STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN TAX TRIBUNAL

MENARD, INC.,

Petitioner/Appellee,

v.

CITY OF ESCANABA,

Respondent/Appellant.

Supreme Court No. 154062

Court of Appeals No. 325718
MTT Docket No. 316763 &
14-001918 (Consolidated)

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AMICUS CURIAE **BRIEF ON APPEAL ON BEHALF OF THE**

MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, PUBLIC CORPORATION LAW SECTION, AND MICHIGAN ASSOCIATION OF COUNTIES

Dated: September 8, 2016

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and

COUNTER-STATEMENT AND DISAGREEMENT WITH

BASIS FOR APPEAL AND RELIEF SOUGHT

The *Amici* agree that the Appellant is appealing the May 26, 2016 Opinion of the Court of Appeals in Docket no. 325718, which is attached to its brief as Exhibit A.

The *Amici* disagree that the grounds for the Application relied upon are appropriate. In that regard, and contrary to that as stated by Appellant, the published decision of the Court of Appeals which orders a remand to correct substantial deficiencies in a non-precedential opinion rendered by a non-attorney administrative law judge in a quasi—judicial tax proceeding does not involve legal principles of major significance to the State's jurisprudence as required by MCR 7.302(B)(3). Further, the Court of Appeals Opinion is not clearly erroneous, cannot be said that it causes material injustice where it orders a remand to more fully develop the record, and does not conflict with other opinions of the appellate courts of this State as required by MCR 7.302(B)(5).

The apparent purpose of the Court of Appeals' published Opinion is to send a clear message and guidance to the Michigan Tax Tribunal as to what evidence should be considered, and to what extent, on remand in order to develop a record which is in compliance with the State of Michigan Constitution, applicable statutes, and case law, and which also supports the Michigan Tax Tribunal's decision. The application for leave should not be granted, where the Appellant has not raised as an error the order of remand to more fully develop the record itself, and Appellant is merely complaining about perceived misconceptions as to the clear directives of the Court of Appeals.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The *Amici* provide this counter-statement of the questions presented by Appellant and raise no new issues:

I. Should the Court deny Appellant's Application for Leave to Appeal, and/or affirm the decision of the Court of Appeals decision requiring a remand to the Michigan Tax Tribunal to more fully develop the record, where:

a. the Appellant has not raised an issue involving legal principles of major legal significance to the state's jurisprudence where the issues are premised on a fiction, and which, therefore, are also technically not an appeal of the decision of the Court of Appeals where the Appellant wrongfully claims the Court of Appeals has required a value-in-use valuation by the tribunal and mandated a cost-less-depreciation valuation where the language of the Opinion states otherwise, and where the case law relied upon by the Court of Appeals, contrary to the averments of Appellant, is valid and should be followed; and,

b. the decision of the Court of Appeals does not cause material injustice and is in concert with prior decisions of the Courts, where the Court of Appeals ordered a remand of the case to the tribunal so that the tribunal, and not the Court of Appeals, can take sufficient evidence under the law to support its decision, which allows all parties to make additional arguments, and where the weighing of that evidence is still left to the tribunal?

Appellant answers "no."
Appellee and *Amici* answer "yes."
The Tax Tribunal's answer is unknown because these issues were not raised before it.
The Court of Appeals would answer "yes".
This Court should answer "yes".

INTRODUCTION

The Court of Appeals correctly determined that the tribunal's decision contradicts the competent, material and substantial evidence on the whole record and is based on wrong principles, and therefore constituted an error of law requiring reversal. The decision of the tribunal is precedential to itself per MCL 205.751(1)[1], and if it had been allowed to stand would impact subsequent decisions of the tribunal and communities across the State. By extrapolation, leaving the decision intact would increase the number of appeals to the Court of Appeals, and potentially this Court. The Court of Appeals properly made clear to the tribunal that in performing its duties it may not ignore the evidence, fail to acknowledge contradictory evidence, and value property that is not deed restricted as if it were restricted, and as if it were being used for a purpose other than the property's maximally productive legal use without properly accounting for the cost of alterations.

The tribunal's acceptance of the application of artificial and non-existent deed restrictions to the valuation of the property that is the subject of this case resulted in a substantially low value that did not represent what the property would have sold for on tax day. Does it make sense that a potential reasonable purchaser will ignore all of the potential uses to which the property could be put, and assume the use of the property will be restricted even though there are no deed restrictions of record, when determining how much to pay? When looking at a comparable property that had to be altered, would it make sense to ignore the extra costs that would be incurred subsequent to purchase? Would a reasonable mind in trying to determine how much to pay for the property not determine after purchase costs of the subject based on the cost approach and the particular attributes of the subject? A typical

[1] See *Thrifty Royal Oak, Inc v City of Royal Oak*, 208 Mich App 707, 712 (1995), where the Court took issue with a decision of the Tax Tribunal that deviated from established Michigan Tax Tribunal precedent.

reasonable purchaser would answer "no" to all. The tribunal violated the constitutional requirement that all property in the State of Michigan be uniformly assessed, and assessed at 50% of true cash value and was therefore, based on a wrong principle. The Court of Appeals properly reversed and remanded for findings consistent with law. The Appellant's Application for Leave to Appeal should be denied, and the decision of the Court of Appeals should be upheld.

COUNTER-STATEMENT OF FACTS

The *Amici* agree with and adopt by reference, and incorporate herein, the "Statement of Facts" set forth by the Appellee City of Escanaba in its Answer to the Application for Leave to Appeal. However, it is also important to discuss particular allegations of fact which were not properly brought forth by Appellant in its Statement of Facts with citation to the record or authority, but instead were introduced without authority and/or for the first time within the Argument section of the Application and/or which are inaccurate. In order to clarify what is, and what is not, part of the record, and what is correct and what is incorrect, *Amici* provide the following:

A. The result of the Court of Appeals decision is not a mandated use of the cost approach, and more importantly the decision does not require the "value in use" methodology which is relied upon by Appellant to create an issue which does not exist and which issue is further complicated by the lack of a supportive record.

The Appellant incorrectly claims on page 10 of the Application, that the Court of Appeals Opinion, "essentially mandates the cost approach (without appropriate deductions for obsolescence amounting to a value in use standard) for "big-box stores."" Appellant cites to page 9 of the Opinion. Page 9 of the Opinion does state, "the cost-less-depreciation approach is appropriate to value the [true cash value] of the property." However, it is completely devoid of the requirement that the cost-less-depreciation approach should be applied "without appropriate deductions for obsolescence" (a.k.a. depreciation). While the Court did determine that a cost-less-depreciation approach is suitable for this property for which there is a limited market (Op. 9-10), the conclusion of the Court presented on page 12 of the Opinion requires the tribunal to take additional evidence as to both the sales comparison approach and the cost-less-depreciation approach, and then, ""apply its expertise to the facts of the case in order to

determine the appropriate method . . . " [Citation omitted].". By misstating the holding of the Court of Appeals, Appellant has created a false premise upon which to base its arguments.

