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Waukesha County  
2016CV001317

BY THE COURT:

DATE SIGNED: March 20, 2019

Electronically signed by William J. Domina  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT  
CIVIL DIVISION

WAUKESHA COUNTY

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Kohl's Value Services, Inc.

Plaintiffs,

CASE NO. 16CV1317 and  
17CV1683

vs.

City of Delafield

Defendants.

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**DECISION AND ORDER**

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**STATEMENT OF FACTS**

The facts set forth in this decision are found by clear and convincing evidence adduced during the trial of this matter. The Court has reviewed and does adopt all of the proposed findings of fact set forth in the Proposed Findings of Fact and Conclusions of Law submitted by the City of Delafield on November 18, 2018, unless specifically excepted by this decision.

This is an action pursuant to Wis. Stat. §74.37(3)(d), for a partial refund of real estate taxes imposed on Kohl's by the City of Delafield (the "City") for tax years 2015, 2016, and 2017, plus statutory interest, with respect to a parcel of real property in the City. The property is located at 3105 Golf Road within the City (the "Subject Property"), and is identified on the City's records as Tax Parcel No. DELC 0804-999-002. Kohl's is responsible for payment of the property taxes under the terms of its lease with the property owner, Ramco Gershenson Properties Trust of Farmington Hills Michigan ("Ramco"), and is thereby authorized to challenge the property tax assessment. The assessment for the Kohl's property was set by the City assessor, using mass appraisal techniques, at \$9,104,700, for the 2015 and 2016 tax years. By hearing waiver filed by Kohl's, the City extended the assessment of \$9,104,700 for the 2017 tax year.

#### The Subject Property

The Kohl's store consists of a retail structure built in 1994 as a one-story Kohl's store, expanded by separate lease in 2003 and remodeled in 2014. The Subject Property anchors Nagawaukee Center, located on the north side of Golf Road at the intersection of Interstate 94 and State Highway 83. The Nagawaukee Center is owned by Ramco and was purchased by it in 2012 for \$15,000,000.<sup>1</sup> This purchase included the Subject Property and the improvements on an adjoining parcel consisting of In-line retail stores. In-line retail stores are smaller stores with narrower facades and less depth than a larger anchor store. Because of reduced economies of scale, In-line stores are typically assessed and appraised at a higher per-square-foot cost than larger anchor stores. Only the Subject Property portion of the 2012 sale is the subject of this litigation.

The Nagawaukee Center enjoys modern construction with a good mix of tenants and adequate parking, loading and services. The Subject Property is an irregularly shaped parcel that is 299,911 sq. ft. in size, located at 3105 Golf Road in the City of Delafield. Kohl's is the tenant under a long term triple net ("NNN") lease of 80,684 square feet of the retail space in the shopping center on the subject tax parcel. (Exhibits 38 and 39) Kohl's also leases on a NNN basis an additional 8,313 sq. ft. from Ramco based on a 2003 store expansion located on the adjacent tax parcel for a total leased area of 89,076 sq. ft.. The separate 2003 lease to the Expansion Area was never produced in

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<sup>1</sup> See Trial Ex. 204, Part I, p. 35.

response to a Delafield Board of Review subpoena or in connection to this litigation. The approximate floor areas of the three areas of the Subject Property are: Original Area – storage: 7,602 sq. ft.; Original Area – finished retail: 73,276 sq. ft.; Expansion Area: 8,313. The Original Area has a depth of 225 ft. from the front of the building to the back wall. The Expansion Area of the retail building has a depth of about 100 ft.

Situated on this parcel is a retail building containing 89,076 sq. ft. of ground-level building area and an additional 6,725 sq. ft. of mezzanine style second-story storage space. The retail building features include steel beams, masonry block, concrete tilt up panels and a rubber membrane roof. The interior finish is typical for commercial retail buildings and the floor consists of a combination of ceramic tile and carpet. The electrical and HVAC systems are typical and the parcel includes landscaping, good-quality asphalt paving, and good-quality accessibility. At the rear of the retail building is a storage portion that includes a mezzanine with air conditioning and second story storage with 10-foot ceiling heights.

#### 2015 Assessment

For 2015, the City's assessor, Calvin Magnan, initially set the assessment of the Subject Property at \$9,735,300, matching the assessment entered for 2014. Following an Open Book meeting with a representative of Kohl's, Mr. Magnan reduced the 2015 assessment of the Subject Property to \$9,104,700, with an allocation of \$2,419,800 to land and \$6,684,900 to improvements. Kohl's appealed the 2015 assessment of the Subject Property by filing timely objections with the City's Board of Review pursuant to Wis. Stat. §70.47 and otherwise complying with all of the requirements of Wis. Stat. §70.47, except Wis. Stat. §70.47(13). The City's Board of Review heard Kohl's objection and sustained the revised assessment at \$9,104,700. The Wisconsin Department of Revenue determined that the aggregate ratio of the Subject Property assessed in the City was 98.8554199% as of January 1, 2015. For 2015, property tax was imposed on the Subject Property in the City at the rate of \$15.9360337 per \$1,000 of the assessed value for property. Before any First Dollar Credit, the City imposed tax on the Subject Property in the amount of \$145,092.81. Kohl's timely paid the property taxes imposed by the City on the Subject Property for 2015, or the required installment thereof. On January 26, 2016, Kohl's timely and personally served on the City Clerk a Claim for

