REPRESENTATIVE FOR THE PETITIONER:
Paul M. Jones, Jr., Ice Miller, LLP

REPRESENATIVE FOR THE RESPONDENT:
Marilyn S. Meighen

STATE OF INDIANA
INDIANA BOARD OF TAX REVIEW

KOHL'S INDIANA LP,	)	
	)	Petition Nos: 34-002-10-1-4-00350
Petitioner,	)	34-002-11-1-4-00304
	)	34-002-12-1-4-00114
	)	
v.	)	
	)	Parcel No.: 34-10-05-376-002.000-002
	)	
HOWARD COUNTY ASSESSOR,	)	
	)	County: Howard
Respondent.	)	
	)	Assessment Years: 2010, 2011, and 2012
	)	

Appeals from Final Determinations of the Howard County Property Tax Assessment Board of Appeals

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December 31, 2014

I. Introduction

1. The parties offered valuation opinions from two experts who fundamentally disagreed about how a built-to-suit big-box store like the subject property should be appraised. Much of the dispute lay in the experts' differing interpretation of Indiana's true tax value standard. The Assessor's expert viewed that standard as being closely focused on the business model of the property's current owner—Kohl's. That led him to give little weight to approaches other than the cost approach and to recognize no external

obsolescence, despite the oversupply of retail properties and the economic recession and slow recovery that spanned the valuation dates at issue. By contrast, the expert for Kohl's focused much less on the owner and its business model and more on the property's general retail use. And unlike the Assessor's expert, she did not view the property as special purpose. We are more persuaded by the opinions of the expert for Kohl's, which more closely follow the Indiana Tax Court's interpretation of true tax value and more appropriately characterize the nature of the property.

II. Procedural History

2. Kohl's appealed the subject property's 2010-2012 assessments to the Howard County Property Tax Assessment Board of Appeals ("PTABOA"), which upheld the assessments. Kohl's then timely filed Form 131 petitions with the Board. David Pardo, designated as the Board's administrative law judge ("ALJ"), held a hearing on those petitions. That hearing began on January 21, 2014, and lasted four days.

3. Five appraisers testified: Sarah Coers, Lawrence Mitchell, Thomas Morlan, John Feine, and David Matthews. The real estate expenses manager for Kohl's, Scott Schnuckel, was testified. All were sworn.

4. Kohl's offered the following exhibits, all of which were admitted without objection:

Petitioner's Exhibit A:	Form 131 petitions, including all attachments and exhibits as well as courier documents,
Petitioner's Exhibit B:	Property record cards for the subject property,
Petitioner's Exhibit C:	Summary Appraisal Report for the subject property signed by Sara Coers, Lawrence Mitchell, and Caitlin Alerding
Petitioner's Exhibit D:	Response document prepared by Sara Coers, addressing the appraisal review prepared by John F. Fiene,
Petitioner's Exhibit E:	Real Estate Appraisal Review prepared by Lawrence Mitchell,
Petitioner's Exhibit F:	The entire Uniform Standards of Professional Appraisal Practice ("USPAP"), 2012-2013 Edition, including Guidance from the Appraisal Standards Board, USPAP Advisory Opinions, and USPAP Frequently Asked Questions (FAQ),

Petitioner's Exhibit G: David C. Lenhoff, *You Can't Get the Value Right if You Get the Rights Wrong*, *Appraisal Journal* (Winter 2009),
Petitioner's Exhibit H: Richard C. Sorenson, APPRAISING THE APPRAISAL, (1998),
Petitioner's Exhibit I: Appraisal Institute, THE APPRAISAL OF REAL ESTATE, (13th Ed. 2008),
Petitioner's Exhibit J: E-mails between counsel concerning discovery issue,
Petitioner's Exhibit K: Spreadsheet prepared by Sara Coers,

5. The Assessor offered the following exhibits, all of which were admitted except Exhibit AA:

Respondent's Exhibit A: 2002 REAL PROPERTY ASSESSMENT MANUAL,
Respondent's Exhibit B: 2011 REAL PROPERTY ASSESSMENT MANUAL,
Respondent's Exhibit C: Appendix F to the INDIANA REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A,
Respondent's Exhibit D: Appendix F to the 2011 REAL PROPERTY ASSESSMENT GUIDELINES,
Respondent's Exhibit E: Selections from THE APPRAISAL OF REAL ESTATE, (12th ed.),
Respondent's Exhibit F: Selections from THE APPRAISAL OF REAL ESTATE, (13th ed.),
Respondent's Exhibit G: Scholarly articles: David C. Lenhoff, *You Can't Get the Value Right If You Get the Rights Wrong* together with letters to the editor and Lenhoff's responses; and David C. Lenhoff, *Separating the Real Property from the Tangible and Intangible Personalty in Appraisals*, *The Practical Real Estate Lawyer,*
Respondent's Exhibit H: Appraisal report of Thomas Morlan,
Respondent's Exhibit I Land sale documents,
Respondent's Exhibit J: Work file cost approach supporting documentation,
Respondent's Exhibit K: File memorandum to the appraisal report of Thomas Morlan,
Respondent's Exhibit L: Sales-comparison stratified grouped data,
Respondent's Exhibit M: Income approach documentation from Morlan's work file,
Respondent's Exhibit N: Michigan Tax Tribunal cases,
Respondent's Exhibit O: Appraisal review of Lawrence Mitchell's appraisal by John F. Fiene,
Respondent's Exhibit P: Guidelines from the Institute of Real Estate Management,
Respondent's Exhibit Q: Review of Lawrence Mitchell's review of Thomas Morlan's appraisal report prepared by David Matthews,
Respondent's Exhibit R: Inspection documentation (one page of handwritten notes),
Respondent's Exhibit S: Errata letter from Sara Coers,

Respondent's Exhibit T: Same store sales report for 2009 and 2010
Respondent's Exhibit U: Site improvement spreadsheet,
Respondent's Exhibit V: Morlan land sale documentation from Lawrence Mitchell's appraisal work file,
Respondent's Exhibit W: Excerpts from *Dollars & Cents of Shopping Centers/The Score 2008,*
Respondent's Exhibit X: RealtyRates.com *Investor Survey 2nd Quarter 2011,*
Respondent's Exhibit Y: RERC *Real Estate Report*, Fall 2010, Vol. 39, No. 3,
Respondent's Exhibit Z: Land Sale Information from Coers' work file,
Respondent's Exhibit AA: Google page showing address of subject property,
Respondent's Exhibit BB: Demonstrative exhibit prepared by Jack Fiene showing cost approach calculations.

6. The ALJ sustained the objection of Kohl's to Respondent's Exhibit AA—a printout from a search of Google.com—on grounds that the Assessor did not list that document as an exhibit or provide Kohl's with a copy of it before the hearing. In their Appeal Management Plan, the parties agreed to abide by the Board's procedural rules for the exchange of evidence, except for expert reports and work files, which were to be exchanged in October. The relevant procedural rule—52 IAC 2-7-1(b)—requires the parties to exchange witness and exhibit lists at least 15 business days before a hearing and copies of their documentary evidence 5 days before the hearing.

7. The Assessor offered Respondent's Exhibit AA to impeach or rebut information contained in the appraisal report of Sarah Coers, the valuation expert offered by Kohl's. The Assessor had received that report well before 52 IAC 2-1-7(b)'s exchange deadline. Thus, she should have been aware of any documents necessary to rebut or impeach that report in time to identify those documents as potential exhibits and exchange them within the appropriate deadline. The Board therefore adopts the ALJ's ruling excluding the exhibit. In any case, the exhibit goes to a minor point—whether Coers misreported the subject property's street address.

8. Kohl's also objected to Respondent's Exhibits A-G, I-J, L-N, and P-Z. According to Kohl's, the Assessor did not comply with the spirit of our pre-hearing exchange rule. On January 13, 2014, more than five business days before the hearing, the Assessor provided Kohl's with a flash drive containing 117 documents. The Assessor then followed up with

binders containing hard copies of her exhibits on the Friday preceding the start of the hearing. The binders included some, but not all, of the documents from the flash drive. Kohl's agrees that all of the exhibits it seeks to exclude were on the flash drive. It apparently takes exception to having to spend additional time to match the documents in the Assessor's binders to what was provided on the flash drive.

9. We adopt the ALJ's decision overruling the objection. As explained above, our pre-hearing exchange rule, which the appeal management plan incorporates, requires the parties to exchange copies of documentary evidence at least five business days before a hearing. Kohl's agrees that the Assessor did that. There is nothing to indicate that the Assessor sought to confuse or inconvenience Kohl's by further narrowing the documents that she ultimately chose to offer at the hearing.

10. The record also includes the following: (1) all pleadings, briefs, and documents filed in the appeals, including the parties' post hearing briefs, an amicus curiae brief filed by the Howard County Board of Commissioners,[1] and the response of Kohl's to the amicus brief; (2) all orders and notices issued by the Board or our ALJ; and (3) the four-volume hearing transcript.

11. The PTABOA determined the following assessments:

Year	**Land**	**Improvements**	**Total**
2010	$1,491,500	$4,492,500	$5,984,000
2011	$1,413,000	$4,272,300	$5,685,300

[1] The amicus brief is comprised largely of factual assertions about what generally accepted appraisal principles require concerning various valuation issues in these appeals. Indeed, according to the author, "It is not the intent of this document to argue points of law or to advance new or additional criteria by which to measure true tax value but rather it is to help the Court better understand several of the intricacies of appraisal principles." *Amicus Brief at 2.* As explained in our order granting the board of commissioners leave to file its amicus brief, we disregard those assertions as well as any other assertions concerning matters that are properly the subject of expert testimony. Five experts testified at the hearing, each of whom faced vigorous cross-examination. Because he did not testify, the parties did not have the opportunity to cross-examine the amicus brief's author about any of his assertions or opinions.

2012	$1,413,000	$4,493,300	$5,906,300

12. Kohl's asked for the following assessments:

Year	**Total Assessment**
2010	$3,690,000
2011	$3,820,000
2012	$3,680,000

III. Findings of Fact

A. The Subject Property

13. The subject property is located in Kokomo. It contains a building of roughly 88,000 square feet on a 10.65-acre site. Kohl's, a discount department store chain, owns and operates the property as one of its stores. It built the store in 2003. Before construction, work was needed to mitigate wetlands on the site. *Vol. I at21*; *Vol. II at 134; Pet'r Ex. C at 19, 24; Resp't Ex. H at 63*.

14. Kohl's has a portfolio of more than 1,100 properties, which includes more than 200 existing buildings that were vacant, or "dark" when Kohl's bought them. As Scott Schnuckel, the real estate expense manager for Kohl's, testified, Kohl's builds properties when it feels that existing properties are inadequate or financially infeasible. When Kohl's buys an existing property, it puts up some type of façade. In many recent cases, it has simply painted the building's exterior and put up a Kohl's sign. Depending on the existing building's format, it may not be possible to make the building look like a built-to-suit Kohl's without gutting it. Kohl's therefore works within the building's confines. *Vol. II at 50-53*.

