STATE OF MINNESOTA

COUNTY OF CLAY

TAX COURT
REGULAR DIVISION
SEVENTH JUDICIAL DISTRICT

Menard, Inc.,

Petitioner,

v.

County of Clay,

Respondent.

ORDER ON PARTIES' MOTIONS FOR AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

File Nos. 14-CV-12-1500
14-CV-13-1454
14-CV-13-1405
14-CV-14-1352

Filed: January 29, 2016

This matter came before The Honorable Bradford S. Delapena, Judge of the Minnesota Tax Court, on the parties' separate motions for amended findings of fact, conclusions of law, and order for judgment.

Robert A. Hill, Attorney at Law, represented petitioner Menard, Inc.

Thomas J. Radio, Felhaber Larson, and Jenny M. Samarzja, Assistant Clay County Attorney, represented respondent Clay County.

These cases concern the market value of the Menards home improvement store in Moorhead, Minnesota, as of January 2, 2011, 2012, 2013, and 2014. On September 18, 2015, we filed Findings of Fact, Conclusions of Law, and Order for Judgment concluding that the assessor's estimated market value for the subject property overstated its market value as of each valuation date and ordering appropriate tax re-computations and refunds. *Menard, Inc. v. Cty. of Clay*, No. 14-CV-12-1500 et al., 2015 WL 5944893 (Minn. T.C. Sept. 18, 2015) (Trial Order). On October 1, 2015, the parties filed separate motions for amended findings of fact, conclusions of law, and order for judgment. We grant in part and deny in part each party's motion.

Based upon all of the files, records, and proceedings herein, the court now makes the following:

ORDER

1. Finding of Fact No. 25 is amended as follows:

   The subject property suffered from physical deterioration of ~~$1,649,533~~ $1,508,693 on the 2011 valuation date; ~~$1,701,853~~ $1,542,638 on the 2012 date; ~~$2,196,350~~ $1,971,685 on the 2013 date; and ~~$2,744,620~~ $2,419,257 on the 2014 date.

2. Finding of Fact No. 28 is amended as follows:

   The subject property's indicated market value under the cost approach was ~~$9,121,382~~ $9,262,222 for the 2011 valuation date; ~~$9,302,631~~ $9,461,846 for the 2012 date; ~~$9,046,960~~ $9,271,625 for the 2013 date; and ~~$8,742,890~~ $9,068,252 for the 2014 date.

3. Finding of Fact No. 33 is amended as follows:

   The market value of the subject property for each valuation date is as follows:

	2011	2012	2013	2014
~~Cost Approach~~	~~$ 9,121,382~~	~~$ 9,302,631~~	~~$ 9,046,960~~	$ ~~8,742,890~~
Cost Approach	$ 9,262,222	$ 9,461,846	$ 9,271,625	$ 9,068,252
Sales Approach	$ 4,898,122	$ 5,010,462	$ 5,390,987	$ 6,044,243
~~Market Value~~	~~$ 7,432,100~~	~~$ 7,585,800~~	~~$ 7,219,000~~	~~$ 7,393,600~~
Market Value	$ 7,516,600	$ 7,681,300	$ 7,331,300	$ 7,556,200

4. Finding of Fact No. 34 is added, to read as follows:

   A nine-month Minnesota Department of Revenue sales-ratio study of commercial/industrial property in Clay County indicates a median ratio of 88.4 percent for the 2011 assessment date.

5. Conclusion of Law No. 6 is added, to read as follows:

   The 2011 market value determined by the court is reduced by 6.6 percent (from $7,516,600 to $7,020,500) to equalize the subject property's value with similarly classed properties in the same taxing district.

6. The parties' motions for amended findings of fact, conclusions of law, and order for judgment are in all other respects denied.

AMENDED ORDER FOR JUDGMENT

1. The assessed value of the subject property as of January 2, 2011, shall be decreased from $11,220,000 to $7,020,500.

2. The assessed value of the subject property as of January 2, 2012, shall be decreased from $11,220,000 to $7,681,300.

3. The assessed value of the subject property as of January 2, 2013, shall be decreased from $11,220,000 to $7,331,300.

4. The assessed value of the subject property as of January 2, 2014, shall be decreased from $11,220,000 to $7,556,200.

5. Real estate taxes due and payable in 2012, 2013, 2014, and 2015 shall be recomputed accordingly and refunds, if any, paid to petitioner as required by such computations, together with interest from the original date of payment.

IT IS SO ORDERED. THIS IS A FINAL ORDER. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT,

Bradford S. Delapena, Judge
MINNESOTA TAX COURT

Dated: January 29, 2016

MEMORANDUM

I. INTRODUCTION

Each party has submitted a three-part motion for amended findings. Menard argues: (1) that we must use as comparable sales all of the big box retail store transactions about which its appraiser, Mr. MaRous, provided information;[1] (2) that we should fully credit MaRous' cost approach, but should give that approach no weight in our final reconciliation (and should rely entirely on the sales comparison approach);[2] and (3) that we erred by not granting its unopposed request for equalization relief for the 2011 valuation date.[3] The County contends: (1) that we should have rejected Mr. MaRous' appraisal report in its entirety;[4] (2) that we should make several changes to our cost approach;[5] and (3) that we should have considered as comparable sales additional transactions about which its appraiser, Mr. Vergin, provided information.[6]

II. LEGAL STANDARD

On proper motion, a court may "amend its findings or make additional findings." Minn. R. Civ. P. 52.02; *see also* Minn. Stat. § 271.08, subd. 1 (2014) (authorizing motions for amended findings of fact and conclusions of law). A motion for amended findings authorizes a court "to review all of the evidence and all of [its] findings" and to revise its findings in a manner either favorable or unfavorable to the moving party. *McCauley v. Michael*, 256 N.W.2d 491, 499-500

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[1] Pet'r's Mem. Supp. Amend. Findings 14-18.

