

FILED

09-09-2026

Anna Maria Hodges

Clerk of Circuit Court

2017CV006146

BY THE COURT:

DATE SIGNED: September 9, 2026



Michael J. Hanrahan  
Circuit Court Judge  
Branch 4

901 N Ninth Street  
Milwaukee, WI 53233  
(414) 278-5102

Erica Bautista  
Deputy Court Clerk

September 9, 2026

Re: Wal-Mart Real Estate Business Trust v. City of Greenfield,  
Case No. 17-CV-6146

Dear Counsel,

As the Presiding Judge of the Civil Division, I am writing to clarify the circumstances concerning the final decision recently issued by Judge Glenn Yamahiro, who retired last Friday, September 4<sup>th</sup>.

The proposed decision was inadvertently viewable on the CCAP website before it was finalized. Attorney Amy Siebel apparently saw the proposed decision, and, in a letter dated September 4, 2026 (Doc. 273), she pointed out several typographical errors and asked Judge Yamahiro to consider correcting them before finalizing the decision.

Judge Yamahiro reviewed the issues identified in the letter and determined that the typographical errors were insignificant and did not affect his analysis, findings, or ultimate decision. There is one error, however, that he wanted to clarify for the sake of accuracy. In particular, page 24 of the decision states, "all seven of Miller's 'comparables' were vacant." Judge Yamahiro has confirmed that he intended to refer to Allen, not Miller. Although this typographical error did not affect Judge Yamahiro's analysis or the outcome of the case, he believed it was important to clarify the person to whom he was referring.

In a subsequent letter which was also dated September 4, 2026 (Doc. 272), Attorney Seibel pointed out that the Decision and Order acts as a final order regarding the substantive issues in the case and that the Decision and Order should so state at the end of the document. That is a correct assessment. As such, Attorney Seibel should submit a proposed "Order For Judgment" under the five-day rule that provides a finality statement. The proposed order should say something to the effect of: "the Decision and Order entered by the Court on September 4, 2026 (Doc. 270) addressed all substantive issues in the consolidated cases with finality and is a final order of this Court for the purposes of appeal. Judgment is ordered entered in favor of the City of Greenfield with taxable costs and expenses as allowed by law, and the consolidated complaints of Wal-Mart Real Estate Business Trust are dismissed with prejudice." As you may know, Judge Jonathan Richards will be rotating into Judge Yamahiro's calendar on September 14, 2026, and he will be the judge who will consider such a proposed Order For Judgment.

I also want to be clear that this is not a decision or ruling by me as the Presiding Judge of the Civil Division. The decision remains entirely Judge Yamahiro's decision. My role is limited to communicating this clarification to the parties and ensuring that everyone has the same information concerning the circumstances surrounding the typographical errors.

Thank you for your understanding.

Best regards,

Judge Michael Hanrahan  
Presiding Judge, Civil Division

**FILED**  
**09-04-2026**  
**Anna Maria Hodges**  
**Clerk of Circuit Court**  
**2017CV006146**

**BY THE COURT:**

**DATE SIGNED: September 4, 2026**

Electronically signed by Glenn H Yamahiro-34  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 34

MILWAUKEE COUNTY

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WAL-MART REAL ESTATE  
BUSINESS TRUST.,

Plaintiff,

v.

CITY OF GREENFIELD,

Defendants.

Case No. 2017-CV-6146

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**DECISION AND ORDER AFFIRMING  
THE CITY OF GREENFIELD'S TAX ASSESSMENTS**

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Wal-Mart Real Estate Business Trust ("Walmart") brought these now-consolidated actions to challenge four years of the City of Greenfield's tax assessments for Walmart's big-box retail store in Greenfield, Wisconsin.<sup>1</sup> Based on an independent review of the evidentiary record, the court finds that Walmart has failed to introduce significant contrary evidence to overcome the statutory presumption of correctness attached to the City's assessments. For the reasons set forth below, the Court finds that the assessments for the 2017, 2018, 2019, and 2020 tax years for the subject property are neither unlawful nor excessive. The court therefore determines that the

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<sup>1</sup> In particular, Walmart brought excessive-assessment claims under Wis. Stat. § 74.37 for the 2017-2020 tax years and unlawful-assessment claims under Wis. Stat. § 74.35 for the 2019 and 2020 tax years.

assessments should remain unchanged. Judgement shall be entered in favor of the City, and Walmart's consolidated complaints are dismissed with prejudice.

### **BACKGROUND**

The subject property, located in the City of Greenfield, is a big-box grocery and general merchandise store that was constructed in 2013. It has 154,602 square feet of footage and sits on 18.7885 acres of land, including 3.5 acres of undeveloped land that is used for stormwater drainage. The land was purchased in 2011 for \$7,365,000.

Walmart currently values the property at \$6,060,000 (\$39 per square foot) as of January 1, 2017; \$6,250,000 (\$40 per square foot) as of January 1, 2018; \$6,440,000 (\$42 per square foot) as of January 1, 2019; and \$6,630,000 (\$42 per square foot) as of January 1, 2020. The City's competing valuations for these tax years are \$20,566,500 (\$133 per square foot); \$20,765,500 (\$134 per square foot); \$20,765,500 (\$134 per square foot); and \$20,803,100 (\$134 per square foot).<sup>2</sup>

### **DISCUSSION**

Walmart brought excessive-assessment claims under Wis. Stat. § 74.37 for the 2017-2020 tax years, and unlawful-assessment claims under Wis. Stat. § 74.35 for the 2019 and 2020 tax years.<sup>3</sup> The fundamental difference between these claims lies in their definitions. Under Wis. Stat. § 74.35, an unlawful tax means a general property tax with respect to which one or more errors specified in § 74.33(1)(a) to (f) were made, and critically, an unlawful tax does not include a tax in respect to which the alleged defect is solely that the assessor placed a valuation on the

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<sup>2</sup> Additional facts are set forth in the discussion below to the extent relevant to the issues presented.

<sup>3</sup> While Walmart initially asserted a cause of action for lack of uniformity, it did not offer any evidence at trial to support such a claim.

property that is excessive. Wis. Stat. § 74.35(1). By contrast, under Wis. Stat. § 74.37, a claim for an excessive assessment means a claim by an aggrieved person to recover that amount of general property tax imposed because the assessment of property was excessive. In essence, an unlawful assessment involves a procedural or legal error in the assessment process, whereas an excessive assessment is purely a challenge to the dollar amount or valuation placed on the property.

### **STANDARDS OF REVIEW**

Wisconsin law provides three distinct avenues for challenging a tax assessment. A property owner who disagrees with a board of review determination may appeal by an action for certiorari under Wis. Stat. § 70.47(13), file a written complaint with the Department of Revenue requesting revaluation under Wis. Stat. § 70.85, or file a claim against the taxation district for an excessive assessment under Wis. Stat. § 74.37(2)(a). *Hermann v. Town of Delevan*, 215 Wis. 2d 370, 380, 572 N.W.2d 855, 858 (1998). For unlawful taxes specifically, a separate recovery action is available under Wis. Stat. § 74.35(2)(a), which permits an aggrieved person to file a claim to recover the unlawful tax against the taxation district that collected it.

An unlawful-tax claim is governed by Wis. Stat. §74.35. The statute defines an “unlawful tax” as a general property tax with respect to which one or more of the errors specified in Wis. Stat. §74.33(1)(a)-(f) occurred. The inquiry is directed to the legality of the tax rather than merely to the correctness of the property’s valuation. Stated differently, an unlawful-assessment claim concerns whether a defect identified in Wis. Stat. §74.33(1)(a)-(f) resulted in the levy and collection of a tax that the taxation district was not legally entitled to collect.

