



After Menard Inc. v City of Escanaba, What's Next for Big Box Store Appeals?

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After many months of new releases and public discussion of the Court of Appeals' "big box" decision in *Menard Inc. v City of Escanaba*, 315 Mich App 512 (2016), the Michigan Supreme Court ended some of the speculation on October 20, 2017 by determining not to hear Menard Inc.'s appeal.

Though the Michigan Supreme Court's order is not precedential, it underscores the scrutiny Michigan appellate courts have given to the issues addressed in the Court of Appeals' decision. Regardless of what happens at the Tax Tribunal, the law is now settled. The Michigan Supreme Court's denial of Menard Inc.'s appeal leaves the Court of Appeals published decision as binding legal precedent in Michigan. What has been settled? What is the holding that is precedential?

The Court of Appeals held in *Menard* that when the market for "big box" stores is dominated by former big box properties containing anti-competitive deed restricted property, use of the sales comparison approach alone is unreliable and the tribunal must consider the cost-less-depreciation approach. On the surface, the Menard Inc. decision joins the similar holdings of two earlier published decisions of the Court of Appeals in *Meijer v City of Midland*, 240 Mich App 1 (2000) and *Thrifty Royal Oak v City of Royal Oak*, 130 Mich App 207 (1984).

In all three cases, the cost-less-depreciation approach was found to be a reliable method of valuation given the limited or speculative comparable sales data. Thus, for over thirty years, the Court of Appeals has upheld the use of the cost approach when sales of other stores suffered from substantial physical and external obsolescence and as a result were not comparable to a new "big box store."

But, despite the similar holding, the *Menard Inc.* decision is different. Unlike the more fact-specific determinations in the two prior cases, the Court of Appeals' decision in *Menard Inc.* reached broad conclusions regarding the market for the sale of big box stores. Those conclusions have enduring application to any big box store appeal in Michigan.

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Notably, the Court of Appeals accepted Menard's repeated assertion in the Tribunal and on appeal that big box retailers routinely place anti-competitive deed restrictions on their former big box stores. The big box retailers' anti-competitive practices prohibited sales of big box stores precisely for the big box store's original, designed use. The practices excluded all likely competing retailers from purchasing the property. In the Court's view, the restrictions distorted the market for big box stores, a fact that has important implication to the method of value that can be used to value big box stores and the independent findings required to be made in valuing them.

The Court of Appeals' conclusion that the market for big box stores was distorted undermines three arguments central of "dark store theory." For a discussion of the "dark store theory" see "*Bringing Light to Dark Stores.*" First, the Court of Appeals rejected the claim that the low sale prices for former big box stores reflected functional obsolescence. Big box retailers argue that their stores were built to serve the needs of their specific big box and have limited functional utility to other retailers.

But the pervasive use of anti-competitive deed restrictions among big box retailers suggested otherwise: that the stores were functionally useful to an array of other competing retailers who were prohibited from using the store because of the deed restrictions.

Another problem with the retailer's theory of functional obsolescence is that the theory itself does not identify or explain any specific deficiencies in the property that would hinder the property's ability to function in the market.

Second, the Court of Appeals rejected the "Dark Store" claim that only the comparable sales approach should be used to value big box stores because it was the only approach that directly reflected the market for big box stores. The Court instead concluded that the sales of former big box stores reflected a market that excluded retailers who could continue to use the property as originally designed.

As well, the Court rejected the standard comparable "big box" sale offered by big box retailers: typically, sales of big box stores that were sold for "secondary" uses, uses different from "big box retail." Once again, because the deed restrictions prohibited the continuation of the originally designed big box retail use, sales for secondary uses had, according to the Court of Appeals, questionable relevance. Secondary sales reflected anti-competitive practices, not the market for the original use.

Finally, the Court of Appeals continued to reject the claim, raised first in *Clark Equip Co. v Leoni Twp*, 113 Mich App 778 (1982), that use of the cost approach for newly constructed property represents a "value in use" of the owner constructing the building. The Court reaffirmed its holding in *Huron Ridge LP v Ypsilanti Twp.*, 275 Mich App 23 (2007) that simply because an owner's use of property provides benefits to the owner does not mean the benefits have no market value. By the same reasoning, an owner-built store, did not mean other purchasers would not purchase and use the store for the same reasons as the owner. Market use is independently determined and whether it coincides with an owner's specific use is irrelevant to a market value.



The continued validity of the cost approach has wider implications in the Menard Inc. case. The Tribunal had rejected the State Tax Commission's mass appraisal assessment method as an inadequate valuation method for any property on appeal to the Tribunal. In reversing the Tribunal's broad rejection of mass appraisal, the Court of Appeals found that mass appraisal presented a valid form of new replacement cost. The Court affirmed the primary reliance on the use of the cost approach for limited market property, whether the property was sold in a market distorted by anti-competitive business practices or whether the property exists in a market in which big box stores continue to be built but sales of the stores as originally built are limited.

Though major supporting arguments of the Dark Store Theory were addressed in the Menard Inc. decision, there are still challenges to valuing "big box" stores. The Court of Appeals decision should be reassuring to assessors that their work cannot be dismissed and that analysis deserves thoughtful consideration at the Tribunal. If anything, the Court of Appeals decision underscores the need for more information and more analysis rather than a theory of assumptions.