[2] Pet'r's Mem. Supp. Amend. Findings 12, 19-32.

[3] Pet'r's Mem. Supp. Amend. Findings 33-34. Although Menard makes additional arguments for relief in its reply memorandum, *see, e.g.*, Pet'r's Reply Br. 3 (raising for the first time an argument concerning site value), such arguments are waived. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (ruling that an argument made for the first time in a reply brief was "waived and stricken" because the respondent "did not raise this matter in its brief").

[4] Resp't's Mem. Supp. Amend. Findings 4-6.

[5] Resp't's Mem. Supp. Amend. Findings 6-8.

[6] Resp't's Mem. Supp. Amend. Findings 8-10.

(Minn. 1977). Ultimately, the court is "free to examine all of the evidence ..., and then to enter amended findings as appear ... warranted by [its] review of the record as a whole." *Id.* at 500.

"[T]he tax court typically determines '[t]he weight and credibility of ... testimony, including that of the expert witnesses.' " *Beck v. Cty. of Todd*, 824 N.W.2d 636, 639 (Minn. 2013) (second and third alterations in original) (citations omitted). Consequently, a party proposing *additional* findings must do more than simply point to record evidence that might support those findings. *Nielsen v. City of Saint Paul*, 252 Minn. 12, 29, 88 N.W.2d 853, 864 (1958). "[T]he moving party must show that the ... court *was compelled to make the requested findings* and failed to do so ...." *Zander v. State*, 703 N.W.2d 845, 857 (Minn. App. 2005) (emphasis added). Correlatively, a party requesting the *excision* of existing findings must show that they have insufficient evidentiary support. *See Kehrer v. Seeman*, 182 Minn. 596, 602, 235 N.W. 386, 389 (1931) (noting that a court "is required to strike out a finding of fact only when the finding has no sufficient support in the evidence").

A motion for amended findings must be based on the files and exhibits in the case, not on evidence that is not part of the record. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006). The moving party "should address the record evidence, explain why the record does not support the district court's findings, and explain why the proposed findings are appropriate." *Lewis v. Lewis*, 572 N.W.2d 313, 316 (Minn. App. 1997), *abrogated on other grounds by Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168, 171-72 (Minn. 2000).[7]

[7] Each party submitted, in connection with its motion for amended findings, documents that were *not* part of the record. Resp't's Mem. Supp. Amend. Findings Exs. A-C (computations for implementing proposed amended findings); Pet'r's Reply Br. Ex. A (news article and property tax statements). To the extent these documents were submitted *as evidence*, we decline to consider them. *See Zander*, 720 N.W.2d at 364 (indicating that a motion for amended findings must be based exclusively on record evidence).

III. MENARD'S REQUESTS

We agree with Menard that we erred by failing to grant its unopposed request for equalization relief with respect to the 2011 valuation date.[8] Grateful for the opportunity to correct this oversight, we grant the request without further discussion. *See supra*, Order ¶¶ 4-5 (amending Trial Order by adding one factual finding and one conclusion of law).

A. Use of Comparable Sales

Mr. MaRous considered two sets of comparable sales: a primary set that he adjusted and relied on in his sales comparison analysis,[9] and a secondary set that he neither adjusted nor relied on (other than as generally supporting that analysis).[10] MaRous also computed for each set an average total depreciation figure,[11] which he used in his cost approach to support a separately derived total depreciation estimate of approximately 80 percent for the subject property.[12]

The court's sales comparison analysis used as comparable sales three of the seven transactions from MaRous' primary set, and none of the twenty from his secondary set. *Menard*, 2015 WL 5944893, at *19-20, *23. Our cost approach rejected as unreliable the average total depreciation MaRous computed for his primary set, and declined even to consider the computation for his secondary set. *Id.* at *16-18 & n.139.

Menard's written submission urges us to reconsider our "rejection of the 24 sales of big box retail stores Menards offered to demonstrate the most probable sales price for the subject

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[8] Pet'r's Mem. Supp. Amend. Findings 33-34; Hearing transcript (Nov. 12, 2015) at 34-35.

[9] Ex. 1, at 75-101.

[10] Ex. 1, at 101-05.

[11] Ex. 1, at 64-68.

[12] Ex. 1, at 61-64.

property." [13] During a motion hearing, however, Menard clarified that it is *not* asking us to rely on MaRous' secondary set of comparables in our sales comparison approach.[14] Instead, it asserts only that we should have credited MaRous' total depreciation estimates (based on his primary and secondary sets), and should have used those estimates in our cost approach.[15] Menard also qualified its assertion that we should have considered the four remaining comparables from MaRous' first set in our sales comparison approach.[16]

1. Use to Estimate Total Depreciation

According to Menard, we erred because appraisal theory recommends the very market extraction method of computing total deprecation MaRous used to verify his separately derived 80-percent depreciation estimate.[17] As the Trial Order makes plain, however, we did *not* disagree with MaRous' selection of the market extraction method. Instead, we emphasized that the method is reliable only when applied to truly comparable properties. *Menard*, 2015 WL 5944893, at *16-18. As we explained, the properties in MaRous' primary set were materially dissimilar from the subject property. *Id.* Consequently, MaRous' application of market extraction to the primary set was inappropriate, and his results unreliable. *Id.* In addition, "[b]ecause MaRous included so little information about the transactions making up his second set of comparable sales, we cannot evaluate their true comparability to the subject property and therefore place no reliance on his market extraction using that second set." *Id.* at *18 n.139. In

[13] Pet'r's Mem. Supp. Amend. Findings 14.

[14] Hearing transcript (Nov. 12, 2015), at 16-20, 39-40, 55.

[15] Hearing transcript (Nov. 12, 2015), at 19, 39-40.

