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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019AP000974

Lowe's Home Centers, LLC,

Plaintiff-Appellant,

v.

Village of Plover,

Defendant-Respondent,

Appeal from the Circuit Court for Portage County
The Honorable Thomas T. Flugaur, Presiding
Circuit Court Case Nos. 2016CV000208 and 2017CV000187

Brief of Defendant-Respondent

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Statement of the Issues

1. **Did Lowe's rebut the statutory presumption that the Village's assessments were correct and valid?**

The circuit court credited the Village's evidence that it appraised the subject Lowe's in 2016 and 2017 using mass appraisal and held that Lowe's had failed to rebut the presumption that the assessments were valid and correct.

2. **Was valuation under a Tier 2 sales comparison approach required?**

The circuit court credited the Village's evidence that valuation under a Tier 2 sales comparison approach was not required because the comparable sales put forward by Lowe's were not reasonably comparable and were not apples-to-apples comparisons for multiple reasons explained by the court, including differences in market, location, and vacancy.

3. **Did Lowe's present Tier 3 valuation evidence sufficient to rebut the presumption that the Village's assessments were valid and correct?**

After concluding that there were no reasonably comparable sales and that a Tier 3 analysis was thus required, the circuit court credited the Village's Tier 3 evidence, specifically regarding its cost approach. The circuit court held that the Village's evidence was more credible than Lowe's, such that Lowe's did not rebut the presumption of correctness, but that, even if it had done so through its challenge to the

mass appraisals, no remand would be necessary because Lowe's did not prove that its assessments were excessive.

Statement on Oral Argument and Publication

Oral argument should not necessary because the issues will have been fully briefed.

This appeal does not meet most of the criteria for publication as it involves only the application of well-settled rules of law; the issues are determinable on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent. However, Respondent is aware that numerous other big box stores have challenged assessments based on arguments similar to those made by Appellant. As a result, the case could have value as precedent reaffirming the well-settled rules of law that the trial court followed.

Statement of the Case

This is an appeal of the circuit court's decision affirming the Village of Plover's tax assessments for 2016 and 2017 in an excessive assessment challenge under Wis. Stat. § 74.37.

Statement of the Facts

The broad contours of Lowe's Statement of Facts are generally accurate and can serve as a general factual background. We do not undertake here to correct or respond to all of Lowe's inaccurate factual statements, especially those Lowe's never uses in its argument section. The factual errors Lowe's does use in its argument, we discuss where appropriate in the Argument section. Some comments on the facts are necessary, however, at the outset.

A. The trial court was presented with credible evidence that the Village performed a mass appraisal of the subject property in 2016 and 2017.

Lowe's attacks the Village's assessments from 2016 and 2017. Lowe's falsely asserts that the Village "simply carried over" the exact market value determined by the initial 2005 appraisal. The Village assessor testified that the Village did not simply carry-over the numbers without analysis, but performed a mass appraisal each year from 2006 through 2017 and that the evaluation resulted in no change to the assessments. (R.128:15-16, 20-23, 99, 129-30). The mass appraisals included sales ratio analysis through use of a computer-assisted mass appraisal program that identified properties that needed adjustment from the prior year. (R.128:27, 15-16, 29-30, 43-44, 47, 83).

Dan McHugh, Jr. of Affiliated Property Valuation Services, LLC was contracted by the Village in 2016 and 2017 to perform commercial assessments. (R.57:5; R.58:6). The trial testimony and discovery responses explained that the mass appraisals for commercial properties were done by Affiliated using computerized software. But Lowe's never deposed or subpoenaed McHugh for trial to question him on his methodology. The trial court concluded that Lowe's did not rebut the presumption that the assessment was done properly. (R.122:5, P.-App.5).

B. The trial court was presented with ample evidence supporting its conclusion that the location and market in Plover was not comparable to the market and location of MaRous's Tier 2 comparable sales and that it was thus permissible to move on to a Tier 3 analysis.

For every argument or evidence Lowe's presented, the Village presented competing competent evidence and argument the court was entitled to credit.

Much of trial was a battle of experts. Trial lasted four days and involved hundreds of pages of reports and trial testimony. Lowe's presented a report and testimony from MaRous in an effort to present significant contrary evidence to rebut the presumption that the assessment was correct. The details of MaRous's opinions are discussed in the Argument section.

The Village defended its mass appraisal with the reports and testimony of Dominic Landretti, and Dr. Hamilton. Landretti performed his own appraisal of the property. Landretti's opinions will be discussed where appropriate in the Argument section.

Contrary to Lowe's assertion, Landretti *did* perform a Tier 2 sales comparison analysis. He performed the analysis and determined that there were no reasonably comparable Tier 2 sales. (R.110:7-9, R.122:6-7, P.-App.6-7). This *is* a Tier 2 analysis. *State ex rel. Kesselman v. Bd. of Review*, 133 Wis. 2d 122, 129-30, 394 N.W.2d 745, 748 (Ct. App. 1986).

1. The court received evidence that there was demand in Plover for big box buildings, due at least in part to land purchased in Plover for new construction of a big box store and the lack of vacancies of big box stores in Plover.

Lowe's offered evidence to try to persuade the court there was low demand for big box retail stores in 2016 and 2017. The court, however, heard contrary evidence from Landretti, who presented evidence that the market for big box stores in Plover was better than suggested by MaRous. (R.110:37, 38-48, 55; R.131:193, 196-98, R.131:228-29, 244-45).

Lowe's criticizes Landretti for not identifying new construction of large big box stores *in Plover* in the ten years before the assessment. (7-8). However, unlike the locations of MaRous's comparables (outside of Plover), there was very little vacancy in the area of the subject Plover Lowe's, and evidence showed there were no vacant big box stores in the immediate area. (R. 131:77; R. 116:5). Lowe's ignores the purchase of land across the street from the Crossroads development for the construction of a big box Meijer, which demonstrated demand for big box stores in Plover. (R.131:144-45, 152-53, 206). The trial court was persuaded by the Village's evidence of a market in Plover that was stronger than the market in the locations of MaRous's comparables. (R.122:7, P.-App.7).

Lowe's repeats its argument regarding economic issues unfolding in 2007. But the Village presented evidence that those market forces had changed by 2016-17, with home improvement big box stores faring better than others. (R.110:38-48, 55). It was undisputed that the subject store had not left or gone vacant and had not announced any intent to do so. (R.130:122-23, 163).

Lowe's discusses the extent to which sales of vacant stores could appropriately be used as comparable sales. Landretti did not use sales of vacant properties because he did not find them to be reasonably comparable to the subject Lowe's. MaRous used *only* sales of stores that were vacant or distressed as his comparables. (R.122:6, P.-App.6, R.71). Yet MaRous did not analyze the normal time period similar properties are vacant before sold in the markets for his comparables or for Plover, and did not analyze or account for how vacancy impacted the marketability of the properties.. (R.71; R.130:148, 130, 151-52, 184-85). MaRous, in fact, admitted that *it didn't matter how long the properties sat vacant* before sale so long as they were "move-in" ready. (R.130:63, lines 4-19). This contradicted MaRous's recognition that vacancies in an area result from an over-supply of retail properties, which obviously depresses market values. (R.130:22). It also ignored MaRous's admission that even an announcement of a store closing "terrifies the market". (R.130:22-23).

2. The court heard evidence that the donation by TOLD did not demonstrate a lack of demand for big box retail property in Plover.

