Dated in Stevens Point, Wisconsin this 4th day of April, 2019.

BY THE COURT:

HONORABLE THOMAS T. FLUGAUR
Circuit Court Judge, Branch 3

STATE OF WISCONSIN BRANCH 3 PORTAGE COUNTY

LOWE'S HOME CENTERS, LLC.,

Plaintiff,

-vs-

Consolidated Case Numbers: 16CV208
17CV187

VILLAGE OF PLOVER,

Defendant.

DECISION

I. SUMMARY OF THE PARTIES' POSITIONS AND THE BASIC ISSUE IN DISPUTE

To summarize Lowe's position: E-commerce has changed the retail landscape in a dramatic way. Big box stores such as Sears, Shopko and K-Mart are closing every day, leaving a glut of these large buildings on the real estate market. As a result, because of the oversupply of these stores, they can be bought very cheaply on the open market, and, therefore, are significantly over-assessed for property tax purposes.

To summarize the Village's position: While it is true that some retail big box stores are suffering in the world of e-commerce, it is not true when it comes to home improvement/building materials stores. In fact, these stores are thriving. (Exh. 119, pp 34-41). Lowe's is one of the anchors in a highly successful retail development, which has a very low vacancy rate within the immediate area. The Village argues that it is

improper to compare an occupied home improvement store with vacant buildings that were formerly American TV, K-Mart, Walmart or Target in other locations around the state. All of these types of retail stores have been negatively affected by e-commerce.

The real issue in this case is (when assessing fair market value) whether a home improvement retail building, Lowe's, which is located in a thriving low vacancy retail setting, compares with vacant or transition properties located in other areas of the state.

II. THE PRESUMPTION OF CORRECTNESS HAS NOT BEEN OVERCOME

The question on appeal in Wis. Stat. §74.37 action is not whether the initial assessment was incorrect, but whether it was excessive. *Metro. Assocs. v. City of Milwaukee,* 2018 WI 4, ¶40, ¶64 n. 15, 379 Wis, 2d 141, 158, 167, 905 N.W. 2d 784, 792, 797. The taxpayer has the burden to show that the assessment is excessive. *Regency W. Apts. L.L.C. v. City of Racine,* 2016 WI 99. ¶ 72, n. 23, 372 Wis. 2d, 282, 888 N.W. 2d 611, *citing, Sausen v. Town of Black Creek Bd. of Review,* 2014 WI 9, ¶ 20, 352 Wis. 2d 576, 843 N.W. 2d 39. A municipality's assessment enjoys a statutory presumption of correctness. Specifically, under Wis. Stat. § 70.49(2):

> The value of all real and personal property entered into the assessment roll to which such affidavit is attached by the assessor shall, in all actions, and proceedings involving such values, be presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other.

Pursuant to Wis. Stat. § 903.01, the presumption is a significant hurdle. To overcome the presumption, the taxpayer must present its own direct and unambiguous contrary evidence – referred to as "significant contrary evidence" – or a challenge will be rejected. *Adams Outdoor Advert. Ltd. v. City of Madison,* 2006 WI 104 ¶ 25, 294 Wis. 2d 441, 717 N.W. 2d 803; *Sausen v. Town of Black Creek Bd. of Review,* 2014 WI 9, ¶ 34, 352 Wis. 2d 576, 590, 843 N.W. 2d 39, 46. The presumption is not overcome by the existence of contrary or even substantially contrary evidence. *Bonstores Realty One, L.L.C. v. City of Wauwatosa,* 2013 WI App 131, ¶ 6, 351 Wis. 2d 439, 439 N.W. 2d 893. Indeed, if the assessor correctly applies the Wisconsin Property Assessment

