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Electronically signed by William Sosnay-08
Circuit Court Judge

**STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY**

BEST BUY STORES LP

Plaintiff,

v.

Case No. 15-CV-6472

Money Judgment – 30301

CITY OF WAUWATOSA

Defendant.

CITY OF WAUWATOSA’S FINDINGS OF FACT

The Defendant, CITY OF WAUWATOSA (“City”) by its attorneys, CRIVELLO CARLSON, S.C., and SEIBEL LAW OFFICES LLC, submits the following proposed Findings of Fact:

General Property Information

1. The subject property is known as the Best Buy electronics retail store located at 2421 North Mayfair Road in Wauwatosa, Wisconsin, and is identified on the tax rolls of the City of Wauwatosa as parcel 336-9997-09. Exhibit 303, pp. 1-3, 17; Ex. 4, p. 1.
2. The Best Buy property is comprised of approximately 4 acres of land (approx. 162,100 sq. ft.), a freestanding building constructed in 2007 that contains approximately 47,901 square feet of gross leasable area, a 28,000 square foot attached parking garage, and a surface parking lot and related site improvements. Exhibit 303, p. 3.
3. The subject property is in good condition, built with quality materials and has been maintained. Transcript, November 8, 2018, p. 50.
4. The subject property meets the RERC definition of a first-tier investment property; it is a newer quality construction property in a good location. Id., pp. 213-14.
5. The location of the subject Best Buy is excellent, across from Mayfair Mall. It is a near 100 percent location in its market, primarily due to its location on Mayfair Road across from Mayfair

Mall, which has the highest retail sales of any mall in Wisconsin. The property has identical access to the mall, with a dedicated lane. Transcript, March 5, 2019, pp. 43-44.

6. Shannon Krause is the Statutory Assessor for the City of Wauwatosa. She started as the Wauwatosa Assessor on July 14, 2014. Transcript, November 5, 2018, pp. 49-50.
7. Prior to her role in Wauwatosa, Ms. Krause was the statutory assessor for the City of West Bend for 17 years, all the while assessing property on a mass appraisal basis using mass appraisal techniques under Wisconsin law.
8. Ms. Krause is certified as an Assessor by the State of Wisconsin. *Id.*, p.49.

The Assessment

The Assessment Was Set Using Mass Appraisal

9. As a result of the mass appraisal prepared for the subject property as of January 1, 2015, Best Buy was assessed at \$8,695,800. Transcript, November 5, 2018, pp. 57-58, 66.
10. There were no changes in the property to warrant a different cost approach or value for 2015 or 2016. *Id.*, p. 78.
11. The assessment was set using mass appraisal techniques that included a mass appraisal cost approach and a mass appraisal income approach. *Id.*, pp. 57-58.
12. The cost approach was based on the CLT Computer Aided Mass Appraisal (CAMA) system, which contains the data source for the replacement cost new and depreciation deductions. This is the type of mass appraisal cost approach that is specified in the Manual under Chapter 7. The CAMA system is the model for the cost approach and is used for all commercial properties in the City. It has table-driven items and a cost model that is specific to the Wauwatosa market. The model takes into account physical depreciation. *Id.*, pp.76, 87; November 6, 2018, pp. 209-110.
13. The 2015 mass appraisal cost approach was based on the base year of 2013 to maintain uniformity. The Assessor analyzed the market and any changes that may have occurred since 2013, and made any changes that were applicable to this property. Transcript, November 5, pp. 68-69.

14. The assessor analyzed land sales from 2013-15 of commercial real estate, calculating the price per square foot and adding any razing costs or site improvements. Id., p. 73; Exhibit 2.
15. The Wauwatosa market was booming from 2013-15. The Assessor reviewed sales of land and improved property that were all higher than their assessments. Id., p. 86.
16. The Assessor followed the Manual and its section on sales validation. The IAAO Standard on Verification and Adjustment of Sales is a guide, not a requirement. The Manual indicates Assessors may look to IAAO standards as guidance.
17. The Assessor analyzed the mass appraisal model and reviewed other information, including confidential leases, and felt there was no change in the model and it was still supportive for the 2015 and 2016 Best Buy values. Id., p. 97.
18. Assessments are reviewed annually and sales analysis performed to determine if specific classes or types of property need to be adjusted to maintain equity. The Assessor reviewed sales and income and expense information to see if it supported the model, to maintain equity. Id., pp. 127,

The Assessor's Affidavit

19. Ms. Krause was the statutory assessor in 2015 and 2016 and affixed her signed affidavit to the City assessment roll in each year. Transcript, November 6, 2018, pp. 175-176.
20. The Best Buy assessment was listed on the assessment roll for 2015 and 2016. Id., p. 176.
21. The Assessor's affidavits for 2015 and 2016 attest that the roll is a complete list of all taxable property and that the assessments have been with the best information practicably available using professionally accepted appraisal practices. Id., p. 177.
22. Ms. Krause performed a mass appraisal assessment of the Best Buy property in 2015 and 2016, and for every property in the City. Id., p. 171.

City Wide Revaluation Set in 2013

23. Assessors are not required to do a city-wide revaluation of properties each year. The statutes provide that the assessed value of the community must be within 10 percent of full value, between 90 and 110 percent, or the community is required to perform a revaluation. Id., p. 181.

24. Prior to 2013, 2006 was the last City-wide revaluation of all taxable parcels in the City. *Id.*, p. 179.
25. Between 2006 and 2013, the assessment ratio increased in the City such that the City was required to perform a City-wide revaluation in 2013. *Id.*, p. 180.
26. In 2013, the City conducted a revaluation of all properties in the City. The assessment of the Best Buy was set using mass appraisal techniques that include a mass appraisal cost approach and a mass appraisal income approach. Transcript, November 5, 2018, pp. 57-58.

Mass Appraisal Was Based On The Best Information Practicably Available to the Assessor

27. The assessor did not do a sales comparison approach when valuing the subject property because there were no reasonably comparable sales reliably suitable for a tier-2 sales comparison approach. *Id.*, pp. 61-62.
28. The Assessor relied upon the cost approach and reconciliation, along with confidential rental information. The Assessor relied upon information regarding the listing and sale of a Best Buy retail store in Lake Geneva as part of the mass appraisal. It was part of the best information available. The Assessor analyzed a lease for a Best Buy in Kenosha and was informed by the Kenosha Assessor that the rent was at market. *Id.*, pp. 122, 116-17.
29. The Assessor considered additional rental information from a newer, smaller building in the area at \$24.48/sf. The Assessor considered a West Bend Pick N' Save lease at \$18/sf and noted the Wauwatosa Pick N' Save lease rate was similar. *Id.*, pp. 136-38.
30. The Assessor considered current rent for the Pick N' Save in Menomonee falls at \$16.42/sf. The confidential rents at Mayfair Collection were considered and publicly disclosed in September of 2018. The rents at Mayfair Collection for Dick's, Nordstrom Rack and Whole Foods are triple net and support a range of \$16-17.50/sf. The Assessor noted the interior finish of Dick's and Nordstrom were similar to the subject Best Buy, but that the tenants reported the cost of the interior finish as assessable personal property. *Id.*, pp. 139-144.

31. The Assessor determined the 2013 income approach rent conclusion of \$16/sf was still supportable in 2015 and 2016, based on the review of rental information and the Assessor's subsequent work. *Id.*, pp. 152.
32. The Assessor noted that landlords typically charge rent based on all property attributes and the parking garage provides contributory value to the property through additional parking as of the valuation dates. Landlords receive payments for parking at retail properties through CAM payments. *Id.*, pp. 81, 154.
33. A revaluation seeks to achieve equity and uniformity in assessments amount all taxpayers in the City of Wauwatosa . Transcript, November 6, 2018, p. 178.
34. The City was not required to perform a City-wide revaluation in 2014, 2015 or 2016, because the City was within 10 percent of the 100 percent assessment ratio. *Id.*, p. 182.
35. Best Buy did not object to the 2013 or 2014 assessments of the subject property. Transcript, November 5, 2018, p. 120.

**Information Obtained from Board of Review Subpoena
Was Consistent With the Mass Appraisal Assessment**

36. After Best Buy filed the objection for 2015, the City issued a subpoena to Best Buy by which the Assessor obtained additional information and performed further review. *Id.*, p. 123.
37. Assessors may request information from taxpayers, but taxpayers are not required to provide it. The Board of Review may subpoena information pursuant to statute. Transcript, November 6, 2018, p. 158.
38. The Assessor obtained a subpoena from the Board of Review to obtain information to analyze the value of the subject Best Buy. *Id.*
39. The objection form submitted by Best Buy stated an acquisition price of \$6.8 Million for the subject property. The objection form indicated Best Buy had not improved, remodeled, added to or changed the property since acquiring it, which was not accurate. *Id.*, pp. 158-59.

40. In response to subpoena, the Assessor received and reviewed Best Buy's fixed asset listing from their books and records. The Assessor reviewed the asset listing to identify what was real property versus personal property, to avoid double taxation. *Id.*, pp. 160-61.
41. In response to the subpoena, the City Assessor received and reviewed the actual construction costs for the subject Best Buy. The asset listing provided by Best Buy shows a value of \$9.79 Million for the building alone. The fixed asset listing shows over \$12 Million of costs for the improvements at the subject property, information that was not already in the possession of the Assessor. The subpoena requested operating expenses pertaining to the property, but the Assessor never received any information from Best Buy regarding operating expenses or parking garage expenses, and was never informed that Best Buy felt they were too high. *Id.*, pp. 162-68; Ex 4.
42. The information requested and ultimately subpoenaed and reviewed by the Assessor was an attempt to have the best information available to value the property and to provide that information to the Board of Review to make any adjustments to change or reduce the assessment that were deemed appropriate. After reviewing the information, the Assessor determined the assessment was not excessive and maintained the value. *Id.*, pp. 165-66.

Assessment In Maintenance Years Are Mass Appraisal Assessments

43. The Wisconsin Property Assessment Manual (the "Manual") provides for the maintenance of assessments during the years in which a community-wide revaluation is not required. Transcript, *Id.*, p. 183-184.
44. The Manual states assessments should not be carried over from year to year without adjustments. This means the assessor is to review additional information each year to see if an adjustment to the value of a property is necessary. *Id.*, pp. 184-185.
45. During the intervening years between revaluations, the assessor monitored building permits, verified sales from Real Estate Transfer Returns using questionnaires and inspections, and reviewed new permits for construction and demolition. *Id.*, p. 186.