Further, Appellant (also on page 10 of the application) inappropriately and without citation to authority for a definition (and the record itself is devoid of a discussion on this), posits the fiction that the Opinion mandates the use of the cost-less-depreciation approach without appropriate deductions and that this amounts "to a value in use standard". While the cases utilized and relied upon by the Court of Appeals do state that a property's existing use may be its highest and best use, there is nothing in the Court of Appeals Opinion and direction on remand which requires, as claimed within the Application, utilization of a cost-less-depreciation approach "without appropriate deductions for obsolescence", or which calls for a "value-in-use" methodology. *See* Application, p. 10. References to "value-in-use" are then peppered throughout Appellant's Application and appear to be the methodology about which Appellant is complaining, although this methodology was neither required nor directed to be used by the Court of Appeals.

Amici assert that the use of terms of art, that are similar, yet which carry different meanings, and which have not been adequately explained in the Application's Statement of Facts or in the Brief itself, should be viewed with extreme caution. As an example, the phrases "highest and best use", "value-in-use" or "use value", "market value", "market analysis" or "sales comparison approach" while using the same or similar terms can have very different meanings. Copies of pages from the treatise, *The Dictionary of Real Estate Appraisal*, Appraisal Institute, 6th Ed. (2015), defining these terms are attached hereto as Exhibit A. Appellant further compounds the terminology confusion by making the unsupported methodology claim on page 13 of the Application that, "functional obsolescence is inherently built into each business's building to fit its respective image and operating needs". At this point, this is a

fictional premise not supported by the record in this case. In fact, the Court of Appeals noted on page 4 of its Opinion that Appellant's own expert appraiser, "did not, however, identify any specific features of the building that created functional obsolescence, nor did he identify any economic factors in the subject market that would account for external obsolescence." On remand, it would be expected that Appellant would be provided an opportunity to revisit this issue.

Appellant earlier in the same paragraph on page 13 of Application refers to an article, not attached to its brief, by David Charles Lennhoff for other definitions, which definitions while similar to those found in *Dictionary of Real Estate Appraisal,* they are not quite the same. *See* the definitions as contained within footnote 9, on page 13 of the Application. Caution is advised against relying on an opinion article which puts forth definitions contrary to *The Dictionary of Real Estate Appraisal*. As can be seen from the definitions contained with *The Dictionary of Real Estate Appraisal* for "functional obsolescence" and "external obsolescence" (Exhibits B and C hereto), while they may discuss similar subject matter to the Lennhoff definitions, the Lennhoff definitions are not the same as those agreed upon by the Appraisal Institute as being the proper definitions.

It is, however, worth noting that a prior article by the same author (Exhibit D hereto) on similar subject matter has had varying levels of acceptance and rebuke. Just in relation to this case, Exhibit D supports the Court of Appeals Opinion, or contains positions disregarded by all parties involved or just by the Appellant's own expert. As an example, it appears Lennhoff himself, like the Court of Appeals, would criticize Appellant's appraiser's sales comparables based upon what Lennhoff wrote (Exhibit D, page 62) in discussion of the sale of second generation properties like those utilized by the Appellant's appraiser:

> If these sales are not distress sales and share the same highest and best use as the subject if vacant and available to be leased,

> then they will provide credible evidence of the subject's market value. More times than not, however, ample transactions of this kind are not available and the appraiser is not able to use the sales comparison approach.

And contrary to Lennhoff's position on page 63 of his article (Exhibit D) that the, "application of the income capitalization approach is important", both sides agreed in this case that it was not. Op. page 2, n. 1. The point is that while any Lennhoff article may be a mildly relevant anecdote, reliance on a Lennhoff "theory" or "definition" must be viewed critically, and seen for what it is: an opinion article not contained within any recognized treatise pertaining to the valuation of real estate.

In sum, while the Appellant's Application for Leave to Appeal is replete with references to "value-in-use", and claims that the Court of Appeals has required a "value-in-use" methodology solely, this appears to simply be a fiction not utilized by the Court of Appeals below, not ordered to be utilized on remand to the tribunal, and only utilized within the Application in an attempt to create an issue where one does not exist.

B. The Appellant over simplifies and misstates the holding of the Court of Appeals in order to create an additional claim of appealable error.

On page 10 of the Application, the Appellant through the failure to fully discuss the holding of the Court of Appeals, over simplifies the Court of Appeals' reasoning by merely stating, "[t]he Court of Appeals concluded that the Tax Tribunal committed an error of law requiring reversal when it adopted the sales-comparison approach over the cost-less-depreciation approach, and remanded." Appellant cites to page 12 of the Opinion for this misrepresentative proposition. In actuality, the conclusion of the Court of Appeals is much more encompassing, as well as not nearly as severe. The Court of Appeals actually concluded that:

> [t]he tribunal committed an error of law requiring reversal when it rejected the cost-less-depreciation approach and adopted a sales-comparison approach that failed to fully account for the effect on the market of the deed restrictions in those comparables . . . [O]n remand, the tribunal shall take additional evidence with regard to the market effect of the deed restrictions. If the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject property's [highest and best use], the comparables should not be used. The tribunal shall also allow the parties to submit additional evidence as to the cost-less-depreciation approach.

There was no wholesale rejection of the sales comparison approach as suggested by the Appellant. Nor was there a wholesale acceptance and directive to only use the cost-less-depreciation approach. And both parties have the opportunity to present more evidence as to each approach. Depending on what evidence Appellant introduces on remand, the tribunal may have sufficient information to utilize Appellant's sales comparables to value the subject property. Also depending on what evidence is introduced, the tribunal may also be able to utilize the cost-less-depreciation approach. The use of either approach, and whether either approach is eventually utilized, remains to be seen. The Court of Appeals has not mandated one use of one approach over another, and has simply remanded the case for the taking of additional evidence in order to have a record, which on the whole, could potentially support the tribunal's conclusions.

C. Other Problematic Statements

Three other incorrect or only partially correct factual statements were also made in the Application which should be cleared up so that these statements are not assigned more importance than what they are due. First, Appellant asserts that Judge Abood has been "a licensed and certified appraiser (since 1991)". Application p. 4. According to the State of Michigan Department of Licensing and Regulatory Affairs, ALJ Abood has held his Certified

General Real Estate Appraiser license since 2007. He became a Certified Residential Real Estate Appraiser in 2003, and he first became a State Licensed Real Estate Appraiser in 1991. See Exhibit E hereto. Further, ALJ Abood, as the appraiser member of the tribunal, is also not a licensed attorney.

