STATE OF MICHIGAN
IN THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL FROM
MICHIGAN COURT OF APPEALS

BEFORE: Talbot, C.J., and Hoekstra and Shapiro, JJ.

MENARD, INC.,

Petitioner-Appellant,

v

CITY OF ESCANABA,

Respondent-Appellee.
_____/

Supreme Court No. 154062
Court of Appeals No. 325718
MTT Nos. 00-441600 and 14-001918-TT

BRIEF OF *AMICI CURIAE* MICHIGAN MUNICIPALITIES

Submitted by: Cities of Otsego, Coldwater, Sault Sainte Marie, Fenton, Novi, East Lansing, Kentwood, Lowell, Norton Shores, Auburn Hills, Novi, Reed City, Grand Haven, Sturgis, Three Rivers, Harper Woods and Allen Park; Village of Dundee; Charter Townships of Dewitt, Breitung, Clinton, Delta, Windsor, Grand Blanc, Meridian, Oshtemo, Plainfield, Marquette and Orion; Township of Hartland; and Counties of Dickinson, Eaton and Ingham.

Dated: March 29, 2017

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STATEMENT OF AUTHORITY AND RELIEF SOUGHT

On May 26, 2016, the Michigan Court of Appeals issued *Menard, Inc v Escanaba*, 315 Mich App 512 (2016), reversing the opinion below by the Michigan Tax Tribunal ("MTT"). Menard, Inc. ("Menard") filed an application for leave to appeal to this Court. On February 1, 2017, this Court ordered the Clerk to schedule oral argument on whether to grant the application or take other action, and directed the parties to file supplemental briefs on two (2) issues.

Amici Curiae Michigan Municipalities, 33 political subdivisions of this State, submit this brief pursuant to MCR 7.312(H)(2).[1] *See, e.g., Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921). The Michigan Municipalities submit this *Amici Curiae* brief to address the two (2) issues identified by this Court. The Michigan Municipalities maintain that the Court of Appeals properly resolved this case, including the two (2) issues raised by this Court, so leave to appeal should be denied.

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[1] *Amici Curiae* Michigan Municipalities are 33 counties, cities, villages, charter townships and townships located across the State of Michigan in 23 counties. They include the following local units of government:

Cities: Otsego (Allegan County), Coldwater (Branch County), Sault Sainte Marie (Chippewa County), Fenton (Genesee, Oakland and Livingston Counties), East Lansing (Ingham and Clinton Counties), Kentwood and Lowell (Kent County), Norton Shores (Muskegon County), Auburn Hills and Novi (Oakland County), Reed City (Osceola County), Grand Haven (Ottawa County), Sturgis and Three Rivers (Saint Joseph County), and Allen Park and Harper Woods (Wayne County).

Villages: Dundee (Monroe County).

Charter Townships: Dewitt (Clinton County), Breitung (Dickinson County), Delta and Windsor (Eaton County), Grand Blanc (Genesee County), Meridian (Ingham County), Oshtemo (Kalamazoo County), Plainfield (Kent County), Clinton (Macomb County), Marquette (Marquette County) and Orion (Oakland County).

Townships: Hartland (Livingston County).

Counties: Dickinson, Eaton and Ingham Counties.

STATEMENT OF QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS EXCEED THE STANDARDS OF REVIEW APPLICABLE TO MTT DECISIONS?

Petitioner-Appellant Menard answers:	Yes
Respondent-Appellee Escanaba answers:	No
The Court of Appeals answered:	No
Amici Curiae Michigan Municipalities answer:	No

2. MAY THE MTT USE AN APPROACH TO VALUE SIMILAR TO *CLARK EQUIPMENT CO v LEONI TWP*, 113 MICH APP 778; 318 NW2d 586 (1982)?

Petitioner-Appellant Menard answers:	No
Respondent-Appellee Escanaba answers:	Yes
The Court of Appeals answered:	Yes
Amici Curiae Michigan Municipalities answer:	Yes

INTRODUCTION

The MTT adopted Menard's property tax valuation theory to drastically lower the "true cash value" of Menard's "big box store" property. Menard's property is presently used for its highest and best use as a freestanding retail building. The MTT valued Menard's property based on sales of former big box stores that were encumbered by deed restrictions and could not be used for the same" highest and best use" as Menard's property. The Court of Appeals recognized that the deed restrictions reduced the value of the alleged "comparables" as compared to Menard's property. Imposing deed restrictions that limit property uses remove a significant portion of the "bundle of sticks" of full property ownership. Anyone willing to buy what remains will pay only a discount price for an empty shell that must be demolished or converted to some secondary use.