46. New construction is valued using the 2013 base year cost model to maintain uniformity. Transcript, November 5, 2018, p. 88.
47. The Manual describes the process of annual assessment/sales ratio analysis, which is performed to determine if specific classes or types of property need to be adjusted to maintain equity. Transcript, November 6, 2018, pp. 188-189.
48. Sales ratio analysis is not single property appraisal. The assessor did not perform any single-property appraisals for the City for 2015 or 2016.
49. The 2015 Assessor's Annual Report ("AAR") shows that 1,265 sales occurred in the City, of which 738 were reviewed for validity through sales analysis and reported to the State. Id., pp. 191-192.
50. The Assessor completed mass appraisal for the City in compliance with the Manual for 2015 and 2016. Analysis was done through sales ratio analysis, inspecting sales, and analysis of the income and expense information for the properties that sell. Id., p. 196.
51. The Annual Assessment Report is prepared on a form created by the Department of Revenue and is also referred to as a mass appraisal report. The AAR is the mass appraisal as of a given date and contains the results of the Assessor's statistical testing. Transcript, November 7, 2018, pp. 67-68.
52. The Assessor's letter to the Mayor states the Assessor understands and has used the correct methods, procedures and techniques to produce credible mass appraisal for 2015. It states the AAR and methods confirm to the requirements of the Wisconsin Constitution, Statutes, case law, administrative rules and the Manual. Id., pp. 68-69, Ex. 381.
53. The Assessor certified the mass appraisal uses the guidelines and standards in the Manual. Id., p. 72.
54. The AAR was submitted to the Wisconsin Department of Revenue (DOR) as proof that the City Assessor properly conducted mass appraisal for 2015 and 2016. The DOR reviews the report for

compliance. The DOR did not inform the City that it was not in compliance with the mass appraisal rules for 2015 or 2016. *Id.*, pp. 197-198.

55. The Assessor reviewed and verified building permits and applied changes to value using the base cost model from the last revaluation, to maintain equity. Transcript, November 6, 2018, pp. 198-200.

56. The Assessor surveyed the market and collected income and expense information to make sure the value model was still appropriate. *Id.*, p. 201.

57. The Assessor performed trend analysis using ratio studies, which compare the sale price to the assessment to see how close the model is approximating the market transactions. Trend analysis for 2014-15 shows a 1 percent increase in residential sale prices and a 5 percent increase in commercial sale prices. *Id.*, pp. 201-202.

58. From 2013-2016, the City has seen a lot of redevelopment, new construction, renovation, and re-gentrification. The City has updated street, sewer and water, resulting in more development and higher real estate prices. There has been a huge resurgence in activity, and higher sale prices. *Id.*, pp. 203-204.

59. Wauwatosa is a cherry on top of the Milwaukee market, consistently growing. *Id.*, p. 204.

60. The Assessor is aware of what is happening in the Wauwatosa market. The AAR states the Assessor's office has done analysis of economic and market trends from outside professional sources such as Co-Star and Xceligent. *Id.*, pp. 204-205.

61. There has been no residual effect of the recession on 2015-16 sale prices. *Id.*, p. 205.

62. Retail development has increased in City since 2013. There are very limited vacant parcels, particularly for larger retail boxes. Redevelopment of existing properties is typical. *Id.*, p. 206.

63. A sale of land with improvements that are torn down is treated as a land sale, with the cost of razing the improvements added to the sale price. *Id.*, pp. 206-207.

64. After completing the AAR and a review of sales and income, the Assessor felt there was no need to change the mass appraisal model for the Best Buy assessment.

65. The Assessor determined there were no comparable sales that were appropriate to value the Best Buy. The Manual states the Assessor should use the income approach and/or the cost approach for the larger retail stores and those smaller stores for which there are no comparable sales. Id., p. 208.
66. The Assessor did not re-run the cost approach model in 2015 or 2016 to account for any additional physical depreciation for any property in the City. The Assessor also did not adjust for any appreciation during that same time period. Additional appreciation or depreciation were not applied to any property in the City so as to maintain uniformity and equity among all properties until the next City wide revaluation. Id., p. 210.
67. The Assessor reviewed the actual construction costs for the Best Buy property produced by Best Buy in response to the Board of Review Subpoena and compared them to the cost model used by the City. The City's costs were lower than the actual construction costs. The parking garage was valued at \$495,000, well under actual cost. Id., pp. 214-15.

Land Values in Setting the Assessment

68. The Assessor compared the assessed value of the improvements at approximately \$4 Million to the \$11-12 Million actual cost of the Best Buy improvements. The Assessor's land value for the Best Buy property was \$5.2 Million per the mass appraisal model for 2015-16. Id., p. 215.
69. The revaluation set land value rates for specific commercial neighborhoods. Mayfair is the best district with the highest land values. Id., p. 216.
70. After review of land sales contained in Exhibit 4, the Assessor determined to maintain the land values from the 2013 revaluation for 2015 and 2016 for Best Buy. Id., pp. 219, 221-22, Exhibit 4.
71. Mayfair Mall is one of the strongest commercial corridors. Mayfair is the only Class A mall in Wisconsin, with high retail sales per square foot. Id., pp. 222-23.
72. The 2006 purchase of land by Best Buy for the retail store was not used to value the land in 2015 or 2016. The Assessor used the mass appraisal model for the land assessment. Id., pp. 223-24.

73. The Assessor applied Chapter 14 of the Manual to verify sales, not the IAAO standard. The Manual is mandatory and governs if there is a conflict. The IAAO standard is advisory only. *Id.*, pp. 225-26.
74. The Assessor followed the Manual and the provisions that govern mass appraisal. The Assessor did not follow the provisions in the Manual that govern single-property appraisal, since they were not applicable to her mass appraisal. *Id.*, p. 227.
75. The mass appraisal summary shows the Assessor gave 50 percent weight to cost and to income, reaching a value of \$8,695,800. *Id.*, pp. 225-26.
76. The Assessor reviewed land sales and all of the factors relevant to value, including size and location, and concluded these sales supported the \$30/sf land value. The Assessor felt sales of land on Burleigh and Mayfair were the most indicative of value of the Best Buy land, particularly the sale of land for Meijer on Burleigh, located East of the Freeway and two blocks or more from Mayfair Road. *Id.*, pp. 229-231.
77. The assessment of the Best Buy land remained at \$30/square foot. *Id.*, p. 230.

Other Factors Considered in the Mass Appraisal Assessment Determination

78. The 2015-16 mass appraisal assessments of the Best Buy have taken into account the particulars of the property while still using the model applied to all commercial properties. *Id.*, p. 228.
79. The Assessor reviews items of functional obsolescence and will adjust a value if appropriate for the individual property, but not the model itself. Transcript, November 7, 2018, p. 38.
80. A lack of demand for mezzanine space has not been established to warrant an adjustment to the Best Buy assessment. *Id.*, p. 40.
81. Once created, the mass appraisal model is calibrated each year to account for necessary adjustments. There were changes made in 2015 and 2016 to the mass appraisal model. 1,200 notices of changed assessment were sent out in 2015 for adjustments necessary to the model. If no adjustment necessary, no notice was sent out. *Id.*, pp. 72-73.

82. The Reconciliation and Value Summary (RVS) as reported in the AAR filed by the assessor with the Wisconsin Department of Revenue certifies that the approaches to value are considered in conjunction with WI case law and Statutes and that mass appraisal results have been reviewed to ensure fairness and equity. Data has been reconciled based on the quality and quantity of data and the relevance of approaches, methods and techniques. The AAR report further certifies that recognized and professional mass appraisal techniques have been used in the Wauwatosa mass appraisals for the tax years at issue. *Id.*, p. 75; Ex. 381, p. 23.
83. The RVS also states the Wauwatosa assessment process takes into account the guidelines regarding uniformity and equity. Mass appraisal techniques used to arrive at assessments are based on best information available. *Id.*, pp. 75-76.
84. The cost approach does not reflect appreciation, as this would cause inequity between assessments. The proper procedure is to recognize any appreciation during revaluation of all properties. *Id.*, p. 76.
85. All properties were treated uniformly with regard to depreciation. *Id.*, p. 77.
86. If the Assessor reviewed information in a maintenance year and determined an assessment was too low, the Assessor would not increase one property assessment as that would cause inequity. *Id.*, p. 82.
87. There has been appreciation in the Wauwatosa market from 2013-2016. Assessment ratios have declined, based on how the assessments reflect sales. *Id.*, p. 77.
88. The estimated aggregate level of assessment for 2015 is at 97 percent, based on the Assessor's analysis of sales activity. If the level of assessment is below 100 percent it means the assessments are less than what the market is experiencing, so there is appreciation. *Id.*, pp. 77-78.
89. The City final level of assessment for 2013 was reflective of 100 percent, after the Board of Review closed and the assessments were set. *Id.*, p. 80.
90. The Assessor reviews sales of properties outside of the City, but only performs testing of sales in City for uniformity purposes. *Id.*, pp. 80-81.

91. All of the documents that comprise the backup support for the 2015-16 assessment are the opinions of the current Assessor, Shannon Krause. Id., p. 82.

92. The Assessor reviewed the 2013 valuation and felt it was appropriate. The Assessor determined the 2015 and 2016 assessments of the Best Buy are not in excess of market value. Id., pp. 82, 85.

The Best Buy Witnesses

93. Ms. Beine is the Director of Property Management for Best Buy. Transcript, November 5, 2018, p. 145.

94. The current Best Buy store was not the first Best Buy on Mayfair Road in Wauwatosa. An older store was closed to open the current store. Best Buy may close a store and open a new store to serve the same retail market in order to have a superior location. Id., pp. 184-86.

95. Best Buy built the parking garage to meet its own parking standards, it was not a requirement imposed by the City. Id., p, 192.

96. Best Buy expects a significant increase in business and customer traffic during the holidays. Id., p. 193.

97. There is no evidence Best Buy has lost revenue or the real estate is worth less due to delivery truck access issues. Id., p. 199.

98. The mezzanine contains a district office and training room that could be located at another Best Buy retail store or stand-alone, but they must exist somewhere. Id., pp. 200-01.

99. The Best Buy fixed asset listing shows a land value of \$6.76 Million for the subject property. Id., p. 206.

100. The subject Best Buy has a Magnolia Home Theater, an upper end product line and retail space, which is only present in about one third of the Best Buy stores. Id, p. 176

101. Ms. Cassellius is the Director of Real Estate for Best Buy. Id., p. 208.

102. Best Buy is commonly the prime tenant in a strip center. Transcript, November 6, 2018, p. 31.

103. Ms. Casellius is not aware of any City requirement for the construction of a mezzanine. Id., p. 33.
104. There are no plans or discussion of closing the subject Best Buy in Wauwatosa. Id., p. 35.
105. The prior Best Buy store was located on Mayfair, North of the subject, not in front of the Mall. Id., p. 35-36.
106. Access to the subject Best Buy is through a signaled intersection, specifically constructed to align with the Mall exit. Id., p. 36.
107. The 90 Best Buy employees take up a significant percentage of the parking at the store and would not have adequate parking during the holiday season without the parking garage. Id., p. 39.
108. It is difficult to find parking at malls during the holidays, due to the seasonal nature of the retail business. Id., p. 40.
109. Best Buy negotiates use restrictions in leases to their benefit to prevent competition in the categories of products they sell. Best Buy is able to obtain acceptable use restrictions and would not sign a deal without them. Id., pp. 46-47.
110. Changes in the quality and category of a retail node may result in vacancy. Id., p. 49.
111. The decision to locate a Best Buy retail store is based on economics and location. The economics of how a store performs are based on the demographics of the location. The determination and consideration of where to locate a Best Buy store differs for a lease versus a purchase, since the value of the land is a significant aspect. Id., pp. 60-62.

