STATE OF MICHIGAN
IN THE COURT OF APPEALS

AUTOZONE STORES, INC./ AUTO ZONE #2137,
Appellee/Petitioner,

v.

CITY OF WARREN,

Appellant/Respondent.

Court of Appeals Case No. 320213
MTT Docket No. 451812

NOA
Petitioner-Appellee
123 S. Front Street
Memphis, TN 38103

Caitlin Murphy (P75741)
Attorneys for Respondent-Appellant
City of Warren
One City Square, suite 400
Warren, MI 48093
586-574-4671

AMICI CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF APPELLANT CITY OF WARREN

Dated: March 10, 2015

Robert E. Thall (P46421)
BAUCKHAM, SPARKS, LOHRSTORFER, THALL & SEEBER, P.C.
Attorney for Amici Curiae, Michigan Municipal League and Michigan Townships Association
458 W. South Street
Kalamazoo, MI 49007-4621
269-382-4500
thall@michigantownshiplaw.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

CASES **PAGE**

MICHIGAN COMPILED LAWS

OTHER

STATEMENT OF APPELLATE JURISDICTION

Amici Curiae, Michigan Municipal League and Michigan Townships Association, concur with Appellant, City of Warren's Jurisdictional Statement contained in Appellant City of Warren's Brief on Appeal.

This case stems from appeal of the Michigan Tax Tribunal (MTT or Tax Tribunal) Small Claims Division Final Opinion and Judgment dated January 16, 2014 incorporating the Proposed Opinion and Judgment dated November 5, 2013 in Docket Number 451812 (MTT Opinion or Tax Tribunal Opinion).

STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW AND ADOPTED WRONG PRINCIPLES IN INTERPRETING TRUE CASH VALUE PURSUANT TO MCL 211.27(1) TO PRECLUDE VALUATION OF AN OCCUPIED SMALL BOX RETAIL STORE BASED UPON A CONTINUATION OF THE EXISTING USE ON TAX DAY AND INSTEAD ACCEPTED THE PETITIONER'S FLAWED APPRAISAL METHODOLOGY USING SALES OF VACANT BUILDINGS TO ESTABLISH TRUE CASH VALUE

The Tax Tribunal answered:	"No".
Appellee would answer:	"No".
City of Warren answered:	"Yes".
Amici Curiae answers:	"Yes".

2. WHETHER THE MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW AND ADOPTED WRONG PRINCIPLES IN PRECLUDING THE USE OF LEASED FEE TRANSACTIONS IN APPLYING THE SALES COMPARISON APPROACH TO ESTABLISH TRUE CASH VALUE PURSUANT TO MCL 211.27(1).

The Tax Tribunal answered:	"No".
Appellee would answer:	"No".
City of Warren answered:	"Yes".
Amici Curiae answers:	"Yes".

STATEMENT OF FACTS

Amici Curiae Michigan Municipal League and Michigan Townships Association concur with and hereby adopt Appellant City of Warren's Statement of Facts as contained in Appellant City of Warren's Brief on Appeal.

STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates its Legal Defense Fund through a board of directors. The purpose of this Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief amici curiae is authorized by the Legal Defense Fund's Board of Directors.[1]

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in a large number of state and federal cases presenting issues of statewide significance to Michigan townships.

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[1] The Board of Directors' membership includes: the President and Executive Director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys; Lori Grigg Bluhm, City Attorney, Troy; Clyde J. Robinson, City Attorney, Kalamazoo; Randall L. Brown, City Attorney, Portage; Catherine M. Mish, City Attorney, Grand Rapids; Eric D. Williams, City Attorney, Big Rapids; James O. Branson, III, City Attorney, Midland; James J. Murray, City Attorney, Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee; John C. Schrier, City Attorney, Muskegon; Thomas R. Schultz, City Attorney, Farmington and Novi; and William C. Mathewson, General Counsel, Michigan Municipal League.

Proper resolution of this case is of major importance to municipal property tax administration, property tax levying entities, and jurisprudence in this state. The General Property Tax Act (GPTA)[2] provides a comprehensive system for the assessment of real and personal property for ad valorem tax purposes, for the collection of such taxes, and for administration of such laws. Within this system, each municipal assessor is charged with establishing the assessment of all parcels of property in the municipality[3] and, in doing so, must establish the true cash value[4] of all real property.

This case principally involves the methodology for determining the true cash value of occupied small box retail stores (i.e., Auto Zone) for ad valorem real property tax purposes and the proper application of this methodology. This is an especially important case due to the vast number of small box retail stores throughout the state and the large amount of valuation at risk. Additionally, the valuation methodology issues presented in this case stand to have a much broader impact as affecting all real property, not just small box retail stores (i.e., industrial, commercial and residential property), as these issues involve broad valuation concepts regarding uniformity in taxation, existing use, highest and best use, present economic income, and comparable sales.

The Tax Tribunal Opinion is erroneous and misguided with regard to these considerations in that it precludes valuation of the occupied small box retail store based upon a continuation of the existing use on tax day, instead, requiring that the property be valued in comparison to vacant potentially obsolete buildings available for secondary uses. Significantly, this renders the existing use and present economic income components of value required by MCL 211.27(1)

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[2] MCL 211.1 et seq.
[3] MCL 211.10(1).
[4] Article IX Section 3 of the Michigan Constitution of 1963 indicates, in part, that the legislature shall provide for the determination of true cash value. MCL 211.27(1) sets forth the definition of "true cash value" upon which the assessment is based.

nugatory and will produce artificially low valuations that are not reflective of true cash value. It further creates a violation of the constitutional principle of uniformity in property taxation to require owner occupied buildings to be valued as vacant while allowing for investor owned buildings to be valued as occupied and income producing.[5] Uniformity prevents buildings from being assessed and taxed based upon differences in who owns the property (i.e., owner occupant and investor owner must be treated the same).

