

FILED
07-23-2019
John Barrett
Clerk of Circuit Court
2015CV006472

DATE SIGNED: July 22, 2019

STATE OF WISCONSIN

CIRCUIT COURT

Electronically signed by William Sosnay, 08
Circuit Court Judge
MILWAUKEE COUNTY

BEST BUY STORES, LP,
Plaintiff,

v.

Case No.: 15-CV-6472
Consolidated with 16-CV-6384

CITY OF WAUWATOSA
Defendant.

CITY OF WAUWATOSA’S CONCLUSIONS OF LAW

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

CONCLUSIONS OF LAW

The Presumption of Correctness Pursuant to Wis. Stat. §70.49(2)

1. Wis. Stat. §70.49(2) affords a presumption of correctness to the assessments.
2. “Wisconsin Stat. §70.49(2) provides that a tax assessment being challenged pursuant to Wis. Stat. §74.37 is entitled to a presumption that it was “justly and equitably” made, giving rise to a presumption of correctness.” *Metropolitan Associates v. City of Milwaukee*, 2018 WI 4, ¶ 50, 379 Wis. 2d 141.
3. “If by any reasonable view of the evidence the *assessment* is valid, it must be upheld.” *Clear Channel Outdoor, Inc. v. City of Milwaukee*, 2017 WI App 15, ¶4, 374 Wis.2d 348,

893 N.W.2d 24 (emphasis added); citing, *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶5, 351 Wis2d 439, 839 N.W.2d 893.

4. Relative to the application of the presumption of correctness, “[t]he circuit court, as the trier of fact, is the ultimate arbiter of the weight and credibility of the evidence and of any reasonable inferences drawn from that evidence. We may not consider whether the evidence might support a contrary conclusion, or a contrary inference that is reasonable. We therefore examine the record as a whole to determine whether evidence, and reasonable inferences therefrom, support the court's conclusion.” *Bonstores*, ¶ 10.
5. An assessor's valuation stands as prima facie correct as “the *assessment* needs no support by evidence in the first instance, but must stand, unless shown to be incorrect by reasonably direct and unambiguous evidence.” *Sausen v. Town of Black Creek Bd. of Review*, 2014 WI 9, ¶ 34.
6. The taxpayer has the burden to show that the *assessment* is excessive. *Regency West Apartments LLC v. City of Racine*, 2016 WI 99, ¶ 72, ftnt. 23; citing, *Sausen v. Town of Black Creek Bd. of Review*, 2014 WI 9, ¶ 20, 352 Wis.2d 576, 843 N.W.2d 39.
7. Critique of the assessor alone does not overcome the presumption of correctness. *Bonstores*, 2013 WI App 131; *Sausen*, 2014 WI 9, ¶ 34.
8. To overcome the presumption the owner must present “significant contrary evidence” or a challenge will be rejected. *Adams Outdoor Advertising Ltd. v. City of Madison*, 2006 WI 104, ¶25, 294 Wis. 2d 441, 717 N.W.2d 803.
9. A valuation that does not correctly apply the *Wisconsin Property Assessment Manual* or Wisconsin law cannot *per se* constitute significant contrary evidence to overcome the

presumption. *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶17, 311 Wis. 2d 158, 752 N.W.2d 687.

10. The challenging taxpayer's expert appraisal must follow Wisconsin assessment law or that evidence will not, *per se*, constitute significant contrary evidence sufficient to overcome the presumption of correctness. "An opinion of value which ignores the statutory factors is not 'significant contrary evidence' necessary to overcome the presumption that the assessment is valid." *Great Lakes Quick Lube, LP v. City of Milwaukee*, 2011 WI App 7, ¶18, 331 Wis.2d 137, 794 Wis.2d 510; *Marathon Petroleum Company LP v. City of Milwaukee*, 2018 WI App 22, ¶24.

Standard of Review In A §74.37 Claim of Excessive Assessment.

11. A §74.37 action for excessive assessment is a *de novo* review by the court of the assessment. This means that "§ 74.37(3)(d) allows the court to proceed 'without regard to any determination made at an earlier proceeding.'" *Bloomer Hous. Ltd. P'ship v. City of Bloomer*, 2002 WI App 252, ¶ 11, 257 Wis. 2d 883, 653 N.W.2d 309; citing, *Nankin v. Village of Shorewood*, 2001 WI 92 at ¶ 25, 245 Wis.2d 86, 630 N.W.2d 141.
12. In a *de novo* action, the court can hear new evidence submitted by both parties. *Nankin*, ¶ 25.
13. "The question on appeal in a Wis. Stat. §74.37 action is not whether the initial assessment was incorrect, but whether it was excessive." *Metropolitan*, ¶40.

The Use of Mass Appraisal Constitutes The Use Of The Best Information Practically Available To The Assessor, As Required by Wis. Stat. §70.32(1). Thus, the 2015-2016 Best Buy Mass Appraisal Assessments Comply With §70.32(1) Stats.

14. "The Manual makes clear that mass appraisal is accepted at the initial assessment stage." *Metropolitan Associates v. City of Milwaukee*, 2018 WI 4, ¶38, 379 Wis.2d 141. A single-

property appraisal is only necessary after the initial mass appraisal has been challenged by the taxpayer. *Id.*

15. “Requiring a single property appraisal after a taxpayer challenges an assessment does not mean that the value of the property must be set in accordance with the single property appraisal. Indeed, this could not be the case when the subsequent single property appraisal is higher than the initial mass appraisal. In *Trailwood Ventures*, the court of appeals determined that Wis. Stat. §§74.37 and 74.39 do not permit the court to impose a greater tax burden than the one the taxpayer challenges.” *Metropolitan*, ¶ 39.
16. “Wisconsin Stat. §70.32(1) explicitly directs that property be assessed ‘in the manner specified in the Wisconsin property assessment manual.’ The Manual provides that ‘[c]ommercial property can be valued by either single property or mass appraisal techniques.’” *Metropolitan*, ¶ 28.
17. “[T]he assessor does not have to have perfect information[,] when setting an assessment, only ... the best information practically available.” *Marathon Petroleum Company LP v. City of Milwaukee*, 2018 WI App 22, ¶53, 381 Wis.2d 180.
18. “ ‘Mass appraisal is the systematic appraisal of groups of properties, as of a given date, using standardized procedures and statistical testing.’ 1 Wisconsin Property Assessment Manual at 7-32. The Manual provides for assessors utilizing mass appraisal in initial assessments: ‘Mass appraisal is the underlying principle that Wisconsin assessors should be using to value properties in their respective jurisdictions.’” *Metropolitan*, ¶ 29.
19. “At the initial assessment stage, the best information the City can “practicably” obtain is often that underlying a mass appraisal. Because its use is provided for by the *Manual* and it allows the City to efficiently assess a large number of properties, mass appraisal comports

with Wis. Stat. § 70.32(1). We thus reaffirm that mass appraisal is appropriately utilized as a manner of valuing property under § 70.32(1).” *Metropolitan*, ¶ 46.