[16] Hearing transcript (Nov. 12, 2015), at 39-40, 55-57.

[17] Pet'r's Mem. Supp. Amend. Findings 6 & n.17; Hearing transcript (Nov. 12, 2015), at 12, 26, 34.

sum, we rejected MaRous' market extraction analyses not because he incorrectly *invoked* the method but, instead, because he incorrectly *applied* it.

A party requesting amended findings must, among other things, "explain why the record does not support the district court's findings." *Lewis*, 572 N.W.2d at 316. Menard does not address—or even acknowledge—our reasons for rejecting MaRous' market extraction analyses.[18] Necessarily, then, Menard fails to explain why the record does not support our related findings. We therefore deny this portion of Menard's motion.

2. Use in Sales Comparison Approach

The court used three of the seven comparable sales from MaRous' primary set because each is relatively large and has covered/unheated space, as does the subject property. This selection of comparable sales was well supported by the record. First, all three comparables we used were also used by both appraisers. *Menard*, 2015 WL 5944893, at *20. Second, Menard has consistently emphasized the subject property's large size (162,340 square feet of gross building area).[19] During the motion hearing, Menard itself urged that larger comparables are therefore preferable.[20] Thus, our rejection of two MaRous comparables that are approximately 80 percent smaller than the subject was supported by the record.[21] Likewise, our rejection of MaRous' remaining two comparables was supported because neither has covered/unheated

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[18] Ignoring our stated reasons, for example, Menard simply asserts that "the Tax Court's rejection of Marous' [sic] empirical analysis of the actual accrued depreciation ... *appears mistaken*." Pet'r's Mem. Supp. Amend. Findings 5 (emphasis added).

[19] Ex. 1, at ii, 1, 41, 43, 45, 62, 74, 92, 94, 142; Tr. 156-57; Hearing transcript (Nov. 12, 2015), at 55; Pet'r's Reply Br. 10, 15.

[20] Hearing transcript (Nov. 12, 2015), at 9, 55-56.

[21] Each of these comparables, the Runnings at 300 West 7th Street in Monticello, and the Furniture Outlets at 19146 Freeport Street in Elk River, is under 90,000 square feet. Ex. 1, at 75, 80, 82.

space.[22] Our selection of comparable sales was well supported by the record, and Menard has not shown that we are compelled to rely on the additional comparables. *Zander*, 703 N.W.2d at 857. Accordingly, we deny this portion of Menard's motion.

B. Application and Weighting of Cost Approach

Menard argues that we misapplied the cost approach by failing to adopt Mr. MaRous' depreciation analysis and that we gave the cost approach undue weight in our final reconciliation.

1. Application of Cost Approach

MaRous estimated depreciation for the subject property's building improvements at 7 percent for physical deterioration, 75 percent for functional obsolescence, and 10 percent for external obsolescence.[23] He computed total depreciation not by "considering the[se] various percentages in aggregate," but instead by "dividing the total depreciation as a dollar amount by the estimated cost new."[24] Using this procedure, MaRous estimated total depreciation for the improvements at approximately 80 percent for each valuation date.[25] He then sought to support these estimates by applying the market extraction method to his two sets of sales comparables.[26]

The court adopted Mr. Vergin's physical deterioration estimates, which exceeded those suggested by MaRous. *Compare* Ex. 1, at 64, 70-72, *with Menard*, 2015 WL 5944893, at *15 and *infra* § IV.B.1. We rejected MaRous' 75 percent functional obsolescence estimate because it

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[22] These comparables are the Walmart at 1360 Town Centre Drive in Eagan and the Miller Auto Plaza at 380 33rd Avenue South in St. Cloud. Ex. 1, at 75. Each is, in addition, significantly older that the subject. *Id.* The only older property we used as a comparable, the former Menard's in Burnsville, is both relatively large *and* has covered/unheated space, like the subject. Ex. 1, at 75, 89.

[23] Ex. 1, at 61-62.

[24] Ex. 1, at 64.

[25] Ex. 1, at 63.

[26] Ex. 1, at 64-68.

was "based on the assumption that the subject property would not be sold for use as a big box retail store," *Menard*, 2015 WL 5944893, at *15, an assumption we found unwarranted, *id.* at *10. (Although the court found substantial functional obsolescence, we attributed it to a different source. *Id.* at *15.) The court likewise rejected MaRous' 10 percent external obsolescence estimate because he "failed to demonstrate that factors allegedly causing external obsolescence elsewhere in the United States were operative in the Fargo/Moorhead market area." *Id.* at *16. Finally, we rejected MaRous' market extraction offered to support his separately derived total depreciation estimates. *Id.* at * 16-18; *see also supra* § III.A.1.

Menard contends that the court misapplied the cost approach because its treatment of depreciation is contrary to appraisal theory.[27] We cannot agree.

Menard first argues that the court was bound to accept Mr. MaRous' market extraction analysis of total depreciation[28] because it adopted his highest and best use conclusions.[29] We did

[27] Pet'r's Mem. Supp. Amend. Findings 5-6 & n.17, 10-11; Pet'r's Reply Br. 9, 18-19; Hearing transcript (Nov. 12, 2015), at 12, 24-25.

[28] Pet'r's Mem. Supp. Amend. Findings 4, 5, 7, 8, 9; Pet'r's Reply Br. 5, 9-10, 18. Notably, Menard does not ask us to credit MaRous' *primary* depreciation estimates of 75 percent for functional obsolescence and 10 percent for external obsolescence. Ex. 1, at 61-62. Menard would thus have us rely exclusively on a total depreciation estimate that MaRous himself characterized as merely a "test of reasonableness." Ex. 1, at 64.