Manual (WPAM) and the Wisconsin Statutes and no *significant* contrary evidence exists, the assessment is deemed accurate. *Allright Props., Inc., v. City of Milwaukee,* 2009 WI App 46 ¶ 12, 317 Wis. 2d 228, 767 N.W. 2d 567 (the challenging party must either (1) present significant contrary evidence in opposition to the assessment, or; (2) demonstrate that the assessor failed to correctly apply the law); see also *W. Capitol, Inc. v. Vill. of Sister Bay,* 2014 WI App 52, ¶ 50, 354 Wis. 2d 130, 848 N.W. 2d 875. When the assessor correctly applies the law, and no significant contrary evidence exists, the Court must reject a party's challenge. *Allright Props., Inc.,* 2009 WI App 46, ¶ 12. Further, when a party fails to value a property in accordance with the Manual, it cannot constitute significant contrary evidence to rebut the statutory presumption. *Id.* ¶ 16.

The Village Assessor, Deb Edwards, testified that mass appraisal was performed for the January 1, 2016 and January 1, 2017 years of value. The mass appraisal included a sales ratio analysis through use of a computer-assisted mass appraisal program that identified properties that needed adjustment from the prior year.

Valuations using mass appraisal were recently discussed in *Metro. Assocs.,* 2018 WI 4, wherein the Supreme Court of Wisconsin was asked to determine whether mass appraisal was properly utilized and relied upon by the City of Milwaukee to determine the initial assessed value of certain property. Notably, the Court held that use of mass appraisal to set the initial assessment is consistent with Wisconsin law, and failure to perform a single property appraisal to set the initial assessment does not rebut the presumption of correctness afforded to a municipality. *Id.*

In *Metropolitan Associates,* the properties at issue were initially assessed by mass appraisal. 2018 WI 4 at ¶ 9. The *Metropolitan Associates* Court pointed out that "mass appraisal stands in contrast to single property appraisal, which is the valuation of a single particular property as of a given date. A single property appraisal focuses on the unique characteristics of the subject property within the strictures of the methodology set forth in *Markarian,* 45 Wis. 2d 683". ***Id.*** *At ¶ 30* (*citing, Markarian v. City of Cudahy,* 45 Wis. 2d 683, 173 N.W. 2d 627

(1970). After a two-day trial, the Court found that the City had complied with the applicable statutes and the WPAM through its use of mass appraisal for the initial valuation. *Id.* ¶ 18.

On appeal, the appellants argued that the initial assessment was invalid because the City assessor should have used the ThreeTier *Markarian* technique used in single property appraisal as opposed to mass appraisal. *Id.* ¶ 21. Further, appellants argued that the use of mass appraisal permissibly prevented the municipality from relying on the "best information" as required by Wis. Stat. § 7.32(1). *Id.* At ¶ 26. The Wisconsin Supreme Court disagreed with both arguments.

First, it held that according to the statutes, property must be assessed "in the manner specified in the [WPAM]," *Id.* ¶ 35, *citing*, Wis. Stat. § 70.32(1) and, not only is mass appraisal an accepted method of appraisal in the WPAM, it "is the underlying principle that Wisconsin assessors should be using to value properties in their respective jurisdictions." *Id.* ¶ 29, *citing,* WPAM, 7-32 (2009). It is further pointed out that the WPAM outlines the division of labor between mass appraisal and single property appraisal, demonstrating when the use of each method is appropriate:

> The assessor needs skills in both mass appraisal and single property appraisal. Mass appraisal skills for producing initial values, whether during a reappraisal year or not, and single property appraisal skills to defend specific property values or to value special-purpose properties that do not lend themselves to mass appraisal techniques.
> *Id.* ¶ 36 (*citing*, WPAM 7-32).

Accordingly, the Court held that the WPAM clarifies that mass appraisal is accepted at the initial assessment stage. *Id.* ¶ 36. The Court further held that defending the initial assessment with a single property appraisal – even if the single property appraisal is higher than the initial assessment – is also consistent with Wisconsin law. *Id.* In fact, the Court noted that if the municipality subsequently employs a single property method of valuation to defend the initial assessment and it comes back higher than the initial valuation, as was the case in *Metropolitan Associates*, it could affirm that the taxpayer was not over-assessed. *Id.* ¶ 40.

