STATE OF WISCONSIN

TAX APPEALS COMMISSION

THERMO ELECTRON,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NOS. 14-M-041, 14-M-042, AND 14-M-043

DECISION AND ORDER

DAVID D. WILMOTH, COMMISSIONER:

The Commission conducted a trial in these cases in Madison, Wisconsin, on January 26-27, 2015, Commissioners Roger W. LeGrand and David D. Wilmoth, presiding. The Petitioner was represented by Attorneys Thomas R. Wilhelmy and Jennifer A. Kitchak of Fredrikson & Byron, P.A., Minneapolis, Minnesota. The Respondent, the Wisconsin Department of Revenue ("the Department"), was represented by Attorney Peter D. Kafkas. Both parties filed post-trial briefs. Based upon the proceedings at trial, the exhibits received at trial, and the entire record, the Commission finds, concludes, and orders as follows:

FINDINGS OF FACT

A. Jurisdictional Facts

1. Petitioner, Thermo Electron, owns three tax parcels which are the subject of this appeal. The parcels (collectively, "the Property") are located in Fitchburg, Wisconsin.

2. The parcels are identified as follows:

Parcel	Parcel ID No.	Computer ID No.
Main Campus Parcel	225/060906480030	76-13-225-R000002592
Former Building 2 Parcel	225/060905385015	76-13-225-R000002587
Highway PD Entrance Parcel	225/060905390009	76-13-225-R000002588

3. These cases involve Petitioner's objections to the Department's valuations of the Property as of January 1, 2013.

4. Petitioner timely appealed the assessments to the Board of Assessors. The Board of Assessors upheld the assessments in its decision dated January 3, 2014. Petitioner timely filed a Petition for Review with the Commission. Those appeals were the subject of the trial in these cases.

5. The appeal forms at both the Board of Assessors level and at the Tax Appeals Commission include spaces for a breakdown of land versus improvements, followed by a total value for the parcel.

6. Petitioner entered the same values for the improvements as the Department had used on the assessments, but Petitioner's allocated land values differed significantly from those of the Department. Thus, the total valuations offered by

Petitioner were less than those of the Department. The 2013 assessments and Petitioner's opinions of value were as follows:

Parcel	2013 Assessment	Petitioner's Total Opinion of Value
Main Campus Parcel	$6,713,100	$5,750,000
Former Building 2 Parcel	$2,425,900	$1,000,000
Highway PD Entrance Parcel	$3,278,500	$1,225,000

B. Material Facts

7. At the time of assessment, the Property was utilized by Thermo Fisher Scientific, Inc., a worldwide medical products company, as an office, research and development, light assembly, and manufacturing complex or campus. The three parcels consisted of a combined 86.61 acres located along the Verona Frontage Road and Williamsburg Way, very near the intersection of McKee Road/Highway PD and Verona Road in the City of Fitchburg.

8. The Property was in a desirable mixed use location in a vibrant county very close to a major expressway. One Parcel, the "Main Campus Parcel," included improvements, while the other two parcels consisted of essentially vacant land.

9. The Main Campus Parcel was a 21.34 acre parcel improved with three buildings that were constructed in phases between 1966 and 1980. As of the 2013 assessment date, the Main Campus Parcel was zoned I-S, Industrial Specialized.

10. The Main Campus Parcel improvements totaled 194,497 square feet (SF) of primarily steel-framed buildings. The improvements consisted of some older buildings that had been connected together, which is common for an older manufacturing facility. In addition, more modern facilities were also located on the subject property. The Main Campus improvements included modern offices, conference rooms, research and development labs, customer training and support labs, a workout room, and a cafeteria.

11. The Main Campus was used for various office operations, product research and development, light manufacturing, quality control, hands-on lab, and customer training and support.

12. The overall weighted average age of the facility was 35 years. The buildings were 100% air-conditioned and 73% of the building area was outfitted with sprinkler systems. All mechanicals were in working order and the buildings were routinely maintained on a regular basis. One of the Department's assessors described the Main Campus as being in "fair, yet average condition."

13. The Property was not the subject of any recent sale; thus, the parties agreed that, in the absence of a recent sale, the sales comparison approach was the appropriate method for valuing the Property.

14. The Former Building 2 Parcel was a 34.10 acre parcel of land with only minor site improvements remaining; the parties agreed that this parcel was essentially vacant land. At the time of assessment, the parcel was bisected north-to-south by the Badger State Trail, a multi-use recreational trail which is part of the

Wisconsin State Park System. As of the 2013 assessment date, the land west of the trail, which comprised approximately two-thirds of the parcel's acreage, was zoned I-S, Industrial Specialized, while the portion to the east was zoned A-T, Agricultural Transitional. The Department's assessed value of this parcel was $2,425,900, while Petitioner claimed the value of the parcel was $1,000,000.

15. The Highway PD Entrance Parcel was a 31.17 acre parcel of land with only minor site improvements; the parties agreed that this parcel was essentially vacant land. This parcel, which lies directly to the south of the Former Building 2 Parcel, was also bisected by the Badger State Trail. As of the 2013 assessment date, the land west of the trail, which comprised approximately two-thirds of the parcel's acreage, was zoned I-S, Industrial Specialized, and the eastern portion was zoned A-T, Agricultural Transitional. The Department valued this parcel at $3,278,500, while Petitioner valued the parcel at $1,225,000.

16. The Property was located in the Arrowhead Park Industrial Area which included 261.8 total acres on the North side of the City of Fitchburg. The City of Fitchburg's Arrowhead Redevelopment Plan (the "Plan") is a comprehensive 20-year plan for the development of the Arrowhead Park Industrial Area. The Plan was developed by the City's economic development office with input from businesses, residents, and other stakeholders in the area. At the time of trial, the Plan contained multiple maps and land use plans of different possible, potential future use and development of the area.

17. The Plan did not change any zoning for the subject parcels. Any changes in zoning and development of the unimproved land would be subject to zoning change approvals, required studies, re-platting, and other approvals. While there was testimony that the City was open to changes and new uses, there were no guarantees that any particular use or development would be approved, with all changes still "subject to city review and approval."

18. As of the date of the assessment on January 1, 2013, the Plan was still undergoing changes and further revision, including the location of proposed new roadways, which were slated to run through the Property. Due to this, Petitioner faced the potential that some portions of the Property would be condemned for the new road projects.

19. The Plan contained several alternative development and land use maps, most of which showed a significant portion of the Highway PD Entrance Parcel east of the Badger State Trail as park and conservancy. The uncertainty of the details of these plans created uncertainty for potential buyers in the market.

20. Petitioner called an expert appraiser who held graduate degrees from both UW Madison (M.S. in Real Estate) and University of Chicago as well as a law degree. His experience involved practicing real estate law, appraising properties, and consulting on property valuation issues from zoning to tax appeals. Although based in Illinois, Petitioner's appraiser, with his Wisconsin ties, had also valued close to 100 commercial properties in Wisconsin.

21. Petitioner's appraiser concluded that current use was the highest and best use of the Property.

22. The Department called two Certified Assessors who had many years of experience with assessment for the Department.

23. One of the Department's assessors opined that the current use as a manufacturing campus was its highest and best use. The Department's other assessor further described the highest and best use as being the Property's "current situation. They use it as the office, research, development with light manufacturing. The two vacant parcels that are under appeal, those could have further possibility if they want to expand their operations or sell the parcels for other use."

The Department's Methodology for Valuing the Main Campus Parcel

24. The Department valued the improvements of the Main Campus Parcel separately from the land. The method involved subtracting an estimated land value out of the full sale price of each comparable sale. The assessor characterized the result as "the improvement sale price," a residual value he believed was the portion of the comparable sale price attributable to the improvements only. The assessor then adjusted those residual values to match the Main Campus Parcel's improvements. The assessor referred to this method of valuing the improvements as the "building residual" method.

25. Each of the comparable sales relied on by the assessor in valuing the improvements had been "fielded" by a Department employee other than the

assessor. In fielding a sale, a Department employee typically visits and examines the property which was the subject of the sale, talks with the purchaser and seller, reviews available sale-related documents, and collects and documents sale data. One of the things the employee fielding the sale does is establish an estimated value for the land.

