S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

LOWE'S HOME CENTERS, INC., Petitioner-Appellee,	UNPUBLISHED April 22, 2014
v TOWNSHIP OF MARQUETTE, Respondent-Appellant.	No. 314111 Michigan Tax Tribunal LC No. 00-385768
HOME DEPOT USA, INC., Petitioner-Appellee,	
v TOWNSHIP OF BREITUNG, Respondent-Appellant.	No. 314301 Michigan Tax Tribunal LC No. 00-366428

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

These consolidated appeals arise out of taxpayer appeals of ad valorem property tax assessments for two big box retail stores located in the Upper Peninsula. In Docket No. 314111, the subject property is an operating Lowe's Home Centers, Inc. (Lowe's) store, and in Docket No. 314301, the subject property is an operating Home Depot USA, Inc. (Home Depot) store. In both cases, Lawrence Allen served as the expert appraiser on behalf of the taxpayer and Bruce Closser served as the expert appraiser on behalf of the township. Following the taxpayers' filing of petitions with the Michigan Tax Tribunal (the tribunal) and hearings, the tribunal found in favor of the taxpayers in both cases and rejected the townships' assessments of the subject properties. Though raised in a variety of ways, the central issue on appeal is whether the tribunal improperly valued the owner-occupied properties as vacant and available, rather than occupied. We conclude that the tribunal properly valued the fee simple interest, and we affirm.

I. FACTS

A. DOCKET NO. 314111

Lowe's filed a petition to appeal the ad valorem property tax assessments for tax years 2010, 2011, and 2012 for property located in Marquette Township (Marquette). Marquette made the following valuations of the property: (1) for 2010, the taxable value (TV) of the property was determined to be $5,098,259 and the assessed value (AV) was determined to be $5,172,300; (2) for 2011, the TV and AV were determined to be $5,171,700; and (3) for 2012, the TV and AV were determined to be $5,195,200.[1]

Lowe's indicated in its petition that the property was classified as commercial real estate and "presently used or available for use for Retail purposes" and alleged that the true cash value (TCV), upon which the taxable value and state equalized value were based, was erroneously determined and denied Lowe's its constitutional rights to uniformity in taxation, equal protection, and due process of law. Lowe's requested that the equalized value and TV be reduced to the following amounts for the following tax years: (1) 2010, to $2,400,000; (2) 2011, to $2,040,000; and (3) 2012, to $1,500,000.

Lowe's filed a prehearing statement in which it indicated that the property classification was commercial, the highest and best use (HBU) of the property was as a "retail store," and that the current use was as a Lowe's store. Marquette's prehearing statement indicated that the property classification was commercial real estate and both the HBU and current use was as commercial real estate / a big box retail store.

At the hearing, both Allen and Closser testified regarding their appraisals of the subject property. Allen's appraisal indicated that the interest appraised was the fee simple interest, the HBU as vacant was retail development, and the HBU as improved was use as a retail store. Allen reached his conclusions regarding the market value of the property by developing the income, sales-comparison, and cost approaches to valuation. Allen distinguished between existing facilities and build-to-suit facilities, explaining that the subject property is an existing facility and that "[t]he build-to-suit market rent or sale price is based upon the cost of construction; whereas, the 'existing' market sale price or rent is a function of supply and demand and the open interaction of buyers and sellers or landlords and tenants in the marketplace for an existing property."

In his sales-comparison approach, Allen provided eight comparable sales of vacant and available big box store properties, and valued the properties, rounded, as follows: (1) 2009—$4,180,000, (2) 2010—$3,760,000, (3) 2011—$3,490,000.

In his income approach, Allen provided comparable leases of big box stores, including existing building rental rates, build-to-suit rental rates, and re-lease rates of build-to-suit stores.

[1] The taxable value of property for a tax year is determined by the value of the property on December 31 of the immediately preceding year—"tax day." MCL 211.2(2). References to the value of the property in a specific year constitute the value of the property for the following tax year. For example, the value of the property in 2009 corresponds with tax year 2010.

Allen used the direct capitalization method to convert a year of net operating income into a present value and reached the following valuation conclusions, rounded: (1) 2009—$3,920,000, (2) 2010—$3,660,000, and (3) 2011—$3,580,000.

In his cost approach discussion, Allen explained that functional obsolescence is an issue for big box stores, stating:

> Unlike many other commercial properties, free standing "big box" stores like the subject are not constructed for the purpose of thereafter selling or leasing the property in the marketplace. . . . In addition, one constructing a free standing 'big box' store similar to the subject may expect to incur a profit on the operation of the store but would expect a loss upon the sale of the real estate. . . . Furthermore, to the extent that any [are] features particular to Lowe's, a buyer must either incur modification costs or utilize features different than those desired.

Allen reached the following valuation conclusions under the income approach, rounded: (1) 2009—$4,160,000, (2) 2010—$3,890,000, and (3) 2011—$3,800,000.

In reconciling the three approaches, Allen indicated that he used the sales-comparison approach as the primary indicator of value, the income approach was "considered an important indicator of value but is secondary to the [s]ales [c]omparison approach," and because of the "significant amount of obsolescence associated with the subject building improvements," "[t]he [c]ost [a]pproach is not considered a primary indication of value; rather it will serve as a 'check' to the value conclusions reached via the [i]ncome and [s]ales [a]pproaches." Based on this reconciliation, Allen reached the following fair market value conclusions regarding the property: (1) 2009—$4,120,000, (2) 2010—$3,740,000, and (3) 2011—$3,510,000.