Menard wants special tax treatment for its big box store, but our Constitution requires ***uniformity*** of taxation. Const 1963, art 9, §3. Over the years, this Court and the Court of Appeals have rejected similar taxpayer theories that attempted to undervalue property, finding those theories unlawful or based on wrong principles under Const 1963, art 6, §28.

Amici Curiae Michigan Municipalities agree with the Court of Appeals' decision of this case. Michigan courts must ensure lawful and uniform application of tax statutes and correct appraisal principles. Creative and well-financed taxpayers often fabricate new theories in MTT property tax appeals, seeking to reduce their property taxes. Cities and townships must defend all of those tax appeals, even though cities and townships receive only a fraction of the property taxes at issue, which are substantially less than the litigation costs of such appeals for any property. Judicial review of the MTT provides a constitutional safeguard against attempts to gain special tax treatment for certain taxpayers, rather than uniform treatment for all taxpayers, at the expense of funding for education and other essential local services by local units of government.

The MTT's theory in this case would remove many millions of dollars of property tax support for essential local services across Michigan. Throughout the State, that would impair the funding for primary and secondary education (including the 18-mill education operating millage and 6-mill state education tax), as well as revenues for essential services provided by counties, cities, villages, townships, public libraries, police and fire departments, intermediate school districts, community colleges, special purpose districts and municipal authorities.

The Court of Appeals applied controlling law and correct appraisal principles to reverse the MTT's flawed decision. Since the Court of Appeals reached the correct result, this Court should deny leave to appeal.

STATEMENT OF FACTS

Amici Curiae Michigan Municipalities adopt the Statement of Facts in Escanaba's Answer to Application for Leave to Appeal. Additional detail is discussed below in context.

STANDARDS OF REVIEW

General Review Standards. The MTT is an administrative agency in the Department of Treasury. MCL 205.721. Appellate review of the MTT is provided by MCL 205.753:

> "Subject to [Const 1963, art 6, §28] and pursuant to [MCL 24.302], and in accordance with the Michigan court rules, an appeal from the [MTT's] decision shall be by right to the court of appeals."

Const 1963, art 6, §28 provides judicial review of all final administrative agency decisions to ensure that they are at "a minimum" (1) "authorized by law" and (2) "supported by competent, material and substantial evidence on the whole record." In addition, for MTT decisions, that constitutional provision specifies review for "fraud, error of law or the adoption of wrong principles."

Legal Questions. This Court reviews legal questions *de novo*. *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999); and *Cardinal Mooney High School v Michigan High School Athletic Assn*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Statutory Construction. This Court also reviews questions of statutory construction *de novo*. *Preserve the Dunes, Inc v MDEQ*, 471 Mich 508, 513; 684 NW2d 847 (2004). In its review of statutory interpretation:

> "… this Court must 'ascertain and give effect to the intent of the Legislature.' The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute. In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory. 'As far as possible, effect should be given to every phrase, clause, and word in the statute.' Moreover, the statutory language must be read and understood in its grammatical context. When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme" (footnotes omitted). *MDEQ v Worth Twp*, 491 Mich 227, 237-38; 814 NW2d 646 (2012).

Constitutional Construction. This Court reviews questions of constitutional construction *de novo*. *See Wayne County v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004), explaining:

> "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. This rule of 'common understanding' has been described by Justice Cooley in this way:
>
> "'A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.'
>
> "In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified." 471 Mich at 468 (footnotes omitted).

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE REQUIRED *DE NOVO* STANDARD OF REVIEW TO REVERSE THE MTT'S DECISION.

Amici Curiae Michigan Municipalities observe that the Court of Appeals applied all the appropriate standards of review discussed above to the MTT decision in this appeal. This is evident from a careful review of the Court of Appeals decision itself, which correctly applied de *novo review* to the legal errors and wrong principles that caused the MTT to reach an incorrect decision. Several points of the Court of Appeals' review show that it applied the correct standards.

A. The MTT Accepted an Unlawful Sales Comparison Approach and Adopted Wrong Appraisal Principles for that Approach By Relying on Deed-Restricted Properties as "Comparables."