26. Although not a requirement, we note that the assessor did not personally inspect the properties used as comparable sales.

The Department's Improved Comparable Sales

27. Department's Improved Comparable Sale 1 was the facility of a printing concern in Neenah, WI, which had a manufacturing use. The assessor first subtracted out a land value from the sale of this parcel at a rate of $38,000/acre. This land value was taken from the report of the Department's employee who had fielded this sale. The assessor had no independent knowledge or opinion concerning the value of the land. He did not know the details of how the value was determined and what, if any, comparable sales were relied upon for determining the value. He then adjusted the residual improvement value in comparison with the subject. He made upward adjustments to this sale for its inferior location in downtown Neenah, for inferior site coverage, inferior quality, inferior office space, and lack of basement (quality category). The Department made a downward adjustment for its smaller size (87,288SF), higher ceilings, and superior (newer) condition. He weighted this sale at 35%.

28. Department's Improved Comparable Sale 2 was the property of a wood fabricator in Mt. Pleasant, WI, so it was also considered as being used for manufacturing. The assessor subtracted a land value from the sale of this parcel in the

Racine area at a rate of $45,000/acre. Again, this land value was taken from the report of the Department employee who fielded the sale and the assessor did not have personal knowledge of how the value was determined. His adjustments to the residual included upward adjustments for inferior location, inferior office space, and lack of basement. His downward adjustments reflected the comparable property's superior (newer) condition, higher ceilings, and smaller size (80,690SF). This property was weighted at 25%.

29. Department's Improved Comparable Sale 3 was the property of a manufacturer of compressors and vacuum pumps in Sheboygan, WI. Again, the assessor subtracted out a land value, this time at a rate of $36,000/acre, per the value derived from the report of the Department employee who fielded the sale. His adjustments to the residual included upward adjustments for inferior location, inferior office space, and lack of basement. His downward adjustments reflected the comparable property's superior (newer) condition and higher ceilings. No specific adjustment was made for its larger size (250,000SF). This property was weighted at 40%.

30. Using these three Improved Comparable Sales (less the estimated land value), the assessor determined a value of $3,460,100 for the Main Campus Parcel improvements.

The Department's Comparable Land Sales

31. The Department then valued the land associated with the Main Campus as though vacant. For land comparable sales, the Department's assessor used

vacant lots located near the subject property in Fitchburg which were sold for various commercial and retail purposes. These were not manufacturing properties subject to assessment by the Department.

32. Department's Comparable Land Sale 1 was 24.1 acres sold in July 2012. It was comprised of five parcels in the Orchard Pointe retail area behind Super Target and HyVee stores and was zoned B-G, General Business. The predominant use was described as commercial.

33. Department's Comparable Land Sale 2 was an 8.1 acre parcel zoned B-H, Highway Business, which was sold in May 2012, for a future development as a HyVee grocery store. This particular sale was a bank sale which may call into question its reliability as an arm's-length sale.

34. Department's Comparable Land Sale 3, was a 6.6 acre parcel sold in June 2012, which was intended to be developed with a medical clinic and was zoned SC-NC, Smart Code – New Community.

35. The Department's Comparable Land Sale 4 was a 1.5 acre parcel zoned B-G, General Business sold in August 2013, for future retail development. This parcel was sold after the assessment date and was so small that the improvements on the Main Campus would not have fit on it; therefore, it cannot be viewed as a suitable substitute for the subject property. The Department's assessor tried to account for the difference in size resulting in an overall adjustment of 70-80%, reflective of its lack of comparability.

36. None of the Department's Comparable Land Sales was zoned I-S or any similar industrial zoning. The Department's assessor testified that he made no adjustments to the Comparable Land Sales based on their zoning.

37. Using these four Comparable Land Sales, the assessor determined a value of $3,460,100 for the Main Campus Parcel land.

38. The assessor then added the improvement value and the land value to determine a full assessed value for the Main Campus of $6,713,100.

The Department's Valuation of the Former Building 2 Parcel and the Highway PD Entrance Parcel

39. The Department used the same four comparable land sales to value the vacant parcels as it used to value the land of the Main Campus Parcel.

40. None of the Department's Comparable Land Sales was zoned I-S, Industrial Specialized, or any similar industrial zoning. None of the Comparable Land Sales was zoned A-T, Agricultural Transition, or any similar agricultural zoning. The Department's assessor testified that he made no adjustments to the Comparable Land Sales based on their zoning.

41. Using these four Comparable Land Sales, the assessor determined that the assessed value of the land of the Former Building 2 Parcel was $2,423,900. He also determined an improvement value of $2,000, for a total assessed value of $2,425,900.

42. Using these four Comparable Land Sales, the assessor determined that the assessed value of the land of the Highway PD Entrance Parcel was $3,258,000.

He also determined an improvement value of $20,500, for a total assessed value of $3,278,500.

Petitioner's Methodology for Valuing the Main Campus Parcel

43. In contrast to the Department's "building residual" method, Petitioner's appraiser applied a more traditional comparable sales method by comparing all aspects of comparable sales and adjusting the overall sales figure per square foot to compare to the subject property.

44. Petitioner's appraiser initially valued the three parcels comprising the Property in conjunction with three other additional parcels owned by Petitioner. All six parcels comprised the real estate holdings of Petitioner in this immediate area. The entire grouping had been the subject of earlier appeals, but these three smaller parcels were not the subject of the instant appeal.

45. Petitioner's appraiser grouped the six parcels into two parcels for valuation purposes based upon his conclusion that each of the two parcels constituted an economic unit. His Parcel 1 consisted of the Main Campus Parcel and an adjacent small irregularly shaped parcel with a relatively nominal value ($50,000, according to the appraiser). His Parcel 2 consisted of the Former Building 2 Parcel, the Highway PD Entrance Parcel, and two small irregularly shaped parcels with relatively nominal values ($20,000 and $5,000, according to the appraiser). The appraiser valued Parcel 1 by using comparable sales of improved property and Parcel 2 by using comparable sales of vacant land.

46. Later, when it became clear to the appraiser that individual values were needed for each parcel, Petitioner's appraiser allocated values to each individual parcel in a letter written shortly before trial. That letter was lacking detail as to the full reasoning behind the calculations of the allocated values, although the appraiser did testify that he allocated the full values to the individual parcels based on location and physical characteristics of each particular parcel.

47. In valuing the vacant land parcels, Petitioner's appraiser made only qualitative adjustments to the comparable sales. As such, he could not demonstrate the details of his calculations for reaching his conclusions.

Petitioner's Appraiser

48. Petitioner's appraiser did not have a familiarity with some of the specific requirements for valuing manufacturing property for the purpose of appeals in Wisconsin.

49. Petitioner's appraiser was not familiar with the term *Markarian* hierarchy, stating "I believe the appraiser must rank the value indications by the different approaches according to which is the most relevant" to the property. However, his testimony was similar to language of Wisconsin Property Assessment Manual ("WPAM") which sets forth the reasoning behind the *Markarian* hierarchy. Also, he did rely on the comparable sales method, so his lack of familiarity with the *Markarian* term did not affect the case.

50. Petitioner's appraiser failed to bring his working file along so documentary foundational evidence concerning many of his opinions was not available.

51. Petitioner's appraiser erroneously believed that it is not appropriate to use comparable sales in other markets. WPAM actually encourages the use of comparable sales in other areas.[1]

Petitioner's Comparable Sales
for the Main Campus Parcel

52. Petitioner's appraiser introduced six comparable improved properties in support of his opinions of value. He testified that he could not find any comparable campus style properties, so each of his comparable improved properties held single buildings. Five of his comparable sales occurred in the Madison area, while one was in Pewaukee, a location similar to Fitchburg.

53. Petitioner's Improved Comparable Sale 1 was a very small nine year old, vacant, two-story building in Fitchburg. It was comprised of only 20,490SF. It was zoned I-S, Specialized Industrial and sat on an irregularly shaped lot of only 2 acres. The property sold in December 2009 at $103.71/SF. The appraiser's -70% net adjustment to the property value resulted in an adjusted value of $31.11/SF. The appraiser testified that, because of the magnitude of the net adjustments, he gave the least weight to this comparable sale.