20. Based upon the testimony of the City Assessor, Shannon Krause, along with the Manual provisions pertaining to mass appraisal, the Court finds that the City Assessor properly set the 2015 and 2016 assessments using mass appraisal. The mass appraisal model was based on the cost and income valuation methods that were applied uniformly in the assessments of commercial properties throughout the City. The assessor also took into consideration various sales of other large retail properties, several of which sold for prices in excess of \$100 per square foot, but in the end determined that the sales were too dissimilar in terms of size, location, occupancy, use and economics to be considered reasonably comparable to the subject property.
21. The Assessor prepared, certified and filed with the Wisconsin Department of Revenue (WDOR) an Annual Assessment Report (AAR) which identified the steps taken, procedures followed and statistical testing completed relative to the 2015-2016 mass appraisals conducted in Wauwatosa. The DOR accepted the certified Wauwatosa AAR reports without modification.
22. The Court finds that pursuant to Wis. Stats. §70.05 (5)(b) and (d) the City is not required to do a full city-wide revaluation each and every year. Best Buy’s criticisms of the assessors valuations in 2015 and 2016 essentially argues that the City must complete a city-wide mass appraisal every year in order to claim a mass appraisal has been done. Best Buy argues that maintaining a mass appraisal assessment from the prior year demonstrates that the assessment was set in violation of §70.32(1). The Court rejects this argument as inconsistent with the specific holding in *Metropolitan*, and the provisions of the Manual

as applied to the procedures followed by the City Assessor, Ms. Krause, in the 2015-16 tax years.

23. In both the 2015 and 2016 tax years, this Court finds that the City Assessor made appropriate adjustments to the mass appraisal model where needed, using the best information practicably available to the Assessor at that time, and that her work followed proper mass appraisal methods and procedures.
24. The Court finds the testimony of the assessor, Shannon Krause, credible and on the work she did in the 2015 and 2016 assessments reasonable and in compliance with Wisconsin law.
25. The Court finds Ms. Krause set the 2015 and 2016 assessments using the best information practicably available, as required by Wis. Stat. §70.32(1). See, *Metropolitan*, ¶46.
26. The 2015 and 2016 Best Buy assessments are fair and equitable and in proper relationship to other assessments in Wauwatosa, in accordance with Wis. Stat §70.49(2).
27. The assessor used mass appraisal to set the 2015-16 assessments for the subject Best Buy property. Based on the *Metropolitan* decision, the value reflected in the City's mass appraisal is the value of the Best Buy property for assessment purposes under Wis. Stats. §70.32(1).
28. The Court finds that Best Buy has not shown that the City Assessor violated §70.32(1) or the *Wisconsin Property Assessment Manual*, in the determination of Best Buy's 2015 and 2016 assessments; therefore Best Buy has not overcome the presumption afforded the assessments.

The Assessment Statute, Wis. Stat. §70.32 and the Hierarchy of Valuation Methodology

29. Property tax is governed by statute. “The power to determine the appropriate methodology for valuing property for taxation purposes lies with the legislature.” *Regency West Apartments LLC v. City of Racine*, 2016 WI 99, ¶ 23, 372 Wis. 2d 282, 888 N.W.2d 611; *citing, Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 19, 311 Wis.2d 158, 752 N.W.2d 687.

30. “The objective of an appraisal is to determine ‘the full value’ that an owner would receive at a ‘private sale.’” *Id.*, *citing*, Wis. Stat. §70.32(1).

31. Wis. Stat. §70.32(1) states in part:

Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. ...

32. “... real property must be assessed on the basis of its ‘fair market value.’ That is, the amount it will sell for upon negotiations in the open market between an owner willing but not obliged to sell and a buyer willing but not obliged to buy.” *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 661, 242 N.W.2d 681 (1976).

33. Wisconsin Stat. §70.32(1) provides the methodological framework that appraisers must follow when appraising property. It delineates a three-tier approach:

In determining the value, the assessor shall consider recent arm's-length sales of the property to be assessed if according to professionally acceptable appraisal practices those sales conform to recent arm's-length sales of reasonably comparable property; recent arm's-length sales of reasonably comparable property; and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed. *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 661, 242 N.W.2d 681 (1976);

citing, Wis. Stat. § 70.32(1); *State ex rel. Markarian v. City of Cudahy*, 45 Wis.2d 683, 686, 173 N.W.2d 627 (1970).

34. “An assessor has an obligation to follow the three tier assessment analysis. Nevertheless, this hierarchy of appraisal methods does not permit an assessor to use an appraisal method when insufficient data exists to perform an accurate valuation under that method. To the contrary, an assessor must not appraise a property using unreliable data”. *Regency West*, ¶ 26; *citing*, *Adams*, 294 Wis.2d 441, ¶ 47, 717 N.W.2d 803.
35. “If there are no ‘reasonably comparable’ properties, the comparable sales approach cannot be used.” *Regency West*, ¶ 60; *citing*, *Allright Properties*, 317 Wis.2d 228, ¶ 29, 767 N.W.2d 567.
36. “That is, an appraiser cannot accurately value a property using data from the sales of properties that are not ‘reasonably comparable’ to the subject property. Absent comparable sales, an appraiser must apply the third tier for valuing property.” *Regency West*, ¶ 60;
37. “When both tier 1 and tier 2 are unavailable, an assessor then moves to tier 3.” *Metropolitan*, ¶34.
38. “The goal of the assessor is to estimate the current market value of the bundle of rights for a particular property, considering only those rights and privileges that the owner, or beneficial owner, can transfer to a willing buyer in an arm’s-length transaction.” *Wisconsin Property Assessment Manual*, 7-9, Rev’d 12/12.

The City’s Expert, Dr. Thomas Hamilton’s Review of the MaRous and Lennhoff Appraisals

39. “The question on appeal in a Wis. Stat. §74.37 action is not whether the initial assessment was incorrect, but whether it was excessive.” *Metropolitan*, ¶40.
40. The City offered the testimony of Dr. Thomas Hamilton at trial. Dr. Hamilton testified on the proper application of generally accepted appraisal practices and reported on his findings

relative to the review appraisals he conducted on the expert reports submitted by Best Buy's experts, Michael MaRous and David Lennhoff.

41. Dr. Hamilton is an expert in generally accepted appraisal practices in Wisconsin. *Marathon Petroleum Company LP v. City of Milwaukee*, 2018 WI App 22, ¶45, 381 Wis.2d 180.
42. "An opinion of value which ignores the statutory factors is not 'significant contrary evidence' necessary to overcome the presumption that the assessment is valid." *Marathon*, ¶24.
43. 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. Dr. Hamilton has been teaching for over 30 years. He holds the designation of Member of the Appraisal Institute (MAI) and teaches advanced appraisal classes for the Institute that MAI candidates must complete.
44. Dr. Hamilton teaches the class, Advanced Market Analysis and Highest and Best Use for the Appraisal Institute. Dr. Hamilton also teaches quantitative analysis, which uses numeric analysis as a means to use market data more efficiently to accurately describe the market without resorting to subjective analysis.
45. 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 assessment case law. His thesis was on mass appraisal and he has worked for the IAAO, (International Association of Assessing Officer) taxpayers and the government.
46. Dr. Hamilton is a regular speaker and publisher of writings relating to real estate valuation. His article, *Valuing the Leased Fee Simple Estate* is part of his report and incorporated into his analysis in this case.