The flawed valuation method employed by the Petitioner and accepted by the MTT ignores the existing use of the property on tax day, being a fully operating non-obsolete small box retail store, and then erroneously derives the property value by comparison to sales of vacant, potentially obsolete commercial property. The Tax Tribunal failed to make the required findings regarding the highest and best use of the building, thereby failing to recognize that the highest and best use was the continuation of the existing use for which the building was designed.

Additionally, the Tax Tribunal Opinion erroneously precluded the City of Warren from using sales of leased properties (at least one tenant at the time of sale) as comparables to establish the true cash value of the occupied auto parts retail building. This preclusion is a complete misinterpretation of comparative analysis used in the sales approach to establish value. Property rights transferred at sale (i.e., sale of property with leases in place) are a value influencing factor to be analyzed, not precluded. For purposes of establishing true cash value, the leased fee transaction is analyzed and subject to adjustment to come up with a value based upon market rents.[6] By establishing a comparative value based upon market rent rather than the

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[5] MCL 211.27(5) addresses leased building valuation based upon market rent. Valuation based upon market rent can be applied to any building.
[6] See MCL 211.27(5).

actual rent, the leased fee sale comparative value will equate to fee simple value (i.e., the full bundle of ownership rights) for proper use to establish true cash value.

Proper valuation of property for ad valorem tax purposes is essential to maintain stability in the local tax base upon which tax levies are used to support such things as local public services, schools, and general municipal budgets. The Tax Tribunal Opinion stands to produce serious repercussions through numerous losses to local tax bases from use and abuse of the erroneous valuation methodology accepted therein. These losses will most certainly negatively impact the citizens of this state. It is important for this Honorable Court to weigh in on this issue and correct this misguided course of jurisprudence espoused by the Michigan Tax Tribunal. The MML and MTA are hopeful that when this Honorable Court reviews the relevant constitutional and statutory language, along with proper valuation concepts, it will reverse the MTT Opinion. The legal significance of this case will be further apparent from the argument herein.

ARGUMENT

1. THE MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW AND ADOPTED WRONG PRINCIPLES IN INTERPRETING TRUE CASH VALUE PURSUANT TO MCL 211.27(1) TO PRECLUDE VALUATION OF AN OCCUPIED SMALL BOX RETAIL STORE BASED UPON A CONTINUATION OF THE EXISTING USE ON TAX DAY AND INSTEAD ACCEPTED THE PETITIONER'S FLAWED APPRAISAL METHODOLOGY USING SALES OF VACANT BUILDINGS TO ESTABLISH TRUE CASH VALUE.

A. INTRODUCTION

This case involves the proper methodology for determining true cash value of an occupied small box retail store (i.e., Auto Zone) for ad valorem real property tax purposes. In this case, Auto Zone challenged the real property tax valuation. As of the relevant tax day (December 31, 2012), Auto Zone was making full use of the property as a retail auto parts store. There was no evidence that this use was obsolete or would not continue. Regardless of this fact, the Petitioner submitted a valuation intended to artificially manipulate reductions in the true cash value of the subject property by establishing the usual selling price at the time of the assessment based upon the building being vacant. The Tax Tribunal Opinion accepted the Petitioner's flawed appraisal methodology.[7] The MTT erroneously precluded any consideration of the occupied small box retail store valuation being based upon a continuation of the existing use on tax day. Rather than valuing the property based upon the "highest and best use" being the continued "existing use" as an occupied small box retail auto parts store on the relevant tax day, the value determinations were improperly based upon vacant potentially obsolete commercial

[7] "The subject was valued as vacant and available at the time of the sale. Petitioner's Comparables Nos. 1, 2, 4 and 6 were vacant at the time of sale". Tax Tribunal Opinion page 7 in Proposed Opinion and Judgment. The MTT used these vacant comparables to establish the valuation. In contrast, the City of Warren used sales with leases in place to establish value using the sales comparison approach. The MTT improperly determined as a conclusion of law that ". . . lease fee transactions are not true sales, but more of a financial tool, as such they are not a reliable indicator of value". Id, page 7.

buildings being purchased for unknown secondary, or noncomparable uses.[8] This spurious appraisal methodology diminished the correct valuation for the subject property. [9] By only allowing sales of unoccupied commercial property to be used as comparables, the MTT erred. Such sales are not indicative of the usual selling price since unoccupied commercial property is normally sold at a bargain price due to obsolescence in original design for secondary uses, holding periods causing necessary repairs and maintenance, other holding costs, void or increased property insurance costs, lack of income stream and vacancy risk.[10]

Additionally, the Tax Tribunal's misguided methodology creates a violation of the constitutional principle of uniformity in taxation. The uniformity principle requires that like buildings used for like purposes will be valued similarly regardless of who the owner is. Unfortunately in applying the Tax Tribunal's methodology, an owner occupied auto parts store would be valued as vacant while an investor owned auto parts store would be valued as occupied and income producing. This will improperly produce different valuations for the same building depending on who the owner is. Existing use matters but not existing user.

Specifically and significantly, the Tax Tribunal Opinion improperly renders language in the legislative definition of true cash value nugatory. MCL 211.27(1) requires that, among other things, "existing use" shall be considered as a determining factor in establishing true cash value. However, the Tax Tribunal Opinion adopts a valuation methodology requiring that the true cash

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[8] See *Detroit Lions, Inc. vs City of Dearborn*, 302 Mich App 676, 840 NW2d 168 (2013); appeal denied 495 Mich 948 (2014) where the property was properly valued based on the existing use as an integrated professional football team headquarters and practice field rather than vacant buildings available for some lesser secondary use such as an office complex or technology park. In the case at bar, the MTT incorrectly determined the usual selling price at the time of assessment means valuing in comparison to vacant buildings.

