjusted sale price per square foot is \$44.51 for tax year 2009 and \$36.46 per square foot for tax year 2010.

Improved Sale 3: Kalamazoo, Michigan has two rinks, a restaurant and office and sold for \$37.22 per square foot. The sale was adjusted for inferior location, and quality of construction. This property was sold in June, 2008 and was used for tax years 2009 and 2010. After total adjustments of 30%, the adjusted sale price per square foot for tax year 2009 is \$45.96 and \$37.45 for tax year 2010.

Improved Sale 4: Windsor, Colorado has one rink, a concession stand and pro shop and sold for \$68.02 per square foot. The sale was adjusted for its inferior location, superior size, and inferior condition. This property sold in May, 2007 and was used in the sales comparison approach for all three years at issue. After total adjustments of 25%, the adjusted sale price per square foot for tax year 2008 is \$85.53, \$71.31 for tax year 2009 and \$51.69 for tax year 2010.

Improved Sale 5: Tacoma, Washington has one rink, a concession area and lockers and sold for \$60.00 per square foot. The sale was adjusted for its superior location and building size, and its inferior condition and quality. This property sold in April, 2007 and was used in the sales comparison approach for all three years at issue. After total adjustments of 45%, the adjusted sale price per square foot is \$87.61 for tax year 2008; \$50.43 for tax year 2009; and \$52.11 for tax year 2010.

Improved Sale 6: Bolton, Connecticut has one rink, four locker rooms, a pro shop and a vending room and sold for \$42.83 per square foot. The sale was adjusted for its inferior location, quality, and condition. It was also adjusted for superior size and land-to-building ratio. This property sold in November, 2006 and was used in the 2008 and 2009 sales comparison approach. After total adjustments of 50%, the adjusted sale price per square foot is \$64.95 for tax year 2008; and \$50.43 for tax year 2009.

Improved Sale 7: Elmsford, New York has two rinks, eight locker rooms, a café, and a pro shop and sold for \$61.60 per square foot. The sale was adjusted for its superior location and inferior condition. This property sold in June, 2006 and

was used in the 2008 sales comparison approach. After total adjustments of 5%, the adjusted sale price per square foot is \$59.45 for tax year 2008.

20. One of the sales relied upon by Petitioner's appraiser was a Michigan sale.
21. Although Petitioner prepared a cost analysis for each tax year at issue, Petitioner did not rely on the cost approach in making its value determinations.
22. Although Respondent prepared a summary analysis of the assessed value per square foot for fifteen ice arena properties located in Michigan, Respondent did not rely upon that analysis in determining the true cash value of the subject property.
23. The sale of the Chelsea ice arena occurred in December, 2004. The gross building area was 85,794 square feet, it has two sheets of ice, and the property sold for \$3,024,000.
24. The sale of the West Bloomfield ice arena occurred in March, 2006. The gross building area was 115,264 square feet, it has two sheets of ice, and the property was purchased for \$2,850,000 for redevelopment.
25. The sale of the East Lansing ice arena occurred in December, 2004. The gross building area was 89,821 square feet, it has two sheets of ice, and the property sold for \$2,200,000, with approximately \$150,000 in deferred maintenance.

ISSUES AND CONCLUSIONS OF LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value.

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

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

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

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

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

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735(1); MSA 7.650(35)(1). The Tribunal's factual findings are to be supported by competent, material, and substantial evidence. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Dow Chemical Co v Department of Treasury*, 185 Mich App 458, 462-463; 452 NW2d 765 (1990). Substantial evidence must be more

than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *Jones and Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

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

The three most common approaches to valuation are the capitalization of income approach, the sales comparison or market approach, and the cost-less-depreciation approach. *Meadowlanes*, at 484-485; *Pantlind Hotel Co v State Tax Commission*, 3 Mich App 170; 141 NW2d 699 (1966), *aff'd* 380 Mich 390 (1968). The market approach is the only appraisal method that directly reflects the balance of supply and demand for property in marketplace trading. *Antisdale*, p278. The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale*, p277. The Tribunal finds that the appropriate method of determining the true cash value of the subject property for the tax years at issue is the sales comparison approach.