Second, Appellant asserts that an, "MAI designation is the professional designation of the Appraisal Institute for appraisers experienced in the valuation and evaluation of all types of properties." Application page 4, footnote 3. Technically, and according to the Appraisal Institute, an MAI designation does not mean an appraiser is "experienced in the valuation and evaluation of all types of properties" and merely means that the holder is, "experienced in the valuation and evaluation of commercial, industrial, residential and other types of properties".[2] In other words, just because someone holds an MAI designation, does not mean that person holds a particular expertise in the valuation of any type of property, much less "all types". Third, the Appellant incorrectly claims that the City Assessor's valuation disclosure did not comply with Tax Tribunal Rule 237, and was not an actual valuation disclosure. Application, p 5. Not only was there no ruling to this effect from the Tribunal, the Tribunal accepted the valuation disclosure (Trial Exhibit R-9) into evidence. FOJ, p. 6. The Tribunal also found, as contained in its Findings of Fact on page 9 of the FOJ, that: "40. Respondent submitted a valuation disclosure prepared by Diana Norden."

D. The Response to the Application for Leave to Appeal

The Appellee City of Escanaba has filed its response to the Application for Leave to Appeal asking that the Application be denied and the decision of the Court of Appeals be otherwise upheld. The *Amici* - Michigan Municipal League, Michigan Townships Association, Public Corporation Law Section of the State Bar of Michigan, and Michigan Association of

[2] http://www.appraisalinstitute.org/designation-requirements/

Counties – as interested parties responsible providing essential services, and whose tax bases could be detrimentally and severely impacted should the decision of the tribunal be allowed to stand have joined in the support of the City of Escanaba's position supporting the decision of the Court of Appeals through the filing of this *Amicus Curiae* Brief.

STANDARD OF REVIEW

The factual determinations of the tribunal are binding upon an appellate court unless there is fraud, error of law or the adoption of a wrong principle.[3] A decision of the tribunal that is not supported by competent, material and substantial evidence is an error of law.[4] According to the State of Michigan Constitution, Mich Const 1963, art 6, § 28, the:

> review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence.[5] The Tribunal's actions are reviewable for an abuse of discretion.[6] Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal.[7] Matters of statutory construction are decided *de novo*.[8]

Furthermore, substantial evidence "is that which a reasonable mind would accept as adequate to support a decision," and may be less than a preponderance of the evidence. *McBride v Pontiac School Dist (On Remand),* 218 Mich App 113, 123 (1996). "Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn." *Id*. Where the

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[3] *Wolverine Tower Associates v City of Ann Arbor,* 96 Mich App 780 (1980); *Georgetown Place Cooperative v City of Taylor*, 226 Mich App 33, 43 (1997).
[4] *Connors & Mack Hamburgers, Inc v Michigan Department of Treasury*, 129 Mich App 627 (1983); *Georgetown Place Cooperative v City of Taylor*, *supra.*
[5] *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353 (1992).
[6] *Stevens v Bangor Twp*, 150 Mich App 756 (1986).
[7] *Oldenberg v Dryden Twp*, 198 Mich App 696, 698 (1993).
[8] *Danse Corp v City of Madison Heights,* 466 Mich 175, 178 (2002).

Tribunal's findings are supported by competent, material, and substantial evidence, there is no basis to reverse. See *Comcast v Sterling Heights*, 218 Mich App 8, 11 (1996).

ARGUMENT

Basically, what is at issue in this case is whether the tribunal had competent, material and substantial evidence on the whole record upon which to base its decision, and whether the Court of Appeals was correct in remanding the matter back to the tribunal after finding that the tribunal did not. The Appellee City of Escanaba successfully appealed to the Court of Appeals the tribunal's decision which failed to properly account for the effect of deed restrictions on sales comparables utilized by the tribunal to value the property at issue. The tribunal decision, rendered by a non-attorney member of the tribunal, failed to consider the effect of deed restrictions which, for the most part, prevented the sales comparables from being utilized for the same use as the property being valued and then failed to apply its expertise in order to utilize a cost approach to value the property. The result was a significant reduction to the property's true cash, assessed and taxable values. The Court of Appeals correctly reversed the tribunal's decision and remanded matter back to the tribunal for additional findings.

The *Amicus Curiae* - Michigan Municipal League, Michigan Townships Association, Public Corporation Law Section of the State Bar of Michigan, and Michigan Association of Counties - have joined in the support of the City of Escanaba's Answer to the Application for Leave to Appeal. The potential widespread detrimental effect of the tribunal's decision (to reduce property values more than 50% based upon inapplicable deed restrictions and inappropriate highest and best uses) could have on the State's real property tax base – and as result the funding cuts which would be suffered by our schools, counties, and local governments - are

substantial. The ability of our schools to educate our children, and our counties and local governments to provide essential services (such as police, fire, and safe roads), depends on a system of taxation that is premised on what the property under appeal would sell for at market rates and according to the property's highest and best use. *Amici* are greatly concerned about the potential effects of the continuation of the appeal of this case, and request that leave to appeal be denied and that the decision of the Court of Appeals be upheld.

It should be noted that Amici will discuss the issues raised by Appellant after a brief discussion as to taxation basics.

I. Discussion as to Taxation and Valuation Basics

Prior to discussing any of the issues it is important to discuss property taxation in general, and the accepted methodologies in Michigan for determining property value for taxation purposes. The assessment of real property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value. The electorate of the State of Michigan adopted Section 3 of Article IX of the Michigan Constitution of 1963 which reads as follows:

> 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 percent; and for a system of equalization of assessments. . . .

The Legislature, to fulfill its Constitutional duties, adopted MCL 211.27, which defines true cash value and states in its pertinent part that true cash value is:

> . . . 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).

The Michigan Supreme Court has stated that "'[t]rue cash value' is synonymous with 'fair market value'" while at the same time finding that a commonly utilized valuation approach does not result in true cash value because it failed to take into consideration the in-place lease which restricted income. *CAF Investment Co v State Tax Commission*, 392 Mich 442, 450, 465 (1974).

This brings us back to the statute and the need to consider the entirety of MCL 211.27(1) and (6) which read:

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

> * * *(6) Except as otherwise provided in subsection (7), the purchase price paid in a transfer of property is not the presumptive true cash value of the property transferred. In determining the true cash value of transferred property, an assessing officer shall assess that property using the same valuation method used to value all other property of that same classification in the assessing jurisdiction. As used in this subsection and subsection (7), "purchase price" means the total consideration agreed to in an arms-length transaction and not at a forced sale paid by the purchaser of the property, stated in dollars, whether or not paid in dollars.

