



CITY COUNCIL WORK SESSION AGENDA

January 20, 2015
8:00 a.m. to 10:00 a.m.

Marc D. Tall, Mayor
Ronald J. Beauchamp, Mayor Pro-Tem
Patricia A. Baribeau, Council Member
Ralph B. Blasier, Council Member
Michael R. Sattem, Council Member

James V. O'Toole, City Manager
Robert S. Richards, CMC, City Clerk
Ralph B.K. Peterson, City Attorney

City Council Chambers located at: City Hall - 410 Ludington Street - Room C101 - Escanaba, MI 49829

The Council has adopted a policy to use a Consent Agenda, when appropriate. All items listed with an asterisk (*) are considered routine by the City Council and will be enacted by one motion. There will be no separate discussion of these items unless a Council Member or citizen so requests, in which event the item will be removed from the General Order of Business and considered in its normal sequence on the Agenda.

Work Session

Tuesday, January 20, 2015, 8:00 a.m. to 10:00 a.m.

CALL TO ORDER
ROLL CALL
APPROVAL/ADJUSTMENTS TO THE AGENDA
CONFLICT OF INTEREST DECLARATION

NEW BUSINESS

1. Discussion - 2015-16 Operating Budget Preparation.

Explanation: Administration will lead a discussion about the upcoming 2015-16 operating budget and seek Council input on items the Council as a whole would like to see considered for inclusion in the budget. Additionally, the various departments will update the Council on budgetary opportunities and challenges for the upcoming year.

GENERAL PUBLIC COMMENT
ANNOUNCEMENTS
ADJOURNMENT

Respectfully Submitted,

James V. O'Toole
City Manager



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Work Session - Agenda Addendum

Tuesday, January 20, 2015, 8:00 a.m. to 10:00 a.m.

NEW BUSINESS

2. **Discussion - Michigan Tax Tribunal Finding (Menard's) - Michigan Court of Appeals.**
Explanation: Administration will discuss the possibility of appealing the recent Michigan Tax Tribunal judgement regarding the Menard's property tax assessment to the Michigan Court of Appeals.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J. O'Toole".

James V. O'Toole
City Manager

NB-1

CITY OF ESCANABA
2015-16 Budget Calendar

- December 26th (Fri)**- Budget papers to department heads; operating budgets due 1/23/15.
- January 9th (Fri)**- Publish notice of first Public Hearing for the 2015-16 City budgets at the 1/15/15 regular Council meeting.
- January 15th (Thur)**- (Regular Council Meeting) First Public Hearing for citizen input into the 2015-16 City budgets.
- January 23rd (Fri)**- Departmental operating budgets due.
- February 13th (Fri)**- Publish notice of second Public Hearing for the 2015-16 City budgets at the 2/19/15 regular Council meeting.
- February 16th (Mon)**- First draft of budget requests to City Manager.
- February 19th (Thur)**- (Regular Council Meeting) Second Public Hearing for citizen input into the 2015-16 City budgets.
- March 13th (Fri)**- Publish notice of third Public Hearing for the 2015-16 City budgets at the 3/19/15 regular Council meeting.
- March 19th (Thur)**- (Regular Council Meeting) Third Public Hearing for citizen input into the 2015-16 City budgets.
- March 27th (Fri)**- Council receives tentative copy of the City budgets.
- April 13th (Mon)**- Budget work session open to the public.
- April 14th (Tues)**- Budget work session open to the public.
- April 15th (Weds)**- Budget work session, if required, open to the public.
- April 16th (Thur)**- (Regular Council Meeting) Council passes resolution to set May 7th as the fourth Public Hearing on the 2015-16 City budgets.
- April 17th (Fri)**- Budgets are revised, based on the work sessions, and are made available to the public.
- April 27th (Mon)**- Publish notice of Public Hearings on budgets.
- May 7th (Thur)**- (Regular Council Meeting) Public Hearing on 2015-16 City budgets.

May 11th (Mon)-

Publish notice of final hearing and adoption of 2015-16 City budgets. This notice must be at least 6 days prior to the budget adoption and must contain language to the effect that the tax rate will be a subject at this meeting, assuming that the City does **not** intend to roll back the millage by the bae tax reduction fraction.

May 21st (Thur)-

Public Hearing and adoption of City budgets. First reading of the Appropriations Ordinance, including the millage rate, and first reading of the Tax Levy Ordinance, with second reading and adoption set for the May 28th special meeting. First reading of Utility Ordinances, with second reading and adoption set for the Monday, June 1st special meeting.

May 28th (Thur)-

(Special Council Meeting) Second reading and adoption of the Tax Levy Ordinance and the Appropriations Ordinance.

June 1st (Mon)-

(Special Council Meeting) Second reading and adoption of the Utility Ordinances.