Kendal Lees Testimony

112. Kendall Lees opined that different retailers have been impacted differently by the recession, online sales and the increased use of smart phones. Transcript, November 7, 2018, pp. 104-05, 149.

113. When compared to other retailers, Best Buy has experienced a more positive sales trend. Best Buy sales increased from 2013-2015. *Id.*, pp. 147-48.
114. The variation in the impact on retail sales is caused in part by how well the specific retailer has adapted to internet sales. Some retailers have done better than others. *Id.*, pp. 149-150.
115. There is a connection between physical presence and internet sales. Amazon is developing a physical presence. Returns are a big issue. *Id.*, pp. 149-150.
116. The trend is for online retailers to develop a physical presence to assist with sales. *Id.*, p. 153.
117. Best Buy offers store pickup and return of online items. Customers at the store for online items may purchase additional items. Shipping of items direct from retail stores is becoming widespread and helps with distribution and shipping. *Id.*, pp. 151-52.
118. Kendall Lees did not include or analyze retail store openings that were occurring in the Milwaukee area, only closings. To understand the impact of the recession on the market you need to look at stores that opened. Menards, Meijer, IKEA, Mayfair Collection are all examples of new retail, including stores larger and smaller than the subject Best Buy. *Id.*, pp. 153-56.
119. The Delafield Kohl's is an example of a larger retail store that functions well and Kohl's wants to continue to operate. The strength of the Delafield location supports the construction of a larger retail store. *Id.*, p. 163.
120. A 140,000 square foot Nordstrom department store was recently built at Mayfair Mall. *Id.*
121. Kmart, Sears and JC Penney all had sales declines that put pressure on their stores. They cannot operate all of their stores under those conditions, so they close the non-performing stores. *Id.*, p. 170.
122. Kmart, Sears, and JC Penney were all facing difficult times, declining sales and stores that could not perform. This may constitute distress. *Id.*, p. 171.

123. There is not a direct causal relationship between increased internet sales and store closings. *Id.*, p. 182.
124. From 2007-2016, the absolute increase in Walmart sales was greater than the amount of Amazon sales. *Id.*, pp. 184-85.
125. The Court determined that the testimony offered by Kendall Lees was not expert opinion testimony and would not meet the *Daubert* standard for expert testimony, but allowed the testimony as a lay witness. Transcript, November 8, 2018, pp. 9-15.

The Miller Appraisal and Testimony

126. William Miller is an appraiser with 40 years of experience, and is employed as the managing director of the Chicago office of Integra Realty. He is licensed in WI, MN, NY, and PA. His appraisal report for the Best Buy in Wauwatosa for 2015 and 2016 is Exhibit 303. Transcript, March 5, 2019, p. 16, 19-20; Ex. 303.
127. The Miller appraisal was also signed by Ron DeVries, MAI. Mr. Miller and Mr. DeVries took full responsibility for the appraisal under USPAP. *Id.*, pp. 16-17.
128. Miller's opinion of value for the subject Best Buy is \$13,300,000 for 2015 and \$13,200,000 for 2016. *Id.*, p. 20.
129. Miller has testified as an expert witness in several Wisconsin property tax cases for various communities over the past five years. His testimony has been accepted by Wisconsin courts as an expert. *Id.*, pp. 21-22.
130. Miller has appraised hundreds of commercial properties, including several in Wauwatosa and many throughout Wisconsin. *Id.*, p. 23.
131. Miller has an understanding of the national retail market and keeps up on market trends and sales through proprietary data services, articles, journals and the SEC filings of retailers. SEC filings are publicly-reported information under a fiduciary responsibility intended for use by investors. *Id.*, pp. 24-25.

132. Best Buy has approximately 1050 stores that are comparable in size to the subject Best Buy. Best Buy also has mobile kiosks, which operate in a different market segment. Best Buy owns a small percentage of its stores, 90-95 percent are leased. *Id.*, pp. 25-26.
133. Best Buy's SEC filings discuss e-commerce issues since 2007. E-commerce sales work hand in hand in a multi-channel/omni-channel environment. Sales can be placed online and picked up and returned to a store. *Id.*, p. 31.
134. Miller also tracks SEC filings of other retailers within the same environment and competitors of the property he is appraising. *Id.*, p. 32.
135. Miller's 2015 and 2016 appraisal value conclusions are based on the Manual. Miller has consulted the Manual, relevant case law and states. His opinions comport with the Manual, statutes and relevant case law. His report cites and applies relevant excerpts from the Manual. *Id.*, pp. 32-33.
136. The subject Best Buy was valued in an 'as-is' condition, as it physically, legally and economically existed on the valuation date. *Id.*, p. 33.
137. Miller's value conclusions assume the property was occupied on the valuation date because it was occupied. To assume a property is not occupied is contrary to fact, which is a hypothetical condition. *Id.*, pp. 32-34.
138. A 'go-dark' property has actual vacancy or impending vacancy. The method of 'go-dark' valuation is different in terms of the analysis and the comparable properties that are used. Vacant properties are relevant to the appraisal of a vacant property. If occupied, occupied properties are comparable. *Id.*, pp. 34-35.
139. Miller has prepared 'go-dark' valuations for retail properties. He appraised Sam's stores based on impending closure instead of continued occupancy, and Walmart used the appraisals in SEC filings as the basis for impaired property, reducing the value due to the change in economic circumstances. *Id.*, pp. 35-36.

140. Asset impairment of retail stores is primarily the result of store closures. Transcript, March 6, 2019, p. 140.
141. The appraisals of the Sam's stores were based on specific assignment conditions that used a different definition of market value than the Manual. *Id.*, p. 136.
142. Impaired value means the real estate values were written down on the books and is publicly reported. Miler has reviewed Best Buy's financial statements and there is no indication the Best Buy in Wauwatosa has been written down. March 5, 2019, pp. 36-37.
143. Occupied property tends to be more valuable because there is a use of the property that is creating revenue that affords that the rent can be paid. An operating store has demand. Demand drives the value of real estate. *Id.*, pp. 37-40.
144. When a property is vacant or vacancy is impending, often the use is no longer economic. There are too few customers. There is a change in the use of the property or a change in the placement of the property in the market, referred to as the market segment. A vacant store has no market demand, but a supply of property. It will remain vacant until it transitions to its next use or an alternative use, also known as second-generation use in retail. *Id.*

Miller's Highest and Best Use Analysis

145. An appraiser must have an understanding of the property in that market that builds in to the analysis and conclusion of Highest and Best Use. Appraiser should analyze market segment according to generally accepted appraisal principles and the Manual. *Id.*, pp. 38, 40.
146. Highest and Best Use points to which properties are comparable. The use of the property drives the value and creates the need in the supply and demand relationship. *Id.*, p. 40.
147. The factors to determine Highest and Best Use are laid out in the *Nestle* decision. They are what is possible, permissible or feasible, and then what is maximum productive. The property must be marketable for that use; there must be market, someone else who may be interested. *Id.*, pp. 40-41.

148. Under WI law, the appraiser must select the use that produces the greatest net return to the owner over time. Continued use as a retail electronics store provides the greatest net return for the subject Best Buy. *Id.*, p. 42.

149. The Highest and Best Use should be as specific as possible. Fast food should be used instead of the broader category of restaurant. *Id.*, pp. 42-43.

150. Continued use as an electronics store is the focal point for the Highest and Best Use of the subject. It continues to fill a need in the market and has done so over a long period of time. The store continues to operate. Best Buy and other retailers have closed other stores, which is normal. This property has not closed and the continued use is an indication of the continued demand for the property. *Id.*, p. 43.

Best Buy's Location is Excellent

151. The subject property has an excellent location, excellent access and alternative uses. *Id.*, pp. 43 and 45.

152. The location across from Mayfair Mall has impacted the value of the subject Best Buy. It is a near 100 percent location in this market. The location is very strong, primarily due to its location on Mayfair Road across from Mayfair Mall, which has the highest retail sales per square foot of any mall in Wisconsin. It has identical access to the mall, with a dedicated lane. The location is considered 'near' 100 percent because it is a freestanding property on the West side of the street. The mall is located on the East side. *Id.*, pp. 44-45.

153. Miller has appraised Mayfair Mall and is familiar with its economics. *Id.*, p. 45.

Miller's Fee Simple Valuation. Use of Dark and Vacant Store Sales As "Reasonably Comparable Sales" Is Not Proper. Therefore, Miller Properly Used Tier 3 Cost and Income Approaches Rather Than A Tier 2 Sales Comparison Approach

154. Miller has appraised the fee simple market value, which is defined as occupied and leased at market rent, not vacant and available to be leased. This is consistent with the Appraisal Institute course materials, which direct the appraiser to be specific as to whether fee simple means leased at market rents or vacant and available. *Id.*, p. 47.