In Closser's appraisal, he indicated that he valued the fee simple interest of the property and that the HBU was "[c]ontinued use as a Lowe's home-improvement center." Closser explained that because there is no other home improvement store in the area, "a home-improvement center would appear to be a good choice for a big-box store for the site[,]" and that "[t]he improvements . . . closely resemble the ideal improvement and therefore the subject building, as constructed on the site, represents the highest and best use of the property as improved."

Closser reached the following valuation conclusion, rounded, pursuant to the cost approach, "based upon the replacement cost new of the building, less depreciation, plus the depreciated cost of the site improvements and the value of the site assumed vacant and available for development to its highest and best use": (1) for 2009—$10,075,000, (2) for 2010—$10,500,000.

In Closser's sales-comparison approach, he eliminated any comparables that were stores that closed "[b]ecause . . . the subject property is an occupied store[.]" Closser was left with 10 comparable properties, which included "sale-leaseback transactions, sales of leased properties from one investor to another[,] and sales of leased properties from the landlord to the tenant." Morever, three of these sales were Shopko stores that were all involved in a large sale-leaseback transaction involving all 178 Shopko stores in the chain. Closser reached the following valuation

conclusions, rounded, using the sales-comparison approach: (1) 2009—$9,070,000, and (2) 2010—$9,910,000.

In Closser's income approach, he based his valuation conclusion on six of the 10 comparable properties used in his sales-comparison approach. Closser reached the following valuation conclusions, rounded, using this approach: (1) 2009—$9,600,000, and (2) 2010—$9,725,000.

In reconciling the three approaches, Closser concluded that the income "approach is the most relevant and the most reliable in this appraisal[,]" because "[t]he typical buyer of the subject property would be buying it based on its income earnings potential and, while cost is certainly a consideration and is well supported in this appraisal, greatest weight was placed upon the income capitalization approach because no developer would construct a property such as the subject property without being assured of a reasonable return on their investment." Closser recognized that the sales-comparison approach was relevant and could not be ignored, but stated that the greatest weight was placed on the income approach, with less weight on the other two approaches. Based on this reconciliation, Closser reached the following fair market value conclusions regarding the property: (1) 2009—$9,550,000 and (2) 2010—$9,850,000. Closser did not value the property for 2011.

Following a two-day hearing, the tribunal made the following conclusions regarding the valuation of the property for the following tax years: (1) for 2010, TCV—$4,120,000, SEV and TV—$2,060,000; (2) for 2011, TCV—$3,740,000, SEV and TV—$1,870,000; (3) for 2012, TCV—$3,510,000, SEV and TV—$1,755,000. The tribunal accepted Allen's appraisal that was created on behalf of Lowe's, which relied primarily on the sales-comparison approach.

In explaining their reasoning, the tribunal stated that "[t]he appraisal assignment requires the appraiser to value the subject property as if sold, available to be leased at market rent for the fee simple interest. Only one of the appraisers valued the fee simple interest. The other appraiser provided an opinion of the value in use of the leased fee estate based upon build-to-suit obsolete leases." The tribunal found that the subject property was not an income producing property. Additionally, the tribunal determined that the three types of transactions that Closser relied on in his appraisal are not fee simple transactions, that Closser testified that the sales he used were all leased fee transactions, and that "[n]o adjustments were made for the value-in-use versus the fee simple." Finally, the tribunal stated that Closser's appraisal was "not a market valuation of the fee simple interest of the subject property" and chastised Closser, stating, "[I]t is shocking that a USPAP Instructor for the Appraisal Institute would write a deceptive report." The tribunal stated that Allen's appraisal, on the other hand, "had a plethora of sales and listings, as well as rents and asking rents, that indicated the difference between the fee simple ownership and the leased fee interest."

B. DOCKET NO. 314301

Home Depot filed a petition to appeal the ad valorem property tax assessments for tax years 2009, 2010, and 2011 for the Home Depot property located in Breitung Township (Breitung). Breitung made the following valuations of the property for the following tax years: (1) for 2009, the TV and AV was determined to be $2,923,400; (2) for 2010, the TV was

determined to be $2,914,629 and the AV was determined to be $2,925,100; and (3) for 2011, the TV and AV was determined to be $2,925,100.

Home Depot indicated that the property is classified as commercial real estate and "is presently used or available for use for Big Box Retail purposes" and alleged that the true cash value (TCV), upon which the taxable value and state equalized value were based, was erroneously determined and denied Home Depot its constitutional rights to uniformity in taxation, equal protection, and due process of law. Home Depot requested that the TV and state equalized value be reduced for tax years at issue to (1) $2,200,000 for 2009, (2) $1,540,000 for 2010, and (3) $1,309,000 for 2011.

Home Depot filed a prehearing statement in which it indicated the property classification was commercial, the HBU was retail, and the current use of the property is as a Home Depot store. Breitung's prehearing statement indicated that the property classification, HBU, and current use was commercial real estate.

Breitung filed a motion to strike Home Depot's Appraisal Report, prepared by Allen, arguing that it was "based on a legally-flawed valuation methodology"—comparing a presently used property to an abandoned property that needed to be disposed of in a distressed secondary market at a deeply-discounted price. The tribunal denied the motion.

At the hearing, both Allen and Closser testified regarding their appraisals of the subject property. Allen's Appraisal indicated that the interest appraised was the fee simple interest, the HBU as vacant was retail development, and the HBU as improved was use as a retail store. Allen developed his conclusions regarding the market value of the property based on the sales-comparison approach and the income approach. Allen explained in his report that "[t]he Cost Approach was not developed due to the substantial amount of depreciation (primarily obsolescence) associated with the subject building improvements and also due to a lack of use of this approach by buyers and sellers in the market." Allen again explained the difference between the market for existing buildings and the build-to-suit market.

