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AND THE CITY OF NOVI, MICHIGAN

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: ERICKSON RETIREMENT COMMUNITIES, LLC, *et al.*, Debtors.	Case No. 09-37010 (SGJ) Chapter 11 (Jointly Administered)

OBJECTION OF THE OAKLAND COUNTY TREASURER AND THE CITY OF NOVI TO DEBTORS' MOTION FOR DETERMINATION OF TAX LIABILITY AND DEBTORS' AMENDED MOTION FOR DETERMINATION OF TAX LIABILITY

The Oakland County Treasurer is the tax collecting governmental unit for Oakland County, Michigan. As such, it is the Treasurer's duty to collect past due property taxes for the county and various cities within the County, which accrue on both real and personal property located within Oakland County, Michigan. The City of Novi is responsible for the assessment of property and the collection of the current year property taxes which accrue on real and personal property located within the City.

The Oakland County Treasurer and the City of Novi have an interest in the property located at 41100 Thirteen Mile, Novi, Oakland County, Michigan ("Novi Property"). The Oakland County Treasurer and the City of Novi, by and through counsel, Kilpatrick & Associates, P.C. and Sherman & Yaquinto, LLP, and for their Objection to Debtors' Motion for Determination of Tax Liability [Docket No. 1211] and Debtors' Amended Motion for Determination of Tax Liability [Docket No. 1287] ("Motion") says as follows:

Jurisdiction and Venue

1. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 1. The property taxes for 2010 on the Novi Property are not due until September 14, 2010, well after confirmation of the plan. The Court does not have subject matter jurisdiction over post confirmation liabilities such as the tax liability for the 2010 tax year. *In re Holly's Inc*., 172 BR 545 (Bankr WD MI, 1994) and *In re UAL Corporation*, 336 BR 370 (Bankr ND IL, 2006). The Court should abstain from deciding the Motion as to the tax liability for the 2009 tax year pursuant to 28 U.S.C. § 1334(c) as more fully stated in Argument, Section D below.

2. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 2.

3. The Oakland County Treasurer and the City of Novi state that no response is necessary to Paragraph 3 since it only contains statements of law.

Background

4. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 4.

5. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 5.

6. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 6.

7. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 7.

8. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 8 and leave the Debtors to their proofs.

Property Values and Taxes

A. Marketing of Debtors' Assets

9. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 9 since they do not have sufficient information and leave the Debtors to their proofs.

10. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 10 since they do not have sufficient information and leave the Debtors to their proofs.

11. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 11 since they do not have sufficient information and leave the Debtors to their proofs.

B. The Auction

12. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 12 since they do not have sufficient information and leave the Debtors to their proofs.

13. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 13 since they do not have sufficient information and leave the Debtors to their proofs.

14. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 14 since they do not have sufficient information and leave the Debtors to their proofs.

15. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 15 since they do not have sufficient information and leave the Debtors to their proofs.

C. The Recharacterization Adversary Proceedings

16. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 16 since they do not have sufficient information and leave the Debtors to their proofs.

D. Redwood's Valuation and Allocation of the Debtors' Assets

17. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 17 since they do not have sufficient information and leave the Debtors to their proofs.

E. Court's Acceptance of Redwood's Valuations

18. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 18 since they do not have sufficient information and leave the Debtors to their proofs.

19. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 19 since they do not have sufficient information and leave the Debtors to their proofs.

F. Taxing Agencies' Proofs of Claim and Valuations

20. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 20 since they do not have sufficient information and leave the Debtors to their proofs. On or about October 23, 2009, the Oakland County Treasurer filed a secured Proof of Claim in the amount of Two Million Eight Hundred Two Thousand Three Hundred Eighty Three and 10/100 Dollars ($2,802,383.10) as a result of the Debtors' failure to pay real property taxes for the Summer of 2009 on the Novi Property. As of April 20, 2010, the Debtors owe the amount of Three Million Three Thousand Four Hundred Ninety and 17/100 Dollars ($3,003,490.17) for the unpaid 2009 taxes on the Novi Property.

21. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 21.

G. Treatment of Secured Taxes Under the Plan

22. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 22 and leave the Debtors to their proofs.

Relief Sought

23. The Oakland County Treasurer and the City of Novi request that the Court dismiss the Motion since the Debtors are seeking to have this Court determine the extent of the Oakland County Treasurer's lien in the Novi Property, and such relief must be sought via an adversary proceeding pursuant to Fed. R. Bankr. P. 2001(2). Alternatively,

the Oakland County Treasurer and the City of Novi seek denial of the Motion as to the Novi Property to permit the Debtors and the City of Novi to continue the proceedings before the Michigan Tax Tribunal.

Arguments and Authorities

A. The Court Should Not Exercise Its Discretion to Determine the Tax Liabilities as to the Novi Property and Should Abstain

24. Section 505(a) provides that the Bankruptcy Court's jurisdiction over tax valuation is permissive not mandatory and this Court has broad discretion under *§ 505(a)(1)* to abstain from such a determination. *In re New Haven Projects Ltd., 225 F.3d 283 (2d Cir. 2000), In re Luongo,* 259 F.3d 323 (5th Cir, 2001). On or about May 29, 2009, Debtor Novi Campus LLC ("Petitioner") timely filed a Petition with the Michigan Tax Tribunal appealing the valuation of the Novi Property seeking a true cash value of $40,000,000 with an SEV of $20,000,000, Docket No. 0370558. On June 3, 2009, the City of Novi filed a Response to the Debtor's Petition in the Michigan Tax Tribunal. On November 18, 2009, counsel for the City of Novi served Interrogatories on the Petitioner since the Petitioner had not informed the Michigan Tax Tribunal or counsel for the City of Novi that it had filed bankruptcy. Only after obtaining an extension of time to respond to the Interrogatories did counsel for the Petitioner inform counsel for the City of Novi that the Petitioner would not respond because it had filed bankruptcy.

25. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 25.

26. The Court should abstain from deciding the Motion pursuant to 28 U.S.C. § 1334(c). The Debtors sought the jurisdiction of the Michigan Tax Tribunal to resolve the issues of tax liability and valuation of the Novi Property for the 2009 tax year prior to

seeking the jurisdiction of this Court. The proceeding before the Michigan Tax Tribunal has not been concluded due to the Debtors' failure to respond to the Interrogatories propounded by the City of Novi and pursue a counsel conference. The amount of the 2009 taxes on the Novi Property was contested before commencement of the case in the Michigan Tax Tribunal, but the matter was not fully adjudicated prior to commencement of the case. Therefore, only one of the two elements of Section 505(a)(2)(A) has been met.

B. The Sale Price and Allocation are Not Evidence of True Cash Value as Required Under Michigan Law

27. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 27 since they do not have sufficient information and leave the Debtors to their proofs.

28. The applicable value under Michigan law is true cash value. The true cash value statute, MCL 211.27, et seq., in Michigan reads as follows, in pertinent part:

> (1) As used in this act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. The usual selling price may include sales at public auction held by a nongovernmental agency or person if those sales have become a common method of acquisition in the jurisdiction for the class of property being valued. The usual selling price does not include sales at public auction if the sale is part of a liquidation of the seller's assets in a bankruptcy proceeding or if the seller is unable to use common marketing techniques to obtain the usual selling price for the property. A sale or other disposition by this state or an agency or political subdivision of this state of land acquired for delinquent taxes or an appraisal made in connection with the sale or other disposition or the value attributed to the property of regulated public utilities by a governmental regulatory agency for rate-making purposes is not controlling evidence of true cash value for assessment purposes. In determining the true cash value, the assessor shall also consider the advantages and disadvantages of location; quality of soil; zoning; existing use; present economic income of structures, including farm structures; present economic income of land if the land is being farmed or otherwise put to income producing use; quantity and value of standing timber; water power

> and privileges; and mines, minerals, quarries, or other valuable deposits known to be available in the land and their value. In determining the true cash value of personal property owned by an electric utility cooperative, the assessor shall consider the number of kilowatt hours of electricity sold per mile of distribution line compared to the average number of kilowatt hours of electricity sold per mile of distribution line for all electric utilities. MCL § 211.27(1).

Sale price along is not sufficient to determine the true cash value as held by the Michigan Tax Tribunal in the case of *Arath III, Inc. v. City of Grand Rapids*, 2001 Mich Tax LEXIS 5 (2001) attached hereto as Exhibit 1. Intangible business enterprise value, or value in use, or value influencers must also be considered. In order to comply with statutory requirements, a valuation by the Michigan Tax Tribunal would require no less than 4 separate analyses: 1) apartments; 2) assisted living; 3) medical care facilities; and 4) vacant land. Each of these 4 types of property has a separate set of developed case law in Michigan regarding true cash value.

29. Pursuant to Michigan law, an auction sale pursuant to a bankruptcy is not to be used for assessment purposes. MCL § 211.27(1). Should the Court decide to take jurisdiction to determine the tax liability for 2009 regarding the Property, the value set by an auction in a bankruptcy at the end of 2009 is not relevant for the valuation of the Property as of December 31, 2008. The auction of substantially all of the Debtors' assets did not occur until December 22, 2009.

30. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 30 and leave the Debtors to their proofs.

31. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 31 and leave the Debtors to their proofs.

32. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 32 and leave the Debtors to their proofs.

C. Applicable Michigan Law

Michigan General Property Tax Act

33. Property tax assessment and collection in Michigan is governed by the General Property Tax Act, as amended. MCL § 211.1, et seq. The taxable status of persons and real and personal property is determined as of the tax day, which in Michigan is December 31 of the immediately preceding year. MCL § 21l.2(2).

34. The City of Novi has a fiscal year from July 1 to June 30 of the following year. The City of Novi imposes a summer property tax levy each year, which taxes become a lien on July 1 of the year but is due on September 14 of the same year, as permitted by MCL § 211.44a(4). The City of Novi imposes a winter property tax levy each year, which is billed in December of the year but due to be paid by February 14th of the following year pursuant to MCL § 211.44 and City ordinances.

35. If the real property taxes are unpaid on February 15 of the following year, the Local Taxing Authorities return the unpaid taxes as delinquent to the applicable county treasurer. MCL § 211.44(9).

