

In the dark

Unfair assessing theory costs locals millions

It started with a single property tax assessment appeal. Lowe's was the first business in **Marquette Charter Township** (Marquette Co.) to use the "dark store" theory to lower its assessment.

The home improvement store argued before the Michigan Tax Tribunal (MTT) that its taxable value shouldn't be higher than other big box store buildings that were sold in Michigan—even though those stores were vacant and obsolete.

When the MTT, and later the Michigan Court of Appeals, ruled in favor of Lowe's, Marquette Charter Township Manager **Randy Girard** and Assessor **Dulcee Atherton** warned that the problem was only beginning. They predicted that once the MTT sided with big box stores, the appeals wouldn't stop, and that eventually, they wouldn't be limited to large retail stores.

Today, all but one of the township's 12 big box stores have appealed their property tax assessments to the MTT. And every commercial business from fast food restaurants to apartment complexes is filing, too. As Marquette Charter Township officials prepare the budget, they're expecting their commercial corridor's taxable value to be 66 percent lower than in years past. Within the next few years, those losses could mean no money for extra police forces, and spending on placemaking, recreation and special events could be put on hold.

"It's very frustrating for those of us in the trenches," Girard said. "It will end up costing residents the services that we now provide that we won't be able to provide. If the residents want them, it's going to cost them more in some manner. And it was unnecessary."

Marquette Charter Township isn't alone. This assessing theory known as the "dark store" theory has spread throughout the entire state, into Indiana and other parts of the Midwest. In fact, Indiana has already taken legislative action to address this issue.

For the last several years, big box stores have appealed their assessments, arguing that they're being overtaxed. They say their fair market value should be based on the sales of comparable properties—properties that may be vacant and abandoned, or now are used for an entirely different purpose. At the same time, companies are placing deed restrictions on their buildings that limit how they could be used in the future if they are ever vacant, potentially rendering them obsolete in the event the current business closes.

Though some townships are still fighting back, others, like Marquette Charter Township, have given up. The precedent is already set with past MTT decisions. And after spending \$260,000 of general fund money fighting the Lowe's case, Girard says they can't afford to do that for the dozen other appeals they're facing. Experts say the only way to stop the disease-like spread is with legislative change.

The issue

The "dark store" theory takes issue with how assessors are determining a big box store's true cash value, or the market



“Our township, financially, is in good shape. But that has come from a lot of hard work over the years and a good tax base. Because of this ‘dark store’ tax tribunal issue, we don’t want to go backward. We want to move forward and do whatever we can. But if this is going to happen to us, we’re going to have to look at cuts.”

—Denny Olson, Supervisor
Breitung Charter Township
(Dickinson Co.)

price the property would likely receive if it was sold. To calculate the true cash value, the assessor looks at how much the property is worth on the open market, without considering a lease or any other rights to the building. The MTT wants assessors to calculate the true cash value by using the sales method, which compares the value of the property to other sales of similar properties.

Sales studies are common when assessing residential properties. The major difference with the “dark store” theory is that except for the size and original uses, the properties being compared to big box stores aren’t similar at all. Most of them are long-since vacant and abandoned, or they’re being used for a purpose that’s far less valuable, such as a church or go-kart track. In some cases, brand-new stores are being valued similarly to aging, obsolete buildings. So when new big box stores are compared to vacant, abandoned, former big box stores, their tax assessments are cut by as much as 50 percent.

Not only is the MTT allowing big box stores to compare their buildings to vacant property, but it’s also accepting comparable properties from different areas of the state, where property values may vary greatly.

Big box companies argue that their buildings are built specifically to suit their purposes. They say that for any other business to use their building, it would require so many modifications that most would likely rather build a new building instead of retrofitting an old one. By that logic, the built-to-suit buildings are disposable and only usable for one business. For that reason, they argue that if they were to attempt to sell the building, the price they would receive is a fraction of what the building is valued to the company that built it.

Further complicating matters is the fact that when most big box stores build their buildings, they place what’s called a deed restriction on the property stating that the building can’t be used for a particular purpose once it’s vacant. For example, a Meijer could use a deed restriction to make sure that if it ever leaves a building, it can’t be used by a competing grocery store. This means that businesses that otherwise might have been interested in the building are barred from using it for a specific purpose, and the building sits vacant as a result, even though it’s still perfectly suited for another, similar store. The result? More blighted properties across the state.