Lowe's repeats its argument that a 2016 donation of land by TOLD demonstrated low demand for big box retail in Plover. Lowe's argued

the land was donated because it was worthless due to low demand for big box retail. But the court heard contrary evidence, crucially, that the "primary reason" for the donation was to receive a tax credit to setoff profits from a different sale. (R.66:6). The court also heard that, far from being worthless, TOLD valued the property at $3,775,000. (R.112:1).

C. The court heard ample evidence supporting the Village's valuation under the Tier 3 cost approach.

MaRous and Landretti's opinions of value of the property under a Tier 3 cost approach before subtracting functional and external obsolescence did not differ greatly.[1] Both exceeded the assessed value of the property. (R.71:45; R.71:47; R.71:47). The significant difference was that MaRous depreciated the value of the property *an additional 50%* for functional obsolescence, while Landretti did not deduct for functional obsolescence beyond what was accounted for in his economic age-life methodology. (R.130:180-81; R. 71:43; R.110:22, 76; 131:64-66). MaRous deducted for functional obsolescence because the Lowe's was not functional *as a multi-tenant building*. (R.130:180-81; R.71:43). The Village argued this was improper because MaRous estimated the cost to build an obsolete building and then depreciated the building because it was obsolete.

Lowe's states that Landretti "summarily dismissed" the notion that there was any functional or economic obsolescence. Not so. Mr. Landretti used the economic age-life model, which uses relevant data

[1] Lowe's states that Landretti "mistakenly" inputted the "wrong building type" using dated numbers in his cost approach. This was refuted at trial. Landretti used an up-to-date print version of the same source MaRous used in electronic form, and showed that he used the current and up-to-date numbers. (R.131:53-54, 254-56).

compiled into a database, and in doing so, the model itself accounts for and incorporates normal functional and economic obsolescence. (R.110:76; 131:64-66). The only functional obsolescence that an appraiser would need to separately account for under this model, would be abnormal functional obsolescence. Landretti evaluated whether there was any abnormal functional depreciation and concluded there was not any because the property was functioning properly with no problems and was similar to new big box properties being constructed. (R.110:21-22; R.131:18-19).

Standard of Review

This is review under Wis. Stat. § 74.37 of an allegedly excessive tax assessment, which is a new trial, not a *certiorari* action. *Trailwood Ventures, LLC v. Vill. of Kronenwetter*, 2009 WI App 18, ¶6, 315 Wis. 2d 791, 762 N.W.2d 841. In reviewing the circuit court's determination, the Court applies Wis. Stat. § 70.32 to determine whether the appraisal followed the statutory directives. *Regency W. Apartments LLC v. City of Racine*, 2016 WI 99, ¶22, 372 Wis. 2d 282, 888 N.W.2d 611. Statutory interpretation is a question of law, reviewed de novo. *Id.*

The Court does defer to a circuit court's fact findings. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 271, 714 N.W.2d 530, 534 (citation omitted). "When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony." *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). The court will upset a finding of fact only if it is clearly erroneous. *Id.* at 665-66. A finding of fact is clearly erroneous if it is against the great

weight and clear preponderance of the evidence. *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (quoted source omitted).

The Court ". . . may not consider whether the evidence might support a contrary conclusion, or a contrary inference that is reasonable." *Bonstores*, ¶10 Instead, the court examines "the record as a whole to determine whether evidence, and reasonable inferences therefrom, support the court's conclusion." *Bonstores*, ¶10.

"The question on appeal in a Wis. Stat. § 74.37 action is not whether the initial assessment was incorrect, but whether it was excessive." *Metro. Assocs. v. City of Milwaukee*, 2018 WI 4, ¶40, ¶64 n.15, 379 Wis. 2d 141, 158, 167, 905 N.W.2d 784, 784, 792, 797. The taxpayer has the burden to show the assessment is excessive. *Regency W. Apts. L.L.C. v. City of Racine*, 2016 WI 99, ¶ 72, n. 23, 372 Wis.2d 282, 888 N.W.2d 611.

Furthermore, a municipality's assessment enjoys a statutory presumption of correctness. Specifically, under Wis. Stat. § 70.49(2):

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

To overcome the presumption the taxpayer must present its own direct and unambiguous contrary evidence – referred to as "significant contrary evidence" – or a challenge will be rejected. *Adams Outdoor Advert. Ltd. v. City of Madison*, 2006 WI 104, ¶ 25, 294 Wis. 2d 441, 717 N.W.2d 803. If the assessor correctly applies the Manual and Statutes,

and no *significant* contrary evidence exists, the assessment is deemed accurate and the court must reject the challenge. *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶12, 317 Wis. 2d 228, 767 N.W.2d 567.

Even if the taxpayer establishes that the assessments were not prepared in accordance with Wisconsin law, it does not follow that they were necessarily excessive. Rather, the assessments merely lose their presumption of correctness and the case must be decided on general legal principles. *Bonstores*, 351 Wis.2d 439, ¶5; Wis. Stat. § 903.01; *JC. Penney Co. v. Wisconsin Tax Comm'n*, 238 Wis.2d 69, 298 N.W.2d 186, 191 (1941).

Summary of Argument

Lowe's attacks the circuit court's decision by seeking to relitigate factual and credibility issues it lost below.

The court heard testimony that the Village performed mass appraisals including the subject property in 2016 and 2017 with the help of an expert consultant who worked with the valuation models to determine which commercial properties needed adjusting. Lowe's did not depose or call that person at trial, but instead cross-examined the Village assessor using the chapter in the Manual devoted to single-property appraisals, without discussing the chapter in the Manual applicable to mass appraisals. The trial court appropriately concluded that Lowe's had not rebutted the presumption that the assessments were correct.

Lowe's then presented at trial an appraisal from Mr. MaRous, focused on painting a dim picture of the market for large big box retail properties and arguing that given the rise in e-commerce, there simply wasn't demand for big box stores. Nevertheless, MaRous opined in his appraisal report that the highest and best use of the subject property was continued use as an operating Lowe's. (R.71:24). He then improperly went on to provide alternate highest and best uses for the property and improperly interjected cost and comparable data into his analysis from properties with other highest and best uses. (R.71:24-25).

As described by Mr. Landretti and Dr. Hamilton at trial, and consistent with the WPAM, to perform an appraisal, one highest and best use must be chosen so the appraiser can select data from properties with a reasonably comparable highest and best use.

(R.131:37-40; R.132:29-33; R.75:13). The Village argued at trial that it was clear when reviewing MaRous's analysis under the various approaches to valuing property that the failure to choose one highest and best use resulted in flawed and unreliable opinions of value. The trial court agreed.

For example, in his Tier 2 sales comparison approach, MaRous chose eight sales of big box stores. But all of the stores sat vacant for a time before they were able to be sold, one for as long as four years, and many were converted to different highest and best uses after they were sold. While MaRous performed the sales comparison approach, the Village argued at trial that it was not an apples-to-apples comparison with the subject Lowe's because he did not properly analyze whether the highest and best use of the subject property was reasonably comparable to properties used in the sales comparison approach. He also failed to analyze how the vacancies impacted the marketability of the properties. It was undisputed that the subject Lowe's was a stable occupied store that had not been vacant and had not announced any intent to go vacant.