CITY OF ESCANABA

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Personnel Count

Based on First Payroll in December

	2010			2011			2012			2013			2014		
	FI	PT	FTE												
PUBLIC SAFETY DEPARTMENT	42	4	44	41	4	43	39	4	41	39	4	41	38	4	40
CITY MANAGER (D)	2	0	2	2	0	2	2	0	2	2	0	2	1.5	0	1.5
H R (A) (D)	1	0	1	1	0	1	1	0	1	1	0	1	1	0	1
CONTROLLER	3	0	3	3	0	3	3	0	3	3	0	3	3	0	3
LAN ADMINISTRATION	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TREASURER (A)	2.5	0	2.5	2.5	0	2.5	2.5	0	2.5	2.5	0	2.5	2.5	0	2.5
UTILITY BILLING	4	0	4	4	0	4	4	0	4	4	0	4	4	0	4
CITY CLERK (E)	1.5	0	1.5	1.5	0	1.5	1.5	0	1.5	1.5	0	1.5	1.5	0	1.5
ASSESSOR (E)	1.5	0	2.5	2.5	0	1.5	2.5	0	2.5	2.5	0	2.5	2.5	0	2.5
COMMUNITY PRESERVATION	1.5	0	1.5	1.5	0	1.5	1.5	0	1.5	0.5	1	1.5	1	0	1
PURCHASING	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ENGINEERING (B)	2.5	0	2.5	2.5	0	2.5	2.5	0	2.5	2.5	0	2.5	2.5	0	2.5
LIBRARY	5	6	7.4125	5	5	7.375	5	5	7.375	5	5	7.375	5	5	7.375
RECREATION	2	8	6.25	2	6	5	2	7	5.5	2	7	5.5	2	7	5.5
CITY HALL/LIBRARY	0	2	1	0	2	1	0	2	1	0	2	1	0	1	0.5
PUBLIC WORKS (B)	18.5	0	17.5	18.5	0	18.5	17.5	0	18.5	18.5	0	17.5	18.5	0	18.5
WASTEWATER (C)	6.5	0	6.5	5.5	0	6.5	6.5	0	5.5	6.5	0	6.5	6.5	0	6.5
ELECTRIC	12	0	12	10	0	10	12	0	12	12	0	12	12	0	12
WATER (C)	9.5	0	9.5	9.5	0	9.5	7.5	0	9.5	8.5	0	7.5	8.5	0	8.5
	<u>115</u>	<u>20</u>	<u>124.66</u>	<u>112</u>	<u>17</u>	<u>120.38</u>	<u>110</u>	<u>18</u>	<u>120.88</u>	<u>111</u>	<u>19</u>	<u>118.88</u>	<u>110</u>	<u>17</u>	<u>118.38</u>

- (A) Valentine listed in Treasurer; shown above as 1/2 in H.R. and 1/2 in Treasurer
- (B) Farrell listed in PW; shown above as 1/2 in PW and 1/2 in Engineering
- (C) Lampi listed in Wastewater; shown above as 1/2 in WW and 1/2 in Water
- (D) Peterson listed in City Manager; shown above as 1/2 in CM and 1/2 in HR
- (E) Weissert listed in Clerk; shown above as 1/2 in Clerk and 1/2 in Assessor

Memo

NB-2

To: City Council
CC: Jim O'Toole, Manager
From: Daina Norden, Assessor
Date: 1/14/15
Re: January 20, 2015 Meeting

Michigan Tax Tribunal Update Regarding Menards Appeal

As the City Council is aware, Menards Inc. recently appealed their property tax assessment levied by the City of Escanaba on their store located at 3300 Ludington Street to the Michigan Tax Tribunal and won that case.

As the Council is also aware, a Motion for Reconsideration was submitted to the Michigan Tax Tribunal by the City of Escanaba. On January 12th I received the Corrected Final Opinion and Judgment from Tribunal Judge Marcus L. Abood, SRA. In the correction the mathematical errors were corrected however we were denied any change in the determination of True Cash Value.

That leaves us with the decision on whether or not to further appeal this case to the Court of Appeals. I have contacted a firm who handles these cases regularly. I have personally spoken with Mr. Van Coevering who has given an estimate of costs as well as an engagement letter, both are attached. He has estimated our costs for retaining his services to appeal to the Court of Appeals between \$18,000 and \$30,000. If the case gets remanded back to the Michigan Tax Tribunal we would need to have legal representation there. Also, the case could be further appealed to the Michigan Supreme Court. Both of these would incur additional legal fees.

Also you should note that on page 2 of the cost estimate from Jack that he states "Finally, a number of the issues in your case have been discussed as potential legislative fixes. Legislation has the advantage of potentially affecting this case *if the matter is pending on appeal when the legislation has been passed.*"

January 13, 2015

Daina Norden, MAAO & MCPPE
Assessor, City of Escanaba
PO Box 948
Escanaba, MI 49849

Dear Daina:

For your reference, my hourly rate for these types of big box appeals is \$300 an hour. Crystal Morgan's rate is \$250 an hour. We bill our associate Scott Noto at \$170 an hour. The majority of cost is attorney fees. We estimate that the total expenses for the appeal to range from \$18,000 to \$30,000.