Excessive Assessment pursuant to Wis. Stat. §74.37(2) (“the 2015 Claim”). Kohl’s also served on counsel for the City a Notice of Damages in the Action for Excessive Assessment (“Notice of Damages”). The City did not take action on the claim within 90 days after it was filed and therefore, the 2015 Claim was deemed disallowed.<sup>2</sup>

#### 2016 Assessment

For 2016, the City’s assessor set the assessment of the Subject Property at \$9,104,700. Kohl’s appealed the 2016 assessments of the Subject Property by filing timely objections with the City’s Board of Review pursuant to Wis. Stat. §70.47 and otherwise complying with all of the requirements of Wis. Stat. §70.47, except Wis. Stat. §70.47(13). By virtue of hearing waiver pursuant to Wis. Stat. §70.47(8m), the Board of Review sustained the 2016 assessments on the merits. The Wisconsin Department of Revenue determined that the aggregate ratio of the Subject Property assessed in the City was 100.9016895% as of January 1, 2016. For 2016, property tax was imposed on property in the City at the rate of \$15.4473113 per \$1,000 of the assessed value for property. Before any First Dollar Credit, the City imposed tax on the Subject Property in the amount of \$140,643.13. Kohl’s timely paid the property taxes imposed by the City on the Subject Property for 2016, or the required installment thereof.

#### 2017 Assessment

For 2017, the City’s assessor set the assessment of the Subject Property at \$9,104,700. Kohl’s appealed the 2017 assessments of the Subject Property by filing timely objections with the City’s Board of Review pursuant to Wis. Stat. §70.47 and otherwise complying with all of the requirements of Wis. Stat. §70.47, except Wis. Stat. §70.47(13). By virtue of hearing waiver pursuant to Wis. Stat. §70.47(8m), the Board of

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<sup>2</sup> As part of this process, The Delafield Board of Review did subpoena from Kohl’s information about the income, expenses and leases related to the Subject Property. The subpoena also sought from Kohl’s information about the 2012 sale to Ramco that included the Subject Property. As noted, the 2003 Kohl’s lease related to the expansion space has never been produced in this litigation, although it appears to have been provided at some point to Mr. MaRous, Kohl’s expert appraiser. Moreover, the City strongly complains that the provisions of the lease that was produced required Ramco to support and cooperate with Kohl’s in any tax assessment challenge, thereby, in the City’s view, placing all documents that Kohl’s claimed that it did not have related to the 2012 sale within Kohl’s control. While the Court is troubled that Kohl’s clearly failed to produce documents that were within its control (2003 expansion lease) and may have failed to produce documents which the Court could impute were within its control (2012 Ramco sale information), the Court chooses to proceed and consider the merits of this litigation, with the factual finding that not all of the documents in Kohl’s possession were produced pursuant to the subpoena issued by the City.

Review sustained the 2017 assessments on the merits without a hearing. The Wisconsin Department of Revenue determined that the aggregate ratio of the Subject Property assessed in the City was 97.9637342% as of January 1, 2017. For 2017, property tax was imposed on property in the City at the rate of \$15.1869304 per \$1,000 of the assessed value for property. Before any First Dollar Credit, the City imposed tax on the Subject Property in the amount of \$138,272.44. Kohl's timely paid the property taxes imposed by the City on the Subject Property for 2017, or the required installment thereof. Kohl's has satisfied the procedural prerequisites necessary to bring a Circuit Court excessive assessment action for the Subject Property under Wis. Stat. §74.37(3)(d) for tax years 2015, 2016, and 2017.

### STANDARD OF REVIEW

Wisconsin Statute Section 74.37 allows a property owner to bring a claim for an excessive assessment against the taxation district or county which collected the tax. Wis. Stat. §74.37(2)(a). The Wisconsin statutes require a claimant under Wis. Stat. §74.37 to complete certain procedural requirements prior to bringing a case in circuit court.<sup>3</sup> Review in the circuit court is conducted *de novo*, “without regard to any determination made at an earlier proceeding.” *Bloomer Housing Limited Partnership v. City of Bloomer*, 2002 WI App 252, ¶ 11, 257 Wis. 2d 883, 653 N.W.2d 309 (quoting *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 25, 245 Wis. 2d 86, 630 N.W.2d 141). Ultimately, the circuit court is the arbiter of the weight and credibility of the evidence, and of any inferences drawn from that evidence. *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶ 10, 351 Wis. 2d 439, 839 N.W.2d 893.

In a Section 74.37 action, the circuit court begins with the presumption that the City's assessment is correct. Wis. Stat. §70.49(2); *Bonstores*, 2013 WI App 131, ¶ 5. Wisconsin Statute Section 70.49 requires City assessors to attach an affidavit to the assessment roll when they report their conclusion, which is “presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other.” Wis. Stat. §70.49(2). The assessment is presumed correct unless the taxpayer

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<sup>3</sup> The parties stipulated to the fact that Kohl's met all of the jurisdictional requirements to bring this action and that the Court's determination of valuation for the tax year 2016 will also apply to the tax year 2017. (Tr. I 5:12-7:2 and Trial Ex. 1).

presents “significant contrary evidence” or shows that the assessment does not apply the principles of the Wisconsin Property Assessment Manual (the “Manual”<sup>4</sup>). *Bonstores*, ¶ 5. The presumption that the City’s assessed value is correct does not disappear simply because contrary evidence exists. *Id.*, ¶ 9. Rather, the Court “retains the obligation to weigh the competing evidence, including the presumption, and to determine whether the presumed fact is more probable than not.” *Id.* Failure to provide sufficient persuasive evidence to rebut the presumption that the assessment represents fair market value entitles the City to judgment based on the presumption. *Id.*, ¶ 10.