15. The property is an end cap to a shopping center called Boulevard Crossing, which the various appraisers who testified at the hearing described as either a regional power center or a neighborhood community center. Kite Realty Group Trust, a real estate investment

trust ("REIT") that bundles properties for investment purposes, developed Boulevard Crossing.[2] It sits off a major conduit, US 31/Reed Road. Local residents who want to avoid traffic on US 31 can access the subject property off Boulevard Road. Boulevard Road will also be a major connector to the US 231 bypass, which was near completion as of August 16, 2013. Kite originally developed the site for Home Depot. It is unclear why Home Depot did not build a store there. *Vol. I at 55, 92-93; Vol. II at 128-29, 160-163, 166*; *Resp't Ex. H at 9, 40, 48-49*.

16. Kohl's entered into an easement and operating agreement with Kite. Some of the witnesses referenced that agreement and disagreed about whether its terms were typical or atypical. Neither party, however, offered the agreement as an exhibit. *See, e.g., Vol. I at 54-55; Vol. II at 262; Vol. III at 30*.

17. When assessing the building, the Assessor used the cost schedules that apply to a General Commercial Mercantile Discount Store. She adjusted the base price to account for the sprinkler system and for the building having higher walls than the model upon which the cost schedules were premised. She also valued three special features, the most significant of which was a mezzanine. *See Pet'r Ex. B*.

B. Expert Opinions

1. Coers' appraisal

18. Kohl's engaged Sara Coers, Lawrence Mitchell, and Caitlin Aldering of Valbridge Property Advisors to appraise the property.[3] They prepared a Summary Appraisal Report in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). *Pet'r Ex. C at 3.*

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[2] It is unclear whether Kite Realty Group Trust or its majority-owned subsidiary, Kite Real Estate Group, LP, actually developed and operated Boulevard Crossing. *See Resp't Ex. H at 48-49*. We refer to them collectively as "Kite."

[3] When they completed the appraisal report, Mitchell, Coers, and Aldering worked for Mitchell Appraisals, Inc. That firm later "launched" as part of Valbridge, a national firm. *Vol. I at 50*.

19. Aldering was a trainee appraiser who helped research the data on which the appraisal is based. *Vol. I at 71-72, 77, 134*. The record is unclear regarding the extent of Mitchell's participation. Coers was the only one of the three who testified about the appraisal at the hearing, and she referred to the valuation opinions contained therein as hers. We therefore refer to the appraisal report and valuation opinions as Coers'.

20. Coers is designated by the Appraisal Institute as an MAI. She is an Indiana Certified General Appraiser as well as Level II assessor-appraiser. She is a managing director of Valbridge's Indiana affiliate and an instructor for the Institute for Professionals in Taxation's Real Property Tax School. She has significant experience appraising retail properties. She has appraised over 350 retail properties in the last ten years. She has also done over 150 market value-in-use appraisals in the last three years. *Vol. I at 20-21*; *Pet'r Ex. C at 132*.

21. Coers appraised the market value-in-use of the fee simple interest in the subject property for each year under appeal. She came to the following values: $3,690,000 (March 1, 2010), $3,820,000 (March 1, 2011), and $3,680,000 (March 1, 2012). *Pet'r Ex. C at 8, 20.*

a. Coers' research and market overview

22. Coers inspected the property. She considered and developed all three generally recognized approaches to value: the cost, sales-comparison, and income approaches. She relied most heavily on the income and sales-comparison approaches, which reflect the perspectives of investors and owner occupants, respectively. She developed the cost approach primarily to analyze the property's potential income for use in applying the income approach. *Vol. I at 22.*

23. Before applying the three valuation approaches, Coers did a market overview and analysis. She identified the property's macro location as Kokomo and Howard County and its micro location as the Kokomo metropolitan statistical area ("MSA"). She rated

the building's characteristics and location in the context of its competitive market—primarily other big box retailers—giving the building a score of 70 out of 150 and the location 35 out of 70. *Pet'r Ex. C at 36-50; Vol. I at 62-63*.

b. Sales-comparison approach

24. For her sales-comparison approach, Coers used fee simple sales, which are invariably vacant. She did not consider leased-fee sales because they would require adjustments for any above-market leases and intangibles, such as tenant quality. *Pet'r Ex. C at 97-98; Vol. I at 33-34, 43-45*

25. Coers did not limit her comparable sales to transactions involving Kohl's. She believed that doing so would violate the principle of market value-in-use as established by Indiana case law, which holds that market value-in-use equates to the value of real property *for* its use, not *of* its use. As she reads Indiana's assessment manuals, the value of the subject property *for* its use means use as "big box retail, general retail," and not specifically as a Kohl's store. *Vol. I at 43-45.* The buildings trade regularly on the market and many different retailers use them. *Pet'r Ex. C at 97-98; Vol. I at 33-34, 43-45.*

26. She looked for sales of single-user properties of approximately 50,000 square feet in the Midwest, preferably from Indiana and surrounding states. She ultimately chose nine sales. The properties all sold for continued retail use. Six were from the following Indiana cities: Bloomington, Fort Wayne, Indianapolis, Logansport, Wabash, and Winchester. Two were from Ohio (Dublin and Akron), and one was from Crystal Lake Illinois. The stores ranged from 55,411 to 225,000 square feet. They included former Walmart and K-Mart stores, as well as others. Some buyers were owner-occupants, such as J.C. Penney's and Kohl's, while others were investors that hoped to lease the stores to retailers. The properties sold between March 21, 2003, and September 1, 2011, for prices ranging from $5.13 to $63.65 per square foot of building area. *Pet'r Ex. C at 97-108*.

27. Coers adjusted each sale price to account for various ways in which the sold property differed from the subject property. Her primary adjustment was for market conditions. She based that adjustment on changes to capitalization rates for Midwestern Tier-1 retail properties. She got that data from *The Real Estate Report*, a publication of the Real Estate Research Corporation ("RERC"). By using rates for Tier-1 properties, which are the best quality physically and locationally, she believed that she effectively isolated pure movements in the market as viewed by market participants. *Vol. I at 34; Pet'r Ex. C at 112-14*.

28. Coers also adjusted for size, condition, and location differences. She quantified her condition adjustments based on the annual depreciation of property with a 40-year life and with 71% of the overall property value attributed to the building.[4] In determining her location adjustments, she relied most heavily on data concerning the average retail rental rate (including general retail) for each location. She testified that she took her data from CoStar, which she described as one of the largest real estate databases in the world. When asked where one could find the data she relied on, however, she responded that it was not in her report or work file, but that she used her professional judgment. For 2010, her total additive adjustments ranged from 2% to 88% of the property's sale price after adjustment for market conditions. The individual adjustments ranged from 1% to 61%. The ranges were a little tighter for 2011 and 2012. *See Vol. I at 156-62; Pet'r Ex. C at 112-14*.

29. She ultimately arrived at the following values under the sales-comparison approach: $3,710,000 ($42/sq. ft) for March 1, 2010, $3,790,000 ($43/sq. ft.) for March 1, 2011, and $3,790,000 ($43/sq. ft.) for March 1, 2012. *Pet'r Ex. C at 118; Vol. I at 34-35.*

[4] In her appraisal report, Coers indicated that she attributed 66% to 68% of the value to the building. In her response to Fiene's review appraisal, she acknowledged that she had erroneously reported that percentage and that she actually used 71%. *Pet'r Ex. C at 114; Pet'r Ex. D at 25*.

c. Income approach

30. Coers used three methods to determine market rent: she extracted rent from the market, she determined feasibility rent, and she calculated rent as a percentage of store sales. *Pet'r Ex. C at 79-82; Vol. I at 27-30.*

31. For her market extraction, Coers looked at rents in the market for similar big-box retail space. With one exception, all of the buildings that she used were older than the subject building. Generally, the buildings were repainted and the interiors were refurbished. Beyond that, Coers did not know what was done to refurbish the buildings. *Pet'r Ex. C at 79-87; Vol. I at 27-28, 120.*

32. To calculate feasibility rent, Coers applied a rate of return to the depreciated replacement costs from her analysis under the cost approach. She determined her rate of return based on market surveys, typical return rates reported by developers, and her own experience and judgment. *Pet'r Ex. C at 81-84; Vol. I at 127-29.*

33. Finally, Coers calculated rent using a percentage of gross sales. She examined retail sales from the Census Bureau and from *Dollars & Cents/The SCORE*—an industry publication reporting national data that was last issued in 2008. She also included nationwide and statewide retail sales for Kohl's stores. She considered the statewide Kohl's data a strong benchmark for the Indiana market and noted that it largely mirrored the average sales for the four property categories she examined from *Dollars & Cents*. She then applied those retail sales to the range of percentage rents from *Dollars and Cents* (1.5% to 3% of sales), which she found to be typical. Coers ultimately concluded that location differences made her market data less than optimal and therefore focused on her percentage-rent and feasibility-rent analyses. *Pet'r Ex. C at 84-87; Vol. I at 28-30, 131-35, 140.*

34. She next considered expenses. Because she posited a triple-net lease, she only included owner expenses. She used CoStar to determine expenses in the area and eliminated any

properties that appeared to vary from what was actually going on in the market. She looked to CoStar to determine vacancy rates for retail space within a one-mile radius of the property and added what she described as a typical 0.5% collection loss. Her estimated vacancy and collection losses totaled 9.2% (2010), 6.5% (2011), and 6.3% (2012). *Pet'r Ex. C at 87; Vol. I at 31.*

35. For her remaining expenses, Coers used shopping center data from the Institute for Real Estate Management ("IREM"). It was the closest data available for a retail store of the subject property's size. She estimated a management fee equaling 5% of effective gross income, which she viewed as typical for the property type, and which translated to less than $23,000 for each year. Although she did not have the property's historical expenses, she did not view them as critical to her analysis. *Vol. I at 31-32, 52-54; Pet'r Ex. C at 88-96.*

36. While Coers considered deducting reserves for each year, RERC reported a preference for determining capitalization rates before reserves for 2010 and 2011. She therefore only deducted reserves for 2012, using what she described as the typical reserve requirement of $.50 per square foot from *Realtyrates.com*. After deducting expenses, she arrived at net operating income of $3.75/sq. ft. (2010), $3.89/sq. ft. (2011), and $3.40/sq. ft. (2012). *Pet'r Ex. C at 90-91; Vol. I at 32.*

37. Coers then turned to selecting an appropriate capitalization rate. She used two surveys—Realtyrates.com and RERC. The Realtyrates.com survey was a national survey for freestanding retail, while the RERC survey included four different property categories (first- and second-tier power centers, and first- and second-tier neighborhood/community centers) from the Midwest. She used 14 sales for her market-extracted rates. Although some were leased-fee sales with national credit tenants, she used those sales with caution. The extracted rates also included sales to REITs and 1031 exchanges, which according to a cited article, can result in buyers paying premiums of 15% to 20%. *Pet'r Ex. C at 91-93*; *Vol. I at 32-33, 145-46*.