While the Legislature has defined "true cash value" and provided a laundry list of what should and should not be considered representative of true cash value, the interpretation of this section and the actual implementation of valuation has been set up by the Legislature to occur primarily in two stages: 1) Assessment through the General Property Tax Act, MCL 211.1, *et seq.*; and, 2) Appeals of the assessment to the Michigan Tax Tribunal, MCL 205.701, *et seq*. What has happened over the years is that a body of case law pertaining to proper valuation methodology has been developed stemming from appeals to the tribunal, and then the appeal of tribunal decisions to the Court of Appeals and the Supreme Court. The decision of the tribunal in this case was not supported by the record on the whole, and the Court of Appeals properly remanded it for the taking of more evidence.

A. Methods of Valuation

Generally speaking, there are three methods of true cash valuation for tax assessment purposes accepted by the Tribunal and the Courts. These methods were described in *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 484-485 (1991) as:

> (1) the cost-less-depreciation approach,[FN18] (2) the sales-comparison or market approach,[FN19] and (3) the capitalization-of-income approach.[FN20] Variations of these approaches and entirely new methods may be useful if found to be accurate and reasonably related to the fair-market value of the subject property. *[Citation and footnote omitted].* It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of

each case. *[Citation omitted].* Regardless of the valuation approach employed, the final value determination must represent the usual price for which the subject property would sell. *[Citation omitted].*

FN18. Under the cost approach, true cash value is derived by adding the estimated land value to an estimate of the current cost of reproducing or replacing improvements and then deducting the loss in value from depreciation in structures, i.e., physical deterioration and functional or economic obsolescence.

FN19. The sales-comparison approach indicates true cash value by analyzing recent sales of similar properties, comparing them with the subject property, and adjusting the sales price of the comparable properties to reflect differences between the two properties.

FN20. The income-capitalization approach measures the present value of the future benefits of property ownership by estimating the property's income stream and its resale value (reversionary interests) and then developing a capitalization rate which is used to convert the estimated future benefits into a present lump-sum value.

In this case, the tribunal utilized the sales comparison approach, and refused to utilize the cost-less-depreciation approach, to value the property. The parties had agreed that the income approach was not applicable. In valuing the property utilizing the sales comparison approach, the tribunal failed in this approach to, "analyz[e] recent sales of similar properties, compar[e] them with the subject property, and adjust[] the sales price of the comparable properties to reflect differences between the two properties." *Id*. Particularly, the tribunal failed to account for how the existence deed restrictions on the sales comparables affected sales price, and failed to adjust the comparables for the effect. Because of these failures, the tribunal's value determination did not represent the usual price for which this non-deed restricted free standing retail store in Escanaba, Michigan would sell.

Further, while the tribunal was presented with sufficient information to utilize a cost-less-depreciation approach, the tribunal chose to ignore it and not utilize this approach to value a property that has limited market/sales comparables available. The Appellant would have the

Court believe that the remand in this case constitutes a mandate to utilize the cost-less-depreciation approach without the appropriate consideration of depreciation and/or obsolescences of the subject property. The Court of Appeals Opinion is devoid of this mandate, and it is presumed that the tribunal will follow the law and apply appropriate depreciation and obsolescence amounts based upon the evidence and testimony in the case. What should be considered and why in terms of obsolescence was explained in *Forest Hills Co-operative v City of Ann Arbor*, 305 Mich App 572, 590-91, *appeal denied sub nom. Forest Hills Co-op v City of Ann Arbor*, 497 Mich 948 (2014), where the Court wrote:

> Functional obsolescence refers to "a loss of value brought about by failure or inability of the assessed property to provide full utility." *Meijer, Inc v City of Midland,* 240 Mich App 1, 4 n. 4 (2000). For instance, a poor floor plan can cause functional obsolescence, although it is possible that the use of a replacement-cost approach might eliminate the need to consider some sources of functional obsolescence. *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 755–756 (1985). Economic obsolescence refers to a "loss of value occasioned by outside forces." *Fisher–New Ctr Co v State Tax Comm,* 380 Mich 340, 362 (1968), vacated on other grounds on reh. 381 Mich 713 (1969). The measure of allowable obsolescence is a subjective determination that demands an exercise of judgment. *Fisher–New Ctr,* 380 Mich at 362–363. "Even a slight variation in the percentage of depreciation or of obsolescence may produce a considerable difference in valuation." *Id.* at 369.
>
> In *Meadowlanes,* 437 Mich at 503, the Supreme Court indicated that when using the cost-less-depreciation approach, economic obsolescence should be calculated in light of the property's highest and best use. [footnote omitted].

The remand in this case is necessary because there was insufficient testimony as to obsolesence.

B. Conclusion

The Court of Appeals correctly determined that the case should be remanded back to the tribunal for additional findings which would support a decision based upon the whole record

as to value utilizing either the sales comparison approach, and/or the cost-less-depreciation approach.

II. The Court should deny Appellant's Application for Leave to Appeal, and/or affirm the decision of the Court of Appeals decision requiring a remand to the Michigan Tax Tribunal to more fully develop the record, where the Appellant has not raised an issue involving legal principles of major legal significance to the state's jurisprudence where the issues are premised on a fiction, and which, therefore, are also technically not an appeal of the decision of the Court of Appeals where the Appellant wrongfully claims the Court of Appeals has required a value-in-use valuation by the tribunal and mandated a cost-less-depreciation valuation where the language of the Opinion states otherwise, and where the case law relied upon by the Court of Appeals, contrary to the averments of Appellant, is valid and should be followed.

A. Introduction

Appellant, in its Application for leave to Appeal, improperly attempts to create an issue for appeal by incorrectly claiming that a case referred to by the Court of Appeals in its Opinion is questionable, and that this somehow translates to a mandated impermissible valuation methodology; while at same time failing to acknowledge that at the tribunal, it was the Appellant property owner, and not the Appellee city, which had the burden of proof. The creation of an issue where there really is not one does not rise to the level of a matter involving legal principles of major legal significance to the state's jurisprudence. Because of this, the Application for Leave to Appeal should be denied.

B. Standard of Review

The factual determinations of the Tribunal are binding upon an appellate court unless there is fraud, error of law or the adoption of a wrong principle.[9] A decision of the Tribunal that

[9] *Wolverine Tower Associates v City of Ann Arbor,* 96 Mich App 780 (1980); *Georgetown Place Cooperative v City of Taylor*, 226 Mich App 33, 43 (1997).

is not supported by competent, material and substantial evidence is an error of law.[10] Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence.[11] The Tribunal's actions are reviewable for an abuse of discretion.[12] Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal.[13] Matters of statutory construction are decided *de novo*.[14]

Furthermore, substantial evidence "is that which a reasonable mind would accept as adequate to support a decision," and may be less than a preponderance of the evidence. *McBride v Pontiac School Dist (On Remand),* 218 Mich App 113, 123 (1996). "Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn." *Id*.

