

STATE OF MICHIGAN
IN THE SUPREME COURT

MENARD, INC.,

Petitioner-Appellant,

vs.

CITY OF ESCANABA,

Respondent-Appellee.

Supreme Court Case No. _____

Court of Appeals No. 325718

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

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**APPLICATION FOR LEAVE TO APPEAL OF
PETITIONER-APPELLANT MENARD, INC.**

ORAL ARGUMENT REQUESTED

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

Petitioner-Appellant Menard, Inc. (“Menard”), pursuant to MCR 7.302(B)(3) and MCR 7.302(B)(5), seeks leave to appeal the May 26, 2016 For Publication Opinion of the Michigan Court of Appeals, which reversed the decision of the Michigan Tax Tribunal (the “Tax Tribunal”). The May 26, 2016 Court of Appeals’ Opinion (the “Opinion”) is attached as Exhibit A.) The Tax Tribunal’s decisions are attached hereto as Exhibits B and C.

For the reasons stated below, Menard requests that this Court grant leave to appeal and, on appeal, reverse the Court of Appeals’ decision and reinstate the Tax Tribunal’s Corrected Final Opinion and Judgment in its entirety.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant Menard’s Application for Leave to Appeal and, on appeal, reverse the decision of the Court of Appeals and affirm the Michigan Tax Tribunal, where the Court of Appeals’ opinion:

a. involves legal principles of major significance to the state’s jurisprudence because it improperly expands the application of *Clark Equipment Co v Leoni*, 113 Mich App 778; 318 NW2d 586 (1982), and effectively establishes Michigan as a value-in-use state when it comes to assessing “big-box stores” and similar commercial and industrial properties for tax purposes, contrary to Article 9, Sec 3 of the Michigan Constitution and Sec 27 of the General Property Tax Act; and

b. is clearly erroneous, will cause material injustice and is in direct conflict with numerous decisions of this Court and the Court of Appeals because the Court of Appeals substituted its judgment for that of the Tribunal’s when the Court of Appeals second-guessed the Tribunal’s weight and credibility determinations, which are factual questions to be answered by the Tribunal?

Appellant Menard answers: Yes
Appellee City of Escanaba would answer: No
The Tax Tribunal would answer: Yes
The Court of Appeals would answer: No
This Court should answer: Yes

INTRODUCTION

In a published decision, in a much watched case involving how to value certain types of commercial property for taxation purposes, the Court of Appeals (Judges Talbot, Hoekstra and Shapiro) adopted the holding of *Clark Equipment Co v Leoni*, 113 Mich App 778; 318 NW2d 586 (1982), a discredited and narrowly applied decision, and effectively defined market value as a value-in-use concept for “big-box stores.” However, the reliance on *Clark* was erroneous as that case depended on *First Federal Savings & Loan Ass'n of Flint v City of Flint*, 104 Mich App 609; 305 NW2d 553 (1981), which was overturned by this Court just nine months after *Clark* was decided.¹ In *First Fed Savings & Loan Ass'n v Flint*, 415 Mich 702, 704-705; 329 NW2d 755 (1982), this Court noted that “[t]he constitution requires that property tax assessments reflect ‘true cash value’”, and “[t]he General Property Tax Act defines that term to mean ‘the usual selling price’ of the property.” This Court went on to state that “[w]hile actual and reproduction cost are some evidence of value, the constitutional and statutory standard is market-based.” (*Id.* at 705) (emphasis added). Accordingly, the Court of Appeals’ decision conflicts with this Court’s prior decision that assessments must be based upon a value in exchange concept, not value in use.

The distinction between the terms “value in use” and “value in exchange” is an important one, often muddled and misinterpreted by the judiciary. However, Michigan has long been established as a value in exchange state, based on statute dating back to 1893, and the focus of value in exchange is a determination of the current market value to the typical buyer. The traditional definition of market value is:

¹ *Clark* was decided on March 3, 1982 and was not appealed, relying heavily on the 1981 Court of Appeals decision in *First Federal Savings*, 104 Mich App 609. In *First Fed Sav & Loan Ass'n v Flint*, 415 Mich 702; 329 NW2d 755 (1982) which was decided December 23, 1982, this Court reversed the Court of Appeals and remanded.

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

The Appraisal of Real Estate, 14th ed, p. 58. Although the Michigan statute utilizes the term “true cash value,” the definition is synonymous with the above definition of market value. In fact, this Court has determined that “[t]he concepts of ‘true cash value’ and ‘fair market value’ ... are synonymous.” See *First Fed Savings*, 415 Mich at 705, *supra*, and *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974). True cash value, as defined in MCL 211.27(1), means:

[T]he 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.

In stark contrast to value in exchange, value in use refers to the value a specific property has for a specific use to a specific user, which focuses on the value the property contributes to the overall business of which it is a part or the use to which it is devoted, without regard to the usual selling price that might be realized from its sale. The Court of Appeals’ decision to adopt a value in use concept for “big-box stores” is incongruous with the mandate of Michigan law, which requires property to be assessed at its true cash value. In determining the true cash value, the proper inquiry is how much would a knowledgeable buyer pay, not how much Menard would pay to purchase or did pay to construct the property, or the value of the Property to Menard for its use.

Furthermore, the Court of Appeals’ published decision encompasses more than just “big-box stores”, and will have a devastating impact on the assessment of both commercial and industrial properties located in the State of Michigan, in violation of both the Michigan

Constitution and General Property Tax Act. The decision will deter manufacturers and retailers from locating their facilities within the state, and hamper future investment by such manufacturers and retailers, causing an undue burden on Michigan's economy.

Put another way, the Court of Appeals' published decision puts into question what Michigan considers when determining a property's true cash value for purposes of tax assessments, which this Court, the Michigan Constitution, and the General Property Tax Act, have all established must be based on the market value, not value to the owner. *See* 1963 Mich Const art 9, § 3 and MCL 211.27. And the Court of Appeals' Opinion upends the commonly accepted method of verifying sales of comparables as determined by appraisers in this state and several others, and converts Michigan to a value in use state for assessing commercial and industrial facilities. Many, many properties will be impacted by the Court of Appeals' opinion. For all of these reasons, leave to appeal the erroneous holding of how to determine the true cash value of this type of property should be granted.

Leave to appeal should also be granted because the Court of Appeals substituted its judgment for that of the Tax Tribunal, in direct contravention to decisions of this Court and other decisions of the Court of Appeals regarding the role of the appellate court when reviewing decisions of the Tax Tribunal. Indeed, the Court of Appeals improperly made its own weight and credibility determinations regarding both Menard's and Escanaba's expert testimony, their respective appraisals, and other documentary evidence, which is clearly erroneous and will cause material injustice. Further, in the event that this Court finds that the cost-less-depreciation approach is more appropriate in determining the true cash value of the property, this Court should nonetheless reverse the Court of Appeals' decision in light of the fact that the Court of

Appeals failed to recognize that Escanaba's appraiser did not account for any obsolescence, in contravention of this Court's decision in *First Federal Savings*, 415 Mich at 705.²

As set forth more fully below, this Court should grant leave to appeal and, on appeal, reverse the Court of Appeals and affirm the Tax Tribunal's Corrected Final Opinion and Judgment.