38. Ultimately, Coers used her professional judgment to select a capitalization rate of 8.75% for 2010 and 2011, and 8.25% for 2012. She then loaded that rate with the landlord's share of the effective tax rate (the effective tax rate multiplied by her estimated vacancy percentage), explaining that the landlord would only be responsible for taxes during periods of vacancy. She arrived at the following values under the income approach: $3,670,000 (2010), $3,840,000 (2011), and $3,560,000 (2012). *Pet'r Ex. C at 91-93; Vol. I at 32-33, 145-48.*

d. Cost approach

39. For the cost approach, Coers determined a land value based on comparable sales of sites that were similar to the subject site in terms of location, use, and size. She ultimately relied most heavily on the 2002 sale in which Kohl's bought the subject site for $1,550,000. Coers then used Marshall Valuation Service to calculate the improvements' replacement cost new. She excluded entrepreneurial incentive, but included indirect costs, arriving at the following replacement costs new for the building: $4,760,000 (2010), $4,940,000 (2011), and $5,040,000 (2012). She then adjusted those costs for physical depreciation and obsolescence. *Pet'r Ex. C at 56-75; Vol. I at 25-26, 108-09.*

40. Coers did not believe that the building suffered from functional obsolescence. She explained that the specialized features conforming to Kohl's business model, such as the raised block design around the store's entrance, could be considered as super adequacies. Because she used the replacement cost for a building with similar utility, however, she believed that had already effectively eliminated that obsolescence. *Pet'r Ex. C at 75.*

41. She did find economic obsolescence. She based her finding partly on data and forecasts from Marcus and Millchap's *National Retail Report* for each year under appeal as well as on other publications addressing national and regional markets. In her view, weak economic conditions for retail in general, and for big-box retail in particular, affected the property's value. That weakness stemmed from an oversupply of competing space in the

general market and the limited number of big-box users for existing space in any given region. She explained that the market was generally oversupplied for most of the later 2000s. There were deluges of big-box vacancies in 2004 and 2009. While the 2004 vacancies were generally caused by retailers leaving older stores for newer buildings, the 2009 vacancies were largely due to retailers shuttering underperforming stores or filing bankruptcy petitions. *Pet'r Ex. C at 51-54, 75; Vol. I at 39-41*.

42. According to Coers, the problem continued into 2010 and 2011, as the market remained soft. The recession had caused the overall retail market to significantly decline by 2010, with retail expected to have the longest road to recovery of all property types. The market recovered only modestly in 2011 but had begun to recover in earnest by 2012. Nonetheless, most retailers had to re-think their business plans, and many continued to downsize, "right-size," and limit expansion because they had more competitors and fewer customers. According to Coers, few, if any, markets in Indiana would have been exempt from those trends. *Vol. I at 39-41; Pet'r Ex. C at 51-54*.

43. Coers quantified the subject property's economic obsolescence as the difference between her conclusions under the cost approach (after deducting physical depreciation) and her reconciled value from the sales-comparison and income approaches. In her opinion, the external obsolescence was reflected in the data she used for those other two approaches. She acknowledged that her adjustment was "somewhat over simplified," but because she did not ultimately rely on the cost approach, she felt that it was reasonable. *Pet'r Ex. C at 75; Vol. I at 26*.

e. Reconciliation

44. Coers determined that market participants seeking to buy an existing building would give the cost approach little consideration, especially during a national recession. In her opinion, the income and sales-comparison approaches provided a good quantity and quality of data that addressed the thinking of both types of market participants (investors and owner-occupants), and best reflected the market value-in-use of the fee simple

interest in the subject property. She believed potential buyers were split roughly evenly between owner-occupants and investors and therefore gave equal weight to the two approaches. Thus, she came to the following values: $3,690,000 (2010), $3,820,000 (2011), and $3,680,000 (2012). *Pet'r Ex. C at 119-20; Vol. I at 22, 35-36.*

2. Fiene's Review and Coers' Response

a. Feine's review

45. The Assessor hired John Fiene to review Coers' appraisal. Fiene has designations as an MAI and SRA and is a certified general appraiser licensed in Indiana, and two other states. He has 35 years of appraising experience, including 20 years doing review appraisals. He is also a certified tax representative and a Level III Indiana assessor-appraiser. Fiene has served on boards and committees of the National Association of Independent Fee Appraisers. He has also served the Appraisal Foundation in several capacities, including as chair of the publications committee, which publishes USPAP. *Vol. III at 5-10; Resp't Ex. O at 37-39.*

46. Fiene offered myriad criticisms of Coers' appraisal, many of which led him to believe that she had a "bias against the property." *Vol. III at 58; see also, Vol. III at 64; Resp't Ex. O at 26, 37.* Some of his criticisms addressed her underlying data and analyses of the relevant markets, while others went to specific aspects of her methodology in applying the three approaches to value.

47. As to Coers' market analysis, Fiene believed she failed to identify various significant neighborhood features, such as the property's location near the Kokomo Mall and the Chrysler transmission plant. Coers also misidentified the property's parcel number, and there were some discrepancies in the way she referenced its street address. Fiene was similarly troubled by Coers' failure to note that the property has more parking spaces than required and to discuss factors such as soil conditions and the presence of wetlands. He likewise felt that she did not adequately discuss what he viewed as atypical easements

and restrictions under the easement and operating agreement between Kohl's and Kite. *Vol. III. at 17-18, 25-30; Resp't Ex. O at 10.*

48. Fiene similarly criticized Coers' failure to analyze the subject property's highest and best use. While Coers did not develop an opinion of market value, an improvement that is not to the site's highest and best use can diminish value. Fiene explained that a highest-and-best-use analysis also aids in determining financial feasibility and is the basis for defining and quantifying obsolescence. *Resp't Ex. O at 13, 17.*

49. According to Fiene, Coers performed only a "Level A" market analysis, which (1) is general and descriptive rather than subject-specific, and (2) relies on historical data rather than future projections. Even in her Level A analysis, Coers identified a macro location—Kokomo and Howard County—that was actually smaller than what she identified as the property's micro location, the Kokomo MSA. *Vol. III at 34-35; Resp't Ex. O at 13-15.*

50. Turning to Coers' analysis under the three valuation approaches, Fiene identified two over-arching concerns: (1) her inconsistent and incorrect application of methodology, and (2) her inappropriate selection of comparable sales, particularly her use of dark boxes.[5] *Resp't Ex. O at cover letter; Vol. III at 11-12.*

51. Fiene took issue with how Coers determined market rent. According to Fiene, her use of feasibility rent is inconsistent with her general position on build-to-suit leases. In any event, she used the depreciated replacement cost for the subject building instead of its cost new in her analysis. In David Lenhoff's article, *You Can't Get the Value Right if You Get the Rights Wrong*, which Coers cited in her appraisal, Lenhoff used replacement cost new for his feasibility-rent analysis. Coers also estimated the required rate of return at 7% and 8% in calculating feasibility rent, while the rates of return from

[5] In his report, Fiene also criticized Coers for using arithmetic that he could not replicate. He largely backed off that criticism at the hearing, noting that the differences may have stemmed from Coers using a software program that rounded differently than he did with a hand-held calculator. *Resp't Ex. O at cover letter; Vol. III at 39.*

Realtyrates.com and RERC never averaged below 8.2%. *Resp't Ex. O at 32; Vol. III at 53-59.*

52. Fiene similarly challenged Coers' decision to use a percentage of gross sales as a means for determining market rent. By doing so, Fiene believed that she determined the value *of* the property's use rather than *for* its use. On the other hand, Fiene acknowledged that while percentage rents value elements to the business enterprise, they are accepted throughout the appraisal profession. In any case, he believed that Coers failed to support her range of percentage rent, which was lower than the range reflected by retail sales for Indiana Kohl's stores. *Resp't Ex. O at 32; Vol. III at 58, 64.*

53. Fiene also disagreed with Coers' choice of rent comparables—two were what he described as "second tier" tenancies and two were "third tier"—while ignoring what he believed were more comparable leases of built-to-suit properties. He found it unreasonable for Coers to assume that build-to-suit leases were not indicative of market rent without "getting to the bottom of the commitment and deal points." *Resp't Ex. O at 31-32*; *Vol. III at 57-58.*

54. He likewise disagreed with Coers' expense estimates, noting that her allotment of $.50/sq. ft. for replacement reserves was more than the average reserves for power centers listed in the *Korpacz /PWC Investor Survey* for 1st Quarter 2012. He similarly explained that management expenses for a property with a single long-term tenant would not be 5% of estimated gross income. *Resp't Ex. O at 33.*

55. Fiene also criticized Coers' methodology in choosing a capitalization rate. Because she extracted rates from the market based on gross rents instead of net income, she did not subtract typical vacancy losses and other typical outside expenses. According to Fiene, that methodology necessarily leads to a higher capitalization rate, which in turn leads to a lower value. In any case, he believed her rates were too high in light of survey data from

Korpacz for investor-grade power centers and Coers' own extracted rates from first-tier transactions. *Vol. III at 59-60; Resp't Ex. O at 32-33*.

56. As to Coers' sales-comparison analysis, Fiene was bothered by her decision to include sales from markets with primary trade areas of approximately 7,800, 14,000, and 26,000 people (sales 4, 7,and 8), when the subject property's primary trade area had 64,000 people. Two of her sales (sales 6 and 8) involved two-story buildings, one of which (sale 8) was built in 1974 and was located in a "dead" mall. Fiene did not believe those properties were comparable to the subject property. He felt that another (sale 1) was inferior to the subject property in quality and finish. It sold to what Fiene described as a second-tier speculator and remained vacant for at least six years after the sale. He could not confirm the sale price for another sale (sale 2), a former Walmart that was apparently sold to a speculator. According to Fiene, only one sale—the one from Walmart to J.C. Penney in Crystal Lake, Illinois (sale 3)—could be considered comparable to the subject property. That sale had the highest per-unit price ($63.65/sq. ft.). Fiene claimed that he found sales of more similar properties that would have led to a more credible appraisal.[6] *Vol. III at 44-49; Resp't Ex. O at 26-27.*

57. In any case, Fiene was troubled by the breadth of the price range for Coers' comparable sales and by the size of her adjustments, which barely narrowed that range. He also criticized specific adjustments. For example, he took issue with Coers' use of capitalization rates for first-tier properties to calculate her market-conditions adjustments. The average adjusted sale prices for the two stores that Fiene believed were most comparable to the subject property, and to which Coers applied the least net adjustments (sales 3 and 6), were $52.22/sq. ft. (2010), $52.85/sq. ft. (2011), and $53.53 (2012). Those unit values translate to overall values of $4,600,000 (2010), $4,660,000 (2011), and $4,725,000 (2012) for the subject property—significantly more than the amounts Coers settled on for each year. *Vol. III at 44-49; Resp't Ex. O at 26-29*.