[9] "If the analysis of a comparable sale is flawed, the valuation for the subject property is also flawed." *Great Lake Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 391; 576 NW2d 667 (1998).

[10] The bargain to the purchaser is not the "usual selling price". See *22 Charlotte, Inc. v City of Detroit*, 294 Mich 275, 283; 293 NW2d 647 (1940).

value specifically not take into consideration the existing use, instead valuing the subject property as a vacant building available for any secondary use. This type of valuation would only be appropriate if it were determined that the current use would not be continued.[11] Common sense tells us that comparing sales of vacant commercial properties to establish value will produce a far lower valuation than comparing sales of ongoing facilities.

Further, the Tax Tribunal Opinion erroneously failed to engage in any required analysis of the highest and best use of the property. [12] Continuation of the existing use however can be the highest and best use that a prospective buyer would purchase the property for. Instead, the Tax Tribunal Opinion inappropriately allowed the flawed sales comparables of the Petitioner to be used without determination of the highest and best use for the property, thereby establishing an erroneous deep discount in the value of the subject property arbitrarily based upon the sale of vacant commercial property rather than the ongoing use as an occupied small box auto parts store on tax day.

In carrying forward this flawed methodology regarding consideration of only unoccupied property sales, the MTT Opinion also erroneously precluded consideration of the City of Warren's sales comparison approach which analyzed sales of properties that had at least one tenant at the time of sale.[13]

The Petitioner's flawed appraisal methodology which was accepted by the MTT pushes down valuations to artificially low levels and cannot stand. Unless corrected, the erroneous interpretations and valuation methodology violate uniformity in property taxation principles and will result in far-reaching consequences with the devaluation of small box retail stores

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[11] See *Safran Printing Co. v Detroit*, 88 Mich App 376, 382; 276 NW2d 602 (1979).
[12] Compare to *Detroit Lions, supra* where the Court of Appeals properly found the HBU to be the practice facility's existing use.
[13] See Argument 2.

throughout the State. Further, this erroneous disregard of the existing use will likely spill over into other types of tax appeals (i.e., golf courses, hotels, arenas, malls, industrial properties, etc) where unoccupied properties sold for lesser secondary uses will be used to improperly establish artificially low true cash values. This improper methodology will create substantial loss in tax revenue affecting municipal budgets and reducing services provided to the citizens of this state.

Amici Curiae concur with the arguments set forth by the City of Warren in their Brief. The within argument is intended to further enlighten this Honorable Court regarding proper valuation methodology and the erroneous nature of the Tax Tribunal Opinion.

B. STANDARD OF REVIEW

The Michigan Supreme Court in *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69; 780 NW2d 753 (2010) expressed the standard of review in Tax Tribunal cases as follows:

> "The standard of review of Tax Tribunal cases is multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal's factual findings conclusive if they are supported by 'competent, material, and substantial evidence on the whole record'. But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo." (Footnotes omitted).[14]
>
> Constitutional and statutory interpretation matters are reviewed de novo.[15]

The issues in this case involve constitutional and statutory interpretation regarding the proper methodology for determining true cash value pursuant to MCL 211.27(1) and are therefore reviewed de novo.

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[14] *Briggs, supra*, at 75.

[15] *Toll Northville Ltd v Township of Northville*, 480 Mich 6 at 10-11; 743 NW2d 902 (2008).

C. RULES OF INTERPRETATION

When reviewing a constitutional provision, the primary objective is to realize the intent of the people and in doing so, apply the plain meaning of the language used unless they are technical legal terms.[16]

The issue before this Honorable Court turns in part on statutory interpretation. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature."[17] "The first step in that determination is to review the language of the statute itself."[18] "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed and judicial construction is neither required nor permissible."[19] Courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."[20] Courts "interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole."[21] "[I]n seeking meaning, words and clauses will not be divorced from those which precede and those which follow."[22] "Statutory interpretation requires courts to consider the *placement* of the critical language in the statutory scheme."[23]

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired

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[16] *Toll Northville Ltd v Township of Northville, supra*, at 11.
[17] *In re: MCI Telecommunications*, 460 Mich 396, at 411; 596 NW2d 164 (1999).
[18] *In re: MCI Telecommunications, supra*, 411.
[19] *In re: MCI Telecommunications, supra*, 411.
[20] *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) citing *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich. 142, 146; 644 N.W.2d 715 (2002).
[21] *Johnson, supra*, 177 citing *People v. Peltola*, 489 Mich. 174, 181; 803 N.W.2d 140 (2011).
[22] *Sanchick v. State Bd. of Optometry*, 342 Mich. 555, 559; 70 N.W.2d 757 (1955).
[23] *Johnson, supra*, 177 citing *United States Fidelity & Guaranty Co. v. Mich. Catastrophic Claims Ass'n* (On Rehearing), 484 Mich. 1, 12; 795 N.W.2d 101 (2009).

a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning".[24]

This Honorable Court has articulated a contextual principle regarding ambiguity as follows:

> "A word is not rendered ambiguous, however, merely because a dictionary defines it in a variety of ways. (Citation omitted). Rather, the doctrine of *noscitur a sociis* requires that the term 'liquidation' be viewed in light of the words surrounding it. (Citation omitted). "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed.), p. 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting." *Brown v Genesee Co. Bd. of Comm'rs* (After Remand), 464 Mich 430, 437, 628 NW2d 471 (2001), quoting *Tyler v Livonia Schs*, 459 Mich 382, 390-391, 590 NW2d 560 (1999)[25].