The MTT adopted the appraisal theory of Menard's appraiser, Joseph Torzewski, who used a sales comparison approach[2] to appraise a "fee simple interest"[3] in Menard's property based on comparisons to sales of ***former big box stores encumbered by deed restrictions***. The Court of Appeals found that the MTT's decision was "based on an error of law and was not supported by competent, material, and substantial evidence" (Slip Op, p 7).[4]

Menard incorrectly suggests that the Court of Appeals reversed the MTT on fact questions and Torzewski's credibility. Menard also wrongly argues that, if the MTT's decision is supported by ***any*** expert testimony (even if unlawful or based on wrong principles), then the MTT decision

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[2] The three traditional methods of appraisal are: (1) the sales comparison approach, (2) the income capitalization approach, and (3) the cost approach. *Meadowlanes Ltd Dividend Housing Assoc v Holland*, 437 Mich 473, 484-85; 473 NW2d 636 (1991).

[3] "Fee simple estate" means: "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." *Dictionary of Real Estate Appraisal* (Chicago, 5th Ed, 2010), p 278.

[4] Page cites are the Court of Appeals' slip opinion.

is beyond any court's review. But an MTT decision based on a flawed appraisal is unlawful and requires reversal. *Fisher-New Center Co v State Tax Commission*, 380 Mich 340, 380; 157 NW2d 271 (1968) (opinion of Justice Souris); *Fisher-New Center Co v State Tax Commission*, 381 Mich 713, 715; 167 NW2d 263 (1969) (adopting Justice Souris' opinion on rehearing).

It is clearly not the law that an appraisal is "unreviewable" simply because it is submitted by an appraiser and accepted by the MTT. In *Meadowlanes Ltd Dividend Housing Assoc v Holland*, 437 Mich 473, 476; 473 NW2d 636 (1991), the taxpayer's appraiser used wrong principles to reduce the claimed value of property by disregarding the actual financial benefits of the property's subsidized mortgages. The MTT and Court of Appeals adopted the theory offered by the taxpayer's appraiser, but this Court reversed, holding that the MTT "adopted a wrong principle by determining the true cash value of the subject property under a flawed appraisal method." 437 Mich at 476. This Court explained that:

> "We hold that the Tax Tribunal and the Court of Appeals did in fact ***adopt a wrong principle when they determined the true cash value of the [taxpayer's] property using [the taxpayer's appraiser's]*** … ***approach*** … [lengthy discussion of why the appraisal methodology used by the taxpayer's appraiser was contrary to law]. Thus, ***the Tax Tribunal adopted a wrong principle*** by using [the taxpayer's appraiser's] … approach in determining the true cash value of the subject property. This ***approach makes a number of invalid assumptions*** … In so doing, it has the potential for creating ***irrational disparities in the true cash value of real property*** and thus ***violates the constitutional mandate of uniformity*** in the assessment of *ad valorem* taxes" 437 Mich at 494 (emphasis added).

The valuation approach adopted by the MTT here also created "irrational disparities" in property values, and violated the constitutional mandate of "uniformity" in Const 1963, art 9, §3:

> "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…." Const 1963, art 9, §3 (emphasis added).

"Uniformity" requires that all relevant factors affecting a property's value must be considered. The deed restrictions encumbering Torzewski's alleged "comparables" reduced their "true cash value" as compared to Menard's big box store, like the subsidized mortgages in *Meadowlanes, supra,* increased the "true cash value" of the subject properties in that case. *Meadowlanes* analogized the mortgage subsidies to other MCL 211.27(1) considerations for "true cash value," since they are all "intangible" "value-influencing factors." 437 Mich at 494-98. Just as subsidized mortgages had to be considered in determining "true cash value" in *Meadowlanes,* the deed restrictions (or lack thereof) must be considered here.[5]

Meadowlanes followed *Antisdale v Galesburg*, 420 Mich 265, 285; 362 NW2d 632 (1984), where this Court held that the MTT adopted a wrong principle, since "if it can be shown that the sale price [for] each of the comparable properties has been determined by a flawed method the result of the [sales comparison] approach to valuation will also be flawed." 420 Mich at 278-79. The Court noted that "true cash value" can be affected by "***deed restrictions***":

> "To the extent that tax benefits to a typical owner affect the 'usual selling price' of property, they are properly included within the true cash value of the property. Tax benefits, like ***deed restrictions*** [citations omitted] 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***." 420 Mich at 285 (emphasis added).