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[6] He did not elaborate on those sales other than to say they were contained in file memoranda. *Vol. II at 27*. The Assessor did not offer those memoranda.

58. Fiene also criticized Coers' condition and size adjustments. While her method of taking 68% of the property's age-life based on 40 years equates to about 1.8% per year, her condition adjustments ranged from 1% to 1.54% per year. He noted that she gave sale 6 an increasingly larger negative adjustment each year, implying that its condition somehow improved in relation to the subject property. Although her building-size adjustment was uniform, Coers did not explain how she quantified it. Fiene also believed that Coers' use of income-based indicators for some of her adjustments was unsupportable in light of her decision to use solely dark boxes for her comparable sales. Regardless, he observed that in very small markets, such as the markets for three of her comparables, there was insufficient data from which to garner a reliable sample to make a location adjustment. *Resp't Ex. O at 28*.

59. Coers' use of dark boxes in a market-value-in-use appraisal fundamentally troubled Fiene. In his opinion, that does not conform to the valuation standard, because dark boxes no longer have utility to either the previous owner or user or to another owner or user in the same retail tier. For support, Fiene quoted a passage from Lenhoff's article, where, among other things, Lenhoff explained:

> *A property that has been custom built for the current occupant—be that an owner-occupant or tenant—will usually have a value in use that is higher than the property's market value....* [T]he improvements have been tailored to the wants and needs of the occupant, and those requirements are unlikely to be exactly the same as those of the market in general.

Resp't Ex. G at 61 (emphasis added); Vol. III at 35-36.

60. According to Fiene, when looking at sales of dark boxes under a market value-in-use premise, one must consider not only what actually exists, but also what it will take to give the property utility to a new owner. An appraiser must therefore adjust the sale price by what the new user will have to spend to create the utility it needs. Fiene testified that few owner-users walk into a situation like the subject property; they are very specific property types that require more of an investment than just painting. For example, Fiene testified

about a 48,000-square-foot store in Lafayette that was occupied by one sports and recreation retailer before another sports and recreation retailer, Gander Mountain, moved in. It took Gander Mountain $25/sq. ft, or $1.2 million, to convert the store to its business model. *See Vol. III at 50-51*.

61. Also, some big boxes have deed restrictions when they sell. To illustrate, Fiene pointed to sale 7, a former Walmart in Wabash. That deed included restrictions prohibiting the buyer from having any tenant over 30,000 square feet and excluded supermarkets, drug stores, general retailers, and merchandisers. *Vol. III at 47.*

62. Turning to the cost approach, Fiene took issue with Coers' analysis of comparable land sales. Nonetheless, he agreed with her conclusions, which were close to what Kohl's paid for the site in 2002. Fiene, however, disputed how she calculated accrued depreciation to the improvements. He pointed to an excerpt from a book by Richard Sorenson in which Sorenson described the "back-door" approach used by Coers as a common error. Coers estimated depreciation of 65%. At that level, Fiene argued, the store never should have been built. *Resp't Ex. O at 20; Pet'r Ex. H at 64*; *Vol. III at 43, 62*.

63. Fiene also argued that it was illogical for Coers to minimize the cost approach given that she was valuing a seven-year-old building. According to Fiene, the cost approach truly represents the value of the fee-simple interest for such a property under a value-in-use premise. *Vol. III at 61-62*.

64. Finally, although Coers' appraisal says otherwise, her reconciliation of values was essentially an average of the three approaches. Indeed, Fiene felt that Coers relied too heavily on averages. As he explained, simply using arithmetic is insufficient; it requires no judgment and is professionally irresponsible. *Vol. III at 24-25, 64*.

b. Coers' response

65. Coers responded to Fiene's review in detail. She believed that she sufficiently identified the property notwithstanding any typographical errors in referencing its parcel number. She similarly dismissed Fiene's criticisms about her description of the surrounding neighborhood on grounds that her intended users knew about the surrounding properties. She recognized that the property had a lot of parking, but based on the site's size and shape, it could not necessarily be maximally developed. At any rate, the parking and land-to-building ratios were in line with what she has seen across central Indiana. She also explained that she did not see anything unusual in the easement and operating agreement with Kite. *Vol. III at 92-100.*

66. Coers noted that she never claimed to have performed more than a Level A analysis. In any case, USPAP does not require any specific level of analysis. She did admit that her reference to the Kokomo MSA as the property's micro-area was an error—she intended to refer to the property's immediate one-mile radius. *Pet'r Ex. D at 13*.

67. Turning to Fiene's criticisms of her analysis under the income approach, Coers acknowledged that one would not deduct depreciation in a feasibility-rent analysis for a new building. But she was appraising a seven-to-nine-year-old building. She similarly explained that her decision to use market data in estimating percentage rent rather than just relying on the experience of Kohl's was consistent with Indiana law. She also disagreed with Fiene's view that she understated rent for what he described as first-tier properties. Fiene was referring to the tenant profile, which Coers does not believe should be considered in determining the value of a fee simple interest. *Vol. III at 83-88, 119; Pet'r Ex. D at 28.*

68. Although Fiene criticized her reserves and operating expenses as excessive, she spoke to market participants who believed that her estimate for replacement reserves was conservative. Similarly, she used market data from IREM as well as her professional judgment to estimate operating expenses. Because Indiana is a "fairly average" market

when compared to the rest of the country and Kokomo is a "fairly average" market within Indiana, she believed that the median levels were appropriate. *Vol. III at 115-16*.

69. While Fiene criticized her use of gross rents in extracting capitalization rates, market participants viewed gross rent as the driving factor. She was therefore simply reporting how those properties trade in the market. Nonetheless, she checked to make sure that the extracted rates based on gross rent fell within the rates indicted by other sources. *Vol. III at 117-19*.

70. Coers similarly disagreed with Fiene's various criticisms of her sales-comparison analysis. Constraints on capital and financing meant that real estate in general did not trade frequently during the periods relevant to her appraisal. Because she did not have as many recent sales as she would have liked, she included properties that were not necessarily in the most similar locations, although she included both inferior and superior locations. While she gave the most weight to the sale of the former Walmart in Crystal Lake, Illinois (sale 3) and the former Marshall Field's in Dublin, Ohio (sale 6), those locations had much larger populations than the subject property's trade area. She therefore felt that it would have been inappropriate to ignore the other sales. *Vol. III at 109-13; Pet'r Ex. D at 22*.

71. Coers defended using rental rates for her location adjustments even though the properties were owner-occupied. She explained that those rates reflect the composition of retail in the area, supply and demand conditions, and underlying land values, all of which are indicators of a location's quality. And there was nothing wrong with her physical-condition adjustment for each property changing from year to year—the subject property's age increased in accordance with each valuation date while the comparable properties' effective ages were fixed as of their sale dates. Finally, she explained that she made all her adjustments based on her professional experience. *Pet'r Ex. D at 24-25*; *Vol. III at 111-12*.

72. Ultimately, Coers and Fiene differ on the meaning of market value-in-use. Coers confirmed with Lenhoff that his interpretation of value-in-use, which Fiene relied on, was based on the way the appraisal profession has historically interpreted the term—value *to* the user, not *for* the use. Lenhoff even differentiates between market value-in-use and value-in-use, as evidenced by a footnote where he indicates, "Some jurisdictions have assessment criteria that mandate a *market value in use* estimate, which usually means the exchange value of the property assuming the current use is the highest and best use." *Resp't Ex. G at 61 n.1 (emphasis in original); Vol. II at 82*. She spoke to Lenhoff about build-to-suit retail properties, although not specifically about big-box retail. Given his understanding of Indiana's market value-in-use standard, Lenhoff felt her approach was appropriate. *Vol. III at 82-83*.

73. Coers disagreed with Fiene's claim that an appraiser should adjust for business-specific expenditures to make an existing big box look like a Gander Mountain or a Kohl's. She adjusted for improvements needed to maintain the property's utility for a general retail user. That is essentially a condition adjustment. In her view, making a separate buyer-expenditure adjustment would be double counting. *Vol. III at 113-14, 133.*

74. As to Fiene's criticisms of her cost approach analysis, Coers explained that she found market-wide obsolescence due to the national recession, and that the obsolescence affected the oversupplied big-box-retail market. The oversupply was part of the larger big-box market, and the market for those properties includes both local and regional buyers. The subject property competed in most of central Indiana and beyond. It was potentially more susceptible to economic conditions because of its reliance on employment sectors that experienced higher than average unemployment rates. *Vol. III at 89-93, 99.*

75. Coers explained that she lacked enough reliable data to calculate external obsolescence using traditional methods, such as a paired-sales analysis. While Fiene took issue with her methodology, he did not accurately describe what she did. She also pointed to an

article from the *Appraisal Journal, Entrepreneurial Profit Incentive and Marketwide External Obsolescence: Are they Mutually Exclusive?* in which the authors defend her approach on grounds that the sales-comparison and income approaches have external obsolescence built into their methodologies. *Vol. III at 87-90; Pet'r Ex. D at 19*.

76. At any rate, Coers believed that her ultimate decision not to rely on the cost approach mooted her disagreement with Fiene. According to Coers, some experts argue that the cost approach should be minimized where market-wide obsolescence exists, because costs will not necessarily equal value, even for newer properties. *Vol. III at 89-92, 119; Pet'r Ex. D at 32.*

3. Morlan appraisal

77. The Assessor hired Thomas P. Morlan, III to appraise the subject property. Morlan is an Indiana licensed appraiser with over 40 years of experience. He is also a licensed real estate broker, a Level II assessor-appraiser, a licensed real estate instructor, and a former USPAP instructor. He has designations as an MAI, SRA, and SREA. His firm, RE Research Associates, offers a variety of services, such as brokerage financing placement, appraising, and tax assessment. He currently appraises primarily high-risk, high-value commercial properties. He has extensive experience appraising commercial developments in north central Indiana. *Vol. II at 56-64*.