In his sales-comparison approach, Allen provided seven comparable sales, which were the same as the first seven comparables used by Allen in the Lowe's case, and valued the market value of the property, rounded, as follows: (1) 2008—$2,660,000, (2) 2009—$2,370,000, (3) 2010—$2,140,000.

In his income approach, Allen used the same methodology and comparables as in the Lowe's case, and reached the following valuation conclusions, rounded: (1) 2008—$2,800,000, (2) 2009—$2,500,000, and (3) $2,320,000.

In his cost approach discussion, Allen explained, as he did in the appraisal for Lowe's, that functional obsolescence is an issue for big box stores. However, Allen did not reach a valuation conclusion under the cost approach in this case.

In reconciling the three approaches, Allen indicated that he used the sales-comparison approach as the primary indicator of value, the income approach was "considered an important indicator of value but is secondary to the [s]ales [c]omparison approach," and the cost approach was not considered reliable because of the large amount of depreciation and because this

approach is not used in the market place for property like the subject property. Based on this reconciliation, Allen reached the following fair market value conclusions regarding the property: (1) 2008—$2,700,000, (2) 2009—$2,400,000, and (3) 2010—$2,200,000.

In Closser's appraisal, he indicated that he valued the fee simple interest of the property and that the HBU was "[c]ontinued use as a Home Depot retail facility." Closser explained that because there is no other home improvement store in the area, "a home-improvement center would appear to be the best big-box store for the site[,]" and that "[t]he improvements closely resemble the ideal improvement and therefore the subject building, as constructed on the site, represents the highest and best use of the property as improved."

Closser reached the following valuation conclusions, rounded, pursuant to the cost approach, using the same methodology he used in the Lowe's case: (1) 2008—$6,525,000, (2) 2009—$5,600,000, and (3) 2010— $5,800,000.

In Closser's sales-comparison approach, he used the same 10 comparable properties he used in the Lowe's case, and reached the following valuation conclusions, rounded: (1) 2008—$5,890,000, (2) 2009—$5,030,000, and (3) 2010—$5,600,000.

In Closser's income approach, just as in the Lowe's case, he based his valuation conclusion on six of his 10 comparable properties used in his sales-comparison approach and reached the following valuation conclusions, rounded: (1) 2008—$5,740,000, (2) 2009—$5,525,000, and (3) 2010—$5,575,000.

In reconciling the three approaches, Closser made the same conclusions regarding the three approaches and based on this reconciliation, Closser reached the following fair market value conclusions regarding the property: (1) 2008—$5,950,000, (2) 2009—$5,450,000, and (3) 2010—$5,650,000.

Following a three-day hearing, the tribunal made the following conclusions regarding the valuation of the property for the following tax years: (1) for 2009, TCV—$2,850,000, SEV and TV—$1,450,000; (2) for 2010, TCV—$2,660,000, SEV and TV—$1,330,000; (3) for 2011, TCV—$2,375,000, SEV and TV—$1,187,500. The tribunal found that Home Depot's "data within the sales comparison approach is sufficient to arrive at an independent determination of value." However, the tribunal did not accept Allen's reconciled valuations outright, and increased the values.

In explaining its reasoning, the tribunal stated, "Although Respondent purports to value the subject property in fee simple, the Tribunal concludes . . . that it is instead valuing the leased fee interest of the same[,]" whereas, "petitioner's selected comparables were vacant and available at the time of sale. The tribunal finds that these sales best represent the fee simple interest in the subject property." The tribunal found that the subject property was not an income producing property because it is owner-occupied and had no history of an income stream. The tribunal also took issue with Closser's appraisal, stating, "Respondent's use of leased fee sales is quite striking based on Mr. Closser's admission that the subject property was valued on the premise of fee simple. Mr. Closser goes even further to admit that none of his data are fee simple properties." The tribunal further stated, "Mr. Closser admits to valuing the subject use as

a Home Depot store. . . . The lack of clarity between fee simple and leased fee does not bolster Respondent's opinions, analyses and conclusions. This gives rise to the question of adjustments between fee simple and lease[d] fee properties; the result is Mr. Closser makes no adjustment for this difference in his sales comparison analysis." The tribunal concluded that "Petitioner has provided credible documentary evidence and testimony" and found that "Petitioner's data within the sales comparison approach is sufficient to arrive at an independent determination of value."

II. STANDARDS OF REVIEW

This Court's review of tribunal cases is limited, and because fraud was not alleged, "this Court reviews the [tribunal's] decision for misapplication of the law or adoption of a wrong principle." *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010); see also Const 1963, art 6, § 28. Findings of fact made by the tribunal are "conclusive if they are supported by competent, material, and substantial evidence on the whole record." *Briggs Tax Service, LLC*, 485 Mich at 75 (quotation marks and footnote omitted). Moreover, "[f]ailure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal." *Meijer, Inc v City of Midland*, 240 Mich App 1, 5; 610 NW2d 242 (2000). "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) (quotation marks and citation omitted). There is substantial evidence to support the 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).

The petitioner bears the burden of proving the true cash value (TCV) of the property. *President Inn Props, LLC v City of Grand Rapids*, 291 Mich App 625, 631; 806 NW2d 342 (2011). This Court has previously explained this burden, stating:

> The burden of proof encompasses two 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 & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 354-355; 483 NW2d 416 (1992). Nevertheless, because Tax Tribunal proceedings are de novo in nature, the Tax Tribunal has a duty to make an independent determination of true cash value. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App [379, 409; 576 NW2d 667 (1998)]. Thus, even when a petitioner fails to prove by the greater weight of the evidence that the challenged assessment is wrong, the Tax Tribunal may not automatically accept the valuation on the tax rolls. *Id.* at 409. Regardless of the method employed, the Tax Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485-486, 502; 473 NW2d 636 (1991). [*Id.*]

However, "[t]he appellant bears the burden of proof in an appeal from an assessment, decision, or order of the Tax Tribunal." *Drew*, 299 Mich App at 499 (quotation marks and citation omitted).