Article VIII, Section 1 of the Wisconsin Constitution, the Uniformity Clause, requires that the “rule of taxation shall be uniform...” Wis. Const. Art. VIII, §1; WPAM 7-10. A taxpayer bears the burden of proving a uniformity violation. *Noah’s Ark Family Park v. Bd. of Review of the Village of Lake Delton*, 210 Wis. 2d 301, 318, 565 N.W.2d 230 (Ct. App. 1997) Pursuant to the Manual’s glossary, uniformity is the “constitutional requirement that the taxable property must bear its proportionate share of ad valorem basis taxes. As applied to assessing, a condition wherein all properties are assessed at the same ratio to market value ...” (WPAM §G-7.) A tax conforms to the Uniformity Clause if it meets the following standards:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an ad valorem basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an ad valorem basis with other taxable property.

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<sup>4</sup> Assessments must be set in conformance with the Manual. Wis. Stat. §70.32(1). All references to the Manual are to the 2015 or 2016 version, depending upon applicable tax year, and will be abbreviated WPAM.

*Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967). In order to ensure compliance with the Uniformity Clause, Wis. Stat. §70.32(1) requires that assessors value property “from the best information that the assessor can practicably obtain....” *State ex rel Levine v. Board of Rev. of the Village of Fox Point*, 191 Wis. 2d 363, 372, 528 N.W.2d 424 (1995).

To determine fair market value, Wisconsin has a three-tiered valuation hierarchy, often referred to as the Markarian hierarchy. *Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶¶ 34, 35, 294 Wis. 2d 441, 717 N.W.2d 803. The best evidence of fair market value, Tier One, is an arms-length sale of the subject property. The next best evidence of value, Tier Two, is derived from the sale of similar properties, known as the sales comparison approach. A sales comparison approach generally uses recent market value sales of comparable properties to derive a value for the subject property. (WPAM §7-23.) If there has been no arms-length sale, and there are no reasonably comparable sales, an assessor may use a Tier Three assessment methodology, such as the cost approach or income approach.

### TRIAL TESTIMONY

**Mr. Calvin Magnan.** Mr. Magnan, of Magnan Assessment Services, is the City of Delafield assessor. Magnan Assessment Services provides assessment services to a number of communities mostly in southern Wisconsin. It served as the assessor for the City of Delafield from 1991-1997 and then from 2013 until the present. Mr. Magnan testified that he used a mass appraisal process to perform an annual market equalization of the 2,450 properties in the City of Delafield in 2014.<sup>5</sup> Mr. Magnan described that all verified market sales would be input into a computer program and:

[W]e take our model, cost model to generate values, apply it against sale prices, and once we are comfortable with our adjustments to the model we apply the model uniformly to the community.

Trial Tr. Day 2, p. 191. Mr. Magnan stated that for commercial properties, he used a product call the Marshall and Swift CAMA or computer assisted mass appraisal program to generate the property values in 2014. Marshall and Swift is a valuation service which

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<sup>5</sup>A full reevaluation was not performed in 2014 as there were not physical inspections of the interiors of all the properties in the Delafield community.

estimates the value of a variety of structures (ex: Discount Store, Power Center, Shopping Center, Big Box Anchor, Neighborhood Center, etc) in the commercial category throughout the United States and its regions.<sup>6</sup> Mr. Magnan explained that for the 2014 annual market equalization, he input the sales data of all categories of commercial property from the prior three assessment years (2011-2013) along with other data requested by the program (ex: style of building, type of construction, building heights, year of construction and effective remaining life, etc) and performed “hundreds and hundreds” of test runs of the computer data, making adjustments each time so that the final assessments can be as close as possible to the actual prior sale data.<sup>7</sup> Because the Swift and Marshall CAMA design is based upon national and regional data, included in this process were adjustments known as “local cost modifiers” performed by Mr. Magnan to adjust the model to reflect the true value in the local Delafield community. This adjustment resulted in an increase in assessed value for commercial structures in Delafield of just under 10%. (“the 109.8 percent is a number that I generated based off of the base cost to match the market sales...[and was] applied to all commercial properties in the City of Delafield.”). Trial Tr. Day 2, p. 206. Through this process, it was inferred that Delafield could set a fair and equitable assessed value on properties in their community without having to go through the obstacle and expense of an individual appraisal for each property.

Mr. Magnan was clear that included in the sale data used for the mass-appraisal in 2014 was the \$15,000,000 sale price for both parcels of property located at 3131 Golf Road and 3105 Golf Road in the City of Delafield consisting of the Subject Property and the adjoining In-line property sold in 2012.<sup>8</sup>

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<sup>6</sup> For residential properties, which is not at issue here, Mr. Magnan utilized the Wisconsin property assessment model for the 2014 reassessment.

<sup>7</sup> Kohl’s included a line of questioning regarding whether Mr. Magnan “double counted” walls or HVAC equipment. This Court concludes that after reviewing this issue on both direct and cross-examination that the evidence did not sufficiently establish Kohl’s complaint of “double-counting” and therefore, this Court declines to make any findings that any “double-counting” occurred during the CAMA process.