47. Dr. Hamilton also is a co-author of the IAAO position paper on big box retail valuation which is the official position of the IAAO and was included in his analysis.
48. Dr. Hamilton reviewed the MaRous appraisal for completeness, accuracy and reliability, within the guidelines under the Manual, Wisconsin law and appraisal practice.
49. Dr. Hamilton found that the MaRous appraisal reports for both 2015 and 2016 contain a large number of severe errors that appear from beginning to end and result in unreliable and non-credible opinions of the market value of the fee simple interest for property tax purposes in Wisconsin. Hamilton opines:

A. MaRous' tier 2 sales comparison approach is founded on "comparable" properties that are significantly different than the subject property as all of MaRous' comparables were dark and vacant. When a property is sold from a first to a second-generation user, the Highest and Best Use changes. Highest and Best Use is based on the use, timing and market participants for the property. A change in market participants is a change in market draw and economics, and therefore a different Highest and Best Use. A vacant property also has different timing and thus a different Highest and Best Use than an occupied property.

B. The income and cost approaches are equally troublesome in that the income approach does not contain direct, market metrics for rental income, vacancy, or capitalization rates to value an occupied property.

C. MaRous' cost approach incorrectly creates a "shell value" for the subject property (no interior build) and fully discounts the market value of the attached parking structure and office mezzanine, without market evidence to support the discount.

D. Every MaRous comparable sale or rental property is a "former" something, indicating that these properties are no longer first generation uses. When a property changes from a first generation use to a second generation use, the property's highest and best use changes. 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. The *Bonstores* decision and the Manual also refer to the need for an apples to apples comparison, which is the same concept as in the IAAO paper. None of the MaRous

comparable data properties have the same first generation highest and best use as the subject.

E. Wis. Stat. §70.32(1) requires an appraiser to use the “best information” that the assessor can practicably obtain” (which would be fully comparable properties) The best information for an occupied property would be data from occupied properties (either tenant or owner occupied) that have a similar highest and best use as the subject property - not data from vacant properties that have a different highest and best use.

F. Each of the three individual conclusions of value, the sales, income and cost approaches in the MaRous report has significant data problems or unexplained analysis that results in unreliable opinions of value for each approach to value, several of which have been shown to be untested by market data.

G. Dr. Hamilton concludes, the overall value conclusions for each date of value in the two MaRous appraisal assignments are not credible and are unreliable indicators of market value.

50. The Court finds Dr. Hamilton’s opinions above to be credible and accepts and adopts these opinions.

51. Dr. Hamilton further testified as to the misapplication of the appraisal term *fee simple* in the MaRous appraisal.

52. The Court finds Dr. Hamilton’s testimony regarding the application of the term *fee simple* to be consistent with Wisconsin law and credible and MaRous’ application in his appraisal and conclusions to be inconsistent and contrary to the holding in the *Walgreen* decision. *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 10, *fn*t. 5, 311 Wis.2d 158.

53. MaRous testified that he 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.

54. MaRous equates the term *fee simple* with a property that is not occupied and term *leased fee* with a property that is not occupied. Thus, MaRous opines that in order to determine a

fee simple value of a property, the property must be valued as if vacant and available, rather than as occupied. This is inconsistent with the *Walgreen* holding. The MaRous appraisal therefore is inconsistent with Wisconsin law.

55. The Court finds that *fee simple* does not mean a valuation as if “dark and vacant” but rather means valued as if a property is occupied on a market basis.

Dr. Hamilton’s Review of the Lennhoff Report

56. Dr. Hamilton further did a review appraisal of David Lennhoff’s report, which was an appraisal review of the Miller appraisal.

57. Dr. Hamilton opines that Lennhoff incorrectly applies the the term “fee simple” in Wisconsin. Lennhoff opines that fee simple means vacant and available. Hamilton explains that Lennhoff’s opinion is inconsistent with the Wisconsin Supreme Court case of *Walgreen v. City of Madison* as well as generally accepted appraisal practices.

58. Dr. Hamilton testified that a property does not need to be assumed to be vacant in order to obtain the fee simple market value of the property being appraised. Lennhoff’s outdated rationale for a property needing to be vacant is based on Lennhoff’s misunderstanding that a possessory-interest arising from a lease does not encumber the ownership of the fee simple interest. Dr. Hamilton explained that his opinion in this regard is consistent with the Manual, the *Walgreen* decision and the IAAO big box paper admitted at trial.

59. Hamilton disagrees with Lennhoff’s criticism of Miller for not completing a sales comparison approach. Hamilton explains that Miller properly did not do a sales comparison approach because there was a lack of reliable market data upon which to base a credible analysis.

60. Dr. Hamilton further is critical of Lennhoff's explanation of highest and best use. According to Hamilton, Lennhoff confuses the concept of the highest and best *use* with a highest best *user*. At no time does Miller discuss the highest and best user, such as Best Buy. Lennhoff's critique of Miller for valuing the user of the property, rather than valuing the use of the property, is therefore incorrect.
61. Lennhoff is critical of Miller's conclusion to \$45 per square foot for the land value, stating that Miller fails to explain how he reached his conclusion. Dr. Hamilton rejects Lennhoff's criticism and points out that Miller explains precisely how he reached the \$45 per sq. ft. conclusion in his report at page 142.
62. Lennhoff is critical of Miller adding 7.5% for soft cost to his cost approach value. Hamilton explains that Miller fully explains his reasoning and purpose for including the 7.5% of soft cost and that it is unquestionably appropriate to include soft costs and hard costs in a cost valuation. Hamilton further explains that Miller also trended the 2006 actual construction costs forward to 2015 and comes within 2.4% of Miller's estimated replacement cost new, including the soft costs. This proves the appropriateness of adding in the 7.5% of soft costs as no property is built without incurring soft costs.
63. Hamilton testified that Lennhoff is wrong in his criticism of Miller's use of Marshall & Swift depreciation tables to calculate physical depreciation in the cost approach. Dr. Hamilton testified that the *Uniform Appraisal Standards for Federal Land Acquisitions*, (as noted in the Lennhoff review) is not an authoritative source for valuing real estate for property tax purposes in Wisconsin. Hamilton further opined that the curvilinear depreciation tables in M&S reflect market reality as buildings do not depreciate on a

straight line basis as physical depreciation is less in the earlier years of a building and much more rapid towards the end of the useful life.

64. Lennhoff is critical of the Miller appraisal because he believes Miller's finding of no functional or economic obsolescence is based only on the Miller's personal judgment. Hamilton disagrees with Lennhoff and explains that the Miller appraisal report, at pages 147-148 fully explains why Miller found no functional or economic obsolescence with an appropriate analysis.

65. Hamilton concludes on Miller's cost approach that his cost approach was fully developed and within generally accepted appraisal principles and within the guidelines established by the Manual and Wisconsin law.

66. Lennhoff is critical of Miller for putting full weight on his cost approach. Hamilton explains however, that given the inability to complete a sales comparison approach, reliance on the cost approach was not only appropriate it is highly consistent with the Markarian Hierarchy and the Manual, for an owner occupied property.

67. Hamilton testified that Lennhoff has an inadequate understanding of the appraisal practices in Wisconsin. The Lennhoff appraisal review inaccurately concludes to the quality and reliability of the Miller appraisal report.

68. The Court finds that the Lennhoff appraisal review fails to accurately and reliably conclude to the reliability and accuracy of the Miller report.

69. This Court accepts the opinion of Dr. Hamilton and finds them to be credible. The Court further rejects the opinions, testimony and report by Mr. Lennhoff and finds him not to be credible or his opinions something the Court can rely upon.