Questions of statutory interpretation in tribunal decisions are reviewed de novo. *Briggs Tax Service, LLC*, 485 Mich at 75.

> The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language. The words used by the Legislature in writing a statute provide us with the most reliable evidence of the Legislature's intent. While, generally, the interpretation of a statute by an agency charged with its execution is entitled to the most respectful consideration, an agency's construction of a statute is not binding on the courts and cannot conflict with the Legislature's intent as expressed in clear statutory language. [*Drew*, 299 Mich App at 499 (internal quotation marks and citations omitted).]

Where a statute involves clear and unambiguous language, that language must be applied as written. *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676, 692; 840 NW2d 168 (2013). Moreover, "[w]hen tax statutes are construed, any ambiguities are resolved in favor of the taxpayer." *Kelly Services, Inc v Dep't of Treasury*, 296 Mich App 306, 311; 818 NW2d 482 (2012).

III. PROPERTY VALUATION GENERALLY

Article 9, § 3 of the Michigan Constitution sets out "the fundamental principles concerning ad valorem taxation" and mandates: "(1) that the Legislature is to provide a uniform system of real property taxation, (2) that the tax must be assessed on the basis of the true cash value of the property, and (3) that the Legislature is to provide a determination of true cash value." *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 483; 473 NW2d 636 (1991). Thus, determination of the taxable value of real property in Michigan begins by determining the TCV of the property. *Detroit Lions, Inc*, 302 Mich App at 696. Generally, "property must be assessed at 50 percent of its true cash value." *Id.*, citing Const 1963, art 9, § 3.

Our courts have long recognized that there are three common approaches for determining the TCV of property: "capitalization-of-income approach, the sales-comparison or market approach, and the cost-less-depreciation approach." *President Inn Props, LLC*, 291 Mich App at 639 (quotation marks and citation omitted). However, because "the legislature did not direct that specific methods be used[,]" it is up to the courts to approve or disapprove of valuation methods used. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 390; 576 NW2d 667 (1998). It may be useful to use variations of the common approaches or "entirely new methods" "if found to be accurate and reasonably related to fair market value," but regardless of the approach used, "the valuation determined by the Tax Tribunal must be the usual price for which the property would sell." *Id.* at 390. "In other words, a valuation method is wrong only if it does not lead to the most accurate determination of the taxable property's [TCV] or fair market value" based upon the circumstances of the particular case. *President Inn Props, LLC*, 291 Mich App at 639.

IV. ANALYSIS

A. MCL 211.27

Respondents argue that the tribunal committed an error of law and applied a wrong legal principle when it valued the properties as vacant and available, rather than occupied, because it ignored the "existing use" of the taxpayers' properties and the "present economic income" of their buildings and land "at the time of assessment," which is contrary to the requirements of MCL 211.27(1); therefore, pursuant to MCL 211.27(1) and Const 1963, art 6, § 28, reversal is required.[2]

MCL 211.27 fulfills the constitutional mandate of Article 9, § 3, requiring the Legislature to provide a determination of TCV, by defining TCV as "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) (emphasis added). "[TCV] is synonymous with fair market value, and refers to the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation[.]" *Detroit Lions, Inc*, 302 Mich App at 696 (quotation marks and internal citations omitted).

Moreover, our Supreme Court has stated that "the statutory definition of true cash value—'the usual selling price'—requires that actual facts be a significant consideration in the valuation of the property." *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 637; 462 NW2d 325 (1990). MCL 211.27(1) provides a nonexhaustive list of factors that "the assessor *shall* also consider" in determining the TCV:

> the *advantages and disadvantages* of [1] location; [2] quality of soil; [3] zoning; [4] existing use; [5] present economic income of structures . . . ; [6] present economic income of land if the land is being . . . put to income producing use; [7] quantity and value of standing timber; [8] water power and privileges; [9] minerals, quarries, or other valuable deposits not otherwise exempt under this act known to be available in the land and their value. [MCL 211.27 (emphasis added).]

Importantly, MCL 211.27(5)[3] provides, in relevant part: "[a]s used in subsection (1), 'present economic income' means *for leased or rented property* the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values." (Emphasis added.)

1. PRESENT ECONOMIC INCOME

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[2] We note at the outset that respondents have relied, to a large extent, on nonbinding unpublished cases of this Court and caselaw from other jurisdictions, which is also not binding on this Court. See MCR 7.215(C); *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

[3] Prior to the 2013 amendments to this statute, this provision was labeled as (3); however, the substance of the provision remained the same.

Respondents argue that the tribunal failed to consider the "present economic income" of the subject properties, as required by MCL 211.27(1), resulting from the consumer sales made by the businesses located on the subject properties and the income that would have resulted if the properties were leased instead of owner-occupied. Respondents' contention is that the fact that the subject properties are owner-occupied, rather than leased, does not mean that the properties are not "income producing" properties.

In both cases, the tax tribunal made factual findings that the subject properties are owner-occupied and not income producing properties. The fact that the properties are owner-occupied is uncontested. Because TCV is determined "at the time of assessment," the assessor shall consider the "*present* economic income" "for leased or rented property" at that time. MCL 211.27(1) and (5). In light of this plain and unambiguous statutory language, if a property is not being leased at the time of the assessment, then it has no present economic income to be considered. Therefore, the tax tribunal did not make an error of law or apply a wrong legal principle by not considering the present economic income, nor did it "ignor[e] reality," as respondents contend, because these owner-occupied properties did not have any present economic income pursuant to MCL 211.27(5).