<sup>8</sup> A major complaint of the plaintiff was that Mr. Magnan used the \$15,000,000 2012 sale price which included the Subject Property was not apportioned among the parcels. This Court specifically finds that this sale was an arms-length transaction, that the assessor utilized the same and applied the resulting information uniformly to all commercial properties assessed in the City of Delafield and the CAMA cost inputs for all properties, including the Subject Property permitted the use of this sale even if the sale could not be used by an individual property appraiser as Type 1 sale.

**Mr. Michael MaRous.** Mr. MaRous is an appraiser, hired by Kohl's, who produced a report assessing the Subject Property to have a fee simple value of \$5,600,000 for the relevant tax years. In his report, Mr. MaRous discounted the usability of the 2012 \$15,000,000 sale by opining that:

[T]he subject property was purchased as part of a multiproperty *leased fee acquisition* in June 2012. The property was purchased along with the adjoining retail strip center for a reported price of \$15,000,000. The grantor was Meridian Delafield Ltd Partnership and the grantee was Ramco-Gershenson Properties, LP. It should be noted that this acquisition of the subject property and the adjoining strip center as leased is not germane to this analysis as the purpose of this appraisal is to arrive at a value of opinion of the subject property's *fee simple* value position. Also, the inclusion of the adjoining strip center and of the much smaller retail units in the purchase skews the purchase price.

Trial Ex. 21 at p. 21-8 (italics in original). Therefore, Mr. MaRous disputed the ability of the City assessor to use this most recent sale information. Instead, Mr. MaRous moved to a Tier 2 and Tier 3 analysis of the Subject Property. Mr. MaRous first concluded that the highest and best use for the Subject Property was as "a planned retail development." On direct, counsel solicited broad opinions from Mr. MaRous about the stability of the retail stores in a variety of market segments over an uncertain time period. For example, when asked about the demands of the marketplace for Big Box retailers, Mr. MaRous testified:

Ah, basically the size and depth limits the market. The market is exceptionally competitive, and over the last decade there's been numerous of these type users that have had failing business models or have struggled. The explosion of E-commerce has had a significant impact on the demand for what's called this brick and mortar type space. The other issue is Amazon has basically exploded. Obviously that's E-commerce, but all the successful retailers are doing E-commerce but Amazon is probably the one that's impacted them the most and it's impacted from the grocery stores all the way up to the very larger users, you know, such as Walmart, and basically there's been an oversupply of the space and there have been alternate uses for some of the space, many of it because the size is wrong or it's necessary to break them up at significant cost, and many times they're razed for redevelopment.

Discussing the specific store brands included in this general discussion of the retail marketplace contained in his report, Mr. MaRous testified:

Yes. So it basically talks about either stores that are no longer in the market, that were in the market not too long ago or are liquidating stores or reducing their stores. So going from the general such as the Home Depot Expo Design Center,

the Sears Great Indoors, Montgomery Wards, et cetera, then to electronic, Circuit City, Comp USA, you know, the reduction in size of Best Buy stores, and then office supply, merger of Office Max and Office Depot. Book stores have been particularly hit hard. Boarders Books, B Dalton, Walden Books are basically out of the market, and then furniture stores, Levitz, Wickes, Bombay Company; home improvement, Builders Square, and, you know, as the reading goes on there's a continual change such as Toys R Us and Bon-Ton, which were both in a very weakened condition as of the dates of value. So it's just kind of discussing the evolution of these stores.

Trial Tr. Day 1, p. 19-20.

As for comparable sales, Mr. MaRous selected: (1) the sale of a Walmart store in the City of Delafield across the freeway from the Subject Property, where Walmart was a long-term leaseholder and bought out the owner under the rights established in its lease in October of 2015; (2) the sale of a Sentry Foods grocery store located on West Oklahoma Avenue in the City of Milwaukee which was sold in May of 2011; (3) the sale of a Pick 'n Save grocery store to a car dealership in the City of Waukesha in April of 2015; (4) & (5) two former American TV stores which had closed located in Madison and Oak Creek, WI and which were purchased at bankruptcy auction in April, 2014; and, lastly, (6) another former American TV store located in Waukesha, WI which had closed and which was purchased out of receivership in April, 2014. With adjustment set forth in the report, Mr. MaRous concluded the \$5,600,000 value of the Subject Property for 2015 and 2016. As for the cost approach, Mr. MaRous analyzed comparable land values and concluded that the land value for the Subject Property was \$8.00 sq. ft. or a total value of \$2,400,000. Additionally, Mr. MaRous performed a Tier 3 costs analysis for the Subject Property. Using a CoreLogic SwiftEstimator and applying the category of "discount store" for the full retail areas and the 2003 In-line expansion area (82,351 sq. ft.) and the categories of "interior space, office and storage warehouse" (6,725 sq. ft.) for the storage and mezzanine area, and subtracting for depreciation and functional obsolescence, Mr. MaRous concluded an improvement value of \$4,099,397 or a total value including land of \$6,500,000 (rounded) for 2015 and a value of \$4,022,577 or a total value including land of \$6,400,000 (rounded) for 2016. Lastly, Mr. MaRous utilized the Tier 3 income

method of valuation utilizing the lease information<sup>9</sup> by making comparisons for rental rates and assuming vacancy and capitalization rates and including a deduction for operating expenses. Under this income approach, Mr. MaRous reached a conclusion of value for 2015 and 2016 of \$4,750,000.