Highest and Best Use

70. In *Nestlé*, the Court stated, “to assess the property, [the expert] had to complete two preliminary steps: (1) determine the ‘highest and best use’ of the facility and (2) select and apply the appropriate assessment method to be used in determining its value.” *Nestlé USA, Inc. v. Wisconsin Dept. of Revenue*, 2011 WI 4, ¶ 11, 331 Wis.2d 256, 795 N.W.2d 46.
71. All property must be assessed at its “highest and best use.” *Nestlé*, ¶ 27
72. This is a threshold issue because the properties an assessor identifies as “reasonably comparable” to the subject property for assessment purposes must be reasonably comparable to the subject property's highest and best use.” *Nestlé*, ¶32.
73. The highest and best use must be: 1) legal, 2) complementary, 3) not highly speculative, and 4) marketable for that use. *Nestlé*, ¶ 33.
74. Highest and best use is defined in the *Manual* and in *Nestlé* as “that use which over a period of time produces the greatest net return to the property owner.” *Nestlé*, ¶ 34, 38. WPAM, 7-9.
75. The highest and best use is the narrowest use for which there is a market for the property. *Nestlé*, ¶57.
76. Mr. Miller opines that the highest and best use of the subject Best Buy property is its continued current use as a big box electronics store. The Court finds Mr. Miller’s highest and best use determination to be credible and supported. Mr. Miller’s highest and best use determination identifies a single, narrow, marketable use that will achieve the greatest net return for an owner.
77. Miller’s highest and best use determination is not speculative; rather it is based upon an extensive market analysis he completed prior to concluding to a highest and best use conclusion.

78. Mr. MaRous opines that the highest and best use is as any number of potential uses for which the next buyer of the property might use the property, completely ignoring the current use in place on the valuation dates. The Court finds Mr. MaRous' opinion on the highest and best use to be inconsistent with Wisconsin law and therefore not credible.
79. Mr. MaRous opines that the highest and best use cannot be the continued use by Best Buy. Mr. MaRous' opinion is speculative as it is dependent upon something that may or may not occur at some unknown time in the future. Mr. MaRous also does not conclude to a single highest and best use as is required by Wisconsin law, but rather relies upon multiple alternative uses.
80. Best Buy has not demonstrated that there is no market for an operating junior box retail store in the Wauwatosa area. Thus the subject Best Buy property is marketable in its current use.
81. The Court further rejects Mr. MaRous' opinion that the highest and best use of the Best Buy property on the valuation dates, is an alternative use other than its current use as a junior box electronics retail store.

Kendall Lees Testimony As An Expert Has Already Been Rejected By The Court

82. The Court found at trial that Mr. Lees is not an expert and that his testimony will not be considered expert testimony.
83. The Court permitted Mr. Lees' testimony only to the extent that the Court ultimately finds that it is relevant.
84. The Court did not admit into evidence any of the articles that Mr. Lees referenced at trial as Exhibit 37.

85. Mr. Lees testified that based upon his experience as a property tax manager for Kohl's Department Stores, that retail properties are losing value. Mr. Lees did not testify to any specifics pertaining to the subject Best Buy store. He did not conduct an appraisal of the property or a market study of the Wauwatosa retail market. He was unable to testify about any of the particular economic attributes of the subject property or the Wauwatosa retail market.

86. Mr. Lees was so unfamiliar with the Mayfair Mall area that he did not know that Mayfair Mall is a Class A Mall and further was unaware that Mayfair Mall has significantly higher retail sales per square foot than Brookfield Square. This further demonstrates that Mr. Lees' was not able to apply his global testimony to the specifics of this case.

87. Mr. Lees admits that some retail properties are doing better than others, but he could not speak to how Best Buy was doing in the Wauwatosa market. Lees' testimony was broad and global, rather than specific to the case at bar.

88. The Court finds that Mr. Lees' testimony is not relevant to the valuation of the subject property.

Tier-2 Sales Comparison Approach; Reasonably Comparable Properties; Dark Store Sales Are Not "Reasonably Comparable Properties"

89. MaRous relies upon a tier 2 sales comparison approach to reach his ultimate conclusion of value of \$5,750,000 for 2015 and 2016 for the subject property.

90. MaRous places primary emphasis on his tier 2 sales conclusion based on his reliance on sale prices which he believes to be reasonably comparable to the subject.

91. Only properties that share a similar highest and best use can be "reasonably comparable properties" for valuation purposes in a tier 2 sales comparison approach. *Nestlé*, ¶32.

92. Dark stores cannot be used as reasonably comparable properties for the purpose of determining the value of a property that is not dark. *Bonstores*, ¶¶ 21, 22, 34 and 35.
93. Stores that have gone dark means the store has gone vacant, the vendor or retailer has either gone out of business or moved and there is nobody in the store. *Id.*
94. Dark store sales are not an “apples-to apples” comparison to an operating store and therefore cannot be considered as “reasonably comparable” properties to an occupied and operating store located in a desirable location. *Id.*
95. “The [Wisconsin Property Assessment Manual] defines ‘reasonably comparable’ properties as those properties that represent the ‘subject property in age, condition, use, type of construction, location, design, physical features and economic characteristics.’” *Regency West Apartments LLC v. City of Racine*, 2016 WI 99, ¶ 28; citing, 1 Wisconsin Property Assessment Manual at 7-22.
96. In addition, to be reasonably comparable, the property must enjoy similar business advantages as the subject property. See, *Regency West*, ¶ 90; citing *Rosen v. City of Milwaukee*, 72 Wis.2d 653, 665, 242 N.W.2d 681 (1976)
97. The Manual provides: “The assessor should avoid using sales of improved properties that are vacant (“dark”) or distressed as comparable sales unless the subject property is similarly dark or distressed. A vacant store is considered dark when it is vacant beyond the normal time period for that commercial real estate marketplace and can vary from one municipality to another.” *Manual*, 9-12.
98. The Manual further states: “Regardless of the approach used, the assessor should be careful to avoid using comparable sales involving properties that are vacant, in transition or suffering from some form of distress unless the subject property is similarly vacant, in

transition, or distressed. Rather, when valuing stabilized, operating retail properties, the assessor should choose comparable sales exhibiting a similar highest and best use and similar placement in the retail marketplace.” *Manual*, 9-43. (Exhibit 386)

99. The *Manual* also provides: “The sales comparison approach is often used to value smaller retail stores assuming no recent arm’s length sale data from the subject. For larger retail venues and those smaller stores for which there are no comparable sales, the assessor should use the income and/or cost approach.” *Manual*, 9-43 (Exhibit 386)

100. MaRous’ sales comparison approach is rejected by this Court as he did not follow the valuation hierarchy required by Wis. Stat. §70.32(1), as he did a tier-2 sale comparison approach without using reasonably comparable properties that share a similar highest and best use as the subject property. The effect is MaRous has dramatically understated the market value of the Best Buy property as he relies primarily upon his conclusion under the sales comparison approach for his ultimate conclusion of value in the amount of \$5,750,000.

101. For 2015, Mr. MaRous used 4 sales and 2 listing prices. Of the 4 sales, all were dark and vacant properties, 2 are located in Illinois both of which have been dark for longer than 5 years. Regarding the 2 Wisconsin sales, one is a former Lowe’s in Brown Deer converted to a Wal-Mart and the other is a former grocery store in Milwaukee. The Court finds that none of these properties share a similar highest and best use as the subject and none are reasonable comparable to the subject property to reach an accurate valuation.