155. Under Wisconsin law, fee simple means leased at market rent, based on the Manual and the *Bonstores* and *Walgreens* decisions. *Id.*, pp. 47-48.
156. Miller indicated that dark and vacant properties are typically transferred in fee simple. A sale of a leased property is defined as a leased fee sale. An owner who occupies a property typically does not sell the property unless there is a reason, often declining sales. *Id.*, pp. 45-46.
157. Limiting comparable sales to dark properties limits the analysis to a small set of data. Leased fee sales can be the more relevant information because they address continued use of the store and are presumably paying market rent, which can indicate the property value. *Id.*, p. 46.
158. The Manual states that to be comparable, properties should be similar in both physical and economic characteristics, including the ability to generate income. Real estate value is always related to the value of the location and the competition. *Id.*, p. 49.
159. The use of the property and its ability to generate income are what is important. An occupied property has demonstrated demand, a vacant property does not. Vacant properties had demand in the past, but something changed and the property is in transition. This is often related to the elements of the property, regardless of the performance of an operator. *Id.*, p. 50.
160. Miller has taken the current occupancy of Best Buy into account, but has performed a market valuation, not a use valuation. The use is to benefit the consumers, selling retail goods at an excellent location. The subject meets consumer demand for location, access, physical attributes, size and design. *Id.*, p. 51.
161. The Manual provides that if the current use is also the Highest and Best Use, the use value will equal the market value. *Id.*, p. 52.
162. The Highest and Best Use of the subject Best Buy is continued retail use. The retail use that is continuing is an electronics store. The Best Buy is occupied and continues to be used. The hypothetical buyer and seller concept have been a part of appraisal practice since the beginning. The most logical user in the market is Best Buy. If not occupied by Best Buy, Best Buy would be

- a logical user as the store would fill a void in Best Buy's ability to serve Milwaukee. *Id.*, pp. 52-53, 55.
163. Location and parking are critical for retail properties. The Best Buy property has six parking spaces per 1000/sf of retail space. *Id.*, p. 57.
164. The parking is valuable, particularly during the peak Christmas sale season. Best Buy's SEC filings indicate approximately 50 percent of sales are during the Christmas season. *Id.*, p. 58.
165. Miller's valuation took into account the cost of the parking structure. It adds value and Best Buy chose to repair it when it was damaged by a plow. The structure allows customer access to the store and Geek Squad car stereo installation. Miller has observed it open and accessible to customers on several occasions. The upper deck is important during peak demand. *Id.*, pp. 58-59, 61.
166. Because of the importance of the parking structure, Miller did not apply external obsolescence. He did apply physical depreciation percent. The cost of maintenance for the structure is normal, similar to the surface lot. *Id.*, pp. 60-61.
167. The mezzanine space at the Best Buy is for office and common support of the store itself. The restrooms, equipment and communication rooms are similar to what any store would have. *Id.*, p. 62.
168. The mezzanine space did not increase the cost of the overall structure, and costs less due to shared foundation, walls, HVAC, etc. *Id.*, pp. 63-64.
169. Sec. 70.32 Wis. Stats. provides that property is to be valued based on the Manual. It does not reference the 14th Edition of Real Estate or any other treatise. *Id.*, pp. 64-65.
170. Section 9-43 of the Manual provides that the Assessor should avoid use of comparable sales of vacant, transitional or distressed properties unless the subject property is also vacant, transitional or distressed. When valuing stabilized operating retail properties, the Assessor should

choose comparable sales with similar Highest and Best Use and placement in the retail market. Id., pp. 65-66.

171. Miller addressed a Tier 2 sales comparison approach, but did not arrive at a conclusion of value due to a lack of reasonably comparable sales. Id., p. 66.
172. Section 9-43 of the Manual states that sales comparison approach is often used to value smaller retailer stores. For larger stores, and smaller stores without comparable sales, the Assessor should use the income and/or cost approaches. Miller prepared income and cost approaches consistent with the Manual's direction. Id.
173. According to the Manual, location of a retail store is of extreme importance, parking the second most important. Six parking spaces per 1000 square feet is valuable if there is demand and it will benefit the user. For the subject Best Buy, the parking is valuable. Best Buy desires six parking spaces per 1000 square feet. Id., pp. 66-68.
174. The Manual cautions against using distressed properties, including physical or economic distress. Economic distress is external, such as bankruptcy or a loss of road access. Id., pp. 69-70.
175. Miller is familiar with the former Northridge Mall area and the Capitol Court area from prior appraisals. Northridge closed long ago and has been identified as a failed mall and location. Some retail has been converted to other uses, including industrial. Id., pp. 70-72.
176. Miller's income approach analyzed rent comparables based on data throughout Wisconsin, but focused on Wauwatosa, Mayfair Road and the Mayfair Collection. Id., p. 72.
177. Miller analyzed Mayfair Collection rents from Dick's Sporting Goods and Nordstrom Rack, both recent leases. He also considered Whole Foods, Home Goods and other smaller retailers at Mayfair Collection. Id., p. 73.
178. The rent from the Container Store was considered by Miller, a freestanding 25,000 square foot retail property at Mayfair Mall that was leased at \$25/sf (\$30/sf with taxes). Dick's is 45,000

square feet, while Nordstrom Rack is 36,000. Both are leased at \$16/sf. Whole foods is 45,000 square feet and lease at \$18/sf. *Id.*, pp. 74-75.

179. Dick's and Nordstrom Rack are unfinished, warehouse style space. The others are new construction. Mayfair Mall was noted as a superior location to Mayfair Collection, as demonstrated by the location of the full line Nordstrom's department store at Mayfair Mall, and the discount Nordstrom Rack store at Mayfair Collection. *Id.*, pp. 75-76.

180. Miller reached a market rent conclusion for Best Buy at \$20 per square foot for 2015 and 2016. This was based on the rental range of \$16-25 feet. The Container Store was noted to be an inferior location to the subject, with access and visibility from North Avenue rather than Mayfair Road. *Id.*, p. 78.

181. The \$20 market rent conclusion is triple net, which means the tenant is responsible for all expenses with full control over the property. Miller applied a two percent management expense. *Id.*, p. 79.

182. Miller did not deduct for vacancy. The property has been occupied since construction. There is no expectation of vacancy. The property is stabilized such that the vacancy of other stabilized properties is to be considered. In that market there is near 100 percent occupancy. *Id.*, pp. 79-80.

183. Vacancy is taken account in the capitalization rate, which recognizes all of the variables of risk. Investors typically view single-tenant properties on a fully-occupied basis, unless the property has known, impending vacancy. *Id.*, p. 81.

184. Miller concluded a capitalization rate of 7 percent in 2015 and 6.8 percent in 2016. His cap rate conclusion was based on the marketplace, and the PWC and Calkain industry surveys. *Id.*, p. 82.

185. Miller noted differences in operator preferences for leased versus owned stores. There had been no Best Buy stores sold in Wisconsin in the last 24 months. *Id.*, p. 83.

186. The decision to lease or own a store is a strategic business decision. Ownership gives full control. The Best Buy is at the best location in Wisconsin. Typically, operators want to own the more valuable assets. Location is part of the determination whether to own or lease. *Id.*, p. 85.
187. Miller's conclusion of value under the income approach was \$13,400,000 for 2015 and \$13,800,000 for 2016. This reflects a decline in the cap rate that was industry and location wide. *Id.*, pp. 85-86.
188. The decline in the cap rate means prices are increasing and investors are willing to buy at a lower return, which is an improving market. *Id.*, p. 86.
189. Miller's cost approach valuation of the subject Best Buy involved analysis of the site selection and he considered the strength of the Wauwatosa location and the strong prices paid for retail property along Mayfair Road. *Id.*
190. Best Buy paid \$6,800,000 to acquire the subject property in 2005, which is \$42/sf or land. The sale also included office buildings that were torn down. *Id.*, p. 87.
191. When an improved property is acquired and the improvements are torn down, the sale is considered a vacant land sale and the cost to raze the buildings is added to the sale price. For the subject Best Buy the razing costs were \$500,000 and added to the sale price for a total adjusted site cost of \$7,300,000. *Id.*, pp. 87-88.
192. Best Buy dedicated a portion of the site to the City to create the stoplight with direct access and crossing to Mayfair Mall. *Id.*, p. 88.
193. It is normal for delivery trucks to have to drive around a building and back up to a loading door. The truck access configuration does not devalue the subject property. The parking garage access route actually has a more gentle curve than the original concept route around the building with a sharp 90 degree corner. *Id.*, pp. 89-91.
194. All of Miller's land sales were for retail use or of a former retail site. He considered land sales with a range of value of \$6 to \$28 per square foot and considered their attributes, primarily location, size and sale price. He considered the original Best Buy land sale at \$45/sf and other

recent sales in the \$40/sf range. He valued the land at \$45/sf, consistent with the \$7.3 Million site cost in 2005. He noted the land value is more than 50 percent of the total, which demonstrates the importance of the location. *Id.*, pp. 91-95.

195. 2006 was a high water mark for commercial real estate values prior to the 2008 recession. 2015-16 values in Wauwatosa have rebounded beyond the former high water mark in 2006. *Id.*, p. 97.

196. Miller considered and noted positive growth, income and employment trends in Wisconsin and Milwaukee are. The Mayfair Mall sales trends follow the income trends, and have rebounded and surpassed prior sales. The Mayfair Mall inline retail sales are \$600-650 square foot, as compared to Brookfield Mall at \$350/sf. *Id.*, pp. 98-102.

197. Miller considered the strong Wauwatosa demographics, as demonstrated by occupancy, a as compared to the larger Milwaukee market that is made up of Milwaukee, Waukesha and Racine County. *Id.*, p. 102.

198. The cost approach uses replacement cost, which is the cost to build the building today with modern materials and eliminating any functional obsolescence. He noted the Best Buy was only 10 years old and built with modern materials and design consistent with today. Miller established the replacement cost of the different components of the building separately, sine they are materially different in cost. He then applied depreciation. *Id.*, p. 103.

199. Miller used the Marshall Valuation Services (“MVS”) manual and base cost tables. He applied the base rates for Class C retail stores and Class C discount stores, and blended them to reach a base cost of \$91.75 per square foot. *Id.*, pp. 104-08.

200. The MVS cost figures are for a generic retail store and do not include any atypical features of the subject Best Buy. Since the cost of additional features is not included, it is not appropriate to deduct them as functional obsolescence. March 6, 2019, p. 157.

201. Miller valued the mezzanine space separately at \$59.87/sf. He noted that the space could be converted to additional retail and that market potential for such use exists at this location. 25-

30 percent of the mezzanine is for restrooms and general office, which is considered part of the retail space. *Id.*, pp. 108-09.

202. Miller added the cost of the upper level of the parking garage only. The lower level was considered as if part of the parking lot. *Id.*, pp. 109-10.

203. Miller applied a story-height multiplier based on the height of the building, excluding the mezzanine, consistent with the direction in MVS. *Id.*, p. 111; Ex. 400A.

204. Miller reached a value of \$5.9 Million for the improvements for 2016. The 2015 value was adjusted down with a cost factor. I. He added additional cost for site improvements, and 7.5 percent of the building value as soft costs. It would be improper not to include soft cost. *Id.*, pp. 112-13.

205. Miller applied the MVS depreciation schedules. MVS extracted data from the market and estimated typical life expectancy. MVS uses curvilinear depreciation, not straight-line. *Id.*, pp. 114-16.

206. Miller applied 11 percent depreciation in 2015 and 13 percent in 2016, according to MVS. *Id.*, p. 117; Ex. 392.

207. Functional obsolescence is inherent or existing in a property. Miller applied no functional obsolescence as the property is similar to current standards, the materials are good quality, and the location is excellent and has good visibility on Mayfair. *Id.*, pp. 117-19.

208. The mezzanine does not contribute to functional obsolescence. Rents are high in the area and it is not unusual in the area to have a mezzanine or multi-story retail. The training and regional offices are in a good location at a premier property, which is consistent with the market. *Id.*, pp. 119-20.