CONCISE STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. Menard's Petition and Hearing

On May 31, 2012, Menard filed a petition with the Tax Tribunal challenging Respondent-Appellee City of Escanaba's (the "City" or "Escanaba") assessment against Menard's property located at 3300 Ludington Street, Escanaba, Michigan 49829 (the "Property"), which was amended in both 2013 and 2014 to include assessments for those years. At a hearing on August 14, 2014 before Tax Tribunal Judge Marcus Abood, himself a licensed and certified appraiser (since 1991), Menard's presented its appraiser, Mr. Joseph L. Torzewski, a licensed and MAI³ certified appraiser. The City presented its assessor, Ms. Diana Norden, who is not a Michigan-licensed or Institute-certified appraiser, and Mr. Miles Anderson, its former assessor who is a licensed general appraiser and an SRA⁴ certified appraiser, which certification is applicable to

² The Tribunal concluded that cost approach of the City's Assessor, Ms. Norden, did not include any functional obsolescence for the subject property. (November 7, 2014 Final Opinion and Judgment ("FOJ", attached as Ex. B, p. 9.) Both Ms. Norden and the Court of Appeals failed to understand that functional obsolescence and physical deterioration are two different concepts. Physical deterioration, which Ms. Norden did account for, is loss of value from all causes of age and action of the elements. Functional obsolescence, which Ms. Norden did not account for, is loss in value to the building or an improvement resulting from functional problems caused by age or poor design.

³ MAI is the professional designation of the Appraisal Institute for appraisers experienced in the valuation and evaluation of all types of properties.

⁴ The SRA membership designation is held by professionals who can provide a wide range of services relating to residential properties, including, among other things, providing opinions of value, evaluations, reviews, consulting, and advice regarding investment decisions.

residential properties. Mr. Torzewski testified based on his appraisal report while Ms. Norden testified from her “valuation disclosure”, which did not comply with the requirements of Tax Tribunal Rule 237⁵ because it consisted merely of assessment records for the Property and copies of various sections of the General Property Tax Act and contained no analysis (and therefore was not an actual “valuation disclosure”). Mr. Anderson discussed his limited review of Mr. Torzewski’s appraisal. (The August 14, 2014 Hearing Transcript (“HT”) is attached as Exhibit D.)

B. The Tax Tribunal’s Opinion and the City’s Motion for Reconsideration

After the hearing, the Tax Tribunal issued a twenty page Final Opinion and Judgment containing sixty-one findings of fact. The Tax Tribunal found Mr. Torzewski to be an expert real estate *appraiser*, but admitted Ms. Norden as an expert in real estate *assessing* and mass appraisal and noted Ms. Norden is *not a licensed real estate appraiser in the State of Michigan*. (FOJ, pp. 5, 9-10.) (Emphasis added.) The Tax Tribunal noted that Ms. Norden had never before written an appraisal report (HT, p. 140.) The Tax Tribunal then considered Ms. Norden’s report and found the documentary evidence and her testimony contained “inconsistencies, contradictions and misrepresentations.” (FOJ, p. 12.) And, while the Tax Tribunal noted Ms. Norden’s “steadfast adherence to the State Tax Commission guidelines for mass appraisal is commendable,” it found this was “misplaced for the valuation of a single property.” (*Id.*, pp. 12-13.)

In regards to Ms. Norden’s cost approach, the Tax Tribunal noted that she failed to account for functional or external obsolescence, two of the three components of depreciation.

⁵ TTR 237(1) provides: “valuation disclosure” means documentary or other tangible evidence in a property tax contested case that a party relies upon in support of the party’s contention as to the true cash value of the subject property or any portion thereof and contains the party’s value conclusions and data, valuation methodology, analysis, or reasoning.

(*Id.*, p. 13.) For the above reasons, among others, the Tax Tribunal found that Ms. Norden’s cost approach should not be given any “weight or credibility in the determination of market value for the subject property.” (*Id.*)

Next, the Tax Tribunal considered Ms. Norden’s sales comparison approach, but found that she failed to analyze certain types of sales, which indicated “her valuation inexperience” and that her “listings and sales amount to raw, unadjusted, unapplied data relative to the subject property.” (*Id.*) Because Ms. Norden merely referenced her sales data generally amounting to “informational write-ups”, without the requisite analytical adjustments, the Tax Tribunal found her sales comparison approach insufficient to arrive at an independent determination of value for the Property. (*Id.*, pp. 13-14.) As for Mr. Anderson’s review, the Tax Tribunal determined it to be “so narrow as to be baseless” since it consisted of mere conclusory statements with no supporting market evidence which are not commonly acceptable in appraisal practice and theory.⁶ (*Id.*, pp. 14-15.)

The Tax Tribunal then discussed Mr. Torzewski’s appraisal report and found his “sales comparison approach meaningful to the independent determination of market value for the subject property.” (*Id.*, p. 16.) The Tax Tribunal noted that his report included comparables in southeast Michigan and other competing markets as well as market analysis, and found his “testimony regarding the consideration of deed restrictions [] meaningful to his overall analysis.” (*Id.*) The Tax Tribunal also found that Mr. Torzewski “provided consistent testimony and explanatory narration for his comparison analysis and adjustments.” (*Id.*, p. 17.)

⁶ The Tribunal noted in its findings of fact that Mr. Anderson denoted sixteen strengths of Mr. Torzewski’s appraisal report including “highest and best use analysis,” “sales comparison approach,” and “appraiser credentials.” (FOJ, p. 10.)

In making its independent determination, the Tax Tribunal found that Mr. Torzewski's report did not reconcile adjusted sales prices for the three years under appeal. (*Id.*, p. 16.) The Tax Tribunal disagreed with the reasoning for the concluded (averaged) prices per square foot determined by Mr. Torzewski for each of the years in question and made necessary adjustments. (*Id.*, p. 17.) Overall though, the Tax Tribunal found Menard's "application of available data to the subject property [] persuasive" and the "comparison analysis and adjustments reflect[ed] market actions" and agreed with Menard's sales comparisons. (*Id.*, pp. 16-17.)