In addressing the threshold question of ambiguity, this Honorable Court has held that:

"A term is ambiguous 'when it is *equally* susceptible to more than a single meaning,' *Lansing Mayor v Pub. Service Comm.,* 470 Mich 154, 166, 680 NW2d 840 (2004), not when reasonable minds can disagree regarding its meaning."[26] Further, "ambiguity is a finding of last resort".[27]

Armed with the above rules of interpretation, the following textual analysis of the relevant constitutional language and statutory language in the GPTA will show that the language is not ambiguous and, that it actually provides plain direction that existing uses and present economic income shall, among other factors, be considered in determining the assessment of true cash value. The Tax Tribunal ignores this plain direction and fails to value the property based

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[24] *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69, 77, 780 NW2d 753 (2010), citing MCL 8.3a.
[25] *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 317-318; 645 NW2d 34 (2002).
[26] *Toll Northville Ltd., v Township of Northville*, 480 Mich 6, 15 fn 2; 743 NW2d 902 (2008).
[27] *Lansing Mayor*, supra at 165, citing *Klapp v Limited Insurance*, 468 Mich 459, 474; 663 NW2d 447 (2003).

upon the continued existing use of the building as a small box retail store (the use not being obsolete) on tax day.

D. CONSTITUTIONAL AND STATUTORY APPLICATION

In order to properly understand the errors created by the Tax Tribunal Opinion it is of primary importance to review the property tax assessment process and the applicable constitutional and statutory provisions to be followed.

Article IX Section 3 of the Michigan Constitution of 1963 provides in relevant part that:

> "The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50%; and for a system of equalization of assessments . . . ." (Emphasis added)

When reviewing this constitutional provision as it relates to the case at bar, two requirements stand out. First, in carrying forward the constitutional standard of equal protection, this constitutional provision requires uniformity in taxation and assessment. The Michigan Supreme Court has previously addressed the issue of uniformity in taxation and assessment as highlighted by the following precepts:

> " 'What is meant by the words "taxing by uniform rule?" and to what is the rule applied by the constitution? No language in the constitution, perhaps, is more important that this; and to accomplish the beneficial purposes intended, it is essential that they should be truly interpreted, and correctly applied. "Taxing" is required to be "by a uniform rule;" that is, by one in the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation.' "[28]

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[28] *School District of East Grand Rapids v Kent Co. Tax Allocation Bd.*, 415 Mich 381, 395-396; 330 NW2d 7 (1982), reh. den. 417 Mich 1104 citing *Huron-Clinton Metropolitan Authority v Boards of Supervisors of Five Counties*, 304 Mich 328, 8 NW2d 84 (1943).

Equality in the property tax burden requires that the manner/mode of assessment must produce uniform results between like buildings with the same use.

The Michigan Supreme Court has further indicated that:

> "Similarly, under the Uniformity of Taxation Clause of the Michigan Constitution, the controlling principle is one of equal treatment of similarly situated taxpayers. (citations omitted). As a practical matter, in cases involving taxing statutes, there is no discernible difference between the equal protection and uniformity of taxation clauses."[29] (Citations Omitted)

The Tax Tribunal Opinion does not adhere to this constitutional precept. The Tax Tribunal Opinion improperly treats assessments differently depending upon who the owner is. The Tax Tribunal Opinion has the effect of allowing valuation consideration for existing use if investor owned, but preclude the same if owner occupied.[30] The assessment cannot depend on who the owner is, an investor (i.e., real estate investment trust) versus an owner who is also occupant. The proper uniform consideration is an assessment based on the building and its use, not who owns the building or who uses it. This precept regarding uniformity is carried forward in the manner of assessment by prohibiting consideration of who owns the property or uses it.[31] Uniformity in assessment would require that two auto part stores built right next door to each other, built exactly the same, at the same time, and both presently occupied for their intended use should have the same assessment regardless if it is owner occupied or investor owned.[32] In this

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[29] *Armco Steel Corp v Dept. of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984).

[30] The Tax Tribunal Opinion separates owner occupied buildings from those that are subject to lease by finding that they are not comparable as a matter of law. The Opinion requires an analysis of the owner occupied building as vacant and available but yet sales by investors of leased buildings are somehow valued differently. This violates the uniformity requirement.

[31] *Edward Rose Bldg. Co.*, 436 Mich 620; 640-642; 462 NW2d 325 (1990).

[32] The valuation will be based upon the highest and best use as we will see later in this brief and this valuation may be achieved by analyzing the sale to an investor of the occupied building for its existing use. In all cases the valuation achieved must be uniform. Each taxpayer has an occupied building. It is a red herring to get caught up in making a distinction between leased fee sales and fee simple sales as the MTT does in this case, because in each case valuation must

scenario, if this investor owned building is sold, it is most certainly indicative of the value of the owner occupied building. The value, in part, is based upon the same existing use of the buildings not based upon ownership. As a constitutional issue, this concept crosses all spectrums of properties as whatever valuation technique is used, it must create a uniform assessment.[33]

The second important requirement from Article IX, Section 3 of the Michigan Constitution of 1963 is that it allows the legislature to provide for the determination of true cash value of property for assessment purposes. This requires a review of the language used by the legislature in its definition of true cash value.

In carrying forward this constitutional provision, the GPTA provides a comprehensive system for the assessment of real and personal property for ad valorem tax purposes, for the collection of such taxes and for the administration of such laws.

MCL 211.2(2) provides in relevant part that:

> "The taxable status of persons and real and personal property for a tax year shall be determined as of each December 31 of the immediately preceding year, which is considered the tax day, ..."

For example, the 2013 tax year valuations are based upon the property's status on tax day being December 31, 2012. As of tax day, the subject property's status was that of an occupied small box retail auto parts store. The subject property status on tax day was not a vacant, potentially obsolete, building available for a discounted value.