Because of the “dark store” theory,” big box stores are beginning to require more government services than they contribute in taxes, according to a recent police analysis by Oshtemo Charter Township (Kalamazoo Co.). Township attorney James Porter says the stores are a drain on the community.

Unfair theory

Though the “dark store” theory is being upheld by the MTT, it’s unfair and is hurting townships throughout the state, said MTA Legal Counsel Robert Thall, attorney at Bauckham, Sparks, Lohrstorfer, Thall and Seeber, P.C. Not only this, but the theory also goes against what he believes are sound assessing practices.

“The theories that are being used are inappropriate, and they’re falsely bringing down the value of properties, to the detriment of everybody,” Thall said.

A basic problem is the reliance on the sales approach for calculating true cash value. While it works for houses, it doesn’t work for big box stores. In reality, there are no comparable sales that can be accurately compared to a brand-new big box store. Thall says the cost approach, which is used by most assessors to determine a big box property’s true cash value, is the most appropriate. In this method, assessors value the land and look at what it cost to build the structure, minus any depreciation.

“If you have a new big box store, you shouldn’t be comparing it to a 20-year-old store somewhere else that’s being used as a go-kart track,” Thall said. “That’s not comparable at all. It doesn’t matter if you try to adjust it or not. It’s so far different that it shouldn’t even be compared.”

Adding to this problem is the issue of deed restrictions. Thall says these restrictions shouldn’t be considered when valuing the property, and that it should be against public

policy to limit how these properties can be used. If it weren’t for deed restrictions, a property built to house a grocery store could easily be bought and used as another grocery store once the original business moved out. Instead, big box stores are placing restrictions on their buildings that essentially keep them vacant once they’re empty.

A lower property tax base isn’t the only result—communities also experience blight as more and more shuttered buildings unnecessarily sit vacant. Or, buildings are used for a lesser, secondary use that can have a negative impact for development in the area.

“To take it and value it in that way is really an artificial valuation,” Thall said. “It’s really based upon restrictions they’ve been putting on the property.”

The MTT isn’t giving the location enough consideration when it decides to slash big box stores’ assessments. That’s something that Thall believes is a major key to this issue. Before a company ever decides to invest in a new store location, they conduct extensive research to find the best spot to reach the most people. Their stores have value to them or they wouldn’t have opened at that location.

If not for the deed restrictions, another similar business would likely buy the building simply because of the location and spend a smaller amount of money renovating it to fit their needs. This might slightly lower a big box store’s tax assessment, but it certainly wouldn’t cut the assessment in half.

“As long as that use is not obsolete, as long as it would still be used for a purpose like that, I don’t think you can value it as something else,” Thall said. “It has to be valued as that type of use, as a big box store.”

The impact

In **Breitung Charter Township** (Dickinson Co.), Supervisor **Denny Olson** is wondering how the township will continue spending \$250,000 a year to help the county pay for road repairs. Over the last five years, the township has fought Home Depot’s property tax appeal, first at the MTT and later at the Michigan Court of Appeals after joining forces with Marquette Charter Township. MTA filed an *amicus curiae* brief on behalf of the townships, as an MTA Legal Defense Fund case. The two townships even asked the Michigan Supreme Court to take up the case, but to no avail.

Breitung Charter Township was forced to refund Home Depot more than \$40,000, and the store’s true market value was permanently lowered. Now, history is repeating itself—the local paper mill has also appealed its taxes, and the township has already settled with an auto supply store for a lower valuation.

When the time comes to make cuts, Olson knows road funding will be one of the first places the board looks, since it’s not required of townships by statute. The decreasing tax

base could also impact when the township can buy its next fire truck.

“We are, financially, in good shape. But that has come from a lot of hard work over the years and a good tax base,” Olson said. “Because of this ‘dark store’ tax tribunal issue, we don’t want to go backward in Breitung Charter Township. We want to move forward and do whatever we can. But if this is going to happen to us, we’re going to have to look at cutting those things.”