C. Discussion

In the State of Michigan, and as discussed in the previous section of this Brief, there is more than one way to value property for taxation purposes, and despite what Appellant claims, a derogation of a sales comparison approach relying on sales of properties with different highest and best uses than the subject property is not one of them. The Appellant would also have this Court incorrectly believe that a cost-less-depreciation approach to value property is impermissible. To this end, Appellant provides a misinterpretation of the holdings in *Clark Equip Co v Leoni Twp,* 113 Mich App 778, 783 (1982), and the cases that follow it, while at the same time failing to inform the Court of more recent decisions upholding a cost-less-depreciation

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[10] *Connors & Mack Hamburgers, Inc v Michigan Department of Treasury*, 129 Mich App 627 (1983); *Georgetown Place Cooperative v City of Taylor*, *supra.*
[11] *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353 (1992).
[12] *Stevens v Bangor Twp*, 150 Mich App 756 (1986).
[13] *Oldenberg v Dryden Twp*, 198 Mich App 696, 698 (1993).
[14] *Danse Corp v City of Madison Heights,* 466 Mich 175, 178 (2002).

approach. *See, e.g., Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676, 697 (2013); *app dn'd,* 495 Mich 948 (2014).

1. The decision in Clark is still good and First Federal did not overrule it.

In the late 1970s and early 1980s, there were several tax cases involving the valuation of large industrial properties. In those cases, the tribunal and courts struggled with how to value industrial property that either may not have a potential buyer, because it was so obsolete, or alternatively was not obsolete – but the market for a property with that particular use was very limited. The former situation was presented in *Safran Printing Co v Detroit,* 88 Mich App 376 (1979), *lv den* 411 Mich 880 (1981), which determined that a "value-in-use" approach was appropriate. The latter situation – which is more similar to the case at hand - was discussed in *Clark Equip Co v Leoni Twp,* 113 Mich App 778 (1982).

In *Clark*, the court had to determine whether it was appropriate to utilize the sales comparison approach or the cost approach to value the property where, similar to the property at issue in this case, the property's highest and best use is its current use but the particular type of property was rarely traded on the open market. In this case, the Appellant's appraiser presented nearly no non-deed restricted sales that sold for the same intended use as the subject property, proving the point. The reality is that, as the subject sat on tax day - without deed restrictions and with its highest and best use as its existing use - a retail company would not sell the property unless the company was under financial duress, because to do so would not protect its position in the market.

As explained in *Clark* at 782-783:

> In this case, we are confronted with a factual scenario quite different than that posed by *Safran.* Unlike the situation in *Safran*, all the appraisers in this case agreed that the subject property's current use is also its highest and best use. Indeed, petitioner's appraiser's market analysis report includes the following statement:

> "The subject property was originally designed as a manufacturing plant and has been used for this purpose continuously since its conception. Although it has several obsolete design features, it is still modern enough to be considered for continued use for an industrial purpose. Moreover, it is currently occupied and used as an industrial plant and its owner-occupant has expressed no desire to abandon the property even though recent adjustments have been made in employee levels and product lines. Based upon the consistency of use exhibited by the above factors, the subject's highest and best use was estimated to be consistent with its current use as a manufacturing plant."

> Contrary to petitioner's apparent contention, the Court in *Safran* did not hold that a cost analysis based on value in use could never be used to determine usual selling price. The *Safran* Court specifically noted that "existing 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.*, 382.

The court went on to explain at 784-785:

> The problem with valuing large industrial plants is a problem with the statutory standard itself. The reality is that these types of industrial plants are rarely bought and sold, so that a determination of "usual selling price" constitutes a metaphysical exercise which puts the Tax Tribunal in the position of having to resolve a question somewhat akin to how many angels can dance on the head of a pin. Petitioner may well be correct in its assertion that there is no market for its industrial plant at its current use. However, as we construe MCL § 211.27, to the extent that an industrial plant is not so obsolete that, if a potential buyer did exist who was searching for an industrial property to perform the functions currently performed in the subject plant, said buyer would consider purchasing the subject property, the usual selling price can be based upon value in use. To apply MCL § 211.27, a hypothetical buyer must be posited, although, in actuality, such a buyer may not exist. To construe MCL § 211.27 as requiring the taxing unit to prove an *actual* market for a property's existing use would lead to absurd under valuations.

And that is exactly what happened here in the tribunal. Requiring the property to be valued utilizing the market approach led to "absurd undervaluation".

Contrary to that claimed by Appellant, the holdings in *Clark* applicable to this case are still good and were not overruled by *First Federal Sav & Loan Ass'n of Flint v City of Flint*, 415 Mich 702 (1982). Instead of invalidating the *Clark* case holding as claimed by Appellant, the *First Federal* case, in actuality, only added to the considerations to be employed when using the cost-less-depreciation approach to value property. In *First Federal*, a bank building had enhancements only meant to improve the owner's image and which may not have any value to a subsequent purchaser. The *First Federal* Court explained at 706–07:

> We do not hold that the income approach advocated by First Federal's appraiser should govern, nor do we fault the city's appraiser or the Tax Tribunal for *considering* historical cost. Rather, we reject the notion that it is proper to include, in determining value, expenditures made, as the Tax Tribunal found, to enhance plaintiff's image and business without regard to whether they add to the selling price of the building.
>
> Absent more persuasive evidence, such as comparable sales, historical cost or reproduction cost can be considered in arriving at the usual selling price, but historical or reproduction cost that merely enhances image or business but not selling price is not subject to taxation.

Basically, under *First Federal*, the cost-less-depreciation approach is still a valid methodology and "can be considered in arriving at the usual selling price" provided it does not include costs for items which enhance business image and not the selling price.

2. Even in Clark, the tribunal applied a depreciation factor in the cost-less-depreciation approach.

In this case, the Appellant incorrectly argues that the *Clark* case and its holdings have been overruled to the extent that a cost approach should not have been ordered to be employed on remand. Notably, on page 12 of the Application, Appellant makes broad assertions as to the meaning of "value in use" and then makes the statement, without reference to the record or cited authority that, "[t]his is harmonious with Michigan's requirement that

property be assessed at its true cash value, established as a market value, not value to the owner." Appellant appears to claim the decision in *Clark* at page 785 authorized a value "utilizing a value in use standard". However, even in *Clark*, the tribunal applied a 40% depreciation factor to the property, which caused the *Clark* court to order a remand for the taking of sufficient evidence to support the 40%. *Clark* at 787. Because of this, the premise upon which the Application for Leave to Appeal (that *Clark* has been over-ruled and/or utilizes an impermissible cost-less-depreciation approach which applies no depreciation (a.k.a. "value in use") is based is untrue, and the Application should be denied.