Edward Rose Bldg Co v Independence Twp, 436 Mich 620; 462 NW2d 325 (1990) does not support Menard's position. The Court of Appeals there reversed the MTT for using a "wholesale discount" to value subdivision lots that were being offered only at retail. This Court

[5] To use an analogy in another context, consider that telephone poles and wires have little value without a franchise allowing the utility to use them to provide telephone service. *Michigan Bell Telephone Co v Dept of Treasury*, 445 Mich 470; 518 NW2d 808 (1994). Likewise, a former big box store that can no longer be used as such is only a fractional property interest. The empty shell that any prospective buyer would have to demolish or convert to some secondary use has a lower value than a freestanding retail building that can be used as a big box store.

held that the MTT adopted wrong principles in applying a wholesale discount to retail lots. 436 Mich at 634, 639. The Court stated that "'the usual selling price'—requires that actual facts be a significant consideration in the valuation of property," rather than "unduly speculative" scenarios. 436 Mich at 638. The Court also quoted the Court of Appeals with approval:

> "The term 'fair market value' presumes a market. Petitioner may not fairly argue that its property value is comparable to other group lot sales when petitioner specifically refuses to sell on that basis. The Tax Tribunal is bound to review the actual facts in a case and not possible or hypothetical sales in evaluating [true cash value]." 436 Mich at 629, quoting *Edward Rose Bldg Co v Independence Twp*, 164 Mich App 324, 328; 416 NW2d 433 (1990).

The Court of Appeals ruled that Menard's property must be assessed at its highest and best use ("HBU"), and the MTT "made an error of law by failing to value the subject property at its HBU" (Slip Op, p 8). In *Edward Rose Bldg Co, supra*, 436 Mich at 623, this Court explained that:

> "'Highest and best use' is a concept fundamental to the determination of true cash value. It recognizes that the use to which a prospective buyer will put the property will influence the price which the buyer would be willing to pay. Land is appropriately valued 'as if available for development to its highest and best use, that most likely legal use which will yield the highest present worth.'" (Citations omitted).

In *Detroit/Wayne County Stadium Authority v Drinkwater, Taylor and Merrill, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005), the Court of Appeals stated that:

> "'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.'" (quoting M Civ J I, 90.09; emphasis added).

In *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 285; 730 NW2d 523 (2006), the Court held that the highest and best use is the "legally permissible, financially feasible, maximally productive, and physically possible" use of the property. The use of Menard's property as an owner-occupied freestanding retail building is the property's highest and best use, since that use is legally permissible, financially feasible, maximally productive and physically possible.

Torzewski used flawed evidence to "prove" his flawed theory, since the deed restrictions encumbering his chosen "comparables" made it impermissible, infeasible and impossible for their use as freestanding retail buildings. In other words, due to the deed restrictions, the highest and best use of Torzewski's "comparables" was not the same as Menard's property. Basing an appraisal on such defective "comparables" is not just a matter of weighing facts or credibility. Rather, it involves the application of wrong principles, as the Appraisal Institute clearly explains:

> "***Potentially comparable properties that do not have the same highest and best use are usually eliminated from further analysis***. …
>
> "Some sale contracts call for the sale of real property rights but add ***deed restrictions*** or other forms of limitations on the purchaser or future users of the property. That sort of title or use limitation ***may limit the transaction's use to a general market indicator or render the transaction unusable for direct market comparison because the real property rights conveyed are less than fee simple***" *The Appraisal of Real Estate*, 14th Ed, pp 43, 406 (emphasis added).

The Court of Appeals recognized that the deed restrictions prevented Torzewski's "comparables" from having the same highest and best use and value as Menard's property because (1) buyers seeking a freestanding retail building were eliminated; (2) any buyers were limited by the restrictions; and (3) any buyers would need to demolish or convert the properties to a secondary use (Slip Op, p 8). The MTT applied a "wrong principle" in valuing Menard's property and its highest and best use based on discounted sale prices of properties with a different highest and best use. *Edward Rose Bldg Co, supra*, 436 Mich 634; *Appraisal of Real Estate*, *supra*, pp 43, 406.