Real-property assessments in general are governed by Wis. Stat. §70.32(1), which provides that “[r]eal property shall be valued by the assessor . . . at the full value which could

ordinarily be obtained therefor at private sale.” This statute requires adherence to the Wisconsin Property Assessment Manual for Wisconsin Assessors (“the Manual”), absent conflicting law. *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶ 10, 317 Wis. 2d 228, 238, 767 N.W.2d 567, 572. Thus, courts must analyze the applicable statutes in conjunction with basic principles of real property assessment as described by case law, treatises, and the Manual. *Id.*

A party that is dissatisfied with a valuation may bring an excessive tax assessment claim under Wis. Stat. §74.37(3)(d), which provides for a de novo review. *See Allright*, 2009 WI App 46, ¶ 12. Accordingly, the trial court makes determinations concerning excessive tax assessment claims “without giving deference to any determination made at a previous proceeding,” including a proceeding before the Board of Review. *Id.* The trial court therefore makes its own determination based upon the evidence presented at trial and is not confined to the record before the assessor or Board of Review.

The Assessment nevertheless receives presumptive weight. *Allright*, 2009 WI App 46, ¶ 12. The amount of an assessment is presumed correct only if the challenging party does not present significant contrary evidence, and no presumption of correctness may be accorded to an assessment that does not apply the principles in the Manual. *See id.* Therefore, when a city assessor correctly applies the Manual and Wisconsin statutes, and there is no significant evidence to the contrary, courts will reject a party's challenge to the assessment. *Id.* Accordingly, the court does not ask whether the assessor reached a determination that must be upheld on deferential review. Instead, the court independently determines from the evidentiary record whether the assessment was excessive, while initially giving the assessor's valuation presumptive weight.

**1. Walmart has not met its burden of establishing an unlawful assessment under Wis. Stat. § 74.35.**

In this case, Walmart argues that the property taxes for the 2019 and 2020 tax years were unlawful under Wis. Stat. §74.35 based on the existence of “clerical errors” involving the square footage of the building and the misclassification of the entire acreage as usable commercial property. Instead of challenging the power of the assessor to assess the property, Walmart claims the assessor made “computational” errors, which resulted in excessive assessments for the tax years at issue.

*Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 53, 332 Wis. 2d 85, 113, 796 N.W.2d 717, 731, provides guidance. There, our supreme court explained that unlawful assessment cases under Wis. Stat. § 74.35 involve situations where the assessor lacked the power or authority to assess the property, whereas excessive assessment cases under § 74.37 involve situations where the assessor had lawful authority to tax the property but made errors in applying assessment principles. This distinction matters because Wisconsin law treats these claims under different statutory mechanisms and, historically, they have had different common-law counterparts.

In *Hermann v. Town of Delevan*, 215 Wis. 2d 370, 572 N.W.2d 855 (1998), our supreme court further noted this distinction, explaining that the legislature has created separate appeals processes, which recognize the fundamental difference between claims of tax exemption (where the assessor lacks authority) and those of excessive assessment (where authority exists but valuation is challenged). This substantive distinction determines the procedural mechanism available to the taxpayer.

Notably, the Wisconsin courts have emphasized that not every mistake resulting in an incorrect assessment qualifies as a “clerical” error under Wis. Stat. § 74.33. For example, in *Ahrens v. Town of Fulton*, 2000 WI App 268, ¶ 20, 240 Wis. 2d 124, 147, 621 N.W.2d 643, 653, *aff’d*, 2002 WI 29, 251 Wis. 2d 135, 641 N.W.2d 423, the court held that an intentional but

erroneous legal classification did not constitute a “clerical error” within the meaning of the statute. In other words, where a taxing authority intentionally applies a particular legal classification to the property, the taxpayer’s disagreement with that classification does not, standing alone, convert the resulting tax into an unlawful tax under Wis. Stat. §74.35.

In this case, although the assessor possessed information that could have supported different assessments, the credible evidence establishes that the valuation figures were the product of intentional determinations based on all available information, rather than any inadvertent mistakes in entering figures, transposing numbers, or computing the assessments. Walmart has not met its burden of demonstrating the existence of a “clerical” or similar error within the meaning of Wis. Stat. § 74.33(1) that would render the assessments unlawful under Wis. Stat. § 74.35.

More importantly, Walmart has neither alleged nor demonstrated that the City somehow lacks the power to assess the property. Instead, the crux of Walmart’s unlawfulness challenge is that the assessor used the wrong square footage and misclassified the entire property as commercial property when a portion of it should have been classified as undeveloped land under Wis. Stat. § 70.32(2)(c)4, resulting in an excessive valuation. These allegations concern the accuracy of the property’s measurement, classification, and resulting value, rather than the City’s legal authority to assess the property in the first instance. As a result, Walmart’s allegations, if true, merely constitute valuation errors under Wis. Stat. § 74.37, as opposed to unlawful taxes under Wis. Stat. § 74.35. The court is unwilling to accept Walmart’s request for a “backdoor challenge” under the wrong statute.

Walmart’s challenge to the unlawfulness of the wetland acreage fails on the merits as well. According to Walmart, the assessment “was unlawful to the extent it misclassified non-

buildable wetland acreage and imposed tax on land that should have been assessed at the lower statutory rate.” Walmart is referring to the 3.5 acres of wetlands that were not treated separately from the full 18.789 acres of commercially-zoned property.

In Wisconsin, the treatment of undeveloped land – including wetland acreage that cannot be developed – within a commercial property assessment is governed by a specific statutory classification framework under Wis. Stat. § 70.32. Wetlands and other nonproductive lands that qualify as “undeveloped land” are assessed at a preferential rate of 50% of full value. However, this favorable treatment is only available when the land meets the statutory definition and is not otherwise classifiable under a different property category.

Under Wis. Stat. § 70.32(2)(c)4., “undeveloped land” is defined as bog, marsh, lowland brush, uncultivated land zoned as shoreland under Wis. Stat. § 59.692 and shown as a wetland on a final map under Wis. Stat. § 23.32, or other nonproductive lands not otherwise classified under this subsection. In order to prove that land should be valued at 50% of full value under this portion of the statute, a property owner must demonstrate the property is both: (1) nonproductive land; and (2) “not otherwise classified.” *W. Capital, Inc. v. Vill. of Sister Bay*, 2014 WI App 52, ¶ 22, 354 Wis. 2d 130, 143, 848 N.W.2d 875, 881.

With respect to the first prong, land is “nonproductive” when “it is neither producing nor capable of productive use.” *Id.*, ¶ 29. In this case, Allen testified that the 3.5 acres of wetlands could not be built upon and lacked functional utility for development.<sup>4</sup> However, the inability to

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<sup>4</sup> The persuasive value of Allen’s testimony regarding the wetland area is minimized by his testimony on cross examination that he believed the area was in a floodplain and did not know whether the area had been formally designated as a wetland by the Wisconsin Department of Resources. More importantly, he also acknowledged that wetlands and floodplains are not synonymous and admitted that he was not familiar with the details of the development agreement with the City. His testimony regarding the wetlands is given little overall weight.

build addresses only one dimension of land use; it does not, by itself, demonstrate that the wetland is “not productive” within the meaning of Wis. Stat. § 70.32.