2. EXISTING USE

Respondents also argue that the tax tribunal improperly failed to consider the "existing use" of the properties, as required pursuant to MCL 211.27(1), by valuing the properties as if they had gone out of business and were vacant and available, rather than valuing the properties as occupied, successful home improvement stores.

Contrary to respondents' arguments, the tribunal's opinions indicate that it did, in fact, consider the existing use of the properties. The tax tribunal found that the Home Depot property was built specifically for Home Depot and "is improved with a freestanding, commercial building originally constructed in 2003 for The Home Depot," which is "a modern, single story, big box retail structure . . . . a Class C warehouse discount store." In response to Breitung's argument that Home Depot's appraiser—whose evidence the tribunal ultimately relied on—did not consider the existing use of the property, the tribunal stated, "Petitioner's appraiser did in fact consider the existing use of the subject property, as evidenced by his highest and best use analysis[,]" in which Allen indicated that the property was improved with a "warehouse discount store" and determined that the HBU was use as a retail store. Similarly, the tax tribunal found that the Lowe's property is a "build-to-suit big box store." The tribunal explicitly indicated that it was looking for the fair market value of a big box store, and found that Lowe's appraisal, which relied predominantly on the sales-comparison approach, established the TCV of the property by providing comparables of listings and sales of other big box stores. In both cases, the tribunal relied the taxpayers' appraisals, which based the valuation of the property predominantly on the sales-comparison approach analysis consisting of comparable sales of existing big box stores that were vacant and available. Thus, the tax tribunal in both cases considered the existing use of the properties as big box retail stores.

Moreover, valuing the subject properties as vacant and available for sale, as opposed to occupied, constituted a proper valuation of the fee simple interest. Because these properties were owner-occupied at the time of assessment and because MCL 211.27(1) requires that TCV be

based upon the "the usual selling price . . . at the time of assessment," the interest to be valued was the fee simple interest,[4] which is the value of the property when sold unencumbered, as opposed to the leased fee interest,[5] which is the value of the property sold with a lease in place. The parties in both cases agreed at their respective hearings, and their experts' appraisals also confirmed, that the interest to be valued was the fee simple interest. Because a sale of the fee simple interest in a property means the property is sold without a lease in place, it is also sold without a tenant in place—i.e., unoccupied.[6] Therefore, by valuing the properties as big box stores that were vacant and available, rather than as occupied properties, the tribunal properly valued the fee simple interest of the property by considering the existing use of the properties in compliance with the plain language of the statute.[7]

Further, whether the businesses operating on the properties were successful and had no intention of closing their doors is not relevant to determining the TCV of the property. This Court has previously indicated that whether the owner intends to sell is irrelevant when determining the TCV. *Safran Printing Co v Detroit*, 88 Mich App 376, 382; 276 NW2d 602 (1979). Similarly, the fact that the Lowe's and Home Depot businesses were successful and had no intention of closing their doors is irrelevant to determining the usual selling price of the property resulting from arm's-length negotiation. MCL 211.27(1)'s definition of TCV essentially assumes a willing seller—"the *usual selling price* . . . , being the price that *could be obtained* for the property at a private sale, and not at auction sale . . . or at forced sale"—and does not require that the owner of the property actually intend to sell the property. Determining the TCV requires determining the fair market value of the property as if the owner *were* to sell the property, regardless of whether or not the operating business intended to remain in business. MCL 211.27.

B. HIGHEST AND BEST USE

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[4] In the context of real property appraisals, "a fee simple interest is only subject to the limitations imposed by the four powers of government." The Appraisal of Real Estate (12th ed), p 80.

[5] "The most common type of economic interest is created when the fee simple interest is divided by a lease[,]" and in the context of real property appraisal, "[a] leased fee interest is the lessor's, or landlord's, interest." The Appraisal of Real Estate (12th ed), p 81.

[6] It is respondents' express position in their brief on appeal that leased fee property transactions should have been considered in the sales-comparison approach to value the subject properties; however, Closser's appraisals concluded that the income approach was the most relevant and reliable.

[7] See *Meijer*, 240 Mich App at 3 n 2, quoting *First Fed S&L Ass'n of Flint v City of Flint*, 415 Mich 702, 703; 329 NW2d 755 (1982) (indicating that all experts agreed that the TCV of the subject property containing a retail store and gas station should be "determined by finding the market value of the fee simple interest in the property, based on the assumption that the subject property is vacant and for sale," quoting in an accompanying footnote *First Federal*'s statement that "'the constitution and the [GPTA] require that property tax assessments be based on market value, not value to the owner'").

Respondents argue that the tribunal erred in its determination of the HBU of respondents' respective properties, constituting a violation of law, because it failed to recognize that the HBU was the continuation of the existing use as occupied and operating home improvement stores. Respondents' conception of HBU envisions the user of the respective properties—Lowe's and Home Depot—remaining the same after a sale "from one investor to another," rather than valuing the properties as if vacant and available.

Fundamental to the determination of the TCV is the concept of the "highest and best use." *Detroit Lions, Inc*, 302 Mich App at 697. "[T]o determine true cash value, the property must be assessed at its highest and best use[,]" which "recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay." *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 33; 737 NW2d 187 (2007) (quotation marks and citation omitted; emphasis added). "'Highest and best use' means the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use." *Detroit Lions, Inc*, 302 Mich App at 697 (quotation marks and citation omitted). Thus, the tribunal has the duty to "hypothesize the highest *probable* price at which a sale would take place." *Id.* (quotation marks and citation omitted; emphasis added). The HBU must be "legally permissible, financially feasible, maximally productive, and physically possible." *Id.* at 698 (quotation marks and citation omitted).