Property Taxes for 2009

36. The Debtors' obligation to pay property taxes in Michigan for the 2009 tax year accrued as of July 1, 2009, prior to the filing of the cases. The Summer 2009 property taxes came due on September 14, 2009, pursuant to City of Novi ordinances. The Winter 2009 property taxes came due on February 14, 2010. The unpaid real

property taxes for 2009 in Michigan became statutory liens on the Property as of July 1, 2009, as provided by City of Novi ordinances and pursuant to MCL § 211.40.

37. The Oakland County Treasurer is now responsible for the collection of the 2009 real property taxes on the Novi Property since the Debtors defaulted in payment and the City of Novi returned the delinquent taxes to the Treasurer. Pursuant to Michigan law, interest accrues on past due taxes at the rate of 12% per annum. M.C.L. §§ 211.59 and 211.78g.

Michigan Tax Tribunal Act

38. Appeal of a tax assessment is governed by the Michigan Tax Tribunal Act, MCL § 205.701, et. seq. The Michigan Tax Tribunal holds exclusive jurisdiction over a proceeding for review of valuation of property under the property tax laws of the State of Michigan. MCL § 205.731.

39. Discovery is permitted in the pending Michigan Tax Tribunal matter pursuant to Michigan Tax Tribunal Rules 257 and 260. The Petitioner has the burden of proof in establishing the true cash value of the Novi Property. MCL § 705.737(3). The Petitioner has the responsibility to arrange for a counsel conference with all other parties to discuss the possibility of settlement. Michigan Tax Tribunal Rule 250. All parties are entitled to submit evidence in the hearing before the Michigan Tax Tribunal. MCL § 205.746.

40. All decisions of the Michigan Tax Tribunal are final and conclusive as to all parties unless appealed to the Michigan Court of Appeals. MCL § 205.752.

D. The Applicable Factors Favor the Court Abstaining from Deciding the Motion

41. The Fifth Circuit has utilized the following factors in deciding whether a bankruptcy court should exercise jurisdiction under Section 505(a).

> "(i) the complexity of the issue under tax law,
> (ii) the exigency of the matter,
> (iii) the burden on the bankruptcy court's docket,
> (iv) the length of time required to hold a trial and to render a decision,
> (v) the debtor's asset and debt structure, and
> (vi) the actual or potential prejudice to either party. *In re Luongo*, 259 F.3d 323, 332 (5th Cir, 2001), *In re Davidson, No. 98-42080, 2002 Bankr. Lexis 1984, (Bankr. N.D. Tex. Oct. 21, 2002)*; *see also In re Galvano, 116 B.R. 367, 372 (Bankr. E.D.N.Y. 1990).*

42. Because of the nature of the Novi Property and the various types of buildings, the issues surrounding assessment and valuation of the Novi Property for real property tax purposes are complex. State law issues regarding Michigan tax law and the underlying assessment procedures predominate. Therefore, the interest of comity suggests that the Court should abstain. *In re Montgomery Ward Holding Corp.*, 2000 Bankr. LEXIS 1326 (Bankr Del 2000). The first factor favors this Court abstaining from any determination of the tax liability regarding the Novi Property.

43. Allowing the Michigan Tax Tribunal to decide the tax issues is not likely to delay the administration of the estate. See *In re Luongo*, 259 F3d at 330. The Court has already confirmed the Plan. The Debtors could have obtained relief from the Bankruptcy Court to proceed with the case they filed before the Michigan Tax Tribunal prior to filing bankruptcy. If the Debtors had so acted, it is possible the tax liability issues would be resolved. Therefore, factor 2 favors abstention.

44. The Oakland County Treasurer and the City of Novi acknowledge that the Court is best able to determine the extent to which a lengthy evidentiary hearing will be a burden on the Court.

45. Once the Petitioner responds to discovery and holds the counsel conference, it is possible that the issues regarding the amount of taxes due for 2009 could be resolved quickly with an order from the Michigan Tax Tribunal. See letter from counsel for the City of Novi in the Tax Tribunal matter attached hereto as Exhibit 2. Factor 4 favors abstention.

46. The Debtors' asset and debt structure are not a factor requiring this Court to assert jurisdiction over determining the tax liability. Pursuant to the Debtors' Disclosure Statement, the Novi Campus has assets in the approximate amount of $238 million and liabilities in the approximate amount of $252.2 million. The Debtors admit liability for some portion of the $3 million in 2009 taxes due so the amount in dispute is less than 1% of the liabilities of the pertinent Debtor. If the Debtors are successful as to the Motion, the benefit will inure to the Novi Construction Loan Claimant, not the Debtors. The unsecured creditors will not benefit which weighs in favor of abstention. See *In re New Haven Projects Ltd. Liability Co*., 225 F3d 283 (2nd Cir, 2000). Factor 5 favors abstention.

47. The City of Novi will be prejudiced if it is required to have its counsel, assessors, appraisers and expert witnesses travel to Dallas, Texas regarding property leased by the Debtors in Michigan. The Debtors have already availed themselves of the jurisdiction of the Michigan Tax Tribunal and the Novi Property and witnesses are located in Michigan. Factor 6 favors abstention.

48. The case at bar is similar to *In re Pilgrim's Pride Corporation* in which Judge Lynn of the United States Bankruptcy Court for the Northern District of Texas abstained from determining tax liability and allowed the pending matter to proceed before the judicial body established under state law. *In re Pilgrim's Pride Corporation*, 2009 Bankr LEXIS 2222 (Bankr ND TX, 2009). See also *In re Delafield 246 Corp*., 368 BR 285 (Bankr SD NY, 2007).

49. Abstention will not delay the reorganization since the Court has granted confirmation.

50. The Court should abstain from determining the tax liability related to the Novi Property for the 2009 and 2010 tax years and grant relief from the automatic stay or post confirmation injunction to permit the parties to proceed before the Michigan Tax Tribunal.

WHEREFORE, the Oakland County Treasurer and the City of Novi pray that the Court deny the Debtors' Motion for Determination of Tax Liability [Docket No. 1211] and Debtors' Amended Motion for Determination of Tax Liability [Docket No. 1287] as to the tax liability for 2009 and 2010 as to the property located at 41100 Thirteen Mile, Novi, Oakland County, Michigan and for such other and further relief as is just and necessary.

Dated: April 23, 2010

Respectfully submitted,

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/s/ Leonora K. Baughman

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EXHIBIT 1

9 of 250 DOCUMENTS

Arath III, Inc., Petitioner, v City of Grand Rapids, Respondent.

MTT Docket No. 236813

STATE OF MICHIGAN -- MICHIGAN TAX TRIBUNAL

2001 Mich. Tax LEXIS 5

March 26, 2001

[*1]

Tribunal Judge Presiding: R. Conrad Morrow

OPINION:

OPINION AND JUDGMENT

I. INTRODUCTION

A. THE HEARING.

This real property tax assessment matter came before the Michigan Tax Tribunal for hearing on August 27, 1998, in its Lansing, Michigan offices. The issues in contention are the 1996 tax year true cash value and assessments for subject commercial real property, an older office building in downtown Grand Rapids.

Petitioner, Arath, Inc., was represented by Peter R. Tolley, attorney at law with the firm of Tolley, VandenBosch, Walton, Korolewicz & Brengle, P.C. Subsequent to the hearing and filing of briefs, by MTT Order of September 10, 1999, granting substitution of counsel, Petitioner's legal representation was replaced by Robert C. Shaver, attorney at law with the firm of Rhoades, McKee, Boer, Goodrich & Titta. Respondent, City of Grand Rapids, was represented by Janice F. Bailey, Assistant City Attorney, and was assisted in examination by Laureen Birdsall, City Assessor. Both parties presented witnesses. Petitioner offered eight exhibits (P-1 through P-8, including P-7 videotape of subject), and all were admitted. Respondent offered two exhibits (R-1 and R-2) [*2] and both were admitted. The parties each filed post-hearing briefs, and Respondent filed a response.

B. ADMINISTRATIVE NOTES.

1. Hearing of Tax Year 1996 Only.

Although no motion to amend the 1996 petition was filed for subsequent years in this matter, shortly before hearing a new petition was filed on June 30, 1998, pertaining to the same tax item number as the instant appeal. That petition--received too late for preparation and inclusion in the hearing of instant Docket No. 236813--was assigned MTT Docket No. 254213, as noted by the Tribunal at hearing. Subsequently, Docket No. 254213 was placed in abeyance by Tribunal Order of August 18, 1999.

2. Videotape Record.

It is the Tribunal's practice to make an official record of an Entire Tribunal hearing by videotape recording, the tape being imprinted with the identifying actual clock time of the events being taped. In this matter, for reasons uncertain, the videotape actual clock time failed to imprint on the official videotape record. Therefore, the entire videotaped proceedings will be considered to have begun with 0:00 (hours:minutes) as the hearing started on the morning of August 27, 1998, concluding that same day [*3] after approximately 4 hours and 24 minutes of total videotaping time (being designated as 4:24). For purposes of citing from the video record in this Opinion and Judgment, the Tribunal has estimated the tape time (not the actual clock time) using this system.

C. THE PARTIES' CONTENTIONS.

Subject real property is an older nearly vacant office building (The Keeler Building) located in downtown Grand Rapids.

Petitioner is appealing only the 1996 tax year assessment, a year in which both a Commercial Facilities Tax Exemption (CFT) had expired, and the Taxable Value was "uncapped" following sale of subject in the prior year. Petitioner contends that the increased assessment exceeds fifty percent of the property's true cash value, primarily based on the May 1995 purchase price of $ 525,000. Petitioner offered no appraisal evidence, submitting only a letter of opinion by a real estate broker, reviewing the acquisition history and affirming the purchase price. In summary, Petitioner's case contended that the purchase price is arm's-length and controlling; that subject's market value is hindered by a downtown fringe location, inadequate on-site parking, subject's older age, need for [*4] remodeling, and lack of full air conditioning.

Respondent contends that its new assessment for tax year 1996 is less than 50% of true cash value, and submitted a short narrative and form appraisal by a State Certified Level III assessor, in support of an increased valuation. In summary, Respondent's case contended that the recent sale was not arm's-length and unrepresentative of market value; that local market conditions were improving, the building could attain an 80% occupancy rate and $ 1,700,000 in value based upon published survey data, three sales of older downtown office buildings supported the appraisal valuation, and that other downtown buildings shared the same parking situation as does subject. Respondent asserts that Petitioner has failed to meet its burden of proof.