[29] Pet'r's Mem. Supp. Amend. Findings 5.

not adopt MaRous' highest and best use conclusions.[30] But even if we had, this would not have required us to accept entirely separate components of his appraisal analysis. *See infra* § IV.A. More importantly, as we already have explained, the court rejected MaRous' market extraction analysis specifically because it was not conducted in accordance with appraisal theory. *See Menard*, 2015 WL 5944893, at *16-18. Menard's refusal even to acknowledge the court's methodological critique furnishes us with no grounds to revise it.

Menard also argues that the court's functional obsolescence estimate is unsupported by appraisal theory.[31] We found "that $2,500,000 is a reasonable estimate of functional obsolescence for the subject property, the approximate cost of converting a recently constructed Lowe's home improvement store to a Mill's Fleet Farm home improvement store." *Menard*, 2015 WL 5944893, at *15. Our characterization of this expense as functional obsolescence is directly supported by a peer-reviewed article—submitted by Menard—discussing the valuation

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[30] The court specifically *rejected* MaRous' proposed highest and best use as improved. *Compare Menard*, 2015 WL 5944893, at *5 (quoting MaRous' conclusion that "the subject property's highest and best use as improved was 'continued use as a single-tenant retail building *with its current owner-occupant, a Menards Home Improvement retail store*' ") (emphasis added), *with id.* at *10 (finding that the property's "highest and best use as improved ... was for continued use as a big box retail store" generally, *not* solely as a Menard's). This difference is important because focusing on a property's value *exclusively to its current owner* can improperly yield value-in-use, rather than market value. *See, e.g., Marquette Bank Nat. Ass'n v. Cty. of Hennepin*, 589 N.W.2d 301, 304-05 (Minn. 1999). Courts thus recognize that it is improper to value a big box store solely for use by its current owner-occupant. *See, e.g., Lowe's Home Centers, Inc. v. Twp. of Marquette*, No. 314111, 2014 WL 1616411, at *10-11 (Mich. Ct. App. Apr. 22, 2014) (unpublished) (commenting disapprovingly that the taxing authority's "conceptualization of the HBU—use as a Lowe's ... —makes the determination of [market value] dependent upon the identity of the property owner"), *appeal denied*, 856 N.W.2d 553 (Mich. 2014), *reconsideration denied*, 861 N.W.2d 17 (Mich. 2015). By rejecting MaRous' defective highest and best use conclusion, we avoided inadvertently analyzing value-in-use.

[31] Pet'r's Mem. Supp. Amend. Findings 10; Hearing transcript (Nov. 12, 2015), at 12, 24-26.

of big box retail stores.[32] We therefore deny Menard's motion challenging our application of the cost approach.

2. Weighting of Cost Approach

In his final reconciliation, Mr. MaRous gave no weight to his cost approach, but instead used it solely to support his conclusions under the sales comparison approach (he found the income capitalization approach to have little applicability, and thus did not rely on it).[33] Mr. Vergin developed all three traditional approaches and gave each a one-third weighting in his final reconciliation.[34]

Finding only the cost and sales comparison approaches well supported, and noting the "the recent vintage of the subject property's improvements," the court gave the cost and sales comparison approaches 60 and 40 percent weightings, respectively, for the 2011 and 2012 valuation dates, and each approach a 50 percent weighting for the 2013 and 2014 dates. *Menard*, 2015 WL 5944893, at *25.

Asserting that the cost approach is inherently subjective,[35] Menard argues that we should have relied entirely on the sales comparison approach in our final reconciliation,[36] using the cost approach solely for confirmation.[37] Again, we disagree.

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[32] Ex. 1, Addendum, Part 2, at A263 (David C. Lennhoff, *Valuation of Big-Box Retail for Assessment Purposes: Right Answers to the Wrong Question*, 39 Real Estate Issues, No. 3 (2014)) (hereinafter "Lennhoff"); *see also* Pet'r's Mem. Supp. Amend. Findings 3 n.5 (noting that the Lennhoff article was peer-reviewed).

[33] Ex. 1, at 5, 142. MaRous indicated that "most weight was given to the estimate of value developed by [the sales comparison approach], supported by the cost approach." *Id.* His final value for each assessment date, however, was the precise figure he had derived using the sales comparison approach. *Id.* at 141.

[34] Ex. A, at 135.

[35] Pet'r's Mem. Supp. Amend. Findings 10, 19-21, 29-32; Pet'r's Reply Br. 5.

[36] Pet'r's Mem. Supp. Amend. Findings 10, 12, 32, 34.

Menard's critique of the cost approach is both excessive and contrary to Minnesota law. The cost approach is one of the three traditional value approaches accepted in Minnesota. *See, e.g., Equitable Life Assur. Soc'y of the U.S. v. Cty. of Ramsey*, 530 N.W.2d 544, 552 (Minn. 1995). The approach is "useful for estimating the market value of new or relatively new construction ...." *Guardian Energy, LLC v. Cty. of Waseca*, 868 N.W.2d 253, 262 (Minn. 2015).

It is true, as Menard observes, that estimating depreciation for older improvements can involve subjective judgements that render the cost approach imprecise. *See, e.g., Carson Pirie Scott & Co. (Ridgedale) v. Cty. of Hennepin*, 576 N.W.2d 445, 450 (Minn. 1998) ("This court has recognized that the cost approach is imprecise, owing to the difficulty of calculating the functional and economic obsolescence of older buildings ...."). The income capitalization[38] and sales comparison[39] approaches, however, can likewise involve subjective judgments affecting their reliability in particular cases. Plainly, the potential for subjectivity is not unique to the cost approach. *See Hansen v. Cty. of Hennepin*, 527 N.W.2d 89, 95 (Minn. 1995) (commenting that the cost approach "is essentially no different from any other approach to market value. It involves the analysis of a wide range of data, and any conclusions based on this data are inherently susceptible to speculation and manipulation."). In any event, the possibility that a subjective depreciation estimate can undermine the cost approach when applied to an older

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[37] Pet'r's Mem. Supp. Amend. Findings 10, 21-25, 28, 32; Pet'r's Reply Br. 19.