More importantly, the second prong involves an important limiting phrase: the land must be “not otherwise classified” to qualify as undeveloped. In this case, the evidence at trial indicated that the 3.5 acres were necessary to the property’s stormwater management system under the City’s zoning ordinance, which added inherent value to the property. In other words, the evidence demonstrates that the wetlands function as part of the commercial parcel’s infrastructure and provide a “regulatory compliance value” that benefits the commercial development, which actually supports the City’s decision to include the 3.5 acres in its classification of the entire property as commercial property assessed at fair full-market value. Notably, property classification for tax purposes turns on the use to which the land is put or on its most likely use – not on whether physical development is legally or practicably possible on every portion of the parcel. *See, e.g., W. Capital, Inc. v. Vill. of Sister Bay*, 2014 WI App 52, 354 Wis. 2d 130, 848 N.W.2d 875. In light of the credible evidence in the record that the wetlands are essential to the commercial operation of the site because they enable and support that commercial use, the court finds that Walmart has not met its burden of establishing that it is entitled to the undeveloped land discount.<sup>5</sup>

**2. The court generally finds Dr. Hamilton’s testimony to be more credible than Allen’s testimony.**

In resolving the competing valuation opinions presented by the parties, the court must determine the weight and credibility to be afforded to each expert's testimony. *See Metropolitan Assocs. v. City of Milwaukee*, 2018 WI 4, ¶ 25, 379 Wis. 2d 141, 905 N.W.2d 784 (“It is within

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<sup>5</sup> At trial, Allen admitted that the entire property is zoned commercial.

the province of the factfinder to determine the weight and credibility of expert witnesses' opinions.”). Accordingly, the Court has carefully considered the qualifications of each expert, the data and assumptions underlying each appraisal, the methodologies employed, and the consistency of each opinion with the other evidence in the record.

Dr. Hamilton’s professional experience and qualifications in particular are quite impressive. He holds a Ph.D in Real Estate from the University of Wisconsin-Madison and a Master of Science in Finance. He also received the “MAI designation” from the Appraisal Institute, which signifies his elite competency, rigorous education, and high ethical standards. He has also taught real-estate appraisal, market analysis, highest and best use, and quantitative methods at the graduate level for over 30 years, including at Roosevelt University and the University of St. Thomas. He is a Certified General Real Property Appraiser licensed in approximately a dozen states, including Wisconsin, and has served on the editorial review boards of The Appraisal Journal, Real Estate Issues, and the International Association of Assessing Officers (“IAOO’s) Property Tax Assessment & Administration Journal, which collectively demonstrate sustained, peer-recognized professional standing.

Dr. Hamilton’s qualifications are not limited to his professional designations and experience in commercial appraisal. He also contributed to the development of recognized professional guidance concerning the valuation of commercial property for assessment purposes. In particular, he served on an IAAO committee that collectively published two official IAAO position papers: *Commercial Big-Box Retail: A Guide to Market-Based Valuation* and *Setting the Record Straight on Fee Simple*. These papers, which demonstrate substantial subject-matter expertise concerning the valuations issues in the present case, precisely address the relevant intersections of commercial appraisal, property-tax assessment, fee-simple valuation and the

valuation of large, single-tenant retail properties. His professional record supports his heightened qualifications and general credibility.

Walmart's primary expert, Larry Allen, also has substantial commercial-appraisal credentials and experience. However, on cross-examination, Allen acknowledged that in other midwestern states, his valuation opinions of value have had "mixed results. While some courts appear to have accepted his testimony, others have assigned it limited weight by relying on different factors. While each case necessarily turns on its own record and applicable law, the mixed judicial reception of Allen's opinions provides context in evaluating the reliability and persuasive force of his testimony in this case.

More importantly, the bulk of Allen's experience is in states that have slightly different valuation frameworks, particular with respect to "dark stores." Unlike Dr. Hamilton, who testified in numerous Wisconsin property-tax assessment cases, Allen testified on only one prior Wisconsin property-tax matter, *Scheels v. City of Eau Claire*, where the municipality prevailed at the trial-court level. Although an expert need not have extensive experience testifying in Wisconsin to be qualified, the court finds that Allen's comparatively limited familiarity with Wisconsin's legal standards governing the issues presented here reduces the persuasive value of his opinions.

Moreover, it appears that Allen has previously served as an expert for parties advancing positions that are similar to the position that is currently being advanced by Walmart in this case. While the court is mindful that an expert's experience testifying for one side does not, by itself, establish a lack of credibility, the advocacy-oriented nature of Allen's opinions, coupled with his

tendency to accept assumptions favorable to Walmart,<sup>6</sup> causes the court to question the degree of his objectivity. Accordingly, as a general matter, the court gives less weight to Allen's testimony than Dr. Hamilton's testimony.<sup>7</sup>

**3. The City's appraiser properly used mass-appraisal techniques to arrive at initial assessments during the relevant years.**

Over the years, the courts have determined that mass appraisal is the appropriate and preferred methodology for initial property assessments in Wisconsin, including for commercial big-box properties. *See, e.g., Metropolitan Assocs. V. City of Milwaukee*, 2018 WI 4, ¶ 38, 379 Wis. 2d 141, 157, 905 N.W.2d 784, 791; *Lowe's Home Centers, LLC v. City of Delevan*, 2023 WI 8, 405 Wis. 2d 616, 985 N.W.2d 69. The Wisconsin Property Assessment Manual ("WPAM") defines mass appraisal as the systematic appraisal of groups of properties as of a given date using standardized procedures and statistical testing, and explicitly states that mass appraisal is the underlying principle that Wisconsin assessors should be using to value properties in their respective jurisdictions. *Metropolitan*, ¶ 29. Unlike single property appraisals, mass appraisal requires the development of a valuation model capable of replicating the forces of supply and demand over a large area and recreating mathematically the changes in value and real

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<sup>6</sup> For example, Allen selected an 8.5% capitalization rate, which ultimately produced a lower indicated value of the property with a 151,433 square-foot building that was less than what Walmart paid for the land alone in 2012.

<sup>7</sup> The court's credibility determinations involving the other main experts - William Miller, Gary Battuello, and Dominic Landretti - are based primarily on the substance of their testimony, rather than their demeanor while testifying. To the extent there was a conflict between these experts' testimony, the court made its credibility determinations based on their underlying assumptions, analyses, treatment of the relevant evidence, and ability to explain and defend their conclusions, as will be further explained below when credibility is relevant to the court's analysis.

estate activity happening in the particular municipality being assessed. *Lowe's Home Centers, LLC v. City of Wauwatosa*, 2021 WI App 63, ¶ 25, 964 N.W.2d 547.

As the assessor testified, the goal of mass appraisal is to create uniform equitable assessments relative to a specific year. He explained that the majority of Wisconsin municipalities use a market-modified cost approach through mass appraisal CAMA (Computer-Assisted Mass Appraisal) software, such as Market Drive, to generate uniform and equitable property values that reflect fair market value. After beginning with recent cost information that is aligned with updated “Marshall & Swift guides,” assessors apply localized market adjustments and modifiers, which allows them to efficiently value thousands of parcels while maintaining statistical uniformity.

Like all commercial properties in Greenfield, the initial assessments were generated from 2009 Marshall & Swift cost data because the City's last full revaluation prior to the years at issue was completed in 2009. This “leveled the playing field” by establishing a consistent baseline, allowing the mass-appraisal model to differentiate values based on property-specific characteristics rather than on inconsistent cost inputs, which supports the reliability and uniformity of the resulting assessments.

If an assessor uses mass appraisal techniques using the best information practically available, the initial assessment is proper under Wisconsin law. *See Metropolitan*, ¶ 41. Accordingly, the assessor need not gather every piece of property-specific information that might theoretically be available before making the initial assessment; the assessor simply must use the information that can practicably be obtained and used in accordance with the Manual.

In this case, Walmart has certainly demonstrated that *better* information existed. Most notably, Walmart has shown that the correct gross building area is 151,433 square feet with the

2016 addition, whereas the City's market valuation detail designated 170,830 square feet, which amounts to an approximately 20,000 square-foot error. In addition, Walmart documented the existence of a bifurcated combination of a discount warehouse and warehouse food store, reflecting approximately 50,000 square feet of a "grocery component," rather than simply a "mega warehouse." The assessor did not use this "better information" when he made the initial assessments. However, the assessor's failure to use this information does not, standing alone, necessitate a finding that the assessor reasonably could have obtained any documents that would have reflected the updated information and actual square footage. The fact that additional information later became available does not retroactively make City's original mass appraisal unlawful.