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achieve the true cash value under MCL 211.27 (discussed further herein), which makes no such distinction.

[33] The same residential house next door to one another, one owner occupied and one investor-owned, should have equal assessment. It would be unconstitutional to treat the sale of the investor owned rental home as having a different true cash value. The Dollar General and Family Dollar buildings being exactly equal next door to one another should have the same assessment regardless of owner-occupied or investor-owned.

Each tax year is assessed anew and the present existing use is reviewed at such time. The existing use of the subject property may change annually on tax day with the new assessment. The subject property assessment must not exceed 50% of true cash value.

MCL 211.10(1) provides that:

> "An assessment of all property in the state liable to taxation shall be made annually in all townships, villages and cities by the applicable assessing officer as provided in Section 3 of Article IX of the State Constitution of 1963 and Section 27a." (Emphasis added)

As referenced, MCL 211.27a provides in relevant part that:

> "(1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under Section 3 of Article IX of the State Constitution of 1963.
>
> * * *" (Emphasis added)

This leads us to the legislative definition of "true cash value" in MCL 211.27(1), which provides in relevant part:

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

quarries, or other valuable deposits known to be available in the land and their value".[34] (Emphasis added)

This emphasized legislative procedure for determining true cash value is unambiguous and clear and must be enforced as written. True cash value is essentially the usual selling price at the location and time of assessment. MCL 211.27(1) requires that in determining the true cash value, the assessor "shall" consider a number of items specific to the property including its existing use and present economic income of the structures.[35] The word "shall" is not discretionary. Shall commands public officials to act and excludes their discretion.[36] The Court of Appeals in considering the required assessment considerations in MCL 211.27(1) has previously indicated that "[t]he inclusion of these factors indicates that the Legislature recognized that use may influence value."[37] (Emphasis added) The Court of Appeals stated in *Palace Sports and Entertainment v City of Auburn Hills* that:

> "In conformity with the plain language compromising the penultimate sentence of MCL 211.27(1), the city's assessor had to 'consider the . . . existing use' of the Palace property when 'determining the true cash value'."[38]

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[34] MCL 211.27(1).

[35] Present economic income of structures is further defined for leased or rented properties under MCL 211.27(5). Essentially allowing for the use of market rents to establish true case value as opposed to actual rents from the property. This language works to assure that the constitutional requirement of uniformity, as previously discussed, is satisfied. By using market rents as opposed to actual rents similar owner occupied buildings would have the same true cash value as investor owned buildings. MCL 211.27(5) provides in relevant part that "As 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. The actual income generated by the lease or rental of property is not the controlling indicator of its true cash value in all cases."

[36] *Ladies of the Maccabbees v Commissioner of Insurance*, 235 Mich 459, 465, 209 NW 581 (1926).

[37] *Fairplains Township v Montcalm Co. Bd. Of Comm'rs*, 214 Mich App 365, 379, 542 NW2d 897 (1995).

[38] *Palace Sports and Entertainment v City of Auburn Hills*, unpublished Opinion per curiam of the Court of Appeals, issued June 21, 2012; page 8, 9 (Docket Nos. 294051 and 294185). Attachment A.

In consideration of the meaning of "existing use", the doctrine of "noscitur sociis" helps provide a contextual understanding. Similar to the location, zoning, and present income of structures, the "existing use" of the structure must always be considered in establishing true cash value. Just as a determination of true cash value would never abandon the concept of location as impacting value, existing use has equal value influencing importance. The Tax Tribunal Opinion, however, does not factor in any value consideration for "existing use" as it requires use of vacant comparables as opposed to the City of Warren's sales of occupied buildings. Existing use language is improperly rendered nugatory when the Tax Tribunal requires that the occupied small box retail store must be valued in comparison to only vacant and available buildings. If only sales of vacant buildings can be used as comparables, existing use could never have an influence on value. This would erroneously preclude continuation of the existing use as an influence on value. Obviously, a vacant building obsolete for its original purpose will always have less value than an occupied building being used to its fully designed capability. No matter what valuation approach is used, cost less depreciation, sales comparison approach, or income approach, or some other approach[39] existing use must be an influencing factor in the establishment of true cash value. This is required by statute.

Discarding consideration of the "existing use" in favor of using comparables of vacant and available for sale properties has previously been rejected by the Court of Appeals. The Court of Appeals has previously indicated that:

> "The true cash value of land testified by Mr. Neideau, the Petitioner's expert, must also be rejected. Mr. Neideau admitted that his comparable sales were for vacant properties, not ongoing industrial facilities. Thus the figures offered by Mr.

[39] *President Inn Properties LLC v City of Grand Rapids*, 291 Mich App 625, 639; 806 NW2d 342 (2011).

> Neideau as to the value of the land may have understated its value." [40] (Emphasis added)

Additionally, "although a property may be appraised as 'vacant and available for sale', this valuation is appropriate only when it is determined that the current use of the property would not be continued."[41]

In the case at bar there is no evidence that the use is obsolete and that the subject property would not be continued for its existing use.[42]

On tax day, the existing use was not a vacant or potentially obsolete building available for some secondary less valuable use. Using such comparables does not create an apples to apples comparison to determine true cash value. "If the analysis of a comparable sale is flawed, the valuation for the subject property is also flawed." [43] In this case, the Petitioner's flawed comparables resulted in an unsupportable reduction in value that should have been rejected by the Tax Tribunal. This failure to follow the plain language in MCL 211.27(1) resulting in a methodology that ignores an existing use's influences on value is clearly a misapplication of the law. Such misapplication amounts to a valuation inconsistent with the highest and best use of the property and therefore adoption of a wrong principle.[44]

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[40] *Teledyne Continental Motors v Muskegon Township*, 145 Mich App 749, 758 n2; 378 NW2d 590 (1985). See also *Lionel Trains, Inc. v Chesterfield Township*, 224 Mich App 350, 352; 568 NW2d 685 (1997) where the court rejected a claim that "use of property may not be considered when determining true cash value".