D. SUMMARY OF TRIBUNAL CONCLUSIONS.

Based upon the evidence presented at the hearing, the Tribunal has rendered this Opinion and Judgment. The Tribunal finds that Petitioner has failed in its burden of proof, merely relying upon its own purchase price as the sole indicator of true cash value. Without independent market evidence the Tribunal has no basis to measure the merits of that sale price as market [*5] value. It was Petitioner's task to produce that evidence; it did not.

Respondent's case was more fully developed, producing an appraisal employing all three standard approaches to value. Although the appraisal was brief in form and light on data, there was sufficient information to permit reasonable consideration of market activity. The Tribunal agreed with Respondent that the building's age and forms of obsolescence rendered the Cost Approach of no contributing weight.

As to the Income Approach, the Tribunal used portions of the income/expense data base to gain an understanding of the fairly flat nature of the downtown environment for older properties, but rejected further use of that approach on other bases. Specifically, Respondent's projected occupancy rate was unreasonably high for market conditions and a building with currently nominal tenancy, there had been no deduction of preparation costs necessary to achieve such a high level of occupancy, and no recognition had been given to discounting for the time and cost of absorption in a basically flat market.

The Tribunal did not accept the conclusions of Respondent's Sales Comparison Approach, but did find merit in the sparse data [*6] presented. The data was sufficient for the Tribunal to effect modest adjustments, and extensive analysis, resulting in an independent determination of value. The final outcome of this case was a finding of market value at $ 1,422,500, slightly less than the $ 1,263,000 figure reflected (SEV x 2) by the existing assessment, but rejecting the much higher $ 1,700,000 value contention put forth in Respondent's case for the assessment increase upon which the proofs were offered.

II. FINDINGS OF FACT

A. ASSESSMENT AND TRUE CASH VALUE CONTENTION DATA.

The subject property is classified as real commercial property for tax assessment purposes. The assessment data for tax identification number 41-14-30-155-001 follows:

YEAR	ASSESSMENT	LEVEL	SEV	SEV x 2	TV
1996	$ 631,500	50%	$ 631,500	$ 1,263,000	$ 631,500

The True Cash Value contentions of each party:

YEAR	PETITIONER'S TCV *	RESPONDENT'S TCV **
1996	$ 525,000	$ 1,700,000

* Petitioner contends AV, SEV and TV of $ 262,500.

** Respondent contends increasing AV, SEV and TV to $ 850,000.

B. PROPERTY PHYSICAL DESCRIPTION.

The subject property, an older office building, is located at 56 North Division Street, [*7] on the fringe of the downtown area of the City of Grand Rapids, in Kent County, Michigan. While most commonly known as the Keeler Building, it is sometimes identified as Two Fountain Place, a more contemporary reference. The site is zoned C-3, Central Business District, and CBD-5, Office and Financial District. For assessment purposes, the property is classified as Commercial Real Property. The site is located at the southeast corner of North Division Street and Fountain Street, is irregular in shape, with 198' of frontage along North Division, and 147' of frontage along Fountain Street. The building covers most of the land except for a small paved parking area (61' x 66') in the southeast corner, accessed from Fountain Street by a 21' wide paved drive along the east property line. There is no other on-site parking available.

The structure is seven stories in height, has a partially finished basement, was built in 1914 and remodeled in 1984, and is constructed of reinforced concrete frame and floors. Exterior walls are of hollow tile, finished with brick on three sides, and painted steel panels on the south side. Two passenger elevators and one freight elevator service each floor. [*8] Windows are aluminum frames with insulated glass. Heating energy is supplied by a municipal steam system. About one-third of the structure lacks air conditioning, according to the owner's testimony (Vt at 0:29; also Pet Brief, Summary, p 4), contrary to Respondent's appraisal (Exh R-1, p 2) indicating full service.

Interior finishes include marble trim on the first floor entry, drywall partitions, acoustical tile ceilings, and carpeting. Some areas of the building, particularly on the upper floors, were unfinished. Many areas of the building were in need of clean up, particularly floors 2 through 7, removal of debris and former tenant improvements, and general upgrading preparation in anticipation of leasing. The Tribunal would describe the interior condition as generally only fair, with some areas in poor condition.

The building's condition was illustrated by a seven minute videotaped viewing of the building's interior, shown to the Tribunal as Exhibit P-7 (admitted without objection). The building's condition in the videotape was reported to be similar to the condition on tax day, except for some upgrading to first floor conference rooms.

Building size is 167,360 gross square feet [*9] (SF), with about 148,800 net leasable square feet. The building was substantially vacant at the time of recent sale (Pet Brief, p 3, item 17), and only two tenants occupied part of the first floor on tax day (Pet Brief, Summary, p 1).

C. SUMMARY OF PETITIONER'S CASE.

Petitioner presented neither an appraisal nor valuation testimony by a person qualified as expert in real property appraisal valuation. Its case consisted of the testimony of owner James Azzar, and his real estate broker/leasing agent Steven DeHaan. The main contentions of Petitioner's two witnesses, and Petitioner's case, were that (1) the two prior sales from Prentiss to Ellis Family Trust at $ 275,000--and the recent sale from Ellis to Arath III at $ 525,000--were both arm's-length transactions and evidence of market value; and (2) the best indication of subject true cash value is the Arath III purchase at $ 525,000 for which the State Equalized Value at 50% should be $ 262,500 as of December 31, 1995.

Other than subject sale prices, no statement of highest and best use, no market sales data, and no income capitalization analysis were presented to support the subject sales activity as fair representations of [*10] true cash value.

Petitioner did present eight exhibits, only one of which, Exhibit P-8, expressed an opinion of value. That latter exhibit, a one-page letter of subject's acquisition history, dated July 23, 1997, was prepared by broker Steven DeHaan. In that letter, after summarizing his activities in acting as broker for subject transaction, Mr. DeHaan expressed his opinion of value as being "that it would fall between $ 260,000 and $ 525,000." His use of the $ 260,000 figure for the Prentiss-Ellis transaction, rather than $ 275,000 as noted in the Contract of Sale (Exhibit P-6), was explained in his opinion letter (Exhibit P-8) as being based on the buyer's verbal statement of the final price. He declared that Arath III was the only entity to make a purchase offer to the Ellis Estate for the property. No independent appraisal market data, or analysis and reasoning based on that data was presented in the letter.

The remaining seven exhibits related to tax assessment notification and appeal (Exh P-1, 2, 3), exhibits pertaining to subject sale history (Exh P-4, 5, 6), and the videotape (Exh P-7) of subject property's interior.

1. Testimony of Owner James Azzar.

In direct examination [*11] of James Azzar, Petitioner presented subject's recent sale history through testimony and introduction of exhibits. James Azzar formed Arath III, Inc. solely for the purpose of acquiring the subject building from the Ellis Family Trust. (Vt at 0:15). The Ellis Trust had purchased the property with the intent of demolition and clearing of the land for a parking site. Mr. Azzar testified that he purchased the property from the Ellis Family Trust, Michael S. Ellis, Trustee, through broker Steven DeHaan, for $ 525,000 on May 8, 1995, as confirmed by the Closing Statement. (Exh P-4).

The Ellis Trust had acquired the property just several months earlier, March 1, 1995, for $ 275,000, vacant and "as is," from Prentiss Properties Superior II, L.P., as confirmed by the Contract of Sale. (Exh P-6). The Contract of Sale contained a statement by seller Prentiss that the property had been acquired by them "through a quit-claim deed as a part of a portfolio acquisition, and consequently seller may have little, if any, knowledge of the physical or economic characteristics of the property."

Prior to purchase by Ellis, Prentiss had listed the property for sale on January 4, 1995, with S. J. Wisinski [*12] & Company, at $ 300,000, as confirmed by a Cirrix System listing sheet. (Exh P-5). The listing sheet noted the building was vacant of tenants. Attached to the listing sheet, Exhibit P-5, was a Cirrix System printout of the property listing history, indicating the property had been previously listed from September 15, 1992, through January 1, 1994, at $ 750,000.

Next, Mr. Azzar testified to the building's condition through use of a seven minute videotaped viewing of the building's interior. The visual presentation was introduced as Exhibit P-7 (admitted without objection), and shown to the Tribunal during the hearing. The video was prepared by Petitioner's attorney Tolley in July 1998. There was no narrative on the tape, and only minimal verbal explanation by owner Azzar of views shown. Except for some clean up work on the first floor, the video reasonably reflected the subject's condition as of tax day on December 31, 1995. However, according to Mr. Azzar's testimony under cross-examination, the first floor conference rooms area now appears better in the video than it did on tax day because of some post-acquisition improvements. (Vt at 0:38).

Petitioner's video of the interior, showing [*13] each of the seven floors, in the Tribunal's impression, indicated the 2nd through the 7th floors to vary from fair to poor condition, with the top four floors being in greatest need of work. Some of the rental space was nearly suitable for tenancy, other parts were unfinished, while some sections were in a state of disrepair and required expenditures for clean up of the space to bring it into competitive leasable condition. All areas showed signs of obsolete appearance typical of an older office building. The main floor was in somewhat better condition, although still distinctly older. During cross-examination, owner James Azzar stated he had spent "under $ 50,000" for cleaning, carpeting, ceiling repair, painting, and upgrading of the first floor conference rooms. The work

was not performed for a specific tenant, but in hopes of attracting lessees. (Vt at 0:36). He maintains the on-going services of a maintenance person.

In answer to other issues of cross-examination, Mr. Azzar stated that: he had never put the subject property up for sale (Vt at 0:35); the property currently has only two tenants; space is offered at about $ 5-6 per SF, less than competitive properties, and he is [*14] surprised at absence of leasing; subject land does not have sufficient parking for tenant needs (Vt at 0:52); attempts to find parking in the area (various sites named) were unsuccessful. (Vt at 0:52-:56).

In another line of cross-examination, Respondent attempted to impugn the credibility of the witness by reference to his testimony in a Kent County Circuit Court case. (Vt at 0:57-:59). The Tribunal found no merit in that line of inquiry applicable to the instant case.