[38] *See, e.g., Smith v. Smith*, 410 N.W.2d 334, 336 (Minn. App. 1987) (noting the "subjective process of selecting a capitalization rate" for the income capitalization approach); *Nolan v. Cty. of Ramsey*, No. C4-90-5554, 1991 WL 169092, at *4 (Minn. T.C. Aug. 5, 1991) (commenting that the selection of a capitalization rate "requires subjective judgments by the appraiser regarding what current rate of return lenders and investors are demanding").

[39] *See, e.g., In re Kjeldahl*, 52 B.R. 926, 932 (Bankr. D. Minn. 1985) ("There are subjective judgments that an appraiser must make in selecting the comparables by which he will test his judgment of value."); *Lucas v. Hennepin Cty.*, No. TC-5755, 1988 WL 9686, at *5 (Minn. T.C. Feb. 3, 1988) ("The adjustments between the selling price of comparable properties and the indicated market value of the subject are by their very nature subjective.").

structure does not render the approach unreliable when applied to a newer structure (as here), or to one manifesting only minor depreciation. *See, e.g.*, *Guardian*, 868 N.W.2d at 262 (noting that the cost approach is best applied when "the improvements are new *or* suffer only minor depreciation") (emphasis added) (internal quotation marks and citation omitted); *Baker Properties P'ship v. Cty. of Hennepin*, No. TC-8779 et al., 1990 WL 108050, at *9 (Minn. T.C. July 16, 1990) (noting that because the subject property's "structures [we]re relatively new," application of the cost approach "involve[ed] less subjective judgmental decisions than in the case of older properties").

Here, the cost approach was useful because the subject improvements were relatively new as of the four valuation dates (between 3.5 and 7.5 years old), and because it was supported by reliable information.[40] For construction costs, the court adopted Mr. MaRous' estimate using the Marshall Valuation Service. *Menard*, 2015 WL 5944893, at *12. As we noted, this MVS estimate and Menard's indexed actual construction costs were "reasonably close" ($7,447,783 and $6,956,365, respectively), *id.*, indicating the objective reliability of the cost estimate.[41]

Both appraisers concluded that the improvements suffered from only modest physical deterioration.[42] Consequently, a reliable cost estimate (properly indexed for time) reasonably approximated the costs a potential purchaser might incur to construct a property of comparable utility. *See Equitable Life*, 530 N.W.2d at 552 (observing that "the cost approach ... is founded on the proposition that an informed buyer would pay no more for the property than the cost of constructing new property having the same utility"). And, as we have noted, our $2,500,000

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[40] Ex. 1, at 61-62.

[41] Pet'r's Reply Br. 7 (noting that use of actual-cost figures is "empirically-based"); *see also* Hearing transcript (Nov. 12, 2015), at 26 (same).

[42] Ex. 1, at 61-62, 70-72; Ex. A, at 83-84; Ex. A1, at 47-48.

functional obsolescence calculation was supported by appraisal theory, *see supra* § III.B.1, and by record evidence. *Menard*, 2015 WL 5944893, at *15 & nn.119-25. Consequently, subtracting functional obsolescence from adjusted construction cost (and adding site value) yielded a well-supported market value estimate under the cost approach.

Hoping to demonstrate that we gave undue weight to the cost approach in our final reconciliation,[43] Menard cites numerous cases in which the approach was given little or no weight where: (1) the subject improvements were older;[44] or (2) the alternative value approaches were considered either more appropriate[45] or more reliable.[46] Menard argues that these prior cases limit how much weight the cost approach may properly be given. We cannot agree.

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[43] Pet'r's Mem. Supp. Amend. Findings 20-32.

[44] Pet'r's Mem. Supp. Amend. Findings 23, 25 (citing *Curiskis v. Cty. of Todd*, No. C4-04-186, 2005 WL 94786, at *1 (Minn. T.C. Jan. 14, 2005) (107-year-old improvements); *Jennie-O v. Cty. of Lyon*, Nos. C0-00-287 & C0-99-265, 2001 WL 1007885, at *2 (Minn. T.C. Aug. 21, 2001) (28-year-old improvements); *Sentinel Mgmt. Co. v. Cty. of Hennepin*, Nos. TC-18600 & TC21855, 1996 WL 11167, at *4 (Minn. T.C. Jan. 8, 1996) (20-year-old improvements); *Salkin & Linoff, Inc. v. Cty. of Pennington*, No. CX-91-283, 1992 WL 365081, at *2 (Minn. T.C. Dec. 7, 1992) (50-year-old improvements)).

[45] Pet'r's Mem. Supp. Amend. Findings 23-24 (citing *Geneva Exch. Fund XXVII, LLC v. Cty. of Hennepin*, No. 27-CV-06-08694 et al., 2010 WL 532865, at *13 (Minn. T.C. Feb. 11, 2010) ("[B]oth experts relied heavily upon the income approach, as do we."); *SPX Corp. v. Cty. of Steele*, No. C1-00-350, 2003 WL 21729580, at *3 (Minn. T.C. July 23, 2003) (noting that both experts "placed significant reliance on comparable sales"); *Nw. Nat. Life Ins. Co. v. Cty. of Hennepin*, No. TC-22052 & TC-24021, 1996 WL 494994, at *3 (Minn. T.C. Aug. 27, 1996) ("We agree with the experts and place significant weight upon the DCF income approach to value."); *Apple Valley Ministorage Ltd. P'ship v. Cty. of Dakota*, No. C5-92-7105, 1993 WL 65896, at *2 (Minn. T.C. Feb. 5, 1993) ("[W]e give little weight to any cost approach involving income-producing property that has an established and predictable income stream that would be the basis for any purchase by an investor.")).