3. The Appellant misconstrues the Opinion of the Court of Appeals and fails to inform the Court of current case law contrary to its position that real property in the State of Michigan should only be valued utilizing the sales comparison approach and cannot be valued utilizing the cost-less-depreciation methodology.

Another major problem with the Application is that it is based on a misunderstanding or a misrepresentation of the Opinion of the Court of Appeals. Appellant incorrectly claims the Court of Appeals in its Opinion, "essentially adopted a blanket cost methodology (i.e., value in use) for "big box stores", and other commercial and industrial properties. . . . such properties can no longer be assessed based on comparable sales . . .". Application p. 17. How Appellant has managed to extrapolate this conclusion from an Opinion that orders a remand for the taking of further evidence and the requirement of further consideration as to both the sales comparison approach and the cost-less-depreciation approach is baffling. That said, it should also be made clear that Appellant has provided no authority which supports the ill-founded proposition that it is no longer, or should no longer be, permissible to utilize a cost-less-depreciation approach as described by this Court in *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 484-485 (1991), or that such an approach, by default, is an improper value in exchange methodology.

What is apparent is that in making this argument Appellant seems to forget, or at least fails to fully advise, that the sales comparables utilized by Appellant's appraiser were problematic because the comparables themselves did not have the same highest and best use as the property being valued. In essence, they were different types of properties and these differences needed to be quantified through adjustment to the individual sales prices of the comparables. Instead, we are treated to a long explanation as to how properties with restrictions preventing them from being used for the subject's current use, were still valid comparables. As a part of this argument, Appellant again makes unsupported allegations that the restrictions "have no practical effect" (Application p. 17), because "adult clubs" are prohibited by zoning ordinances, and discount stores are mostly under 50,000 square feet. While minimally salacious, these allegations of fact are not supported by the record in this case. It is incongruous that Appellant wants these facts considered by this Court but at the same time is fighting to not have them considered by the tribunal. If the Appellant wants to argue the effect of sexually oriented business zoning ordinances or the typical size of a discount store in relation to deed restrictions, Appellant should consent to a denial of its Application so the case can proceed on remand to the tribunal.

Further, what concerns *Amici* is the attempt by Appellant to argue falsely that the decision of the Court of Appeals amounts to a requirement that properties be valued according to value in use, as opposed to value in exchange, and that based on this false representation of the Opinion of the Court of Appeals, the Court of Appeals should be reversed. Appellant goes as far as to rely on an unpublished non-precedential decision of the Court of Appeals from 2014. This should be ignored because: 1) This is not what the Court of Appeals Opinion in this case states; and 2) As explained in another recent published decision, considering the existing use of a property is relevant to value and is permissible. In *Detroit Lions, Inc v City of*

Dearborn, 302 Mich App 676, 697 (2013); *app dn'd,* 495 Mich 948 (2014), the property owner argued in part, "that the tribunal committed legal error by concluding that the highest and best use of the property as improved was its existing use as a practice facility." The court disagreed, finding:

> [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. [Citations and internal quotations omitted].

Id. In *Detroit Lions*, the Petitioner had argued that instead of being valued as an National Football League Practice Facility and Team Headquarters, the subject of the appeal should be valued utilizing alternative highest and best uses that were either not permitted under the zoning laws, or like this case, that substantially decreased the property's value and, "therefore "violate[d] the princip[les] of highest and best use." *Id*.

The *Detroit Lions* court determined that the tribunal had sufficient evidence that the, "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.". *Id.* at 698. *Amici* assert that the tribunal in this case likewise had sufficient evidence that the use of the property as a freestanding retail store **without** deed restrictions was the property's highest and best use, just based upon Petitioner's own expert's highest and best use conclusion. The tribunal failed to value the property accordingly and instead confounded the issue by valuing the property utilizing sales comparables that by law could not be utilized in the same manner or for the same purpose as the subject property due to deed restrictions.

Specifically, whether a property should be valued utilizing its current use as a basis for valuation was considered in the *Detroit Lions* case. The court, at 698-699, explained:

> We recognize that the MTT may not determine a property's true cash value solely on the basis of its current use "where such use bears no relationship to what a likely buyer would pay for the

> property[.]" *Safran,* 88 Mich App at 382. However, the *Safran* Court did not hold that a property's existing use could never be used to determine its usual selling price. *Clark Equip Co v Leoni Twp,* 113 Mich App 778, 783 (1982). In *Safran,* 88 Mich App at 382, the property was being used as a printing plant, even though this use was obsolete and it was undisputed that no buyer would purchase the property for this purpose. Accordingly, the property's existing use was not its highest and best use. *Id.* In the present case, conversely, the MTT's valuations were based on record evidence tending to show what a likely buyer would pay for the property. There was competent, material, and substantial evidence on the whole record to support the tribunal's determination that the practice facility's existing use was its highest and best use. See *Great Lakes Div of Nat'l Steel Corp v Ecorse,* 227 Mich App 379, 408 (1998). [footnote omitted]. Consequently, the tribunal properly considered the practice facility's existing use in determining its usual selling price. See *id.*

In this case, Petitioner's own appraisal, Ex. P-1, p34, stated that the highest and best use of the subject property "is concluded to be for continued use of the existing improvements as a free-standing retail building use." The Court of Appeals recognized this and remanded the case to the tribunal for an independent determination as to the applicability of the comparables and whether any adjustments should have been applied to account for the deed restrictions, as well as further review and application of the cost-less-depreciation approach. Both approaches are permissible and applicable to the subject property under the law.

D. Conclusion

The decision in *Clark* is still valid precedent and applies to this case. The claim that somehow the *Clark* decision does not employ a proper cost-less-depreciation methodology that does not account for depreciation is belied by the fact that even in *Clark* the tribunal applied a substantial depreciation factor. Further, more recent decision of the courts have continued to utilize the cost-less-depreciation method where the property's existing use is also its highest and best use, and there are insufficient appropriate sales comparables. Since this case has yet to be remanded for a determination as to whether the sales comparables can be adjusted and

appropriately utilized, the claim the Court of Appeals has somehow mandated a cost-less-depreciation method is premature and untrue. The holdings in *Clark* are applicable to this case and it was not error for the Court of Appeals to rely upon them.

III. The Court should deny Appellant's Application for Leave to Appeal, and/or affirm the decision of the Court of Appeals decision requiring a remand to the Michigan Tax Tribunal to more fully develop the record, where the decision of the Court of Appeals does not cause material injustice and is in concert with prior decisions of the Courts, and where the Court of Appeals ordered a remand of the case to the tribunal so that the tribunal, and not the Court of Appeals, can take sufficient evidence under the law to support its decision, which allows all parties to make additional arguments, and where the weighing of that evidence is still left to the tribunal.