78. Morlan served several terms on the Appraisal Institute's board of directors. He also served the Appraisal Institute in other capacities, including as chair of its state governmental relations committee. He assisted in writing the 10th Edition of *The Appraisal of Real Estate* and chaired the state education committee for the Society of Real Estate Appraisers. *Vol. II at 64-74, 91-92, 168-69.*

79. Morlan researched the property's history. He got traffic counts, populations, sales per square foot, actual gross sales, store sizes, and construction dates for every Kohl's store in Indiana. He also collected information from various sources, including local market

participants. Among other things, Morlan toured both the subject property and competing discount department stores in Kokomo. He interviewed store managers about their site-selection criteria. Given the differences in those criteria, he determined that the stores were not interchangeable. *Vol. II at 124-125, 163, 166; Resp't Ex. H at 11-12.*

80. Morlan believed that the anticipation of the U.S. 231 bypass was important in developing the subject property's feasibility. According to Morlan, the bypass likely will move truck traffic off US 31/Reed Road. If Kokomo reacts to the construction like other communities, such as Lafayette, the removal of congestion and shortening of drive times will enhance retail appeal along US 31/Reed Road. Given the subject property's location, he believes that Beerman's would have moved in had the subject property been vacant. *Vol. II at 128-29, 156-157, 263; see also Resp't Ex. H at 11-12.*

81. Morlan concluded that the site's highest and best use if vacant would be big-box retail as an end-cap or freestanding anchor to Boulevard Crossing. As improved, he believed that the property's current use was its highest and best use. *Vol. II at 135; see also Resp't Ex. H at 9.* He developed all three approaches to value, but gave the most weight to his conclusions under the cost approach. He identified "classic situations" where that is the approach of preference: (1) when the property being appraised has relatively new improvements that represent the land's highest and best use, (2) "when the improvements are unique and therefore no true comps exist;" and/or (3) "when the nature of the improvements are predominantly amenity oriented to an owner/user occupant and the property is new." *Resp't Ex. H at 78 (emphasis in original).* Although the subject property is not new, Morlan described it as "newer." *Id.*

82. According to Morlan, comparables used in developing the sales-comparison and income approaches should come from the market strata in which the appraisal is being conducted. In his view, the lack of available comparables in the market in which Kohl's competes made the sales-comparison approach less reliable than the cost approach. Although Morlan developed an income approach, he determined that it was redundant with the

sales-comparison approach because he used mostly the same sales to get his market-derived capitalization rate as he used in his sales-comparison analysis. And his analyses under both approaches suffered from "a major reliance on inference." *Resp't Ex. H at 14; see also, Vol. II at 217*. He therefore included his income approach analyses only in a file memorandum.

83. Morlan examined sales from Lafayette, Marion, Logansport and other communities both in mid-north Indiana and around the state. Because all the sites met the selection criteria for Kohl's, he believed they would generally be good substitutes. He rated the sales as overall superior, inferior, or similar to the subject site and bracketed them around what he considered the most similar sale—a Kohl's site in Portage. He arrived at $1,490,000 as his land value for all three years under appeal. *Resp't Ex. H at 84-86.*

84. To value the improvements, Morlan first looked at the certified actual historic costs that Kohl's provided. He then validated those costs by checking them against the cost new generated by the "state's software." *Vol. II at 179*. The historical costs varied from the software-generated costs by 1.78% (2010), -1.72% (2011), and 4.91% (2012), respectively. Morlan attributed the relatively higher variance in 2012 to the state switching from Marshall Swift to Craftsman for its cost source. As a further check, Morlan analyzed cost new using guides from Marshall Valuation Service, Craftsman, and Means Cost Service. He settled on the following software-generated costs: $4,052,570 (2010 and 2011) and $4,438,140 (2012). It appears that Morlan then took the economic life and effective age for each line item from the cost breakdown provided by Kohl's and calculated a weighted average depreciation percentage, which he applied to the Assessor's cost new. *Resp't Ex. H at 87-98; Vol. II at 176-81*.

85. Morlan found no functional or economic obsolescence. He analyzed Indiana's economy as well as the economies of Kokomo and Howard County. Both Kokomo and Howard County have long been associated with automobile manufacturing. Manufacturing employment in Indiana steadily declined from 2000 to around 2010, at which point it

began to increase. Similarly, the civilian labor force in Howard County began to decline in 1995, but has been holding steady since 2010. In Morlan's view, those statistics show that Indiana is establishing a sustainable growth trajectory in manufacturing jobs. And Kokomo is a major beneficiary of that growth. According to Morlan, factors such as the government's bailout of the automobile industry and the EPA granting a permit to Chrysler's casting plant, uniquely positioned the Kokomo plants to continue operating during the 2009-2010 recession. *Resp't Ex. H at 24-30, 32, 37; see also, Vol.II at 145-51*.

86. Morlan acknowledged that Kokomo was hit hard by the recession. But he explained that even with job losses and declining income, people do not stop eating. Certain classes of business continue to operate out of necessity and do not incur economic obsolescence. Typically, economic obsolescence does not apply universally throughout the market. Meijer, Kohl's, Sam's Club, Walmart, and Target remained open. *Vol. II at 144, 152, 255; Resp't Ex. H at 30-33*. In fact, the big-box retailers contributed to overbuilding Kokomo's retail space by approximately 1 million square feet and therefore were the beneficiaries of the "creative destruction" they helped cause. *Vol. II at 153; Resp't Ex. H at 41*. Power centers with anchor retail stores, such as those owned by Kite, fared well throughout the recession. *Vol. II at 161*. Boulevard Crossing as a whole also "maintained its stability and exhibited superior performance." *Resp't Ex. H at 53*. And the subject property's year-over-year sales remained steady from 2006 through 2012. *Id. at 47; Vol. II at 153*.

87. While the neighborhood declined from overbuilding and the economic meltdown, it has shown real signs of improvement since 2009. Morlan therefore concluded that "[t]he new tenants, the remodeling, the declining vacancy, the new building, and the turn of Chrysler make it impossible to support Economic Loss" under market value-in-use. *Resp't Ex. H at 42; Vol. II at 251-52*. That was especially true when using direct data from the area, but he could not support economic loss even using regional and national data. As he also explained, to impute economic loss to the subject property, that loss

must be manifested in the property's metrics. And the subject property's year-over-year store sales did not manifest a loss. *Resp't Ex. H at 46.*

88. After adding the improvements' depreciated costs to his land value, Morlan arrived at the following values under the cost approach: $4,920,000 (2010), $4,770,000 (2011), and $4,810,000 (2012). *Resp't Ex. H at 89-98.*

89. Morlan then turned to the sales-comparison approach. He ultimately found that there were no good substitutes for the subject property under a value-in-use standard. He especially believed that dark boxes were not good substitutes. First, the subject property is an operating Kohl's store with utility to its owner. By contrast, dark boxes typically do not sell unless the owner goes bankrupt or changes its ideal improvement. In the first instance, the seller is atypically motivated. In the second, the building has an inutility. By using the sale, an appraiser is therefore determining either value in exchange, or value in exchange for an alternative use, rather than value in use. *Vol. II at 198.Vol. II at 118, 184, 198; see also Resp't Ex. K at 2.*

90. Second, concerns like avoiding competition often overshadow maximizing the sale price when selling big boxes. Sellers therefore may include use restrictions in the deeds from those sales. They may also intentionally keep the store dark a couple of years or more while they train their customers to go to their new location. And nothing good happens to a store that has been dark for a long time. *Vol. II at 101-04, 186-87; see also Vol. II at 108.*

91. Finally, each big-box retailer has a set of requirements, such as a desired traffic count, building footprint, and income level for the surrounding population. A dark Walmart store is 120,000 square feet, while Kohl's requires 80,000 square feet. Kohl's or Macy's may buy a dark box, but they will not pay the same price for a building they must "fit up" as they would pay for a new building. As an example, Morlan pointed to a K-Mart store that sold out of a bankruptcy proceeding for $30 per square foot. The buyer put in $7

million to make the building its own, so the price was really $60 per square foot. *Vol. II at 109, 120-21, 187-89.*

92. In Morlan's opinion, big-box or mega-big-box stores are limited-market properties because they are built to suit the original user's business. *See Vol. II at 257-60; see also, Resp't Ex. E at 25* (THE APPRAISAL OF REAL ESTATE) (defining a limited-market property as a property that has relatively few potential buyers at a particular time, sometimes because of unique design features or changing market conditions.*"*). Morlan also characterized the subject property as a "variant" of a special purpose property. *Vol. II at 257.* According to The Appraisal of Real Estate, "many limited market properties include structures with unique design, special construction materials, or layouts that restrict their utility to the use for which they were originally built" and explains that such properties are often called "*special-purpose* or *special-design properties*." *Resp't Ex. E at 25 (emphasis in original).* While that publication gives examples such as houses of worship, museums, public buildings, and clubhouses, Morlan noted that those examples are not exclusive.

93. When asked what unique physical design, special construction materials, or layout features restricted the subject property's utility for use as big-box retail, Morlan offered the following responses: (1) the property is in a *de facto* planned development, (2) the site plan has a reserve for an additional 20,000 square feet of building, (3) and the presence of wetlands on the property likely restricts its uses as do many other provisions in the easement and operating agreement with Kite. *Vol. II at 259-62.* He ultimately testified that "the box that is there is probably adaptable," but he could not speak to how the site could be adapted. *Id. at 263.*

94. In any case, Morlan testified that properties like the subject property trade in the greater market, but not in the local market. According to Morlan, Kohl's and others frequently engage in arbitrage—meaning they buy property to keep out competitors. That creates a barrier to entry and prevents the market from operating. *Vol. II at 257-59.*

95. For those reasons, Morlan avoided using sales of dark boxes. He ultimately found that sales of stores leased to Kohl's were the best proxy for the subject property. While he believed that the properties were mostly leased at market rates, the creditworthiness of Kohl's and the amount of time remaining on the leases affected the sale prices. He therefore used sales from real estate investment trusts ("REITs") to abstract out the portion of the sale price attributable to those factors. The REITs had bought power centers, which included either end-capped or freestanding Kohl's stores, as a package and then separately sold the Kohl's stores. The capitalization rates derived from the package sales were 300 basis points higher than the rates from the separate Kohl's sales. Based on those paired sales and his observations, Morlan adjusted his comparable sales by 30%. According to Morlan, Lenhoff agreed with his approach. Morlan also adjusted the sale prices for location. *Vol. II at 190, 195-97, 223; Resp't Ex. H at 100-03.*

96. In any case, Morlan explained that his adjustments were "observed" because he lacked sufficient data to accurately perform a classic quantitative analysis. Ultimately, his sales-comparison analysis yielded the following values: $4,870,000 (2010), $4,440,000 (2011), and $4,680,000 (2012). *Vol. II at 186-94; Resp't Ex. H at 101-02.*

97. Morlan performed various analyses under the income approach. In one, he estimated rent based on 3% of the subject property's year-over-year sales. That was the high end of the range reported by *Dollars and Cents of Shopping Centers/The Score*. He benchmarked that against Kohl's stores throughout Indiana, which reflected an even higher percentage. He also looked at other aggregated data for that "tranche" of business and felt that the subject property's sales per square foot would be about right for another user. He estimated vacancy and collection losses at 6% of effective gross income and operating expenses at 10%. He then applied a 9% capitalization rate to arrive at the following values: $4,870,000 (2010), $4,760,000 (2011), and $4,640,000 (2012). In another analysis, he used different vacancy rates and operating expenses and came to the

following values $5,090,000 (2010), $5,020,000 (2011), and $4,950,000 (2012). *See Ex. K; Vol. II at 201-12*.