Notably, the assessor sent a request for information via certified mail to Walmart on May 20, 2016, asking for information regarding the details and costs of its newly constructed store. Among other things, the assessor requested detailed income and expense operating statements, "[a]ll lease information," the square foot area occupied by each tenant, copies of construction/remodeling contracts, and any appraisals that were performed in the last five years. However, Walmart chose not to provide the assessor with any documents reflecting the actual square footage of 151,433 square feet.

Again, the relevant inquiry is whether the assessor used the best information that could be practicably obtained at the time of the assessment; it does not require the assessor to anticipate every piece of information that may later be developed in litigation. In this case, the assessor affirmed under oath in a signed affidavit, attached to the tax-assessment rolls, that the assessments were, in fact, made on the best information that could practically be obtained, consistent with the statutory requirements. The assessor corroborated his affidavit with live

testimony, which was not materially contradicted by any credible evidence to the contrary. In the absence of any argument or evidence by Walmart that the mass appraisal violated any requirements set forth in the Wisconsin statutes or Manual, the court finds that Walmart did not establish that the assessor possessed or reasonably could have obtained materially better documents or information that was available as of the relevant assessment dates.<sup>8</sup> In other words, Walmart did not meet its burden of establishing that the City's original mass appraisal was unlawful when made.

**4. Single-property appraisals must be conducted in accordance with the three-tiered Markarian hierarchy.**

When a municipality uses mass appraisal for its initial assessment and that assessment is later challenged, the municipality must then defend the assessment with a single-property appraisal that follows the Markarian hierarchy. *See Metropolitan*, ¶ 38. The Markarian hierarchy is a three-tiered valuation methodology, rooted in Wis. Stat. § 70.32(1), that governs single-property appraisals for property tax assessments:

An arm's-length sale of the subject property is the best information of a property's fair market value, and is thus the first source of information to which an assessor should look in conducting an assessment. Examination of a recent arm's-length sale is known as a tier 1 analysis. If the property has not been recently sold, then the appraiser moves to a tier 2 analysis, examining recent arm's-length sales of reasonably comparable properties (the "sales comparison" approach).

Finally, when both tier 1 and tier 2 are unavailable, an assessor moves to tier 3, under which the assessor may consider all the factors collectively that have a bearing on the value of the property. These factors include cost, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus, and appraisals produced by the owner.

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<sup>8</sup> Notably, Allen did not sufficiently or credibly develop any opinions regarding the methods used by the assessor in setting the initial assessment.

*Lowe's Home Centers, LLC v. City of Delevan*, 2023 WI 8, ¶¶ 29-30, 405 Wis. 2d 616, 630–31, 985 N.W.2d 69, 76 (citations omitted). While tier 3 may not be used as a standalone basis for assessment when adequate tier two comparable sales data exist, an assessor may appropriate use a tier 3 income and cost analysis as a means to verify that the assessment was not excessive.

*Marathon Petroleum Co. LP v. City of Milwaukee*, 2018 WI App 22, ¶ 68, 381 Wis. 2d 180, 213, 912 N.W.2d 117, 133.

The Manual provides that appraisers should consider all three approaches when estimating the value of a property but cautions that “all three approaches may not be developed in an appraisal because a sufficient amount of data may not be available or, due to the specific property characteristics, the approach may be considered less reliable in estimating market value.”<sup>1</sup> *Property Assessment Manual* at 7–28. When considering commercial property, the Manual states, in relevant part:

Because buyers and sellers of commercial properties usually base their transaction decisions on the property's net operating income, the assessor must be able to apply the income approach. The cost approach is frequently used for new construction, special purpose properties (*i.e.*, funeral homes, medical facilities) or when sales and income/expense information are not readily available or not appropriate.

<sup>1</sup> *Property Assessment Manual* at 9–5; see also *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶ 19, 317 Wis. 2d 228, 243, 767 N.W.2d 567, 574.

Within tier 3, an assessor may consider “all the factors collectively which have a bearing on value of the property in order to determine its fair market value. *Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶ 35, 294 Wis. 2d 441, 460, 717 N.W.2d 803, 812. These factors include cost, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a

prospectus and appraisals produced by the owner. *Id.* The income approach seeks to capture the amount of income the property will generate over its useful life, whereas the cost approach seeks to measure the cost to replace or reproduce the improvements, less depreciation. *See Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶ 35, 294 Wis. 2d 441, 717 N.W.2d 803; *Nestlé USA, Inc. v. DOR*, 2011 WI 4, ¶ 29, 331 Wis. 2d 256, 793 N.W.2d 200

**5. All real estate must be valued at its highest and best use.**

Regardless of the assessment approach that is used, all property must be assessed at its “highest and best use” (“HBU”), a principle that serves as the foundation for determining a property’s full value for property tax purposes. *See Nestle USA, Inc. v. Wisconsin Dep’t of Revenue*, 2011 WI 4, ¶ 27, 331 Wis. 2d 256, 272, 795 N.W.2d 46, 54. The Manual defines “HBU” as that use which over a period of time produces the greatest net return to the property owner. *Id.* The Manual also explains that the contemplated HBU must be legal, complementary, and “not highly speculative.” *Id.* In addition, the property must be marketable for that use. *Id.* Consequently, in determining the HBU of a property, the assessor must consider those uses which are physically possible for the site, those uses which are allowable according to zoning or other local ordinances, and feasible uses which will provide a net return to the owner. *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶ 18, 317 Wis. 2d 228, 242, 767 N.W.2d 567, 574. Again, the use providing the highest net return to the owner is generally considered the HBU for the site. *Id.* According to Dr. Hamilton, an incorrect HBU conclusion fundamentally invalidates the entire appraisal because it misinforms the selection and application of the appropriate valuation methodology, rendering the final value conclusion effectively meaningless.

**6. The court gives great weight to Dr. Hamilton’s testimony regarding the proper application of the fee-simple concept.**

In commercial real estate appraisal, HBU can be analyzed differently depending on whether the valuation is placed on the fee-simple interest or the leased-fee interest. Dr. Hamilton and Allen have presented the court with competing opinions concerning the proper application of the fee-simple concept in valuing the subject property. According to Allen, the value of a leased-fee property and a fee-simple property are “vastly different.” In essence, Allen opines that the court should consider evidence of sales of vacant big-box properties without leases in place because the proper assessment is of the fee-simple interest rather than the leased-fee interest. Allen excluded leased-fee sales based on his opinion that such sales merely reflect the economic terms of particular leases, rather than the unencumbered fee-simple interest.

In contrast, Dr. Hamilton testified that a fee simple is a freehold estate of indefinite duration that is inheritable, and is a property-rights concept, as opposed to a premise of value. He explained that a lease does not encumber the transfer of a fee simple estate; it is at most an economic encumbrance that may be financially favorable or unfavorable, depending on whether the contract rent is at, above, or below market. He opined that the focus should be on the market value of the property, using market-derived rents and other market evidence, rather than a hypothetical value based upon the assumption that the property must first be vacated.

Dr. Hamilton’s opinion is consistent with the IAAO’s “Fee Simple is Not a Value Concept,” which distinguishes between property rights, use, and valuation. The main point of the publication is that a fee simple estate generally means the owner has the full bundle of property rights, subject to governmental powers and other legal limitations, which does not automatically mean the property should be valued as though it were vacant, unencumbered, or available for any use the owner chooses. According to the IAAO, it would be an oversimplification to assume that if a property is fee simple, the fee-simple interest should be valued as if there were no leases or

other interests affecting the property. Again, the definition of the estate and the definition of value are separate concepts. If a property involves fee simple ownership while being occupied by tenants, the existence of the lease would not necessarily mean the owner no longer has fee simple title. The relevant focus for valuation purposes involves the interest and economic conditions that are being valued under the applicable standard.