54. Petitioner's Improved Comparable Sale 2 was a ten year old 169,563SF single-occupant multi-level building in Madison, Wisconsin. The property sold in January 2012 for $44.17/SF. It was zoned RPSM, Research Park Specialized

[1] "Assessors are not limited to sales that occur in the municipality they are currently assessing. Assessors should search for comparable property sales in the surrounding municipalities also. An adjustment for location may have to be made; however, this should not deter the assessor from looking outside of the municipality for comparable property sales." WPAM at 7-26.

Manufacturing and sat on an irregularly shaped 16.7 acre parcel. The appraiser adjusted the sale price downward based on his judgement that the building was superior to the subject property in location, condition/age, office space, construction and design, and land-to-building ratio. He made an upward adjustment for what he determined were the inferior market conditions associated with the sale of the property. His net adjustment of -30% resulted in an adjusted value of $30.92/SF.

55. Petitioner's Improved Comparable Sale 3 was a ten year old 55,800SF, single-occupant, single-level building in Pewaukee. The property sold in May 2012 for $42.11/SF. It was zoned I-Industrial and sat on a rectangular 4.7 acre parcel. Petitioner's appraiser adjusted the sale price downward for location, situs, condition/age, building size, and construction and design. He made upward adjustments for market conditions, office space, and land-to-building ratio. His net adjustment of -30% resulted in an adjusted value of $29.48/SF.

56. Petitioner's Improved Comparable Sale 4 was a 16 year old 60,940SF, multi-tenant, single-level building also in Madison. The property sold in February 2012 for $80.41/SF. It was zoned RPSM, Research Park Specialized Manufacturing and sat on a 6.98 acre parcel. Petitioner's appraiser adjusted the sale price downward for location, situs, condition/age, building size, and construction and design. He made upward adjustments for market conditions. His net -55% adjustment resulted in an adjusted value of $36.18/SF.

57. Petitioner's Improved Comparable Sale 5 was a 20 year old 84,345SF, single-occupant, one- and two-story building in Madison. The property sold

in June 2014 for $59.28/SF. It was zoned RPSM, Research Park Specialized Manufacturing and sat on a 7.2 acre parcel. Petitioner's appraiser adjusted the sale price downward for market conditions, location, condition/age, building size, office space, and construction and design. His net adjustment of -55% resulted in an adjusted value of $26.68/SF.

58. Petitioner's Improved Comparable Sale 6 was a 32 year old 39,972SF, multi-occupant, two-story building in Middleton, Wisconsin. The property sold in August 2014 for $25.81/SF. It was zoned C-1 and sat on a .98 acre parcel. Petitioner's appraiser adjusted the sale price downward for market conditions, building size, and office space. He made upward adjustments for situs, construction and design, and land-to-building ratio. His net adjustment of +22% resulted in an adjusted value of $30.97/SF.

59. Generally, Petitioner's appraiser chose comparable sales zoned and used for office or other industrial, rather than retail or commercial.

60. Although not a requirement, we note that Petitioner's appraiser had not been inside any of the properties he used as comparable sales. The Department's assessor, who had been inside several of them, presented more reliable and credible descriptions as to the condition of Petitioner's Comparable Sale 1.

61. Petitioner's appraiser had some apparent inconsistency with respect to office space adjustments. In his analysis, Improved Comparable Sale 4 and Improved Comparable Sale 6 were both 100% office; yet Improved Comparable Sale 4

was adjusted down 15% while Improved Comparable Sale 6 was adjusted downward only 5%.

62. Petitioner's Comparable Sale 1 and Comparable Sale 6 (20,490SF and 17,824SF, respectively, both with very small acreage as well) were too small to compare to the approximately 194,000SF of the subject property on its 21.34 acres. As such, they were not valid comparable sales. Further, the testimony showed that Petitioner's appraiser believed the construction quality of Comparable Sale 1 was superior to the subject property when, in fact, it was inferior. Consequently, they were not valid comparable sales.

63. Petitioner's Comparable Sales 5 and 6 post-dated the date of assessment by more than a year and, as such, they were not valid "recent comparable sales."

Petitioner's Comparable Sales for the Former Building 2 Parcel and the Highway PD Entrance Parcel

64. Petitioner's appraiser introduced six comparable land sales. These sales involved sales of land with zoning comparable to the land parcels at issue.

65. Petitioner's Comparable Land Sale 1 was a 7.94 acre parcel in Madison zoned I-L, Industrial-Limited. The property sold at $3.92/SF in October 2009. The Petitioner's appraiser testified that the zoning was similar to the subject parcels. He explained that he made positive qualitative adjustments for market conditions and moderately less desirable property shape. He made negative adjustments for its better

location, smaller size, less restrictive zoning, corner orientation, and more valuable physical characteristics. He rated this parcel "superior" to the subject parcels.

66. Petitioner's Comparable Land Sale 2 was a 5.29 acre parcel in Madison zoned I-L, Industrial-Limited. The property sold at $3.15/SF in August 2011. As noted above, the Petitioner's appraiser testified that I-L zoning was similar to the zoning of the subject parcels. The Petitioner's appraiser made a positive qualitative adjustment for market conditions. He made negative adjustments for its more valuable location, expressway exposure, smaller size, less restrictive zoning, and more valuable physical characteristics. He rated this parcel "superior" to the subject parcels.

67. Petitioner's Comparable Land Sale 3 was a 4.53 acre parcel in McFarland zoned M-IC, Manufactured-Intensive Commercial. The property sold at $1.90/SF in August 2012. The Petitioner's appraiser made positive qualitative adjustments for its less desirable location and better exposure and for market conditions. He made negative adjustments for its smaller size, less restrictive zoning, and other more valuable physical characteristics. He rated this parcel "superior" to the subject parcels.

68. Petitioner's Comparable Land Sale 4 was a 3.03 acre parcel in Waunakee zoned PUD, Planned Unit Development. The property sold at $1.67/SF in February 2013. Petitioner's appraiser made a positive qualitative adjustment for its less desirable location. He made limited negative adjustments for its smaller size and better physical characteristics. He rated the parcel "superior" to the subject parcels.

69. Petitioner's Comparable Land Sale 5 was a 36.52 acre parcel in Fitchburg zoned A-T, Transitional Agriculture. The property sold at $0.90/SF in September 2013. The seller of this parcel was a bank and there are indications that this may have been a foreclosure sale such that it was not a typical arms-length transaction. Petitioner's appraiser testified, however, that he believed that the circumstances of the sale did not exclude the use of this comparable; he believed the bank had title and was selling it under its fiduciary duty to shareholders to sell for the maximum amount possible. The Department countered with testimony that the bank in question, or its corporate parent, was in financial trouble. Petitioner's appraiser made positive qualitative adjustments for sale conditions and a less desirable location. He made negative adjustments for superior corner orientation, for superior physical characteristics, and for its contiguous shape. As to the subject parcels, Petitioner's appraiser found that this entire parcel was "superior to subject's A-T portion for size, physical characteristics and corner situs. As to the I-S zoned portion of the subject it is slightly superior for corner situs and smaller size as to Parcel 2 but inferior as to Parcel I for size and zoning."

70. Petitioner's Comparable Land Sale 6, was a 40.55 acre parcel in Fitchburg zoned A-X, Exclusive Agriculture. The property sold at $0.52/SF in November 2013. Testimony indicated that, while there were some differences in the A-T and A-X zoning, the permitted uses were the same and that Petitioner's appraiser made adjustments for perceived differences. Petitioner's appraiser made positive adjustments "reflecting zoning as to the subject's I-S zoned parcels it is similar as to the

A-T zoned parcel. A positive adjustment for partial utilities as to subject I-S zoned parcel and similar to the A-T zoned parcel." He found this comparable property "has an inferior location, but a better degree of visibility and it has mostly level topography-more desirable physical characteristics and contiguous shape." In the end, Petitioner's appraiser found that this parcel was "similar as to the A-T zoned portion of the subject and inferior as to the I-S zoned portion."