The court held that by not considering vacancy at all, MaRous failed to follow the directive in the WPAM to ensure, if using comparables that are vacant, in transition, or distressed, that the subject property is similarly vacant, in transition, or distressed. Further, the court agreed with the Village that MaRous did not perform an apples-to-apples comparison in his sales comparison approach and that the properties he used did not exhibit a similar highest and best use in a similar placement in the retail market. (R.122:6-9; P. App.6-9).

The Village argued that the foundational problem of MaRous not choosing one highest and best use was most recognizable in his cost approach. The Village argued that MaRous's deduction for functional obsolescence was flawed because MaRous estimated the cost to build a building with one highest and best use and then depreciated the building because it did not have a different highest and best use. The court agreed that Landretti's cost approach opinion – which did not improperly include an adjustment for abnormal functional obsolescence – was more credible:

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

(R.122:9; P.App.9).

Lowe's appeal essentially seeks a do-over. Lowe's does not demonstrate that the court made any legal errors. The court's conclusion that the Village's evidence was more convincing was based on credible evidence and was not clearly erroneous. The Decision should therefore be affirmed, both as to its conclusion that Lowe's has not rebutted the presumption and that the Village's evidence of value is more credible and Lowe's has failed to show its assessments were excessive.

Argument

I. Lowe's did not overcome the presumption that the Village's assessments, arrived at using mass appraisals, were correct.

As explained above, the Village's valuation is presumed correct unless Lowe's either proved that it was not performed according to law or presented significant contrary evidence. Lowe's did neither. As the trial court appropriately found, "Lowe's failed to demonstrate that the mass appraisal performed by the Village for the January 1, 2016 and January 1, 2017 years did not comply with Wisconsin law." (R.122:5, P.-App.5).

A. The court's determination that mass appraisals were performed on behalf of the Village by its retained consultant in 2016 and 2017 was supported by the record and was not clearly erroneous.

The court found that "[a] review of the evidence shows that the Village contracted with Dan McHugh, Jr. of Affiliated Property Valuation Services, LLC. to perform commercial assessments in 2016 and 2017. Wis. Stat. § 70.055 specifically allows municipalities to retain expert assessment help." (p. 5). The determination was not clearly erroneous as it was amply supported.

The Village assessor testified under oath that Dan McHugh, Jr. was hired by the Village to assist with the mass appraisals for commercial properties performed in 2016 and 2017. McHugh was responsible for the computer-assisted mass appraisal models for the commercial properties, which identified properties needing adjustment. (R.128:24, 56, 80-81, 99, 129-130, 133). Lowe's chose not to depose or question Mr. McHugh at trial even though Lowe's was provided his name in

discovery, even before the discovery responses were amended. (R.57:5; R.58:6). Instead, Lowe's cross-examined the Village assessor, who left the details of the computer-assisted mass appraisal of commercial properties to Mr. McHugh. (R.128:56, 80-81, 70, 12).

B. The Village's discovery answers do not compel the conclusion that no mass appraisal was done.

Lowe's relies heavily on the Village's amendment of its discovery answers to argue that the Village simply fabricated the notion that a mass appraisal was done. The argument fails.

The initial interrogatory responses indicated that the subject property "has only been assessed once in 2005." (R.57:3, P.-App.46). Obviously, this was mistaken, since this lawsuit is an appeal of a 2016 and 2017 *assessment* of the property. The property was *assessed* every year since 2005. The initial answer was overly-narrow and provided information only about the basis for establishing the value of the *initial* assessment performed in 2005. It was amended to clarify that the Village determined in mass appraisal maintenance years to keep the assessed value for the subject property the same from 2006 through 2017. If Lowe's did not believe a mass appraisal was done, it could have followed up by deposing Mr. McHugh or calling him at trial. It chose not to. Especially given that decision, the court was entitled to accept this reasonable explanation.

C. Lowe's argument that the mass appraisals were not done according to Wisconsin law also fails because Lowe's questioned the Village Assessor using the wrong legal standard about documents that did not constitute the mass appraisals.

Lowe's characterizes the AARs filed for 2016 as improperly-performed mass appraisals because they did not include a "valuation system" consisting of "mass appraisal applications of the sales comparison, cost, and income approaches to value." (Brief, 33). Lowe's argues that the Village assessor even "admitted" that the AARs did not contain a valuation system or model.

The argument fails. The AARs were not the mass appraisals done by the Village's consultant, but are Department of Revenue-required reports on DOR templates, containing summary information from the mass appraisal. (R.128:59, 57). The Village did not state that the 2016 and 2017 AARs constituted the mass appraisal. Its Interrogatory responses instead indicated: "see Annual Assessment Reports . . . for more information on the mass appraisal performed in years 2016 and 2017.") (R.58:4, P.-App.53).

The valuation model and valuation system were not in the AARs, but were in the actual computer-assisted mass appraisal done by Dan McHugh, who was charged with creating the valuation models and performing the actual mass appraisal valuations for commercial properties. (R.128:133, 57, 59). Lowe's chose not to question McHugh about the specifics of the mass appraisal methodology and valuation system he utilized.

Additionally, Lowe's focused its adverse examination of the assessor on Chapter 7 of the 2016 WPAM, Part 3 – (R.75:22-40) – which only deals with single property appraisal. (R.128:125-28, 28-29, 70-80). Lowe's did not question the assessor regarding Chapter 14 of the WPAM (2016). Chapter 14, titled Assessment/Sales Ratio Analysis, is identified in Chapter 7 as the chapter regarding mass appraisal. (*Id.*, R.75:8-41). Mass appraisals are appropriate. *Metro Assocs. v. City of Milwaukee*, 2018 WI 4, 379Wis.2d 141, 905 N.W.2d 784. If Lowe's wanted to demonstrate that the Village Assessor failed to comply with the requirements of mass appraisal, it should have asked questions under the correct chapter of the WPAM

Lowe's failed to meet its burden to prove that the Village did not perform a mass appraisal in 2016 and 2017 that complied with Wisconsin law. Lowe's improperly suggests that the Village had the burden to prove that a mass appraisal was done and was done properly. This is not the law. The law presumes the Village properly assessed the properties in 2016 and 2017. By not questioning the person who worked most intimately with the mass appraisal for commercial properties and by criticizing the mass appraisal under single-property appraisal standards, Lowe's failed to overcome that presumption.

II. The court's determination that the Tier 2 comparable sales offered by MaRous were not reasonably comparable to the subject property and were not apples-to-apples comparisons was not clearly erroneous, but was based on evidence in the record.

A. Contrary to Lowe's mischaracterization, the court's decision did not rely exclusively on the premise that no sales of vacant premises could *ever* be used as comparables because the Lowe's was not vacant and had not announced that it was leaving.

The court's Decision focused on the difference in the *market* for MaRous's comparables versus the subject property in the Crossroads Commons in Plover. (R.122:1-2, P.-App.1-2). The court concluded that "The real issue in this case is (when assessing fair market value) whether a home improvement retail building, Lowe's, which is located in a thriving low vacancy retail setting, compares with vacant or transition properties located in other areas of the state." (R.122:2, P.-App.2). The court noted that the Village's expert, Dr. Thomas Hamilton "found that the comparables used by MaRous are not part of the same direct competitive supply market as Lowe's . . ." (R.122:6, P.-App.6). The court again relied on location, noting that "[a]ll the experts agree that location is a primary factor when assessing any real estate." (R.122:8, P.-App.8).