102. For 2016, Mr. MaRous used 6 sales, all of which were dark and vacant at the time of sale. In addition to the four sales that he used in 2015, in 2016 MaRous also used a 2016 sale of the former Fun World in Brookfield and the former Pick-N-Save at Northridge Mall

that was closed and converted to a U-Haul storage facility. The Court finds that neither of these two additional properties share the same highest and best use as the subject or enjoy the same excellent location factors as the subject and thus are not reasonably comparable to the subject.

103. The Court finds that Mr. MaRous' selected comparable sales are not "reasonably comparable properties" to the subject property. They do not share the same economic characteristics or locational attributes of the subject property and therefore are not reasonably comparable.

104. The properties used by Mr. MaRous in his sales comparison approach are not similar in age, condition, use, type of construction, location, design, physical features and economic characteristics. As such, the Court finds that they are not reasonably comparable to the subject Best Buy.

105. All of the properties used by MaRous had businesses that had closed prior to the date of sale and thus were "dark" property sales. Per the *Bonstores* decision and the *Manual*, dark store sales are not reasonably comparable sales unless the subject property is also dark, in transition or otherwise distressed. The Best Buy property was not dark on the valuation dates and there was no evidence submitted that the store may go dark in the foreseeable future.

106. Both Miller and Dr. Hamilton were critical of the sales used by MaRous in his sales comparison approach. Each provided detailed explanations why each sale used by MaRous was not reasonably comparable to the subject. Dr. Hamilton testified that in addition to selecting sales not comparable to the subject, the adjustments to the MaRous sales in his

sales grid were not substantiated with any market evidence or explanations as to the basis for the adjustments MaRous made.

107. Dr. Hamilton explained: “In the 2015 MaRous report, four of the six comparable properties listed have overall positive adjustments ranging from +49% to +82.5%. In the 2016 MaRous report, four of the six comparable properties listed have overall positive adjustments ranging from +37% to +72.5%. More than half of the comparables needed extremely large, positive adjustments to make them “similar” to the subject property. In the case of the 2015 report, none of the properties were “better” than the subject property. What this indicates, given the large size of the adjustments, is that the “comparables” needing such large adjustments are not very comparable to the subject property.”

108. The City’s expert, Mr. Miller, did not value the subject Best Buy property using a tier-2 sales comparison approach because after a diligent search, Miller was unable to find sales of reasonably comparable properties as defined under Wisconsin law. Instead, Miller properly followed the statutory hierarchy and employed tier-3 valuation methods, including the cost approach and the income approach.

109. Mr. Miller’s opinion that a tier-2 sales comparison approach to value is not appropriate to value the subject Best Buy property is consistent with Wisconsin law and is credible.

110. The Court finds, based upon the above cited law and the testimony of Mr. Miller and Dr. Hamilton, that there are no recent reasonably comparable sales to the subject property.

111. The Court finds that Best Buy’s expert, Mr. MaRous, improperly relied upon a tier-2 sales comparison approach to value the subject Best Buy property.

112. Therefore, the sales comparison approach is not a proper method of valuation of the subject Best Buy property given that the Court finds that there have been no recent sales of reasonably comparable properties.

113. As Mr. MaRous' sales comparison approach relies upon the use of dark properties, the Court finds Mr. MaRous' opinion and appraisal not consistent with Wisconsin law and therefore, not credible.

114. This Court therefore, rejects each of Mr. MaRous' sales in his sales comparison approach as they are not reasonably comparable properties to the subject Best Buy property based on the criteria for comparability as established under Wisconsin law.

115. Because Best Buy's expert's appraisal report does not follow Wisconsin law, his appraisal cannot, *per se*, constitute significant contrary evidence sufficient to overcome the presumption of correctness afforded the assessments.

Tier-3 Income and Cost Approaches to Value

116. “[I]f there has been no arms-length sale and there are no reasonably comparable sales [] an assessor [may] use any of the third-tier assessment methodologies.” *Adams*, 294 Wis.2d 441, ¶ 34, 717 N.W.2d 803; *Regency West*, ¶ 29.

117. “When both tier 1 and tier 2 are unavailable, an assessor then moves to tier 3.” *Metropolitan*, ¶34.

118. Mr. MaRous and Mr. Miller each performed tier 3 cost and income approaches to value.

119. “Under tier 3, an assessor ‘May consider ‘all the factors collectively which have a bearing on value of the property in order to determine its fair market value.’ ’ These factors include ‘cost, depreciation, replacement value, income, industrial conditions, location and

occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus and appraisals produced by the owner.” *Metropolitan*, ¶34, *Adams*, ¶35.

120. “Both the income approach, which seeks to capture the amount of income the property will generate over its useful life, and the cost approach, which seeks to measure the cost to replace the property, fit under the umbrella of tier 3 analysis. *Metropolitan*, ¶34.

Income Approach

121. The income approach looks at the income producing potential of a property along with the expenses associated with that potential. *Manual*, 7-23 (Revised 12/12).
122. These benefits are typically looked at in terms of potential rents and other income a property may produce reduced by the corresponding expenses. *Manual*, 7-23 (Revised 12/12).
123. The subject Best Buy is owner occupied, not a leased property. Actual income producing information for an owner occupied property is not available. An appraiser therefore looks to the market to determine the market rental rate for such a property assuming the property is leased at market rates and the corresponding market expenses. *Manual*, 7-23 (Revised 12/12).

Miller’s Market Data Analysis and Determination of Market Rents is Credible

124. Miller completed an income approach and concluded to a value of \$13,400,000 for 2015 and \$13,800,000 for 2016.
125. Mr. Miller used market data from operating leased retail stores in locations with similar economies to the subject Best Buy to determine market rent and market expenses in his income approach to value.

126. The Court finds that Mr. Miller's income approach properly used actual market rental information from other comparable operating retail stores in the surrounding area. Mr. Miller considered recent rents for stores at Mayfair Collection in Wauwatosa, such as Dick's Sporting Goods, Nordstrom Rack and other recent leasing at Mayfair Collection. The rents at Mayfair Collection are upwards of \$16 per sq. ft. Miller further considered the rent at the Container Store (located across the street in the Mayfair Mall parking area) \$25 sq. ft. triple net as a reliable indicator.

127. Mr. Miller concludes that the market rent is \$20 per square foot for the subject, after adjusting for differences between shell, white box and turnkey finishes that are built into the rental rates. Miller testified the amount of rent paid, will depend on whether the tenant or landlord pays for the cost of the interior buildout. If the landlord pays for interior finish, the rent will be higher because the landlord will seek to recoup the costs through a higher rent. Conversely, the rent is lower if the tenant pays for those costs.

128. The Best Buy property should be valued as fully built out because that is the condition of the property on the valuation dates. A fully built out rent is referred to as a turn-key rent.

129. The Court finds Mr. Miller conclusion of market rent for the subject Best Buy property at \$20 per sq. ft. to be reasonable and credible.

130. Mr. Miller's determination of market rents and expenses is credible and consistent with Wisconsin law.

MaRous' Determination of Market Rents is Not Credible

131. MaRous also completed an income approach and concludes to a value of \$5,750,000 – the same value as in his sales comparison approach.