Under direct examination, the owner testified he had never offered the building for sale, only for lease (Vt at 0:35). Again, along this same line, under re-direct examination, Mr. Azzar testified that he had never received an offer to sell the subject property at $ 1,000,000 (Vt at 1:01), rebutting Respondent's hearsay statement in Exhibit R-1, page 2, that he had "turned down at least one offer in excess of $ 1,000,000." [Note: later in the hearing, after cross-examination of Mr. Payton on this matter, the Tribunal ruled that no weight would be given to the hearsay statement of Petitioner's appraiser.]

2. Testimony of Broker/Leasing Agent Steven DeHaan.

Petitioner called Steven DeHaan as a witness to testify [*15] concerning the acquisition history of subject property, and his experience in securing tenants for the property. Witness DeHaan testified that he has been licensed in real estate since 1981, a broker since 1989, practices in the western Michigan area, and focuses his efforts more in the suburbs than in downtown areas of Grand Rapids. He had participated in, and testified to his knowledge regarding the listing and sale of subject property, and stated that he had attended the closing of subject sale. Mr. DeHaan has been contracted as the listing broker for subject office space. The witness was recognized as an expert with experience in brokerage and leasing, but he was not granted status as an appraisal valuation expert. (Vt at 1:10; 1:18; 1:28).

On direct examination Mr. DeHaan testified that the building was difficult to lease, attributing some of the problem to subject being only partially air conditioned. Also, the system was expensive to operate, since the entire existing system must be activated even though only less space cooling is desired. (Vt at 1:07). Additionally, he stated that the lack of on-site or nearby parking was a deterrent to leasing; he had contacted parking lots [*16] in the area, but was unable to contract for sufficient permanent space within a convenient four-block walking distance. (Vt at 1:08).

Regarding Respondent's three sales used in its appraisal, Mr. DeHaan stated that, based on his experience as a broker, he was familiar with the three properties. He objected to use of Sales # 1 and # 2, at 110 Ionia NW and 40 Pearl NW, respectively, in that they occurred after 1995 tax day. He noted that vacancy was higher in 1995 than several years later. He objected to use of Sale # 1, the Interstate Building, since it was smaller in size than subject, and was 43% leased at the time of sale.

The Tribunal took note that during direct examination of the witness, in what appeared to be an attempt to discredit the assessing practices of the Respondent, Mr. DeHaan noted that Sale # 1 had sold for less than the value reflected by twice the assessment. (Vt at 1:12). The Tribunal gave no weight to the inferences of that one example.

In concluding direct examination, the witness testified that, in attempting to value the subject building, he had tried financial analysis without success. He could not develop a positive capitalization rate. His conclusion of [*17] value was whatever the market would bear, leading him to the range indicated by the two recent sales of subject, the most recent being $ 525,000 based on the arm's-length transaction from Ellis to Arath. (Vt at 1:31).

On cross-examination regarding the recent two sales, the witness stated both transactions were closed at the same time, and that he was unable to justify the difference in prices. On other issues, he testified that lack of a tenant's willingness to walk four blocks for parking was a hindrance to leasing; both Kent County and the Kendall School of Design inquired of space in subject, but leasing failed for lack of parking; the former building manager had reported to him that annual expenses for subject were approaching $ 500,000 per year, but he was unable to secure confirming data (Vt at 1:47); that Ellis had offered to contract for 11 parking spaces next door, but no other lots would contract long term, naming seven other attempts (Vt at 1:49-:54); that the subject's alley and small rear lot would hold 10 cars were it not necessary to use space to provide for truck delivery and trash pickup (Vt at 1:54); and that the downtown market was "a dismal office environment" [*18] at 28% vacancy, and an annual absorption rate around 2%-4% annually (Vt at 1:59).

D. SUMMARY OF RESPONDENT'S CASE.

Respondent's case consisted of a brief form and narrative appraisal report, identified as Exhibit R-1 (the appraisal body) and Exhibit R-2 (the appraisal addenda materials). The report was performed by Charles Payton of the City of Grand Rapids Assessor's Office. The witness testified in support of the appraisal. No other witnesses or exhibits were offered. Respondent's valuation concluded at $ 1,700,000 true cash value for tax year 1996, being an increase over the assessment currently on the roll. As noted in Respondent's opening statement, subject sale is not the presumptive value; instead, one must look to the market. Its appraisal followed straightforward procedures, leading to a conclusion that the assessment was too low. Consequently, Respondent seeks an increase in the assessment.

1. Respondent's Appraisal.

Mr. Charles Payton, author of Respondent's appraisal, is a Certified Level III appraiser, with experience in valuation of commercial property. He has been with the Grand Rapids Assessor's office the past four years, formerly being employed eleven years [*19] as property tax manager for Meijer, Inc. He valued the subject office building under the supervision of City Assessor Laureen A. Birdsall. The eight-page appraisal, Exhibit R-1, was dated March 3, 1998, applied three approaches, and provided a value conclusion of $ 1,700,000 for tax year 1996. Exhibit R-2 consisted of items A through F, seventeen pages in all, being appraisal addenda materials such as maps, floor plans of subject, three sale comparables, a Building Owners and Managers Association (BOMA) survey of downtown rental occupancy and rates, an Institute of Real Estate Management (IREM) office income and expense survey, and two photos of subject property.

Respondent's Highest and Best Use was stated on the first page as being "office use" under its current development; or if the land were vacant, the highest and best use of the subject site would be for "cultural or educational use." There was no supporting analysis of the highest and best use, either as vacant land or as an improved property.

Respondent's Cost Approach used a computerized "calculator cost" methodology common to the assessing field. That method employed a square foot floor area valuation system, with the square [*20] foot base unit rate modified by "multipliers" to adjust for subject's construction features. The method used produced a total reproduction cost new of $ 11,915,355. From that cost new was subtracted 60% physical deterioration based on an effective age of 45 years (1914 age with remodeling in 1984). Also subtracted was functional obsolescence of 45% based on subject's small bay space (close spacing of supporting floor columns). The final deduction was a 45% external obsolescence adjustment for location away from the core of the downtown area. The resulting deductions (factored, not accumulated) left approximately 12% remaining reproduction cost new (known as "percent good" in assessing language), or $ 1,441,758. Land was added at $ 464,055 (30,937 SF x $ 15 per SF), plus depreciated site improvements--asphalt paving--at $ 5,303.

The final Cost Approach conclusion for tax year 1996 was $ 1,910,000 rounded. (Exh R-1, p 7).

Respondent's Sales Comparison Approach began with a brief statement of the market conditions existing in 1995. The report noted that the downtown office market "has been a buyer's market" since the opening of a competitive property in 1993, Bridgewater Place. It was [*21] also noted that there has "not been a discernible change in rents or sale prices, eliminating the need for a time of sale adjustment." (Exh R-1, p 3).

With that background, Mr. Payton's appraisal introduced three sales of downtown office buildings. All three comparables were in subject's immediate neighborhood. Details of each sale were presented in the report's addenda, (Exh R-2), with pertinent indicators summarized in chart format (Exh R-1, p 3). A typographical correction to the sale data chart was noted at hearing under direct examination (Vt at 2:29), wherein the sale prices per SF for the three sales should each be aligned one column to the right.

Sale # 1 at 110 Ionia NW, with 89,900 SF, sold in 1996 for $ 15.29 per SF. It was remodeled in 1979, was about subject's age, seven stories, and had been vacant since 1985. However, at the time of sale, the buyer had a lease agreement with Ferris State University for the first three floors, or about 43% of the rentable area, Sale # 2 at 40 Pearl NW, with 98,236 SF, was built in 1891 and remodeled in 1982, eleven stories, was 80% leased at the time of sale, and sold in 1997 for $ 20.36 per SF. Sale # 3 at 89 Ionia NW, with 46046 SF, [*22] was built in 1916 and remodeled in 1988 and 1993, and has six stories. It sold in 1995 for $ 6.41 per SF. Only the fourth floor was occupied at the time of sale (17%), but the remainder of the building was in a condition ready for tenant finish (referred to as "white box" condition). The report (Exh R-1, pp 3-4) questioned a prior transaction (not the current sale), by which the present seller

had acquired title in 1994 under a Deed in Lieu of Foreclosure, as suggestive of the building's lower pricing history. The Tribunal finds the notation off-point to the current transaction.

Respondent's appraisal considered the best indicator of value to be Sale # 1, but adjusted for the fact that a tenant had committed to 43% of the space at the time of sale. The appraisal concluded that, considering all factors, for tax year 1996 subject should be valued at $ 10.00 per SF for 167,360 SF of gross building area, or $ 1,670,700 rounded. (Exh R-1, p 4).

Respondent's Income Approach was presented in Exhibit R-1, pages 4-5, with application of market survey data contained in the report's addenda, Exhibit R-2. The income analysis was premised on multiple tenancy, using gross leases where the landlord [*23] pays most of the operating expenses. The appraisal concluded subject's 148,800 SF of net leasable area would bring an average of $ 5.00 per SF annually, with a Vacancy and Credit Loss (V&CL) of 20% (or 80% average occupancy). Gross Income was calculated at $ 744,000 and Effective Gross Income (after 20% V&CL) at $ 595,200. The appraisal stated these conclusions were based on the Building Owners and Managers Association (BOMA) survey of downtown Grand Rapids rental occupancy and rates (see Exhibit R-2), for the periods ending December 31, 1995 and 1996.

Next, the appraisal stated that the "probable operating expenses" were based on the 1995 report of the Institute of Real Estate Management (IREM) for downtown office income and expenses. The appraisal calculated expenses at 45% of Effective Gross Income, relying on survey data for mid-range expenses, but excluding real estate taxes. The reduction of $ 334,800 of operating expenses (before real estate taxes) left a remainder net operating income (NOI) of $ 260,400.

For capitalization of net Income, Respondent's appraisal used direct capitalization methodology. The capitalization rate was constructed by use of a mortgage-equity method [*24] known as the Akerson format, which is actually an algebraic presentation of the Ellwood method. All of the income approach calculations were performed by a software program in a printed format, although witness Payton testified he also used his own handwritten calculations.