Although neither of the respective parties' valuation witnesses utilized the income approach to value, Petitioner's valuation expert did find it significant that the subject property failed to achieve projected net operating income for any of the tax years at issue, thus suggesting that external obsolescence deductions in the cost approach were appropriate. Respondent contends that "the fact that the ice arena's net operating income was stable for the 2008, 2009 and 2010 tax years supports the Assessor's testimony that the Township suffered very little in comparison to other communities during the economic decline," and further "supports a true cash value more in line with Respondent's valuation." (Respondent's Memorandum, p. 8). Because neither party provided the information necessary to properly determine the true cash value of the subject property using the income approach for the tax years at issue, the Tribunal finds that application of the income approach in this matter is not appropriate.

The Tribunal also finds that the cost-less-depreciation approach is not appropriate to determine the true cash value of the subject property for the tax years at issue. Generally, the cost-less-depreciation approach is applicable to a newly constructed property. The cost approach values a property based on a comparison with the cost to build a new or substitute property, presumably taking into consideration market influences. In the instant case, Respondent's assessor valued the subject property on a mass appraisal basis, relying upon (1) cost data derived from State Tax Commission manuals, (2) a county multiplier provided by the State Tax Commission that adjusts the STC's Cost Manual to each individual county (but not to individual properties), and (3) an ECF that is supposed to further adjust the cost of the improvements to the neighborhood or specific class or type of property, but which,

instead, was based on “randomly selected” commercial properties throughout Macomb County. Thus, at no stage in the process applied by Respondent in valuing the subject property using the mass appraisal cost-less-depreciation approach were the market influences impacting an ice arena located in Macomb Township considered, which may have principally been reflected through external or economic obsolescence.

That the cost new of a property must be depreciated for *all* forms of depreciation was appropriately recognized by Petitioner’s appraiser. While both Petitioner and Respondent agree that subject property should be depreciated for physical deterioration, the Tribunal finds that Petitioner’s appraiser has correctly determined that the subject property also suffers from external obsolescence due to the decline in the market.

External obsolescence is a loss in value caused by factors outside a property. It is often incurable. External obsolescence can be either temporary (e.g., an oversupplied market) or a permanent (e.g., proximity to an environmental disaster). Appraisal Institute, *The Appraisal of Real Estate*, (Chicago: 13th ed, 2008), p 442.

In this regard, Mr. Anastos testified that the final cost of \$7,500,000 for the subject property included the land cost, construction, as well as furniture, fixtures and equipment. Petitioner’s projections of net operating income for the subject property prior to construction were overestimated by 22% to 29%, primarily because of the declining economy and discretionary income spent for recreational purchases. The Tribunal finds that Petitioner’s appraiser’s deduction for external obsolescence is appropriate. However, given the reluctance of Petitioner’s appraiser to give any weight to the cost-less-depreciation approach because of the substantial economic obsolescence applicable to the subject property and given Respondent’s failure to

adequately defend its mass appraisal cost-less-depreciation approach to valuing the subject property, the Tribunal finds that the cost-less-depreciation approach should be given no weight in determining the true cash value of the subject property. Further, the Tribunal agrees with Petitioner that the cost-new-less-depreciation approach is not generally considered by parties engaged in the purchase and sale of ice arenas. An investor would generally look at what other similar properties have sold for on a per square foot basis, or, in this instance, possibly on a value per sheet of ice, recognizing such variables as rental rates, discretionary income, population, and the amenities offered.

As stated above, the Tribunal finds that the sales comparison approach is the appropriate methodology to use in valuing the subject property for the tax years at issue. Therefore, the Tribunal considered all seven of the comparable sales identified and used by Petitioner's appraiser, as well as the three additional properties that sold in Michigan that Petitioner's appraiser considered but did not use. For the reasons stated above, the Tribunal gave no weight to Respondent's identification of other ice arenas located in Michigan and resulting calculation of average assessed values per square foot.