132. Mr. MaRous' income and expense data is derived from properties that are dark, vacant and in locations which are not similar to the economics of the Wauwatosa retail marketplace. He uses asking rents, not actual rents for vacant stores that have no occupant and are not operating. For example, one of his rental comparables is drawn from a vacant shopping center across from the former Northridge Mall in Milwaukee. Two other rent comparables are taken from vacant space in Janesville and Whitewater. This does not reflect the value of an operating junior box store located in a vibrant retail market.

133. MaRous failed to use rental information in his tier-3 income approach that reflects the occupancy, use and location of the subject Best Buy property. His data instead is taken from asking rents of dark stores in violation of the *Bonstores* holding, that dark stores cannot be used for the purpose of determining the value of a store that is not dark. *Bonstores*, ¶ 22. The effect is MaRous has substantially understated the potential rental income the subject property could generate if rented on the open market based on its current use, location and as an occupied property.

134. Mr. MaRous determine market rent to be \$12 a sq. ft. triple net. MaRous makes no adjustments to his rent comparables so as to make an apples to apples comparison of the asking rents for shell retail space with no interior buildout costs factored into the asking rent as compared to the subject property which has a fully finished interior. Any comparable rents must be adjusted to represent a turnkey rent because that is the condition of the subject property as of the assessment valuation dates of January 1, 2015 and 2016.

135. The Court finds that the use of only asking rents does not reflect market data for use in an income approach of an occupied property. Using only asking rents of vacant space is inconsistent with Wisconsin law. As such, the Court rejects Mr. MaRous' income

approach as flawed and significantly understates the income earning potential of the subject property.

136. The Court rejects Mr. MaRous' opinion that there is a limited number of users for retail buildings the size of the Best Buy as well as his opinion that Best Buy cannot be a hypothetical user of the space.

137. According to Dr. Hamilton's testimony, which this Court found credible, and generally accepted appraisal practices, an appraiser must consider the current user of the property as a potential occupant of the store. Failure to consider the current occupant as a potential user of the space distorts reality and forces the speculation that the property needs to be converted to an alternative use, at great expense to the owner.

138. Specifically, the Court finds that Mr. MaRous' reasoning as follows to be misplaced as it fails to consider Best Buy as a hypothetical user of the property and only looks to alternative uses of the subject property following redevelopment. MaRous states in his report:

“As evidenced by the rental properties included in our analysis, as well as by other alternative big box uses, several of the vacated big box facilities have been leased as a flea market, a health club, a craft store, supermarkets, and secondary commercial uses, and others remain vacant.” (MaRous Appraisal Report, pp.30-31).

139. The Court rejects Mr. MaRous' opinion that secondary uses must be taken into consideration when valuing the subject property. Mr. MaRous' analysis essentially values the property as if dark and vacant, which this Court has rejected as inconsistent with Wisconsin law.

140. Mr. MaRous further takes a large deduction in his income approach for estimated expenses in order to convert the property into an alternative use. Again, this is inconsistent

with Wisconsin law, as an operating and stable retail property must not be valued as if it is dark and vacant and needing to be converted at substantial cost to a speculative secondary use.

Capitalization Rates in the Income Approach

141. The capitalization rate is another component which must be determined by the appraiser when valuing a property via the income approach.

142. “The capitalization rate is calculated by dividing the first year NOI [net operating income] by the initial amount invested. *Wisconsin Property Assessment Manual*, 9-26, Rev’d 12/12.

143. “There are several ways to determine cap rates. The most common ways are to calculate them from arm’s-length sales of similar properties ...” *Wisconsin Property Assessment Manual*, 9-26, Rev’d 12/12.

144. Another way to determine capitalization rates is to consider capitalization rates from published investor surveys, such as the *PWC Real Estate Investor Survey* quarterly publication.

Miller’s Cap Rate

145. Mr. Miller’s selection of the capitalization rate, which he applied to the net operating income, is well supported by appropriate market data and is reasonable and takes into consideration the relevant market circumstances of the subject property.

146. Mr. Miller opined to a capitalization rate of 7.0%, (2015) and 6.8% (2016) which this Court finds credible.

147. Mr. Miller testified, and the Court agrees, that the subject Wauwatosa location is considered a 100% location within the Milwaukee market. The investment size is also at

a price point that will allow wide market interest. Weighing these factors, Mr. Miller selected an overall capitalization rate that approximates the national averages for institutional quality investments of retail properties.

148. Mr. Miller's use of a 7% and 6.8% capitalization rate, for the 2015 and 2016 tax years respectively, is credible and supported by market data consistent with the location and other favorable attributes of the subject property and how the property would be perceived by the investing market.

MaRous' Capitalization Rate

149. Mr. MaRous opined to a capitalization rate of 8.0%, which this Court finds not credible.

150. The Court finds that Mr. MaRous' use of a capitalization rate at 8% is not supported by credible market information consistent with the attributes of the Best Buy property and location.

151. The capitalization rate is based upon the risk associated with the property, which is directly tied to the location of the property. Given this property's location directly across from Mayfair Mall with direct access to Mayfair Mall and to Mayfair Road, the property enjoys a favorable risk factor and as such, Mr. MaRous' capitalization rate is overstated and not reflective of the market for the Best Buy property.

Income Approach Conclusions

152. Mr. Miller's income approach conclusion is credible, reasonable, well supported and prepared consistent with the principles of Wisconsin assessment law and the Wisconsin Property Assessment Manual.

153. Mr. MaRous' income approach to value is not consistent with Wisconsin law and is not credible.

The Cost Approach

154. "The cost approach method determines the value of improvements by estimating the reproduction or replacement cost of the structure. Then, deductions for depreciation, functional obsolescence, and tax-exempt components are subtracted to reach a final value." *Nestle USA, Inc. v. Wisconsin Dept. of Revenue*, 2011 WI 4, ¶50, 331 Wis.2d 256.

155. The *Bischoff* rule supports the use of the cost approach and states that an assessment should not be made by income alone. *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶72, 311 Wis.2d 158.

156. Functional obsolescence is defined as "the loss in value, due to a lack of or excessive utility." *Nestle*, ¶ 54.

157. Economic or external obsolescence is "the impairment of desirability or useful life from factors external to the property such as economic forces in the market." *Nestle*, ¶22.

Miller's Cost Approach is Credible

158. Mr. Miller prepared a cost approach using *Marshall & Swift*, a cost estimation service for both 2015 and 2016. Mr. Miller and Dr. Hamilton both testified that *Marshall & Swift* is an accepted and often used resource in the industry. Miller's cost approach was done in compliance with the *Manual*.

159. Mr. Miller's cost approach valuation for the land, building, parking deck and site improvements is \$13,300,000 for 2015 and \$13,200,000 for 2016.

160. Mr. Miller's methodology is the same for 2015 and 2016 in the cost approach. The estimated cost to construct the property is divided into three separate spaces (1) the 39,301

sq. ft. first floor retail space, (2) the 8,600 sq. ft. second floor mezzanine office space and public restrooms; and (3) the 28,000 sq. ft. parking garage space. Mr. Miller determined the replacement cost new for each of these three spaces separately and added them together to determine his replacement costs.

161. For 2015, Mr. Miller determines a replacement cost new for the three building components of \$5,879,257 for 2015 and for 2016, \$5,908,653. This means that, if on January 1, 2015, Best Buy were to build a replacement building and parking deck from scratch, the hard costs to build those improvements, would be approximately \$5.9 million.