The court also found MaRous's opinions less credible because MaRous's report ignored factors that admittedly affect the value of his comparables. MaRous discussed in his report how long most of his comparables were exposed to the market before they sold and acknowledged that properties exposed to the market for shorter periods of time generally sell for less than if they had been more fully exposed to the market. (R.122:7, P.-App.7; R.130:128-29, 153-56). MaRous,

however, used three sales in which the properties being sold were in receivership, all sold on the same day, and all sold after having been exposed to the market for a very short period of time. For those properties, MaRous's report did not discuss exposure time at all. (*Id.*). The court also noted that with regard to the Lowe's in Brown Deer, the court heard no evidence regarding the time it was exposed to the market or the vacancy rates in that area. (R.122:8-9, P.-App.8-9).

The court also based its Decision on issues with the highest and best use in MaRous's comparables. The court noted that Landretti performed a search for Tier 2 reasonably comparable properties and found that some of the sales of big box stores he found were purchased for redevelopment (R.122:7, P.-App.7). The court noted that these and other sales were rejected by Landretti under the Manual's instruction that comparables should exhibit "a similar highest and best use and similar placement in the retail marketplace." (R.122:8, P.-App.8).

Crucially, while Lowe's argues that the court relied on some bright-line rule that sales of vacant stores can *never* be used as comparables, the court's decision, and the Manual, is more nuanced. The normal time period similar properties are vacant before sold in a location provides information about the relevant market, including the supply and demand for those types of properties. As the court found, and Lowe's has not disputed in its Brief, MaRous failed to consider the normal time period similar properties were vacant before sold in the location where his comparables were located or in Plover. (R.122:7, P.-App.7). MaRous thus failed to persuasively explain how the *markets* where his comparables were located, where big box properties (at least MaRous's

comparables) sat vacant for as long as four years before selling, was meaningfully or reasonably comparable to the thriving Crossroads Commons *market* which was not experiencing vacancies of big box retail properties. (*Id.*). To the contrary, Landretti cited the purchase of property for the planned construction of a big box Meijer as evidence of a demand in Crossroads Commons in Plover for big box retail space. (R.131:144-45, 152-53). MaRous did not convince the court that the market for big box retail in Plover was reasonably similar to the markets for MaRous's comparables.

B. The court did not err in considering vacancy because Wisconsin law provides that vacancy is a relevant factor appraisers must consider in determining whether sales are reasonably comparable, and MaRous failed to do so.

Lowe's argues that vacancy as a relevant factor in determining whether properties are reasonably comparable stems from an overly-expansive reading of *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App. 131, ¶22, 351 Wis.2d 439, 454, 839 N.W.2d 893, 901. (Br. 39-40). Lowe's reads *Bonstores* narrowly as approving only consideration of "distressed" sales, which Lowe's defines narrowly and then argues did not apply according to MaRous's opinion, which Lowe's calls "unrebutted." The argument fails because Lowe's reads *Bonstores* too narrowly and completely ignores the Manual's explicit requirement that assessors must consider vacancy.

1. *Bonstores* permits consideration of occupancy and vacancy in determining whether sales are reasonably comparable.

Bonstores is directly on point and supports the circuit court's Decision. In *Bonstores*, the trial "court explained that it did not 'see the

apples-to-apples comparison' between the subject property and the properties [taxpayer's appraiser] relied on as comparable, and concluded that [taxpayer's appraiser] did not provide meaningful comparable properties because many of the properties had gone 'dark.'" ¶21. This supports the circuit court's rejection of MaRous's comparables.

But Lowe's reads *Bonstores* narrowly, as allowing the trial court to consider only "distressed property sales—not merely vacant sales." (Br. 40). Instead of using the specific definition of "distressed" that the circuit court and court of appeals in *Bonstores* used, Lowe's uses the definition of "distressed" as "a sale involving a seller acting under undue duress." (Br. 40). By not using the definitions used in *Bonstores*, Lowe's reads *Bonstores* too narrowly.

The circuit court in *Bonstores* found no meaningful comparison because a majority of the comparables had gone "dark," by which the circuit court meant that there was "a period of time where the store is not operating." *Id.* ¶21. As in our case, there was no indication the subject was dark, had ever gone dark, or would go dark. *Id.* ¶22. Therefore, the circuit court appropriately concluded that the subject property and the comparables were not apples-to-apples comparisons.

As Lowe's notes, the circuit court did refer to the taxpayer's comparables as "distressed in one way or another." *Bonstores* at ¶21. In upholding the circuit court's analysis, the court of appeals explained that "[i]t appears from the record that the circuit court used the phrase 'distressed property' to refer to a 'dark' business." *Id.,* ¶22. The circuit court and court of appeals thus acknowledged that a sale of a dark

business—one that was not operating for a period of time—is a type of distress sale. *Bonstores* thus approved the circuit court's conclusion that the comparables were not apples-to-apples comparisons because they were all "dark," meaning there was a "period of time in which the store [was] not operating," whereas the subject property was not "dark" in that same sense.

Neither the trial court's rejection of the comparables, nor the court of appeals' approval of that rejection were contingent on proof—beyond the fact that the store was not operating for a time before the sale—that the seller was acting under undue duress. *Bonstores* approved consideration of *vacancy* as bearing on whether purported comparables were reasonably comparable.

2. Lowe's has failed to show that consideration of occupancy in evaluating comparability runs afoul of "foundational valuation principles under Wisconsin law."

Lowe's argues that any consideration of vacancy would contradict "foundational valuation principles" under Wisconsin law. This argument fails because Wisconsin law, *i.e. Bonstores*, explicitly permits such consideration. The argument is also woefully undeveloped.

Given the central importance of the vacancy issue in Lowe's argument at trial, one would expect Lowe's to develop this argument in its moving brief. Lowe's should be prohibited from developing its argument for the first time in reply. *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). Lowe's argument also fails.

2.a. Walgreen/Oshkosh does not establish that an assessment cannot consider vacancy.

Lowe's argument that consideration of occupancy would violate "foundational valuation principles" under Wisconsin law relies, ironically and impermissibly, on an *unpublished* decision, *Walgreen Co. v. City of Oshkosh*, No. 2103AP2818 (WI App. Dec. 17, 2014) (unpublished, not citable as precedent) (P.-App.14-21).

Walgreen/Oshkosh is neither precedential nor persuasive. *Walgreen/Oshkosh* considered the valuation of a Walgreen that was leased at significantly above-market rates. The circuit court concluded that, by relying on those above-market rates, the city's assessor improperly valued the contractual rights involved in the lease and not just the property itself. The assessor skewed value by selecting only comparables that were "investment grade," which the City characterized as those in which "[t]he value of the investment is determined by the value of the real estate, *the creditworthiness of the tenant and the value of the lease itself.*" *Id.* ¶13. The City thus admitted that it was valuing things other than the real property interest. The present case does not involve allegations that above-market leases were valued.

Walgreen/Oshkosh does not hold that considering occupancy is the same as valuing the business, or that occupancy can *never* be considered. Lowe's broad reading of *Walgreen/Oshkosh* is inconsistent with the *Bonstores* and the Manual, which clearly state that occupancy and vacancy are relevant considerations in comparing relevant markets and properties.

2.b. Walgreen/Madison does not establish that an assessment may not consider vacancy.