98. As explained above, Morlan used his analyses under the sales-comparison and income approaches only to benchmark his cost approach. He therefore ultimately relied on his cost approach to reach his final value conclusions of $4,920,000 (2010), $4,770,000 (2011), and $4,810,000 (2012). *Resp't Ex. H at 89-98, 111*.

4. Mitchell review

99. Kohl's hired Larry Mitchell to review Morlan's appraisal report. Mitchell is an MAI and a certified general appraiser in Indiana, Ohio, and Illinois. He is also a Level II certified assessor-appraiser and licensed broker in Indiana. He has been involved in several professional organizations, such as the Metropolitan Indianapolis Board of Realtors and the Indiana Commercial Board of Realtors. For the last 20 years, he has worked exclusively in the appraisal field. *Pet'r Ex. E at 30; Vol. III at 138-39*.

100. Mitchell found four major USPAP-related issues with Morlan's report. First, he concluded that Morlan was not competent to appraise the property's market value-in-use. He based that conclusion on several elements in Morlan's report, including Morlan's repeated use of the term "market value" instead of "market value-in-use." *Pet'r Ex. E at 6-8; Vol. III at 146*.

101. Second, Morlan used comparable sales that occurred well after the valuation dates in his report. Mitchell believes that conflicts with USPAP's Statement on Appraisal Standards No. 3, which addresses retrospective opinions of value. Third, Mitchell found a series of errors, including inappropriate references to market value, retired USPAP terminology, inapplicable boilerplate language from other appraisals, and typographical errors. In some cases, Mitchell felt that the errors were misleading and indicated that Morlan may not have been current on applicable standards. The sheer number of errors also led Mitchell to conclude that Morlan was reckless. Finally, Morlan did not include a

summary of his income-approach analysis in his appraisal report, which Mitchell believes contradicts USPAP Standards Rule 2-2(b)(viii). *Pet'r Ex. E at 6-12; Pet'r Ex. F at U-85; see also, Vol. III at 149-63.*

102. Morlan's analysis troubled Mitchell even aside from the problems under USPAP. For example, in calculating depreciation Morlan used the actual construction costs from Kohl's. According to Mitchell, those costs included items that are considered personal property for assessment purposes, such as signs, wiring, the fire alarm system, and dock levelers. Yet Morlan did not deduct any of those items. Mitchell was even more troubled by Morlan's finding that the subject property suffered no economic loss. In Mitchell's view, that finding conflicts with Morlan's comments about the Kokomo economy, the decline of the automobile industry, and the wiping out of skilled workers' wealth. *Vol. III at 168-71; Vol. IV at 77-78; Pet'r Ex. E at 14*.

103. Morlan's reliance on sales of leased Kohl's stores throughout the country also troubled Mitchell. While Morlan asserted that the properties were leased at market rates, his report does not give any support for that conclusion. The report similarly offers no data to support his 30% adjustment for tenant creditworthiness. And while Morlan says he adjusted for location based on population, traffic, and other elements, his report does not present those adjustments. *Pet'r Ex. E at 20-21; Vol. III at 171-73*.

5. Matthews' review of Mitchell's report

104. The Assessor hired David Matthews to review Mitchell's report. Matthews is a certified general appraiser licensed in Indiana and various other states. He is designated as an MAI and SRA. He is also a licensed real estate broker and counselor of real estate. Among other things, Matthews is a past president of the Evansville chapter of the Society of Real Estate Appraisers, as well as a former national chairman of the MAI comprehensive examination. In the mid-1990s, he served as national chairman of the Appraisal Institute's communications committee, where he assisted in writing the 10th Edition of the Appraisal of Real Estate. He has been a USPAP instructor for 20 years and

has taught several other appraisal courses. He has appraised commercial properties extensively. *Vol. III at 179-84; Resp't Ex. Q at Qualifications*.

105. Matthews found Mitchell's report misleading at times and believed that it showed bias. Matthews pointed to what he described as Mitchell's use of illogical reasoning, misleading explanations, and misstatements. He concluded that Mitchell's attempts to portray Morlan as incompetent to perform the assignment might approach bias, especially considering that Mitchell had done his own appraisal of the property.[7] Matthews also found that Morlan's typographical and terminology errors did not influence his valuation opinion or mislead the reader. *Vol. III at 183; Vol. IV at 13-15, 39*; *Resp't Ex. Q at 5.*

106. While Mitchell criticized Morlan's use of comparable sales from after his valuation dates, USPAP allows an appraiser to use such data if it is consistent with trends in place and meets the marketplace's expectations as of the valuation date. According to Matthews, nothing unexpected occurred in the marketplace from 2010 to 2013—the economy showed the type of slow, sustained recovery that economists predicted. Similarly, if a comparable property sold in January 2012, it was likely on the market on January 1, 2011, and would be part of the database an appraiser could consider. *Vol. IV at 6-10; see also, Pet'r Ex. F at U-85-86*.

107. Matthews similarly felt that Morlan was justified in relying primarily on the cost approach because the subject property is "somewhat of a special purpose property." *Vol. IV at 22*. In Matthews' view, Morlan also justifiably chose not to use sales of dark boxes in his sales-comparison analysis because those properties sell for alternate uses. According to Matthews, use value differs from market value or value-in-exchange in important ways. If an empty building sells for an alternate use for which it was not

[7] Mitchell disputed that he was biased, pointing to the Appraisal Standards Board's response to a frequently asked question about whether an appraiser's prior experience appraising a property creates a bias that would precluded him from accepting a review assignment involving the same property. The board said no, explaining that the prior experience might be an asset. But the board went on to say that the appraiser should decline the assignment if the prior appraisal creates a predisposition about appropriate and reasonable results for the review assignment. *See Vol. IV at 59-60; Pet'r Ex. F at F 152*.

designed, it likely suffers from functional obsolescence and possibly from external obsolescence. Most big boxes are built to one retailer's specific standards and thus cannot be successfully renovated and reused without extensive cost to the second-generation tenant. The subject property's current use is not general retail. Instead, it was built to meet the needs of Kohl's, with the right size, design, and layout. *Vol. III at 191; Vol. IV at 24-31, 54; Resp't Ex. Q at 9.*

108. Thus, when Kohl's bought a former Value City store in 2010, it issued a press release saying that it had spent $2 million to convert the store to a Kohl's. The store was only 80,000 square feet, but Kohl's wanted 87,000, so it built a warehouse for about $500,000. According to Matthews, the remaining $1.5 million represented the cost to cure functional obsolescence. Matthews, however, acknowledged that he did not know how much of the remaining expenditures involved personal property, like shelving, as opposed to real property. He testified that he would not be surprised if the typical cost of personal property and fixtures to set up a store was more than $1 million. Matthews also pointed to several other dark boxes where either no buyer could be found, or the buyer spent significant money repurposing the property. They included properties formerly owned by Sam's Club, Walmart, Target, Venture, and K-Mart. He did not provide much detail about those properties, and Coers did not use them in her sales-comparison analysis. *Vol. IV at 25-28, 52-56.*

109. Big boxes differ from what Matthews described as "vanilla boxes"—standard, "commotitized" freestanding buildings of approximately 5,000 to 10,000 square feet, with 10-to-12-foot ceilings. *Vol. IV at 32*. According to Matthews, vanilla boxes sell frequently and they can easily be converted to many different retail uses. By contrast, big boxes are much deeper than the 100-to-125 feet required for typical retail use. So converting big boxes to other retail uses creates obsolescence. *Vol. IV at 27*.

110. Thus, Matthews believes that using dark boxes to estimate an operating store's value-in-use is dangerous and may lead to underestimating the property's value. In his view, it is

better to use leased-fee sales, at least if, as Morlan did, an appraiser gathers enough data to approximate the market. Along the same lines, Matthews disagreed with Coers' decision to automatically exclude build-to-suit leases when determining market rent. He explained that prospective tenants will simply go elsewhere if builders try to gouge them. *See Vol. IV at 28, 36-39.*

IV. Conclusions of Law and Analysis

A. Burden of Proof

111. Generally, a taxpayer seeking review of an assessing official's determination has the burden of making a prima facie case both that the current assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). If the taxpayer makes a prima facie case, the burden shifts to the assessor to offer evidence to impeach or rebut the taxpayer's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers*, 805 N.E.2d at 479.

112. Indiana Code § 6-1.1-15-17.2, as amended,[8] creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances. Where the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, the assessor has the burden of proving that the assessment under appeal is correct. I.C. § 6-1.1-15-17.2(b). The assessor similarly has the burden where a property's gross assessed value was reduced in an appeal, and the assessment for the following date represents an increase over "the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase …." I.C. § 6-1.1-15-17.2(d).

[8] The amendments to Ind. Code § 6-1.1-15-17.2 became effective with the Governor's signature on March 25, 2014. *See* P.L. 97-2014. The statute, as amended, applies to "all appeals or reviews pending on the effective date of the amendments …." *Id.*; I.C. § 6-1.1-15-17.2(e) (2014).

113. In any case, if an assessor has the burden and fails to meet it, the taxpayer may offer evidence of the correct assessment. If neither party offers evidence that suffices to prove the property's correct assessment, it reverts to the previous year's value. *See* I.C. § 6-1.1-15-17.2(b).

114. The assessment actually decreased between 2009 and 2010. Kohl's therefore has the burden of proof for 2010, the first year at issue in these appeals. Under Ind. Code § 6-1.1-15-17.2(d), the burden for each succeeding years turns on our decision for the preceding year. For example, if we order a reduction for 2010 that lowers that assessment below the 2011 level, the Assessor will have the burden in the 2011 appeal. In a case like this, where both sides offer appraisals from highly qualified experts, the question is largely theoretical. We must weigh the evidence to determine what most persuasively shows the property's true tax value. We now turn to that task.

B. Indiana's True Tax Value Standard

115. The differences in Coers' and Morlan's valuation opinions stem largely from their different understanding of Indiana's true tax value standard. The legislature has directed that real property be assessed based on its true tax value, "which does not mean fair market value," but rather "the value determined under the rules of the [DLGF]." I.C. § 6-1.1-31-7(c).[9] Thus, the legislature left it to the DLGF to create a constitutionally acceptable standard for true tax value. The DLGF did so in the 2002 and 2011 Manuals, defining true tax value as:

> The market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property

2002 MANUAL at 2; *see also*, 2011 MANUAL at 2.[10]

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[9] The legislature has given different definitions of true tax value for specific property types. *E.g.* 6-1.1-4-39 (rental housing with four our more units) -39.5 (riverboat casinos), -42 (golf courses).