Obviously cost range is an estimate and actual amounts may vary. To provide further perspective, I am providing the following outline of the likely appellate steps with rough cost estimates:

1. Initiate Appeal in the Court of Appeals: file Claim of Appeal, Docketing Statement and other appellate documents. (\$2,000 to \$5,000)
 - a. Correspondence and Communication. (\$1,000)
2. File Brief on Appeal: review tribunal record, identify issues, research, draft and file Brief on Appeal, review Menard Response Brief, research draft and file Reply Brief, motions. (\$10,000 to \$18,000)
 - a. Client/Co-Counsel Correspondence and Communication. (\$1,000)
 - b. Coordination of Amicus Representation. (\$3,000)*
3. Oral Argument: research, prepare exhibits, prepare for and present oral argument. (\$2,000 to \$4,000)
4. Court of Appeals Decision: review decision, correspondence/conference with co-counsel and clients; ancillary motions. (\$1,000 to \$4,000)
5. Application for Leave to Appeal to the Michigan Supreme Court and Brief on Appeal: research, draft and ancillary communication. (\$8,000 to \$15,000)*
6. Legislation to address the result. (\$5,000 to \$10,000)*

As you will note a few of the tasks include an asterisk ("**"). The asterisk designates optional steps for the City to undertake. For example, the coordination with other interested parties --as amicus curiae-- filing briefs in support of the City is always advisable because the issues involved affect a number of local units. As well if the City pursues a legislative fix or an additional appeal to the Michigan Supreme Court, those are decisions that would incur additional cost. Finally, there is also a possibility that the Court of Appeals would remand (send back) all or a portion of the cases back to the Tribunal for additional fact-finding. Were a remand to be ordered, the case may be subject to retrial. This eventuality has not been addressed in the fee estimate because it is too uncertain to predict.

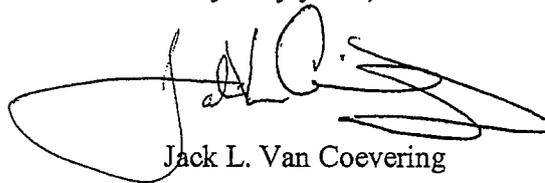
Because of the impact of this case to other properties in Delta County, I would recommend that the City pursue a Cost Sharing Agreement with other local jurisdictions and the State of Michigan. A Cost-Sharing Agreement allocates the cost of litigation to all local tax collecting units by some formula, typically reflecting a local unit's percentage of the total millage assessed. We have assisted Marquette County, Baraga County, Ottawa County and Van Buren County with Cost-Sharing Agreements. We have not included the cost of assisting you with a Cost-Sharing Agreement but it is not significant. We encourage you to speak with the Marquette County Administrator or the City Manager of Marquette if you would like first-hand information on the process.

Finally, a number of the issues in your case have been discussed as potential legislative fixes. Legislation has the advantage of potentially affecting this case *if the matter is pending on appeal when the legislation has been passed.*

Appellate litigation is controlled by appellate courts with pretty clear due dates. The first date, on which the City would initiate an appeal of right, is **January 28, 2015**. *It is very important that the City determine whether they wish to appeal well in advance of that date so that the necessary documents can be timely filed.* The City loses its right to appeal after January 28 and can only appeal by persuading the Court of Appeals to take the case. We have included an engagement agreement to facilitate a quick response given the impending January 28 deadline.

I hope this helps. Please share this information with the City Manager. We would like to work with you to make this appeal work for the City and for you to continue your fight. To that end, we would welcome the opportunity to discuss this with you, your City Manager or elected officials.

Very truly yours,



Jack L. Van Coevering

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Menard Inc,
Petitioner,

v

MTT Docket Nos. 441600
and 14-001918

City of Escanaba,
Respondent.