162. Next, Mr. Miller adds in for soft costs incurred when constructing buildings. These costs are not included in the *Marshall & Swift* estimates and therefore need to be added in separately. Examples of a soft costs include costs for landfill and compacting, berms, onsite infrastructure improvements, entitlement costs, site financing and developers overhead. Mr. Miller estimates these costs at 7.5% of the building's total replacement cost. Thus for 2015 soft costs were \$440,944 and for 2016 \$443,149.

163. Next, Mr. Miller determined the cost of site improvements, which includes paving the parking lot, curbs, sidewalks and exterior lighting, to be \$425,417 for 2015 and \$427,544 for 2016.

164. The overall costs new, before depreciation, add up to \$6,745,618 for 2015 and \$6,779,346 for 2016.

165. As a check against his estimated cost calculations via *Marshall & Swift*, Mr. Miller conducted a trending analysis of the actual construction costs from 2006 trended forward to 2016. This exercise involves trending the actual costs of construction from 2006 to estimate what those same costs would be based on labor and material costs in 2016. The

Marshall Valuation System provides the trend factors which are applied to the actual construction costs figures from 2006, when the Best Buy building was originally built. (Only building costs are trended under this system.)

166. The trended costs of \$6,491,285 are substantially the same as the estimated costs via the *Marshall Valuation System* of \$6,745,618 for 2015 and \$6,779,346 for 2016. Therefore Mr. Miller reconciled to and used the Marshall replacement cost new estimates.

167. The Court finds that Mr. Miller's determination of replacement cost new are reliable and credible as the figures have been verified through the actual cost trending test.

Miller's Determination of depreciation, functional and economic obsolescence under the cost approach is credible

168. Next Mr. Miller determined deductions for physical depreciation, functional obsolescence and economic obsolescence. For 2015, Mr. Miller deducts 11% for physical depreciation due to the age of the building, to arrive at a depreciated cost value of \$6,003,600. For 2016, Mr. Miller deducts 13% for physical depreciation to arrive at a depreciated cost value of \$5,898,301.

169. Mr. Miller calculated physical depreciation using the depreciation tables for commercial properties of the *Marshall Valuation System*. The Court finds this method of depreciation to be credible, based upon the testimony of Mr. Miller and Dr. Hamilton that this is a common and often used reliable resource in the appraisal industry. Dr. Hamilton testified that the *Marshall Valuation System* uses a curvilinear method of physical depreciation which tracks with market reality, rather than linear straight line depreciation. The Marshall tables are graduated to account for the fact that a building depreciates more slowly in the early years and more quickly as the building gets closer to the end of its economic life.

170. In his physical depreciation calculations, Mr. Miller was conservative in selecting a 35 year life for the structures, as opposed to the *Marshall* recommended life of 45 years..
171. Mr. Miller finds no functional obsolescence as there is no evidence that the property is not fully functional for continuation as a junior retail box store.
172. As Dr. Hamilton and Miller testified, functional obsolescence occurs when there are defects in design or when current standards have changed over time rendering some aspect of the structure, material or design obsolete.
173. The Court agrees with Miller's determination of no functional obsolescence. Miller explained at trial and in his report that the Best Buy building is slightly different in design and placement on its lot than a standard junior box store, but he further explains that this was done on purpose in an effort to fit in with the Mayfair Mall complex located just across the street. The Court finds that the Best Buy building is not functionally obsolete due to its placement on the lot, but rather is enhanced by increased visibility.
174. The Court further accepts Mr. Miller's conclusion that no functional obsolescence exists with the parking structure. Mr. Miller opines that the additional parking structure was purposefully built by Best Buy in order to insure that its customers will always find a place to park, in light of the high traffic volume during the holiday season around Mayfair Mall.
175. As the testimony at trial revealed, Best Buy earns 50% of its revenue during the 4th quarter. Best Buy admits that it needs the parking structure during the holiday season to account for the increased customer needs. As such, there is no indication that the parking garage has any functional obsolescence for either Best Buy or any other retailer during the busy season.

176. Further, Mr. Miller opines, and the Court agrees, that the mezzanine space in the retail store is well used as office space. Best Buy uses this store as its regional office and for employee training space. This need is shared amongst other retailers and therefore does not lend itself toward any functional obsolescence. The Walgreen property just one block away on North Avenue uses the same set up with a regional office on the second floor.

177. Mr. Miller also did not find any economic obsolescence with the property. The Court finds this opinion to be credible and based on the market evidence. There is no evidence that the Wauwatosa market is not suitable for successful retail stores. The favorable retail market in Wauwatosa has been demonstrated by the significant new retail developments that have taken place in recent years, including the construction of several new retail stores. The subject property is occupied and the evidence at trial showed there is a balance between supply and demand in the immediate marketplace.

178. The Court therefore finds that Mr. Miller's opinions regarding physical depreciation, functional and economic obsolescence to be consistent with the facts, Wisconsin law and the *Wisconsin Property Assessment Manual* and is reliable and credible.

Miller's Land Valuation in the Cost Approach is Credible

179. Miller's next step involved adding the value of the Best Buy land to the depreciated replacement costs.

180. Miller adds a land value of \$7,294,500 to the depreciated cost to arrive at a final value via the cost approach of \$13,300,000 for 2015 and \$13,200,000 for 2016.

181. Mr. Miller determined land value based upon 11 sales of land, 3 of which were on Mayfair Road, 7 were on Burleigh Street (just down Mayfair Rd from the subject) and 1 on the corner of North Avenue and Mayfair Road (just a block away from the subject).

182. Miller found the Best Buy land location to be superior to these other land sales. Miller considers the subject location to be a 100% location because of its proximity to Mayfair Mall. In particular, Miller points to the signalized intersection with designated turn lanes leading into Best Buy from Mayfair Mall.

183. Miller also looked at the purchase of the subject property by Best Buy back in 2005. The subject land was purchased in 2005 for \$6.8 million, which is \$45 per sq. ft. after adding in for demolition costs to the site. This land sale price is consistent with land sales in the recent Wauwatosa market which has shown that the retail market has rebounded past the high water levels of 2006. Since 2006, Mayfair Mall has expanded and Mayfair Collection was built.

184. Mr. Miller's use of retail land sales located in Wauwatosa to determine the value of the subject Best Buy underlying land is consistent with Wisconsin law and is credible.

185. The Court finds that Mr. Miller's determination of land cost is reasonable, based upon local market data that reflects the upswing in the Wauwatosa market and therefore is reliable and credible.

186. The Court finds that Mr. Miller's cost approach to value is supported by the local market data and is therefore credible and demonstrates that the assessment is not excessive.

MaRous Cost Approach is Not Credible

187. Mr. MaRous determined the value of the property to be \$7,200,000 via the cost approach. However, this conclusion is ignored in the MaRous reconciliation since MaRous relied solely upon his sales comparison approach conclusion of \$5,750,000. MaRous' cost approach conclusion is 25% greater than his final opinion of value.

188. Like Miller, Mr. MaRous asserts he uses replacement costs based upon the *Marshall & Swift Valuation Service*.

189. Mr. MaRous' replacement costs new for 2015, including hard costs and site improvement costs is \$4,364,820 (approximately \$2.3 million less than Mr. Miller's determination of replacement costs new for 2015).