In conclusion, the Tax Tribunal noted, "[t]he extensive findings of fact not only focus on Petitioner's [Menard's] significant evidence but focus on Respondent's [the City's] insignificant evidence," and held that Menard "succeeded in meeting its burden of going forward with competent evidence on the issue of true cash value, assessed value, and taxable value," and Menard's "data within the sales comparison approach is sufficient to arrive at an independent determination of value." (*Id.*, p. 18)

The City moved for reconsideration, arguing that the Tax Tribunal should have upheld the cost approach to valuing the Property and asking that the Tax Tribunal review the eight comparables in Mr. Torzewski's appraisal report and reconsider its decision. Even after considering the City's Motion for Reconsideration, the Tax Tribunal found that Menard's sales comparison analysis included sales that were:

[S]till fee simple transactions, as the grantees in those transactions obtained full ownership rights in the property, and, based on the circumstances presented in this case, Petitioner's [Menard's] sales comparison approach provided the most accurate valuation evidence of the subject property's usual price for which it would have sold for the tax years at issue.

(January 7, 2015 Corrected Final Opinion and Judgment ("CFOJ"), attached as Exhibit C, p. 3.)
Additionally, Mr. Torzewski testified that he considered adjustments to the identified

comparables, including whether any deed restrictions existed and if so, their effect, if any, on the sales price; expenditures made to the property after sale; market condition adjustments; and other adjustments for location, building size and condition. (HT, pp. 47-49.)

Mr. Torzewski considered the potential effect of any deed restrictions when confirming sales figures through discussions with brokers, seller and buyer. (*Id.*, p. 65.) Once identified, he considered the impact of any such restrictions on the sale price of the property, and if that information was unavailable, or the restrictions had an impact, that comparable was not utilized. (*Id.*) Mr. Torzewski reiterated that in the sales that he utilized, “they [may] have had deed restrictions in place but it wasn’t anything that affected the sales price.” (*Id.*)

The Tax Tribunal noted that although deed restrictions can affect a property’s market value, Mr. Torzewski properly considered the deed restrictions, and did not err in determining they had no effect on the properties’ sales prices that he utilized. (*Id.*) Specifically, the Tax Tribunal noted:

Mr. Torzewski credibly testified that “the majority of [the comparables he used] did [have deed restrictions] since they were mostly former Wal-Marts or Home Depot Stores;” however, “deed restrictions are pretty common for build-to-suit users to put in place some sort of a deed restriction,” and the deed restrictions for the sales comparables utilized did not “affect[] the sales price.”

(CFOJ, p. 2, citing HT, pp. 64-65.)

Further, the Tax Tribunal still made an “independent determination of the subject property’s true cash value for the tax years at issue, based on the subject property’s fee simple interest,” which was within the range of valuations in evidence. (*Id.*, p. 3.) However, the Tax Tribunal did agree that it made a mathematical error, and appropriately revised the Property’s true cash, assessed, and taxable values for 2012-2014 tax years.

The City then appealed to the Court of Appeals.

C. The Court of Appeals' Opinion

In a published Opinion, the Court of Appeals reversed the Tax Tribunal's judgment and remanded for the Tax Tribunal to hear additional evidence regarding the market effect of the deed restrictions and the cost-less-depreciation approach, purportedly to allow the Tax Tribunal to make an independent determination of the Property's true cash value. (Opinion, attached as Ex. A, p. 12.)

The Court of Appeals focused on the deed restrictions in the comparables used by Mr. Torzewski. The court acknowledged that the Tax Tribunal accepted Mr. Torzewski's testimony "that the restrictions did not affect the value of the comparables ..." after "he consulted the brokers, sellers, and buyers of the comparables" and testified "that large big-box stores commonly had deed restrictions". (*Id.*, pp. 7, 9.) However, the Court of Appeals went on to state that this testimony:

is only sufficient to establish that to the parties involved in the actual transaction, the deed restrictions did not affect the sales price they were willing to pay. In other words, the market for sale was limited to those purchasers who were willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple.

(*Id.*, p. 8.) Because "no adjustments were taken for this major difference in the subject property and the restricted comparables", the Court of Appeals concluded the Tax Tribunal erred in finding Menard's sales-comparison approach meaningful to the Tribunal's determination of the Property's true cash value. (*Id.*) The Court of Appeals stated that the parties agreed the highest and best use of the Property to be owner-occupied freestanding retail building, even though Menard's appraisal report determined the highest and best use to be continued use of the existing improvements as a freestanding retail building, and the City's report did not state a highest and best use of the Property. The parties did agree that the owner of the Property should have no bearing on its value. (FOJ, p. 7.)

The Court of Appeals also pointed to Ms. Norden’s testimony that “she could not locate a sufficient number of unencumbered comparables to make adjustments in her sales-comparison approach”, and held that “the cost-less-depreciation approach is appropriate to value the [true cash value] of the Property.” (*Id.*, p. 9.) The Opinion then essentially mandates the cost approach (without appropriate deductions for obsolescence amounting to a value in use standard) for “big-box stores.” (*Id.*) The Court of Appeals found this case to be governed by its opinion in *Clark Equip Co v Leoni*, which held that industrial facilities must be valued “as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists.” (Opinion, p. 9, citing *Clark*, 113 Mich App at 784-85.)

The Court of Appeals concluded that the Tax Tribunal committed an error of law requiring reversal when it adopted the sales-comparison approach over the cost-less-depreciation approach, and remanded. (*Id.*, p. 12.)

Menard now brings this application for leave to appeal.

ARGUMENT

I. STANDARD OF REVIEW

The threshold question of whether the Court should grant this application for leave to appeal is, of course, within the Court’s discretion. If this Court grants the application, the review is a limited one. Where, as here, fraud is not alleged, the appellate courts review the Tax Tribunal’s decision for misapplication of the law or adoption of a wrong principle. Const 1963, art 6, § 28; *Briggs Tax Service, LLC v Detroit Pub Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010). The Tax Tribunal’s factual findings are conclusive if supported by competent, substantial, and material evidence on the whole record. Const 1963, art 6, § 28. Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *See, e.g., Jones & Laughlin Steel Corp v Warren*, 193 Mich App

348, 352-353; 483 NW2d 416 (1992). There is substantial evidence to support the Tax Tribunal's factual findings "if a reasonable person would accept the evidence as sufficient to support the conclusion." *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 434; 830 NW2d 785 (2013).

II. LEAVE TO APPEAL SHOULD BE GRANTED UNDER MCR 7.302(B)(3) BECAUSE THIS CASE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO MICHIGAN'S JURISPRUDENCE

The Court of Appeals unjustifiably relied on and expanded the application of *Clark*, a questionable case that created a narrow exception to Michigan's status as a value-in-exchange state, to the valuation of "big-box stores." As noted above, *Clark* relied on a case that was subsequently overturned by this Court's decision in *First Federal Savings*, 415 Mich 702. In *Clark*, the Court of Appeals approved the Tax Tribunal's application of value-in-use principles for assessing certain industrial plants because of a lack of sales of industrial facilities in 1982, creating a common law exception to Michigan's value-in-exchange standard. 113 Mich App at 781-85. *Clark* held, at the time in accordance with the (later reversed) Court of Appeals' decision in *First Federal Savings*, that a large industrial facility could be valued utilizing a value in use standard when no market exists for such facilities. 113 Mich App at 785. *Clark* was not appealed, so this Court did not have an opportunity to review that decision. But this Court reversed *First Federal Savings*, just nine months after *Clark* was decided, noting that "[w]hile actual and reproduction cost are some evidence of value, the constitutional and statutory standard is market-based."⁷ *First Federal Savings*, 415 Mich at 705 (emphasis added.)