209. External obsolescence is outside of the property. Miller concluded there was no external obsolescence, due to the premier location with high prices, high rent, high retail sales and strong demand. *Id.*, pp. 121-22.

210. Miller noted many fewer store closing in Wauwatosa. The one store that did close was quickly reopened. Mayfair Collection demonstrates growing demand. The ‘retail apocalypse’ has not had a material impact on the subject property warranting specific adjustment from the market data. *Id.*, pp. 121-22.
211. Miller’s conclusion of value under the cost approach was \$13,300,00 for 2015 and \$13,200,000 for 2016. *Id.*, p. 122.
212. Miller’s final reconciliation of value placed the greatest weight on the cost approach, but noted similar values among the approaches. *Id.*, p. 123.
213. Miller’s opinion of value is held to a reasonable degree of certainty based on professional appraisal standards, and reflects the fee simple market value for the years at issue. Miller’s conclusions are consistent with the Manual, Wisconsin law and statutes. *Id.*, pp. 123-24.
214. Miller’s appraisal and opinions comply with the Uniform Standards of Professional Appraisal Practice (“USPAP”), which govern the appraisal and work that Miller has performed. *Id.* p. 130.
215. While Miller was not licensed as an appraiser in Wisconsin at the time he completed his appraisal report of the subject Best Buy, licensing was not required for this appraisal assignment. Since completing this Assignment Miller has obtained a Wisconsin appraisal license. Miller is licensed in Illinois, New York , *Id.*, pp. 128-29.
216. Miller’s appraisal report is not a review appraisal under USPAP and specifically states in the scope of work that it is not a review appraisal. Miller has contrasted some of the work that MaRous has performed, but did not form a review conclusion and did not perform a review appraisal. *Id.*, pp. 131-43.
217. Tier 3 assessment methods may be used if there is no arms-length sale of the subject property and an insufficient number of comparable sales. Wisconsin law provides that one reasonably comparable sale is insufficient for use in a comparable sales analysis, consistent with

the *Adams* decision. Both refer to comparable sales as plural rather than as singular, consistent with Miller's opinion. *Id.*, pp. 150-53.

218. The current use as an electronics retail store is successful and supported by market analysis; there is demand being fulfilled at this location. Another retail use could be a change in Highest and Best Use. Varied retail uses are consistent with Miller's conclusion as to the Highest and Best Use as vacant. Under Miller's income analysis under Tier 3, it is appropriate to use rental comparables that are other types of retail properties that do not share the same Highest and Best Use as the subject property. *Id.*, pp. 154-59.

219. An older grocery store is not appropriate for use in a Tier 2 sales comparison analysis, but is appropriate to use in a Tier 3 analysis. Tier 3 is different than Tier 2. Transcript, March 6, 2019, pp. 73-75.

220. Miller has not included business or intangible value to Best Buy in his valuation of the subject property. Best Buy is the user and occupant of the building. The use of the property as an electronics store is the placement of the market, the market segment. Transcript, March 5, 2019, pp. 167-68.

221. The cost approach is useful in separating the value of tangible assets since it specifically excludes personal property and intangibles. Transcript, March 6, 2019, p. 159.

222. Walmart sells electronics but is not consistent with the Highest and Best Use of the subject property. The demand for electronics exists at the location regardless of whether Best Buy is there. Highest and Best Use is focused on the use of the store and the user, not the brand. Transcript, March 5, 2019, pp. 169-72.

223. The market indicates that Best Buy operates well at the subject property. Miller values the property with continued occupancy for use as an electronics store, not Best Buy as a brand. *Id.*, pp. 175, 179.

224. Best Buy's primary competitors are no longer in business. Best Buy and the subject store are in a good position. Competition is a part of retail. Competition has driven Best Buy's competitors out of business, but Best Buy remains. Transcript, March 6, 2019, pp. 143-44.
225. Buyers don't set the market. The seller has to be willing to sell; often they choose not to. Transcript, March 5, 2019, p. 176.
226. The strength of the market indicates no obsolescence is warranted. The PWC trends show a positive attribute for the property, a market in recovery. Moving up from a recession has a lot of upside. *Id.*, pp. 183-84.
227. The subject Best Buy benefits from the synergy of being across from Mayfair Mall, at the main intersection and access point. That is unique to this property, differs from other Mayfair properties, and is highly beneficial. *Id.*, p. 192.
228. The design and attributes of the subject Best Buy are consistent with the premium Mayfair Mall market, as evidenced by the two-level Crate & Barrel and three-level Nordstrom. Transcript, March 6, 2019, pp. 5-6.
229. The South facing entrance makes sense for parking and access from the side of the property, as well as the limited walking traffic on Mayfair Road. The Walmart in Greenfield is an example of retail with frontage perpendicular to the main road, like the subject. Miller has studied the market and the use of secondary space, such as the Walgreen's next door. *Id.*, pp. 16-19, 25-26.
230. The mezzanine space contains the bathrooms. This is a benefit to the store layout as it allows customers access to the bathrooms without concerns over customer taking product into the bathroom. The lack of an escalator is not a design issue; smaller second story space like the mezzanine is more typically accessed through elevators and stairwells.
231. Most buyers of retail properties focus on income, but also consider replacement cost. As a property becomes more atypical, cost can be the most relevant approach. *Id.*, p. 27.

232. The cost approach process does not change specifically due to occupancy or vacancy, the key is market placement. *Id.*, pp. 29-30.
233. Miller's research indicates Best Buy tends to locate in properties with significantly greater than 4 parking spaces per 1000/sf. There are many parking ramps at retail properties, and they tend to occur in high value locations like the subject Best Buy. It is not surprising to have a parking ramp at the subject. *Id.*, pp. 33, 35.
234. The occupancy of the retail stores in the Wauwatosa big box market is a better data point than a statement from a retail buyer. There was only one retail store closure in Wauwatosa. *Id.*, pp. 46-47.
235. Miller valued the mezzanine space at the upper end of the range based on Class A and B office space. The quality of the mezzanine space is better than some of the Class B office space. The \$20/sf value represents the property as a whole. *Id.*, pp. 54-56.
236. The subject Best Buy has the synergy of being located across the street and at the main access point of Mayfair Mall. The superior location is evidenced by the Mayfair Container store rent at \$25/sf, double the rent of the smaller spaces at Mayfair Collection. *Id.*, pp. 57-59.
237. The subject Best Buy has an excellent location, which was a significant factor in Miller's analysis. Miller adjusted his comparable rentals for location, noting the Container Store rent was 100 percent higher than other comparable rents due to its location. *Id.*, pp. 96-98.
238. Miller analyzed the MVS depreciation tables and found them consistent with the marketplace. *Id.*, pp. 70-71.
239. Northridge is a failed retail location. The Lowe's on Brown Deer was a failed retail location for a home improvement store. *Id.*, p. 77.
240. Section 9-12 of the Manual indicate a vacant comparable is appropriate to use if it is not distressed or vacant beyond the normal time period for that commercial real estate market, which can vary by municipality. The Manual allows the use of vacant properties when making a comparison to a vacant property. *Id.*, pp. 89 and 92.

241. Comparable sales should have a similar Highest and Best Use and placement in the retail market. *Id.*, pp. 93-94.
242. If the costs of the portions of the mezzanine not devoted to retail use and the parking structure are removed from Miller's cost approach valuation of the subject property, the value conclusion is \$11.6 Million, which supports the conclusion that the \$8.7 Million assessment is not excessive. *Id.*, pp. 147, 150.
243. Miller analyzed historical actual cost as compared to estimated cost. The cost approach is a fee simple value, which assumes a stabilized income and occupancy. A vacant property does not have stabilized occupancy. *Id.*, p. 156, Ex. 45.
244. Generally accepted appraisal practices change over time; the *Walgreen's* decision cites the 12th Edition from 2001, versus the current 14th Edition. *Id.*, pp. 164-65.
245. The Manual refers to the Appraisal Foundation as authoritative, which publishes USPAP. The publisher of the 14th Edition is the Appraisal Institute, which is not a member of the Appraisal Foundation. *Id.*, p. 168.
246. The *Bischoff* rule supports the use of the cost approach and states that an assessment should not be made by income alone. *Id.*, pp. 165-66.
247. Miller considered cost, depreciation and replacement value, consistent with the *Walgreen's* decision. *Id.*, p. 166-67.
248. The IAAO is an organization that is a source of guidance for assessors. The IAAO big box paper was adopted by the board of directors. *Id.*, pp. 170-71.
249. Miller did not deduct replacement reserves to calculate Net Operating Income (NOI), consistent with the PWC survey results. The PWC surveys show the market, and indicate that the investors who buy and sell this type of property do not deduct replacement reserves to arrive at NOI to calculate a capitalization rate. *Id.*, pp. 173-75.

250. An agreement to a future assessment as part of a sale, as evidenced by the Lowe's in Brown Deer that was sold to Walmart, is a special concession, not a market transaction. *Id.*, p. 176-77.
251. Miller considered the MaRous appraisal to see if he agreed with its analysis. This is consistent with the *Rosen* decision, which indicates that appraisals from the property owner are relevant to market value when there is no sale of the subject or of reasonably comparable properties. *Id.*, pp. 178-79.
252. The Best Buy loading dock arrangement is not unusual. *Id.*, p. 182.
253. Mayfair Collection was built during the 2014-2015 era. This indicates there was not a recession during this period, as it is not typical to have new construction during a recession. *Id.*, p. 183.
254. The rental rate for the At Home property in Wauwatosa is based on an 'as-is' lease of an old property with environmental issues and in poor condition. The tenant paid for all repairs and build-out. The rent was a shell rent, for an 'as-is' property in fair or worse condition. A turn key rent is higher than a shell rent. The rent is lower when the tenant invests all the money. A tenant who pays for improvements may pay personal property tax on the improvements. *Id.*, pp. 185-87.

Dr. Thomas Hamilton's Review Appraisals and Testimony

255. Dr. Thomas Hamilton is a distinguished college professor who teaches real estate courses at Roosevelt University at a master's degree level, and conducts real estate research, professional education and service. He holds the designation of Member of the Appraisal Institute (MAI) and teaches classes for the Institute. Hamilton Trial Transcript, November 9, 2018, pp. 4-6.
256. Dr. Hamilton primarily teaches quantitative analysis, which uses numeric analysis as a means to use market data more efficiently to accurately describe the market without subjective analysis. *Id.*, pp 7-8.
257. Dr. Hamilton has performed real estate consulting work, including mass appraisal and property tax appeals for commercial properties. He is familiar with the Manual and WI case law.

His thesis was on mass appraisal and he has worked for the IAAO, taxpayers and the government.

He is competent to perform the work he has done in this case. *Id.*, pp. 9-10.

258. Dr. Hamilton is a regular speaker and publisher of writings relating to real estate. His article Valuing the Leased Fee Simple Estate is part of his report and incorporated into his analysis in this case. *Id.*, pp. 11-12.