Second, the Court found that the appellant viewed the term "practicably" in Wis. Stat. § 70.32(1) too narrowly. *Id.* 42. Wis. Stat. § 70.32(1) states that an assessment must be based on "the best information that

the assessor can **practicably** obtain". (Emphasis added). The appellant argued that single property appraisal offered the best possible results and because the municipality can undertake such appraisals – but chooses not to – it was not obtaining the best information. *Id. ¶ 26-27.* On review, the Court noted that appellant's position would require a single property appraisal of every parcel in the state and rendered the word "practicably" in the statutes superfluous. *Id.* ¶ 42. Single property appraisal is untenable on an annual basis considering the totality of parcels in the state. *Id.* ¶ 43. On the other hand, mass appraisal is "equitable and efficient" allowing municipalities to manage the annual valuations. *Id.* 44 (*citing,* WPAM 7-32 (2009). Accordingly, the Wisconsin Supreme Court held that mass appraisal comports with Wis. Stats. § 70.32(1) and that it is appropriate to use in the initial appraisal as outlined by the WPAM. *Id.* ¶ 45.

A review of the evidence shows that the Village contracted with Dan McHugh, Jr. of Affiliated Property Valuation Services, LLC. to perform commercial assessments in 2016 and 2017. Wis. Stat. § 70.055 specifically allows municipalities to retain expert assessment help.

Lowe's failed to demonstrate that the mass appraisal performed by the Village for the January 1, 2016 and January 1, 2017 years did not comply with Wisconsin law. Therefore, the Village enjoys the presumption that the appraisals are correct. To overcome the presumption of correctness, Lowe's needed to show *significant* contrary evidence that the assessments were excessive.

Next the Court needs to examine whether a Tier 2 Comparables Approach, or a Tier 3 Cost Approach provides *significant evidence* that the assessments were excessive.

III. A TIER 2 SALES COMPARISON WAS NOT REQUIRED UNDER WISCONSIN LAW

Wisconsin law dictates that if *any reasonably* comparable sales exist, a Tier 2 approach *must* be utilized prior to turning to the *Tier 3* approaches. *See Adams* ¶ 34 (*Only if* there has been no arm's-length sale and there are *no* reasonably comparable sales may an assessor use any of the third-tier assessment methodologies.").

The experts for the Village both testified at trial (and submitted reports) that there are no reasonable comparables to the subject property. Specifically, Dr. Thomas Hamilton (Hamilton) found that Lowe's expert, Michael MaRous (MaRous), used *unoccupied*, second generation properties as comparables, and opined that the appropriate comparables would be a first generation *occupied* property. He further found that the comparables used by MaRous are not part of the same direct competitive supply market as Lowe's, noting that there are no vacant big box stores similar in size or economic prowess to Lowe's in the immediate market areas. (See Exhibit 123, p. 3-5).

The Village's other expert, Dominic Landretti (Landretti) testified and wrote in his report (Exhibit 119, p. 8-9), that Lowe's is an owner-occupied operating store, and that sales of properties that are vacant, distressed or in transition are not reasonable comparables. Landretti concluded that since there are no reasonable comparable properties, there is no requirement to conduct a Tier 2 analysis.

Plaintiff's expert (MaRous) performed a Tier 2 sales comparison approach. The Court looked at the eight comparables studied by MaRous (Exhibit 24, pp 24-38) to determine whether it is an apples-to-apples comparison with the subject Lowe's property.

There is no question that the comparables used by Lowe's were either vacant stores or stores in transition/distressed. (See Exhibit 24). It is undisputed that the subject Lowe's store was not vacant on the dates of value. Also, there were no announcements that the store would become vacant prior to the dates of value. In fact, the store was continuously operating for over ten years prior to the dates of value without any vacancy. MaRous used sales of properties with vacant stores and did not analyze how the vacancies impacted the marketability of the properties.