Oshtemo Charter Township (Kalamazoo Co.) is only beginning to study how badly it will hurt the budget if the township loses pending appeals with Menards and Costco. Just four years ago, Menards was valued at \$8.26 million until the MTT reduced the true cash value to \$6.39 million. Now, Menards is asking for yet another reduction—this time to \$4.2 million. This is only slightly higher than the amount Menards paid for a property in **Comstock Charter Township** (Kalamazoo Co.) in 2014, with an abandoned facility that had to be torn down. Township Attorney **James Porter** calls this the “less than dirt” valuation method.

A brand-new Costco building is also pushing for a similar drop in true cash value. Though the land and building value combined are more than \$17.5 million, the assessor valued the property at just over \$8.6 million in order to find a balance between the cost less depreciation method and a value the MTT would support. Even so, Costco appealed its 2015 assessment, arguing that the property is instead worth \$4 million.

Municipal Insurance You Can Count On



count on
EMC
INSURANCE

TED

Hartleb

AGENCY

geoffiansky@hartlebagency.com jonathankoets@hartlebagency.com
5840 King Highway Kalamazoo, MI 49048
phone: 269.385.5911 fax: 269.385.3370

ALLIED
SERVICE PROVIDER
MTA

‘Big box’ bills would fight growing issue

Townships facing property tax assessment appeals from big box stores could get new tools in their arsenal from two bills that have been introduced in the House and Senate.

Senate Bill 524, sponsored by Sen. Tom Casperson (R-Wells Twp.), and House Bill 4909, sponsored by Rep. John Kivela (D-Marquette), would each help prevent townships from losing millions of dollars due to the “dark store” assessing theory being upheld by the Michigan Tax Tribunal (MTT). The bills would ban stores of certain sizes from being valued as vacant and obsolete, and limit properties used in sales studies to those that are comparable in age and use. Deed restrictions on how the property can be used once vacant could not impact the building’s value, and new negative use deed restrictions would not be allowed at all.

In SB 524, big box stores are referred to as “limited use properties,” defined as a free-standing property of a unique design or larger than 25,000 square feet. For such properties, the highest and best use would be the continued use of the property as improved, rather than assessing it as if it were vacant. The bill also states that there is a rebuttal presumption that the cost less depreciation is the best evidence of the usual selling price of limited use property. Additionally, deed restrictions that limit how the property could be used once vacant could not impact a limited use property’s value.

Sales studies would be limited to properties that are similar age and use of the limited use property being assessed. This addresses an issue in which new properties are compared to old, vacant properties, or those that are no longer being used as a big box store. If a limited use property is not more than 10 years old, it could only be compared to other improved properties being used for the same or similar purpose, and that have not been vacant for more than one year. For industrial properties, the comparison property could not have been vacant for more than five years.

HB 4909 would amend the Michigan Zoning Enabling Act to prohibit any negative use restrictions in a new deed, lease, contract or any other written agreement that would prevent or limit who can own or occupy the building once it’s vacant. This bill would apply to a single, freestanding structure of more than 7,000 square feet where consumer goods are sold to the public.

The local governing body could request additional requirements in a special land use approval in a zoning ordinance. These include requiring the applicant to present proof that the property is not subject to a negative use restriction, and to submit a plan for re-release, reuse, redevelopment or sale of the property in the event of a vacancy. Because vacant single retail establishments lead to blight, townships, cities, villages and counties could rehabilitate such establishments.

As of press time, the bills had not been taken up by legislative committee. Watch MTA’s *Township Insights* and *Township Voice* legislative newsletters for updates.

Part of MTA's Policy Platform

MTA's support of Senate Bill 524 and House Bill 4909, the "dark store" bills, is consistent with our 2015 Legislative Policy Platform, which supports the following objectives:

- Careful consideration and concern for revenue impacts and administrative burdens to townships and other local governments, and the greater burden placed on other taxpayers resulting from broadening tax exemptions
- Tax appeal decisions consistent with the principles of assessment administration required of assessors by the manuals and directives promulgated by the State Tax Commission, and with which compliance is required of local assessors as a condition of maintaining state certification.

Because of the "dark store" theory, big box stores are beginning to require more government services than they contribute in taxes, according to a recent police analysis by Oshtemo Charter Township.

"If one compares the need for services for such facilities to the actual tax contributed, the big box stores are literally no longer an asset to any community," Porter said. "In fact, they are nothing more than a drain on the community. If this is somehow not corrected, I can envision many local communities actually trying to discourage the development of such facilities within their boundaries because of the service costs and inadequate compensation for such services."