Hamilton's Review of the MaRous Appraisal

259. Dr. Hamilton reviewed the MaRous appraisal for completeness, accuracy and reliability, within the guidelines under the Manual, Wisconsin law and appraisal practice. *Id.*, pp. 12-13; Ex. 77.

260. With regard to appraisal practice, the 14th Edition states the opinions contained therein are not an official position of the Appraisal Institute. In contrast, the IAAO position paper on big box retail valuation is the official position of the IAAO and was included in his analysis. *Id.*, pp. 15-17.

261. Fee simple is the highest level of ownership rights associated with the physical real estate. *Id.*, p. 18.

262. Fee simple subject to a lease is a property owned in fee simple with a tenant that is leasing the property in a possessory interest. The owner still has ownership rights. The bundle of rights are ownership rights, not possessory rights. *Id.*, pp. 18-19.

263. Chapter 7 of the Manual states that real property includes all fixtures, rights and privileges appertaining thereto. The rights include intangible benefits, including the right to lease an interest in and to occupy the property. A lease is a possessory interest by a tenant, with a reversionary interest to the landlord at lease end. *Id.*, pp. 20-21.

264. If a property is leased and the rents are at market, the leased fee value will be the same as the fee simple value, consistent with the *Walgreen's* decision. It is incorrect for an appraiser to state that the sale of a property subject to a lease is not a fee simple sale. *Id.*, pp. 22-23.

265. A hypothetical condition is an assumption made that is contrary to known fact. There must be a good reason to do so to avoid misleading the user of the appraisal. If property is occupied on the date of value and is valued as vacant, the vacancy must be disclosed as a hypothetical condition. *Walgreen's* did not hold that property is to be valued as if vacant. *Id.*, pp. 23-24.
266. The MaRous appraisal employs a market analysis that is based on second-generation use, not the current use of the subject property. *Id.*, p. 24.
267. The MaRous appraisal value is based on alternative uses, but not disclose the change in use as an extraordinary assumption or hypothetical condition. *Id.*, pp. 47-48.
268. Second generation use is usually a downgraded use. The IAAO position paper states that first-generation properties should be compared to first-generation properties, conflicting with MaRous' analysis. *Bonstores* and the Manual also refer to the need for an apples-to-apples comparison, which is the same concept as the IAAO paper. *Id.*, pp. 25-27.
269. When a property is sold from a first-generation to a second-generation user, the Highest and Best Use changes. Highest and Best Use is use, timing and market participants. A change in market participants is a change market draw and economics, and a different Highest and Best Use. A vacant property has different timing and thus a different Highest and Best Use than an occupied property. *Id.*, pp. 147-149.
270. The Appraisal Institute course on advanced market analysis teaches Highest and Best Use includes market participants. A change in Highest and Best Use requires fundamental demand analysis and detail as to who the potential owner is. A change from selling electronics to books is a change in market participants and thus Highest and Best Use. *Id.*, pp. 149.
271. Market area, demand and supply must be understood before reaching the conclusion as to Highest and Best Use. Comparable sales should be chosen with a similar Highest and Best Use and market placement as the subject property. If the Highest and Best Use is wrong, the rest of the appraisal will be wrong. *Id.*, pp. 28-30.

272. Demand must be considered before Highest and Best Use. The determination of the most probable user is part of the demand analysis, which predicates the Highest and Best Use. There is a detailed, multi-step process to determine the final most-probable user. The most probable user is the one that meets the market participant standard in the Highest and Best Use determination. *Id.*, pp. 150-52.
273. Highest and Best Use and market analysis are generally accepted appraisal practices. A hypothetical sale with a hypothetical buyer and seller are considered. The current occupant is not the seller. The current occupant can be the buyer or seller, but not both. All relevant parties are a potential buyer or seller. *Id.*, pp. 31-32.
274. MaRous improperly assumes Best Buy is not a potential buyer in a hypothetical sale. MaRous has no market data to establish the features of the property have no value to an alternative user, such as a comparison between sales of properties with and without the feature. *Id.*, p. 40.
275. Transition is a change in use, such as where a farm becomes a residential subdivision. There is no evidence that Best Buy is planning to leave the subject property. If there were evidence it will become vacant, the current use might be the interim use. Highest and Best Use may be different where a property is in transition. *Id.*, pp. 32-35.
276. The MaRous appraisal has no market evidence to support the conclusion that the parking garage at the subject property is functionally obsolete. *Id.*, pp. 35-36.
277. The MaRous appraisal inappropriately considered the 2008-09 recession as part of his 2015-16 appraisal. The recession was done as of 2012 and there was continued growth. The recession is not relevant to the 2015-16 market. *Id.*, p. 37.
278. The retail market was impacted by the recession, but the recovery started to take off in 2012. 2012 values were lower than today and lower than in 2006. *Id.*, pp. 114-15.
279. The MaRous appraisal fails to consider significant new retail development near the subject property or the lack of vacant big box properties near the subject. *Id.*, pp. 37-38.

280. The MaRous appraisal uses the former Northridge Mall market as a comparison to the subject. This is not an appropriate market to consider when valuing property in Wauwatosa. There are structural differences in vacancy and new construction. It is the opposite of Mayfair. *Id.*, p. 39.
281. The parking garage must be included as part of the parcel. The value could be significant if it was equivalent to having additional land for parking. *Id.*, pp. 43-44.
282. Parking is a necessity for most traditional retail. The economic benefit of a parking garage is based on market demand. *Id.*, pp. 111-13.
283. There is no market data to establish the position of the building façade has an impact on the value of a retail property. The MaRous appraisal conclusion that the position of the facade has an impact on value is unsupported. *Id.*, p. 45.
284. The MaRous appraisal conclusion that large retail properties are oversupplied is national, not specific to Wauwatosa. *Id.*, pp. 46-47.
285. The MaRous appraisal used office park land sales. This is not a good practice, since it is difficult to adjust for Highest and Best Use. General appraisal practice could allow the use of properties with a different Highest and Best Use, but under Wisconsin law if you don't have valid data you don't perform the approach. *Id.*, p. 49.
286. If there are not a sufficient number of current local land sales, the appraiser should look for other properties with the same Highest and Best Use, or analyze new sites and perform market extraction. *Id.*, p. 126.
287. The MaRous appraisal conclusions of 15 percent functional obsolescence and 5 percent external obsolescence are subjective and without market support. *Id.*, pp. 49-50.
288. An income approach using the direct capitalization method requires a stabilized property. It is not appropriate to use asking rents for vacant properties; they are only half of the equation, not market sales. *Id.*, p. 50.

289. Quantitative analysis uses numeric data to come up with a conclusion, such as regression or statistical analysis. MaRous incorrectly claims his analysis is quantitative, as he has no numeric proof to support his conclusion. MaRous employs a subjective, qualitative analysis. *Id.*, pp. 51-52.
290. There is no support for the vacancy conclusions in the MaRous appraisal. The data presented in the appraisal indicates it should be higher, and the appraisal concludes that a true market perspective warrants a higher vacancy rate but the conclusion was lower without explanation. *Id.*, pp. 53, 138.
291. The income approach in the MaRous appraisal uses the wrong income, wrong cap rate, and wrong process. *Id.*, p. 53.
292. Use of asking rents are not market transactions and only one side of the equation. A tenant could pay more than asking rent, such as in a bidding war. *Id.*, p. 132.
293. MaRous has no evidence of capitalization rates in the Wauwatosa area. Local cap rates may be obtained from analysis of sales of income producing property. *Id.*, p. 139.
294. The market rent used by an appraiser should include a market level of tenant improvements. Additional tenant improvements only exist for the remaining term of the lease. *Id.*, pp. 57-58, 146.
295. The correct method for the analysis of tenant improvements is to deduct improvements that are above the market level from the value after capitalizing the correct income. The MaRous appraisal deducts tenant improvements as an expense from income. This is incorrect, as it assumes the improvements are deducted in perpetuity, which means the property is not stabilized. *Id.*, p. 57.
296. The cost approach in the MaRous appraisal is flawed. A zero value is assigned to the parking garage, without evidence. The build out of the main building is incorrect. The functional obsolescence calculations are incorrect, tied to income instead of independent. *Id.*, p. 54.

297. The sales comparison approach in the MaRous appraisal is flawed. MaRous excluded leased properties from his comparable sales. It is incorrect to exclude leased properties. The appraiser must look at all sales and determine the impact of the lease on the market value of the fee simple, if any. *Id.*, pp. 58-59.
298. There is no market evidence for the quantitative adjustments in the MaRous appraisal. The appraisal concludes the properties are superior to the subject, but no adjustment is made. The size adjustments for the same property are inconsistent from year to year; size was a 25-30 percent adjustment in 2015, but only 15-20 percent for the same property in 2016. The size adjustment should be the same. *Id.*, pp. 60-61.
299. The range of the adjustments to the sales in the MaRous appraisal is extremely large and indicates the properties are not comparable. *Id.*, p. 61.
300. Reasonably comparable is not defined in the Manual, but a 50 percent adjustment is high and the property is highly unlikely to be reasonably comparable. *Id.*, p. 142.
301. An approach should not be used if there is not valid market data. If there is no reliable data for a sales comparison approach, the assessor and appraiser must drop down to Tier 3. *Id.*, pp. 62-63.
302. If a property is not reasonably comparable, it cannot be used or adjusted to become reasonably comparable. Economic characteristics are a factor in comparability, including income potential and occupancy. *Id.*, pp. 63-64.
303. A property that is not reasonably comparable for a sales comparison analysis under Tier 2 can be used in a Tier 3 analysis. *Id.*, p. 142-43.
304. The exclusion of sales subject to leases in the MaRous appraisal is bias. *Id.*,
305. There are a large number of errors in the MaRous appraisals. The MaRous appraisals are unreliable. *Id.*, pp. 64-65.

Hamilton's Review of Lennhoff's Review of the Miller Appraisal

306. Dr. Hamilton performed a review of the David Lennhoff review of the Miller appraisal. Id., p. 67, Ex. 78.
307. MaRous and Lennhoff both exclude the existing user when determining Highest and Best Use, based on the assumption that only the existing user/owner can be the seller. The seller is hypothetical, not the occupant. Exclusion of the current user differs from generally accepted appraisal practice. Id., p. 69.
308. If the current user is the most probable or highest and best user, the value in use and the market value are equal. Id., p. 70.
309. The appraiser must consider various uses and determine the use which produces the greatest net return to the property, consistent with Wisconsin law. Highest and Best Use is considered as vacant and as improved. As improved, Highest and Best Use is singular. Id., pp. 70-71.
310. Depreciation comes in three forms: Physical, which is wear and tear. Functional obsolescence, which is internal to the property due to market taste/preferences at the present time which differ. Economic or external obsolescence. Id., pp. 71-72.
311. Physical depreciation is not straight line, and should be established based on the market. Depreciation is often non-linear. The rate of depreciation for a property in its teens will typically be greater than for a property that is brand new. Often it is an S-curve relationship, which starts out low, accelerates as the property ages and flattens out later in life. Id., pp. 72-73.
312. The MVS depreciation tables are based on market data and analysis. The non-linear MVS depreciation is consistent with Dr. Hamilton's research. Id., pp. 73-74.
313. The MVS depreciation tables are more likely to reflect actual physical depreciation in the market than a straight-line method. Id., p. 153.
314. Curved depreciation tables do a better job than linear for a retail store with heavy customer and goods traffic that is regularly maintained and has no deferred maintenance.