**Mr. Larry Nicholson.** As part of this litigation, the City of Delafield retained the appraisal services of Larry Nicholson, who produced a report with a letter addendum<sup>10</sup> establishing the value of the subject property for 2015 at \$8,923,000 and 2016 at \$9,016,000. Mr. Nicholson's conclusion as to value was within 2% of the City appraiser's value for 2015 and within 1% of the City appraiser's value for 2016.

In his report and testimony, Mr. Nicholson stated that the highest and best use of the Subject Property was as "a single-occupant retail store." Although the Subject Property sold in 2012 for \$15,000,000, Mr. Nicholson opined that he could not utilize this sale as a Tier 1 recent sale<sup>11</sup> in his appraisal because there had not been an apportionment of the sale value tied to the Subject Property and to the adjoining In-line parcel. However, it was also clear from Mr. Nicholson's testimony that this sale was useful in some of his "reasonability" checks which supported his valuation conclusions.

Like Mr. MaRous, Mr. Nicholson's primary method of valuation of the Subject Property used the Tier 2 method of sales comparison. Before selecting properties for comparison, Mr. Nicholson first concluded that the most probable buyer of the Subject Property would be "an investor or investment group or institution investor such as a REIT that would look to the subject's ability to generate an income stream." Trial Tr. Day 2, p. 96. This was the type of purchaser of the Subject Property when it sold in 2012 for \$15,000,000. Further, Mr. Nicholson testified that when reviewing properties for comparison under this Type 2 method, he looks for properties that share similarity in

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<sup>9</sup> It was evident at trial that Mr. MaRous did not have and had not reviewed the original lease terms related to the Subject Property prior to issuing his report despite having requested the same from the plaintiff. Regarding such lease documents and subsequent to issuing his report, Mr. MaRous testified "I did get it, I did review it, and it didn't affect my conclusions." Tr. Trans. Day 1, p. 129.

<sup>10</sup> After issuing his appraisal report, Mr. Nicholson became aware that although Kohl's expanded its footprint in 2003 by 8300 sq.ft., such expansion included the building space only and not the land under the building. Mr. Nicholson's original report included a value for all land underlying the subject building. Therefore, Mr. Nicholson issued a letter addendum reducing his original opinion as to value for 2015 by \$277,000 and for 2016 by \$284,000. See Trial Ex. 206.

<sup>11</sup> Mr. Nicholson included in his report a statement that under the applicable appraisal standards that an appraiser must analyze all sales of the Subject Property that occurred within the three years prior to the effective date of the appraisal. Ex. 204, Part 1, p. 45.

physical (i.e. square footage, age, commercial classification), locational and economic (i.e. vacant or occupied, in transition or distressed) characteristics. All of the Subject Property had been under long-term lease since its construction in 1994, with 5 years left on the lease on the date of the 2015 assessment. In this respect, Mr. Nicholson stated expressly:

I didn't consider any of the vacant stores. Any vacant stores, I call them distressed stores, high vacancy, or dark buildings, those were not included because they were not occupied at the time and the most probable—the market segment for the [subject] property is—highest and best use is an occupied building.

Trial Tr. Day 2, p. 96-98. Mr. Nicholson included one property that was also included by Mr. MaRous, the Delafield Walmart located across the freeway from the Subject Property. True to the statement set forth above, Mr. Nicholson included six other properties as comparable sales including two Hobby Lobby stores in Brookfield and Franklin, WI, three Shopko stores in Madison, Monona and Sussex, WI and a big-box, two-tenant store (Bed, Bath and Beyond and Gordman's) in Kenosha, WI. The sale periods for these stores was between 2013 and 2016 and the date of construction was 1983 and after. The buyers were institutional investors or REITS, with the exception of the Delafield Walmart where the buyer appears to be a corporate (Walmart) trust. Mr. Nicholson's comparable sales analysis considered market trends in vacancy rates, capitalization rates, traffic counts, employment rates, sales price per square foot trends, etc. Moreover, Mr. Nicholson's testimony gave enhanced focus on the Delafield retail submarket, which Mr. Nicholson has personal knowledge of. He described this market as "a strong retail market" where vacancies were quickly filled during the relevant time period. Using the comparable sales approach, Mr. Nicholson concluded that the 2015 and 2016 value for the subject property was \$8,923,000 and \$9,016,000, respectively.

Mr. Nicholson also used the Tier 3, income approach<sup>12</sup> because the Subject Property had a lease in place with a contract rent which, if the rent is at market level<sup>13</sup>, can be used to value the property. Mr. Nicholson observed that if a Tier 3, income

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<sup>12</sup> Unlike Mr. MaRous, Mr. Nicholson specifically declined to include a Tier 3 cost approach stating the "[c]ost approach was not needed...[For] newer buildings five years or less, it's an applicable approach, but after that it's not very applicable." Trial Tr. Day 2, p. 91-92; Trial Tr. Day 3, p. 191.