In the Home Depot case, the tax tribunal found that the HBU "of the property as improved is as a commercial warehouse retail store." The tribunal also stated, "The Tribunal is not looking for the value of a Home Depot, . . . but rather the value of a big-box commercial . . . building." While the tribunal in the Lowe's case did not make an explicit finding of the property's HBU in its findings of fact, the tribunal expressly stated, "The subject property was built for Lowe's, and continues to be used as such. The Tribunal is not looking for the market value of a Lowe's property but the market value of a big box building[,]" which demonstrates that the tribunal implicitly found that the HBU of the property was use as a big box retail facility.

Respondents argue that the tribunal erred by relying on the "unsupported [legal] premise that the 'maximally-productive use' of each subject property," i.e., the HBU, "cannot be its 'existing use' as an operating home improvement store, but instead [the HBU] is to close the store and sell it as a generic retail building that would have to be modified because it was the site of a failed retail business." While respondents attempt to be evasive by describing the HBU as "continuation of the existing use as an occupied home improvement store," the context of their brief makes clear that respondents' position, just as their appraiser's,[8] is that the HBU of the property is continued use as a Lowe's Store and as a Home Depot Store.

Respondents' conceptualization of the HBU—use as a Lowe's and Home Depot store—makes the determination of TCV dependent upon the identity of the property owner. However, in analyzing the factors laid out in MCL 211.27, our Supreme Court expressly stated that

[8] In Closser's appraisals, he indicated that the HBU was "[c]ontinued use as a Lowe's home-improvement center" and "[c]ontinued use as a Home Depot retail facility."

"[n]oticeably absent from the statutory definition of 'cash value' and those enumerated factors which an assessor must consider is any reference to the identity of the person owning an interest in the property . . . ." *Edward Rose Bldg Co*, 436 Mich at 640. The Supreme Court went on to quote two of its prior cases:

> "'The Constitution requires assessments to be made on property at its cash value. This means not only what may be put to valuable uses, but what has a *recognizable pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it.*'" *Washtenaw Co* [*v State Tax Comm*, 422 Mich 346, 370 n 4; 373 NW2d 697 (1985)], quoting *Perry v Big Rapids*, 67 Mich 146, 147; 34 NW 530 (1887). Emphasis in original. [*Id.* at 640-641.]

Though MCL 211.27(1) requires the assessor to consider the existing *use* of the properties in determining the TCV, pursuant to our case law, consideration of the existing *user* or owner of the property is not permitted. Therefore, the HBU, upon which a TCV determination is made, cannot be user or owner specific.

Moreover, by taking the position that the HBU of the properties is use as a Lowe's and Home Depot store, respondents confuse the distinct concepts of fair market value (i.e., value-in-exchange)[9] and value to the owner (i.e., value-in-use) by treating them as one in the same.[10] Our Supreme Court has expressly stated that "the constitution and the General Property Tax Act require that property tax assessments be based on market value, not value to the owner . . . ." *First Fed S&L Ass'n of Flint v City of Flint*, 415 Mich 702, 703; 329 NW2d 755 (1982).[11] Similarly, this Court has explained that "[r]eal property may not be assessed on the basis of the value of its use to the owner[,]" because "'use value' refers to the economic value of the use made by the property owner, regardless whether it is the highest and best use of the property." *Huron Ridge LP*, 275 Mich App at 33. The HBU looks to the use "a prospective buyer would put the property," recognizing that this use is what "will influence the price which the buyer would be willing to pay." *Id.* Likewise, "[e]xisting use may be indicative of the use to which a potential buyer would put the property and is, therefore, relevant to the fair market value of the property." *Detroit Lions, Inc*, 302 Mich App at 697 (quotation marks and citation omitted; emphasis added). Therefore, while the existing use of a property informs the HBU of the property, the value of the property to the owner is not equivalent to the value of the HBU, i.e.,

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[9] See Black's Law Dictionary (7th ed) (defining "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect").

[10] See Black's Law Dictionary (7th ed) (defining "use value" as "[a] value established by the utility of an object instead of its value upon selling or exchanging it").

[11] While this Court has previously stated that "*First Federal* only applies when a cost approach is used[,]" *Comstock Village Ltd Dividend Housing Ass'n*, 168 Mich App 755, 761; 425 NW2d 702 (1988), the statement we have cited from *First Federal* is a general principle of law applicable to ad valorem taxation valuation generally.

the TCV. Hence, the tribunal's determination that the HBU of the properties is use as big box retail stores did not constitute a misapplication of the law or adoption of a wrong principle because it properly valued the fee simple interest of these properties.

C. APPRAISAL METHODOLOGY RELIED ON BY THE TRIBUNAL

Respondents argue that the tribunal committed an error of law by adopting Allen's valuation of the properties because his methodology, valuing the properties as if vacant and available, was contrary to MCL 211.27(1) and by failing to consider leased fee transactions in the sales-comparison approach, which is the most appropriate method for valuing properties like the subject properties. Respondents also argue that due to the flaws in Allen's appraisals, which were relied on by the tribunal, the tribunal's opinions were not supported by competent, material, and substantial evidence.

1. EXISTING USE AND HIGHEST AND BEST USE

Respondents essentially raise the same arguments raised above regarding existing use and HBU, this time in reference to Allen's appraisals of the subject properties.