⁷ See also *Thrifty Royal Oak, Inc v Royal Oak*, 130 Mich App 207, 222; 344 NW2d 305 (1983) (reversing the Tax Tribunal's value in use approach because the Tribunal relied heavily on *First Federal* which was later reversed.)

It is clear that *Clark* is a narrow exception (if not a completely discredited case⁸) to the rule rather than the standard, which the Court of Appeals' Opinion now makes it in many cases. *See e.g., Jones & Laughlin Steel Corp*, 193 Mich App at 354 (although the case involved the assessment of equipment, the Court of Appeals noted certain "situations involving assessments of industrial property [citing to *Clark*] for which no ready market exists and a hypothetical buyer must be posited...") After all, this Court has found that "[o]f all appraisal methods, the market approach is the only one which directly reflects the balance of supply and demand for a whole property in actual marketplace trading. *Antisdale v City of Galesburg*, 420 Mich 265, 276, n 1; 362 NW2d 632 (1984).

In *First Federal Savings*, this Court "reject[ed] the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance [the taxpayer's] image and business without regard to whether they add to the selling price of the building," 415 Mich at 706, demonstrating this Court's adherence to the concept of value in exchange as opposed to value in use. Value in use includes the costs of improvements and alterations regardless of whether such improvements or alterations affect the market value of the property. But value in exchange includes only the costs of those improvements and alterations that increase the market value of the property. This is harmonious with Michigan's requirement that property be assessed at its true cash value, established as market value, not value to the owner.

⁸ Indeed, since the Court of Appeals' 1982 decision in *Clark*, that case has only been cited for any reason in eighteen cases, and favorably cited in only one other case, which, ironically, upheld the Tribunal's use of the sales comparison method for industrial property ("The record also reveals that the Tax Tribunal's determination that a variation of the sales-comparison or market approach should be adopted started with a finding that the subject property had a market, albeit a limited one. Relying on *Clark*, the Tax Tribunal also noted the difficulty in dealing with such large industrial properties." *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 391; 576 NW3d 667 (1998).)

A. The Court of Appeals Failed to Recognize that the City's Valuation Disclosure Amounted to a Value in Use Standard, Which the Tax Tribunal Properly Rejected

Logically, the market will not pay for those costs which may have had intrinsic value to the owner, but have no value to a prospective buyer. The issue is not with the cost-less-depreciation approach in general, but with first, Ms. Norden's, and second, the Court of Appeals', patent disregard for the value in exchange standard. Ms. Norden's cost approach valuation was simply that – a cost approach without proper adjustments accounting for depreciation; one of the many reasons that the Tax Tribunal found Ms. Norden's cost approach should not be given any “weight or credibility in the determination of market value.” (FOJ, p. 13.)

Depreciation must be calculated and deducted from the cost calculation (value in use) to convert it to market value (value in exchange). Depreciation includes three components: (1) physical deterioration; (2) functional obsolescence; and (3) external obsolescence.⁹ However, Ms. Norden only accounted for physical deterioration based on the age of the building and did not account for functional obsolescence “[b]ecause there are other retail uses that would use the components of that building” (HT, pp. 188-89.) That may be true, but functional obsolescence is inherently built into each business's building to fit its respective image and operating needs.

Mr. Torzewski acknowledged this fact at the hearing when he noted that “big-box stores” are built for a specific user and its needs, thus, functional obsolescence is built into the Property.

⁹ “Physical deterioration refers to simply aging, the wearing out process. Functional obsolescence ... refers to a flaw in the structure, materials or design of the improvements. It can occur when the subject does not have a feature the market demands (air conditioning, for example), or when *it has a feature for which the market is unwilling to pay (the excess ceiling height)*. External obsolescence is a loss in value caused by factors outside a property. Examples include effects of the 2008 financial crisis (which would be properly labeled external obsolescence – economic) and location on a highway that only allows right turn in and right turn out (which would be labeled external obsolescence – locational).” *Valuation of Big-Box Retail for Assessment Purposes: Right Answer to the Wrong Question*, David Charles Lennhoff, CRE, MAI, Real Estate Issues, Vol 39, No 3, 2014, p. 29. (Emphasis added).

(*Id.*, p. 60.) However, as a result of Ms. Norden's inexperience valuing commercial properties, and adherence to the State Tax Commission guidelines for mass appraisal, which is more suitable for personal residences where similar homes in similar neighborhoods should fittingly receive similar market adjustments, she failed to recognize the realities of the market; obsolescence affects nearly all commercial properties. In fact, Ms. Norden's statement that "components" of the building could be used by other retail uses demonstrates that at least some functional obsolescence existed, as modifications and alterations would be required by that subsequent user even if one of Menard's competitors purchased the building. Rarely, if ever, is a business able to simply move into an existing building without modifications for its particular use and operations, and, hence, this affects the fair market value of the property.

The Court of Appeals failed to recognize that Ms. Norden's valuation disclosure embraced a value in use standard. Even if the cost approach is used, in determining the true cash value under that approach, the physical deterioration, functional and external obsolescence must be accounted for. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484; 473 NW2d 636 (1991). As stated above, a cost approach valuation without the appropriate adjustments fails to comprise a value in exchange standard. The Tax Tribunal correctly determined that Ms. Norden's appraisal failed to include any obsolescence calculation, resulting in a value in use standard contrary to Michigan law, and appropriately discredited Ms. Norden's cost approach. (FOJ, p. 13.) The Court of Appeals should have affirmed rather than second-guess the Tax Tribunal's decision to adopt Mr. Torzewski's sales comparison approach, which the Tax Tribunal, after applying its expertise to the facts of the case, determined to be the appropriate method of arriving at the Property's fair market value.