[41] *Freedom Village of Holland v Holland*, Michigan Court of Appeals unpublished Opinion issued April 24, 1998, at *3 (No. 192090, 1998 WL 1991644) , also using *Safran Printing, supra*, 382 – 383 for an example. Attachment B

[42] Contrast the Court of Appeals decision in *Safran*, *supra,* where the court determined that the existing use was obsolete and therefore not relevant to the usual selling price. This finding is inapplicable to the subject property.

[43] *Great Lakes Div of Nat'l Steel Corp, supra*, at 391.

[44] *Edward Rose, supra*,639.

"To determine true cash value, the property must be assessed at its highest and best use."[45] In this case, the Tax Tribunal Opinion erroneously failed to determine the highest and best use of the property. The recent Court of Appeals published case of *Detroit Lions, supra*, is extremely instructive with regard to consideration of the highest and best use with respect to the subject property and demonstrates the error in the valuation methodology accepted by the Tax Tribunal. In *Detroit Lions,* the Court of Appeals succinctly addressed the concept of highest and best use in light of similar arguments that continued existing use should not be used to establish value.

> "Petitioners assert that the tribunal committed legal err by concluding that the highest and best use of the property as improved was its existing use as a practice facility. Petitioners also contend that the tribunal improperly rejected their proposed alternative highest and best uses for the property as improved. We disagree. The concept of 'highest and best use' is fundamental to the determination of true cash value. See *Detroit/Wayne Co. Stadium Auth. v Drinkwater, Taylor & Merrill, Inc.*, 267 Mich App 625, 633, 705 NW2d 549 (2005). '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.' " *Id.* at 633, 705 NW2d 549 (Citation Omitted). A highest and best use determination 'requires simply that the use be legally permissible, financially feasible, maximally productive, and physically possible.' *Detroit v Detroit Plaza, Ltd. Partnership*, 273 Mich App 260, 285, 750 NW2d 523, 2006. "[I]t is the duty of the tribunal to hypothesize the highest probable price at which a sale would take place". *Safran Printing Co v Detroit*, 88 Mich App 376, 382, 276 NW2d 602 (1979). "[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". *Id.*[46] (Emphasis added).

From the *Detroit Lions* case, it is clear that determining highest and best use is fundamental to a true cash value determination. In determining highest and best use the court must consider the most profitable and advantageous use of the property by an owner. In the case at bar, the subject property is maximally productive in its existing use and must be valued in such

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[45] *Huron Ridge, LP v Ypsilanti Township*, 275 Mich App 23, 33; 737 NW2d 187 (2007). See also *Detroit Lions, supra*, 697.

[46] *Detroit Lions, supra*, 697.

capacity. To instead value the subject property in a way that is not maximally productive based upon secondary sales of unoccupied and potentially obsolete buildings is a charade intended to artificially achieve a substantial decrease in the subject property value.

The Court of Appeals in the *Detroit Lions* case, when faced with similar argument of hypothetical secondary uses, found that:

> "The tribunal further determined that using the property as an office complex or technology park would substantially decrease the property's value, and that such alternative uses therefore 'violate[d] the princip[les] of highest and best use.' "[47]

It is obvious, then, that the Tax Tribunal Opinion erred by allowing for flawed sales comparables to be accepted that substantially decrease the property value. If the same logic from the case at bar were applied in the *Detroit Lions* case, then the value of the property would have been based on a large vacant building's value regardless of existing use and the court would have erroneously accepted the hypothetical secondary valuation as an office complex or technology park. It would be absurd to compare the value of the *Detroit Lions* practice facility to that of an unoccupied building to be used for secondary uses such as a golf driving range, flea market, church, indoor go-cart track, etc. The maximally productive use for the subject property herein would be its ongoing use as a small box retail auto parts store being used for its designed purpose. As indicated, the Tax Tribunal Opinion erroneously fails to make a finding regarding the highest and best use and instead, precludes from consideration that the highest and best use can be continuation of the existing use. This preclusion flies in the face of the *Detroit Lions* case where the court went on to indicate that:

> "The evidence established that Petitioners' use of the property as an integrated professional football team headquarters and practice facility was the most profitable use to which the property could feasibly be put. See *Stadium Auth.*, 267 Mich App at 633, 705 NW2d 549. "[48]

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[47] *Detroit Lions, supra*, 697.
[48] *Detroit Lions, supra*, 698.

This misapplication of law in the Tax Tribunal Opinion at bar prevented proper valuation analysis considering the improved highest and best use for the subject property, as maximally productive, based upon the Petitioner's existing use of the property on tax day.

Unfortunately, however, the Tax Tribunal Opinion relied on the Petitioner's flawed sales comparison approach using vacant comparables. Using vacant property to value maximally productive occupied property fails in comparison. Recognizing some of the negative factors associated with using vacant buildings to establish value, the Michigan Supreme Court has explained that the sale of unoccupied commercial property was not indicative of the "usual selling price" during the Great Depression.[49] The Court in *22 Charlotte, supra,* recognized that distressed property lacked a ready market that would provide a meaningful guide to determine the typically obtained price.[50] The Court in *22 Charlotte,* further explained that the property would likely require substantial repair and maintenance to put the property to its former use due to extended holding periods.[51] The Supreme Court reasoned that "the bargain" to the purchaser should not be evidence of the "usual selling price".[52] This reasoning is applicable to the case at bar. The unoccupied commercial property owner would be understood to be willing to sell the property for a bargain below the usual selling price due to many increased holding costs including repair and maintenance expenses, obsolescence in original design and costs to remodel for a new secondary user, void or increased property insurance costs (i.e., commercial building being uninsurable due to its vacancy), and vacancy risk with no income stream. Obviously, the usual selling price for such a vacant commercial building will not be indicative of the usual

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[49] *22 Charlotte, Inc., supra* at 283. It is important to note regarding this case that the definition of true cash value used at that time (*22Charlotte, Inc., supra* at 281), did not include language requiring that existing use or present economic income be considerations. Even without this language, the court knew to be careful in using vacant comparables to establish value.