Input criteria for construction of the overall rate included a 60% mortgage, 11% loan interest rate, 20 year term, 8 year holding period, 16% equity yield (5% greater than the annual constant), and a 5% appreciation at time of reversion. However, the appraisal's capitalization rate was calculated using the Akerson format without inclusion of the reversionary appreciation. The resulting basic rate of .130877, plus a tax capitalization loading for a millage rate of $ 44.1452 per $ 1,000 of AV (= .02207), or a total of 15.29% rounded. Dividing the NOI by the loaded capitalization rate resulted in a final value conclusion under the Income Approach for tax year 1996 of $ 1,700,000 rounded. (Exhibit R-1, p 5).

Respondent's reconciliation reasoned that the Cost Approach would be given no weight because of subject's age, and that the Income Approach was the "most reliable indicator of value," as "strongly supported [*25] by the sales comparison approach."

Respondent's appraised final value conclusion was $ 1,700,000 for tax year 1996. (Exh R-1, p 8).

2. Testimony of Assessor/Appraiser Charles Payton.

Respondent called Mr. Payton as a witness to testify concerning the appraisal he had prepared for valuation of subject, identified in this matter as Exhibits R-1 (the appraisal) and R-2 (addenda data). Witness Payton presented his experience and qualifications, being substantially those noted in subsection 1 above. He stated he had toured the subject property with Petitioner's attorney Tolley in the Fall of 1997, and that it appeared much as shown in Petitioner's videotaped Exhibit P-7.

In direct examination he testified that the assessment had been increased from $ 207,500 in 1995 to $ 631,500 in 1996 because the Commercial Facilities Exemption on the building (an abatement), granted in 1984 for remodeling, had expired. The assessment had been on land only prior to 1996, whereas the newly revised 1996 assessment recalculated current valuations for both land and building. (Vt at 2:05; 3:18). Mr. Payton stated he had not performed the reassessment calculations, but did write the appraisal exhibit prepared [*26] for this hearing.

The witness described the subject property and surrounding neighborhood improvements. He expressed the view that the adequacy of downtown parking, and competition for parking space was no different for subject than for other office buildings. He named several other office buildings, mostly occupied, which also had limited parking. As to the state of the downtown office market in 1995, he felt it had begun to improve as of the end of December 31, 1995; there

had been a national decline in the office market in 1990-91. Additionally, he noted the competition for space being affected by a new property on the market in 1993, Bridgewater Place, a Class A office building with 330,000 SF, much of it having been in pre-leasing since 1991. He stated that older Class C properties, and factory loft conversions, were finding a growing market.

Witness Payton testified as to his appraisal of subject property, being the same facts as were presented in subsection 1 above. His testimony extended to his views on a variety of valuation topics, including: that by statute the sale price cannot be presumptive of value; relative to the three sales in his sales comparison analysis, he stated [*27] that the three used were the best available data in subject's immediate area; in applying the Income Approach, he extracted his vacancy rate from the BOMA study, and also from information available at Board of Review appeals; in deriving his basic capitalization rate, he did not speak with lenders for purposes of this report, but does maintain on-going contacts; as to the air conditioning, he was not aware that one-third of the subject structure was without cooling. (Vt at 2:57; 4:03).

Under cross-examination, regarding Sale # 1 at 110 Ionia, the witness acknowledged that the transaction took place 1 1/2 years after the May 1995 sale of the Keeler Building, that the market was improving during that time, and that a lease agreement in place for 43% of space was a more marketable condition than subject's nearly vacant status. As to Sale # 2, the witness acknowledged that the sale took place several years after the Keeler sale, the sale was closer to the downtown core, and that the building had an 80% occupancy for many years. (Vt at 3:09-:12). On being questioned regarding his view that the Prentiss-to-Ellis sale of subject may not be a market transaction by reason of the bold type [*28] disclaimer statements in the sales document (Exh P-6, pp 6-8), he stated he did not know the basis of the listing price being reduced from $ 750,000 to $ 300,000--acknowledging it could be either duress or a fair price. (Vt at 3:30-:40).

Respondent cross-examined Mr. Payton on the hearsay issue of Mr. Payton's appraisal and testimony alleging that Petitioner had turned down an offer to sell subject "in excess of $ 1,000,000." (Exh R-1, p 2). That claim had been denied earlier by Mr. Azzar during presentation of Petitioner's case. (Vt at 1:01). Mr. Payton explained that the source of the information had been September 1995 minutes or notations (the "scribe" not identified; document not in evidence) from an historical study group, which had noted that a member of the Kent County Council for Historic Preservation had made the statement to the historical group, that person in turn having received the allegation from an unidentified source.

However, upon further cross-examination, Mr. Payton testified that he had not viewed the historical minutes at the time he wrote his appraisal in 1997; instead, having earlier received the allegation from a confidential source whom he declined to reveal [*29] in testimony. The Tribunal explained that failure to testify to information from his knowledge pertaining to the allegation, and answering to Respondent's examination, would be prejudicial to the opposing party's case; on that basis, such information would neither be admitted as evidence in this matter nor accorded any weight. Mr. Payton, having had his options explained, chose not to testify in that regard. Accordingly, on that basis the Tribunal ruled no weight would be given to the hearsay statement of Petitioner's appraiser pertaining to the alleged offer. (Vt at 3:44-:50).

3. Tribunal question on Respondent's appraisal premise.

Upon Respondent resting, the Tribunal inquired of Mr. Payton the basis for his appraisal at $ 1,700,000 projecting an 80% occupancy, as to whether that value represented the building's condition as he had inspected it, or whether his appraisal had assumed some other physical condition necessary to achieve that level of occupancy and value conclusion. Mr. Payton's response was that the building would require remodeling to achieve his appraised results, and that he had not deducted the cost of necessary remodeling. (Vt at 4:19).

> The Tribunal: "Where [*30] did you deduct the cost of remodeling?
> The response of Mr. Payton: "I did not."

Following the Tribunal's inquiry concerning Mr. Payton's appraisal methodology, on re-direct by Respondent-Assessor Birdsall, witness Payton provided a statement that his appraisal assumption was that the landlord would expend preparation costs for bringing the structure close to a "white box" condition (meaning the landlord would bring the building into a condition ready for tenant finish), from which the tenant would then do the build up at its own cost. (Vt at 4:23). That testimony was repeated in Respondent's post-hearing brief, stating that the appraiser's assumption was

that "the landlord would incur costs of cleaning or removal of some of the property shown on the video to get the property close to white box, and that the tenant would do his own build up." (Resp Brief, p 5).

III. CONCLUSIONS OF LAW

A. LAW AND CASE LAW PROCEDURAL REFERENCES.

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, as equalized, and that beginning in 1995 the taxable value is limited [*31] by statutorily determined general price increases, adjusted for additions and losses.

> 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 Michigan Legislature has defined "true cash value" to mean "the usual selling price."

> As used in [*32] this act, "cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. MCL 211.27(1); MSA 7.27(1).

"True cash value" is synonymous with "fair market value." CAF Investment Co v State Tax Comm, 392 Mich 442, 450; 221 NW2d 588 (1974).

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 Dep't 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." (Citations omitted). 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 proof in establishing the true cash [*33] value of the property." MCL 205.737(3); MSA 7.650(37)(3). "'Cash value' means the usual selling price. . . ." MCL 211.27(1); MSA 7.27(1); Meadowlanes Limited Dividend Housing Ass'n v City of Holland, 437 Mich 473, 483-484; 473 NW2d 636 (1991). "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, citing: Kar v Hogan, 399 Mich 529, 539-540; 251 NW2d 77 (1976); Holy Spirit Ass'n for the Unification of World Christianity v Dep't of Treasury, 131 Mich App 743, 752; 347 NW2d 707 (1984).

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 Comm, 3 Mich App 170; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968); Antisdale, at 276. The market approach is the only appraisal method that directly reflects the balance of supply and demand for property in marketplace trading. Antisdale [*34] at 276, n 1. 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 at 277.

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 may not automatically accept a respondent's assessment but must make its own findings of fact and arrive at a legally supportable true cash value. Pinelake Housing Cooperative v Ann Arbor, 159 Mich App 208, 220; 406 NW2d 832 (1987); Consolidated Aluminum Corp v Richmond Twp, 88 Mich App 229, 232-233; 276 NW2d 566 (1979). 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. [*35] Jones and Laughlin, at 356, citing Meadowlanes at 485-486; Wolverine Tower Associates v City of Ann Arbor, 96 Mich App 780; 293 NW2d 669 (1980). A similar position is stated in Tatham v City of Birmingham, 119 Mich App 583, 597; 326 NW2d 568 (1982): "The Tax Tribunal is not required to accept the valuation figure advanced by the taxpayer, the valuation figure advanced by the assessing unit, or some figure in between these two. It may reject both the taxpayer's and assessing unit's approaches."

B. TRUE CASH VALUE DISCUSSION AND ANALYSIS.

1. Petitioner's Case Failed in its Burden of Proof.

At the heart of this appeal is whether Petitioner's recent purchase of subject office building, and its sale price, are solely sufficient to define its market value. That sale, in May 1995, only seven months before the December 31 tax day, at a sale price well below that reflected by the revised assessment, gave rise to this appeal. Purchaser-Petitioner perceives the $ 525,000 acquisition price as controlling, and the seller's 1995 immediately preceding acquisition at $ 275,000 to provide further confirming support for its value contention. In this case, the Tribunal [*36] disagrees. It would appear that Petitioner's confidence in the purchase price as the best indication of value may have played a part in the failure to fully develop his case. Petitioner presented no independent market evidence to measure whether the subject price was at or near true cash value, above it, or below it. Accordingly, in addressing its statutory burden, Petitioner's case barely moved forward, floundering in the inadequacy of its proofs and, not surprisingly, failed to persuade.

The Tribunal has taken note of, and evaluated, Petitioner's purchase from Ellis in 1995, the immediately preceding transaction from Prentiss to Ellis in 1995, and the listing history of subject's offering for sale by Prentiss from 1992 to 1995. That information, while contributing to the body of relevant information, by itself is insufficient to be wholly representative as convincing evidence of subject's market value. Petitioner's failure to present even a minimal body of suitable market evidence was a significant shortcoming in presenting its case. Introduction of an independent appraisal is standard evidentiary procedure in real property appeal cases. The absence of an independent and qualified [*37] market value appraisal, providing data, analysis and reasoning as evidence in support of the purchase price, has significantly contributed to Petitioner's failure to meet its burden of proof.