Lowe's summarily asserts, *in a single sentence*, that under *Walgreen/Madison*, whether a property is vacant or occupied at the time of sale can *never* be relevant to determining the value of the property. (Br. 42). The extent of Lowe's "argument" is this quote: "[T]he valuation of the fair market value of property for purposes of property taxes is by its nature different from business, or income tax assessment. . . ." *Walgreen/Madison*, 2008 WI 80, ¶65, 311 Wis.2d 158, 752 N.W.2d 687. That's it.

This argument is undeveloped and should not be considered. *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). The quote is by no means self-explanatory as proving Lowe's point, especially since it contradicts *Bonstores*. The potential applicability of a Wisconsin Supreme Court case as establishing controlling "foundational principles" is significant and warrants more than a vague quote. Lowe's fails to develop an argument that there is some "foundational" principle that occupancy should never be considered—especially in light of the contrary holding in *Bonstores.* The Court should strike, and not consider any such argument Lowe's might try to develop in its reply brief. *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

This undeveloped argument is even more pernicious in light of the footnote Lowe's drops immediately thereafter in which it summarily asserts that if the Manual could be interpreted as inconsistent with this unexplained "foundational holding" in *Walgreen/Madison* and other cases, the cases control. (Br. 43, fn. 7). Lowe's fails to develop any

argument on this issue, either. Lowe's fails to discuss what the Manual requires and whether the Manual's directive, which the law requires assessors to follow is somehow inconsistent with *Walgreen/Madison* or some other case. We assume Lowe's is referring to section 9-12 of the Manual, *on which the court relied in its Decision* (R.112:6-7, P.-App.6-7), which *does* require consideration of vacancy, which MaRous failed to follow, and which Lowe's studiously and completely ignores in its appellate brief.

By failing to address the applicability of section 9-12 of the Manual or develop an argument explaining how the Manual's directive is inconsistent with published Wisconsin cases, Lowe's has waived any argument that the Manual does not validly instruct appraisers to consider vacancy, or that the trial court erred in relying on this directive in the Manual. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

3. Though ignored by Lowe's, the Manual requires consideration of vacancy.

3.a. The Manual requires consideration of vacancy.

The Manual supports the circuit court's decision and refutes the (undeveloped) argument that occupancy and vacancy can *never* be considered.

The Manual explains that there are often no reasonably comparable sales for commercial properties, and requires assessors to choose comparable sales exhibiting similar highest and best use and similar placement in the commercial real estate marketplace:

> *Because of the wide variety of commercial properties it may be difficult to find comparable sales.* For example, sales of gas stations or movie theatres are not appropriate for valuing small coffee houses. When valuing properties, the assessor should choose comparable sales exhibiting a similar highest and best use and similar placement in the commercial real estate marketplace.

(2016 WPAM 9-12, "Sales Approach" R.76:12.)

The Manual goes on to give direction for ensuring "apples-to-apples" comparisons:

> The assessor should avoid using sales of improved properties that are vacant ("dark") or distressed as comparable sales unless the subject property is similarly dark or distressed. A vacant store is considered dark when it is vacant beyond the normal time period for that commercial real estate marketplace and can vary from one municipality to another. A recent court case stated distressed properties are not seen as meaningfully comparable to operating properties. See the following quotes from *Bonstores Realty One LLC v. City of Wauwatosa,* 2013 WI App. 131, 11 21, 22, 34, and 35. 351 Wis. 2d 439, 839 N.W.2d 893:

(*Id.*).

The circuit court concluded that MaRous did not follow this directive. (R.122:6-7, P.-App.6-7). MaRous did not consider whether his vacant comparables were dark, did not consider the normal time period similar properties were vacant before sold in the relevant marketplace for his comparables or the subject, and therefore did not evaluate whether the subject property was "similarly dark or distressed" compared to his vacant comparables.

Lowe's does not challenge this conclusion. An expert's valuation, such as MaRous's, that does not follow the Manual cannot constitute significant contrary evidence capable of rebutting the presumption of correctness. *Allright Props., Inc. v. City of Milwaukee*, 2009 WI App 46, ¶31, 317 Wis.2d 228, 767 N.W.2d 567.

Even though a commercial real estate market in which big box retail stores sit vacant for considerable periods of time before selling is clearly different from a market without any such vacancies, *MaRous intentionally ignored vacancy altogether*. He did not make *any* adjustments for the vacant status of his comparables. The court appropriately accounted for MaRous's failure to follow the Manual as affecting the reliability, legality, and credibility of MaRous's opinions. That Lowe's does not address this central issue in its argument is baffling.

The Manual also provides explicit directions to assessors in assessing *retail* stores:

> Regardless of the approach used, the assessor should be careful to avoid using comparable sales involving properties that are *vacant*, in transition *or* suffering from some form of distress unless the subject property is similarly *vacant*, in transition, *or* distressed. Rather, when valuing stabilized, operating retail properties, the assessor should choose comparable sales exhibiting a similar highest and best use and similar placement in the retail marketplace. *See Bonstores Realty One LLC v City of Wauwatosa*, App. No. 2012AP1754 (2013).

(2016 WPAM 9-43, emphasis added; R.76:44)

This *explicitly* directs assessors to 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. It was undisputed that the subject property was not vacant or in distress. It was also undisputed that MaRous's comparables were all vacant. (R.71; R.130:63, 4-19). MaRous did not ensure that the subject Lowe's was similarly vacant, in transition, or distressed.

After directing assessors to avoid using comparables when the subject property is not similarly vacant, in transition or, the Manual goes on to explain that, *"[r]ather*, when valuing stabilized, operating retail properties, the assessor should choose comparable sales exhibiting a similar highest and best use and similar placement in the retail marketplace." (R.76:44, emphasis added). This contrast, marked by "rather," recognizes that, when a subject store is a stabilized operating retail property, sales of vacant, in transition, or distressed stores are *not* comparable, do *not* exhibit a similar highest and best use, and are *not* similarly placed in the retail marketplace.

The argument that the Manual only applies to comparables that are "dark" does not help Lowe's because MaRous did not determine the normal time period similar properties were vacant before sold in the commercial retail marketplace for either his comparables or the subject Lowe's. By failing to consider this or the effect of the vacancies of his comparable sales, MaRous failed to follow the Manual's directive to take care to avoid using comparables that were vacant, dark, or distressed similarly as the subject property.

Unlike MaRous, Landretti noted that sales of big-box retail and similar properties he found included properties that were vacant, distressed, purchased for redevelopment, or leased, and followed the Manual to conclude that these dissimilarities rendered them not reasonably comparable as Tier 2 comparables. (R.110:13-44).

3.b. Based on this clear direction in the Manual, which Lowe's ignores, Lowe's argument that the Manual, *in other places* does not explicitly list "vacancy" as a factor to consider in determining whether property is reasonably comparable is disingenuous.

Lowe's argument that the Manual's general list of factors to consider in evaluating comparability does not explicitly list "vacancy" is disingenuous given that Lowe's ignores that the Manual *explicitly* requires consideration of vacancy in 9-12 and 9-43.

C. The court properly applied the "reasonably comparable" standard under Wisconsin law.

Seizing on several comments in the Decision, Lowe's argues that the trial court demanded that MaRous's comparables be "identical" instead of just "reasonably comparable." Lowe's suggests that the law requires assessors to pick comparables that are "close enough" and then adjust away any differences, as it argues MaRous did with a "diligent analysis" that was "unrebutted."