190. Mr. MaRous' replacement costs new for 2016, including hard costs and site improvement costs is \$4,388,274 (approximately \$2.3 million less than Mr. Miller's determination of replacement costs new for 2016).

191. The reasons for the discrepancy between Miller and MaRous' calculations for replacement costs new, before accounting for the deductions for depreciation, include: (1) MaRous puts zero value on the parking structure (2) MaRous does not add for soft costs; and (3) has a lower base cost for the building by some 20% which MaRous was unable to explain.

192. The Court finds that Mr. MaRous' failure to account for the value of the parking structure and soft costs, as well as his understating of the base costs for the building itself, is incorrect. Mr. MaRous' appraisal under the cost approach therefore is not reliable or credible.

MaRous' Determination of depreciation, functional and economic obsolescence under the cost approach is not credible.

193. In addition, the Court notes that after determining replacement cost new for the Best Buy improvements, Mr. MaRous then claims deductions for physical depreciation, and functional and economic obsolescence.

194. For 2015 Mr. MaRous takes 17% physical depreciation, 15% functional obsolescence and 5% economic obsolescence, that reduces his cost figures by 37%.

195. For 2016, Mr. MaRous takes 19% physical depreciation, 15% functional obsolescence and 5% economic obsolescence, that reduces his cost figures by 39%.
196. Mr. MaRous determines physical depreciation using a straight line method in contrast to Miller's use of the *Marshall Depreciation Tables* which use a graduated market based method.
197. Mr. MaRous attributes functional obsolescence to the offices in the mezzanine level and due to an alleged difficulty in truck loading and unloading and the building's front entry not facing the primary street frontage, but instead at a 90 degree angle.
198. The Court rejects Mr. MaRous' findings of functional obsolescence as it is not based on market data and has further failed to demonstrate how these attributes of the property would reduce its value, rather than increase the value as opined by Mr. Miller.
199. The Court further notes that Mr. MaRous does not include any value for the parking structure. Mr. MaRous acknowledges that the parking structure would cost \$1 million to construct, but ignores this fact as he opines without market support that no market participant would attribute any value to the parking structure.
200. The Court rejects Mr. MaRous' opinion that the parking structure has no or negative market value. Best Buy built the parking deck at that location for solid economic reasons given its proximity across from Mayfair Mall. The testimony at trial demonstrated that Best Buy needs the parking structure during the holiday season to meet its customers' parking needs. To assert that the parking structure has no value - or even negative market value - strains the credibility of Mr. MaRous.
201. Mr. MaRous attributes the 5% economic obsolescence to the fact that Best Buy is located on the West side of Mayfair Road. He opines that retail uses along the west side

of Mayfair Road are more scattered and have less identification than those on the east side of the street.

202. The Court rejects MaRous' finding of economic obsolescence as Mr. MaRous has failed to take into consideration the signalized intersection at its entrance and that the property is directly across from Mayfair Mall, giving direct and easy access from Mayfair Mall to Best Buy. This factor sets the Best Buy location apart from the other locations on the west side of street which have no such direct access to Mayfair Mall. The Court finds that instead of being a reduction in value, Mr. MaRous should have recognized this feature as an enhancement, as did Mr. Miller, and adjusted the value upward accordingly.

203. The Court finds that Mr. MaRous' determination of physical depreciation, functional obsolescence and economic obsolescence is not supported by market data and is inconsistent with Wisconsin law and the *Wisconsin Property Assessment Manual* and therefore, not credible. Mr. MaRous' lack of market data makes his opinions *ipse dixit*, making his opinions unreliable and not credible.

MaRous Land Values Are Not Credible

204. MaRous concludes to a value of \$24 per sq. ft. for land for both 2015 and 2016. Two of the MaRous land sales are located in the Milwaukee County Research Park and sold for \$4 a sq. ft. The office parcels are restricted in by Milwaukee County for select office use only, and cannot be used for retail. The \$4 sq. ft. land sale prices were heavily discounted to reflect the limited permitted uses on the parcels.

205. The Court finds, it is legally impermissible to use these parcels for retail and as such cannot be used to represent the market value of retail land. Mr. MaRous' use of land sales that are zoned for office buildings and deed restricted by Milwaukee County to

determine the value of the subject Best Buy underlying land is not consistent with Wisconsin law and is not credible. The office building land sales are not reasonably comparable to the subject land.

206. Ignoring these two restricted office land sales at \$4 a sq. ft., MaRous can no longer justify his reduced land value for the subject property.

207. The Court notes that if Mr. MaRous' land value were corrected to at least \$33 per sq. ft., which is the sale price of one of his land sale comparables located near the subject property, that would add \$1.6 million to his cost approach valuation, bringing his total cost approach value to \$8.8 million. That value approximates the assessment and demonstrates that the assessments are not excessive.

208. Mr. MaRous' cost approach is not consistent with Wisconsin law, is not grounded in market data and therefore is not reliable and not credible.

Cost Approach Conclusions

209. Mr. Miller's cost approach to value is consistent with Wisconsin law and is credible.

210. Mr. MaRous' cost approach to value is not consistent with Wisconsin law and is not credible.

Miller's Other Tier-3 Information

211. The courts have held that other Tier 3 factors including, sales of "like properties" and the location and occupancy of the subject property may be considered as relevant data to determine market value. *Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, ¶35, 294 Wis.2d 441.

212. The fact that the subject property was occupied on each of the valuation dates was an important consideration taken into account in the valuation conclusions of the Assessor and Mr. Miller.

213. Mr. Miller considered 38 leased investment sales of “like properties” as additional tier 3 market evidence. (Miller set 2 of “like properties”) This set of properties range in size from 40,000 sq. ft. to 75,000 sq. ft. and all are single tenant net leased investment properties. The average size of the properties contained in this set was 45,000 sq. ft., which is similar to the subject Best Buy.

214. This data set includes a number of Best Buy property sales throughout the country. These sales, while not rising to the level of being reasonably comparable for use in a tier 2 sales comparison approach, indicate supportable ranges with consistent price-points ranging from sale prices of \$293 sq. ft. for properties in the 50th percentile in size within the set and up to \$307 sq. ft. for sale properties in the 75th percentile in size within the set. This range of sale prices serves as additional tier 3 support for Mr. Miller’s conclusion of value of \$277 sq. ft. (Miller report pp. 115-116)

Court’s Finding That The 2015-2016 Assessments Are Affirmed and Best Buys Claims Are Dismissed With Prejudice.

215. Upon examination of the evidence as a whole, this Court finds that upon a reasonable view of the evidence, the Best Buy assessments are not excessive and therefore, must be upheld.

216. The 2015 and 2016 assessments do constitute the value of the Best Buy property pursuant to Wis. Stat. §70.32(1).

217. The Court concludes that Best Buy has not presented “significant contrary evidence” to overcome the presumption of correctness afforded the assessments. Therefore, the 2015-16 assessments are affirmed.

Dated this 21st day of May, 2019.

Attorneys for the defendant,
City of Wauwatosa

BY: **Electronically Signed by Amy R. Seibel**
Amy R. Seibel
State Bar No. 1006166
Ryan G. Braithwaite
State Bar No. 1037232

Post Office Addresses:
Amy R. Seibel
Seibel Law Offices LLC
11518 N. Port Washington Road
Mequon, WI 53092
(414) 881-4262

Ryan G. Braithwaite
Crivello Carlson, SC
710 N. Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722