Respondents argue that Allen's valuations were unreasonably low because he ignored the existing use of the subject properties by valuing the properties as vacant and available, rather than occupied. However, for the same reasons that we concluded that the tribunal did not fail to consider the existing use of the properties when it valued the subject properties as vacant and available, Allen's valuation of the subject properties as such likewise appropriately considered of the existing use of the properties.

Similarly, respondents argue that Allen failed to consider the appropriate HBU of the properties and, thus, did not consider the appropriate HBU, which is continuation of its current use as an occupied home improvement store, when he used vacant buildings as comparables. Allen's appraisals indicated that the HBU as improved was use as a retail store in both cases. For the same reasons that we concluded the tribunal did not err in determining the HBU to be use as a big box retail store, the tribunal's reliance on Allen's appraisal, which similarly considered the HBU to be retail use, did not constitute misapplication of the law or adoption of a wrong principle.

2. ADEQUACY OF ALLEN'S KNOWLEDGE

Respondents argue that the record demonstrates that Allen was not sufficiently familiar with the subject properties and the neighborhood in which they are found. Respondents assert that Allen was unfamiliar with the Upper Peninsula, not having gone to the Upper Peninsula for 10 years before his appraisals of the subject properties. With regard to the Home Depot property, respondents assert that Allen (1) did not spend sufficient time inspecting the property—only about an hour, (2) was wrong about the construction of the roof of the Home Depot property and the availability of all customary utilities and later retracted his statements, (3) was unable to answer whether all the big box stores in the local area were occupied, how many such stores were in the neighborhood, and where the nearest home improvement store was located, and (4) testified that there was a Kmart store in the area, but did not recall seeing it during his inspection. Regarding the Lowe's property, respondents assert that Allen (1) did not spend sufficient time

inspecting the property—only about an hour or two—and (2) never visited the assessing office in Marquette to inquire about the property and neighborhood.

Respondents' argument challenges the tribunal's determination that Allen and his appraisals of the subject properties, which he testified regarding, were credible. Allen was qualified as an expert appraiser in both cases. However, this Court has made clear that "[w]e do not disturb the [tribunal's] findings regarding the credibility of the witnesses[,]" and that "[i]t is exclusively for the tribunal to assess the credibility of the witnesses who appear before it." *Detroit Lions, Inc*, 302 Mich App at 703. Therefore, "[w]e must defer to the tribunal's determinations of witness credibility." *Id.* Moreover, the weight given to evidence is also within the discretion of the tribunal. *President Inn Props, LLC*, 291 Mich App at 633. Therefore, we must defer to the tribunal.

3. ALLEN'S SALES-COMPARISON APPROACH

Respondents challenge Allen's sales-comparison approach, which was predominantly relied on by the tribunal in both cases, arguing that the tribunal should have given no weight to this analysis because of its errors and defects. Respondents do not take issue with the tribunal's use of the sales-comparison approach itself, and instead take issue with the comparables Allen used within that approach. Respondents argue that "[t]he use of leased fee transactions in the sales comparison approach remains the most appropriate method [of valuing] occupied commercial property like the Taxpayers' occupied home improvement stores." Therefore, respondents' challenge is that the tax tribunal adopted a wrong legal principle by relying on Allen's comparables, which were all sales of vacant and available properties, instead of relying on Closser's comparables of sales of occupied properties. Respondents also challenge specific comparables, arguing that by relying on these comparables, the tribunal's opinions were not supported by substantial, competent, and material evidence.

Our Supreme Court has explained the sales-comparison approach, stating:

> [U]nder the sales-comparison approach, true cash value is derived by analyzing recent sales of similar properties, comparing those properties with the subject property, and adjusting the sales price of the comparable properties to reflect differences. The adjusted sales prices should fall within a range and allow the appraiser to estimate the true cash value of the subject property. Once ascertained, the true cash value of the subject property itself is *not* adjusted. [*Meadowlanes Ltd Dividend Housing Ass'n*, 437 Mich at 492.]

"[W]hen using the sales-comparison approach, the appraiser should adjust the sales price of comparables for differences in size, age, condition, location, and other value influences that buyers and sellers of real property take into account as opposed to the value influences considered by buyers and sellers of commercial paper." *Id.* at 503.

In Allen's appraisals, he used the sales-comparison approach as the primary indicator of value. Allen relied on the same seven comparable sales of big box stores that were vacant and available in both cases and considered an additional such comparable in the Lowe's case.

a. GENERAL CHALLENGES TO ALLEN'S COMPARABLES

First, respondents argue that the tribunal should not have relied on Allen's comparables because they valued the properties as if they were vacant and available as opposed to occupied. Allen's comparables valued the fee simple interest of the owner-occupied properties by using sales comparables of big box stores that were vacant and available for sale and, thus, were appropriate to determine the "usual selling price" of the subject properties' fee simple interest. MCL 211.27(1). As discussed above, the tribunal properly valued the properties by valuing the fee simple interest of the properties as if they were vacant and available. By comparing the subject properties to similar big box retail properties that were vacant and available, with various adjustments made to compensate for differences between the properties, Allen was able to determine what the fair market value would be of the subject properties, if they were to be sold in a private sale, as required by MCL 211.27(1). Therefore, Allen's sales-comparison approach properly valued the TCV of the fee simple interest of the subject properties.