The Court of Appeals attempted to reconcile Ms. Norden's error with her testimony regarding the cost approach, which the Tax Tribunal found should not be given any "weight or credibility in the determination of market value for the subject property."¹⁰ (FOJ, p. 13.) For instance, the Court of Appeals noted: (i) "[Ms. Norden] did not adjust for functional obsolescence because there was none in the subject property" (Opinion, Ex. A, p. 11.); (ii) "[s]he explained that ... the same building would be built by Menard if it were to build a new store" (*id.*); and (iii) "she testified that the existing building would be used in essentially the same fashion if a competitor were to purchase the property." (*Id.*)

But (i) and (iii) are contradictory. If a competitor were to purchase the Property, it would still have to make some changes to the Property for its use. For instance, a Home Depot or a Lowe's would have to make changes to the façade and interior layout of the building to fit its business image and trade dress, just as a McDonald's restaurant would need to if it purchased a Burger King or Wendy's. Accordingly, statement (i) cannot be correct as at least some functional obsolescence exists, and statement (iii) is simply irrelevant since functional modifications will still need to be made to the Property even if a prospective purchaser puts the Property to a similar use. Additionally, statements (ii) and (iii) are value in use considerations that focus on the value of the Property to Menard, which disregards the parties' stipulation that the "the occupant of [the] subject property should not influence the market value of the property." (FOJ, p. 7.)

In like manner, the Court of Appeals failed to recognize that the Tax Tribunal "may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination." *Meadowlanes*, 437 Mich at 485-486. It is the Tax Tribunal's duty to make an independent determination of true cash value utilizing an approach

¹⁰ The issue of the Court of Appeals substituting its weight and credibility determinations for that of the Tax Tribunal is discussed further below.

which provides the most accurate valuation under the circumstances of each case. *Antisdale*, 420 Mich at 277. The Tax Tribunal properly performed this function when it rejected Ms. Norden’s cost approach, which encompassed value in use concepts, and the Court of Appeals erred in reversing.

B. The Court of Appeals’ Opinion Failed to Recognize *Clark*’s Limitations and Michigan’s Established Value in Exchange Standard

Since the *Clark* decision in 1982, and especially after the 2008-2009 recession, there have been an abundance of sales of commercial properties similar to the Property, making *Clark*’s application even more erroneous in today’s market, and the issue therefore even more significant to the state’s jurisprudence. With the existence of an active market, the selling price more closely reflects true cash value. *Teledyne Continental Motors, Inc v Muskegon Township*, 163 Mich App 188, 194; 413 NW2d 700 (1987); *see also First Federal Savings*, 415 Mich at 706 (“Absent more persuasive evidence, such as comparable sales, historical cost or reproduction cost can be considered in arriving at the usual selling price.”) Further, the Tax Tribunal’s duty is to apply its expertise to the facts of each case in order to determine the appropriate method of arriving at the property’s fair market value. *Great Lakes*, 227 Mich App at 389; MCL 211.27(1). Because the Tax Tribunal found Mr. Torzewski identified sales with a high standard of comparability to the Property, it correctly performed this function when it adopted Mr. Torzewski’s sales comparison approach. (FOJ, pp. 16-18; CFOJ, p. 3.)

The Court of Appeals confused the meaning of “fee simple interest,” and the impact of deed restrictions on these types of commercial properties when it noted that half of Mr. Torzewski’s comparables “contained deed restrictions that limited the use of the properties for retail purposes, thereby preventing sale of an entire fee simple interest.” (Opinion, p. 7.) However, the purchasers of these properties containing deed restrictions still acquire fee simple

interest with all the rights of absolute ownership, subject to certain specified restrictions, which commonly include easements for public utilities, rights-of-way for highway purposes, neighborhood restrictions such as building set-back lines, or in the case of “big-box stores,” restrictions on certain uses or limiting building size. Just as a homeowner would not consider an easement for a cable or electric company to hinder ownership of their home, a purchaser of a “big-box” or similar commercial property would not consider a deed restriction prohibiting use of the property as an “adult club”, or limiting the size of a discount store to 50,000 square feet, to interfere with their use of the property. (HT, pp. 119-121.) In essence, these restrictions have no practical effect on these properties’ sales prices because local zoning ordinances typically prohibit an “adult club” except in certain specified areas and most discount stores are under 50,000 square feet. Contrary to the Court of Appeals’ assertion that “[t]hose who would be interested in buying the property with restrictions would need to make modifications to convert the building from retail to something else, like industrial use,” (Opinion,p. 8), Mr. Torzewski’s comparables could still be used for retail purposes and the Tax Tribunal properly considered the deed restrictions on Mr. Torzewski’s comparables, but found that such restrictions did not affect the sales prices of the comparables.

The Court of Appeals, by way of its expansion of *Clark* and noting “the prevalence of the self-imposed deed restrictions on big-box stores” (Opinion, p. 8.), essentially adopted a blanket cost valuation methodology (i.e., value in use) for “big box stores”, and other commercial and industrial properties. As a result of the frequency of use restrictions on “big-box stores,” as a result of the Court of Appeals’ published opinion, such properties can no longer be assessed based on comparable sales, and must be assessed according to *Clark’s* value in use concept. At best, the Opinion will result in confusion as to whether Michigan remains a value-in-exchange

state, and it directly conflicts with established legal principles of the State of Michigan, which requires the Tax Tribunal to at least consider the three established valuation methodologies.¹¹

Specifically, the Opinion contradicts: 1) the requirement of both the Michigan Constitution and General Property Tax Act that a property's true cash value must be based on the market value, not value to the owner, *see* 1963 Mich Const art 9, § 3 and MCL211.27, and 2) the Tax Tribunal's obligation to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances, which the Tax Tribunal did in the instant case. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 409; *see also Huron Ridge, LP v Ypsilanti Twp*, 275 Mich App 23, 33; 737 NW2d 187 (2007) (Michigan is a value-in-exchange state, not a value-in-use state); *Lowe's Home Ctrs v City of Grandville*, unpublished opinion of the Court of Appeals, issued Dec 30, 2014 (Docket No 317986) (unpublished decisions attached as Ex. E), (describing an "attempt to incorporate value-in-use, or use value, into the calculation of the subject's property value" as "contrary to Michigan law.")

The Opinion's improper expansion of value-in-use principles to yet one more type of property contradicts established legal principles of the State of Michigan. *Clark's* application, if ever relevant, was limited to large industrial facilities. *See, e.g., Jones & Laughlin Steel Corp*, 193 Mich App at 354 (*Clark* applies to "assessments of industrial property"); *see also Teledyne Continental Motors, Inc*, 163 Mich App at 192, *Great Lakes*, 227 Mich App at 403.

Ultimately, the Opinion, if not reversed by this Court, will have sweeping implications on future assessments of "big-box stores" and other commercial and industrial properties in

¹¹ The three methodologies include the cost-less-depreciation approach, the sales-comparison or market approach, and the capitalization of income approach. In this case, Mr. Torzewski utilized the income capitalization approach as a test of reasonableness of his comparables, which confirmed the results of his comparable sales analysis. (HT, pp. 61-63.)