71. Petitioner's appraiser also factored in four listings; because they were listings rather than comparable recent arm's-length sales, reliance on them is inconsistent with the *Markarian* hierarchy. Petitioner's appraiser presented no quantitative evidence to show calculations so it is not known how much reliance the appraiser placed on the listings.

72. Petitioner's appraiser did not quantify his adjustments to the comparable land sales, providing only qualitative opinions upon which he based his overall conclusions.

CONCLUSIONS OF LAW

The Main Campus Parcel

1. The Department's assessment of the Main Campus Parcel contained error sufficient to overcome the presumption of correctness.

2. The Department's use of a "building residual" method, separately valuing the land and improvements of the Main Campus Parcel, was inconsistent with applicable Wisconsin law, the Wisconsin Property Assessment Manual, and generally accepted professional appraisal practices.

3. All of the Department's choices of comparable land sales were invalid under the principle of substitution because all of them were zoned for completely different uses and were sold for uses impermissible for the Main Campus Parcel.

4. Of the six improved comparable sales used by Petitioner in valuing the Main Campus Parcel, Comparable Sales 1, 5, and 6 were invalid comparisons. Comparable Sales 2, 3, and 4 were valid comparisons.

5. Petitioner's valuation of the Main Campus Parcel was more credible than the value presented by the Department; thus, Petitioner met its burden of persuasion.

The Vacant Parcels

6. The Department's assessments of the Former Building 2 Parcel and the Highway PD Entrance Parcel contained error sufficient to overcome the presumption of correctness.

7. All of the Department's choices of comparable land sales were invalid under the principle of substitution because all of them were zoned for completely different uses and were sold for uses impermissible for the Former Building 2 Parcel and the Highway PD Entrance Parcel.

8. While flawed, Petitioner's valuation of the Former Building 2 Parcel and the Highway PD Entrance Parcel was more credible than the value presented by the Department; thus, Petitioner met its burden of persuasion.

OPINION

This case involves the assessment for property tax purposes of three parcels located in the Town of Fitchburg, Wisconsin. The property owner, Petitioner Thermo Electron, challenged the Department's property tax assessment for the year 2013.

We begin by setting set forth the standards by which we judge the evidence; then we analyze the evidence to determine whether Petitioner has met its burden.

A. Legal Standards

Wis. Stat. § 70.32 Real Estate, how valued.

> **(1)** 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. 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.
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> **(2)** The assessor, having fixed a value, shall enter the same opposite the proper tract or lot in the assessment roll, following the instruction prescribed therein.
>
> > **(a)** The assessor shall segregate into the following classes on the basis of use and set down separately in proper columns the values of the land, exclusive of improvements, and … the improvements in each class …

Assessments by the Department are presumed to be correct and the burden is upon the taxpayer to prove by clear, convincing, and satisfactory evidence in what respects the Department erred in its determinations. *Calaway v. Dep't. of Revenue,* Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't. of Revenue,* Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). If there is any credible evidence that may support the assessor's valuation in any reasonable view, the valuation must be upheld. *Universal Foods Corp. v Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶ 400-316 (WTAC 1997).

The burden of proof is a two-step process. First, as noted, the Department enjoys a presumption of correctness. The taxpayer bears a heavy burden to show error in the assessments. Should the taxpayer overcome that burden, the taxpayer continues to carry the burden of persuasion; that is, the taxpayer must show that its opinions of value are more credible than those asserted by the Department. *ConAgra Foods Inc. v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶ 401-960 (WTAC 2015).

The Wisconsin Property Assessment Manual ("WPAM") sets forth a three-tiered methodology for assessing real estate property value: (1) First Tier - Evidence of a recent arm's-length sale of the subject property is the best evidence of full value. (2) Second Tier - If the subject property has not been recently sold, then an assessor must consider sales of reasonably comparable properties. (3) Third Tier - Only in situations where there has been no arm's-length sale of the subject property and there are no reasonably comparable sales may an assessor rely on one of the third-tier assessment methods. WPAM, Ch. 7; *Nestle USA, Inc., v. Dep't of Revenue,* 2011 WI 4, ¶ 401-403, 331 Wis. 2d 256, 795 N.W.2d 46, citing *Markarian v. City of Cudahy,* 45 Wis. 2d 683, 686 (1970).

In Wisconsin, the parties must adhere to this *Markarian* hierarchy. If the property itself has not recently been sold, the next best method of proving value is the comparable sales method. In this case, both parties contend, and we agree, that comparable sales existed; therefore, the comparable sales method is the appropriate method of demonstrating value for the Property.

It is against this legal framework that we evaluate the evidence presented at trial. We turn first to the assessment of the Main Campus Parcel, which is the only improved parcel on appeal. Next, we address the assessment of the two vacant land parcels, the Former Building 2 Parcel and the Highway PD Entrance Parcel.

B. The Main Campus Parcel

The Main Campus Parcel is a 21.34 acre parcel improved with three buildings. As of the 2013 assessment date, the Main Campus Parcel was zoned I-S, Industrial Specialized. Both the Department and Petitioner agree that the highest and best use of this parcel is continued use as a campus facility housing office space, research and development, and/or industrial/light assembly.

In computing an assessed value for the Main Campus Parcel, the Department's assessor valued the land and improvements separately. To value the improvements, the Department's assessor chose three comparable sales and, in each case, subtracted from the sale price an estimated value of the land. The result was what the assessor referred to as "the improvement sale price," a residual value he believed was the portion of the comparable transaction sale price attributable to the improvements only. He then adjusted the remaining value for various factors to arrive

at the value of the Main Campus Parcel improvements. To value the land, the assessor treated the improved parcel as vacant, and chose four sales of vacant land which he considered comparable to the land portion of Main Campus Parcel. He then made adjustments to those comparable sales to determine the value of the land. Finally, he added his improvement value and his land value to arrive at the total assessed value for the Main Campus Parcel. In his testimony, the assessor referred to this method of valuing the improvements as the "building residual" method.

Petitioner claims that the Department's assessment of the Main Campus Parcel for 2013 is erroneous and does not properly arrive at the fair market value of the parcel because, among other things, the "building residual" method used to value the property is not an acceptable appraisal method under applicable Wisconsin statutes, WPAM, or generally accepted professional appraisal practices. The Department counters that it has been determining separate values for improvements and land for more than 30 years, that using vacant land comparable sales more accurately reflects the value that the land contributes to the property and allows the Department to achieve greater uniformity in manufacturing assessments. The Department contends that Petitioner has not demonstrated that its method of valuing the improved parcel as a whole is superior to the Department's method and that Wisconsin caselaw supports the Department's use of its "building residual" method.

From a statutory standpoint, the Department cites Wis. Stat. § 70.32(2)(a).[2] A requirement that the assessor place separate values for land and improvements on the assessment roles is a far cry from requiring or even suggesting that the assessor should value them separately using a "building residual" method like that used here by the Department. Thus, we find nothing in the applicable Wisconsin statutes governing the assessment of real property, including manufacturing property, which mandates a separate valuation of the land versus the improvements, using different comparable sales for each and an extraction method like the "building residual" method used by the Department's assessor.

Likewise, we find nothing describing or suggesting the use of a method like the Department's "building residual" method in WPAM. The Department's assessor acknowledged in his testimony at trial that he was not aware of any place that the "building residual" method would be in WPAM. Nor is there any reference to or description of such a method in *The Appraisal of Real Estate*, 14th Ed. (the "*14th Edition*"), published by the American Institute of Real Estate Appraisers and cited as a source in WPAM and by both of the parties in their briefs.[3]

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[2] The Department also cites Wis. Stat. § 70.53(1)(b), which simply cross-references and quotes a portion of § 70.32(2)(a)), which provides that, in entering a property's value on the assessment roles, the assessor shall "set down separately in proper columns the values of the land, exclusive of improvements, and … the improvements…."

[3] Both Wisconsin law and WPAM require that Wisconsin assessors assess property according to generally accepted appraisal practices. Wis. Stat. § 70.32; WPAM at 1-1. We consider *The Appraisal of Real Estate* a reliable reference source for generally accepted appraisal practices.