The Tribunal's primary concern with Petitioner's appraiser's use of six sales of properties located outside of the State of Michigan is that the appraiser had little personal knowledge of those properties. Mr. Kernen was not geographically familiar with the areas (for example, Mr. Kernen lacked knowledge of local populations and household incomes) and, therefore, made adjustments based on his professional experience. Absent some specific familiarity of Mr. Kernen with these comparable sold

properties, the Tribunal is reluctant to simply accept, without some corroborating evidence, that the adjustments made by Mr. Kernen were appropriate and market based. In this regard, the testimony of Mr. Anastos is helpful, as he has exhibited a unique knowledge of ice arena properties in Michigan. Specifically, Mr. Anastos supports a theory that the size of an ice arena building may not necessarily be the most appropriate variable in determining the value of that property. Instead, the evidence and testimony suggest that the number of sheets of ice a property contained, as well as amenities such as number of locker rooms, availability of a bar or restaurant, etc., may be variables more reflective of the value of an ice arena. Therefore, the Tribunal finds that an analysis of comparable sales based first on the number of sheets of ice and then on adjusted sale price per square foot is appropriate.

Here, the subject property has two sheets of ice. Two of the seven comparable sold properties identified and used by Petitioner's appraiser have two sheets of ice: Improved Sale 3 (Kalamazoo, Michigan) and Improved Sale 7 (Elmsford, New York). Further, two of the three Michigan sales not used by Petitioner's appraiser (Chelsea and East Lansing) have two sheets of ice and continue to be used as ice arenas. Thus, the Tribunal finds that the true cash value of the subject property for the 2008 tax year is best determined using Petitioner's Improved Sale 3 (sold in June, 2008) and Petitioner's Improved Sale 7 (sold in June, 2006), supported to some degree by the Chelsea and East Lansing sales in December, 2004, based on the credible testimony of Mr. Anastos. Although Petitioner's appraiser failed to provide substantive support for the adjustments made to Improved Sale 3 and Improved Sale 7, Respondent also failed to substantively discredit the analysis of these comparable sales submitted by Petitioner's appraiser. As

was stated by Petitioner's appraiser, any sales comparison analysis is subjective. Absent physically inspecting each of the seven comparable sales located throughout the country (which the Tribunal finds cannot be reasonably expected of the appraiser in this case), Petitioner's appraiser reasonably relied on experience, communications with brokers, and internet searches. Further, the adjustments made by Petitioner's appraiser to Improved Sale 3 and Improved Sale 7 were minimal compared to adjustments required by the other five comparable sales considered by the appraiser. Based on adjusted square foot rates of \$46 for the Kalamazoo property and \$59 for the Elmsford, New York property, the Tribunal concludes that the true cash value for the 2008 tax year is \$3,844,500, based on a square foot rate of \$55. This square foot rate is supported by Petitioner's evidence and argument that an adjusted per square foot rate of \$50 is appropriate for the two Michigan sales not used by Petitioner's appraiser. For the 2009 and 2010 tax years, the Tribunal has reduced the true cash values of the subject property by 15% and 5%, respectively, to reflect Respondent's determination of the negative impact of market conditions on the true cash values of the subject property.

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

JUDGMENT

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

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

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by this Order within 28 days of the entry of this Order. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of the Tribunal's order. As provided in 1994 PA 254, being MCL 205.737, as amended, interest shall

accrue for periods after March 31, 1985, but before April 1, 1994, at a rate of 9% per year. After March 31, 1994, but before January 1, 1996, interest rate of the 94-day discount treasury bill rate for the first Monday in each month plus 1%. As provided in 1995 PA 232, being MCL 205.737, as amended, interest shall accrue for periods after January 1, 1996 at an interest rate set each year by the Department of Treasury.

Pursuant to 1995 PA 232, interest shall accrue (i) after December 31, 1995 at the rate of 6.55% for calendar year 1996, (ii) after December 31, 1996 at the rate of 6.11% for calendar year 1997, (iii) after December 31, 1997 at the rate of 6.04% for calendar year 1998, (iv) after December 31, 1998 at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999 at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000 at the rate of 6.56% for calendar year 2001, (vii) after December 31, 2001 at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003 at the rate of 2.16% for calendar year 2004, (x) after December 31, 2004 at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005 at the rate of 3.66% for calendar year 2006, (xii) after December 31, 2006 at the rate of 5.42% for calendar year 2007, and (xiii) after December 31, 2007 at the rate of 5.81% for calendar year 2008, (xiv) after December 31, 2008, at the rate of 3.31% for calendar year 2009, and (xv) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (xvii) after December 31, 2010 at the rate of 1.12% for calendar year 2011.

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

MICHIGAN TAX TRIBUNAL

Entered: July 27, 2011

By: Steven H. Lasher