Testimony by Petitioner-owner and his real estate broker, relative to purchase conditions, fell far short of the evidentiary standard. Owner Azzar was not an uninterested bystander in viewing the true and fair market value of subject; he was an interested party, without any market evidence in support of his purchase price, other than $ 525,500 being that which he had paid. He presented no other office building sales or offerings he had considered in arriving at his conclusion of a price to be paid. He produced no independent appraisal upon which he relied in making his decision to purchase.

Petitioner-owner was further unconvincing as a prudent operator of an older downtown office building. He had no financial analysis demonstrating a plan for bringing his older building into a state of occupancy and profitability. In fact, he produced no financial feasibility analysis for realizing a reasonable return on his investment, or countering the existing slower market conditions of older downtown properties, [*38] or a marketing plan. Importantly, he had presented no concept of highest and best use for his property, or investigation of alternate functions that might be feasible, such as conversion to mixed usage or, could it be supported by analysis, the possibility for demolition and re-use of the site.

The standard is clear. "The petitioner has the burden of proof in establishing the true cash value of the property." MCL 205.737(3); MSA 7.650 (37)(3). "The ultimate goal of the Tax Tribunal is to determine the usual price for which property will sell." Great Lakes Division of National Steel Corp v City of Ecorse, 227 Mich App 379, 404; 576 NW2d 667 (1998), citing Antisdale at 278. Where a property under appeal has sold, case law makes clear that a subject sale should not be "rejected out of hand" since "such cursory rejection would be erroneous," Jones and Laughlin Steel Corp

v City of Warren, 193 Mich App 348, 354; 483 NW2d 416 (1992). Yet, the Court notes, "the sale price of a particular piece of property does not control its determination of the value of that property. . . ." Jones and Laughlin at 354, citing Antisdale v City of Galesburg, 420 Mich 265, 278; [*39] 362 NW2d 632 (1984). Petitioner has failed that standard.

The Tribunal finds Petitioner to have failed in its burden of proof, producing no evidence of merit to support its contention that its purchase price is the true cash value of the subject real property.

2. The Tribunal's Duty in Reviewing Respondent's Case.

As noted at the outset of this case, in tax year 1996 the subject assessment and taxable values were newly established as increased from the prior year, by reason of both the termination of a CFT abatement on the building, and a coincident "uncapping" pursuant to MCL 211.27a(3), following the 1995 year of sale. However, for this appeal, beyond the increases on the tax roll attributable to those actions, at hearing Respondent seeks a further increase in assessment.

Petitioner's failure to meet its burden of proof does not automatically default a decision in favor of Respondent, for several reasons: first, because the assessment does not carry a presumption of validity; second, because the Tribunal has the duty to make an independent determination of value; and third, because Respondent seeks an increase in the assessment and must assume the burden of at least showing [*40] the original assessment (that which was newly revised for the 1996 roll) was too low. The several following citations address these points.

> This Court has explained the rationale for prohibiting the Tax Tribunal from automatically accepting the respondent's assessment as follows: Great Lakes Steel at 409-410, citing from Alhi Development Co at 768.
>
> > Recognition of a conclusive presumption of validity as being applicable to an assessment appeal would preclude meaningful review of the assessment. A conclusive presumption of validity is diametrically opposed to the concept of an original, independent, *de novo* proceeding at which the petitioner simply bears the burden of proof. . . The Tax Tribunal Act does not adopt a presumption of validity as a standard of review. Rather, the standard of review to be applied is whether in the proceeding before the Tax Tribunal, petitioner has proven, by the greater weight of evidence, that one or more of the assessments in question were too high based upon the Tax Tribunal's findings as to the true cash value.
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> * * *
>
> The Tax Tribunal Act's provisions in MCL 205.735; MSA 7.650(35) and MCL 205.737; MSA 7.650(37) on the burden of [*41] proof and the de novo nature of the Tax Tribunal proceedings have been construed as imposing the burden on the petitioner to establish true cash value while, at the same time, imposing a duty on the Tax Tribunal to make an independent determination of true cash value.<5> Great Lakes Steel at 409.
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> * * *
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> In Meadowlanes Ltd Dividend Housing Ass'n v Holland, 156 Mich App 238, 243; 401 NW2d 620 (1986), rev'd on other grounds 437 Mich 473; 473 NW2d 636 (1991), the Court observed that it was appropriate for a tribunal judge to impose upon a taxing authority-respondent the burden of proof to at least establish that the original assessment was too low when that respondent is attempting to establish a cash value for property which differs from the original tax assessments. . . . Great Lakes Steel at 409-410, n 5.

3. Respondent's Unpersuasive Case for an Increase.

Respondent's newly revised assessment and taxable value were placed on the roll at $ 631,500 for tax year 1996 which, at a level of 50%, indicated a true cash value of $ 1,263,000. However, as noted earlier in this Opinion, Respondent's appraisal of the subject property resulted in a valuation indication of [*42] $ 1,700,000. For purposes of responding to the appeal, rather than defend the assessment on the roll, based on its appraisal Respondent chose to request an increased assessment. Therefore, no proofs were offered in defense of the $ 631,500 assessment, and all

proofs were directed at supporting the contention of an appraised value of $ 1,700,000 (being an assessment and taxable value of $ 850,000 respectively).

Having evaluated Respondent's evidence, the Tribunal concludes that Respondent was not wholly convincing in its appraisal, resulting in a conclusion unpersuasive at $ 1,700,000 as overstating the valuation. However, certain portions of Respondent's appraisal and data were sufficient to permit the Tribunal to perform its duty in making an independent determination of value at a lesser true cash value, as developed in the next subsection.

4. The Tribunal's Independent Determination of Value Employing Selected Portions of Respondent's Appraisal.

The following notations provide a commentary and analysis of selected aspects of Respondent's appraisal, effecting modifications the sum of which are sufficient to form the basis of the Tribunal's own conclusion of value.

a. The meaning [*43] **of "arm's-length" transaction.**

Subject sale was rejected by Petitioner's appraiser as not being an "arm's-length" transaction, meaning that he held the view it was not a typical transaction, and should not be used for valuation purposes. In direct examination, Mr. Payton expressed the view that both parties may not have been fully informed, basing his opinion on the Prentiss-Ellis sale, and the disclaimer statements of section 9(c) of Exhibit P-6. He speculated that the seller (Prentiss) may never have seen the property (Vt at 2:21), but on cross-examination admitted he had no firsthand knowledge. (Vt at 3:37).

The Tribunal has already discussed its reasons for not being able to use Petitioner's sale as a sole indication of value, but those reasons were based on case-law and appraisal standards, not a view of the parties' transaction failing to meet an "arm's-length" or non-typical definition. The term "arm's-length" is defined as "[a] transaction between unrelated parties under no duress." Appraisal Institute, The Dictionary of Real Estate Appraisal, 3rd ed, (Chicago, IL: Appraisal Institute, 1993). There was no evidence presented that subject acquisition failed that definition. [*44]

It appears Respondent's appraiser may have misapplied the phrase "arm's-length" to mean that certain aspects were questionable. The Tribunal notes that a sale may be "arm's-length" as to the relationship of the parties, but factors surrounding the transaction were not fully representative of the "usual selling price." Consequently, the resulting sale price may not be acceptable, or fully accepted, as a fair representation of market value. In evaluating whether a subject sale between unrelated parties is representative of the statutory "usual selling price," it is a better procedure to use independent market sales data to test the sale price, an action which Petitioner failed to produce. Respondent, although for reasons not wholly coincident with the reasoning of the Tribunal, properly relied on independent market data rather than solely accepting subject sale price as value.

b. Highest and Best Use Requires Clarification and Modification.

The highest and best use of subject was weakly developed by Respondent, leaving unanswered the same questions the Tribunal noted of Petitioner's case, relative to the merits of alternate uses. For example, witness Payton noted an increase in [*45] industrial market activity for residential loft conversions. While industrial properties are often used for that purpose, office buildings may also be converted to such uses, at least in part, in combination with supporting services, providing the required zoning is appropriate or a variance secured. The subject appeal is really a difficult type of appraisal assignment, requiring more than perfunctory conclusions. Some further analysis along the lines of alternate feasibilities would have been a reasonable and helpful exercise of appraisal procedure.

However, the Tribunal will accept, as partially satisfactory, Respondent's conclusion of office use, based on testimony and Respondent's appraisal, but finds it most unlikely that subject's obsolescent condition would support full use as office under current market conditions. The market information indicated by Sales # 1 and # 3 (see later discussion) points to subject being saleable while still far short of the market average of about 85% occupancy for office use. This suggests that there is a market for office use in part, with the balance being held in speculative reserve during an interim holding period, until space demands improve, [*46] or demands for alternate uses emerge. That more refined definition, the Tribunal believes, is better representative of subject's condition. Further, it is market derived, more fully explaining the several sales of property with below normal occupancy, a condition similar to subject. Of course, the property valuation for office buildings with below average occupancy, such as is likely for subject in the current time period, would be reflected in reduced sale prices to reflect such risk, and the sales data (particularly Sales # 1 and # 3) supports that observation.

c. The Cost Approach Carries No Weight.

Respondent's appraiser gave no weight to the Cost Approach. The Tribunal concurs, that position being a correct decision in consideration of subject's age, and the difficulties in estimating deterioration and obsolescence to be deducted from construction cost new.

d. Respondent's Unrealistic Occupancy Projection at 80%.

The correct estimate of occupancy is critical to development of a meaningful net income, and Respondent's Income Approach appraisal has failed to support a projection of 80% occupancy as of tax day. More accurately, Respondent appraiser's own market data has [*47] failed to support an absorption rate that would produce a subject occupancy anywhere near an 80% level within the eight year holding period projected in Mr. Payton's mortgage-equity analysis.