[50] *22 Charlotte, Inc., supra* at 284 – 285.

[51] *22 Charlotte, Inc., supra* at 284-285.

[52] *22 Charlotte, Inc., supra* at 283.

selling price of a commercial building, either presently occupied by its owner or with at least one tenant. Ongoing existing use cannot be ignored as a value influencing factor. This flawed methodology used in the Tax Tribunal Opinion brings us to the analysis of the next major error in this case whereby the Tax Tribunal erroneously precluded the analysis of leased fee sales as comparables when using the sales approach to establish the value of the subject occupied small box retail store.

2. THE MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW AND ADOPTED WRONG PRINCIPLES IN PRECLUDING THE USE OF LEASED FEE TRANSACTIONS IN APPLYING THE SALES COMPARISON APPROACH TO ESTABLISH TRUE CASH VALUE PURSUANT TO MCL 211.27(1).

Amici Curiae incorporates Argument 1 herein. In carrying forward the methodology to determine true cash value using the sales comparison approach the Tax Tribunal Opinion erroneously precluded the City of Warren's leased fee comparable properties. The Tax Tribunal indicated that:

> "The tribunal accepts petitioner's testimony that leased fee transactions are not predicated on market rent, but rather upon the amount the business can afford to pay on its operations. In that regard, lease fee transactions are not true sales, but more of a financial tool, as such they are not a reliable indicator of value."[53]

This statement of law by the Tax Tribunal is patently incorrect and precludes proper consideration of the leased fee transactions as comparable indications of the true market value of the subject property. Property rights conveyed subject to leased fee transactions are most certainly an appropriate comparative analysis using the sales approach. As indicated in *The Appraisal of Real Estate*:

> "In the sales comparison approach, an opinion of market value is developed by comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract (i.e., for which purchase offers and a deposit

[53] Tax Tribunal Opinion at 6 of 9 in Proposed Opinion and Judgment.

have been recently submitted). A major premise of the sales comparison approach is that an opinion of the market value of a property can be supported by studying the market's reaction to comparable and competitive properties.

Comparative analysis of properties and transactions focuses on similarities and differences that affect value, which may include variations in property rights, financing terms, market conditions, and physical characteristics, among others. Elements of comparison are tested against market evidence using pared sales, trend analysis, statistics, and other techniques to identify which elements of comparison within the data set of comparable sales are responsible for value differences."[54] (Emphasis added)

The Tax Tribunal's ruling at law precluding leased fee transactions from consideration in the sales approach is clearly in error. In further addressing comparative analysis using the sales approach, *The Appraisal of Real Estate* provides that:

"The appraiser must also consider any differences in the property rights appraised between the comparable properties and the subject property because the comparable sales may include the transfer of a leased fee interest. If the data is not properly analyzed in the sales comparison approach, the value indication concluded for the leased fee interest in the subject property upon the achievement of stabilized occupancy might be lower or higher than the value for the fee simple interest."[55] (Emphasis added)

Clearly property rights are part of the comparative analysis in the sales approach and leased fee transactions would be analyzed to determine the influence on value. *The Student Handbook to The Appraisal of Real Estate* (Appraisal Institute, by Mark R. Rattermann, MAI, SRA; 2004) defines a leased fee estate as:

"The ownership interest in real estate in which the right to occupy the real estate has been transferred to another. The leased fee interest is worth less than the fee simple interest if the lease rate is below the market rate for the property; it could be higher if the lease is above market rates and is likely to be paid."

The comparative analysis of a building sale subject to a lease, therefore, would involve in part adjustment on the basis of whether the lease is at a market rate. The use of these sales are not precluded but rather may need to be adjusted higher or lower depending on the lease. This is far

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[54] *The Appraisal of Real Estate* (Appraisal Institute, 13th Edition 2008) at 298.
[55] *The Appraisal of Real Estate*, *supra*, at 314.

different, however, than the Tax Tribunal Opinion's blanket preclusion of leased fee transactions.

The above legal conclusion of the MTT that leased fee transactions are more of a financial tool and not true sales makes absolutely no sense in relationship to the sales used by the City of Warren. The City of Warren's comparable sales of leased properties are, in fact, predicated on the market value of the properties. The MTT is confusing comparable sales presented by the City of Warren (i.e., properties with at least one commercial tenant) with what some call a sale-lease back arrangement.[56] For example, a sale-lease back arrangement occurs where an owner occupant such as Home Depot determines for business purposes to sever its ownership from its occupancy and to sell the building to a real estate investment trust subject to Home Depot's long term lease and potential option to purchase at the end of the lease. This type of transaction is often viewed as a financial tool to raise money by the owner occupant (i.e., much like a mortgage) and to pay the investor a rate of return based upon what the occupant's business operations can afford. The sale-lease back arrangement may lead to a sale price that is not indicative of the usual selling price for the structure. However, even a sale-lease back arrangement, with proper adjustment to ensure that market terms are used, still may be used to achieve a comparable value to establish the usual selling price of a property. If a property is more valuable for an owner occupant to sever its ownership from its occupancy and sell the building for the existing use, then highest and best use determination may dictate an assessment based upon the comparable sales of such an arrangement.