Michigan. Despite previous court decisions applying *Clark* only to industrial facilities, the Court of Appeals' expansion of *Clark* to retail facilities establishes that, in assessing the true cash value of "big-box stores" the Tax Tribunal must exclusively use the cost-less-depreciation approach, (in the instant case, overturning the Tax Tribunal's decision to weigh that method against what it found to be comparable sales.)

However, this Court has previously weighed in on the question of what standards should be utilized in assessing property¹², and, the Court of Appeals' blatant disregard for this Court's prior decisions violates established legal principles of major significance to this state's jurisprudence. In sum, the Court of Appeals has erroneously extended *Clark*, in which the Court of Appeals merely held that, in assessing the true cash value of large industrial facilities, the cost-less-depreciation approach was, at best, advisable, and, at worse, permissible, and turned it into the law governing certain retail facilities, contrary to the fundamental valuation principles of the State. And to make it worse, it did so in a published decision.

For all of these reasons, the Court of Appeals' decision involves legal principles of major significance to this state, and this Court should grant leave to appeal.

¹² See e.g., *First Federal Savings*, 415 Mich at 705-706 ("While actual and reproduction cost are some evidence of value, the constitutional and *statutory standard is market-based*" and "[t]he constitution and statute do not authorize a tax on the value of lumber or marble incorporated into a building, but on the market value of the completed structure and land"); *Meadowlanes*, 437 Mich at 490 (the "touchstone of uniform assessment is the true cash value or usual selling price of the property"); *Antisdale*, 420 Mich at 276, n 1 ("Of all appraisal methods, the market approach is the only one which directly reflects the balance of supply and demand for a whole property in actual marketplace trading.")

III. LEAVE TO APPEAL SHOULD BE GRANTED UNDER MCR 7.302(B)(5) BECAUSE THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE IF NOT REVERSED, AND THE DECISION CONFLICTS WITH OTHER DECISIONS OF THIS COURT AND THE COURT OF APPEALS

As previously noted, the Tax Tribunal's factual findings are conclusive if supported by competent, substantial, and material evidence on the whole record. *Briggs Tax Serv, LLC*, 485 Mich at 75; Const 1963, art 6, § 28. Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp*, 193 Mich App at 352-353. "Substantial" means evidence that a reasonable mind would accept as sufficient to support the conclusion. *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994). Moreover, the *Tribunal may accept, reject, or combine the parties' valuation theories* in its determination of assessing a certain property's market value, and it is *entirely within the Tribunal's discretion to assess the credibility of witnesses and weigh the evidence presented*. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 407, 413; *see also, Pontiac Country Club*, 299 Mich App at 436 ("The credibility of the witnesses is a matter for the Tax Tribunal to determine", citing *President Inn Props LLC v City of Grand Rapids*, 291 Mich App 625, 640; 806 NW2d 342 (2011)).

However, in the instant case, the Court of Appeals simply substituted its judgment for that of the Tax Tribunal, in direct contravention to decisions of this Court and prior decisions of the Court of Appeals. Throughout the Opinion the Court of Appeals made its own weight and credibility determinations relating to both parties' expert testimony, their respective appraisals, and other documentary evidence, which is clearly erroneous and will cause material injustice and warrants review by this Court.

A. The Court of Appeals' Opinion Improperly Made Weight and Credibility Determinations Reserved to the Tax Tribunal

Although the Court of Appeals' Opinion noted that "all factors, including 'restrictions imposed' on property must be *considered* in determining a property's [true cash value]," (Opinion, p. 7, citing *Lochmoor Club v Grosse Pointe Woods*, 10 Mich App 394, 397-398; 159 NW2d 756 (1968)) (emphasis added), it then failed to recognize that the Tax Tribunal found Mr. Torzewski's "testimony regarding the consideration of deed restrictions [] meaningful to his overall analysis" and his "comparison analysis and adjustments reflect market actions." (FOJ, p. 16.) On reconsideration, the Tax Tribunal again agreed and concluded Mr. Torzewski considered deed restrictions on the properties he utilized, and did not err in determining that they had no effect on the properties' sales prices. (CFOJ, p. 2.)

Additionally, at the hearing Mr. Torzewski noted that once identified, he considers the impact of any such restrictions on the sale price of the property, and if that information is unavailable, or the restrictions have an impact, that comparable is not utilized. (HT, p. 65.) Mr. Torzewski consulted with the brokers, sellers and buyers involved in these transactions to help determine whether the deed restrictions affected the respective sales figures. (*Id.*) Mr. Torzewski reiterated that in the sales that he utilized, "they [may] have had deed restrictions in place but it wasn't anything that affected the sales price." (*Id.*) For instance, Mr. Torzewski testified that a common deed restriction on the comparables prohibited the use for "adult clubs," "adult bookstore," or "adult video store" on the larger development of which the property was a part, however, this is so commonly restricted on commercial developments that it does not affect sales price. (*Id.*, pp. 65, 120.) Another comparable, a Wal-Mart, had use restrictions on the property relating to use as a grocery store over 35,000 square feet or a discount store more than 50,000 square feet, however, Mr. Torzewski testified that a typical "Walmart" would have a grocery

store or discount store of that size, and therefore, did not impact the comparable's sales price. (*Id.*, pp. 65, 119-121.) Yet another comparable, also a Wal-Mart, was purchased by a secondary but well-known retailer "that may compete with Wal-Mart in some sense," but Mr. Torzewski testified that "the deed restrictions that Wal-Mart had in place didn't affect the use of that similar retail user." (*Id.*, pp. 65-66.)

Additionally, although not relied on in Mr. Torzewski's report, he also provided a chart of thirty other comparables similar to the Property as additional support and confirmation that the sales comparison valuation was "in the ballpark" and that there exists a very active market for these types of properties. (*Id.*, pp. 55-56.) As a test of reasonableness for Mr. Torzewski's comparables, he also completed an income capitalization valuation which confirmed the results of his comparable sales analysis. (*Id.*, pp. 61-63.) Again, on reconsideration, the Tax Tribunal found that Mr. Torzewski "did take such factor [, deed restrictions,] into consideration in developing his sales comparison analysis and determined that the deed restrictions, on those properties that he utilized, had no effect on the properties' sales prices, and the Tax Tribunal found this testimony, and analysis regarding the same, to be credible." (CFOJ, p. 2.)

After considering the testimony and other evidence, viewing the testimony of the witness, and acknowledging that, although commonly imposed on "big-box" stores, deed restrictions did not affect the sales prices of the comparables Mr. Torzewski utilized in this case, the Tax Tribunal determined, absent any credible evidence to the contrary, no adjustments for these particular sales were necessary. (*Id.*) Thus, the Tax Tribunal clearly considered the restrictions imposed on the comparable properties, and agreed with Mr. Torzewski's testimony and report that such restrictions did not affect those properties' sale prices.