1. The court correctly applied the "reasonably comparable" standard and did not require comparables to be identical.

Lowe's criticizes the court's comment that, absent a Tier 1 sale, "there is a significant amount of speculation as to the fair market value of this particular building" and its comment in the conclusion that in the many property valuation cases it has heard, it was rarely

"completely comfortable" that a comparable was extremely accurate. (R.122:8, 12, P.-App.8, 12).

Lowe's argument flyspecks the court's comments out of context, pretending they constitute the trial court's entire analysis. But it is clear from the rest of the Decision that the court did not summarily skip from a Tier 1 analysis to a Tier 3 or require identical comparables. Rather, the court understood that the law recognized that if there are *reasonably* comparable sales, the Tier 2 sales comparison approach *must* be used. (R.122:5, P.-App.5). The court concluded MaRous's comparables were not reasonably similar after analyzing the evidence and evaluating the credibility of witnesses at trial. As explained above, this determination was not clearly erroneous.

2. The law does not require defining comparables broadly and then adjusting away all differences.

Lowe's oversells the role of adjustments when it argues that the Manual and case law require assessors to liberally and inclusively select comparable property and then adjust away the differences. Lowe's authority holds only that adjustments *can* be made, not that they must always be used, regardless of the dissimilarities between the properties. *See, e.g.*, *State ex rel. Brighton Square Co. v. City of Madison*, 178 Wis.2d 577, 588, 504 N.W.2d 436, 440 (Ct. App. 1993) (taxpayer appropriately made adjustments to account for minor differences between two otherwise very similar properties). The portion of the Manual on which Lowe's relies does not support its argument. (Br. 44 citing R/75 [WPAM] at 7-8 [P-App.129]).

Nothing in the Manual required finding the properties to be similar and then adjusting away their differences. Reasonableness is an issue of fact, and whether properties are *reasonably similar* is a matter of degree. *Rosen v. City of Milwaukee*, 72 Wis.2d 653, 665, 242 N.W.2d 681, 686 (1976) (Reasonable comparability depends upon the degree of similarity between the properties.) The court weighed the evidence and was persuaded that Landretti's opinion that the properties were not reasonably comparable was more credible. That determination was not clearly erroneous.

3. MaRous's opinions that the comparables were reasonably comparable was not uncontradicted or unrebutted, but, to the contrary, the court had ample evidence that the properties were not comparable in several respects, including location and market factors.

3.a. As Lowe's begrudgingly acknowledges, the court did consider factors relevant to reasonable comparability in concluding that it was not persuaded that MaRous's comparables were reasonably comparable.

Lowe's argument incorrectly presumes that if MaRous performed a valid appraisal that discussed the ways in which he believed the subject property was similar to his comparables, the court was required to accept his opinion. Lowe's complains that, because the court wasn't persuaded, it must not have been paying close enough attention, arguing that except for "commentary" on location, the court did not reference the elements of comparison.

This begrudging acknowledgement that the court *did* consider differences in the location of the subject property compared to MaRous's comparables is telling, given the indisputable crucial importance of

location to real estate values. Location is a crucial consideration in valuation.

In the section of the Manual addressing the assessment of retail property, after directing the assessor to "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" the Manual states that:

> *The location for a retail store is of extreme importance.* National firms do extensive market studies to determine the exact location of their retail outlets. Even the side of the street on which property is located can have an effect on value. . . .

(R.76:44, at 9-43, emphasis added). Of course, the importance of location was undisputed (R.122:8; P.-App.8), which is why Lowe's disparagingly refers to the court's analysis as "commentary" on location.

3.b. MaRous's opinions were not unrebutted, the Court had evidence to support its conclusion.

Lowe's criticizes the court's factual determinations by arguing that MaRous "diligently analyzed" any differences between the location of the subject premises and the location of his comparables, concluded that the locations were similar, and made adjustments where he thought there were differences. Lowe's argues that his testimony was "unrebutted." But MaRous's testimony and opinions regarding his comparables were far from unrebutted.

Extensive evidence and argument was presented at trial regarding differences between the subject property and MaRous's comparables.

The court received evidence, argument, and expert opinion that the Crossroads area in Plover was a significantly different market than the markets in which MaRous found his comparables.

All of the comparable sales MaRous used had been vacant for a time before they sold, one for four years. (R.130:162-63). Lowe's failed to present evidence about the normal time period similar properties were vacant before sold in either those locations or Plover. Unlike the markets for MaRous's comparables, Crossroads did not have vacant big box properties sitting around, unused, for years waiting to be sold. Given the thriving real estate market in Crossroads and Plover, and given that the big box retail stores there had not been forced to vacate, but were being occupied by stable businesses, it would be speculative to predict that if Lowe's offered the property for sale (without restrictions) that another big box entity would not purchase the store to take advantage of the location or that if Lowe's vacated, the property would stay vacant for any appreciable amount of time.

Landretti presented evidence that Plover and Crossroads was a vibrant and thriving market. In addition to there being no relevant vacancies, there was evidence of *demand* for big box retail space should one be offered up for sale. The purchase of land to develop a Meijer is convincing evidence that Crossroads in Plover was a thriving and growing retail real estate market and that if Lowe's were offered for sale there would be high demand for that space. Lowe's tried to downplay this evidence by ignoring it. Instead, it incorrectly asserted that Landretti only had evidence of demand outside of a sixty mile radius from the subject store and that did not demonstrate demand at

the subject store. While the Village strongly disagreed that Landretti only had evidence of demand outside of a sixty mile radius, Lowe's own argument undercut MaRous's appraisal since all the sales data he used in his sales comparison approach were of properties more than sixty miles from the subject store.

These are all factual issues. There was real dispute at trial. Evidence and arguments were presented on both sides of this issue. MaRous's opinions were far from "unrebutted." Lowe's does this issue a disservice by categorically stating that MaRous's opinions were unrebutted. Tellingly, Lowe's does not address any of the contrary arguments or evidence that was presented to the court and does not defend or explain MaRous's determinations in any detail.

3.c. The court also relied on exposure time in concluding that MaRous's comparables did not present apples-to-apples comparisons.

Lowe's begrudgingly admits that the court addressed location in evaluating comparables, but it ignores that the court also relied upon exposure time in concluding that MaRous's comparables were not reasonably comparable. The court noted that "A shorter exposure of time is also a sign that the property is not reasonably comparable. Further, a shorter exposure time could be evidence of a distressed sale." (R.122:7, P.-App.7). The Decision noted that three of MaRous's comparables were former American TV stores that had sold after a very short exposure time following American TV going into receivership. (*Id.*). "MaRous's report excludes information about the short exposure time of those sales, and admitted while testifying that the exposure/marketplace time for these properties was less than his stated

exposure time of two to three years, and he did not dispute that the sales were exposed to the market for only two months." (*Id.*). This failure of MaRous to address exposure time at all for his comparables that sold after very short exposure to the market count for shorter exposure time casts a shadow on the credibility of MaRous's other opinions.

3.d. The court's rejection of MaRous's comparables was supported by the record.

Lowe's fails to meet its burden to persuade the court that his comparables were reasonably comparable. The court appropriately weighed the evidence and gauged the credibility of the competing experts to determine which evidence and expert opinion analysis it deemed more credible and persuasive. Its decision was not clearly erroneous. The Court should decline Lowe's invitation to re-try the case on paper.