<sup>13</sup> Mr. Nicholson testified that four of the six properties selected for rent/lease comparison were also sales comparison properties.

approach to value can be used, it serves as a check on the “reasonableness” of the other valuation methods used (e.g. sale comparison). Mr. Nicholson compared the rent comparables with the location, age, condition, interior finish, size, traffic counts and vacancy rates and then made adjustments in comparison to the Subject Property. Mr. Nicholson knew that the Subject Property rent was at \$8.12 sq. ft.<sup>14</sup> Through his analysis of lease comparables, he found the appropriate market rent would be \$8.50 to \$9 a square foot. Mr. Nicholson also compared, using the same type of analysis, properties with “asking rents” on the appraisal dates and reduced the same by 15% to account for lease negotiation. This process revealed a market rent range of \$8 to \$9 a square foot. From all of this Mr. Nicholson concluded that the rent paid by Kohl’s of \$8.12 sq. ft. was market rent. Next, Mr. Nicholson reduced rent income flows by a vacancy rate (which was relatively low due to the strong Delafield submarket) to reach the “effective gross income” and then subtracted estimated operating expenses in order to reach “net operating income.” From there, Mr. Nicholson made an assumption for the appropriate capitalization rate. To reach this estimate, Mr. Nicholson studied investor surveys in the same market segment as the Subject Property with the same probable buyer and highest and best use and with comparable building age and size, etc. From all this Mr. Nicholson concluded a capitalization rate of 7.5% for 2015 and 7.25% for 2016.<sup>15</sup> Using all of this information, Mr. Nicholson concluded that Tier 3, income approach resulted in a valuation of the Subject Property of \$9,200,000 (rounded) for 2015 and \$9,500,000 (rounded) for 2016. Further, Mr. Nicholson, using this Tier 3, income approach analysis, concluded that his Tier 2, sales comparison conclusions were reasonable.

**Dr. Thomas Hamilton.** Dr. Hamilton was called by the City of Delafield and is a professor of real estate with Roosevelt University in Chicago. He testified in review of Mr. MaRous’s appraisal. He was strongly critical of the analysis and assumptions used by Mr. MaRous. For example, Dr. Hamilton testified:

Mr. MaRous limited his view of the concept of fee simple to mean only vacant and available properties can be considered as comparable to a subject property. If

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<sup>14</sup> Again, Mr. Nicholson did not know what the specific rent was for the 8300 sq. ft. of 2003 expansion space because Kohl’s had not provided this lease during the litigation to the City. As a result, Mr. Nicholson included the \$8.12 sq. ft. rent for this area.

<sup>15</sup> As a check on this analysis, Mr. Nicholson observed that the 2012 sale of the Subject Property was at a 7% capitalization rate.

this property were vacant then his methodology would fit with the economic reality of the subject property. However, the subject property is not vacant and therefore he suspends reality by making the property vacant and therefore does not really reflect the market value of the subject property. A fee simple valuation requires an appraiser to look to the market for indications of value, income, rates, costs, economic potential, a variety of things that would come into play, and fee simple is the full bundle of rights ownership, and that is what I want to stress is ownership of the real estate....In Mr. MaRous's report he—he presumed that in order to conduct a fee simple market value of the property for property tax purposes in Wisconsin required the appraisal development to only look at vacant and available properties, whether it's in a sales comparison approach or an income approach, and what that does it skews the analysis to a non-real component for an occupied property. So it creates a hypothetical and it's a hypothetical that exists because it's contrary to fact.

Tr. Trans. Day 4, p. 87-91. Additionally, Dr. Hamilton revealed what apparently are academic skirmishes over the methodology of valuation used by Mr. MaRous in this and other cases and a series of point/counterpoint articles penned to attempt to persuade the reader of the righteousness and folly of the cause.<sup>16</sup>

**Mr. Gary Battuello.** Mr. Battuello was called by Kohl's as a real estate appraiser who provided a review report analysis for the appraisal report issued by Mr. Nicholson and the review report issued by Dr. Hamilton. Mr. Battuello criticized Dr. Hamilton for including in the materials that he relied upon his own published article. He also argued that Dr. Hamilton's "opinions regarding property rights push the review to disfavor the fee simple analysis and look to a leased fee analysis." Similarly, Mr. Battuello criticized Mr. Nicholson's sales comparison and income analysis because "the premise of value is a leased fee premise...or leased fee property rights appraised" as opposed to a fee simple premise for appraisal. Overall, Mr. Battuello draws a sharp distinction between the required fee simple analysis and the value of a leased fee property and complains that the professional witnesses called by the City fail to appreciate the significance of this distinction and the effects of this distinction on the economic value of the Subject Property.

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<sup>16</sup> During the trial, the Court observed that this week-long presentation has become a "road-show" of sorts, traveling from courthouse to courthouse across Wisconsin. The witnesses appeared to well-know each other's work and opinion as they have testified against each other with great frequency. For example, Dr. Hamilton, testifying about Mr. MaRous's opinions, stated "It's not the first time I've reviewed his work...He does the same every time and he does it wrong."

