



Michigan Supreme Court Rejects Menard's Appeal in "Dark Store" Tax Appeal

Foster Swift Secures Victory for Municipalities

Laura J. Genovich

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In an Order dated October 20, 2017, the Michigan Supreme Court denied an application for leave to appeal filed by Menard, Inc. in a closely watched "dark store" property tax appeal. As a result, the Court of Appeals' decision in favor of the City of Escanaba, which rejected Menard's "dark store" theory of valuation, will stand.

Under the "dark store" theory, big-box retailers file property tax appeals that rely on vacant stores ("dark" stores) as comparable sales. One principal reason most big box retail stores are vacant is that the big box retailer uses anti-competitive restrictions to prohibit the sale of the property to other big box retailers or other similar retail users. The Court of Appeals held that anti-competitive deed restrictions artificially restricted the market and did not result in sales of similar property that were comparable to the current big box use of property as designed and constructed.

The City argued that this approach resulted in artificially low valuation and, ultimately, a windfall for the taxpayer. The Court of Appeals agreed with the City and concluded that an industry-wide practice of using anti-competitive restrictions did not accurately reflect property values. The Court of Appeals also affirmed the validity of assessment methods based on cost, particularly when other methods of valuation were unreliable. The Court of Appeals remanded the case to the Tribunal for further proceedings. Menard sought Supreme Court review of that decision.

The Supreme Court's decision not to hear Menard's appeal is a victory for local governments and will affect many pending and future property tax appeals. Though the Michigan Supreme Court's order rejecting the appeal is not itself a precedential decision, the order underscores that the Court of Appeals' decision was not erroneous and remains binding precedent in the state. The City was represented in the Supreme Court by Foster Swift shareholders Jack Van Coevering and Laura Genovich.

AUTHORS/ CONTRIBUTORS

Laura J. Genovich

Jack L. Van Coevering

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Mr. Van Coevering presented the City's oral argument to the Supreme Court on October 12, 2017.