Structural components last much longer than the typical economic life and depreciate at a slow rate. *Id.*, pp. 156-57.

315. The Miller appraisal explains the basis for its conclusion that there is a lack of functional and external obsolescence at the subject property. The determination involves subjective analysis and judgment. *Id.*, p. 76.

316. The MVS cost data is based on current market data as of the date of publication, and is updated frequently. MVS replacement cost typically does not include functional obsolescence or super adequacy. *Id.*, p. 77.

317. In contrast to replacement cost, reproduction cost is for an exact replica, including any super-adequacy or inefficiency, with the same materials as the original property. *Id.*, p. 78.

318. The Lennhoff review of the Miller appraisal relies upon an improper understanding of appraisal development and reporting under Wisconsin law for assessment purposes, such as excluding all leased properties. A lease is a possessory interest, not ownership. Highest and Best Use analysis involves use, timing and market participants. Given these shortcomings, the Lennhoff conclusions are not consistent with Wisconsin property tax requirements. *Id.*, pp. 78-79.

319. Dr. Hamilton's opinions are consistent with the Manual, Wisconsin statutes and case law. *Id.*, p. 79.

320. A transition from a Lowe's home improvement store to a Walmart store is a change in Highest and Best Use, as part of the market participant demand matrix has changed, from home improvement to general merchandise. *Id.*, p. 103.

MaRous' Appraisal Is Inconsistent with Wisconsin Law

321. Plaintiff's appraiser is Michael MaRous. He appraised the subject Best Buy for 2015 and 2016. Transcript, November 8, 2018, p. 29; Ex. 38, Ex. 39.

322. MaRous noted the subject Best Buy is in good condition, was built with quality materials and has been maintained. *Id.*, p. 50.

323. The subject Best Buy is located on Mayfair Road, which is a strong location on a six-lane major North-South arterial. *Id.*, p. 52.
324. The property is an attractive box, more attractive than most Best Buys, with face brick, block construction and windows on the front elevation. The parking ratio is 6 per 1000, which is very good. *Id.*, pp. 59-60.
325. The Highest and Best Use analysis is the foundation of the appraisal and sets the tone for the selection of comparable sales. *Id.*, p. 61.
326. The improved value of the subject Best Buy is higher than the value as vacant. *Id.*, p. 62.
327. No first-tier sale of the subject Best Buy has occurred. MaRous valued the property using a second-tier sales comparison approach. He also employed a third-tier cost analysis as a check to support the report and reader understanding. *Id.*, pp. 51-52.
328. MaRous relied upon four comparable sales and two sales listings to value the subject Best Buy. Two sales were in Wisconsin, the Lowe's in Brown Deer and a grocery store on Oklahoma Avenue. Two other sales were of properties in Illinois. *Id.*, pp. 66-74.
329. The Manual provides that listings can be considered, but not relied upon. They show competition, but are not closed transactions. *Id.*, p. 74.
330. The Brown Deer and Oklahoma Avenue locations are inferior to the subject location. The Brown Deer location has significant vacancy throughout the area of the shopping center and former Target, and the entire area. Both properties had unique situations at their locations that required upward adjustments. *Id.*, pp. 79-81.
331. MaRous determined a market value and land value at the upper end of the ranges of his comparable sales, due to size, the location across from Mayfair Mall, and the retail synergy of Wauwatosa. *Id.*, p. 85.
332. The subject Best Buy is far more desirable than a 100,000+ square foot big box space. *Id.*, p. 88.

333. The access route for delivery trucks is made easier with a larger radius turn due to the indentation of the column in the parking garage. Travel behind the building would involve a more difficult right-angle turn. MaRous has not concluded that truck access has impacted retail sales at Best Buy. *Id.*, pp. 138, 149.
334. The MaRous appraisals contain no indication or analysis of the retail sales of the subject Best Buy. *Id.*, p. 142-43.
335. The MaRous appraisals do not cite to or quote any specific section of the Manual. *Id.*, p. 144.
336. The MaRous conclusion of external obsolescence is based on Milwaukee area negative site absorption of 171,000 square feet in the fourth quarter of 2014, due to the closing of a Sears and Pick N' Save. The Sears closing was due to a distressed operator. Best Buy is not a distressed or weak operator. They have survived. *Id.*, pp. 144-46.
337. Mayfair Mall did not experience a drop in occupancy in 2015 or 2016 as a result of the construction of Mayfair Collection. *Id.*, p. 147.
338. Having a controlled intersection access point is a benefit to Best Buy. *Id.*, p. 148.
339. Best Buy spent \$200,000 to maintain the parking garage prior to the dates of value, having determined the benefit of the garage was greater than the cost. *Id.*, pp. 150-51.
340. The sales comparison approach looks for the properties that are the best comparables to the subject. MaRous stated that his comparable sales were the best he could find, but he did not include any sales of properties that were occupied. Many of his sales were vacant several years. He excluded sales of occupied and leased properties from his analysis. *Id.*, pp. 154-56.
341. MaRous Sale #1 was a complex public and private transaction involving TIF financing, payback of debt and an agreed assessed value. The property was 139,500 square feet, almost three times larger than the subject Best Buy. MaRous used the property because it was close to the former Northridge Mall, which he admits has been closed along with numerous other stores in the area, including Walmart. He claims the area is oversupplied with retail, but admits that part

of it has failed as a retail location. He notes that the Northridge area has higher crime than the Mayfair area. Best Buy closed their store in that area and has not opened another store to serve that location, while the Mayfair store remains open. MaRous Sale #1 is not an appropriate comparable to use to value the subject Best Buy. *Id.*, pp. 156-58, 161-63.

342. MaRous considered the appropriate range of size for a sale to be comparable to the 48,000 square foot subject Best Buy to be 15,000 to 144,000 square feet, but probably something smaller than 144,000 square feet, which is three times the size of the subject. MaRous has previously claimed the 'real' retail size of the Best Buy is 39,000 square feet. With that metric, any property over 117,000 square feet would be too large to be comparable. *Id.*, pp. 170-71.

343. MaRous Sale #2 was an older grocery store in a less desirable location. It has the lowest income demographics of all of his sales, significantly lower than the subject. It is not located near or off a freeway. MaRous Sale #2 is not an appropriate comparable to use to value the subject Best Buy. *Id.*, p. 160.

344. MaRous considered but did not use the sale of a Target in Kenosha, which involved deed restrictions and was redeveloped from single-tenant to multi-tenant. *Id.*, pp. 164-65.

345. MaRous Sale #3 was a former Ethan Allen furniture store in Illinois. It was vacant 65 months and had been on the market 74 months at the time of sale. MaRous Sale #3 is not an appropriate comparable to use to value the subject Best Buy. *Id.*, p. 169.

346. MaRous Sale #4 is a former furniture store that was vacant since 2008 and renovated after purchase. The property sold again after the renovation for a much higher price, but MaRous did not use the sale because the property was leased. *Id.*, pp. 171-72.

347. MaRous acknowledged that WI law provides that the fee simple value equals the leased fee value if the rent is at market analysis. MaRous claimed that additional analysis regarding the tenant credit and lease duration were required to use a leased fee sale, but that claim was not based on Wisconsin law, which can differ from general appraisal principles. *Id.*, pp. 172-73.

348. Renovation and occupancy resulted in a 40 percent increase in the sale price of Sale #4 after one year. MaRous did not analyze Sale #4 to determine if the rent was at market. *Id.*, pp. 174-75.
349. MaRous did not consider several additional sales of retail properties, including a Lazy Boy store that sold at \$370/square foot, and two grocery store sales. *Id.*, pp. 176-79; Ex. 4.
350. MaRous Listing #1 is the former Fun World entertainment center that became a window company showroom, including shop and storage warehouse. MaRous used the traffic counts from Bluemound Road, despite the lack of direct access to the property, due to visibility from Bluemound. It is appropriate to use the traffic count of Mayfair Road for the subject property due to visibility from Mayfair. *Id.*, p. 179-180,182.
351. MaRous was not aware of and did not consider the sale of the Metro Market grocery store in Shorewood. The property sold for \$424/sf for a 90,000 square foot building, with an actual cap rate of 6 percent extracted from the sale. *Id.*, pp. 183-84; Ex. 4.
352. MaRous agreed a grocery store can be an appropriate comparable sale, but only if it was sold in fee simple. *Id.*, p. 191.
353. MaRous is familiar with the method of extracting cap rates from sales, but did not use that method in this case because he did not have the data to do the analysis. The Manual has a preference for cap rates extracted from actual sales. *Id.*, p. 184-85.
354. MaRous did not consider the sale of the Whole Foods grocery store in Milwaukee, which was 53,000 square feet that sold for \$412/sf. The extracted cap rate was 5.77 percent. *Id.*, p. 185.
355. MaRous' land value conclusion was \$24/sf. Considered as a land sale, the Brown Deer property was \$10.65/sf including the improvements. MaRous used an improved sale that was worth less than half of the subject land value as a teardown. His other comparable sales range from \$9 to \$27 as a teardown. *Id.*, pp. 187-89.
356. Sale #1 would not have been used by MaRous if he had better comparable sales data. *Id.*, p. 189.

357. MaRous claims to have performed quantitative analysis, but his use of that term refers simply to expressing his conclusion as a number, in this case a percentage range. He is aware of a different understanding of quantitative analysis that refers to the methodology used to reach the conclusion. MaRous did not use mathematical calculations to reach his percentage ranges. He considered the information and applied his experience. The only conclusion he reached using a mathematical calculation was his estimate of physical depreciation in the cost approach he used as a test of reasonableness. He divided the age of the building by its useful life. *Id.*, pp. 192-93.
358. MaRous's adjustments are shown as a percentage range, but he actually applies the specific midpoint to reach his final adjustment and value. It would be more accurate to show the specific number that was actually used in the calculation, or to express his conclusion as a range if it was based on a range. *Id.*, pp 194-96.
359. All of the adjustments in his sales adjustment grid were subjective, based on professional judgment. *Id.*, p. 197.
360. As a result of the difficulty in performing adjustments in sales comparison analysis, MaRous used a bracketing technique, which requires data from superior and inferior properties. If you only have superior or only have inferior properties, you only have data to conclude to an upper or lower limit. *Id.*, pp. 197-98.
361. The adjustments show that only Sale #3 as determined to be equal to the subject Best Buy. All of the other five sales and listings had positive adjustments, meaning they were determined to be overall inferior to the subject. *Id.*, pp. 198-99.
362. MaRous' rental comparables in his income approach were all vacant. The size of the rental comparables range from 1400 sf to 61,000 sf. Comparable #7 is a 1500 sf bay in a strip mall and not a proper comparable sale to value the subject. *Id.*, pp. 202-03.
363. The 1500 sf strip center is not the top end of the retail rental market. Mayfair Mall is the top end of the market. *Id.*, p. 210.