Tribunal Judge Presiding
Marcus L. Abood

ORDER PARTIALLY GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION

ORDER VACATING THE TRIBUNAL'S NOVEMBER 24, 2014 CORRECTED FINAL
OPINION AND JUDGMENT

CORRECTED FINAL OPINION AND JUDGMENT

On December 15, 2014, Respondent filed a motion requesting that the Tribunal reconsider its decision in this case. In its Motion, Respondent states that (i) the Tribunal "made a mathematical error when computing the SEV for 2013 . . ." which also affected the Tribunal's determination as to the subject property's taxable value for the 2013 and 2014 tax years; (ii) "[t]he Tribunal and . . . Petitioner[s] appraiser failed to note . . . that [five] of the [sales] comparables had use restrictions and failed to make any adjustments in determining the value of the subject property which did not have use restrictions;" (iii) the Tribunal erred in its reliance on Petitioner's Sales Comparable No. 1 as (a) it has use restrictions, (b) it resold less than four months later on January 21, 2014, for \$1,750,000, (c) "Mr. Torzewski admitted that [his -10%] adjustment [to this comparable for condition] was incorrect during the trial," and (d) Mr. Torzewski failed to make an adjustment or provide discussion as to why no adjustment was necessary given the fact that this comparable is dissimilar to the subject property since it is attached to another retail space; (iv) Sales Comparable No. 3 "had large use restrictions which were not mentioned at all in Petitioner's Appraisal," and Mr. Torzewski failed to "mention . . . the cost to convert [Sales Comparable No. 3] into a light manufacturing plant;" (v) "the true 'fee simple' ownership [for Sales Comparable No. 3] . . . was a prior sale . . . in July of 2010 . . . [which] would calculate to \$30.36 per sq. ft. . . .;" (vi) Sales Comparable No. 4 "was a foreclosure sale[and] was also sold and converted into industrial space;" (vii) Sales Comparable No. 5 "was also sold as a manufacturing use and rezoned just prior to the sale to allow for the use remaining which was dictated by the greatly restricting use restrictions;" (viii) "use restrictions demand that the space be converted into something other than what the building was built for[-]something other than the highest and best use;" (ix) Mr. Torzewski committed "a flagrant violation of appraisal practice by . . . refus[ing] to admit that these [use] restrictions do affect the sales price of the property and further by his absence of even noting the restrictions exist;" (x) "on the contrary[, Mr. Torzewski] does admit that use restrictions affect the sales price in a property as it states in

his appraisal (Exhibit P-1) on page 42;" (xi) "USPAP says the report must contain sufficient information to enable the intended users to understand the report properly;" (xii) "the land [for Sales Comparable No. 7] is listed incorrectly as 150,282 sq. ft. and it should be 74,021 sq. ft. . . .," (xiii) Sales Comparable No. 8 "has use restrictions[, and] . . . [c]ombining the entire parcel [for an 'extra lot'] and adjusting the sale for the -10% adjustment places the price per sq. ft. at \$24.11;" (xiv) "[i]t would appear that [Petitioner's] . . . appraisal has an underlying Extraordinary Assumption which was not disclosed as part of the appraisal report;" (xv) the sales comparables that have use restrictions are not fee simple transactions; and (xvi) Mr. Torzewski's testimony contradicted his written appraisal report. Respondent, in furtherance of the foregoing, states:

The [Tribunal,] by ignoring the facts of the sales and making no adjustment for the self-imposed use restrictions placed by the seller[,] is subsequently creating a value based on incorrect appraisal practices which ignore the highest and best use of the property and ignore the definition of true cash value which is the "usual selling price" and "being the price that could be obtained" and ignore fee simple ownership which is "**absolute ownership unencumbered by any other interest**" and ignore the obvious misrepresentations and false statement set forth in the appraisal thus concluding to a false value.

In sum, Respondent contends that "the Michigan Tax Tribunal should have upheld the assessment which utilized the cost approach to value [as] . . . [y]ou cannot adjust bad sales into a good indication of value[, and t]he best approach to valuation in this case is the cost approach"

The Tribunal, having considered the Motion and the case file, finds that Respondent's contention, asserting that the Tribunal erred in relying on Petitioner's sales comparison approach, lacks merit. Although deed restrictions can affect a property's market value and therefore must be considered, see *Lochmoor Club v City of Grosse Pointe Woods*, 10 Mich App 394, 398; 159 NW2d 756 (1968), Petitioner's appraiser, Mr. Torzewski, did take such factor into consideration in developing his sales comparison analysis and determined that the deed restrictions, on those properties that he *utilized*, had no effect on the properties' sales prices, and the Tribunal found this testimony, and analysis regarding the same, to be credible. More specifically, Mr. Torzewski credibly testified that "the majority of [the comparables he used] did [have deed restrictions] since they were mostly former Wal-Marts or Home Depot Stores;" however, "deed restrictions are pretty common for build-to-suit users to put in place some sort of a deed restriction," and the deed restrictions for the sales comparables utilized did not "affect[] the sales price." TR at 64-65. As a result, no adjustment for these sales comparables, absent any credible evidence to the contrary, was necessary. Further, to the extent that there were any errors or omissions in the appraisal that were not previously disclosed, Mr. Torzewski remedied the same during his testimony as a witness. Specifically, and including the foregoing wherein he testified that the *majority* of the sales comparables that he used did have deed restrictions, Mr. Torzewski also acknowledged the conditional adjustment error for Sales Comparable No. 1 and the error in the