It is also important to note that the two cases the Court of Appeals highlighted regarding deed restrictions, *Lochmoor Club* and *Helin v Grosse Pointe Twp*, 329 Mich 396; 45 NW2d 177 (1966), involved obvious examples of deed restrictions affecting the subject property's market value; facts not present in the instant case. For instance, in *Lochmoor Club*, the court remanded to the State Tax Commission because it failed to reduce the assessment of property, which was restricted to use as a park even though it was within a subdivision of homes. 10 Mich App at 396, 398. The court explained that “[l]and restricted [to use as a park] ... cannot be compared in valuation to subdivision lots in the same general area which may be utilized for the erection of homes.” *Id.* at 398. Further, in *Helin*, this Court discussed the effect of the use restriction in that case by stating:

As the record shows, some of the owners of similar homes in the subdivision have either torn down the houses or permitted them to be sold for taxes, or sold them for but a small fraction of their original cost. The restrictions mentioned are largely responsible for the destruction of the larger part of the value of the property and should result in a very material reduction in assessments if they are to be made in a legal manner.

329 Mich at 407-408 (emphasis added).

The record in our case does not demonstrate that the restrictions on the comparable properties in Mr. Torzewski's appraisal report would result in an assessment reduction as in *Lochmoor Club* or *Helin*. To the contrary, the record and the foregoing show that deed restrictions are commonplace for “big-box stores,” and they typically do not affect the ultimate sales price. In fact, these types of restrictions are so commonly in place in the context of “big-box stores” that Mr. Torzewski testified that the only instances in which a restriction of some sort is not imposed on a “big-box store,” is in the case of a lease of a “big-box store” and instances of foreclosure or bankruptcy. (HT, pp. 121-122.) This is in line with this Court's and the Court of Appeals' previous decisions. *See e.g., Antisdale*, 420 Mich at 286 (“Although the

existence of tax benefits may be considered in determining value ... Those are decisions for the Tax Tribunal”) and *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 405 (“Although the sales price ... is not conclusive evidence of true cash value, even when the sale is for the property that is the subject of the assessment, this does not preclude a determination that the evidence concerning a sale has relevancy”). Ultimately, the goal of the Tax Tribunal is to determine the usual price for which property will sell. *Antisdale*, *supra* at 278. MCL 211.27(1).

Also, the Court of Appeals found issue with Mr. Torzewski’s market data and testimony “that he consulted the brokers, sellers, and buyers of the comparables,” but, according to the Court of Appeals, that was “only sufficient to establish that [the deed restrictions did not affect the sales price] to the parties involved in the actual transaction.” (Opinion, p. 7.) Again, this disregards previous decisions of the Court of Appeals, which found that these determinations are reserved for the Tax Tribunal. *See e.g.*, *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 404 (even though the Tax Tribunal’s formula was flawed, it did not constitute an error of law or the adoption of a wrong principle to reject a cost-less-depreciation approach since the question of “whether the market data were adequate and would provide the more accurate determination of true cash value was a determination for the Tax Tribunal to decide in light of the evidence presented by the parties on cost and market approaches”); *Kern v Pontiac*, 93 Mich App 612, 622, 287 NW2d 603 (1979) (petitioner taxpayer challenged the township’s appraisers’ comparables, but the Court of Appeals found no error in the weight given to the expertise of the three witnesses as that is a discretionary matter for the Tax Tribunal).

Even if a cost-less-depreciation approach were appropriate, the Tax Tribunal rejected the City’s particular approach on the basis that the approach failed, among other things, to account for any obsolescence calculation, particularly functional obsolescence, which amounted to a

value in use determination contrary to Michigan law. The weight to be accorded to this evidence is within the Tax Tribunal's discretion. *Great Lakes, supra* at 404 (finding that "[i]t did not constitute an error of law or wrong principle for the Tax Tribunal to reject [the city's] proposed [cost-less-depreciation] valuation.")

As this Court has held, "[a]bsent more persuasive evidence, such as comparable sales, historical cost or reproduction cost can be considered in arriving at the usual selling price," however, in the instant case, the Tax Tribunal clearly found Menard's and Mr. Torzewski's evidence of comparable sales more persuasive. *First Federal Savings*, 415 Mich at 706. In making this determination, the Tax Tribunal found Menard's evidence and Mr. Torzewski's approach more persuasive than the City's and found several "inconsistencies, contradictions and misrepresentations" in the City's and Ms. Norden's documentary and testimonial evidence, and noted Ms. Norden's "valuation inexperience." (FOJ, pp. 12-13.) Moreover, in considering whether to use the cost approach for this Property, Mr. Torzewski stated:

[F]or the most part buyers of these properties just don't utilize the cost approach when they're looking to buy a property. They're looking at sales of similar properties and identifying how much people are paying for them and using that as their basis to determine what they're willing to pay."

(HT, p. 60.) This is consistent with recent decisions of the Court of Appeals.¹³

¹³ See e.g., *Lowe's Home Ctrs, Inc v City of Grandville*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014, p. 2 (Docket No. 317986) (attached as Ex. E) (affirming the Tribunal's decision to reject the city's cost approach after Lowe's appraiser stated "[h]e did not provide ... a cost approach because he considered it an unreliable method of determining the market value ..., and because prospective buyers of such property did not generally make their decisions to purchase based on a cost-approach appraisal.") and *Lowe's Home Ctrs v Twp of Marquette*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014, p. 3 (Docket Nos. 314111 and 314301) (Ex. E) (appraiser for both Petitioner-Lowe's and Petitioner-Home Depot "indicated that he used the sales-comparison approach as the primary indicator of value" while the "the cost approach is not considered a primary indication of value; rather it will serve as a check to the value conclusions reached via the income and sales approaches." The municipality respondents in *Lowe's v Marquette* filed an application for leave to appeal to this Court, which was denied. (Supreme Court Case Nos. 14907, 14908; Dec. 23, 2014 Order.)

The consideration of this evidence is within the Tax Tribunal's discretion, and, contrary to the Court of Appeals' Opinion, it did not constitute an error of law or wrong principle for the Tax Tribunal to reject the City's proposed cost valuation. Accordingly, the Court of Appeals' Opinion is clearly erroneous, will cause material injustice, and conflicts with prior decisions of this Court and the Court of Appeals.

B. The Court of Appeals' Opinion Violated the Standard of Review

As noted above, the review of Tax Tribunal cases is limited, and because fraud was not alleged, the Court of Appeals was required to "review[] the [tribunal's] decision for misapplication of the law or adoption of a wrong principle." *Briggs Tax Service, LLC*, 485 Mich at 75 (citations omitted). Findings of fact are conclusive if supported by competent, material, and substantial evidence on the whole record. (*Id.*). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Drew v Cass County*, 299 Mich App 495, 499; 830 NW2d 832 (2013). There is substantial evidence to support the Tax Tribunal's factual findings "if a reasonable person would accept the evidence as sufficient to support the conclusion." *Pontiac Country Club*, 299 Mich App at 434.