[10] The definition in the 2011 Manual is identical except for one word: "The market value-in-use of a property for its current use, as reflected by the utility received by the owner or *by* a similar user, from the property." 2011 MANUAL at 2 (emphasis added).

116. The 2002 Manual offers further guidance regarding that standard. For example, it defines "market value-in-use," "value in use," and "use value," as being synonymous. 2002 MANUAL at 6-8. It also speaks to measuring property wealth by the utility obtained from a property. It offers guidance for when a property's true tax value will equal its value-in-exchange, such as when properties are frequently exchanged and used for the same purposes by the buyer and seller. It similarly offers examples of when the two will differ, such as when a property qualifies as special-purpose or in markets where sales are not representative of utilities. *Id*. at 2, 4. The 2011 Manual has a much more condensed discussion about true tax value. *See* 2011 MANUAL at 2-3. The parties do not argue, nor do we find, that by condensing its discussion in the 2011 Manual, the DLGF intended to change the true tax value standard, whether in response to judicial interpretations of the 2002 Manual or otherwise.

117. When one considers the applicable statutes and the language from the 2002 and 2011 Manuals, the following picture emerges. True tax value is something other than purely market value or value-in-use. Given mandates from the Indiana Supreme Court and the legislature, the Department of Local Government Finance created a valuation standard that relies heavily on what it terms objectively verifiable data from the market, but that still maintains the notion of property wealth gained through utility, and therefore recognizes situations where true tax value will differ from market value.

118. The parties disagree about what those situations are. The Assessor and her appraisers point to the Manual's glossary defining market value-in-use, value-in-use, and use value as synonymous and argue that true tax value necessarily differs from market value for built-to-suit, owner-occupied properties. They focus primarily on the user, and interpret true tax value to mean essentially the value of the subject property's use by Kohl's as a Kohl's store, or at least the value of the use by what they characterize as a "first-tier" big-box retailer.

119. Kohl's interprets the true tax value standard more broadly. More importantly, so does the Tax Court. Three cases illustrate that point: *Meijer Stores Ltd. P'ship v. Smith,* 926 N.E.2d 1134 (Ind. Tax Ct. 2010); *Stinson v. Trimas Fasteners*, 923 N.E.2d 496, 497 (Ind. Tax Ct. 2010); and *Millenium Real Estate Investment, LLC v. Benton County Assessor*, 979 N.E.2d 192 (Ind. Tax Ct. 2012).

120. In *Meijer Stores*, the Board had rejected the sales-comparison approach of Meijer's appraiser, Larry Mitchell, because he relied on sales of vacant big-box stores originally owned by Walmart and Lowes to "secondary" users, such as Big Lots or Hobby Lobby. *Meijer Stores,* 926 N.E.2d at 1137. The Tax Court disagreed. It initially quoted from the portion of the 2002 Manual explaining that the sales-comparison approach may be used to determine a property's market value-in-use "[w]hen others could feasibly use the property for the same *general* commercial or industrial purpose e.g. [,] light manufacturing [or] general retail[.]" *Id*. at 1136 (*quoting* 2002 MANUAL at 4) (emphasis added). The Court went on to explain:

> The Indiana Board essentially rejected Meijer's sales comparison analysis because Meijer did not establish what another Meijer, or comparable retailer such as Wal-Mart or Lowe's, would have paid for the subject property. This rejection was improper. Indeed, in formulating an estimate of value under the sales comparison approach, an appraiser need only 'locate [ ] sales of comparable [ ] *properties* and adjust [ ] the selling prices to reflect the subject property's total value.' Manual at 13 (emphasis added). Here, Meijer's appraisal utilized five big-box properties in Indiana that were used for retail purposes both pre- and post-sale. Wayne County's cross-examination of Mitchell did not solicit any testimony as to any other sales. Accordingly, it was improper to discount the appraisal's sales comparison approach because 'secondary users' purchased vacated big-box properties instead of entities like Wal-Mart.

926 N.E.2d at 1137 (emphasis in original, citations to record omitted).

121. In *Trimas Fasteners*, an assessor appealed from the Board's determination involving a 200,000-square-foot owner-occupied manufacturing facility. *Trimas Fasteners,* 923 N.E.2d at 497. The parties had offered competing appraisals (two from the assessor and one from the taxpayer, again prepared by Larry Mitchell). The Board found the

taxpayer's appraisal, which used sales of manufacturing facilities without leases in place, more persuasive than the other appraisals, which relied on sale-leasebacks. *Id*. at 498-99.

122. On judicial review, the assessor contended that use of vacant facilities by the taxpayer's appraiser did not reflect the market value-in-use of the property under appeal, which was occupied. *Id.* at 501. The Court rejected that argument. Among other things, it found that the assessor misunderstood "the concept of market value-in-use on its most basic level." *Id*. As the Court explained, "[g]enerally speaking, market value-in-use, as determined by objectively verifiable market data, is the value of a property *for* its use, not the value *of* its use." *Id*. (*citing* 2002 MANUAL at 2-3) (emphasis in original). For support, the Court pointed to the 2002 Manual's statement that, "in markets where property types are frequently exchanged and used by both buyer and seller for the same *general purpose*, a sale will be representative of utility and market value-in-use will equal value-in-exchange." *Id* at n.10 (*citing* 2002 MANUAL at 2-3) (emphasis added). The Court recognized that the Manual provided an exception to that rule and that sales will generally not represent utility for special-purpose properties. *Id*. The appraisers, however, agreed that the property at issue was not special purpose. *Id*.

123. Finally, in *Millenium Real Estate*, a taxpayer claimed that because Indiana's assessment system is based on market value-in-use, the Board had erred in relying on an appraisal that estimated the property's market value. *Millenium Real Estate*, 979 N.E.2d at 195-96. The Court disagreed, explaining, "[w]hile Indiana assesses real property on the basis of its market value-in-use, this does not mean that a subject property's assessed value and its market value will never coincide." *Id*. at 196. Thus, "when a property's current use is consistent with its highest and best use, and there are regular exchanges within its market so that ask and offer prices converge, a property's market value-in-use will equal its market value because the sales price fully captures the property's utility." *Id*. at 196 (*citing* 2002 MANUAL at 2). By contrast, when a property's current and highest and best uses are inconsistent with each other, "market value-in-use will not equal market value because the sale price will not reflect the property's utility." *Id*.

124. Taken together, *Meijer Stores*, *Trimas Fasteners*, and *Millenium Real Estate* mean that where a non-special-purpose property is put to its highest and best use and is of a type that regularly exchanges for the same *general* use, the property's true tax value will equal its market value. *See In re Majestic Star Casino, LLC,* 457 B.R. 327, 363 (Bankr. D. Del. 2011) *findings adopted* 2013 U.S. Dist. LEXIS 174894 (D. Del. Dec. 10, 2013) ("Taken together, *Trimas* Fasteners and *Meijer Stores* clearly direct that what matters most for purposes of determining "market value-in-use" is not whether the sales comparables were in business and operating on the date of sale, but whether the properties' 'use'—both before and after sale—was generally the same (*i.e* retail use, manufacturing use, gaming use.").[11] Here, while a landmark economic recession led to fewer sales than might be ideal, even Morlan acknowledged that properties like the subject property generally trade in the larger market for the same general retail use. And he viewed the property's current use as its highest and best use, although he characterized that use rather narrowly.

125. The Assessor seeks to distinguish *Meijer Stores* on grounds that the assessor in that case did not offer a countervailing appraisal. She reads the decision as simply holding that "an appraiser's estimate of value cannot be discounted in the absence of factual evidence to the contrary." *Assessor's Post-Hearing Brief at 67*. We disagree. The relevant holding from *Meijer Stores* addresses the meaning of the DLGF's true tax value standard. The Court found that Board's interpretation, which the Assessor acknowledges aligns with the interpretation that she and her witnesses advocate in this case,[12] was wrong. The Court's own later characterization of its holding supports our view. *See Shelby County Assessor v. CVS Pharmacy,* 994 N.E.2d 350, 354 Ind. Tax Ct. 2013) (characterizing *Meijer Stores* holding as "recognizing that the market value-in-use of a property should be measured against properties with a comparable use, as opposed to properties with identical users.").

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[11] *Majestic Star* involved the assessment of a riverboat casino. Indiana Code § 6-1.1-4-39.5 generally defines the true tax value of those properties as the lowest valuation determined by applying the cost, sales-comparison, and income-capitalization approaches. We cite to *Majestic Star* for its analysis of how the Tax Court has interpreted the DLGF's true tax value standard. We make no finding regarding how that standard relates to the statutory definition of true tax value for riverboat casinos.

[12] "The Board's point of view [in *Meijer Stores*] regarding truly comparable properties in terms of current use is aligned with the Assessor's argument here." *Assessor's Post-Hearing Brief at 66*.

126. As the Assessor also points out, however, when valuing what the 2002 Manual and Guidelines alternately describe interchangeably as "special purpose," "special-use," or "specialty" properties, both the Manual and Tax Court recognize an exception to the general rule that sales equal utility. The Manual identifies a "special use" or "specialty" property as one that "is so uniquely designed and adapted for the business conducted upon it or the use made of it and which cannot be converted to other uses without the expenditure of significant sums of money." 2002 MANUAL at 4. Similarly, the Guidelines define a "special purpose" property as "[a] limited-market property with unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built." 2002 GUIDELINES, App. F at 17 (*citing* APPRAISAL INSTITUTE, THE DICTIONARY OF REAL ESTATE APPRAISAL, p. 42). The Guidelines also define "special purpose design" as:

> An improvement whose design is such that it limits its use to a narrow range of occupancies. Any building designed in such a way that it cannot easily be converted to another use can be considered a *special-purpose structure*. Although most buildings can be converted to alternative occupancies, conversion of special-purpose structures involves the expenditure of large sums of money and requires design expertise. Examples are steel mills, theaters, auditoriums, and churches.

2002 GUIDELINES, glossary at 19 (emphasis in original); 2011 GUIDELINES, Glossary at 21.

127. The Assessor's appraisers described the subject property as a limited-market property and at times as, "somewhat of a special purpose property," or a "variant" of a special-purpose property. *Vol. II at 257; Vol. IV at 22*. But they did little to explain how it actually meets the definition of a special-purpose property as laid out in the Manuals, Guidelines, or The Appraisal of Real Estate. Indeed, the property does not resemble any of the examples of special-purpose properties given by those sources, such as steel mills, museums, or auditoriums.

128. Instead, the Assessor's experts testified generally about how Kohl's wants a certain-sized building, with a certain layout, lighting, wall cover, and flooring. While Morlan and

Fiene testified about the costs of converting vacant big boxes to the buyers' specific business models, they did not say what those costs entailed. Matthews similarly testified about a vacant store that Kohl's spent $2 million to convert. But he could not say whether the bulk of those costs were for changes to real property or were instead for personal property.