Dr. Hamilton used the “pin cushion” analogy to explain that a fee simple estate is like owning a pin cushion with many pins sticking out of it. Each “pin” represents a different right or interest in the property, such as the right to possess, use, sell, lease or transfer it. The key idea is that fee simple is the most complete form of ownership recognized by law; the owner holds the bundle of rights, although specific rights may be limited by easements, leases, mortgages, and other restrictions. The fee simple is the complete pin cushion of property rights, and the value reflects how those rights are measured under a particular valuation concept. In other words, fee simple dictates what estate/right a property owner has, but does not by itself dictate what the property is worth.

The court finds Dr. Hamilton’s analysis to be more persuasive than Allen’s conflicting testimony. The court does not question Allen’s position that the fee-simple interest must be valued. However, the identification of the interest being valued does not, by itself, resolve the separate questions of the HBU or which sales are sufficiently comparable to establish the fair market value. Nor does “fee simple” necessarily mean “physically vacant.” By essentially making vacancy a prerequisite to the selection of fee-simple comparables, Allen effectively assumed the conclusion his appraisal was intended to establish, namely that the subject property should be valued as vacant. Allen places too much weight on the “fee simple” label and too little weight on the actual characteristics of the property and the market in which it would sell. The

court therefore gives greater weight to Dr. Hamilton's analysis and opinion, which distinguishes the property interest being valued from the separate issue of whether the market evidence supports treating the subject as vacant.

**7. The court finds that Walmart's broadly-defined HBU is entitled to less evidentiary weight than the City's more narrowly-defined HBU.**

In this case, Allen identified the HBU generally as "retail use," which would include "home goods stores, farm and home stores, discount retail, grocery, and self-storage." In contrast, Dr. Hamilton and Landretti defined the HBU more narrowly as an occupied, single-tenant big-box property, and a "general discount store with grocery," respectively.

At first glance, Allen would appear to have the better formulation because "retail use" actually identifies a use, while Dr. Hamilton's phrase mixes use, occupancy, and economic characteristics. However, Dr. Hamilton credibly testified that HBU must be as narrow as the market will allow, because a narrower conclusion reduces the number and size of (potentially subjective) adjustments and produces more precise, comparable data. Landretti corroborated Dr. Hamilton's testimony, opining that "retail use" is too broad to give the court meaningful guidance on which comparables to look at, and is contrary to standard appraisal practice. Generally speaking, the court agrees that the narrower HBU definitions submitted by Dr. Hamilton and Landretti more precisely define the specific subset of the retail market and property account for actual market demand.<sup>9</sup>

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<sup>9</sup> The court gives great weight in particular to the testimony of Dr. Hamilton, who opined that an HBU based on an improper foundation makes "everything else in the appraisal meaningless" and that market analysis must be completed correctly before any approach to value is begun. Dr. Hamilton also credibly testified that broad labels like "retail" use are far too wide because they include Taco Bell, Mayfair Mall, and Lowe's.

The court finds that Landretti's and Dr. Hamilton's narrower conclusions more persuasive because they more closely identify the property's actual competitive position and economic characteristics and provide a more meaningful basis for selecting comparable properties. This distinction is important because Wisconsin law requires comparable properties to be reasonably comparable to the subject property's HBU, and the greater the similarity between the properties, the more reliable the comparable sale.

The effect of Walmart's generalized HBU is significant because the court views the HBU determination as the first "domino" in the valuation analysis. After all, it effectively guides the selection of comparable properties, the valuation approach, as well as the assumptions and calculations used in the experts' analysis. The court finds that Allen's characterization of the HBU, together with his reliance on less comparable "second generation" sales of vacant properties located outside of Wisconsin, reflect a position and methodology that are more closely aligned with an outcome-driven advocacy position than with an objective valuation of the property. This significantly undermined the reliability of his expert valuation. Walmart's generalized "retail use" HBU label was the first domino that fell.

**8. Walmart has not provided significant contrary evidence with respect to comparables under the tier-2 sales approach.**

The tier-2 sales approach relies on recent market sales of similar properties to predict the probable market price of the subject. This approach is based on the premise that similar properties will sell for similar prices on the open market. *See Lowe's*, 405 Wis. 2d 616, ¶ 43. ("Comparable sales refer to properties that are similar to the subject property in age, condition, use, type of construction, location, design, physical features and economic characteristics.") The more similar the sold property is to the subject, the more reliable is the sale price as an indicator

of the value of the subject property. *Id.* “Where sales differ from the subject, [the sale prices] are adjusted up or down in an attempt to reflect how the market responds to the various differences.”

1 Wisconsin Property Assessment Manual 9-22. The amount of adjustment must be reflected in sales data; it cannot involve guesswork.

The selection of comparables is driven by the HBU and property-rights determinations mentioned above. This is where the distinction between first-generation and second-generation space becomes particularly relevant. The IAAO defines “first-generation space” as “a building or space designed to be functionally and economically efficient for the original tenant or a similar class of tenants over a period of time during which the space retains its original utility and desirability.” “Second-generation space,” in contrast, is defined as “a building or space whose design is no longer functionally and/or economically desirable for the original tenant or a similar class of tenants.”

In the IAAO Big Box Valuation Position Paper, a valuation as second-generation space is considered an Investment Class D property, described as follows:

Investment class D big-box retail properties sell at low prices and when leased, indicate high capitalization rates. They are often vacant or soon-to-be vacant properties with a highest and best use for a second-generation use. The original market demand for these properties has moved to more desirable locations. These vacant properties are ready for redevelopment for a different use (e.g., low-end retail, office, or warehouse). The original design is no longer valuable or viable in the marketplace except by second-generation users at low prices or rents.

The Class D categorization describes a particular economic condition of big-box properties in which the original use has lost market viability and the property is vacant or approaching vacancy, with a second-generation use becoming relevant.

When a first-generation big-box store sells, it generally follows two paths: it either sells to an investor with a potentially lucrative corporate lease intact, or it sells as a vacant property,

often at a sizeable discount, to a second-generation user. Accordingly, under Wisconsin's Markarian hierarchy for property tax assessment, occupancy status of comparable properties is a critical factor in the Tier 2 sales comparison approach. After all, when valuing properties, the assessor “should choose comparable sales exhibiting a similar highest and best use and similar placement in the commercial real estate marketplace.” *Lowe’s Home Centers, LLC v. City of Delevan*, 2023 WI 8, ¶ 44, 405 Wis. 2d 616, 636, 985 N.W.2d 69, 78–79. In this case, Walmart is, in essence, asking the court to find that Class D sales are sufficiently comparable to the subject property.

Relevant to this issue, the Manual sets forth language regarding the use of “vacant” and “dark” properties in commercial valuation:

The assessor should avoid using sales of improved properties that are vacant (“dark”) or distressed as comparable sales unless the subject property is similarly dark or distressed. A vacant store is considered dark when it is vacant beyond the normal time period for that commercial real estate marketplace and can vary from one municipality to another. A recent court case stated distressed properties are not seen as meaningfully comparable to operating properties.

*Lowe’s Home Centers, LLC v. City of Delevan*, 2023 WI 8, ¶ 44, 405 Wis. 2d 616, 636, 985 N.W.2d 69, 78–79 (citing *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶ 22, 351 Wis. 2d 439, 454, 839 N.W.2d 893, 901). The *Lowe’s* court clarified that the Manual does not strictly prohibit the use of vacant properties as comparables to occupied properties; rather, comparability exists along a continuum depending upon how long a property has been vacant as compared to normal exposure time for property of that type in the same geographic area. *Id.*, ¶71. The court rejected “the blanket proposition that occupancy or vacancy has no role to play in valuation[,]” and it noted “[g]enerally, a site that can sustain a business is more valuable than one that cannot.” *Id.*, ¶¶ 52-53. The court also emphasized that assessors should “use caution” when comparing vacant properties to occupied properties because “the economics

underlying a vacancy may be indicative of a meaningful difference in the circumstances of the properties.” *Id.*, ¶71.