B. <u>The MTT Based Its Decision on Incompetent Testimony.</u>

Although Menard acknowledges that correct principles require deed restrictions to be considered in property value (Menard Supp Br, p 8), it argues that Torzewski testified the deed

restrictions did not affect his "comparables."[6] Torzewski's opinion about the effect of the deed restrictions on the values of his "comparables" was solely based on his discussions with the parties actually involved in those purchase transactions. As the Court of Appeals explained, Torzewski's "testimony is only sufficient to establish that ***to the parties involved in the actual transaction***, the deed restrictions did not affect the sales price they were willing to pay. In other words, the market for sale was limited to those purchasers who were willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple" (Slip Op, pp 7-8; emphasis in original).[7]

C. The MTT's Findings Are Unlawful Because They Are Not Supported by Competent, Material and Substantial Evidence on the Whole Record.

Menard claims that the MTT fact-findings are conclusive and not subject to judicial review (*e.g.*, Menard Supp Br, pp 5, 7). But Menard's argument is contrary to precedent of this Court and the Court of Appeals. *Fisher-New Center Co, supra*, 380 Mich at 382 (Justice Souris explaining that underlying assumptions upon which opinion was based were not supported by facts in the record); *Fisher-New Center Co, supra*, 381 Mich at 715 (adopting Justice Souris' opinion on rehearing); *Oldenberg v Dryden Twp*, 198 Mich App 696, 698; 499 NW2d 416 (1993) ("The Tax Tribunal's failure to base its decision on competent, material and substantial evidence on the record as a whole is an error of law"); *Kern v Pontiac Twp*, 93 Mich App 612, 620; 287 NW2d 603 (1979).

Menard also ignores this Court's holding in *MERC v Detroit Symphony Orchestra*, 393 Mich 116; 223 NW2d 283 (1974), which affirmed the Court of Appeals' reversal of MERC Board

[6] That is like testifying that a bite out of an apple does not affect its price, since a whole apple has value, but an apple with a bite out of it is garbage. *See Bonstores Realty One, LLC v Wauwatosa*, 351 Wis2d 439. 454-55; 839 NW2d 893 (2013) (discussing lack of an "apples-to-apples comparison" where taxpayer's appraiser used comparables that were "dark" stores not operating).

[7] By analogy, the value of a car is higher if it is drivable, rather than having to be sold to a junkyard for parts. But if you ask the junkyard owner if he cares that he bought scrap, he could be expected to say: "No, I paid scrap value for scrap."

findings of fact that were "supported by some record evidence." 393 Mich at 121. Based on the 1961 Constitutional Convention record of Const 1963, art 6, §28 (393 Mich at 122-24), this Court held that this constitutional provision requires "meaningful review" of the "whole record":

> "The cross-fire of debate at the Constitutional Convention imports meaning to the 'substantial evidence' standard in Michigan jurisprudence. What the ***drafters of the Constitution intended*** was ***a thorough judicial review of administrative decisions, a review which considers the whole record –*** that is, both sides of the record ***– not just those portions of the record supporting the findings of the administrative agency***. Although such a review does not attain the status of *de novo* review, it necessarily ***entails a degree of qualitative and quantitative evaluation of the evidence considered by an agency***. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk a tightrope of duty which ***requires judges to provide the prescribed meaningful review***." 393 Mich at 124 (emphasis added).

Although the MTT may weigh the testimony of one witness over another based on credibility, it cannot simply ignore or reject the testimony of all but the one witness who supports its desired outcome. The Court must consider "both sides of the record – not just those portions of the record supporting the findings of the administrative agency." *MERC, supra*, 393 Mich at 124. The MTT may not disregard relevant evidence to reach an unlawful or arbitrary decision.

Expert testimony is "substantial" only if it is offered by a ***qualified*** expert who has an ***informed*** and ***rational*** basis for his view. *Great Lakes Steel v Public Service Comm*, 130 Mich App 470, 481; 334 NW2d 321 (1983). Expert testimony may not be considered if it is "connected to existing data only by the *ipse dixit* of the expert." *General Electric Co v Joiner*, 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997); *Gilbert v DaimlerChrysler Corp*, 470 Mich749, 783; 685 NW2d 391 (2004). What matters is "not what the experts say, but what basis they have for saying it." *Daubert v Merrell Dow Pharmaceuticals, Inc*, 43 F3d 1311, 1316 (CA 9, 1995). Unfounded and disproven assertions are entitled to no weight, and cannot support an MTT

decision. *Ludington Service Corp v Commr of Insurance*, 444 Mich 481, 483, 494-97, 500-501, 507; 511 NW2d 661 (1994), *amended* 444 Mich 1240 (1994) (reversing administrative agency decision that exceeded the limits of its statutory authority, and decided based on speculation instead of substantial evidence).

Menard attempts to preclude consideration of any appraisal methodology other than Torzewski's flawed sales comparison approach (*e.g.*, Menard Supp Br, pp 10-16). There are three well-recognized valuation approaches,[8] and other methods may be presented if they are demonstrated to be accurate and reasonably related to the fair market value of the subject property. *Meadowlanes, supra*, 437 Mich at 501-502. The Court of Appeals properly remanded this case for further evidentiary proceedings and consideration of other appraisal approaches in accordance with the controlling law and correct appraisal principles (Slip Op, p 12).

D. <u>The MTT's "Expertise" Cannot Shield an Unlawful or Unprincipled Decision.</u>

Menard suggests that the Court of Appeals erred by not deferring to the MTT's "expertise" (Menard Supp Br, p 10). Although Menard quotes *Edward Rose Bldg Co, supra*, 436 Mich at 631-32, it totally ignores what this Court actually held in that case:

> "Despite this deferential standard of review, we conclude under the present circumstances that the ***Tax Tribunal adopted a wrong principle*** in discounting the individual lot values by a factor of eighteen percent. The tribunal's valuation of petitioner's property utilizing a wholesale discount was an ***improper method of valuation which distorted the fair market value of the property***" 436 Mich at 632 (emphasis added).

The MTT is also bound by correct appraisal principles, as discussed above. An MTT opinion that deviates from controlling law and appraisal principles is entitled to no deference.

Limited deference is due the MTT's "expertise" on factual matters, since findings of fact are reviewed for "competent, material and substantial evidence on the whole record." Whatever

[8] See footnote 2.

"expertise" the MTT may have to choose between alternatives that are supported on the record lacks relevance here, however, where the MTT's chosen result is both unlawful and based on wrong appraisal principles.

Regarding expertise, it is notable that the MTT was initially contemplated by statute to sit on cases as a multi-disciplinary tribunal of experts. MCL 205.722 (providing that at least two MTT members shall be attorneys, at least one member shall be a certified assessor, at least one member shall be a professional real estate appraiser, and at least one member shall be a certified public accountant). But that is not how the MTT actually operates. In this case, for example, the MTT opinion was issued by a single MTT Judge who is not an attorney, not an assessor and not a certified public accountant. Although certified as a residential real estate appraiser, the Judge was not a commercial appraiser. "Expertise" was not a factor requiring any extraordinary deference.

E. Menard Failed to Carry Its Burden of Proof.

MCL 205.737(3) provides that: "The petitioner [taxpayer] has the burden of proof in establishing the true cash value of the property." In *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976), this Court explained that: "The party alleging a fact to be true should suffer the consequences of a failure to prove the truth of that allegation."

Menard's burden of proof in the MTT included both (1) the burden of persuasion; and (2) the burden of going forward with evidence. *Jones & Laughlin Steel Corp v Warren*, 193 Mich App 348, 354-55; 483 NW2d 416 (1992). Unproven allegations cannot stand in the place of evidence. Things not proven by Menard must be taken as not existing, since a decision cannot be based upon conjecture. *Star Steel v USF&G*, 186 Mich App 475, 481; 465 NW2d 17 (1990); *see also, Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994).

Since Menard presented an inherently flawed appraisal theory, it failed to carry its burden of proof in the MTT. The MTT was thus required make an independent and otherwise proper

determination of true cash value based on the substantial evidence before it. *Jones & Laughlin Steel Corp, supra,* 193 Mich App at 351-56. If the record is insufficient for the MTT to make a proper decision, then the remedy is to remand to the MTT for further proceedings. That is what the Court of Appeals did here, and there is no basis to deviate from that correct result.

Thus, the answer to this Court's first question is "NO." The Court of Appeals did not exceed the *de novo* scope of appellate review, but did its appellate duty. Menard's efforts to obtain special tax treatment must yield to Constitutionally-required uniformity of taxation and application of correct appraisal principles. The MTT's decision adopting Menard's faulty appraisal theory was unlawful, contrary to correct appraisal principles and unsupported by the competent, material and substantial evidence on the whole record. There is no basis to disturb the Court of Appeals' correct review and resolution of this case.

II. THE MTT MAY USE AN APPROACH TO VALUE AS IN *CLARK EQUIPMENT CO v LEONI TWP,* 113 MICH APP 778; 318 NW2d 586 (1982).

A. The Cost Approach is Well-Suited for the Valuation of Big Box Stores.

The Court of Appeals held that the MTT erred by refusing to consider Escanaba's evidence under the cost approach (Slip Op, p 10). Since the "comparables" that the MTT used were inappropriate (as discussed above), and the sale of former big box stores was limited and distorted by deed restrictions prohibiting their resale and reuse as freestanding retail buildings, the sales approach used by the MTT was inaccurate and unrealistic in this case.

The Court of Appeals faced a similar situation involving the valuation of an industrial property in *Clark Equipment Co v Leoni Twp,* 113 Mich App 778; 318 NW2d 586 (1982). There, the Court explained that MCL 211.27 requires rejection of a fictional-discount appraisal methodology for unique but presently-used properties, since:

> "The reality is that these types of industrial plants are rarely bought and sold … However, as we construe M.C.L. §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 M.C.L. §211.27 … a hypothetical buyer must be posited, although, in actuality, such a buyer may not exist. To construe M.C.L. §211.27 … as requiring the taxing unit to prove an actual market for a property's existing use would lead to absurd undervaluations. 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. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists." 113 Mich App at 784-85.

Instead of basing values on clearly non-comparable, deed-restricted properties, and in the absence of any other comparable sales, it is reasonable for the MTT to use one of the other accepted methods of valuation.[9] In this case, where the property involved is a basic big box of standard construction and design, the use of the cost approach to valuation presents the most logical and compelling means of determining value, just as in *Clark Equipment*.

B. Menard's "Value in Use" Argument Attempts to Ignore the Highest and Best Use of its Property.

Menard attacks the approach recognized by *Clark Equipment, supra*, claiming that it is an improper "value in use" standard. A long line of Court of Appeals decisions recognizes that "true cash value" is required to be based on reality and MCL 211.27(1)'s factors. As discussed above (particularly in Argument I. A), the Court of Appeals properly ruled that the MTT made an error

[9] See footnote 2.

of law by failing to value Menard's property at its highest and best use (Slip Op, p 8). Menard's position regarding *Clark Equipment* further reflects Menard's attempt to avoid the "highest and best use" requirement.

Menard essentially states inconsistent positions. On one hand, Menard claims that it has a custom-built building like the property at issue in *Clark Equipment*, stating: "Indeed, custom built properties generally have functional obsolescence built into them from day one" (Menard Supp Br, p 14, quoting *Clark Equipment* with approval at footnote 15). But on the other hand, Menard seeks to discredit the *Clark Equipment* valuation approach for such unique properties, in favor of simply comparing the sales of defunct properties encumbered by deed restrictions that cannot be used for the same highest and best use. Menard's positions are mutually-exclusive. If Menard's building is truly "unique," then it cannot also be comparable to a closed and deed-restricted shell.

To create the illusion of a coherent theory, Menard seeks to escape from the highest and best use of its own property by labeling it a "value in use," claiming its store could be valued based on some alternative other than its highest and best use. The Court of Appeals properly ruled otherwise, recognizing that that the *Clark Equipment* approach is applicable when a sales comparison approach fails due to the lack of any "comparable" sales.

Courts in other states have similarly rejected taxpayers' disguised arguments attacking the "highest and best use" requirement. For example, in *Meijer Stores Ltd Partnership v Franklin County Bd of Revision*, 122 Ohio St 3d 447, 912 NE2d 560, 566 (2009), the Ohio Supreme Court rejected a taxpayer's similar attempt to distinguish use value from highest and best use in an analogous case concerning the tax valuation for a Meijer "big box" store. See also *STC Submarine, Inc v Dep't of Revenue*, 320 Or 589; 890 P2d 1370, 1374 (1995), where the Oregon Supreme Court

rejected the taxpayer's "use value" argument that "simply may be another way of saying that the 'highest and best use' of the subject property is not its existing use."

Based on the above authorities, Menard has no valid objection to the cost approach as an allegedly invalid "value in use" standard. That is just a disguised attempt to avoid valuing its property at its highest and best use, which the Court of Appeals properly rejected.