D. Lowe's fails to show that the court's rejection of Tier 2 evidence was based on a highest and best use conclusion contrary to the evidence.

Lowe's criticizes the court for stating that the highest and best use would be another home improvement store desiring to be a main anchor in a thriving retail environment, when the experts agreed that the highest and best use was simply "continued big box retail." (Br. 46). Lowe's summarily states there was nothing in the record warranting reference to highest and best use as a home improvement store.

This argument must be rejected as undeveloped and because. Lowe's presents no argument explaining how this statement affected the court's rejection of MaRous's comparables. It is clear that the court did

not reject MaRous's comparables simply because they were not home improvement stores looking to anchor the Crossroads development in Plover. That would have made for a short decision. Additionally, both side's experts occasionally phrased the subject property's highest and best use similarly, sometimes referring to continued use as a Lowe's. (R.71:24) (MaRous stated in his report that "the highest and best use of the subject property is its continued use as a Lowe's retail building.") Without a reasoned argument, it cannot be presumed that the court attached any special meaning to this phraseology or that it affected the court's Decision.

E. The court did not inappropriately rely on any allegedly ambiguous provision in the Manual as always requiring the use of Tier 3 cost approach for appraising large retail properties.

Despite ignoring the court's reliance on MaRous's failure to follow the Manual's requirement to ensure vacant comparables and the subject property are similarly vacant, in transition, or distressed, Lowe's argues that the court relied on the *Manual* at 9-43 as requiring the cost approach for larger retail stores, regardless of the existence of any reasonably comparable sales.

But, as is explained throughout this Brief, and is apparent in the Decision, the court analyzed whether the comparables were, in fact, reasonably comparable. It did not rely on 9-43 to avoid that analysis. The court, instead, interpreted this provision as applying to larger retail venues *for which there were no comparable sales*:

> The Court agrees with the Village's position that there are no comparables to the subject property. Therefore, under WPAM, 9-43, *since there are no comparables from sales for*

> *this larger retail venue*, the assessor should use the Cost and/or Income Approach to determine fair value.

(R.122:8-9, P.-App.8-9) (emphasis added). It is clear that the court did not view this provision as a directive to ignore the *Markarian* hierarchy and skip to a Tier 3 cost approach regardless of the existence of Tier 2 comparables.

F. The court appropriately considered all eight of MaRous's proposed comparables and concluded that none of them were reasonably comparable.

Contrary to Lowe's argument, the court *did* evaluate all of MaRous's comparables and conclude that *no* reasonably comparable sales existed: "The Court looked at the eight comparables studied by MaRous (Exhibit 24, pp 24-38) to determine whether it is an apples-to-apples comparison with the subject Lowe's property." (R.122:6, P.-App.6). The rest of the Decision makes it abundantly clear that the court considered all of MaRous's purported comparables.

Lowe's points to no requirement that the court must specifically *explain* the application of its conclusion separately for each purported comparable sale offered by the taxpayer. The unpublished case Lowe's relies on does not require that. *Hanning Regency LLC v. Town of Brookfield Bd. of Review,* No. 2018AP1584, unpublished slip op., ¶4 (WI App July 3, 2010) (P.-App.39). The portion cited merely paraphrases the *Markarian* hierarchy.

As explained in the Decision and throughout this Brief, the court rejected MaRous's comparables for reasons applicable to all of them in common; *i.e.* differences in vacancy and vacancy rate, occupancy, location, and market. The court also noted additional problems that

applied to some of the comparables—such as the American TVs for which MaRous did not discuss exposure time in his report, but which he admitted at trial all sold at the same time as part of a receivership after very brief exposure to the market. (R.130:128-29, 153-56). Under the doctrine of *falsus in uno, falsus in omnibus*, the court, as the factfinder, was not required to feign amnesia and review each purported comparable offered by a witness with a *tabula rasa*, completely blind to MaRous's credibility problems exposed at trial.

III. The court's determination that the Village's Tier 3 evidence was more credible than Lowe's was not erroneous.

Lowe's characterizes the court's Decision oddly. The court did not determine there was "no Tier 3 evidence" rebutting the assessment. Instead, "The Court [found] that the Village's expert Landretti provided the most credible Cost Approach opinion." (R.122:9, P.-App.9). Remember, the Manual advised using the cost approach absent evidence of reasonably comparable sales under Tier 3. (9-43). The court went on to explain why, after having read the experts' reports and listened to them at trial, it considered Landretti's opinion more credible.

Once again, Lowe's reiterates the opinions of its expert, characterizes them as undisputed and then argues that the court should have been persuaded. It is telling that in this entire section, Lowe's studiously ignores the opinions, testimony, and evidence from the expert that the court explicitly stated it found more credible. Lowe's does not address, and therefore does not dispute, that Landretti's opinion was sufficient evidence supporting the court's decision. Once

again, Lowe's fails to show that the court's determination was clearly erroneous.

A. The court was persuaded by the way Landretti accounted for functional and economic obsolescence over the way MaRous accounted for those factors.

Lowe's again mischaracterizes the circuit court's analysis and decision by arguing that the court "concluded that no functional or economic obsolescence should be accounted for in the cost approach." (Br. 49). This is false and misleading. The court did not conclude that the cost approach did not require "accounting for" functional or economic obsolescence. Nor did the Village argue that.

Rather, the court was persuaded by the *way* Landretti accounted for functional and economic obsolescence compared to the way MaRous handled those issues. Landretti used the economic age-life model, which indisputably accounts for normal physical, functional, and economic obsolescence. (R.110:76; 131:64-66). Landretti then concluded that no *additional* amount should be deducted for functional obsolescence because the property functioned as required as a big box retail store such that there was no abnormal functional depreciation. (R.110:76).

Strikingly, Lowe's *completely ignores* Landretti's cost approach opinions, which the court explicitly stated it found more credible than MaRous's. As the factfinder, the court was entitled to credit that approach and those opinions. Lowe's fails to show that the determination was clearly erroneous.

1. The court appropriately recognized that MaRous was playing fast-and-loose with highest and best use. (Br. 52).

The court was warranted in crediting Landretti's cost approach opinions, which Lowe's does not discuss. The court also had good reason for not finding MaRous's opinion persuasive and credible.

Lowe's argues that the court misapplied the cost approach by concluding that MaRous should have started with the cost to construct a multi-tenant building, which is different than what the Lowe's currently is. Lowe's argues that it was appropriate to start with the cost to construct a big box retail property because both experts agreed that the highest and best use was continued use as a big box retail property. But that only addresses half of the criticism.

Although MaRous stated that this was the highest and best use, he went on in his highest and best use analysis to state that the property would likely need to be converted to multi-tenant, and his deductions for functional obsolescence in the cost approach operated on this contrary assumption. According to what MaRous described as his bible, on appraisal, "[t]o apply the cost approach, an appraiser estimates the market's perception of the difference between the property improvements being appraised and a newly constructed building with optimal utility (i.e. the ideal improvement identified in the highest and best use analysis." (R.101:2). MaRous did not compare the Lowe's big box retail property to an ideal big box retail property. MaRous did not deduct for functional obsolescence based on evidence that the Lowe's property did not function exactly as needed and as appropriate for continued use as a retail big box.