The WPAM instructs: "When valuing property, the assessor should chose comparable sales exhibiting a similar highest and best use and similar placement in the commercial real estate marketplace." WPAM, 9-12; Exhibit 47)). "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". Id. "A vacant store is

dark when it is vacant beyond the normal time period for that commercial real estate marketplace and can vary from one municipality to another." Id.

The Village presented testimony through their experts that the *marketplace* for the subject Lowe's store was not suffering any vacancies. MaRous never explained in his report or in court what a normal vacancy time period is for the Plover commercial real estate marketplace. Nevertheless, he used comparable sales that were vacant for extended periods of time; in one case, a former Target store was vacant for four years prior to the date of the sale (See Exhibit 24, p. A-10 Improved Sale No. 5)

MaRous testified consistent with his report that as of the appraisal dates, exposure times for properties similar to the subject property ranged from two to three years. (See Exhibit 24, p. 18), He also testified that if a comparable property is exposed to the market for a shorter time (i.e. less than two to three years), it should sell for less than if the property had been fully exposed to the market. A shorter exposure of time is also a sign that the property is not reasonably comparable. Further, a shorter exposure time could be evidence of a distressed sale.

Nevertheless, three of MaRous' eight sales comparable properties were former American TV stores that sold to Steinhafel's, on the same date after a very short exposure time following American TV going into receivership. (See Exhibit 24, p. 24). MaRous' report excludes information about the short exposure time of those sales, and admitted while testifying that the exposure/marketplace time for these properties was less than his stated exposure time of two to three years, and he did not dispute that the sales were exposed to the market for only two months.

The Village's expert, Landretti, also performed a search for Tier 2 reasonably comparable properties. (See Exhibit 119, p. 8-9). He described in his report that he located numerous sales of big box retail properties; however, the sales included properties that were vacant, distressed, purchased for redevelopment, or leased. Based on the WPAM direction that when valuing stabilized, operating retail properties, the assessor

should choose comparable sales exhibiting a similar highest and best use and similar placement in the retail marketplace, Landretti concluded that the sales were not reasonably comparable.

Landretti also noted sales of leased properties. However, again, based on the WPAM, he concluded that the sales were not reasonably comparable to an owner-occupied store. As a result, he also excluded those sales from a Tier 2 analysis. The result was that Landretti concluded that there were **no reasonably comparable properties to meet the Tier 2 criteria**. This conclusion is consistent with the WPAM's direction in 2016 that for larger retail venues the assessor should use the Income and/or Cost Approach.

> Retail property includes: apparel shops, bookstores and drugstores. Restaurants, taverns laundromats and other service-oriented stores are also included. This category ranges in size from small convenience stores to department stores that anchor regional malls, to massive supercenters that offer both grocery and general merchandise. *The sales comparison approach is often used to value smaller retail stores assuming no recent arm's length sale data from subject.* ***For larger retail venues and those smaller stores for which there are no comparable sales, the assessor should use the Income and/or Cost Approach. (WPAM 9-43 (2016); Exh. 47, p 9-43) (Emphasis added)***

Over the years, this Court has heard hundreds of hours of testimony from experts opining and disputing the value of real estate. It is well known that the fair market value of all real estate depends on the actual purchase price in an arm's length transaction. In this case, it would be the sale price of this Lowe's property in Crossroads Commons, if and when it is sold.

Clearly, its highest and best use would be to another *home improvement* store desiring to be a main anchor in a thriving retail environment. The next highest and best use would be a different type of big box store. Until and unless that happens, there is a significant amount of speculation as to the fair market value of this particular building.

All the experts agree that location is a primary factor when assessing any real estate.