Conversely, the comparables presented by Closser in both cases in his sales-comparison approach are all either "sale-leaseback transactions, sales of leased properties from one investor to another[,] [or] sales of leased properties from the landlord to the tenant." These transactions are all leased fee transactions, rather than fee simple transactions. Had Closser made appropriate adjustments for the difference in the property rights involved in his comparables—the leased fee interest—as compared with the subject properties—the fee simple interest—these comparables could have been appropriate.[12] However, in the tribunal's opinion in Lowe's, the tribunal pointed out that "Closser made no adjustments or made any determination that the three [types of transactions used by Closser] are leased-fee transactions. No adjustments were made for the value-in-use verses the fee simple." Similarly, in the Home Depot case, the tribunal stated, "Although Respondent purports to value the subject property in fee simple, the Tribunal concludes . . . that it is instead valuing the leased fee interest of the same[,]" and

> The lack of clarity between fee simple and leased fee does not bolster Respondent's opinions, analyses[,] and conclusions. This gives rise to the question of adjustments between fee simple and lease[d] fee properties; the result is Mr. Closser makes no adjustment for this difference in his sales comparison analysis."

Our review of the appraisals confirms that Closser made no such adjustments. Therefore, contrary to respondents' contention, the tribunal's position was not that Closser's comparables—i.e., sales of "occupied" properties—could never be used in valuing a fee simple property, but rather that Closser did not appropriately make adjustments for the differences between the sales of a leased fee interest, which was the interest sold in Closser's comparables, and a fee simple interest, which was the interest being valued in the present cases.

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[12] See The Appraisal of Real Estate (12th ed), p 431 ("By definition, a property that is subject to one or more leases is no longer a fee simple estate. Thus, if the sale of a leased property is to be used as a comparable sale in the valuation of the fee simple estate for another property, the sale can only be used if reasonable and supportable market adjustments for the difference in rights can be made.").

Finally, respondents argue that Allen's appraisal comparables essentially valued a forced sale, contrary to MCL 211.27(1), because Lowe's and Home Depot were not willing to sell their properties for secondary uses. However, again, whether the owner intends to sell is irrelevant when determining the TCV. *Safran Printing Co*, 88 Mich App at 382. Respondents fail to recognize that MCL 211.27(1) assumes a willing seller for purpose of determining TCV and does not require that the owner of the property actually intend to sell the property.

Therefore, we cannot conclude that, in relying on Allen's comparables, the tribunal misapplied the law or adopted a wrong principle because Allen's comparables properly valued the fee simple interest of the subject properties.

b. SPECIFIC CHALLENGES TO ALLEN'S COMPARABLES

Respondents make several arguments that specific comparables used by Allen were improper for various factual reasons. Allen's appraisals and testimony explained his sales-comparison approach and the appraisals he selected for this approach. In the Home Depot case, the tribunal concluded that "[p]etitioner has provided credible documentary evidence and testimony for the 2009, 2010, and 2011 tax years at issue" and found this evidence sufficient to reach its independent valuation, and by accepting Allen's valuations of the property, the tribunal in the Lowe's case also found Allen to be credible. Therefore, in both cases, the tribunal's determinations of TCV were based upon competent, material, and substantial evidence—Allen's appraisals.[13] Conversely, in both cases the tribunal gave no weight to Closser's appraisals and declined to give his appraisal and testimony any weight or credibility). These factual challenges are challenges to the tribunal's determination that Allen's appraisal was credible while Closser's was not, and its decision to weigh Allen's appraisal over Closser's. However, it is not the role of this Court to second guess the tribunal's weight and credibility determinations, and we must defer to the tribunal on these matters. *Detroit Lions, Inc*, 302 Mich App at 703; *President Inn Props, LLC*, 291 Mich App at 633.

4. ALLEN'S INCOME APPROACH

Respondents argue that Allen's income approach was not a sufficient basis for valuation, evidenced by the judge in the Home Depot case dismissing Allen's income approach. In both cases, Allen considered the income approach secondary to the sales-comparison approach.

a. HOME DEPOT

While the tribunal concluded that Home Depot "provided credible documentary evidence and testimony" and found that Home Depot's "data within the sales comparison approach is sufficient to arrive at an independent determination of value," the tribunal did not accept Allen's reconciled valuation of the Home Depot property, and instead increased Allen's reconciled valuation for 2008 by $150,000, for 2009 by $260,000, and for 2010 by $175,000. The tribunal

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[13] Respondents do not argue that the tribunal lacked record support for its determinations; instead, respondents take issue with the record support itself and challenge its credibility.

stated that it found Allen's "conclusions of market rents [in his income approach] slightly baffling[,]" but concluded that "the Tribunal is not compelled to place any weight on this approach to value. Petitioner's primary indication of value rests on the sales comparison approach." Thus, it is clear from the tribunal's opinion that the income approach was given no weight by the tribunal. Therefore, the arguments respondents make regarding Allen's income approach are irrelevant to the Home Depot appeal.

b. LOWE'S

The tribunal accepted Allen's reconciled valuation of the Lowe's property. The tribunal noted that in Allen's appraisal, "[t]he income approach was not given as much weight as this is not an income-producing property[,]" and that "Allen relied on the sales comparison approach." The tribunal was not troubled by Allen's income approach and concluded that "Allen had a plethora of sales and listings, as well as rents and asking rents, that indicated the difference between the fee simple ownership and the leased fee interest." Therefore, it is clear from the tribunal's opinion that while the tribunal did rely in part on Allen's income approach, this approach had little effect on the valuation of the property. Moreover, the arguments respondents raise are factual challenges to Allen's appraisal, and because the tribunal found Allen's appraisals and testimony credible, this Court will not second guess that weight and credibility determination. *Detroit Lions, Inc*, 302 Mich App at 703; *President Inn Props, LLC*, 291 Mich App at 633.

We have reviewed all remaining arguments appellants have raised, and we find them to be without merit.

Affirmed.

Having prevailed in full, petitioners may tax costs. MCR 7.219(A).

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan