TAX

PENDING APPEAL IN MICHIGAN SUPREME COURT MAY WARRANT FILING A PROTECTIVE PROPERTY TAX APPEAL THIS YEAR.

by Robert F. Rhoades[1]

On February 1, 2017, the Michigan Supreme Court ruled that it would hear oral arguments on the application for leave to appeal in *Menard*[2]. One of the issues to be considered is "whether the Michigan Tax Tribunal may utilize a valuation approach similar to that recognized in *Clark Equipment Company v Leoni Twp*, 113 Mich App 778 (1982)". The referenced *Clark* approach is a "value in use" approach. This is important to any owner of property which has special features which while valuable to the owner, would have little or no value, or possibly even negative value, if the property were to be sold in the marketplace. Many commercial and industrial properties have such features. Owners of such properties may wish to file property tax appeals.

Property is supposed to be assessed at 50% of "true cash value" which has been held to be "synonymous with fair market value."[3] Since the Supreme Court's 1982 decision in *First Federal Savings and Loan*[4], it was widely considered settled law that the market value standard is to be based on "value in exchange" and not "value in use". To illustrate the reasoning of the two valuation premises, if a factory, retail store or other building contains features which are used by and useful to the owner, but which would not bring additional value in the marketplace, the value in use premise would ascribe value to those features and the value in exchange approach would not. The value in use approach would result in higher assessed values for any property containing special features which are desired by their owners, but which would not be desired in the marketplace.

While the Court of Appeals approved of "value in use" as a proper value premise for specialty properties, such as factories in 1982[5], it did so relying on its then recent 1981 Court of Appeals decision in *First Federal*[6], which, the Supreme Court reversed shortly after the *Clark* court relied upon it. The Supreme Court's ultimate rejection of the value in use approach in *First Federal* was also the basis for the 2000 decision of the appellate court in *Meijer v Midland*.[7] The recent decision of the Court of Appeals in *Menard*, however, cited the Court of Appeals' 1982 *Clark* decision *twelve times* and adopted its value in use reasoning, suggesting that the issue is not entirely resolved. If leave is granted and the issue is addressed, the Court will decide whether it is proper for assessors to hypothesize a potential purchaser who desires unusual features of the property as much as the owner does, even when no such buyers really exist --and since any one such hypothetical buyer would pay not much more than the market price set by the other real world market participants, the Court may consider whether one should hypothesize multiple hypothetical buyers, even when they don't.

The issue affects retail stores, industrial facilities and any other property with features desired by the owner which would add little to value, or perhaps even reduce value, if the property were offered for sale. Owners of such properties may want to consider filing protective appeals before the May 31, deadline for commercial, industrial and developmental valuation appeals.

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[1] Bob Rhoades is a member of the law firm of Dickinson Wright PLLC and has practiced in the property tax field for many years. http://www.dickinson-wright.com/our-people/robertf_rhoades

[2] *Menard Inc v Escanaba,* ___Mich App___ (May 26, 2016, COA No 325718), 1v applied for Supreme Court No 154062

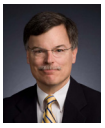
[3] *CAF Investment Co v State Tax Commission,* 392 Mich 442, 450; 221 NW2d 588 (1974).

[4] *First Federal Savings and Loan v City of Flint,* 415 Mich. 702; 329 N.W.2d 755 (1982), *reversing* 104 Mich App 609; 305 NW 2d 553 (1981)

[5] *Clark Equip Co v Leoni Township,* 113 Mich App 778; 318 NW2d 586 (1982)

[6] *First Federal Savings and Loan v City of Flint, supra, decided by the Court of Appeals in 1981.*

[7] *Meijer, Inc v City of Midland,* 240 Mich App 1, 5; 610 NW2d 242 (2000). See fn 2, quoting First Federal, supra, 415 Mich at 703.



FOR MORE INFORMATION CONTACT:

Robert F. Rhoades is a member in Dickinson Wright's Detroit office. He can be reached at 313.223.3046 or rrhoades@dickinsonwright.com.