Contrary to the assertion of the Court of Appeals, Menard presented substantial evidence that: (i) the deed restrictions had no effect on the comparable properties' sales prices; (ii) Mr. Torzewski made appropriate adjustments in his sales comparison analysis; and (iii) Mr. Torzewski's sales comparison approach provided the most accurate depiction of the subject property's true cash value for the tax years at issue sufficient to arrive at an independent determination of value. The City did not offer credible testimony or other evidence to the contrary. Instead, the Tax Tribunal found Ms. Norden lacked valuation experience, her cost approach "did not account for functional or external obsolescence," and noted several

“inconsistencies, contradictions and misrepresentations” in the City’s documentary and testimonial evidence (FOJ, pp. 12-14; 16.) The Tax Tribunal rejected Ms. Norden’s cost approach and appropriately exercised its discretion when it gave more weight to Menard’s evidence and found Mr. Torzewski more credible than Ms. Norden. Although it may be not only proper but desirable to consider evidence of cost in cases where the parties fail to present other persuasive evidence of valuation, in the instant case, the Tax Tribunal determined that Mr. Torzewski’s “application of available data to the subject property is persuasive.” (FOJ, p. 16.)

In contrast, the Court of Appeals rejected the Tax Tribunal’s findings and took issue with the Tax Tribunal’s acceptance of Mr. Torzewski’s testimony and use of deed-restricted comparables. (Opinion, p. 7.) The City’s arguments on appeal were factual challenges to Mr. Torzewski’s appraisal, and because the Tax Tribunal found Mr. Torzewski’s appraisal and testimony credible, the Court of Appeals should not have second-guessed that weight and credibility determination. *See e.g., Pontiac Country Club*, 299 Mich App at 436; *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676, 703; 840 NW2d 168 (2013) (“We do not disturb the [Tribunal’s] findings regarding the credibility of the witnesses. It is exclusively for the tribunal to assess the credibility of the witnesses who appeared before it.”); *President Inn Props, LLC*, 291 Mich App at 633. Further, the Court of Appeals disregarded Mr. Torzewski’s testimony as to the consideration of deed restrictions and found that, simply because the restrictions existed, the comparables “did not reflect the full value of the unrestricted fee simple.” (Opinion, p. 8.) This directly contradicts the Tax Tribunal’s finding, on reconsideration, that Menard’s comparable sales are “still fee simple transactions, as the grantees in those transactions obtained full ownership rights in the property.” (CFOJ, p. 3.)

The Court of Appeals also stated “[i]t is plain that no adjustments” were taken for the deed restrictions and concluded that “the tribunal erred in finding Menard’s sales-comparison approach meaningful to its determination of the subject property’s.” (Opinion, p. 8.) However, the Tax Tribunal’s decision noted that Mr. Torzewski’s appraisal report included comparables in southeast Michigan and other competing markets and a market analysis, and found his “testimony regarding the consideration of deed restrictions [] meaningful to his overall analysis.” (FOJ, p. 16.) Likewise, the Tax Tribunal also found that Mr. Torzewski “provided *consistent testimony and explanatory narration for his comparison analysis and adjustments.*” (*Id.*, p. 17.) (Emphasis added.) Overall, the Tax Tribunal found Menard’s “application of available data to the subject property [] persuasive” and the “comparison analysis and adjustments reflect[ed] market actions” and agreed with Menard’s sales comparisons. (*Id.*, pp. 16-17.)

In contrast to the Court of Appeals’ contentions, the Tax Tribunal was under no obligation to accept the cost valuation approach advanced by the City. *Teledyne Continental Motors*, 145 Mich App at 754. The Tax 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.” *Jones & Laughlin*, 193 Mich App at 356. The Tax Tribunal properly performed this function in the instant case. The foregoing demonstrates that, after considering the entire record, a reasonable person would accept Menard’s and Mr. Torzewski’s evidence as sufficient to support the Tax Tribunal’s conclusion.

The Tax Tribunal considered each of the traditional approaches to valuing property, analyzed the strengths and weaknesses of each appraiser’s valuation methods under the respective approaches, assessed the credibility of witnesses and weighed the evidence presented,

selected the method which it found to be the most accurate after considering all the facts before it, and explained the reasoning behind its independent determination of value.¹⁴ *See e.g. Great Lakes*, 227 Mich App at 407, 413, and *Huron Ridge LP*, 275 Mich App at 28. The Court of Appeals should have affirmed. Instead, it violated the standard of review by making its own assessments about the evidence. To do so in a published decision sets a dangerous precedent.

Accordingly, this Court should grant leave to appeal and, on appeal, reverse the Court of Appeals.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioner-Appellant respectfully requests that this Court grant its Application for Leave to Appeal, and on appeal, reverse the Court of Appeals' May 26, 2016 Opinion, and reinstate the Tax Tribunal's Corrected Final Opinion and Judgment.

Dated: July 7, 2016

Respectfully submitted,

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¹⁴ "To be certain the Tribunal's deliberations are bound by the evidence presented and not by any misguided perception of public policy motives." (FOJ, p. 18.)

INDEX TO EXHIBITS

Exhibit A	May 26, 2016 Court of Appeals' Opinion
Exhibit B	November 7, 2014 Tax Tribunal Final Opinion and Judgment
Exhibit C	January 7, 2015 Tax Tribunal Corrected Final Opinion and Judgment
Exhibit D	August 14, 2014 Hearing Transcript
Exhibit E	December 30, 2014 Court of Appeals' Opinion in Lowe's Home Ctrs, Inc v City of Grandville; and April 22, 2014 Court of Appeals' Opinion in Lowe's Home Ctrs v Twp of Marquette

CERTIFICATE OF SERVICE

On July 7, 2016, I e-filed this Application For Leave To Appeal with the Michigan

Supreme Court and served a copy of this Application upon:

Clerk of the Court
Michigan Court of Appeals
Hall of Justice
925 W. Ottawa St.
P.O. Box 30022
Lansing, MI 48909-7522

by attaching a copy of this filing to Notice of Filing Plaintiff-Appellant's Application For Leave To Appeal In the Michigan Supreme Court and electronically filing document using Court of Appeals ECF system. Also served a copy of Application For Leave to Appeal upon:

<p>Jack L. Van Coevering, Esq. Foster Swift Collins & Smith PC 1700 East Beltline, N.E., Suite 200 Grand Rapids, MI 49525-7044</p>	<p>Jill Andreau, Clerk Michigan Tax Tribunal P.O. Box 30232 Lansing, MI 48909</p>
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by enclosing copies of the same in envelopes properly addressed, and by depositing said envelopes in the United States Mail with postage thereon having been fully prepared.

Respectfully submitted,
DYKEMA GOSSETT PLLC

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