Both WPAM and the *14th Edition* describe an abstraction method for valuing vacant land when there are insufficient comparable sales available to the appraiser. WPAM describes the land abstraction method as follows:

> This method can be used when there is a lack of vacant land sales. Under this method, the assessor estimates the value of vacant land through the use of sales of improved property. From the sale price, the assessor subtracts the estimated market value of the improvements to arrive at a market value for the land. The problem with this method is determining the value of the improvements. Usually this is done by estimating the cost new of the improvements and deducting the accrued depreciation. Due to the difficulty in estimating accrued depreciation, this method is best utilized on newer properties with little or no depreciation. This method is most reliable when the building's contribution to the total property value is small and relatively easy to identify.

WPAM at 7-29, 7-30.

The *14th Edition* cautions that, because of the assumptions and estimates required, "extraction methods should be used with extreme care and only when lack of market data prevents application of more direct methods and procedures." *14th Ed.* at 368-70.

The "building residual" method employed by the Department's assessor in this case is the opposite of the land abstraction method and is not a method recognized by WPAM or the *14th Edition*. Moreover, WPAM and the *14th Edition* both caution that the land abstraction method should be used only when there is a lack of vacant land sales. The Department used its "building residual" method despite the *14th Edition*'s caution that the land abstraction method should be used with extreme care only when a lack of market data prevents the use of more direct methods, and even

though the assessor acknowledged that adequate comparable sales of improved manufacturing properties existed.

As noted in the WPAM description of the land abstraction method, one problem is determining the value of the improvements which are to be subtracted from the comparable sales price in order to abstract the land value. Likewise, there is a similar problem with the Department's "building residual" method in determining the appropriate land value to be subtracted from the sale price of the comparable sales.

With respect to the Department's three comparable sales, the amount of the deduction for land was not supported by any facts specific to the sales transactions, as none of the parties to those transactions separately negotiated prices for the land or for the improvements. Instead, the land values subtracted were determined based on factors unrelated to the sale transaction itself. The subtracted land value for each of the assessor's comparable sales was estimated by someone in the Department other than the assessor, and the assessor did not review, approve, or testify concerning the land valuation relied upon for his land value subtraction adjustment. He did not know what comparable land sales, if any, were used to determine the land values he subtracted out of each comparable sale.

Based upon our review of WPAM and generally accepted professional appraisal practices as expressed by both WPAM and the *14th Edition*, we conclude that there is no support for the use of the Department's "building residual" method of valuing improved manufacturing properties.

The Department cites a nearly century-old case as support for its long history of using this valuation method. In *State ex rel. Gisholt Machine Co. v. Norsman*, 168 Wis. 442, 169 N. W. 429 (1919), the Wisconsin Supreme Court considered an argument by a property owner that the assessor should not have valued land and improvements separately. The Court stated:

> Fault is also found with the assessment because the assessor valued the land independent of the buildings, and then valued the buildings independent of the land, and arrived at a total valuation by adding the two items together. It is argued that, in order to comply with the statute, the assessor should have adopted the inverse method, and should have first found the value of the land and improvements as a whole, and then apportioned the total so found to real estate and to improvements. We do not so understand the statute. Section 1052 requires the assessor to enter in one column "the value of the land, exclusive of the buildings thereon; in a separate column under the head 'Improvements,' he shall enter the value of such buildings, together with machinery and fixtures therein, if any, not separately assessable, as personal property; and in the third column he shall enter the value of both land and improvements." Compliance with this provision requires the assessor to first assess the real property irrespective of any buildings or improvements thereon. Two lots lying side by side, one having improvements thereon and the other with no improvements, should be valued the same, if the improvement is the only element of difference in the value. Having arrived at the value of the lot in this manner, the improvement should then be valued and set down in another column. This was the manner in which the assessor proceeded in valuing realtor's property, and we hold that it was in strict compliance with the statute.

Norsman, 168 Wis. at 448-449.

More than seventy years later, the Commission was called upon to address the precise issue of whether the Department appropriately valued a

manufacturing property using the "building residual" method. In *Madison-Kipp Corp. v. Dep't of Revenue*, the Commission said:

> The comparison of appraisals has been complicated by respondent's use of "improvement values." This requires an allocation out of the total sale price of comparables the estimated value of the land. The remaining sale price is then allocated to improvements. These improvement values of each comparable are then adjusted and utilized to derive an improvement value for the subject, to which the subject's land value is added.
>
> This approach is problematic, however, in a number of ways. Errors in the valuation of the land will necessarily result in using an erroneous improvement sale price, and also an erroneous adjusted sale price. The value of sales data lay, in large part, in the relative certainty of the sale price. Respondent's approach immediately destroys this very important element of objectivity.
>
> We presume this improvement allocation approach represents an attempt to implement the Wisconsin assessment system of valuing land and improvements separately and is, no doubt, a well intended application of the law. However, we believe it to be unwarranted and based on an excessively literal application of the separate valuation system. The objective of § 70.32(1) is to establish assessment at full value which could ordinarily be obtained at private sale. While it is conceivable that industrial improvements could sell independently of land, such as where the land is leased, in most instances improved industrial property sells as a totality of land and improvements. To bifurcate the sale for administrative convenience (of which we are not, in any event, convinced here) injects additional subjectivity into an already excessively subjective evaluation process.
>
> We are cognizant of the decision in *State ex rel. Gisholt Mach. Co. v. Norsman*, 168 Wis. 442 (1918) which seemingly mandates property tax assessors to value land and improvements separately. However, *Norsman* was decided long before the long line of cases emphasizing use of the

> market approach overall valuation, beginning with *State ex rel. Hennessey v. Milwaukee*, 241 Wis. 548, 549 (1942); see also *State ex rel. Markarian v. Cudahy*, 45 Wis. 2d 683, 685 (1970).

Madison-Kipp Corp. v. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶ 203-250, (WTAC 1991), *aff'd Dep't of Revenue v. Madison-Kipp Corp.*, Wis. Tax Rptr. (CCH) ¶203-380 (Cir. Ct. 1992).

We agree with the reasoning in *Madison-Kipp*. When a purchaser and seller agree to a price in an arm's-length transaction for the sale of a fee simple interest in improved property, that sale price provides an objective and reliable indication of value. That is the reason the courts, WPAM, and generally accepted professional appraisal practices all place such a premium on the comparable sales method of valuation. In such a transaction, the purchaser is not buying a parcel of vacant land and separately purchasing the building and improvements. The land and buildings come together, for better or for worse, and the purchaser takes that into account when negotiating the purchase price. Adjusting comparable sales to the subject property, as assessors and appraisers must do when using the comparable sales approach, interjects a great deal of subjectivity into the process, and those adjustments are often some of the most contentious points in the manufacturing property valuation cases that come before the Commission. As noted in *Madison-Kipp*, subtracting an estimated value of the land before making value adjustments to the improvements and then valuing the land by comparison to adjusted vacant land sales, adds another layer (or perhaps two or three layers) of subjectivity.

We also note that the assessor in the *Norsman* case was using the cost approach, rather than the comparable sales approach, to value the subject property. WPAM describes the use of the cost approach in valuing improved property as follows:

> The cost approach is based on the principle of substitution. That is, that a well-informed buyer will pay no more for a property than the cost of constructing an equally desirable substitute property with like utility. The basic steps in the cost approach are:
>
> 1. Estimate the land value.
> 2. Estimate reproduction or replacement cost new of the structure.
> 3. Estimate accrued depreciation.
> 4. Subtract accrued depreciation from the estimated cost new to arrive at a present value for the improvements.
> 5. Add the present value of the improvements to the estimated land value to get total property value.

WPAM at 7-31.

Use of the cost method of valuing property would necessarily require separate valuation of land and improvements.[4] But as the Commission noted in *Madison-Kipp*, *Norsman* was decided long before the long line of cases emphasizing the use of the more market-based sales comparison method of valuation. *Norsman* was decided more than fifty years before *Markarian*, the transfer to the Department of responsibility for valuing manufacturing property, the legislative direction to the Department to prepare and

[4] The Wisconsin Supreme Court cited and followed *Norsman* in *Park Plaza Shopping Center, Inc. v. O'Malley*, 59 Wis. 2d 217, 207 N.W.2d 622 (1973). The brief *per curiam* decision is short on facts, but the Court stated that the land was valued on comparable sales per *Markarian*, and the improvements were valued on a "reproduction cost basis." In upholding the assessment, the Court held that the property owner had not objected to any of the comparable sales used by the assessor and provided no evidence to suggest that better information was available for determining the value of the improvements. In this case, the parties agree that the sales comparison method is the proper way to value the subject property, and that there are sufficient comparable sales with which to do that.

publish WPAM, and all of the refinements to the comparable sales valuation method that followed.