364. MaRous used asking rents due to the difficulty in obtaining actual rents from existing leases. MaRous obtained actual lease information from Best Buy, but did not include the data in the analysis contained in the appraisals. *Id.*, pp. 203-04.
365. MaRous did not provide any backup information for the rental comparables. *Id.*, p. 205.
366. The former grocery store at Northridge has a far inferior location and a rent that was much lower than MaRous' ultimate conclusion. It is not an appropriate rental comparable to value the subject Best Buy. *Id.*, p. 205-06.
367. A portion of the former JC Penney anchor department store at the Janesville Mall has a far inferior location to the subject Best Buy. It is not an appropriate rental comparable to value the subject Best Buy. *Id.*, pp. 207-09.
368. MaRous' use of rental comparables was inconsistent. He used the strip center space as a comparable, but claims it is not appropriate to use space at Mayfair. MaRous claimed there was no comparable rental space at Mayfair, but he used other space at other malls that was not comparable in size. *Id.*, pp. 211-12.
369. MaRous concluded that large box retail space has a significantly higher vacancy rate than the subject Best Buy. Despite this difference, he still used large-box retail space as comparable sales for the subject. *Id.*, pp. 212-13.
370. The subject Best Buy meets the RERC definition of a first-tier investment property. It is a newer quality construction property in a good location. If the Best Buy were sold to another user it would be a second-tier property. Mayfair Mall was a first-tier property on the dates of value. Mayfair Collection and other net leased retail properties in the City are first-tier retail properties. *Id.*, pp. 213-14, 218-19.
371. The income approach in the MaRous appraisals uses a direct capitalization method, which is based on a single-year of income. This method requires the property be in a stabilized condition. His analysis included expenses for tenant improvements as if leased to a new tenant, which is not a stabilized condition. *Id.*, pp. 216-17.

372. MaRous has used the same rental comparables in other Wisconsin retail property appraisals, including Lowe's, Menard's, Kohl's, Walmart, Sam's and Woodman's, despite the significant size differences in those properties versus the subject Best Buy. MaRous uses the same rental comparables for properties across Wisconsin, including the Walmart in Rice Lake. *Id.*, pp. 220-21.
373. MaRous could have used the Dick's lease as a rental comparable, but did not have the information at the time of his report. *Id.*, pp. 222-23.
374. In his cost approach, MaRous' Land Sale #1 and #2 were not retail properties. They were office buildings in the medical research park, highly deed restricted to technological, medical or start-up use. They had limited market exposure. The County was the seller and had to approve the sale. Retail use is not even allowed in the research park. MaRous admitted an appraiser could reasonably conclude they were not proper comparables for the subject Best Buy. Land Sale #1 and #2 are not appropriate to value the subject Best Buy. *Id.*, pp. 226-28.
375. MaRous used a 16-foot ceiling height, but the subject Best Buy has 22 foot ceilings. MVS has a different cost multiplier for 16 foot versus 22 foot ceilings and states that story height is measured by disregarding the mezzanine, contrary to what MaRous did. The mezzanine is to be figured as an added cost. *Id.*, p. 229; MaRous Transcript, November 9, 2018, pp. 25-28.
376. Land sales #3 and #4 were from 2008, more than six years old at the 2015 valuation date. Land Sale #1 and #2 are not appropriate to value the subject Best Buy. Transcript, November 8, 2018, pp. 229-30.
377. MaRous concluded the subject Best Buy as not vacant, in transition or distressed. The Manual states sales of properties that are vacant, in transition or distressed should not be used unless the subject is also vacant, in transition or distressed. *Id.*, pp. 232-33.
378. MaRous admitted the subject Best Buy is a stabilized, operating retail property. He agrees with the Manual that when valuing stabilized retail properties, the assessor should choose

comparable sales with similar Highest and Best Use and placement in the retail market. *Id.*, pp. 234-36.

379. Location is of extreme importance to a retail store. Access and proximity to other retail and customers are also important. *Id.*, pp. 236-37.

380. Parking is important to a retail store. Free and adequate parking at the subject Best Buy, including the garage, is a positive factor. *Id.*, pp. 237-38.

381. MaRous conceded that Chapter 9 of the Manual states comparable sales should have a similar Highest and Best Use and placement in the retail market, and the assessor should avoid using sales of vacant, dark or distressed properties unless the subject is similar. A distressed property is not meaningfully comparable to an operating property. MaRous is not consistent with the statements in Chapter 9. His comparable sales were vacant, several for more than one year. One was vacant for 65 months, another since 2008. MaRous Transcript, November 9, 2018, pp. 12-14.

382. The MaRous appraisal for 2016 is generally the same as the prior year report, but included a new property that sold, a former Pick N' Save in the Brown Deer/Northridge area. The property was closed for two years before it was purchased by Menard's for storage use, not a direct retail use. *Id.*, pp. 16-21.

383. There is no evidence of any plan or intention to tear down the parking garage at the subject Best Buy. There is no evidence or specific plan to change the current use of the mezzanine space at the subject. *Id.*, pp. 75-76.

384. MaRous disagreed with the Supreme Court's holding in *Walgreen v. City of Madison*, that the leased fee value is the same as the fee simple value if the contract rents are at market. *Id.*, p. 65. MaRous' entire appraisal is based on his premise, which contradicts the *Walgreen* holding.

385. MaRous disagrees with the definition of market rent set forth in the Manual because it does not include any of the additional factors that he claims must be included. *Id.*, pp. 69 and 80.

Lennhoff's Review of the Miller Appraisal is Inconsistent With Wisconsin Law

386. Plaintiff retained David Lennhoff to perform an appraisal review of the Miller appraisal of the subject Best Buy. Transcript, March 6, 2019, p. 202; Ex. 104.
387. Lennhoff employed a definition of fee simple market value that requires the property to be available to be leased. Lennhoff acknowledged the existence of a contrary definition, under which fee simple is defined as leased at market rates and occupancy. This latter definition was applied in the Miller appraisal. *Id.*, pp. 207-08.
388. Lennhoff agreed that the income approach to valuation assumes the property is occupied and stable. *Id.*, pp. 211-12.
389. Lennhoff agreed that if the current use of a property is also the Highest and Best Use, the value in use is the same as market value. *Id.*, p. 218.
390. Lennhoff criticized the Miller appraisal for valuing the subject Best Buy under the income approach as if leased at market and with stabilized occupancy. Transcript, March 7, 2019, pp. 8-9.
391. Lennhoff agreed it was appropriate for the Miller appraisal to consider and add soft costs to the cost approach valuation under MVS, as MVS does not include soft costs. He noted that if a sourced for costs does not include soft costs it would be a mistake not to add them. *Id.*, pp. 22-23, 72.
392. Lennhoff criticized the use of judgment, experience and training to determine adjustments for functional or external obsolescence. He indicated it was necessary for the appraiser to show the method used to reach the adjustment. *Id.*, pp. 25-26.
393. Lennhoff agreed that adjustment to the cost approach for the mezzanine and garage are a good start to address his criticism of the Miller appraisal. *Id.*, pp. 30-31.
394. Lennhoff agreed that if sales are not adequately comparable the sales comparison approach may not be used. *Id.*, pp. 34-35.

395. The Lennhoff's review does not mention the Wisconsin Manual, it is a review of basic appraisal methodology. *Id.*, p. 43.
396. Lennhoff opined that the "fatal flaw" of the Miller appraisal of the subject property was to value the property as if leased at a market rate, not as if vacant and available for lease. *Id.*, p. 54.
397. Lennhoff acknowledged the Appraisal Institute course materials state fee simple can mean either leased at a market rate or vacant and available. *Id.*, pp. 55-56; Ex. 355.
398. Lennhoff concluded that the meaning of fee simple in Wisconsin was available to be leased, based on direction from counsel for Best Buy. *Id.*, p. 59.
399. Lennhoff criticized the Miller appraisal for failing to include an adjustment for additional cost associated with the lease-up of the property. He agreed that including those costs would increase the Miller appraisal conclusion of value under the cost approach. *Id.*, p. 63.
400. Lennhoff opined that a 55 percent land to value ratio for the subject property was too high, but had no opinion as to the correct ratio for Wauwatosa. *Id.*, p. 68.
401. Lennhoff noted that the Appraisal Institute course materials on market analysis use a textbook written by Stephen Fanning. Lennhoff disagreed with the course materials and an article written by Fanning. The materials and article state that the use of property and the users of property are part of the highest and best use determination. Lennhoff agreed with the concept endorsed by Fanning that the Highest and Best use should determine the methods and approaches used to value the property. *Id.*, pp. 91-92, 95, 100-01; Ex. 405.
402. Lennhoff agreed that retail demand is driven by demographics, income and buying power. He noted that appraisers look to consumers to determine market demand; demand for a typical product sold in this type of property. *Id.*, pp. 94, 106.
403. Lennhoff agreed that the retail market participants are the customers. Lennhoff further agreed that the most probable buyer is for use by an owner occupant or purchase by an investor. *Id.*, p. 103.

404. Lennhoff agreed that Highest and Best Use may be narrowly defined if the real estate is specifically designed for that use. *Id.*, p. 105.
405. Lennhoff agreed that Best Buy could be a potential purchaser of the property under the valuation analysis. *Id.*, p. 108.
406. Lennhoff agreed that the Miller appraisal did not do a Tier 2 analysis. *Id.*, p. 118.
407. Lennhoff opined that fee simple cannot have a lease. Fee simple and leased fee are different concepts, it does not matter if the lease is at market. They can be the same value but they are not the same thing. *Id.*, pp. 119-21.
408. Lennhoff's opinion that a *fee simple* value and a *leased fee* value can be the same, is completely inconsistent with his opinion that a *fee simple* value can never exist for a property with lease and can only be determine by valuing a property as if it is vacant.

Dated this 21st day of May, 2019.

Attorneys for the defendant, City of Wauwatosa

BY: *Electronically signed by Ryan G. Braithwaite*

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