## ANALYSIS

The question in this case and all cases brought under Sec. 74.37, Wis. Stats. is not whether the initial assessment was incorrect, but whether it was excessive. Metropolitan Assoc. v. City of Milwaukee, 379 Wis. 2d 141 905 N.W.2d 784 (2018). Based upon the following, this Court concludes that the plaintiff has failed to show that the challenged assessments were excessive. As noted above, the City of Delafield appraiser, Calvin Magnan, used a mass appraisal CAMA program to uniformly assess all commercial properties in 2014, including the Subject Property. Mass appraisal techniques utilizing the best information available to the assessor are legitimate methods for the assessment of commercial and residential property in Wisconsin. *Id.* If challenged, it is appropriate for taxing authority to defend its use of mass appraisal techniques with single property appraisals demonstrating that the assessment was not excessive. *Id.*

Here, the City has presented the single property appraisal from Mr. Larry Nicholson. The plaintiff has countered with a single property appraisal from Mr. Michael MaRous. Based upon this Court's analysis, it finds that the single property appraisal from Mr. Larry Nicholson offered a more credible statement of the value of the Subject Property and Mr. Nicholson was more credible in his testimony and analysis of the Delafield submarket and the factors impacting the value of the Subject Property.

Commercial properties can present complex factual information for a municipal assessor. Ultimately, the goal of any assessment is to value all rights, privileges and benefits of the real estate which is also known as the fee simple interest in the property. Walgreen Co. v. City of Madison, 311 Wis. 2d 158, 752 N.W.2d 687 (2008). While this is the goal, the law does not require certitude in the product from an assessment process. Also, where a commercial property is leased and the rents charged are "market-rents", then the value of the leased fee interest is equal to the fee simple interest. *Id.* Moreover, as noted previously, absent a Tier 1 sale of the Subject Property usable in a single property appraisal, a Tier 2 analysis of comparable sales of properties provides the best information for establishing fee simple value. Comparable property sale analysis requires an "apples-to-apples comparison" between the Subject Property and the properties relied on as comparable. Where the Subject Property is an active property engaged in a long-term retail business which is vibrant and on-going, it cannot be compared to the sales of

properties defined “dark” as “a period of time where the store is not operating.” See. *Bonstores Realty One LLC v. City of Wauwatosa*, 351 Wis. 2d 439, 839 N.W.2d 893 (Ct. App. 2013).

The Court finds the Tier 2 analysis of the City of Delafield offered through appraiser Larry Nicholson to be far more credible than that offered by the plaintiff, Kohl’s. The analysis for the plaintiff quickly breaks down based upon the “comparables” selected. Three of the six properties are, in the Court’s view, clear sales of distressed properties (three American TV stores) as the sales came out of either bankruptcy or receivership. The stores were out of business (“dark”) at the time of sale. Additionally, one of the three properties offered as “comparable” had a deed restriction limiting its retail use. Moreover, a fourth property offered as comparable (Waukesha Pick ‘n Save) was announced for closure and ultimately was sold to a neighboring car dealership for use in that industry. This transfer also appears to be a “distressed” sale given the announcement of closure and conversion of use to something other than the original retail use. The Court does not find this sale to be a comparable sale offering legitimate information for a Tier 2 analysis. Ultimately, this leaves only two properties that may be considered “comparable” but, this Court concludes, that this is an insufficient number of comparable properties from which this Court may reach conclusion of value.

The witnesses seemed to agree that Tier 3 analysis could be used as a “reasonability check” on Tier 2 conclusions. Still, here, Mr. MaRous’s Tier 3 analysis made certain assumptions that did not appear to have credible factual support and were included, in the Court’s view, to reduce the value of the property and to make the math closer to his Tier 2 conclusions. For example, under his Tier 3 analysis, Mr. MaRous included functional obsolescence deduction of 25%. Dr. Hamilton is credibly critical of this approach as it fails to account for the real fact that the property is currently occupied by Kohl’s with a lease running at least five years into the future from the 2015 assessment:

The [MaRous] cost approach is developed on the assumption that Kohl’s (or a similar department store) is not a potential user for the property. This is evident in the functional obsolescence deduction of 25% in the cost approach. There is nothing in real estate economic theory that precludes any type of potential user in the development of a highest and best use analysis. The hypothetical transaction that is surmised in a market value appraisal assignment is between a potential

(hypothetical) buyer and a potential (hypothetical) seller. Nowhere in real estate economic theory is it assumed that the current user/occupant is precluded from this analysis as either the potential buyer or the potential seller. As such, to assume that the best use of the property is anything but that which currently exists as reality is unwarranted, unnecessary and implies bias in the appraisal development process. Therefore, the [MaRous] cost approach to value is improperly developed and is an unreliable indicator of the subject property's market value.

Tr. Ex. 208, p. 11-12. Additionally, the MaRous Tier 3, income approach repeats the “dark” store history by using rent information from vacant and available properties rather than occupied properties as going concerns. Moreover, Mr. MaRous makes an assumption of a 15% vacancy rate which is five times the assumption made by Mr. Nicholson and appears without credible supporting market evidence. *Id.*

In sharp contrast, Mr. Nicholson's Tier 2, sales comparison analysis follows the directive of the Wisconsin Property Assessment Manual (WPAM), Ch. 9 (citing Bonstores Realty One LLC v. City of Wauwatosa, 351 Wis. 2d 439, 839 N.W.2d 893 (Ct. App. 2013)):

[T]he 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.

Moreover, Mr. Nicholson's assumptions concerning a vacancy rate of 3% appears directly structured to the Delafield submarket. Mr. Nicholson chose the Tier 3, income method of analysis and provided a coherent breakdown of how, in his opinion, the Kohl's store in the City of Delafield was paying market rent. This Court concludes that Mr. Nicholson's Tier 3, income analysis provided a credible “reasonability check” on his Tier 2, comparable sales analysis.