MaRous wrote in his report that comparables 1, 3 and 6, (all former American TV stores) and 8 had superior locations compared to Lowes. This description of superior location was noticeably absent from the other four comparables, including comparable 4 of the former Lowe's store. With regard to the Lowe's in Brown

Deer, the Court heard no evidence of the amount of time it was exposed to the market, or the vacancy rates in the immediate area.

The Court agrees with the Village's position that there are no comparables to the subject property. Therefore, under WPAM, 9-43, since there are no comparables from sales for this larger retail venue, the assessor should use the Cost and/or Income Approach to determine fair value.

IV. THE TIER 3 COST APPROACH PROVIDES THE BEST ASSESSMENT VALUE FOR THE SUBJECT PROPERTY

The Cost Approach is based on the principle of substitution. WPAM, 7-30 (2016), That is, that a well-informed buyer will pay no more for a property than the cost of constructing an equally desirable substitute property with like utility. Id. The basic steps for the Cost Approach are: (1) estimate land value; (2) estimate reproduction or replacement cost new of the structure; (3) estimate accrued depreciation; (4) subtract accrued depreciation from the estimated cost new to arrive at present value for improvements; and (5) add the present value of the improvements to the estimated land value to get total property value.

The Court finds that the Village's expert Landretti provided the most credible Cost Approach opinion. It was based on market evidence of demand for big box stores in the Plover area, as well as a highest and best use analysis. It provides the best estimate of the fee simple value of the property on the dates of value and is supported by Landretti's other Tier 3 analysis.

Landretti's estimate of *land value* is more credible in that he uses recent sales within or adjacent to Crossroads Commons (*Crossroads*), which is where the subject property is located. His opinion of $4.00 per square foot for the land value is supported by the recent land purchase at $3.39 per square foot for the development of a large Meijer's store. Since the land is adjacent but not within *Crossroads*, it was considered slightly inferior by Landretti. The Court agrees that two other recent sales of small parcels for $4.53 a square foot and $7.85 a square foot within Crossroads were rightfully determined to be superior by Landretti, because

of their smaller size. His bottom line opinion of *land* value for the subject property is $2,300,000.00, which is supported by the evidence.

The next step in the Cost Approach is to estimate the replacement cost for building a new structure. Landretti used the following cost sources for this part of the analysis: (1) Marshall Valuation Service; (2) Construction Costs of Comparable Projects; (3) Actual Costs of the Subject Property.

After reading Landretti's report (Exh. 110, 62-71), and listening to his testimony at trial, the Court finds that his estimate of $48.60 per square foot to replace the subject property, (new without improvements), is the most credible opinion. It accurately states the building type; base costs adjustments; cost multipliers; and site improvements. Landretti's opinion that replacement cost new is $8,216,000.00 is credible, and therefore, accepted by the Court.

The next steps in the analysis is to estimate accrued depreciation and subtract that amount from the estimated cost to build new and then arrive at the present value for improvements. Landretti used the Economic Age-Life Method to arrive at an annual depreciation rate of 2.9% over the subject property; with the effective age of Lowe's in 2016/2017 of 10 years, for a total of 29%. His analysis in his report (Exhibit 119, p 72-75), along with the testimony at trial is reasonable and credible, and, therefore, the Court accepts it.

The final part of the Cost Approach Analysis is to add the present value of the improvements to the estimated land value to get total property value. Page 75 of Exhibit 119 (Landretti's Report) summarizes the Cost Approach accepted by this Court:

Cost New of the Building	$8,216,000.00
Less Depreciation	$2,347,000.00
Depreciated Value of the Buildings	$5,869,000.00
Depreciated Value of Site Improvements	$ 370,000.00
Total Depreciated Value of the Improvements	$6,239,000.00
Land Value	$2,300,000.00
Total Indicated Value of Cost Approach	$8,539,000.00
Final Indicated Value Rounded	$8,500,000.00