site size for Sales Comparable No. 7, both of which did not affect his conclusion of value for the tax years at issue. See TR at 103-104. Additionally, Mr. Torzewski properly disclosed and separated the excess land that was part of the purchase price for Sales Comparable No. 8. See Appraisal Institute, *The Appraisal of Real Estate* (Chicago: Appraisal Institute, 14th ed, 2013) at 200-201. And, even if the Tribunal were to give Petitioner's Sales Comparable Nos. 1 and 4 less weight due to the dissimilarity of Sales Comparable No. 1, being attached to another retail space, and the condition of sale for Sales Comparable No. 4, being a foreclosure, the Tribunal's independent determination of the subject property's true cash value for the tax years at issue, based on the subject property's fee simple interest,¹ would still be within the range of valuations in evidence. See *President Inn Properties LLC v City of Grand Rapids*, 291 Mich App 625, 642; 806 NW2d 342 (2011). Further, despite any deed restrictions in the sales comparables utilized in Petitioner's sales comparison analysis, the sales are, contrary to Respondent's contentions, still fee simple transactions, as the grantees in those transactions obtained full ownership rights in the property, and, based on the circumstances presented in this case, Petitioner's sales comparison approach provided the most accurate valuation evidence of the subject property's usual price for which it would have sold for the tax years at issue. See *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991).

With that being said, however, Respondent's contention that the Tribunal "made a mathematical error . . ." is correct. Although the Tribunal, upon further review of its decision and the case file, attempted to correct the original Final Opinion and Judgment, issued on November 7, 2014, to accurately reflect Respondent's revised contention of the subject property's taxable value for the 2014 tax year and the Tribunal's conclusion of the same, to bring the taxable value for the 2014 tax year into conformity with the mandates set forth in MCL 211.27a(2), such efforts were futile as the Tribunal failed to recognize that it inadvertently erred in its calculation of the subject property's true cash and state equalized values, as indicated in the Summary of Judgment section, for the 2013 tax year. As a result, the Corrected Final Opinion and Judgment, issued on November 24, 2014, shall be vacated in its entirety, and the correct values, reflecting the parties' contentions and the Tribunal's decision, shall be as indicated below.

Given the above, Respondent has demonstrated a palpable error, with regard to the Tribunal's mathematical error, that misled the Tribunal and the parties and would have resulted in a different disposition if the error was corrected. See MCR 2.119. Therefore,

IT IS ORDERED that Respondent's Motion for Reconsideration is PARTIALLY GRANTED.

IT IS FURTHER ORDERED that the Tribunal's November 24, 2014 Corrected Final Opinion and Judgment is VACATED.

IT IS FURTHER ORDERED that that the Summary of Judgment section in the Final Opinion

¹ See *Lowe's Home Centers Inc v Marquette Twp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket Nos. 314111 and 314301).

and Judgment is modified as follows:

The subject property's 2012, 2013, and 2014 True Cash Values (TCVs), Assessed Values (AVs), and Taxable Values (TVs) as determined by Respondent are:

Parcel No. 051-420-2825-100-006

Respondent			
Year	TCV	SEV	TV
2012	\$7,815,976	\$3,907,988	\$3,907,988
2013	\$7,995,596	\$3,997,798	\$3,997,798
2014	\$8,210,938	\$4,105,469	\$4,061,762

Petitioner's contentions are:

Parcel No. 051-420-2825-100-006

Petitioner			
Year	TCV	SEV	TV
2012	\$3,300,000	\$1,650,000	\$1,650,000
2013	\$3,300,000	\$1,650,000	\$1,650,000
2014	\$3,300,000	\$1,650,000	\$1,650,000

The Tribunal's conclusions are:

Parcel No. 051-420-2825-100-006

Year	TCV	SEV	TV
2012	\$3,325,000	\$1,662,500	\$1,662,500
2013	\$3,490,000	\$1,745,000	\$1,702,400
2014	\$3,660,000	\$1,830,000	\$1,729,638

IT IS FURTHER ORDERED that all remaining portions of the Final Opinion and Judgment, except as modified herein, are incorporated into this Corrected Final Opinion and Judgment.

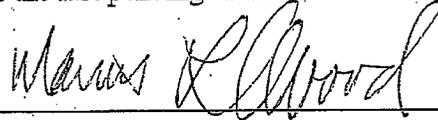
IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as provided in this Corrected Final Opinion and Judgment within 20 days of entry of this Corrected Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of

this Corrected Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Corrected Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010; (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011; (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%; and (iv) after June 30, 2012, through June 30, 2015, at the rate of 4.25%.

This Corrected Final Opinion and Judgment resolves the last pending claim and closes this case.

By



Entered: JAN 07 2015
lka

**STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL**

MENARD INC,

Petitioner,

v.

MTT Docket No. 0441600

Parcel ID No. 051-420-2825-100-006

CITY OF ESCANABA

Respondent.