However, Mr. Nicholson did not stop there in “checking” his Tier 2 conclusions. Exhibit 342 memorializes Mr. Nicholson's attempt to understand how the assessor's, Mr. MaRous's and his conclusion regarding the fee simple value of the Subject Property impacted the per square foot value of the In-line retail space that was included in the 2012 \$15,000,000 sale but was not part of the Subject Property. Mr. Nicholson (correctly in this court's view) reasoned that if \$X were assigned to the Subject Property from the 2012 \$15,000,000 sale, then \$Y, as a remainder, had to be assigned to the remaining In-

line property, creating a cost per square foot value. According to Exhibit 342, Mr. Nicholson subtracted the value for the Subject property reached by the assessor, Mr. MaRous and himself.<sup>17</sup> He divided the remainder by the square footage of the In-line space not included in the Subject Property, but included in the 2012 sale and observed a cost per square foot for this In-line space of \$239.45 for the City of Delafield assessor, \$381.80 for Mr. MaRous and \$246.83 for himself. Mr. Nicholson then looked at the actual per square foot values for three additional In-line space sales which occurred since the 2012 sale, two of which were in the same development location across a single-lane service road (Shoppes at Nagawaukee I and Shoppes at Nagawaukee II), see Tr. Ex. 378, and one that was across the freeway. The sales of the Shoppes at Nagawaukee I and II occurred on April 9, 2014 and April 18, 2013, respectively and were purchased by the same institutional entity that purchased the Subject Property in 2012. According to Exhibit 342, the cost per square foot value of these sales was \$241.16 and \$213.84. Moreover, the cost per square foot of the third property sold across the freeway on August 12, 2015 was \$206.94.<sup>18</sup> Exhibit 342 supports this Court's conclusion that this In-line space in the same development sold in the range of \$213.84-\$241.16 after the sale of the Subject Property in 2012. Thus, the range of value remaining for the In-line space not included in the 2012 sale with the Subject Property based upon the value assigned by the City of Delafield assessor and Mr. Nicholson was in a range of \$239.45-\$246.83 and thus the reasonability of the assessment and appraisal of the Subject Property. Said differently, using the MaRous value for the Subject Property, which created an In-line per square foot remainder value of \$381.80, falls far outside what is reasonable and, thereby, substantially undercuts the MaRous opinion of value.<sup>19</sup>

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<sup>17</sup> This was noted as "TNG" on Exhibit 342 standing for "The Nicholson Group."

<sup>18</sup> Mr. Nicholson opined from Exhibit 342 that the property across the freeway was "inferior" to the In-line space sold in 2012 as it included 2<sup>nd</sup> floor office space.

<sup>19</sup> The Court did not find Mr. Battuello's criticisms of Dr. Hamilton's review and Mr. Nicholson's appraisal to be particularly persuasive. As to Dr. Hamilton, Mr. Battuello stated that "[t]he basic flaw is a kind of conflating of the issues of title as to the description of the property rights and the economics of the property rights which appraisers are supposed to value." Tr. Trans. Day 4, p. 195. As to Mr. Nicholson, Mr. Battuello stated that "[b]ased upon the data and discussions, the highest and best use and the most probable buyer discussion, all of these indicate that the premise of value is a leased fee premise of value or leased fee property rights appraised...[Regarding the Nicholson sales comps], [f]rom the standpoint of title, yes, they were fee simple transfers. From the standpoint of economics they were net lease transactions." Tr. Trans. Day 4, p. 211. The Court does not see the distinction drawn between economics and title and, therefore, rejects this criticism. This Court finds that Mr. Nicholson appraised the value of the fee simple

## CONCLUSION

At times during this litigation, the Court felt as though it was in the middle of a philosophic tug-of-war between the parties. From the perspective of the plaintiff, it was clear to the Court that they adopted an “all or nothing” approach on their comparable sales valuation by including mostly distressed or transition properties in the analysis. Unfortunately for the plaintiff, this Court concludes that this results in nothing as it created a Tier 2 analysis which does not successfully rebut the conclusion of the assessor. Moreover, the Tier 2 analysis offered by the City of Delafield, supported by the “reasonability checks” noted above, provides credible support for the assessor’s conclusions generated under a mass appraisal process. Therefore, the Court concludes that there has been no showing that the assessment made by the City for the tax years 2015 and 2016 were excessive. By agreement, the 2016 assessment is extended to the 2017 tax year.

## ORDER

IT IS HEREBY ORDERED that the City of Delafield shall prepare a final order, consistent with this decision, and submit the same under the local rules for the Waukesha County Circuit Court.

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interest of the Subject Property. While his analysis included a conclusion that Kohl’s was paying market rents based on an analysis of the rents of comparable properties, such analysis is legitimate and supported by Wisconsin law. See, *Walgreen Co. v. City of Madison*, 311 Wis. 2d 158, 168 n.5, 752 N.W.2d 687 (2008). (wherein the Court refused to get caught up into the labels offered by Walgreens between fee simple and leased fee interests where market rents were being paid causing the value of the leased fee interest to equal the fee simple value). Lastly, the fact that Mr. Battuello was critical of Mr. Hamilton for citing his own article, along with a myriad of other materials and sources, does not strike the Court as a significant criticism worthy of analysis other than to mention that the complaint was made.