A. Introduction

The Application for Leave to Appeal should be denied and this case should be remanded to the tribunal. After examining the whole record, the Court of Appeals determined that an error of law requiring reversal had occurred where the tribunal rejected with little to no consideration the cost-less-depreciation approach, and "adopted a sales-comparison approach that failed to fully account for the effect on the market of deed restrictions in those comparables." Opinion, p. 12. The Court of Appeals did not substitute its weighing of the evidence as claimed by Appellant; rather the Court of Appeals called out errors of law consistent with prior decisions, and which did not cause material injustice. The Application for Leave to Appeal should be denied.

B. Standard of Review

The factual determinations of the Tribunal are binding upon an appellate court unless there is fraud, error of law or the adoption of a wrong principle.[15] A decision of the Tribunal

[15] *Wolverine Tower Associates v City of Ann Arbor,* 96 Mich App 780 (1980); *Georgetown Place Cooperative v City of Taylor*, 226 Mich App 33, 43 (1997).

that is not supported by competent, material and substantial evidence is an error of law.[16] Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence.[17] The Tribunal's actions are reviewable for an abuse of discretion.[18] Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal.[19] Matters of statutory construction are decided *de novo*.[20]

Furthermore, substantial evidence "is that which a reasonable mind would accept as adequate to support a decision," and may be less than a preponderance of the evidence. *McBride v Pontiac School Dist (On Remand),* 218 Mich App 113, 123 (1996). "Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn." *Id*.

C. Discussion

The decision of the Court of Appeals does not cause a material injustice where the case has been remanded to the tribunal for the taking of additional evidence, and where the final determination of which valuation approach to be utilized is still left to the tribunal. Appellant complains the Court of Appeals improperly substituted its judgment for that of the tribunal's. This is untrue. The Court of Appeals was correct in ordering a remand so that the tribunal can obtain sufficient evidence upon which to render an opinion which complies with the law.

1. *The Court of Appeals decision to remand for the taking of more evidence as to the effect of the deed restrictions on the sales comparables, corrects an*

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[16] *Connors & Mack Hamburgers, Inc v Michigan Department of Treasury*, 129 Mich App 627 (1983); *Georgetown Place Cooperative v City of Taylor*, *supra.*
[17] *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353 (1992).
[18] *Stevens v Bangor Twp*, 150 Mich App 756 (1986).
[19] *Oldenberg v Dryden Twp*, 198 Mich App 696, 698 (1993).
[20] *Danse Corp v City of Madison Heights,* 466 Mich 175, 178 (2002).

> *error of law and is not an impermissible substitution of the tribunal's weight and credibility determinations.*

When reviewing the whole record, it becomes evident that the legal effects of the deed restrictions were not properly considered by the tribunal. This, as properly determined by the Court of Appeals, is an error of law. The effect of deeds restrictions on property values has been recognized by the courts of this state, and should have been recognized by the tribunal. The Court of Appeals did not impermissibly substitute its judgment for that of the tribunal where it appeared from the tribunal's decision that the non-lawyer ALJ either may not have fully considered or understood the implications of deed restrictions on the sales comparables. The Court of Appeals was correct in remanding the matter for a development of a record which properly addressed the deed restrictions.

Deed restrictions need to be properly considered because they do affect the value of a property, and they must be properly adjusted for if a sales comparable is subject to one or more of them. As explained in *Kensington Hills Development Co v Milford Twp,* 10 Mich App 368, 372 (1968), where the Court compared zoning restrictions to deed restrictions:

> Zoning restrictions are real and, during their duration, limit the use of the property as much as deed restrictions. Just as it is error to fail to consider deed restrictions in establishing assessments, [citation omitted], it is error to assess noncommercial property on the proposition that it will ultimately be zoned commercially.

As later explained in this Court's 1984 decision in *Antisdale v City of Galesburg*, 420 Mich 265, 285 (1984):

> Tax benefits, like deed restrictions, *Helin v Grosse Pointe Twp,* 329 Mich 396 (1951), and zoning classifications, *Kensington Hills Development Co v Milford Twp.,* 10 Mich App 368 (1968), of course, are not real property. Nevertheless, such incorporeal items, not taxable in and of themselves, can increase or decrease the value of real property, and that amount should be reflected in the assessment process.

The *Antisdale* Court stated it plainly, and the law has not changed.

Requiring compliance with the law in rendering a tribunal decision on remand does not amount to material injustice to the Appellant such that this Court should grant the Application for Leave to Appeal. In this case, the Court of Appeals recognized that the tribunal did not follow the law when weighing the comparables utilized by the Appellant, and instead rested on a verbal explanation from Appellant's appraiser (that did not address what the deed restrictions were and how they individually did or did not affect the sale price of the comparables) that the deed restrictions had no effect. Had each of the comparables had the exact same restriction, and if that restriction could have been easily weighed, then perhaps the tribunal's reliance on the appraiser's statement would have passed muster. But where the comparables were differently restricted, there should have been an analysis as to how each of the deed restrictions affected the value of each of the sales comparables. To say that absolutely none of the deed restrictions affected value is contrary to what a reasonable mind would find to be sufficient and is not competent, substantial and material evidence. In fact, saying that the deed restrictions did not affect the sales prices of the comparables is contradictory to the Appellant's own evidence, because the two sales that had the highest per square foot values were the two sales that did not have deed restrictions. The failure to properly analyze the comparables is an error of law, and the Court of Appeals was correct in requiring reversal and remand.

Furthermore, as explained in *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676, 697 (2013) *app den*, 495 Mich 948 (2014):

> 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 (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 (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 (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 (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.* [Emphasis added].

The tribunal in this case utterly failed to value the subject property at its "highest probable price" when it used sales of deed restricted properties purchased for uses other than the subject's current (and maximally productive) use without adjusting those sales prices upward to compensate for their deficiencies. In essence, instead of determining the "highest" probable price, the tribunal actually determined the "**lowest**" probable price that could be obtained - assuming without support that the Escanaba retail property market was as depressed as the 400 miles away Detroit area, and that the property would be treated as though it were subject to non-existent deed restrictions that would prevent the full range of retail uses or would sell for use as something other than a retail use.

As stated in *Great Lakes Div of Nat Steel Corp v City of Ecorse*, 227 Mich App 379, 391 (1998):

> The sales-comparison or market approach has been described as requiring an analysis of recent sales of similar properties, a comparison of the sales with the subject property, and adjustments to the sale prices of the comparable properties to reflect differences between the properties. [Citation Omitted]. It has been described as the only approach that directly reflects the balance of supply and demand for property in marketplace trading. [Citation Omitted]. However, if the analysis of a comparable sale is flawed, the valuation for the subject property is also flawed. [Citation omitted].