Dykema Gossett PLLC
By: Carl Rashid, Jr. (P23915)
400 Renaissance Center
Detroit, MI 48243
(313) 568-5422
Attorney for Petitioner
crashid@dykema.com

Degradand, Reardon & Hall PC
By: Russell W. Hall (P34800)
517 Ludington Street
Escanaba, MI 49829
(906) 786-6009
Attorney for Respondent
degrandlaw@gmail.com

Paradigm Tax Group
By: Paul Bach
10299 Grand River Road, Suite M
Brighton, MI 48116
(810) 844-0143
Representative on Behalf of Petitioner
pbach@ptgtax.com

City of Escanaba
By Daina Norden, Assessor
410 Ludington Street, Room C101
P.O. Box 948
Escanaba, MI 49829
(906) 786-9402
Representative on Behalf of Respondent
assessor@escanaba.org

MOTION FOR RECONSIDERATION OR REHEARING

Now comes Respondent, City of Escanaba, by and through its attorney, Russell W. Hall, and moves that the Tribunal grant its Motion for Reconsideration and/or Rehearing and in support thereof states as follows:

1. The Tribunal made a mathematical error when computing the SEV for 2013 on Page 17 of the Final Opinion and Judgment (FOJ). The Tribunal determined the 2013 valuation at \$21.00 per foot and determined a TCV of \$3,350,000.00. However, since the building size was found to be 166,250, the correct TCV should have been \$3,491,250.00 not \$3,350,000.00 as noted.

The Taxable Value (TV) for 2012 was found to be \$1,662,500.00. In order to determine TV for 2013, the 2012 TV should have been multiplied by the inflationary factor for 2013 1.024 to render a TV of 1,702,400 for 2013. For determination of the 2014 TV, the 2013 TV (\$1,702,400.00) should have been multiplied by the 2014 inflationary factor of 1.016 to determine a TV of \$1,729,638.00.

2. The Tribunal and the Petitioner appraiser failed to note in the sales comparable that 5 of the comparables had use restrictions and failed to make any adjustments in determining the value of the subject property which had not use restrictions. Mr. Torzewski noted on a sales comparison that was not used stating that because it had use restrictions. However, no adjustments were made for the sale comparables used and no justification or support was presented to the Tribunal to find that the use restrictions resulted in no adjustments.

3. The Respondent requests that the Tribunal reconsider the following:

- A. In the Final Opinion and Judgment (FOJ) Page 3, Paragraph 3 "Mr. Torzewski testified to the difference between a fee simple interest and a leased fee interest." "The subject property was appraised in fee simple interest;" according to Mr. Torzewski.
- B. Submitted into evidence was Petitioner's Appraisal Report, Exhibit P-1, where the definition of Fee Simple Estate as "Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power and escheat."
- C. SALE NOT USED TO DETERMINE VALUE: Exhibit P-1 page 42 Titled, Other Considerations, states in the first paragraph "Additional sales were found and researched but excluded from our analysis for various reasons. The second paragraph from the bottom states: "The fourth sale is a former Target in Warren that sold with use restrictions in place, according to the City assessing and building departments. This negatively impacted the sale price, as no retail uses were allowed."

In Petitioner's appraisal Mr. Torzewski confirms that no longer being able to use the building for what it was built for, it's highest and best use, negatively impacts the sales price.

- D. SALE USED IN FINAL CONCLUSION OF VALUE: **Improved Sale No.1**, P-1 page 85, explains that the property had been purchased 9/23/13 for 1,250,000 "it was a cash transaction and closed quickly which may have slightly influenced the sales price." "The purchaser... indicated they intended to occupy a portion of the building and is considering leasing the remainder or possibly selling the building in the future." "The property has use restrictions which restrict the retail use of the building." "[T]hese restrictions have been relaxed over the years and were primarily driven by the Target store who wants to limit competing retail uses."

Then 1/21/14, less than 4 months later, the property was sold again. The previous purchaser having never moved in listed the property shortly after moving in and sold it for 1,750,000 a gross profit of \$500,000 over less than 4 months.

Additionally Petitioner's adjustments list a -10% adjustment which was made for condition. Sale #1, built in 2006, was listed as having Superior condition than the subject property built in 2008. This is unreasonable especially considering sale #1 was vacant for roughly 2.5 years and the subject property has never been vacant. Mr. Torzewski admitted that this adjustment was incorrect during the trial.

It should be noted as well that this property is attached to another retail space on the South boundary of its building as shown in Respondent's Exhibit 1 page 48, which shows that this is dissimilar to the subject property again with no adjustment or discussion.