While vacancy alone does not operate as an automatic disqualifier for comparable properties, it is nonetheless may be a significant factor that must be analyzed in context. Thus, if a property is distressed or vacant, such attributes should be considered in determining whether properties are reasonably comparable to the subject property. While the terms describe different conditions – vacancy relates to occupancy status and duration, whereas distress relates to financial pressure or market conditions – both may render a property inappropriate as a comparable to a stabilized, operating retail property.

In this case, Allen identified the market as existing facilities that were available for sale or lease in the open market, and he found seven “comparable” fee-simple sales that were vacant but available for retail use in the Midwest during the relevant time periods involved in the valuation.<sup>10</sup> He excluded the “build-to-suit market” – which involve yet-to-be-constructed facilities built to the specifications of the prospective buyers and tenants – because the sale prices for such properties are based upon the cost of construction, whereas the “existing market” sale price more accurately reflect the actions of buyers and sellers with respect to supply and demand. In addition, he excluded leased-free sales based on his opinion that such sales were subject to above-market build-to-suit leases and were “at prices reflective of the credit of the tenant.” Finally, he excluded sale/leaseback sales because they involved financing transactions that, in his opinion, did not adequately convey fair market value.

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<sup>10</sup> The court considered Allen’s testimony with skepticism as he discussed “comparable” sales that seemed to be in inferior, as opposed to prime retail locations, and which were geographically distant from the subject property.

Despite our supreme court's admonishment in *Lowe's*, all seven of Miller's "comparables" were vacant:

- A former Target in Illinois. The Target had a marketing time of approximately four months; the buyer reimaged the building into a Big R retail store, and there were no deferred-maintenance items at the time of sale.
- Two former Super Kmart's in Michigan. One of the former Super Kmart's had a marketing time of approximately twelve months; the buyer, U-Haul, purchased the property for a retail showroom, truck-and-trailer rental, and storage use, and Allen made an upward adjustment for deferred maintenance. The other former Super Kmart had a marketing time of approximately eighteen months; Kroger purchased the property for use as a Kroger Marketplace, occupying approximately 140,000 square feet and marketing the balance for lease.
- A former Walmart in Minnesota. This property had a marketing time of approximately fourteen months; the buyer, At Home, was an owner-user that reimaged the property for retail use, and the building was in good condition with no deferred maintenance.
- A former Walmart in Michigan. This property had a marketing time of approximately five months; Rural King purchased the property for general-merchandise retail use, multiple parties were interested in acquiring the property, and the building was in good condition with no deferred maintenance.
- A former Target in Wisconsin. This property had a marketing time of approximately eleven months; the buyer reimaged the building into a Festival Foods grocery store, and the building and parking lot were in very good condition.
- A former HOM Furniture in Wisconsin. This property had a marketing time of approximately three months; and owner-user purchased the property for general-merchandise retail use, and the property had been well maintained and was in average condition. The former HOM Furniture in Wisconsin had a marketing time of approximately three months; and owner-user purchased the property for general-merchandise retail use, and the property had been well maintained and was in average condition.

Instead of “using caution” when relying on vacant property sales, Allen actually rejected, from the outset, all property sales that were subject to a lease, with continued occupancy at the time of sale.<sup>11</sup>

To his credit, Allen performed an extremely thorough analysis of adjustments that were warranted for expenditures after sale, property rights conveyed, market trends and conditions, arterial and demographic attributes, and submarket trends. He also provided a number of helpful charts and tables from the Situs RERC report, which supported his opinions regarding the necessity and/or scope of adjustments. For example, he provided a table showing the statistics on deed restricted versus non-deed restricted retail property sales over 50,000 square feet, which concluded that no adjustment was required for these deed restrictions.<sup>12</sup> With that said, the credibility of Allen’s testimony is diminished by the magnitude of adjustments to his comparable sales for property rights, age, condition, and size, which were supported by largely arbitrary five-percent increments without supporting paired-sales analysis, statistical analysis, or cost-to-cure studies.<sup>13</sup>

Dr. Hamilton testified that Allen’s consideration of the vacant properties required a hypothetical condition and did not appropriately consider evolving property characteristics as a

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<sup>11</sup> The court gives greater weight to opinions supported by demonstrated familiarity with the Wisconsin market and its governing valuation framework. The court reiterates that Allen’s professional experience is principally regional rather than concentrated in Wisconsin. This distinction is material because Wisconsin’s property-tax valuation framework, as developed by the common law, materially differs from the law and practice of other Midwestern jurisdictions.

<sup>12</sup> However, Allen conveniently omitted any reference to one particular chart in the Situs RERC report: the “US Big Box Sales – Property Rights Summary.” This chart actually quantifies the impact that continued occupancy of the sale properties has on the sale price. It shows that the average sale price per square foot for occupied properties (leased fee) is \$128.54, while the vacant properties (fee simple) sold for an average of only \$46.65 per square foot.

<sup>13</sup> Allen’s age adjustments in the sales approach did not match the depreciation rate he used in his own cost approach

rationale for the change in a property's use.<sup>14</sup> He noted that abandoned stores may be evidence of oversupply in the market or a failed retail location. He described the market economics of functional and economic obsolescence, and also distinguished the data needed to support each type of loss.

The court notes the existence of competing expert testimony regarding the use of build-to-suit properties in the sales comparison analysis. In contrast to Allen's decision to automatically discard build-to-suit and sale-leaseback transactions, Dr. Hamilton opined that such transactions *must* be analyzed to determine whether non-market pricing exists, and Landretti opined that such transactions *should* be analyzed to determine if the rental rates are consistent with market based on all the other market conditions.

While Allen's opinion was corroborated by Batuello, the court finds Dr. Hamilton and Miller more credible than Allen and Batuello. Batuello in particular admitted that he never personally inspected any of the properties, never reviewed the underlying leases, and could not identify the basis for his conclusion that they were sale-leaseback transactions other than he had "some basis" that he could not articulate at trial. More importantly, Batuello ultimately conceded that build-to-suit and triple-net leases "can be equivalent" to market value, thus contradicting his categorical rejection of build-to-suit transactions. Finally, Batuello could not recall whether his opinions on leased fee and fee simple have ever been accepted in Wisconsin by a court. In light of the evidence and after making the appropriate credibility determinations, the court finds that the City appropriately considered these transactions and made rigorous, evidence-based downward adjustments to isolate the true value of the underlying real estate.

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<sup>14</sup> Allen insisted that valuing fee simple for a retail store requires assuming the property would need to be vacated at closing to deliver full occupancy rights to the buyer.

As our supreme court recognized, significant expenditures might be required to make certain properties usable again. Notably, two of Allen's comparables required considerable expenditures. In particular, one of the former Kmart's required an investment of \$19 million, on top of the \$5.5 million paid for the property to make it usable again as a grocery store. Similarly, the former Wisconsin Target required an investment of at least \$9 million on top of the \$4 million paid for the property. Allen did not effectively take these expenditures into account in his tier-2 valuation approach.

Perhaps most importantly, Landretti credibly testified that none of Allen's seven sales were reasonably comparable to the subject property because they were either vacant, in transition, or distressed. Landretti noted that five of the comparables are located outside Wisconsin, which had "a very different market, [with] a very different base," even though Allen identified the Milwaukee/Waukesha MSA as the relevant market area.<sup>15</sup> Landretti labeled the former Illinois Target a "failed business location" because it was closed due to "multiple years of declining sales and underperformance." He testified that one of the former Michigan Kmart's has a different HBU because it was purchased to be converted to a moving and storage property. He opined that the other former Michigan Kmart was distressed because of Kmart's bankruptcy, additionally noting that the buyer sustained \$19 million in transition costs. He said the Minnesota Walmart "didn't make sense" to him because it was actually closed due to inadequate size dimension, was sold subject to a deed restriction prohibiting use as a discount or grocery store, and was converted to multi-tenant use.<sup>16</sup> He distinguished the former Michigan Walmart because it was deed-restricted against discount and grocery use, was converted to multi-tenancy, and was

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<sup>15</sup> This inconsistency further undermines Allen's analysis.