In this case, the analysis of the comparables was hopelessly flawed because the differences as to the legally permitted uses for each of the comparables, and the intended uses of the comparables, were not considered as factors in weighing their applicability to the subject. The tribunal, in reaching its value determination, should have utilized comparables with the same

highest and best use as the subject in order to determine the highest and best use of the subject, or somehow adjusted for the deed restrictions or alternative uses to which Appellant's comparables had or were put. Instead, the tribunal shied away from doing the work necessary to come to a true cash value of the property based on a misconception that somehow it was acceptable to not value the property according to its current use. By utilizing comparables that were deed restricted, purchased for another use, or otherwise not used as a free-standing retail building, the tribunal did not value the property at its highest and best use and committed an error of law requiring reversal by the Court of Appeals.

Appellant argues that the remand is tantamount to the Court of Appeals making improper weight and credibility judgments as to the witnesses. *Amici* disagree. The factual determinations of the tribunal are binding upon an appellate court unless there is fraud, error of law or the adoption of a wrong principle.[21] A decision of the tribunal that is not supported by competent, material and substantial evidence is an error of law.[22] According to the State of Michigan Constitution, Mich Const 1963, art 6, § 28, the:

> review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

In this case, the tribunal's decision which failed to properly address the deed restrictions was an error of law, and based upon a review of the "whole" record, it was evident that the tribunal failed to acknowledge that the preponderance of the evidence called into significant question the use of low-ball deed restricted sales to value the non-deed restricted subject property. These were errors of law which required reversal and remand. Contrary to that as asserted by

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[21] *Wolverine Tower Associates v City of Ann Arbor,* 96 Mich App 780 (1980); *Georgetown Place Cooperative v City of Taylor*, 226 Mich App 33, 43 (1997).

[22] *Connors & Mack Hamburgers, Inc v Michigan Department of Treasury*, 129 Mich App 627 (1983); *Georgetown Place Cooperative v City of Taylor*, *supra.*

Appellant, the decision of the Court of Appeals requiring so is not clearly erroneous, does not cause material injustice and does not conflict other decisions of the courts.

2. *It was not error, or a substitution of the tribunal's judgment to also order the consideration of the cost-less-depreciation approach on remand.*

It has long been held that multiple valuation methods should be utilized to value property when possible. *Meadowlanes*, *supra*. at 485. Not to do so where possible, or as in this case to even refuse to consider to do so, is an error of law. The tribunal had available to it evidence to support a cost-less-depreciation approach, but failed to consider it. If, on remand it is determined that there is no actual market for the property as it sits, and/or the only market comparables are either deed restricted or sold for a differing highest and best use for which appropriate adjustments cannot be made, then the cost-less-depreciation approach will have to be utilized. If it is determined that the sales comparison approach can be used, then the cost-less-depreciation approach should still be considered, if for no other reason than as a check against the value determined utilizing the sales comparison approach.

Again, the subject here is not unlike the large industrial plants. The *Clark* court explained at 785:

> Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. Such plants are not constructed like small commercial buildings or residential structures with only a mere hope or expectation on the builder's part that the plant will be sold. When a large corporate entity such as Ford or General Motors builds a factory, it is probable that absolutely no market exists for the resale of that factory consistent with its current use. It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost premised on value in use because, in actuality, such industrial facilities are rarely bought and sold.

The court explained that, when valuing a property as if a purchaser would want to use the property in accordance with its current use and according to its current capabilities, sustaining

the assessment [which is a cost approach based upon the property as it sits – and is not a "cost on the open market" approach] is not error, because "the subject property here remains suited to its particular use and is not obsolete.". *Id*. at 785-786. Whereas here, the sales comparables presented at trial were deed restricted, sold under duress, or sold for a differing highest and best use, and our subject property is a non-deed restricted property not under duress, with a current use that is its highest and best use, the tribunal should have endeavored to explore and utilize the cost-less-depreciation approach to value the property. The Court of Appeals did not substitute its judgment for that of the tribunal when it called the tribunal out for this error of law, and remanded the case so that the tribunal, in accordance with *Meadowlanes*, could utilize more than one approach which could then be specifically tailored to the subject property's obsolescences.

Additionally, remand was appropriate in this case because it was an error of law for the tribunal to improperly shift the burden onto the City as to obsolescence factors, and it is not a material injustice to Appellant or contrary to other decisions of the courts to require the tribunal to consider a cost-less-depreciation approach which by its plain meaning requires the consideration of depreciation. The tribunal below improperly rejected Escanaba's cost-less-depreciation approach, finding that it had failed to account for functional obsolescence without specifically calling out what those functional obsolescences were. FOJ, p13. This is contrary to *Clark*. When the property's highest and best use is its current use, the tribunal should have valued the property as if it would be used for that use and not required a "cost on the open market" approach. The tribunal essentially, and inappropriately, placed the burden of proof on the City of Escanaba to show what the "obsolescences" were, and therefore the amount of depreciation which should have been employed.

Conversely, by not presenting specific evidence as to what was wrong or how much of a deduction should have been made to Escanaba's cost approach, the tribunal should have found that Appellant had conceded the issue of the amount of obsolescence/depreciation. In *Clark* at 787, the court wrote:

> We recognize that the petitioner has the burden of proving true cash value, MCL § 205.737(3), and that, here, petitioner presented no evidence of an appropriate depreciation rate, relying solely on a market analysis to the valuation problem. In our opinion, however, all this constitutes is a concession that, if the respondent's cost analysis be adopted by the tribunal, petitioner does not claim error in the depreciation factor respondent's appraiser has found to be applicable.

The Tribunal adopted a wrong principle by not using a cost approach to value the property, and the decision was correctly reversed as an error of law.

D. Conclusion

The Court of Appeals properly determined that this case should be remanded for the taking of more testimony and evidence as to the effect of the deed restrictions, as well as for the consideration of the cost-less-depreciation approach. To do so was not an impermissible substitution of the tribunal's weight of the evidence determinations when the tribunal's determinations were not based upon the record as a whole and thereby constituted an error of law. Requiring the tribunal to look at the whole record and take additional evidence to support the tribunal's determinations does not cause material injustice and is consistent with the other decisions of the courts.

CONCLUSION

This case was properly reversed and remanded by the Court of Appeals. The record is replete with contradictory evidence that the tribunal did not consider. Specifically, the tribunal inadequately addressed the effect of deed restrictions on, and alternative highest and best uses of, the sales comparables, and the entirely ignored evidence submitted by City of Escanaba. The tribunal further failed to value the property according to its highest and best use, and also failed to apply its own expertise to properly value the property utilizing the cost-less-depreciation approach. All of this lead to the "absurd undervaluation" of the subject property, which is of great concern because of the impact the decision may have had on subsequent determinations by the tribunal if the decision had been allowed to stand. For these reasons, *Amici* request that this Court uphold the decision of the Court of Appeals and/or deny the Application for Leave to Appeal.

Respectfully Submitted,

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