C. Menard Overstates the Impact of "Obsolescence" on its Property Value Under the Cost Approach.

Menard's discussion of obsolescence under the cost approach ignores case law, correct appraisal principles and common sense.[10] This Court explained in *Meadowlanes, supra*, that for a property devoted to its highest and best use, like the Menard property:

> "When using [the cost approach], economic or external obsolescence should be calculated recognizing that the real property is devoted to its highest and best use as [the highest and best use in that case]. ***If there is a market*** for [that highest and best use] at the location where it is built and ***a sufficient number of individuals who can afford to pay*** [for that highest and best use], ***then there will be little economic obsolescence*** under this approach." *Meadowlanes, supra*, 437 Mich at 503 (emphasis added).

Menard's property is used for its highest and best use as a freestanding retail building. There was no evidence of any negative external factor (*e.g.*, location near a landfill) that would result in external obsolescence.

[10] The Appraisal Institute defines the relevant terms as follows: "External obsolescence" means: "An element of depreciation; a diminution in value caused by negative externalities and generally incurable on the part of the owner, landlord, or tenant." … "Functional obsolescence" means: "The impairment of functional capacity of a property according to market tastes and standards." *Dictionary of Real Estate Appraisal* (Chicago, 5th Ed, 2010), pp 73, 85.

Menard's suggestion of "functional obsolescence" is similarly unavailing. This case is not about a "bank [that] puts fine hardwood and marble throughout its building,"[11] or a "12-bedroom home with 6 bathrooms" (Menard Supp Br, p 21).[12] It is undisputed that Menard's property is a "big box" store, which is – as the name indicates – essentially a big box. Any big box store can be fully and accurately described as a large, no-frills, warehouse-style rectangular building, with a cement floor and a high ceiling. They vary only slightly depending on occupancy (*e.g.*, Menard's store has a Menard's sign on the front), but otherwise are largely similar, with a basic design that continues to be constructed today, so it is plainly functional. Menard's property is also functioning as a freestanding retail building. Since that is the property's highest and best use, Menard would build the same building, or a competitor could use the existing building for the same highest and best use, as the Court of Appeals recognized (Slip Op, p 11). Any "functional obsolescence" under the cost approach would be straightforward and at most very modest.

The answer to this Court's second question is "YES." The MTT may use a valuation methodology similar to that recognized in *Clark Equipment Co, supra*. That type of methodology is especially appropriate here, due to the nature of Menard's property and the limited or distorted market for former big box stores that are all burdened by deed restrictions. Menard's contrary arguments are inaccurate and threaten State-wide tax uniformity.

CONCLUSION AND RELIEF REQUESTED

It is telling that Menard's evident path to victory requires that (1) the MTT's review be blinded with regard to the well-established cost approach to valuation, and tilted away from

[11] *First Federal Savings & Loan Assn of Flint v City of Flint*, 415 Mich 702, 705; 329 NW2d 755 (1982).

[12] Menard takes the strained analogy a step further; more like claiming that a swimming pool is virtually worthless based on the value of another pool that had to be sold as a turtle pond due to a "no swimming" restriction.

uniform taxation and the well-accepted cost approach to valuation (this Court's second question), with (2) no effective judicial review (this Court's first question). The Court of Appeals properly resolved this case in accordance with controlling law, correct appraisal principles and the competent, material and substantial evidence on the whole record, as required by Const 1963, art 6, §28. Therefore, and for the additional reasons outlined above, *Amici Curiae* Michigan Municipalities respectfully request that this Court deny leave to appeal.

Respectfully submitted,

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Via Electronic Filing

Dear Clerk:

Re: Menard, Inc v City of Escanaba; Supreme Court No. 154062; Court of Appeals No. 325718; MTT Nos. 00-441600 and 14-001918-TT

Enclosed for filing in the captioned matter is the Brief of *Amici Curie* Michigan Municipalities. Please also note that there is no accompanying motion to file the brief because this filing is made pursuant to MCR 7.312(H)(2), which provides an exception to the general need to file such a motion for political subdivisions of the State. *Amici Curie* Michigan Municipalities are 33 political subdivisions of this State, as further indicated in their Brief.

Thank you for your assistance with this filing. Please do not hesitate to contact the undersigned you have any questions or concerns.

Very truly yours,

FAHEY SCHULTZ BURZYCH RHODES PLC

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Enclosures

cc w/enc: Parties of record