Exhibit R-2, the addenda data portion of the appraisal, contained a report of the Building Owners and Managers Association (BOMA), surveying 47 office buildings (including subject) in downtown Grand Rapids. The rental occupancy and rates in the survey were for the periods ending December 31, 1995, and 1996. Between those two dates, and the Tribunal eliminating subject from the square foot totals, the survey indicated the total office stock remained unchanged at 3,669,700 SF. Of that amount (again, subject excluded), vacant space of 459,100 SF in 1959 was reduced only 17,000 SF to 442,100 SF, or a reduction in vacancy of only 3.7% spread over an inventory of 46 buildings. In that same time period, average office occupancy downtown increased from 84% in 1995 to 86% in 1996.

Where is the demand for space coming from, sufficient to give subject an 80% occupancy for its 148,800 SF of leasable area, a share requiring a tenancy of 119,040 SF? Even with subject's low rental rates as an attraction, for [*48] such occupancy to be obtained office market conditions would require drastic improvement, or modification in the highest and best use would be required, as the Tribunal observed earlier. However, the highest and best use projected by Respondent was not inclusive of any use other than 80% office space. Respondent appraiser's occupancy assumption in the Income Approach, critical to his valuation, is missing essential support.

e. Occupancy Preparation Costs Not Considered.

Further failure of Respondent's Income Approach stems from the appraiser's failure to take into account the additional owner investments necessary to prepare the structure for the projected 80% occupancy. The Tribunal doesn't take exception with the appraiser's premise that the prospective tenant, after the structure has been brought to a "white box" condition, could be responsible for the cost (or increased rent) for finishing the leased space according to tenant specifications. Some sections of the building, perhaps 25% or so, are in a state of near-readiness, sufficient to produce occupancy at a reduced level without substantial outlay. What is seriously missing, however, is that no provision for expenditures [*49] was made for the cost of the landlord's preparatory work to produce the much more demanding occupancy of 80%, as Respondent proposes. The Tribunal's question of Mr. Payton, at the conclusion of his examination (see Part II, Section D, subsection 3), made clear that he had not deducted any of the essential sums necessary to make ready the structure for occupancy at levels he proposes necessary to support his valuation under the Income Approach.

f. Inappropriate Use of Capitalization Methodology.

As a final note to Respondent's incorrect application of the Income Approach, the Tribunal points to inappropriate use of methodology. For appraisal problems requiring solutions occurring over time, as would seem indicated here, the better methodology is the discounted cash flow process. In that methodology, the periodic income and expense relationships are recognized as not being immediately obtainable, and changing over time--at least for a period into the future sufficient to stabilize net income. For appraisal assignments possessing those demands, the better measure of value is the present worth of those future negative and positive cash flows, plus the reversionary sale at the end [*50] of the holding period. For this case, direct capitalization of NOI as if stabilized in the first year is an inappropriate methodology.

g. Respondent's Flawed Income Approach Conclusion.

In summary, these issues just discussed are matters fatal to Respondent's Income Approach, and render the approach of no weight for the Tribunal's use. Additionally, Respondent's Income Approach lacks the necessary additional research market data in evidence to permit the Tribunal to produce an income and expense analysis of its own. Without such additional data, the results would only be more opinion than method, and not reasonably reliable. That observation brings the matter at hand to the only remaining approach, as follows.

h. Respondent's Sales Comparison Approach Requires Modification.

Mr. Payton's Sales Comparison Approach presents sparse data and minimal analysis and reasoning upon which the Tribunal can evaluate the conclusions. However, Respondent's appraiser has provided, in the three sales presented, sufficient clues to the general area of value that, with further analysis, the Tribunal's additional analysis will sufficiently support a revised conclusion. Generally, while Respondent [*51] has identified the range of value, it has concluded at value too high in that range. Modifications are required, and further analysis necessary, as presented following.

i. The Tribunal's Independent Sales Comparison Analysis and Conclusion.

Although the Tribunal does not accept Respondent's conclusions in the Sales Comparison Approach, and finds the reasoning weak, the approach does provide the Tribunal with sufficient information to form a true cash value conclusion for the market conditions of subject's valuation date. The three sales ranged in value from $ 6.41 per SF to $ 20.36 per SF (Respondent used gross building area indicators in the Sales Approach), were all within two blocks of subject's downtown fringe location, were all older structures of subject's general era, were all on terms equivalent to cash, and required no market adjustments (a/k/a "time" adjustment). This is useful information.

Concerning the matter of dates of comparable sale transactions, Petitioner was critical, in its cross-examination of Respondent's market data, that two of the three sales took place after the December 31, 1995, tax date. While the date of a sale is a factor that should be considered, [*52] the Tribunal rejects Petitioner's objections on two fronts. First, time differences are really a consideration of market change. In this case, Respondent's appraisal authored by Mr. Payton stated that there were no significant changes in the sale and rental market during the time of valuation (Exh R-1, p 3), and that statement was left unrebutted by any evidence to the contrary. Secondly, as to sales occurring "after tax date, the lapse in time is important only with respect to the weight that should be given the evidence, not to the relevance of the evidence." Jones and Laughlin at 354.

Important to the appraisal problem is that the three sales address varying levels of occupancy at the time of sale. That correlation is most pertinent to subject's highest and best use as defined and modified by the Tribunal's finding in this matter. It is also pertinent in that the market values cover a range of occupancies for older buildings, directly addressing the lower level of probable absorption likely for subject--at least until market conditions improve and the feasibility of alternate mixed uses becomes clear.

However, before proceeding further with a discussion of the market data, [*53] from the testimony in this case the Tribunal concludes that subject property's continuing vacancy was not simply a matter of the condition of an older building. The testimony leads the Tribunal to note evidence of lax management style and failure to develop an aggressive, competitive, and effective development plan tailored to the management of older downtown properties. Further, the broker employed by the owner appears to specialize in, and be oriented to, suburban markets, rather than older downtown properties--and is a leasing agent/broker, not a building manager of note in downtown properties. (Vt at 1:19; 1:26). The required experience and skill differences are of significant importance. The continuing vacancy in subject property is in contrast to other properties that, even if not at optimum occupancy, certainly were not in a continuing state of vacancy as is subject under current management. Even recognizing some of subject's particular disadvantages, such as its air conditioning being only partially effective, there is still a distinct lack of competitive investment management style when compared with the results of comparable properties. While the subject's positive and negative [*54] features should be recognized, the current non-aggressive management style should not be considered as a permanent element of negative value influence. For appraisal purposes, it is proper to consider that particular condition temporary and curable; competitive results can be assumed as implemented.

Turning now to the analysis of market data as presented by Respondent's appraiser, it is clear that Sale # 3 at $ 20.36 per SF for its 80% occupancy is far superior to subject, and sets a value limit beyond that applicable to subject. As to Sale # 1, the Tribunal differs with Respondent's choice of that transaction as the best indicator, since that property had an occupancy "committed to 43% of the building" at sale time, a condition which the Tribunal's absorption analysis shows to be obtainable in time, but entirely beyond present reality for subject.

Instead of Sale # 1 being treated as the primary indicator, it should be treated as the upper limit of value for the value range applicable to subject's status, and its consideration strongly merged with Sale # 3. The Tribunal believes that Respondent's primary reliance on Sale # 1 at $ 15.24 per SF, a value expected to be above subject [*55] for reasons of 43% occupancy, should have been considered in tandem with Sale # 3, a transaction with lesser occupancy, and one setting the lower limit of value. Sale # 3, a transaction at 89 Ionia NW, with 46,046 SF and six stories, has a land ratio of 1.0, was built in 1916, and was remodeled in 1988 and 1993. It sold in 1995 for $ 6.41 per SF, with only the fourth floor, or about 17% of the building, occupied at the time of sale. One advantage of Sale # 3 not held by subject was that the remainder of the comparable's building property was in a condition ready for tenant finishing (referred to as "white

box" condition), while only portions of subject are near that condition. However, those portions of subject that are in near-readiness should offer some immediate opportunities to bring about partial vacancy sufficient to initiate cash flow to the property. As the Tribunal made clear in its discussion of highest and best use, the most likely situation for subject as of the tax date of valuation would be the potential to bring about modest occupancy, while awaiting market change, and recognize that office space absorption at 80%--as proposed by Respondent--is unrealistic.

On that [*56] basis, the best comparables are Sale # 3 with 17% occupancy bringing $ 6.41 per SF, and Sale # 1 with 43% occupancy bringing $ 15.29 per SF. Subject's highest and best use at partial occupancy would be met at some valuation between those two numbers, employing an assumption of effective management experience in older downtown properties being immediately implemented. Further, taking into account subject's disadvantage of insufficient on-site parking (an issue shared by other older properties), its air conditioning not providing full coverage, and the need for some clean up work, the Tribunal would correlate at a valuation between the indications of Sales # 1 and # 3. The Tribunal finds that the market value of subject property will most likely reside somewhat above Sale # 3 on the lower end of value, and below Sale # 1 at the upper limit. Interestingly, the two sales bear a direct correlation to occupancy which, if considered as a further element, would project a near-term occupancy of around 27%-28% at a mid-range valuation of $ 10.00 per SF. That appears to be a reasonable indication of value, considering the Tribunal's highest and best use discussion, and those other factors affecting [*57] value. By coincidence, Respondent also correlated at $ 10.00 per SF, but that analysis was unconvincing in its occupancy analysis, and inconsistent in assumptions related to other approaches. The number may be the same; the reasoning is not.

To complete subject's valuation, the Tribunal would reduce the $ 10.00 per SF unit rate by 15% as the average present worth discounting recognition (rounded) for lost investment return over the two years to achieve occupancy within the lower ranges indicated by the referenced market data. On this basis, the adjusted rate would be $ 8.50 (rounded) per SF of gross building area.

Therefore, having considered the evidence, the Tribunal calculates subject true cash value at 167,360 gross SF of building area x $ 8.50 per SF = $ 1,422,560 or $ 1,422,500 rounded for tax year 1996 under appeal.

j. Tribunal Conclusion of Market Value as of December 31, 1995.

TRUE CASH VALUE for TAX YEAR 1996 = $ 1,422,500.

C. ASSESSMENT AND TAXABLE VALUE.

1. Assessed Value and State Equalized Value.

In this matter, no challenge was made to the level of assessment. For tax year 1996, the level of assessment in the City of Grand Rapids relative to the Commercial [*58] Class of Real Property was 50%, and the State Equalization Factor was 1.00000.