Instead, MaRous compared the Lowe's big box property to a different highest and best use—multi-tenant property. MaRous clearly and explicitly deducted for functional obsolescence based on ways he thought the property did not measure up *as a multi-tenant building*:

> . . . As discussed in the highest and best use section of this report, the subject's large building size and deep retail footprint of approximately 260 feet appeals to a relatively narrow segment of the market. There is a significantly larger pool of potential tenants for smaller retail buildings and units. Additionally, the minimal fenestration does not readily allow for multiple storefronts and the overall depth of the building is not readily utilized for occupancy by other retailers. *Based on the above attributes*, a 50 percent functional depreciation allowance has been included in the analysis.

(R.71:43).

But if MaRous was going to compare the Lowe's big box property to a multi-tenant property, the multi-tenant property had to be the highest and best use. This would have required starting with the cost to build that ideal improvement—a multi-tenant building. The cost to construct that improvement is approximately twice the cost to build a big box. (R.102:28, 34). MaRous does not run the analysis with either a multi-tenant or a big box as his highest and best use. Instead, MaRous switches highest and best uses midstream. He starts with the cost to build *a large single tenant big box retail building* and then deducts value from the property because it is not functional *as a multitenant building*. The court appropriately concluded that MaRous's failure to pick one highest and best use and stick to it compromised the credibility of MaRous's opinions. (*See also* R.116:17-18). Given that the

cost to construct a multi-tenant building would have been about double the cost to construct a big box, MaRous's 50% deduction for the big box not functioning as a multi-tenant would have yielded a final value very close to Landretti's.

2. The court was warranted in concluding that MaRous's approach was actually based on replacement cost and not on reproduction cost as MaRous claimed.

Lowe's briefly argues that MaRous used the reproduction cost method to determine construction costs. Lowe's fails to develop this argument. It fails to explain the relevance, if any, if MaRous had used reproduction cost. It doesn't argue that this method was legally required or that a replacement cost method as used by Landretti would not be acceptable or appropriate. By failing to develop this argument, Lowe's has waived it.

The argument also fails. Although MaRous claimed to the contrary at trial, it was clear he was actually using replacement cost analysis. Tellingly, MaRous's figures for the cost of construction were nearly identical to the figures available in the Marshall & Swift database used by assessors for determining replacement cost new. (R.71:39-71:44). MaRous's report does not demonstrate that he obtained the specific construction costs necessary to perform a reproduction cost analysis.

Lowe's remarks that the property must be valued as it physically existed on the date of the assessment because that is the date of the hypothetical sale. Lowe's simply drops this assertion without developing any argument. Both reproduction cost and replacement cost analysis value the property as it existed on the valuation date.

3. Lowe's fails to show any error caused by a "first generation" concept.

Lowe's attempts in three paragraphs to argue that the trial court's Decision was erroneous because it was influenced by Dr. Hamilton's "first generation" concept. It would take well over three paragraphs to debunk Lowe's erroneous reasoning and arguments, which rest on cherry-picking and mischaracterizing the trial testimony and arguments. A thorough refutation of Lowe's cursory argument is unnecessary, however, because Lowe's fails to deliver on the premise of its argument—that a "first generation" concept caused the court to err.

Lowe's fails to show that the Decision relied on, or was influenced by, Hamilton's "first generation" concept. Lowe's sole discussion of the Decision is an assertion that it relied on Dr. Hamilton's opinion that the subject property cannot be compared to "second generation" properties, and instead must be valued as a "first generation occupied property." (Br. 54). But this part of the Decision simply summarizes opinions from the three experts, including Dr. Hamilton's criticism of MaRous for using only unoccupied vacant properties as comparables, and including no sales of occupied properties. (R.122:6, P.-App.6).

But when the court analyzed the purported comparables, it did not refer to any "first generation" principles, but relied on the Manual's instruction that the assessor should "chose comparable sales exhibiting a similar highest and best use and similar placement in the commercial real estate marketplace" and that "[t]he assessor should avoid using sales of improved properties that are vacant ('dark') or distressed as comparable sales unless the subject property is similarly dark or

distressed." (9-12). The court noted that MaRous did not follow the Manual's directive to determine what the normal vacancy time or ensure that the comparables and the subject property were similarly vacant or distressed. (R.122:6-7, P.-App.6-7). The court criticized MaRous for nonetheless using comparables that were vacant for extended periods of time. The court relied on MaRous's departure from the Manual's instructions, not on a "first generation" concept.

The requirement under the Manual and *Bonstores* to consider occupancy and vacancy is not undermined by the law expressed in *State ex. rel Northwestern Mut. Life Ins. Co. v. Weiher*, 177 Wis. 445, 188 N.W. 598, 598-99 (1922) and S*tate ex rel. Keane v. Bd. of Review of City of Milwaukee,* 99 Wis.2d 584, 597, 299 N.W.2d 638, 645 (Ct. App. 1980), relied on by Lowe's.

In *Northwestern Mutual*, the "supreme court affirmed the circuit court's lowering the city's assessment by half, because the city based its assessment on the intrinsic worth of the "fine, substantial, artistic building, gracing half a block in the city of Milwaukee, built to meet the peculiar needs of its owner," to "one who might need it just as it is," whereas the circuit court looked at those same facts and determined the building's "sale value, taking into consideration the actual situation as it existed in Milwaukee at the time." *Id.* at 449-50." *Lands' End, Inc. v. City of Dodgeville*, 2014 WI App 71, 354 Wis. 2d 623, 848 N.W.2d 904. That is not the case here. The subject Lowe's is essentially a "big box." There was no testimony that it was "built to meet the peculiar needs of its owner" or assessed based on unique features valuable only to

Lowe's. The court clearly heard evidence regarding the value of the subject Lowe's on the market.

Similarly, *Keane* held that special and unique improvements required by tenant Foley & Lardner, including wood floors and spiral staircases, must be valued based on their market value. The recent lease of Foley's former quarters, with similar unique improvements tailored to Foley & Lardner's special needs and tastes, were essentially worthless because the landlord could not charge a premium for them and, in fact, at least one tenant demolished those improvements to replace them with their own improvements. Again, there is no evidence that Lowe's was assessed based on features of the property that were specially constructed to suit Lowe's particular needs, but that would be worthless on the marketplace. To the contrary, the evidence was that a "big box" like Lowe's would be suitable for a variety of other "big box" entities. (e.g. R.110).

B. Lowe's fails to develop any argument regarding its Tier 3 income approach.

Lowe's complains that the court did not discuss MaRous's Tier 3 income approach. Lowe's does not develop this argument, or present a reasoned argument explaining why its income approach was correct or that the court was required to accept it. Instead, Lowe's simply asserts that it presented "potentially significant contrary evidence that rebuts the assessments" that the court should have considered. (Br. 56). In its post-trial brief, Lowe's argued that MaRous used his income approach merely as a "check" on the value from his Tier II approach. (R.71:16, R.130:101). Lowe's did not present it to the court as an independent

basis for determining the value of the property. Lowe's argument fails because Lowe's fails to show, or even argue, its Tier III income arguments were more credible than the Village's evidence or should have changed the court's Decision. The court was justified in relying on the cost approach evidence, and Lowe's does not present any argument to the contrary.

Conclusion

Lowe's failed to rebut the presumption that the assessment was correct or convince the court that the assessments were excessive. On appeal, Lowe's has failed to show that the court's decision relied on any legal errors or clearly erroneous factual determinations. The Court should, therefore, affirm the decision of the circuit court.

Dated this 21st day of November, 2019.

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Dated this 21st day of November, 2019.

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