[46] Pet'r's Mem. Supp. Amend. Findings 22, 24 (citing *Multifoods Specialty Distribution, Inc. v. Cty. of Benton*, No. C7-96-307, 1996 WL 685572, at *5 (Minn. T.C. Nov. 25, 1996) ("We will place very little weight on the cost approach. Both experts agreed that the cost approach was not reliable for the subject."); *Sec. Bank Minnesota v. Cty. of Mower*, No. C2-95-452, 1996 WL 138106, at *2 (Minn. T.C. Mar. 25, 1996) (noting that both appraisers "rely primarily on their sales comparison approaches" and commenting that prevailing market conditions rendered "the cost approach less reliable")).

Menard's suggestion fails to recognize that reconciliation proceeds on a case-by-case basis: "[A]t best, appraisal is an inexact value determination.... Whatever weight priority may usually attach to each approach, the priority and quantum of reliance depends on the facts of each case." *Lewis & Harris v. Cty. of Hennepin*, 516 N.W.2d 177, 180 (Minn. 1994). Where such fact-specific determinations are involved, decided cases typically are helpful only by analogy. *See Mayo Found. v. Comm'r of Revenue*, 306 Minn. 25, 36, 236 N.W.2d 767, 773 (1975) (commenting as to tax-exempt organization status that the "identification of factors in our prior cases are only guides for analysis" and that "[e]ach case must be decided on its own particular facts"); *cf. also In re Zotaley*, 546 N.W.2d 16, 20 (Minn. 1996) ("Because each [attorney discipline] case involves a different factual setting, different violations and mitigating or aggravating circumstances, prior disciplinary law is helpful only through analogy and the facts of each individual case must be carefully examined."). The cases cited by Menard neither establish an abstract limitation on how much weight the cost approach may be given nor—because the cases are factually distinguishable—even provide useful analogies.

The particular circumstances of this case justify the court's reliance on the cost approach. First, the subject property was "relatively new construction" on each valuation date. *Guardian*, 868 N.W.2d at 262. Substantial reliance on the cost approach was therefore proper. *See, e.g.*, *Pep Boys v. Cty. of Anoka*, No. C2-01-2780 et al., 2004 WL 2436350, at *8 (Minn. T.C. Oct. 26, 2004) ("As the Subject Property is newer, we give the cost approach the most weight and the sales market approach moderate weight."); *Shepard Park Office Ctr. Ltd. P'ship v. Cty. of Ramsey*, No. 464980, 1984 WL 2047, at *2 (Minn. T.C. July 26, 1984) ("[I]n appraising newer properties the cost approach is usually the best indication of value and should be given substantial weight.").

Second, the court concluded that there was "no reliable market value indication under the income capitalization approach." *Menard*, 2015 WL 5944893, at *25. Consequently, reliance upon both the cost and sales comparison approaches, because practicable, became relatively more important. *See Equitable Life*, 530 N.W.2d at 553 ("Whenever possible, appraisers should apply at least two approaches to market value because the alternative value indications derived can serve as useful checks on each other.").

Finally, the court had substantial misgivings about the comparable sales used in this case. *Menard*, 2015 WL 5944893, at *17 ("Our principal concern is with the comparability of MaRous' comparable sales."). This concern affected our confidence in, and final weighting of, the sales comparison approach.

Most of the comparable sales the appraisers identified—and all of those the court ultimately used—were vacant big box stores.[47] Menard's own theory of the case, however, raises considerable doubt about whether vacant big box stores are truly comparable to occupied and functioning stores. *Menard*, 2015 WL 5944893, at *17. Briefly, Menard contends that retailers build stores not to sell or lease them, but *solely* to occupy them to generate retail sales revenue. *Id.*; *see also* Ex. 1, Addendum, Part 2, at A262 (Lennhoff) (likewise indicating that big box stores "are never built speculatively, then put up for rent or sale"). As we noted, "Menard's occupancy-only theory necessarily suggests that sales of big box retail stores are extraordinary events that must be carefully analyzed for comparability." *Menard*, 2015 WL 5944893, at *17.

A peer-reviewed appraisal article concerning big box valuation highlights our primary concern: the comparability of retail locations. The article posits that a big box retailer might sell

[47] Ex. 1, at 78-91 (MaRous' primary sales comparables), 103-04 (MaRous' secondary comparables); Ex. A, at 88-100 (Vergin's sales comparables).

an existing store and move to a new one "to improve its productivity and increase profits."[48] The article continues: "This has nothing to do with the existing site being a bad location *necessarily* ...."[49] The unstated premise, of course, is that the existing site may well be a bad location. Other evidence presented by Menard likewise associated store vacancy with inferior retail location. *See Menard*, 2015 WL 5944893, at *17 & nn.136-37. Because Menard's own case theory and trial evidence associated big box store vacancy with inferior retail location, there was a particular need in this case for evidence demonstrating that proffered comparable sales did *not* have inferior retail locations.

Both evidence in the record and appraisal authority indicate that retailers evaluate the desirability of a potential retail site, in part, by analyzing the demographics of the site's retail trade area. *Menard*, 2015 WL 5944893, at *8-9 & nn.61-64.[50] As we noted, this trade-area analysis must be distinguished from mere generalizations about the overall market area in which a site resides (*e.g.*, about the Fargo/Moorhead market area). *Id.* at *8 (citing Appraisal Institute, *Shopping Center Appraisal and Analysis* 47–50 (2d ed. 2009)). Indeed, Menard has insisted that its Fargo location is superior to its Moorhead location—that one of its two retail locations in the Fargo/Moorhead market area is superior to the other.[51]

As the court noted, however, Mr. MaRous' appraisal "is bereft of any radial trade-area analysis for ... the subject property." *Menard*, 2015 WL 5944893, at *9. Likewise, neither appraiser included any trade-area analysis for any of the proffered comparable sales.[52] *See, e.g.*,

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[48] Ex. 1, Addendum, Part 2, at A264 (Lennhoff).