<sup>16</sup> This testimony refutes Allen's claim that the Greenfield store is oversized and underscores that the sale cannot be used for an unrestricted, single-tenant, occupied subject.

“condo-ized” with portions sold off afterward. He noted that the former Wisconsin Target was closed after several years of decreasing profitability, was gutted at a cost of approximately \$9 million, and was operated as a multi-tenant property. Finally, he explained that the former HOM Furniture in Wisconsin was distinguishable in use and income generation because it was a partially-occupied, multi-tenant building that was still being marketed for partial lease at the time of trial.

The vacant comparables<sup>17</sup> submitted by Allen stand in direct contrast to the four comparables submitted by Miller that recently sold in Wisconsin: a Walmart, a Walmart Supercenter,<sup>18</sup> a former Sam’s Club, and a Fleet Farm.<sup>19</sup> Miller examined the physical characteristics, offering-sales memoranda, public lease records, real estate transfer returns, news articles, brokerage market reports, SEC filings and CMBS mortgage documents in order to verify the terms of the sales with reasonable precision. Miller testified that the Walmart transferred for approximately \$17 million as a “useable sale.” He confirmed that the Walmart Supercenter

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<sup>17</sup> Miller selected these comparables for the 2018-2020 tax years. For the 2017 tax year, Miller considered second-generation sales of former big-box stores, but rejected them as comparable because they did not compete in the same market, lacked the similar ability to generate income, and did not have similar physical characteristics. He also considered “national investment sales of continued big box stores,” including Home Depot, Lowe’s, Sam’s Club, and Walmart. In doing so, he acknowledged that these stores could compete for the same investor dollars as the subject property if they were leased, but he found it difficult to make proper adjustments for the national market-location differences. In addition, he considered sale of properties that competed in different market segments, such as Shopko, Pick ‘n Save grocery stores, and a handful of other retailers, but he rejected them as comparables because they were physically dissimilar, with differing ability to generate income.

<sup>18</sup> Jeff Yoder, the City of West Bend Assessor, corroborated the existence of the Walmart Supercenter as an arm’s length, “usable” transaction.

<sup>19</sup> Allen offered no reason for the exclusion of these sales except that the properties were all occupied and subject to a lease at the time of sale.

involved a fee simple, arm's length transaction on an all-cash basis at \$83 per square foot. He also confirmed that both transactions were not "portfolio sales" because they involved different sellers and were offered, marketed, and priced as separate properties in the market. The Sam's Club sold for almost \$10 million, and included a \$12 million post-closing investment by the buyer for renovations. The Fleet Farm sold for \$163 per square foot. Three of the sales were build-to-suit transactions.

Miller then applied adjustments to the comparable sales.<sup>20</sup> For example, he included a 30 percent upward adjustments to the Walmart and Walmart Supercenter sales to compensate for below-market fixed-contract rents. He also included a 30% adjustment for physical condition and age, and 10% for size difference. In addition, he applied a 15% location adjustment to the Sam's Club to account for its location on the opposite side of the Madison beltway from the primary retail market, as well as supplemental adjustments for size and condition. After adjustments, his four comparable sales produced indicated values ranging from \$143 to \$163 per square foot. His valuation of Walmart – at \$150 per square foot – fell squarely within this range.

The court concludes that Walmart's comparative-sales analysis does not constitute significant contrary evidence that is sufficient to overcome the presumption of correctness or demonstrate that the City's assessments were excessive. After all, Walmart's relatively broad and less restrictive HBU permitted it to look beyond the actual, economically viable use for the property, which led to the selection of vacant properties that produced a substantially lower indication of value, which severely weakened the reliability of Walmart's tier-2 analysis.

Because the HBU determination and comparative sales are intertwined, the deficiencies in the

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<sup>20</sup> On cross-examination, Miller credibly explained that his qualitative adjustments were not "guesstimates," but rather reflected "a typical methodology used in any time of assignment regarding a similar complexity of property of where there are few sales in particular."

former substantially undermine the reliability of the latter. As stated above, the HBU determination was the first domino to fall. Walmart's selection of comparable properties was the second.

**9. The City's valuations for the relevant tax years are not materially affected by the parties' tier-3 income analyses.**

After completing their analyses under tier 2, both Miller and Allen conducted a tier-three analysis of cost and income. As stated above, tier 3 permits consideration of "all the factors collectively which have a bearing on value." *Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶ 35, 294 Wis. 2d 441, 460, 717 N.W.2d 803, 812. These factors include cost, depreciation, replacement value, income, location, occupancy, and other relevant considerations. *See id.*

Using the income capitalization approach, which seeks to capture the amount of income the property will generate over its useful life, Miller first estimated the gross income obtainable from the property and then estimated a reasonable vacancy allowance based upon the property's actual experience and the experience of similar properties in the area. He analyzed two sets of rental comparables: nine grocery-anchored properties and ten general merchandise big-box properties. Based upon this information, Miller determined that market rent was \$15.00 per square foot for the 50,000 square feet of grocery space and \$9.50 per square foot for the 105,000 square feet of general merchandise space, producing a "blended market rent" of \$11.25 per square foot for the entire property on a triple-net basis.<sup>21</sup> Miller then identified \$123,573 of

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<sup>21</sup> While the court questions whether Miller's "blended methodology" is materially consistent with USPAP Rule 1-4(e), the court understands that an appraisal could potentially violate the USPAP without necessarily violating the particular requirements governing a Wisconsin property tax assessment. The court also recognizes there is a distinction between rebutting the presumption of correctness and proving excessiveness.

additional annual income from subtenants, which capitalized to approximately \$1.7 million in value.

Miller also testified that under the existing triple-net lease structure, no separate vacancy or collection-loss deductions were appropriate because the property was occupied and a vacancy was not anticipated.<sup>22</sup> He did not deduct management fees, replacement reserves, or tenant improvements, which avoided a “double counting” between the NOI deductions and the capitalization rate.

Miller developed an overall capitalization rate of 7.25 percent that was drawn from four sources: (1) the Bolder Group net-lease survey; (2) seventeen Wisconsin big box and grocery sales transactions; (3) eleven additional recent capitalization rates drawn for Wisconsin sales; and (4) a band of investment analysis. Applying the market rent of \$11.25 per square foot and the 7.25 percent capitalization rate, Miller calculated an income-approach value of approximately \$24 million, or roughly \$155 per square foot.

Allen’s technique, in contrast, involved the direct capitalization of NOI with an adjustment for stabilization costs. He estimated the gross potential rental income that the property is capable of producing, deducted a vacancy and collection-loss factor to arrive at the stabilized estimated effective gross rental income, deducted estimated expenses to arrive at the NOI, capitalized the NOI to reflect return on and return of the investment, and subtracted stabilization costs.

Using rental rates that were primarily from outside Wisconsin, Allen compared seven build-to-suit leases averaging approximately \$12.46 per square foot with leases of existing big-

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<sup>22</sup> This is consistent with the PWC National Lease Market survey, which has historically shown that a zero percent underlying vacancy/credit loss is a common assumption. In some survey periods it was used by a majority of investors/market participants.

box stores averaging approximately \$4.83 per square foot.<sup>23</sup> He ultimately determined a market-rent range of \$5-6 per square feet from second-generation building leases while rejecting higher first generation build-to-suit rents. After deducting various stabilization costs, Allen built a “fee simple” capitalization rate by consulting “leased-fee” oriented investor surveys and band-of-investment inputs. He then chose an 8.5 percent capitalization rate (plus a tax load) for an approach that layered multiple benchmarks.

The court recognizes that the parties’ competing income-approach testimony was technical and complicated. Their competing analyses involved numerous interrelated assumptions concerning market rents, comparable properties, and capitalization rates. The complexity of the analysis, however, does not relieve the court of its responsibility to determine what weight the competing opinions deserve.