New legislation could help

Lawmakers have heard the outcry from township officials that something must change. Recently, Sen. Tom Casperson (R-Wells Twp.) and Rep. John Kivela (D-Marquette) introduced bills that take aim at different aspects of the "dark store" theory. They called the theory "nonsense" and hope that their bills will prevent true cash values from being drastically reduced in the future.

"Creative lawyers working for big corporations should not be the force behind the state's tax policy—a policy that

is devastating local units of government and is unfair to local retailers and residents," Casperson said in a press release.

Casperson's bill—Senate Bill 524—would state that the highest and best use of a 25,000-square-foot freestanding building is the continued use of the building as improved, rather than vacant. Deed restrictions could not impact the building's value, and sales studies could only include properties that are comparable in age and use. House Bill 4909, sponsored by Kivela, would amend the Michigan Zoning Enabling Act to prohibit deed restrictions or any other written agreement that would prevent or limit who can own and occupy a building once it's vacant. (See sidebar on page 21 for more details on these bills.)

The bills wouldn't change true cash values that were already lowered by MTT decisions. But if they're enacted, they would prevent future true cash values from being dropped based on the "dark store" theory.

What can township officials do?

In the meantime, townships can also take steps to fight the issue. As new big box stores move in, townships could adopt in their zoning ordinance a zoning special exception use stating that deed restrictions aren't allowed. This would stop new



MTA
Michigan Township Association

Plans to cover groups and individuals.

A promise to cover everyone.

We have a broad range of group plan options, including PPO, Flexible Blue (HSA), HMO, Dental and Vision. We also offer affordable individual health care for you and your family, at any stage of your life.

Blues group and individual members have unparalleled statewide and nationwide access to the doctors and hospitals they need.

MTA has provided employee benefit services to its members since 1987. For more information, call 800-653-2483.

Blue Cross
Blue Shield
Blue Care Network
of Michigan

Nonprofit corporations and independent licensees of the Blue Cross and Blue Shield Association

properties from having their values artificially dropped. This approach can't be applied retroactively, but could only be used for new properties.

This issue also highlights the importance of townships making doubly sure that their appraisals are as accurate and well-done as possible. When appraisals aren't easily criticized, it's more difficult for a big box store to challenge their assessed valuation. Township assessors should review their assessments to ensure they're error-free, while township boards must supervise their assessor to ensure that state guidelines are being met.

Most importantly, township officials must let their lawmakers know that the "dark store" theory must end. If your township has been affected, tell your legislators how the lost tax dollars will impact local services and your residents. Legislators need to hear from you that their action on this issue is vital. Your efforts could mean the difference between stopping the epidemic and allowing it to spread even further.



Bethany Mauger, MTA Staff Writer

Contact your lawmaker today!

The two bills addressing the "dark store" issue—Senate Bill 524 and House Bill 4909—are the result of numerous meetings among lawmakers, MTA and other local government associations, as well as other stakeholders. MTA has worked extensively with legislators to find a solution to this spreading problem. We strongly support the legislation and thank Sen. Casperson and Rep. Kivela for supporting local government.

Members are encouraged to contact their state representative and state senator to pass these bills. Without corrective action taken, local governments will continue to face reductions, forcing reduced services or placing a higher property tax burden on residents and small businesses in their community.

- Find your state representative contact information at: www.house.mi.gov/mhrpublic/
- Find your state senator contact information at: www.senate.michigan.gov/senatorinfo.html



Mika Meyers PLC

Attorneys at Law



Legal counsel that helps local government work effectively.

Our Local Government Law practice group works with local governments and public authorities to ensure the efficient and cost-effective delivery of vital public services. We provide specialized legal expertise in areas as diverse as zoning and land use planning, bond issues, special assessments, tax increment financing, DDAs and other public authorities, labor contracts and arbitration, employee benefits, elections, environmental regulation and many other matters affecting local governments. For more than 50 years, skilled Mika Meyers attorneys have helped public-sector entities meet the ever-increasing demands of their constituents and communities.

For more information on how our **Local Government Law team** can assist your community, visit mikameyers.com.



900 Monroe NW Grand Rapids, MI 49503 (616) 632-8000

mikameyers.com