On that basis, the Assessed Value at 50% of the True Cash Value of $ 1,422,500 would be $ 711,250. With an Equalization Factor of 1.00000, the State Equalized Value would also be $ 711,250.

2. Taxable Value.

Taxable Value computations are pursuant to provisions of MCL 211.27a(2)(a) and (b), where the Taxable Value is based on an inflationary increase, but the result limited by the State Equalized Value. The statute reads that the taxable value for a parcel is measured as "the property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions," or "the property's current state equalized valuation," whichever is the lesser.

However, in this case the sale of subject property in calendar year 1995 additionally invokes another provision of the statute. MCL 211.27a(3) provides: "Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer." Transfers of ownership [*59] are defined in MCL 221.27a(6), and include conveyances by deed, land contract, and other means identified in subsections (a) through (m).

Under the statute, subject's 1995 sale results in an "uncapping" (where TV = SEV based on a newly determined TCV) for tax year 1996. On that basis, the SEV being $ 711,250 for tax year 1996, the Taxable Value would also be $ 711,250 for that year. That a CFT abatement on the building had also expired, requiring a new assessment on land and

building for tax year 1996, is moot, in that the Tribunal has already effected the taxable value statutory provisions of MCL 211.27a(3).

D. SUMMARY OF TRUE CASH VALUES AND REVISED ASSESSMENTS.

Based upon the Findings of Fact and Conclusions of Law presented in the preceding sections, the Tribunal concludes that the true cash value, revised assessments, and taxable values for subject property, for tax year 1996 under appeal, are as stated in the following chart. No costs allowed.

	Tax Year1996
Tax Identification No.	41-14-30-155-001
Finding of True Cash Value	$ 1,422,500
Level of Assessment	50%
Revised Assessed Value	$ 711,250
Revised State Equalized Value	$ 711,250
Revised Taxable Value	$ 711,250
School Districts:	Grand Rapids Public School District
	Kent Intermediate School District

[*60]

IV. JUDGMENT

IT IS ORDERED that the subject property's true cash, assessed, and taxable values shall be revised for the tax year at issue as provided in the "Conclusions of Law" section of this Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with keeping the assessment rolls for the tax year at issue shall correct or cause the assessment roll to be corrected to reflect the property's revised assessed and taxable values as provided in the "Conclusions of Law" section of this Opinion and Judgment within 20 days of the entry of this Order.

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 20 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. 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 [*61] been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Order. As provided in 1994 PA 254 and 1995 PA 232, 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 shall accrue at an interest rate set monthly at a per annum rate based on the auction rate of the 91-day discount treasury bill rate for the first Monday in each month, plus 1%. After January 1, 1996, interest shall accrue 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 a rate of 6.55% for calendar year 1996, (ii) after December 31, 1996, at a rate of 6.11% for calendar year 1997, (iii) after December 31, 1997, at a 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, and (vi) after December 31, 2000, at the rate of 6.56% for calendar [*62] year 2001.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Income Tax ComputationTax AccountingGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

EXHIBIT 2

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April 20, 2010

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Re: **Novi Campus LLC v City of Novi**
Michigan Tax Tribunal Docket No. 370558
Our File No. 69974 NOV TT349

Dear Ms. Baughman:

It was a pleasure speaking with you this morning. I believe you will find the following explanation to be of assistance to you in the matter currently pending in the U.S. Bankruptcy Court – Northern District of Texas, captioned *Erickson Retirement Communities, LLC et al*, Case no. 09-37010.

One of the properties included in Exhibit A to the Debtors' Amended Motion for Determination of Tax Liability is a property located in Novi, Michigan, which property is the subject of a State of Michigan Tax Tribunal (MTT) proceeding captioned, *Novi Campus LLC v City of Novi*, Michigan Tax Tribunal Docket no. 370558. My office, in its capacity as counsel for the City of Novi, has been defending the case.

Enclosed with this correspondence is the MTT's Docket Information for the case. As you can see from the Docket Information, the parcel at issue is 50-22-01-300-013 for tax year 2009. The Petitioner filed the case on May 29, 2009 and on December 28, 2009, filed its appraisal of the property with the MTT. The procedural posture of the case is that it is positioned to be placed on the MTT's Prehearing General Call and be given witness and exhibit list deadlines, exhibit exchange date deadlines, and the date after which a prehearing would be held. Trials are usually held within six months of the prehearing.

The City of Novi very rarely reaches the trial stage on a case, taking to trial less than 1% of its cases over the last ten years. This particular case has been difficult to resolve due to what appears to be a feigned inability of the property owner to provide financial and construction cost data in a timely fashion and in accordance with discovery requests. Our records indicate that the Petitioner provided to us an appraisal in July of 2009, which they asked us to review and then schedule a meeting to discuss potential resolution of the case. We reviewed the appraisal and then contacted the Petitioner's representative to set up a meeting. On July 22, 2009, we were advised by the Petitioner's representative that they no longer wished to meet.

After hearing nothing from the Petitioner's representative, and still needing information to evaluate the Petitioner's claims, the City served discovery requests (a copy of which is also

included) on November 18, 2009. On or about December 15, 2009, the Petitioner's representative contacted my office, and without word of the pending bankruptcy claim, requested an extension of time to respond until December 30, 2009, which request was granted. On December 28, 2009, the Petitioner filed its appraisal with the Tribunal (see the MTT's Docket Information) without simultaneously serving a copy on our office and without notice to our office. On December 30, 2009, Petitioner's Representative wrote to us claiming an inability to provide us with the requested information due to the pending bankruptcy matter. This same inability, conveniently, did not prevent the Petitioner's representative requesting an extension in order to avoid a Motion to Compel, or filing evidentiary documents with the MTT.

It should also be noted that much of the information requested was information that would have been needed by Petitioner's appraiser (and therefore presumably within Petitioner's representative's ability to also obtain), and/or directly available from the on-site management of the property. The City perceives this refusal as a blatant attempt to frustrate its ability to analyze Petitioner's claims and reach a resolution, as it does in more than 99% of its pending Michigan Tax Tribunal cases.

It is my understanding that the debtor in the bankruptcy proceeding has requested the Bankruptcy Court to assert jurisdiction over the pending State of Michigan ad valorem tax matter, and also to include as a part of the bankruptcy litigation the 2010 taxes. My office's response to that is as follows:

1. The State of Michigan Tax Tribunal is a quasi-judicial administrative agency which hears *appeals* from local jurisdiction Boards of Review. In this matter, the Petitioner chose not to appear before the Board of Review, and filed its appeal directly to the MTT. All proceedings in the MTT are *de novo*. The parties are provided with an opportunity for a hearing where they have the ability to present evidence and testimony, and after which a decision is rendered.
2. The property at issue is complex, comprised over 100 acres of land, and over 1,000,000 square feet of varying improvements (residential apartments, assisted living facilities, medical facilities, club houses, etc.) at different stages of construction. Construction began in 2002 and was halted during 2008. Due to the property's presumed market value of over $100 million dollars as of December 31, 2008, and the complexity of the nature of the property, it is expected that should this matter go to trial, the proofs required would be substantial and most likely would take in excess of two weeks to put before the MTT.
3. Michigan Law in this area is very complex. Cases involving income producing real estate have been known to take several weeks to try, and render decisions hundreds of pages long in order to comply with statutory requirements for the contents of the decision. See MCL 205.751(1) which requires a concise statement of facts and conclusions of law, and which has resulted in an explicit summary of testimony and evidence being included within the opinions. In addition, a very particular subset of administrative law cases will need to be interpreted and applied to the facts of this case. Examples include *Amway Grand Plaza Hotel v City of Grand Rapids*, MTT Docket No. 237807, State of Michigan -- Michigan Tax Tribunal, 2001 Mich. Tax LEXIS 25, November 26, 2001, and *Novi Golf Associates v City of Novi*, MTT Docket No. 260722, State of Michigan -- Michigan Tax Tribunal, 2001 Mich. Tax LEXIS 23, May 30, 2001.
4. Among many matters, the valuation of this type of property requires an understanding of the unique way in which the Michigan Tax Tribunal has chosen to treat taxes in the

income approach, properties under construction, personal property associated with income producing real estate operations, and the desirability of market comparables based upon location. This type of expertise can take years to acquire.

5. The tax case also requires the understanding of statutory definition and interpretation of "true cash value" under Michigan law. From what we have been able to ascertain, the debtor is claiming that an unconsummated auction sale of assets as a result of bankruptcy proceedings should be used as a basis to value property for Michigan ad valorem tax purposes. This argument is inapposite to the law in Michigan because MCL 211.27 specifically excludes this type of sale from consideration, and it fails to consider that the date of valuation, pursuant to MCL 211.2(2), is December 31, 2008, and not some undetermined date in the future.
6. It appears to the City that the Petitioner in the Tax Tribunal case may be forum shopping. There is absolutely no reason for the Petitioner's delays other than to allow it to obtain review by another court other than the MTT. Had the Petitioner truly intended to reach an amicable resolution of this case, it is probable that such a resolution could have been reached prior to the filing of the bankruptcy proceedings.
7. Requiring the City of Novi to defend its assessments in a Bankruptcy Court located in Dallas, Texas is unduly burdensome and prejudicial to the City of Novi who has done nothing to delay the MTT proceedings, and everything necessary to attempt to resolve the case. All of the witnesses for the City are located in Michigan. All of the City's evidence is located in Michigan. The only law at issue is Michigan tax law.
8. The request of the debtor to include the 2010 taxes as a part of the proceedings is inappropriate. Under Michigan law, MCL 211.40, the date upon which taxes become a lien may be set by City Charter. The City's Charter, section 9.14, provides that taxes do not become a lien until July 1 of the tax year. This means the 2010 taxes are not a current lien against the property, and may not become a lien until after title to the property has transferred. In which case it is probable that the 2010 taxes will be the debt of another party other than the debtor.
9. We believe the bankruptcy Court should abstain from this matter pursuant to 28 USC § 1334(C)(1).

Please let us know if you believe you need any additional information.

Very truly yours,

STEPHANIE SIMON MORITA

SSM:cu

cc: Thomas R. Schultz, Esq.
D. Glenn Lemmon, City of Novi Assessor

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