After reviewing the evidence, the court finds that the City’s expert opinions are better supported by the actual market evidence and requires fewer unsupported assumptions. For example, Allen primarily used rental rates from outside Wisconsin, without a credible explanation why out-of-state evidence is necessary or why the other markets are sufficiently similar. Also, he admitted that build-to-suit rents are not always above market, yet rejected the higher first-generation rents, without credibly explaining why these particular build-to-suit rents are not evidence of market rent. The result is a selection of rental evidence that appear to favor the lower end of the observed market without a sufficiently persuasive explanation for why the

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<sup>23</sup> Allen recognized the disparity, explaining that build-to-suit space is built to the retailer’s exact specifications, whereas existing space requires the retailer to incur significant modification costs.

higher rental evidence should be disregarded.<sup>24</sup> Accordingly, Walmart's income-based evidence is entitled to diminished weight.

**10. The City's valuations for the relevant tax years are not materially affected by the parties' tier-3 cost analyses.**

Miller also used the cost approach, which seeks to measure the cost to replace or reproduce the improvements, less depreciation. After reviewing twenty-two land sales in the big-box retail market, Miller calculated a land value of \$7,352,000.<sup>25</sup> Miller testified that Walmart's actual construction expenditures totaled approximately \$33 million, far in excess of the initial contractor's budget of approximately \$19 million, because Walmart supplied many construction materials directly. He also identified approximately \$10 million of documented site work that was necessary because of the topography and elevation.

In order to determine a reasonable estimate of the current cost to construct a substitute building of equal utility, Miller used the Marshall Valuation Service ("MVS") replacement-cost-new methodology, blended between general merchandise and supermarket cost categories, supplemented by a ten percent allowance for stormwater management and site improvements that were not captured in baseline MVS costs. This produced approximately \$18 million for building and site improvements, with time adjustments to the relevant valuation dates. Instead of assuming a straight-line loss in value, Miller applied a curvilinear-depreciation methodology to reflect the way the market actually loses value over a property's life. In particular, he explained that this method reflects the marketplace reality that depreciation occurs at a lower rate in early

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<sup>24</sup> The subject property is leased at a rental rate of \$17.17 per foot triple net. Numerous sales of similar large retail properties in Wisconsin show market-derived capitalization rates of 7.0 to 7.5 percent.

<sup>25</sup> This valuation is actually less than the \$7,365,000 initial purchase price.

years and a higher rate later in life. Miller also considered both functional and external obsolescence, finding none.

Allen also derived building costs from MVS, including building costs, site improvements, soft costs, and leasing commissions.<sup>26</sup> Using Marshall & Swift, he blended mega warehouse and discount store benchmarks and extracted approximately 71% functional/economic obsolescence based on indications from the sales and income approaches.<sup>27</sup> He calculated physical depreciation on a straight-line age-life basis using a 35-year life from MVS tables for big-box, discount, and mega-warehouse stores.

Walmart argues that Miller's cost approach improperly split the building into two separate components – for merchandise and grocery space – even though the building operates as one integrated big-box store with shared infrastructure. According to Walmart, this “split-store” premise inflated the replacement cost and made the cost approach less reliable.

Walmart has not met its burden of persuasion. Under Wisconsin's tier-3 cost approach, the controlling question is whether the assessor's estimate represents the current cost to construct an improvement of equal utility – as opposed to reproducing the exact existing building – using professionally accepted appraisal practices and the best available information. Nowhere in the Manual is the estimate defined by Walmart's categorical label as an integrated big-box store. Moreover, it is undisputed that the property combines general merchandise retail with grocery function, which gives rise to a sound argument for componentizing the building and applying

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<sup>26</sup> Soft costs and leasing commissions were allocated into building and site improvements so they could be depreciated.

<sup>27</sup> Allen calculated functional obsolescence using both the “direct extraction” and “capitalized rent loss” methods.

different MVS cost sections where the construction requirements and physical characteristics actually differ.<sup>28</sup> In this case, Miller explained that grocery space costs more because it includes expensive electrical and cooling equipment, which, in turn, changes the load factor and HVAC requirements. The court finds Miller's testimony to be credible and consistent with the MVS methodology. Contrary to Walmart's assertion, the court additionally finds that Miller's component-based replacement-cost analysis is actually more accurate than forcing the entire building into one category.<sup>29</sup>

With respect to obsolescence, Walmart points to Allen's testimony that retailers build big-box stores to operate businesses profitably, not to maximize the retail sale of the real estate, and that second-generation buyers typically reimage such properties for their own brands and business models. According to Walmart, those market realities create functional and external obsolescence that the sales-comparison captures directly. As legal authority for its assertion, Walmart relies on Chapter 9 of the Manual, which provides tables to provide the average depreciation or residual for different structure types. These tables "reflect physical depreciation and functional obsolescence due to out-of-date materials and workmanship." Relevant here, the Manual provides that "[t]he assessor must still estimate economic obsolescence and functional obsolescence due to such factors as design, style, or layout."

However, as the City points out, the Manual also provides that a separate functional-obsolescence deduction is generally not appropriate for functional deficiencies that have already

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<sup>28</sup> Batuello testified that Miller's "mixing and matching" "might be somewhat aggressive," but was not problematic.

<sup>29</sup> In his rebuttal testimony, Batuello did opine that Miller relied on old MVS depreciation tables and did not calibrate those tables to the local market. However, he did not demonstrate with credible evidence that Miller's use of such tables, without further local-market calibration, produced an excessive measure of depreciation or otherwise caused the assessment to exceed the property's fair market value as of the relevant assessment dates.

been eliminated by using replacement cost rather than reproduction cost. Whereas the “reproduction cost” “represents the cost of an exact replica of the structure using the same materials, design, and quality of workmanship,” the replacement cost “is the cost of a structure having the same utility but using current materials, design and methods.” As explained in the Manual:

The major difference between reproduction and replacement cost is that the reproduction cost can include replicating obsolete items such as high ceilings, ineffective layouts, and other functionally obsolete items or materials. When using reproduction cost, the assessor must remember to deduct the market value of functional obsolescence caused by these items when estimating depreciation. This is not necessary when using replacement cost because the functional obsolescence is eliminated by using current materials, design, and workmanship.

Consistent with this language, Miller credibly testified that a separate functional-obsolescence deduction is generally not appropriate for functional deficiencies that have already been eliminated by using replacement cost rather than reproduction cost. His conclusion is further supported by the evidence, which indicates that the property was built in 2012, is fully occupied, generates strong sales, and has no observed deferred maintenance.

Finally, when weighing the credibility of the experts, the court takes particular notice of Walmart’s hefty deduction for functional and economic obsolescence, despite the building being relatively new during the assessment period. Generally speaking, a deduction of that magnitude requires credible market evidence to demonstrate that market participants would discount the property to such an extent. Instead of presenting such evidence, Walmart relies in large part on data and conclusions drawn from its sales-comparison and income approaches, which the court has addressed separately. The Court therefore gives Walmart’s obsolescence adjustment little weight and finds that it does not constitute “significant contrary evidence.”

## **CONCLUSION**

For the reasons set forth above, the court concludes that Walmart has not met its burden of presenting significant contrary evidence sufficient to overcome the presumption of correctness afforded to the City's assessments for the tax years at issue. The court finds that Walmart's initial premise – that valuation of the fee-simple interest requires the subject property to be treated as vacant – was unpersuasive. That premise affected Walmart's HBU determination, which, in turn, affected its selection of vacant properties as comparable sales. When considered in light of the court's credibility and reliability determinates articulated above, Walmart has not met its burden of persuasion. For the reasons set forth above, the Court finds that the assessments for the 2017, 2018, 2019, and 2020 tax years for the subject property are neither unlawful nor excessive. Judgement shall be entered in favor of the City, and Walmart's consolidated complaints are dismissed with prejudice.

**SO ORDERED.**