[49] Ex. 1, Addendum, Part 2, at A264 (Lennhoff) (emphasis added).

[50] Hearing transcript (Nov. 12, 2015), at 22-23 (indicating Menard's agreement that trade area analysis is central to site evaluation).

[51] Pet'r's Reply Br. 10 n.18, 11, 15-17; Hearing transcript (Nov. 12, 2015), at 15-16.

[52] Ex. 1, at 93; Ex. A, at 107.

Eden Prairie Mall, LLC v. Cty. of Hennepin, No. 27–CV–06–04210 et al., 2012 WL 360453, at *18 (Minn. T.C. Jan. 25, 2012) (noting that an appraiser using anchor department store comparable sales "made locational adjustments based upon the five-mile radius demographic information he analyzed"), *rev'd on other grounds*, 830 N.W.2d 16 (Minn. 2013). This left the court with no objective basis for evaluating the true comparability of the subject property to the proffered comparables with respect to a critical factor plainly bearing upon comparability: the quality of retail location.[53] *Menard*, 2015 WL 5944893, at *22.

The point is not that vacant stores *necessarily* occupy inferior retail locations. Indeed, one of the comparable sales on which we relied was a 34-year-old store Menard had recently replaced with a brand new building.[54] Apparently, then, Menard was sufficiently satisfied with the location to incur the expense of constructing a new store there. The other two comparables we used, in contrast, were three- and six-year-old Lowe's stores that had been closed "due to insufficient sales."[55] Were these "insufficient sales" attributable to inferior retail location? Might inferior location explain why one of these relatively new stores sold for little more than the 34-year-old Menard at a proven location?[56] Would the purchasers of the newer stores have considered it worthwhile to incur the higher costs of constructing brand new buildings at those locations (rather than purchasing existing stores they could convert to their own specifications for a far lower total costs)? *See Menard*, 2015 WL 5944893, at *7 n.49 (noting that purchasing

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[53] Mr. MaRous made subjective location adjustments based on broad generalizations. Ex. 1, at 93, 100. Mr. Vergin made subjective adjustments without any rationale whatsoever. Ex. A, at 107-08. We found "neither appraiser's location adjustments well supported," and were thus unable to make adjustments of our own. *Menard*, 2015 WL 5944893, at *22.

[54] Ex. A, at 91.

[55] Ex. 1, at 79, 85.

[56] The six-year-old former Lowe's sold in August 2012 for $3,200,000, whereas the 34-year-old Menard sold in October 2012 for $3,000,000. Ex. 1, at 85, 89.

and reconfiguring an existing store can involve a significantly lower total cost than constructing a new store). We are confident that proper analysis—supported by objective evidence—can establish the degree of comparability between a subject property and vacant stores offered as comparable sales. The record in this case, however, contains no such analysis or evidence.[57]

Based upon reservations about the comparability of the available sales comparables, the court concluded that the sales comparison approach, although producing "reliable indications of market value," was not entitled to controlling weight. *Menard*, 2015 WL 5944893, at *25; Appraisal Institute, *The Appraisal of Real Estate* 642-43 (14th ed. 2013) (indicating that final reconciliation requires, among other things, an assessment of the true comparability of comparable sales). We think this judgment was well within our discretion. *See, e.g.*, *Harold Chevrolet, Inc. v. Cty. of Hennepin*, 526 N.W.2d 54, 59 (Minn. 1995) ("The respective weight placed upon each of the three traditional approaches to value depends on the reliability of the data and the nature of the property being valued."); *Lewis & Harris*, 516 N.W.2d at 180 ("It seems to us that in this case the market data approach left a good deal to be desired and that the tax court cannot be faulted for giving it minimal weight while relying primarily on the replacement cost approach."). Consequently, we deny Menard's motion concerning our weighting of the cost approach.

IV. THE COUNTY'S REQUESTS

We now turn to the County's three-part motion.

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[57] One commentator appears to suggest that vacant stores are *per se* the best evidence of value for functioning stores because most vacant stores on the market are not "distressed sales." Ex. 1, Addendum, Part 2, at A264 (Lennhoff). The fact that a potential comparable sale is not *disqualifiable* as a "distressed sale," however, would not appear to entail that it is *per se* comparable as to the quality of retail location, our concern in the present case. In our view, analysis and evidence are necessary to establish such comparability, not merely the absence of status as a "distressed sale."

A. Treatment of Mr. MaRous' Appraisal Report

The County contends that because we "discredited the foundation of [certain of] MaRous' opinions [and] his highest and best use conclusion," we should not have "chose[n] to adopt several [other] opinions and factual assertions advanced by MaRous." [58] We disagree.

"[T]he tax court typically determines '[t]he weight and credibility of ... testimony, including that of the expert witnesses.' " *Beck*, 824 N.W.2d at 639 (citations omitted). Thus, like a district court sitting without a jury, we "may accept all or only part of any witness' testimony." *City of Minnetonka v. Carlson*, 298 N.W.2d 763, 767 (Minn. 1980); *cf. also State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977) ("A jury, as the sole judge of credibility, is free to accept part and reject part of a witness' testimony."). Although we were at liberty to reject Mr. MaRous' testimony in its entirety, we had no reason to do so, and certainly were not obliged to do so.

B. Modifications to Cost Approach

The County contends that we should make several specified changes to our cost approach.