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[56] A sale-lease back is defined as: a financing arrangement in which the real property is sold by its owner-user, who simultaneously leases the property from the buyer for continued use. Under this arrangement, the seller receives cash from the transaction and the buyer is assured a tenant. *The Dictionary of Real Estate*, (Chicago: 5th Edition, 2010), at 175.

Just because a property is leased does not mean that true cash value or the fee simple interest cannot be determined for comparison purposes. The MTT recently and correctly used the sales comparison approach to value an occupied commercial building by comparison to the sale of other occupied similar buildings which were sold subject to leases.[57]

In *LA Fitness,* the Michigan Tax Tribunal indicated that:

"Fee simple estate is:

> The sticks in the bundle of rights each have some type of value. For example, the owner of the fee simple estate (i.e., the holder of the complete of sticks in the bundle) can trade the rights to occupancy a certain amount of space within an existing building on the land in exchange for rent. In this way, the familiar relationship of landlord to tenant can be thought of as an exchange of property rights, and the appraiser can develop and opinion of the market value of the right to use and occupy the leased premises. The right does not cease to exist when the owner of the fee simple estate separates it from the complete bundle of rights. Rather, it is held by someone else, in this instance the tenant. *Appraisal Institute, The Appraisal of Real Estate*, (Chicago: 14 Ed, 2013), p 69."[58]

What comes next in the *LA Fitness* case is key to understanding the relationship between valuing a fee simple estate and using leased fee transaction comparables. In *LA Fitness* the Tribunal indicated that:

> "The fact that a property is leased does not mean the appraiser must value a leased fee or leasehold estate." *Appraisal Institute, The Appraisal of Real Estate*, (Chicago: 14 Ed, 2013), p 70.[59]

This is precisely the issue misunderstood by the MTT Opinion in erroneously precluding the use of leased fee comparables. We are not valuing a leased fee transaction but rather analyzing and comparing such transaction to determine its relationship to true cash value and the entire bundle of rights associated with a fee simple estate. For comparative analytical purposes, analysis of

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[57] *LA Fitness 476 v Township of Bloomfield*, (MTT Docket No. 417658, Nov. 8, 2013, 2013 WL 7710412). Attachment C.
[58] *LA Fitness, supra*, at *10, 11.
[59] *LA Fitness, supra,* at *11.

leased fee transactions will come up with a valuation that is the same as the fee simple bundle of all rights used to determine the true cash value.[60]

"The fact that a property was leased at the time of sale does not invalidate a sale price. As with all sales, the data has to be analyzed."[61] In *LA Fitness*, the Tax Tribunal used leased fee sales to establish the usual selling price of a property pursuant to the sales approach to valuation.

Further in *LA Fitness,* the MTT recognized the fitness center's highest and best use was to continue its "existing use" and used comparison sales of similar occupied properties rather than vacant properties. In *LA Fitness* the tribunal found:

> ". . . that Respondents' sales comparison are a better reflection of the value range for the subject property based on its location, age, amenities and income stream. An appraiser is compelled to research and consider all relevant data in a comparative analysis.
>
> > After excluding non-arms length sales, the remaining sales that cannot be effectively used for direct comparison are still part of the market at large and can be used for bracketing, understanding general market activity, and other analytical purposes. Thus, market data is classified and weighted for its importance, relevance, and reliability. *Appraisal Institute, the Appraisal of Real Estate* (Chicago: 14th Edition, 2013), p, 382."[62]

These concepts addressed in *LA Fitness* support the comparables offered by the City of Warren and, at a minimum, prevent preclusion as determined by the MTT. Analysis of a number of sales of small box commercial buildings with at least one tenant as presented by the City of Warren provided a comparative analysis of sales indicative of the usual selling price for the subject property in a much more credible manner than comparison to vacant building sales. Amici Curiae are extremely concerned that the errors in the Tax Tribunal Opinion will be

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[60] Remember that MCL 211.27(5) removes the issue of valuation based upon the specific rent received on a leased property and replaces it with consideration of market rent. By doing this, the valuation of a leased property will equate to the same as the valuation of a fee simple interest for purposes of determining true cash value.

[61] *LA Fitness, supra*, at *11 citing the Appraisal Foundation, Uniform Standards of Professional Appraisal Practice (Chicago, 2012-2013 ed), pp 11 – 20 in footnote 2.

[62] *LA Fitness, supra* at *12.

perpetuated unless this Honorable Court takes action to reverse the determination that the sale of properties subject to leases are not true sales, but more of a financial tool that should be precluded from use.

CONCLUSION

For the reasons stated herein, the MTT misapplied the law and adopted wrong principles in interpreting true cash value pursuant to MCL 211.27(1) to preclude valuation of occupied small box retail stores based upon a continuation of the existing use on tax day and instead accepted the Petitioner's flawed appraisal methodology requiring sales of vacant potentially obsolete buildings to establish true cash value. In carrying forward this methodology, the MTT further erred by precluding analysis of the City of Warren's sales comparables consisting of sales of properties with at least one tenant. These sales of leased properties are, in fact, the most comparable to the value of the currently occupied subject property.

Wherefore, Amici Curiae respectfully requests that this Honorable Court reverse the Tax Tribunal Opinion in this matter and/or remand this matter for further consideration using proper methodology.

Dated: March 10, 2015

BAUCKHAM, SPARKS, LOHRSTORFER, THALL & SEEBER, P.C.

By: _____
Robert E. Thall (P46421)
Attorney for Amici Curiae, Michigan Municipal League and Michigan Townships Association

458 W. South Street
Kalamazoo, MI 49007-4621