E. SALE USED IN FINAL CONCLUSION OF VALUE: **Improved Sale No.3**, P-1 page 89. This sale was a transfer from Wal-Mart Stores to Gratiot Legend LLC. This sale had large use restrictions which were not mentioned at all in Petitioner's Appraisal. See Respondent's Exhibit 3, Page 3. The use restrictions begin *"This conveyance is expressly subject to the following conditions and restrictions:*

(a) *The Property will not be used for or in support of the following: (i) a grocery store or supermarket, as hereinafter defined below; (ii) a wholesale club operation similar to that of a Sam's Club owned and operated by Wal-Mart; (iii) a discount department store or other discount store, as hereinafter defined; (iv) a pharmacy; or (v) gaming activities (including but not limited to gambling, electronic gaming machines, slot machines and other devices similar to the aforementioned), billiard parlor, any place of recreation/amusement, or any business whose principal revenues are from the sale of alcoholic beverages for on or off premises consumption (the "Property Restrictions"). "Grocery store" and "supermarket", as those terms are used herein, shall mean a food store or a food department containing more than thirty-five thousand (35,000) square feet of gross leasable area, for the purpose of selling food for consumption off the premises, which shall include but not be limited to the sale of dry, refrigerated or frozen groceries, meat, seafood, poultry, produce, delicatessen or bakery products, refrigerated or frozen dairy products, or any grocery products normally sold in such stores or departments. "Discount department store" and/or "discount store", as those terms are used herein, shall mean a discount department store or discount store containing more than fifty thousand (50,000) square feet of gross leasable area, for the purpose of selling a full line of hard goods and soft goods (e.g. clothing, cards, gifts, electronics, garden supplies, furniture, lawnmowers, toys, health and beauty aids, hardware items, bath accessories and auto accessories) at a discount in a retail operation similar to that of Wal-Mart. Notwithstanding the foregoing, the Property Restrictions shall not apply to Wal-Mart Stores, Inc., or any parent company, affiliate, subsidiary, or related company.*

(b) *The Property shall not be used for or in support of the following: (i) adult book store, adult video store (an adult video store is a video store that sells or rents videos that are rated NC-17, X, XX, XXX, or of a rating assigned to works containing material more sexually explicit than XXX, by the film rating board of the Classification and Rating Administration), "adult" business activities, including without limitation any massage parlor, escort service, facility with nude (or partially nude, bathing suit-clad or lingerie-clad) models or dancers or any establishment selling or exhibiting sexually explicit materials; or (ii) bar or night club (the "Noxious Use Restrictions").*

(c) *The Property Restrictions shall remain in effect for a period of twenty-five (25) years. The Noxious Use Restrictions shall be perpetual unless applicable law prohibits a perpetual restriction, in which case the Noxious Use Restrictions shall remain in effect for the maximum amount of time allowed by law but in no event fewer than one hundred (100) years. The aforesaid covenants, conditions, and restrictions shall run with and bind the Property, and shall bind Grantee or an affiliated entity, or its successors or assigns, and shall inure to the benefit of and be enforceable by Grantor, or an affiliated entity, or its successors and assigns, by any appropriate proceedings at law or in equity to prevent violations of such covenants, conditions, and restrictions and/or to recover damages for such violations, including without limitation damages incurred by Grantor, or an affiliated entity, concerning the business conducted on the land adjacent to the Property"*

These restrictions greatly restrict the use of the property for retail purposes.

There was a prior sale listed where Wal-Mart purchased the same property that they were previously leasing to be an; owner-occupied, free-standing, single tenant, retail building for \$3,550,000 in July of 2010 as stated in P-1 page 90. That would calculate to \$30.36 per sq. ft. using the 5% adjustment and square footage listed by the appraisal.

Yet the appraiser contested that deed restrictions were investigated in each of the comparable sales, "particularly in a case like this where we know going in that a lot of the sales would have some sort of a deed restriction attached, we ask did these deed restrictions have any effect on the sales price?" However, in his appraisal, Mr. Torzewski stated on page 39 under the heading "1. Real Property Rights Conveyed" that "All of the sales are fee simple transactions. Accordingly, no adjustments for differences in property rights conveyed are made to any of the comparable sales." Additionally on the included data sheet there is no mention of the property rights not conveyed as a part of the sale, nor was there mention on who was spoken to in order to determine that these greatly reduced property rights affected the sales price. Lastly, there was no mention of the cost to convert the Wal-Mart store into a light manufacturing plant.

The buyer bought and used the property for light manufacturing purposes. Keep in mind that the Highest and Best Use as determined by the Appraiser and the City of Escanaba is continued use of the existing improvements as a free-standing **retail** building.

Clearly there is an absence of complete disclosure, unless of course Mr. Torzewski was not aware of the use restrictions, in that case it was just negligence on the part of Mr. Torzewski. Either way there is a blatant contradiction between his testimony and his appraisal report.