1. Physical Deterioration

We adopted Mr. Vergin's method for estimating physical deterioration. *Menard*, 2015 WL 5944893, at *15. As the County observes, however, we erred by using Vergin's actual computations (based on his cost estimates) rather than doing our own computations (based on our cost estimates).[59] We thus amend Finding No. 25 to read as follows: The subject property suffered from physical deterioration of $1,508,693 on the 2011 valuation date; $1,542,638 on the 2012 date; $1,971,685 on the 2013 date; and $2,419,257 on the 2014 date.

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[58] Resp't's Mem. Supp. Amend. Findings 4-5.

[59] Resp't's Mem. Supp. Amend. Findings 6.

These changes affect both our cost approach computations, *Menard*, 2015 WL 5944893, at *18, and our final reconciliation, *id.* at *25. Accordingly, we now find that the indicated market value of the subject property under the cost approach for the 2011 valuation date is $9,262,222. The computation is as follows:

Replacement Cost of Improvements		
Site Improvements	$ 1,989,412	
Building Improvements	$ 7,447,783	
Subtotal	$ 9,437,195	
Entrepreneurial Incentive	$ 943,720	
Total		**$ 10,380,915**
Depreciation		
Physical	($ 1,508,693)	
Functional	($ 2,500,000)	
External		
Total		**($ 4,008,693)**
Site		**$ 2,890,000**
Cost Approach Value		**$ 9,262,222**

Accordingly, we amend Finding No. 28 to read as follows: The subject property's indicated market value under the cost approach was $9,262,222 for the 2011 valuation date; $9,461,846 for the 2012 date; $9,271,625 for the 2013 date; and $9,068,252 for the 2014 date.

In our final reconciliation, we gave the cost and sales comparison approaches 60 and 40 percent weightings, respectively, for the 2011 and 2012 valuation dates, and each approach a 50 percent weighting for the 2013 and 2014 dates. Using those same weightings, we amended Finding No. 33 to read as follows:

The market value of the subject property for each valuation date is as follows:

	2011	**2012**	**2013**	**2014**
Cost Approach	$ 9,262,222	$ 9,461,846	$ 9,271,625	$ 9,068,252
Sales Approach	$ 4,898,122	$ 5,010,462	$ 5,390,987	$ 6,044,243
Market Value	**$ 7,516,600**	**$ 7,681,300**	**$ 7,331,300**	**$ 7,556,200**

2. Functional Obsolescence

The court found that "$2,500,000 is a reasonable estimate of functional obsolescence for the subject property, the approximate cost of converting a recently constructed Lowe's home improvement store to a Mill's Fleet Farm." *See supra* § III.B.1 (quoting *Menard*, 2015 WL 5944893, at *15). The County argues, however, that "the cost to reconfigure the store should be added back to the purchase price, not subtracted." [60] We disagree.

The County's assertion is contrary to appraisal theory because potential purchasers of another retailer's big box store will compute their offers to account for the costs of eliminating the seller's trade dress and installing their own.[61] This anticipated conversion cost represents functional obsolescence.[62] As a form of depreciation, functional obsolescence must be subtracted under the cost approach.[63] *Appraisal of Real Estate* 562, 569, 576-78.

3. Inclusion of Indirect Soft Costs

The County argues that the court erroneously excluded indirect soft costs from its cost approach, and that information in the Marshall Valuation Service "shows that 13% would be a reasonable amount to be added for soft costs." [64] Again we disagree.

For construction costs, the court adopted Mr. MaRous' estimate using the Marshall Valuation Service. *Menard*, 2015 WL 5944893, at *12. As the County observes, Mr. Vergin "included in his Appendix information from [MVS] that showed soft costs to be included." [65] The cited information indicates not that soft must be *added* to an MVS estimate but, instead, that

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[60] Resp't's Mem. Supp. Amend. Findings 7.

[61] Ex. 1, Addendum, Part 2, at A262-64 (Lennhoff).

[62] Ex. 1, Addendum, Part 2, at A263 (Lennhoff).

[63] Ex. 1, Addendum, Part 2, at A266 (Lennhoff).

[64] Resp't's Mem. Supp. Amend. Findings 7-8.

[65] Resp't's Mem. Supp. Amend. Findings 7.

they *are already included* in such an estimate.[66] We implicitly noted that MVS figures incorporated soft costs, commenting that Menard's "indexed actual cost figure ($6,956,365) and [MaRous'] adjusted MVS estimate ($7,447,783) are reasonably close, particularly considering that the actual cost figure does not include soft costs." *Menard*, 2015 WL 5944893, at *12.

C. Consideration of Additional Comparable Sales

The court's sales comparison analysis used as comparable sales three of Mr. Vergin's eleven proffered sale transactions (all of which MaRous also used). *Menard*, 2015 WL 5944893, at *19-20, *23. The County argues that we should not have used one of the these transactions or, in the alternative, that we improperly adjusted it.[67] Vergin's own reliance on the contested transaction forecloses the former argument; the latter is fully addressed in our Trial Order. *See Menard*, 2015 WL 5944893, at *20-21 (reducing Mr. Vergin's use restriction adjustment); *id.* at *20 & n.160 (discussing treatment of post-sale investment not anticipated by both buyer and seller). The County further argues that we should have used three other of Vergin's proffered comparable sale transactions.[68] The transactions the County cites, however, did not have covered/unheated space (like the subject property), and/or were either too small or too remote in time.[69] *See Menard*, 2015 WL 5944893, at *20. Consequently, we deny this portion of the County's motion.

B.S.D.

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[66] Ex. A, Addendum (*Marshall Valuation Service* § 13, at 1 (May 2010)) ("Calculator Costs are averages of final costs including architects' fees and contractors' overhead and profit, sales taxes, permit fees and insurance during construction. Interest on interim construction financing is also included ....").

[67] Resp't's Mem. Supp. Amend. Findings 9-10.

[68] Resp't's Mem. Supp. Amend. Findings 8-9.

[69] Ex. A, at 88, 97-98, 100.