MaRous and Landretti's opinions of value of the property under the Cost Approach (without MaRous subtracting functional and external obsolescence) did not differ greatly. Both opinions exceeded the assessed

value of the property for the years at issue. MaRous opined that the "indicated Cost Approach value [for 2016] before *functional and external obsolescence* would be approximately $8,942,300.00." (Ex. 24, p. 42). Based on MaRous' chart for 2017, his indicated Cost Approach value for 2017 before *functional and external obsolescence* would be approximately $8,907,900.0 (Ex. 24, p. 44). Landretti opined that the property did not have any abnormal *functional obsolescence* or *economic obsolescence* and, therefore, did not make a deduction for those forms of obsolescence. As a result, his Cost Approach value without *functional and external obsolescence* was $8,500,000.00 for 2016, which can then be adjusted for 2017 to $8,700,000.00 by adding 2% per his final reconciliation approach. (Ex. 119, p. 75).

The significant difference in the two experts' opinions of value under the Cost Approach is MaRous' conclusion of 50% *functional depreciation* to the property. The Court agrees with the Village that MaRous' deduction of 50% functional depreciation is flawed because he estimated the cost to build an obsolete building and then depreciated the building because it was obsolete. (see. Ex 24, p. 41). This is not consistent with accepted appraisal practices. According to what MaRous described as his bible on appraisal during his testimony, "[t]o apply the Cost Approach, an appraiser estimates the market's perception of the difference between the property improvements being appraised and a newly constructed building with optimal utility (i.e., the ideal improvement identified in highest and best use analysis)." (See Ex. 116)

If MaRous had concluded that the highest and best use of the property was to convert it to multi-tenant, he should have estimated the market's perception of the difference between the subject property and a newly constructed multi-tenant building of the same size. This would have entailed estimating the cost to build a multi-tenant improvement, and then deducting functional obsolescence because the improvement being appraised is not a multi-tenant store. If MaRous had performed that analysis, his Cost Approach would have resulted in deducting 50% functional obsolescence from what it costs to construct a multi-tenant building, which the Village showed would be around double the cost of building a big box store per Marshall Valuation Service cost estimates. (Ex. 124, pp 28-34). He did not perform this analysis. Instead, he estimated the cost to build a

big box store, but then improperly depreciated it because it was not a multi-tenant improvement that would cost twice as much to build.

V. CONCLUSION

The value of real estate is one of the most litigated disputes heard by trial courts. This Court has heard hundreds of hours of testimony over the years from appraisers who will have diametrically opposed opinions as to fair market values of a particular property. This includes farm land, developmental land, residential lots, residential homes, apartment complexes, office complexes, shopping centers, small retail buildings, and large retail buildings. Almost always, there is testimony regarding comparable properties. The experts will then provide testimony as to the many reasons why a comparable property is very similar or not similar at all.

Over the years, the Court has had only a few occasions when it has felt completely comfortable that a comparable was extremely accurate. One involved a home that was identical to the subject home, built the same year, by the same builder, and was located on the same block.

In most cases, if there are two extreme values of real estate being argued by opposing parties, the Court has ordered the sale of the property, thereby ensuring to the greatest extent possible the fair market value. Obviously, an order of sale is not an option in this case.

This case would be an easy one if there was a recent sale of the subject property. As long as it was an arms length deal, we would know with certainty the fair market value; and of course, there would not be this lawsuit.

So this is another case where the value of real property is widely disagreed upon by the parties. As stated previously, the bottom line issue is whether there are comparable properties that the Court finds reliable when determining fair market value for tax assessment purposes.

For the reasons stated in this decision, the Court is not convinced that the comparable sales used by Plaintiff's expert are reliable. The Court finds that under the facts surrounding this large retail property, the Tier 3 Cost Approach provides the fairest value of the property, and the least amount of speculation.

Lowe's *has not proved by significant contrary evidence* that the tax assessment is excessive, and has not overcome the presumption of correctness.

WHEREFORE, the claims are dismissed with respect to both files.