The Department also argued that it had repeatedly prevailed before the Commission when valuing land and improvements separately from each other, citing six cases. Three of those cases involved valuations using the cost method. Two cases simply recognized that values of land and improvements were separately stated, which is required by Wis. Stat. § 70.32(2). The final case cited, *Ashley Furniture, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-747 (WTAC 2013), does contain language that appears to approve of the separate valuation of land and improvements using the comparable sales method.

In *Ashley Furniture*, the Commission found that the petitioner had failed to carry its burden of proof in challenging the Department's assessment of its manufacturing property, which consisted of 17 separate tax parcels. The Commission rejected the value reflected in the report of the petitioner's appraiser because it had the fatal flaw of placing an aggregate value on the properties as a whole, without allocating that value to the 17 individual parcels. In finding other faults with the valuation, the Commission stated, "When adjusting the comparables, Petitioner's expert did not value the land and the improvements separately. This runs contrary to the approved methodology in Wisconsin...." *Id.* This language appears to be a conclusion based principally on the uncontroverted testimony of the Department's assessor that the method was required by WPAM. But there is nothing in WPAM that requires, describes, or approves valuing land and improvements separately using a residual

value type method when employing the comparable sales approach. The Department's assessor in this case acknowledged that fact. To the extent *Ashley Furniture* refers to the separate valuation of land and improvements as "the approved methodology in Wisconsin," it is in error.

Further, although the Department is required by Wis. Stat. § 70.32(2) to separately "set down" values for land and improvements on the assessment roll, nothing requires a petitioner to place separate values on land and buildings when appealing an assessment to the Commission. Wisconsin Statute § 70.995(8)(c)1 provides: "Persons who own land and improvements to that land may object to the aggregate value of that land and improvements to that land, but no person who owns land and improvements to that land may object only to the valuation of that land or only to the valuation of improvements to that land." While the appeal form to the State Board of Assessor requires the property owner appealing a manufacturing assessment to list separate values for land and improvements, the law is clear that what is appealed and what the Commission evaluates is the aggregate value of the property. Consequently, despite any implication in *Ashley Furniture* to the contrary, it is not error for a petitioner to present a valuation report which places an aggregate value on the subject property without an allocation to land and improvements.

The potential pitfalls of valuing the land of an improved manufacturing property by comparison to sales of vacant land are highlighted in this case by the Department's selection of what it viewed as comparable sales. Although the Main Campus Parcel was zoned I-S, Industrial Specialized, and the Department determined that the highest and best use of the property was continued use as an office space, research and development, light assembly, and industrial campus, not a single one of the four comparable sales identified and used by the Department was zoned I-S. With respect to the highest and best use of a property, WPAM states:

> The contemplated use must be legal. That is, it must not violate any government regulations. This would include such items as zoning, building codes, health codes, criminal laws, and other regulations. For example, an office building may represent the greatest net return on a parcel of real estate; however, **if this use is prohibited by zoning laws, it does not represent the highest and best use.**

WPAM at 7-12 (emphasis added).

The Department's comparable land sales involved properties zoned B-G, General Business; B-H, Highway Business; and SC-NC, Smart Code – New Community. They were properties eventually used for retail, a medical clinic, and a grocery store. These uses are not identified as legally permissible uses in I-S zoning.[5] We conclude that none of the comparable land sales used by the Department to value the land of the Main

[5] There was testimony that Fitchburg Municipal Code § 22-428(6) provides that a conditional use for I-S zoning is "Retail sales or services that exclusively or predominantly serve businesses and employees of the industrial area and are a minor part (less than 25 percent) of the total parcel usages by area, volume or similar measures." But this is a conditional use which would require a conditional use permit and a use which is still far more limited than another form of commercial zoning which would allow for traditional retail use.

Campus Parcel was, in fact, comparable, and it was error for the Department to use them.[6]

Because the Department used an inappropriate method of valuing the Main Campus Parcel and relied on sales in valuing the land which were not in fact comparable, Petitioner has shown errors in the Department's assessment sufficient to overcome the presumption of correctness. Having cleared this first hurdle, the next question is whether Petitioner has met its burden of persuasion by showing that its opinion of value is more credible than the Department's. We believe Petitioner has met the burden. While Petitioner's value analysis is not without its own defects, it does not suffer from the kind of errors we find in the Department's analysis which render the latter inherently unreliable.

Petitioner's appraiser relied on six comparable improved property sales in support of his opinion of value. He testified that he could not find any comparable campus style properties so each of his comparable improved properties held single buildings. Petitioner's appraiser chose comparable sales of manufacturing zoned properties with office or other industrial space, rather than retail or commercial.

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[6] In its brief, the Department argued that its method of valuing manufacturing properties promotes the statewide uniformity the Wisconsin legislature sought when it transferred the responsibility for the assessment of manufacturing property from local municipalities to the Department: "In 1973, the Wisconsin legislature created a state law (sec. 70.995, Wis. Stats.), making the Wisconsin Department of Revenue ... responsible for the assessment of manufacturing real estate and personal property. This law was created to help ensure fair and equitable assessments for manufacturing property and assessment uniformity statewide. Wisconsin's manufacturing property assessment approach is unique and certainly different from that in Illinois, Minnesota, and other states. A central state-wide manufacturing methodology versus county or municipal assessment procedure is set forth in the Wisconsin Statutes." What is left unexplained is how the valuation of manufacturing property by reliance on sales of non-manufacturing vacant land, valued by a municipal assessor rather than the Department, promotes statewide uniformity in the assessment of manufacturing property.

Petitioner's appraiser prepared a narrative for each of the comparable sales and a chart showing percentage adjustments he made for certain criteria, along with the overall percentage adjustment for each comparable sale. There were significant downward adjustments on all of Petitioner's comparable sales. The net adjusted values ranged from $26.68/SF to 36.18/SF. The appraiser then calculated his opinion of the value of the Main Campus property using a weighted average of those adjusted values. The report did not disclose the weight he gave to each of the comparable sales in arriving at his conclusion, but the appraiser settled on $30.00/SF which, when multiplied times the square footage of the subject property, resulted in an appraised value of $5,808,330.

Petitioner's Improved Comparable Sale 1 consisted of only 20,490SF on only 2 acres. We note that the size of the parcel used as Petitioner's Improved Comparable Sale 1 was so small that the improvements of the Main Campus Parcel would not fit on it. The appraiser testified that, because of the magnitude of the net adjustments (-70%), he gave the least weight to this comparable sale. The evidence also showed that while Petitioner's appraiser believed the construction quality of Improved Comparable Sale 1 was superior to the subject property, the opposite was the case. In our view, the property required such significant adjustments that we do not believe this sale merits any weight at all. Similarly, Sale 6 sat on a parcel less than an acre in size. We reject these sales as not reasonably comparable. Petitioner's Improved Comparable Sales 5 and 6 both occurred more than one and one-half years after the assessment date. As such they are not reasonably comparable recent sales. We reject these three sales.

Having eliminated Petitioner's Improved Comparable Sales 1, 5, and 6, we are left with Improved Comparable Sales 2, 3, and 4, with adjusted net values of $30.92/SF, $29.48/SF, and $36.18/SF, respectively. While the Department's assessor did not agree with some of the adjustments made by Petitioner's assessor to the comparable sales, the criticisms were not specific; at least not specific enough for us to revise the adjustments in any meaningful way. The average of these net adjusted values is $32.19/SF. When multiplied by the square footage[7], the full value of the Main Campus Parcel for 2013 is $6,261,507.

C. The Vacant Parcels

The other two assessments on appeal in this case involve two parcels identified as the Former Building 2 Parcel and the Highway PD Entrance Parcel. The improvements on these parcels are minimal and the parties agree that they should be treated as vacant.