- F. **SALE USED IN FINAL CONCLUSION OF VALUE: Improved Sale No.4**, P-1 page 92 was a foreclosure sale. This was also sold and converted into industrial space.
- G. **SALE USED IN FINAL CONCLUSION OF VALUE: Improved Sale No.5**, P-1 page 93 was also sold as a manufacturing use and rezoned just prior to the sale to allow for the use remaining which was dictated by the greatly restricting use restrictions. These use restrictions which are nearly identical if not identical to those use restrictions listed with Improved Sale No. 3. These use restrictions **demand** that the space be converted into something other than what the building was built for. Something other than the highest and best use. This is a flagrant violation of appraisal practice by Mr. Torzewski in his refusal to admit that these restrictions do affect the sales price of the property and further by his absence of even noting the restrictions exist. Yet on the contrary he does admit that use restrictions affect the sales price in a property as it states in his appraisal (Exhibit P-1) on page 42.

Note that in Standards Rule 2-1(b), USPAP says the report must contain sufficient information to enable the intended users to understand the report properly.

- H. **SALE USED IN FINAL CONCLUSION OF VALUE: Improved Sale No.6**, P-1 page 95. This was an arms-length transaction, see Respondent's Exhibit 6 page 2. Although clearly Mr. Torzewski stated on the stand that "all of his comparable sales had some type of deed restrictions but none that impacted their sale prices" (FOJ page 4), he must have misspoke. Another contradiction between the written appraisal report and testimony. **SALE USED IN FINAL CONCLUSION OF VALUE: Improved Sale No.7**, P-1 page 97 also did not have use restrictions

on the property. Mr. Torzewski's statement would also not apply to this sale. The problem with this sale is that the land is listed incorrectly as 150,282 sq. ft. and it should be 74,021 sq. ft., see Respondent's Exhibit 7.

- I. **SALE USED IN FINAL CONCLUSION OF VALUE: Improved Sale No.8, P-1** page 99 again has use restrictions, though they are fewer than sales 3 and 5 they still limit the use of the property for 20 years. Again there was zero mention of any restrictions, additionally the sales price is reduced for an "extra lot" which if included into the original lot still comes out at a smaller size than the subject properties land size. Combining the entire parcel and adjusting the sale for the -10% adjustment places the price per sq. ft. at \$ 24.11.
- J. The Constitution states in SECTION 3 Property taxation; uniformity; assessments; limitations; classes; approval of legislature that "The legislature shall provide for the **uniform** general ad valorem taxation of real and tangible personal property not exempt by law..." "The legislature shall provide for the determination of true cash value of such property..."
- K. ACT 206 of 1893: **211.27 "TRUE CASH VALUE"** Sec. 27 (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."
- L. **Highest and best use is the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.**

- M. USPAP's SR 2-2 a (x), b (x), and c (x) says the appraisal report must "clearly and conspicuously state all extraordinary assumptions; and state that their use might have affected the assignment results." This does not mean the property must be appraised twice—both with and without the extraordinary assumption. It simply means the client and intended users must be alerted to the extraordinary assumptions so that their significance, given the intended use, can be comprehended

It would appear that the submitted appraisal has an underlying Extraordinary Assumption which was not disclosed as a part of the appraisal report. That Extraordinary Assumption is that if this property was sold as "general fee simple, vacant and available space" the seller of the property would be transferring their business within the market area and would want to limit the use of the property and would thereby by their own motivation limit the use of the property to the potential buyer thereby retaining a portion of the property rights for a specified number of years. In doing so this is no longer a "fee simple" ownership as repeatedly stated by Mr. Torzewski. The property rights transferred to the purchaser are not whole and are not "Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power and escheat."

- O. Appraisal Institute Standards of Valuation Practice Effective January 1, 2015 STANDARD C: A report must be clear and not misleading. As a matter of fact it clearly shows that the valuation without the use restrictions, the true "fee simple" ownership is shown on sale number three (P-1 page 89) was a prior sale listed where Wal-Mart purchased the same property that they were previously leasing to become an; owner-occupied, free-standing, single tenant, retail building for \$3,550,000 in July of 2010 as stated in P-1 page 90. That would calculate to \$30.36 per sq. ft. using the 5% adjustment and square footage listed by the appraisal. That is the price paid to have the complete rights to a property.

In conclusion we appeal to the Michigan Tax Tribunal to reconsider its decision. The facts included in the case clearly show that these substantial restrictions on the allowed uses of the property are detrimental to the existing property and were completely ignored by Mr. Torzewski who only references them on the stand as "all of his comparable sales had some type of deed restrictions but none that impacted their sale prices". This statement is both arguable in premise and a completely false in that **the appraisal has sales without use restrictions.** The judgment uses the same sales which are falsely presented by Mr. Torzewski. The court by ignoring the facts of the sales and making no adjustment for the self-imposed use restrictions placed by the seller is subsequently creating a value based on incorrect appraisal practices which ignore the highest and best use of the property and ignore the definition of true cash value which is the "usual selling price" and "being the price that could be obtained" and ignore fee simple ownership which is "**absolute ownership unencumbered by any other interest**" and ignore the obvious misrepresentations and false statement set forth in the appraisal thus concluding to a false value.

Respectfully Submitted,

Date: _____

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