As with the improved parcel, the same legal standards apply: The Department is accorded a presumption of correctness. If the presumption is overcome, Petitioner still bears the burden of persuasion as to an alternate valuation based upon the evidence. Neither of these parcels had been part of a recent sale. Therefore, the comparable sales method was the appropriate method for valuing these parcels, and both parties proceeded with that method.

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[7] The exhibits introduced into evidence by the Department show that its assessment was based on 194,497 square feet of improvements. In his appraisal, Petitioner's appraiser used a figure of 193,611SF. Because the assessment was based on 194,497SF and because no evidence was submitted at trial to dispute that figure, we have used it in our calculations.

The Department's 2013 Manufacturing Property Record Card, in identifying the zoning for the Former Building 2 Parcel as "industrial," failed to acknowledge the fact that nearly one-third of the parcel was zoned A-T. The 2013 Manufacturing Property Record Card for the Highway PD Entrance Parcel erroneously identified its zoning as "commercial." For its comparable sales, the Department relied on precisely the same four comparable sales they used in valuing the land of the Main Campus Parcel. Not one of these comparable sales had zoning similar to the subject parcels. The uses for which the "comparable" properties were zoned and sold were not the types of uses allowed by the subject properties' zoning. Consequently, we find that none of the sales transactions used by the Department in valuing the Former Building 2 Parcel and the Highway PD Entrance Parcel was, in fact, comparable.

The Department attempted to justify its reliance on properties zoned for commercial, retail, and business purposes principally by reference to the Arrowhead Redevelopment Plan. The Plan did not change any zoning of the Property, but it is clear that the Department's assessors were of the opinion that zoning of Petitioner's vacant parcels could be easily changed to accommodate commercial or retail uses, as the following excerpts from the assessor's testimony demonstrate:

> Q: Is it your understanding that a change in the zoning ordinance would be required in order to build a retail property in the industrial zoning district?
>
> A: That would not be my understanding as part of the Arrowhead development plan that is a major part of the Thermo properties. They've already planned and indicated a variety of uses that would be acceptable throughout all 86 acres that we're talking about here.

> Q: When was the Arrowhead development plan enacted?
>
> A: It was signed in 2011.
>
> Q: And you interpret that as amending the zoning ordinance regarding permitted uses?
>
> A: No, but I think it leaves open the possibility, meaning they're basically suggesting retail, commercial, office buildings, similar uses as now.

Later, with respect to the Department's Land Comparable 4:

> Q: Okay. This is zoned SC-NC, SmartCode dash new community, is that correct?
>
> A: Correct.
>
> Q: Have you determined whether a medical clinic is a permitted use in the industrial specialized zoning district?
>
> A: I believe that it is in the Arrowhead development plan as a possible use.
>
> Q: Is it listed in the industrial zoning, industrial specialized zoning district as a permitted use?
>
> A: I'm not certain of that, no.
>
> Q: You did no analysis of the industrial specialized zoning district to determine whether medical use was permitted?
>
> A: No.

Of the A-T zoning on the portions of the vacant parcels east of the Badger State Trail, the assessor, when asked what effect that zoning had on his 2013 assessment, stated: "Well, I considered some of the acres to the back for the transitional zoning, but I don't consider based on what I read, what I've talked to the City of Fitchburg, I don't consider that it's legally impermissible to build something on those properties if they wanted to develop them, and I think the Arrowhead development

plan reflects that, a variety of uses from office space to restaurants to manufacturers to warehouses."

A legend on the Plan's "Master Plan" map, one of several alternative maps included in the Plan, reads: "This is a conceptual master plan to illustrate potential new streets, parcels and buildings. Final design will be proposed by property owners and subject to city review and approval." The Department appears to read this to mean that the City is open to approve any retail, business, or commercial use of Petitioner's vacant parcels that Petitioner might request - so much so that the Department's assessor testified that he made no adjustments to his chosen comparable sales based on zoning. But this view simply disregards the notion that any proposed change in zoning would be "subject to city review and approval."

Moreover, none of the Plan maps show retail or nonmanufacturing commercial as a planned use of Petitioner's Property. Of this area, the Plan states: "The development plan proposes a predominance of manufacturing and warehouse uses (and related office uses), as these generate less peak hour traffic than other uses." The "Master Plan" map and two related alternative land use maps included in the Plan all show manufacturing and associated office space and parking in the future development of the I-S zoned portions of the vacant parcels west of the Badger State Trail. Those uses are consistent with the present zoning of the parcels. We also note that these maps all show multiple public roadways running through these portions of the vacant parcels as well, which is all part of the Plan.

The majority of the A-T zoned portion of the Highway PD Entrance Parcel abuts the Pine Ridge residential neighborhood. The A-T zoned portion of the Former Building 2 Parcel abuts forest land. With respect to these parcels the Plan provides:

> To balance conflicting interests regarding the land east of the Badger State Trail, the plan indicates: The land immediately west of the Pine Ridge neighborhood is planned for park or conservancy use. Two manufacturing lots are proposed, however the southern of the two parcels includes a 200' Park and Conservancy buffer from the nearest residential parcel. A 100' tree protection zone is provided along the edge of the Pine Ridge Neighborhood. Strict limitations on objectionable emissions, sound and light.

WPAM provides that "Local zoning ordinances, and how strictly they are enforced, can greatly influence value. Zoning ordinances limit the permissible uses of the land. If land use is limited, the value may be affected by zoning unless the purchaser can easily get the zoning changed to permit other uses." WPAM at 7-18.

Given the stated objectives of the Plan and the need to balance competing interests in the area, it is simply not credible to conclude that Petitioner, or anyone to whom Petitioner would sell these parcels, could easily obtain a zoning change to allow retail or general commercial uses.

The *14th Edition* states:

> Appraisals involving an assumed zoning change are subject to an extraordinary assumption or hypothetical condition depending on whether the date of value is a prospective date or a current date. The current market value cannot be based on an extraordinary assumption that the subject property is likely to be rezoned in the future, although depending on the intended use of the appraisal, a similar extraordinary assumption could be made in an appraisal of the prospective value of a property that is likely to be rezoned in the future.

14th Edition at 339.

Wisconsin Statute § 70.10 sets the statutory assessment date as the close of January 1 of each year. The assessment is based on the status of the property as of the close of that day. It is a valuation as of a current date, not a prospective date.

We find that there was no credible evidence presented at the trial in this case that would justify a conclusion that the zoning of the Former Building 2 Parcel or the Highway PD Entrance Parcel was likely to be, or could easily be, changed to something materially different than its present zoning. Consequently, as was the case with the Main Campus Parcel, we find it was error for the Department to rely on comparable sales which did not have zoning comparable to the subject property.

The presumption of correctness attached to the Department's assessment has been overcome. We now consider whether Petitioner has met its burden of persuasion by proving that its valuation is more credible than that of the Department.

Petitioner's appraiser presented a report with ten comparable sales for the valuation of the subject vacant parcels. Several of the comparable sales, specifically, numbers 7 through 10, were not actual sales, but were listings for sale. Petitioner's appraiser testified that, under Uniform Standards of Professional Appraisal Practice, an appraiser should consider "all available market data. They do not exclude listings." In addition, he noted that the National Association of Realtors has written papers on the validity of using listings that often help to set the upper limit of value when conducting an appraisal. Nevertheless, we have found that relying on listings in valuing

manufacturing property in the state is inconsistent with the *Markarian* hierarchy which requires the use of comparable recent arms-length sales. *ConAgra Foods Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-960 (WTAC 2015).

Petitioner's appraiser also identified and used six comparable land sales which he then adjusted. His land sales, unlike the Department's comparables, were either zoned I-S or a similar industrial zoning, or zoned A-T, or a similar agricultural zoning. While there were problems, as discussed below, with some of the six comparable properties selected by Petitioner's appraiser and issues with his presentation of the comparable sales, we believe that there were a sufficient number of comparable land sales selected and adjusted to support the valuations given by Petitioner.

As part of his qualitative analysis, Petitioner's appraiser testified as to other attributes that influenced his option of his valuation of the vacant parcels. He noted the issue related to the possible condemnation of a portion of the subject properties for roadways and the "chilling effect" that the Plan could have on a potential buyer of the entire parcels:

> Well, the language used here has a chilling effect. As of prior to the evaluation date plans were developed by Fitchburg, and they were preliminary plans, they weren't final plans. And they were – in fact, the city officials contacted various property owners in this area for the proposed construction of Spoke road to elicit their responses to it, and there were a number of scenarios that were developed, but they were conceptual plans, nothing specific. And in a case like that, my experience has been there's often uncertainty among property owners to the extent to what actually will be taken in the future, if the project will in fact even be done, when it

> will be done or maybe other property owners will think their property may be taken. So it usually has a detrimental or negative impact on value because of the -- primarily because of the uncertainty.
>
> Q: Well, what about if the plan was to do something fantastic with the area, wouldn't that be a plus as opposed to a chilling effect?
>
> A: It may be, but there's always uncertainty if the plan will actually -- a conceptual plan is exactly what it says. It's a plan. Plans are modified all the time. Sometimes they're canceled. But the point is there's uncertainty. Maybe when there's more specifics available to the market and they know in fact the plan is being implemented, it will probably have a positive impact, it may have a positive impact on values. But the point is at this point in time when there was a lot of uncertainty, often there will be no buyers available until they know more what to expect because the market does not like uncertainty, and it's a perfect example of that.

We agree that the varying and unsettled nature of the Plan could have a negative impact as of the date of the assessment. Further, the plan for a roadway to be placed somewhere on the subject parcels created uncertainty that could negatively impact the value of the parcels.

We further note that the Plan calls for significant portions of the A-T zoned portions of the Highway PD Entrance Parcel to be park or conservancy, essentially a buffer between the industrial areas and nearby residential property. Thus, this portion of the property could have little productive use in the eyes of a prospective buyer.

We also reject the Department's assertion that the bike trail that bisects the property, thereby encumbering the property, has basically no impact. It is the bike trail

that delineates this unusual split zoning for the parcels. It prohibits use of the parcels as a whole and limits their use. This is also a negative to the value of the properties.

The valuation analysis of Petitioner's appraiser, however, was far from perfect. The Department leveled a number of legitimate criticisms, including the appraiser's use of listings, the relatively small acreage of Petitioner's manufacturing comparable sales, the possibility that Petitioner's Land Sales Comparable 5 may not be an arms-length sale, and that he may not have made adequate adjustments for the differences between the A-X zoned comparable and the A-T zoned subject parcels. Unlike his analysis of the Main Campus Parcel comparable sales, the appraiser's valuation report on the vacant parcels does not quantify adjustments made to the comparable sales or the net value per square foot of each comparable sale after adjustments. Consequently, we do not have information which would allow us to exclude one or more comparable sales used by Petitioner's appraiser (including property sale listings) and to evaluate his quantitative adjustments and modify them to the extent we deemed appropriate, as we did in the case of the Main Campus Parcel.

Based on the testimony and documentary evidence presented at trial, we suspect that the true fair market value of these vacant parcels lies somewhere between the Department's assessed value and the Petitioner's appraised value, but there is no authority for us to simply "split the difference" between the values submitted. The Department valued the vacant parcels relying on four sales transactions, none of which was comparable to the subject property. Consequently, there is no credible evidence to support the assessed value. Although the valuation of the vacant parcels by the

Petitioner's appraiser has its faults, it is based, to some degree, on reasonably comparable sales transactions.

Petitioner has met the burden of persuasion and has shown that its opinion of value is more credible than those asserted by the Department. We find that as of January 1, 2013, the value of the Former Building 2 Parcel is $1,000,000 and the value of the Highway PD Entrance Parcel is $1,225,000.

D. Other Points of Contention

Several other issues were raised by the parties in their respective briefs which we address here.

In its proposed Finding of Facts and Brief submitted in this case, the Department noted no fewer than 23 times that Petitioner's appraiser was not licensed in Wisconsin. The evidence at trial was that he was not required to be licensed in Wisconsin in order to conduct the appraisal and prepare the appraisal report for Petitioner's appeal of these assessments. We do not consider the fact he was not licensed in Wisconsin, standing alone, to be problematic.

Petitioner's appraiser was not familiar with the term "*Markarian* hierarchy," but, nevertheless, he employed the sales comparison approach in valuing the Property, which is consistent with the *Markarian* hierarchy. The appraiser also developed values using the cost and income capitalization approach, but he relied on the comparable sales analysis in arriving at his value conclusion. Similarly, one of the Department's assessors developed a cost approach as part of her analysis but relied on the comparable sales approach in valuing the Main Campus Parcel improvements. We

note that developing values under alternative methods, if adequate data is available, is consistent with WPAM, if for no other reason than to test the results of the comparable sale analysis. WPAM at 7-22, 23.

The Department points out that Petitioner's appraiser initially made his appraisal by taking six parcels owned by Petitioner, three of which are the subject of this appeal and three of which are not, and combining them into two artificial parcels, each of which he valued using the comparable sales approach. Then, shortly before trial, he assigned values to each of the properties on appeal here as is required under Wisconsin law. The Department contends that the appraiser "created a mess" by combining these parcels in this fashion, with the result being that vacant land was used to value an improved property and an improved property was used to value vacant properties. That, however, is not what the evidence showed.

It is true that Petitioner's appraiser initially valued the three parcels on appeal with three other parcels owned by Petitioner in the immediate area. The entire grouping had been the subject of earlier appeals, but the three smaller parcels are not the subject of this appeal. The appraiser grouped the six parcels into two parcels for valuation purposes based upon his conclusion that each of the two parcels constituted an economic unit based upon zoning and other factors. It is not the case that sales of improved properties were used to value vacant land and vice-versa.

Later, when it became clear to the appraiser that individual values were needed for each parcel, he issued his letter assigning a value to each individual parcel. He backed out the value assigned to the small irregularly shaped parcel from the value

for his Parcel 1, which left only the Main Campus Parcel. Likewise, he backed out the values assigned to the two small vacant parcels from his value for Parcel 2 which left the Former Building 2 Parcel and the Highway PD Entrance Parcel. His letter was lacking in detail as to the full reasoning behind the values assigned to each of those two parcels, although he did testify that he allocated the full values to the parcels based on the location and physical characteristics of each. While the appraiser's path to his final valuations of the three parcels on appeal was not ideal, we are confident that he valued the Main Campus Parcel by using comparable sales of improved manufacturing property and the vacant parcels by using comparable vacant land sales.

At trial, the Department elicited testimony from an executive of Petitioner concerning an unsolicited $4.50 per square foot offer Petitioner had received for part of one of the vacant parcels in October of 2014. The offer was not accepted or countered. The testimony showed that the offer was for a specific 7 to 8 acre plot which would have required the subdivision of the vacant parcel and an attendant engineering study. The sale would also have required rezoning and site preparation of the plot. Any implication that this offer was an indication of the value of the vacant parcels on the assessment date is not credible. The offer came ten months after the assessment date. It was not countered or accepted, so no sale resulted. The offer was subject to significant conditions, requiring an investment of time and money, and would have required approvals from the city of Fitchburg. This offer simply has no probative value in this case.

Similarly, there was testimony at the trial concerning a 2014 sale by Petitioner to the City of Fitchburg of approximately three acres of land for one of the roadways contemplated by the Plan. Again, this is a non-arms-length sale of a small parcel well after the assessment date; it is not indicative of the value of the subject property for purposes of this case.

ORDER

Based upon the foregoing,

IT IS HEREBY ORDERED that the Petitions are granted and the Department's assessments for 2013 are modified to conform to the proof at trial as follows:

The Main Campus Parcel:	$6,261,507
The Former Building 2 Parcel:	$1,000,000
The Highway PD Entrance Parcel:	$1,225,000

Dated at Madison, Wisconsin, this 12th day of April, 2016.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

David D. Wilmoth, Commissioner

David L. Coon, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. **Several points about starting a case:**

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier** within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.

2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.

3. The 30-day period starts the day after personal service or the day we mail the decision.

4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is *http://wicourts.gov*.

This notice is part of the decision and incorporated therein.