129. As its real estate manager testified, Kohl's does not necessarily spend significant money to convert vacant big boxes into Kohl's stores. Coers and Morlan's respective analyses under the cost approach further support the inference that the subject property does not have too many expensive, unique design elements. In her analysis, Coers eliminated the need to separately account for super adequacies by using the replacement cost for a building with similar utility without specialized features, such as the raised block design around the subject property's entrance. Yet her replacement cost new for the non-specialized version of the building was higher than both the time-adjusted construction costs from Kohl's and Morlan's analysis using the Guidelines-based costs. In fact, when computing those replacement costs under the Guidelines, Morlan and the Assessor made only two adjustments of any significance to the base model for a General Commercial Mercantile Discount building—they adjusted the base price for differences in wall height between the subject property and the model, and they added an amount for a mezzanine.

130. Indeed, when pressed, Morlan did not identify any unique physical design, special construction materials, or layout features that restrict the subject building's utility to a specific use. Although he did identify some restrictive features of the site—the site plan's reserve for an additional 20,000 square feet of building, its location in a planned development, and potential restrictions posed by the wetlands and easement—the record does not lend much support to his characterization. Neither party offered a copy of the easement and operating agreement, and Morlan did not explain what particular restrictions he had in mind. Coers credibly explained why, given the site's shape, expansion was unlikely. Regardless, we do not see why the ability to expand the building would be something that limits its use. The vague restrictions that Morlan identified do

not limit the property to being used as a Kohl's store, which is how Morlan and the Assessor would have us view its utility. Morlan himself testified that had the site been vacant, Beerman's would have moved into it and that Kite originally developed the site for Home Depot. At the end of the day, the most concrete limitation the Assessors' experts identified was that the store, like other big boxes, was deeper than vanilla boxes. According to Matthews, many retailers would not need the extra depth.

131. While the market for the subject property may be somewhat limited, properties like it do trade, especially when one looks beyond Kokomo. Morlan himself acknowledged that fact. As Coers credibly testified, the market for big-boxes is regional, and the subject property would compete for buyers with other properties throughout Indiana and neighboring states. We therefore find (1) that the subject property is not special purpose or special use, and (2) that there is no functional difference between its true tax value and its market value, and (3) that sales of vacant big boxes used for generally similar retail purposes both pre- and post-sale, if otherwise comparable and properly adjusted, may be employed in determining its true tax value.

132. That last finding begs an important question in this case: Should the sale prices of vacant big boxes be adjusted for expenditures necessary to convert the stores to the buyers' specific business models? The Assessor and her experts say yes; Kohl's and its experts say no. We agree with Kohl's. As the Tax Court has made clear, we must focus more on the property's use than the identity of its user. The question therefore is whether a sale price must be adjusted to make the sold property comparable to the subject property in terms of its utility for the same general type of retail use—not for use by Kohl's. Adjusting the comparable properties' sale prices for the type of buyer expenditures that the Assessor envisions would make those properties better than, not similar to, the subject property.[13] The comparable properties, as adjusted, would fit their buyers' business models, while anyone other than Kohl's who bought the subject property would still need to spend money to fit the property to its business model.

[13] Presuming the properties are otherwise in similar condition as the subject property.

133. Although they go a long way to doing so, those findings do not completely answer the question of which appraiser's valuation opinion we find more persuasive. Morlan's view of true tax value does not match what we have found to be the correct interpretation under prevailing case law. But that does not mean that his analyses are completely unrelated to the property's true tax value. Similarly, the mere fact that appraisers are not categorically prohibited from using sales of dark boxes in analyzing an occupied box's true tax value does not mean that Coers' analyses under the sales-comparison or income approaches are necessarily persuasive. We must therefore examine Coers' and Morlan's opinions in more depth.

C. Coers' Valuation Opinions are More Reliable than Morlan's

1. Coers' opinions

134. We start with Coers' opinions. As already explained, her opinion generally comports with Indiana's true tax value standard. She applied all three generally accepted approaches to value. And with some exceptions, she appears to have followed generally accepted appraisal principles in applying those approaches. That does not mean that her appraisal was perfect. Few appraisals are, and when subjected to vigorous cross-examination, those imperfections become apparent. The question is how, if at all, those imperfections affect the overall reliability of the appraiser's opinion.

a. Background descriptions and analyses

135. Fiene claimed that Coers was not as thorough as she could have been in her background descriptions and analyses, such as her decisions to prepare only a Level A market analysis and to forego a highest-and-best-use analysis. While increased thoroughness and the inclusion of a highest-and-best-use analysis might have made her ultimate opinions more persuasive, Coers explained that she complied with USPAP, and she was not so superficial as to detract significantly from the reliability of her ultimate valuation

opinions. Similarly, her error in describing the subject property's primary competitive area does not appear to have affected her valuation opinion.

b. Sales-comparison approach

136. As to the criticisms of Coers' sales-comparison analysis, we have already explained why we reject the claim that that her use of dark boxes was inherently wrong under Indiana's true tax value standard. But the Assessor and her experts criticized Coers' use of dark boxes for additional reasons. First, the Assessor's experts testified that dark boxes sometimes sell with deed restrictions. One of Coers' sales had a restriction in its deed prohibiting the property from being used for retail operations of more than 30,000 square feet. Similarly, Morlan credibly testified that some sellers of big boxes, such as Walmart, intentionally keep their stores dark for lengthy periods in order to avoid competition while they train their customers to go to the seller's new location.

137. Those criticisms have some merit. It does not appear that Coers did much to investigate why the properties were vacant or whether they had deed restrictions. On the other hand, the Assessor pointed to only one property from Coers' analysis that had deed restrictions, and she did not ultimately rely most heavily on that sale. Similarly, the Assessor did not show that any of Coers' comparable properties were vacant for lengthy periods preceding the sale. The lack of evidence showing that Coers aggressively investigated those issues therefore does not detract too greatly from the reliability of her conclusions.

138. Some of Fiene's other criticisms about Coers' comparable sales data also have some merit, particularly that two of the stores were two stories, that three were from locations with significantly lower populations than the subject property's primary trade area, and that Coers had to apply large adjustments. Coers explained that there were limited sales of retail properties during the period spanning the valuation dates at issue, and that she therefore used a larger quantity of data, which included properties that were both inferior and superior to the subject property. Although that may be an appropriate way to deal with weaknesses in underlying data, it does not completely eliminate those weaknesses.

139. While Fiene also criticized how Coers determined her adjustments, we give most of those criticisms no weight. For example, although Fiene took issue with Coers' decision to use capitalization rates for Tier-1 properties in calculating her market-conditions adjustment, she logically explained that by doing so, she was able to better isolate pure movements in the market. And we disagree with Fiene's characterization of Coers' condition adjustments as inconsistent. While those adjustments changed from year to year, Coers based them on each building's age as of the sale date. The relative age differences between the comparables and the subject property therefore changed with each valuation date—the comparables' ages remained fixed, while the subject property's age increased. We, however, agree with Fiene that Coers did not explain how she quantified her building-size adjustment.

c. Income approach

140. The criticisms that the Assessor and her witnesses leveled at Coers' income approach are a similar mix of the persuasive and un-persuasive. First, they criticized her choice to forego using leases of built-to-suit properties or from sale-leaseback transaction. Coers, however, persuasively explained that both types of transactions often reflect things other than the inherent value of the real property being leased. The Tax Court has approved of other appraisers' decisions to approach sale-leasebacks with caution. *E.g., Grant County Assessor v. Kerasotes Showplace Theatres, LLC*, 955 N.E.2d 876, 881-82 (Ind. Tax Ct. 2011). Other courts and commentators have offered similar cautions about leases of built-to-suit properties. *See In re Equalization Appeal of Prieb Properties, LLC*, 47 Kan. App. 2d 122, 275 P.3d 56, 63-65 (2012) *and authorities cited therein* (describing build-to-suit leases as essentially financing agreements with rental rates based on an amortization of the cost of construction plus profit over lease term); *but see Meijer Stores LP v. Franklin County Bd. of Revision*, 122 Ohio St. 3d. 227, 912 N.E.2d 560, 565-66 (2009).

141. We likewise give no weight to Fiene's related criticism that Coers used "second tier" tenancies to extract rent from the market. Again, the focus should be more on the property than on the tenant's identity. Fiene also criticized Coers' decision to use percentage rent as one method of estimating market rent for the subject property, claiming that her approach determined the value *of* the property's use, not the value *for* its use. That criticism rings a little hollow given the experts' agreement that market participants consider retail-sales volume when entering into leases for stores like the subject property. Morlan also used percentage rent in his analysis. Fiene himself acknowledged that using percentage rent is accepted throughout the appraisal profession. *See also, Resp't Ex. G (Lenhoff, You Can't Get the Value Right if You Get the Rights Wrong) at 62.*[14]

142. Nonetheless, we agree that relying directly on retail sales creates the danger of valuing the business enterprise of Kohl's instead of just the real property. Coers professed to use Kohl's stores' actual retail sales only as a benchmark for the sales volume that a typical retailer would achieve at the subject property. That at least lessens the danger. Of course, sales volume is only half the equation—one must also determine a percentage rate to apply to the sales volume. Again, Coers used what she described as typical percentage rates from leases involving a broader base of retailers. That reduced the likelihood Coers was valuing the business enterprise of Kohl's or other interests beyond the fee simple interest in the real estate.

143. As for Coers' estimate of expenses, we find Fine's criticism of her management fee, which was less than $23,000 for each year, unpersuasive. His criticism of her capitalization rate is more understandable. Her use of gross rents in extracting capitalization rates from the market led to higher rates than if she would have subtracted

[14] Lenhoff describes percentage rent as "a typical retail lease mechanism." *Resp't Ex. G at 62.* He explains that an appraiser can develop market rent if she can find an appropriate percentage and typical sales, either by reviewing leases or from a secondary source, such as *Dollars and Cents of Shopping Centers/The Score*. *Id*.

a market vacancy rate and other expenses.[15] But Coers' explanation—that the market participants reported gross rents as the driving factor and that the rates were in line with what was indicated by her other sources—minimizes those concerns. Indeed, her capitalization rates were close to, or lower than, Morlan's rates.

144. Some of Fiene's other criticisms of Coers' income approach, however, are well taken. For example, Coers' determination of feasibility rent troubled Fiene. Coers credibly responded to one of his criticisms—that she amortized depreciated cost, rather than cost new—by explaining that she was valuing a seven-to-nine-year-old building. But she did not persuade us that market participants would likely use that approach to determine rent for an existing building, as opposed to a contemplated build-to-suit facility.

d. Cost approach

145. Many of the criticisms that the Assessor and her witnesses leveled at Coers' cost-approach analysis focus on her comparable land sales. But they agreed with her decision to rely most heavily on the sale in which Kohl's bought the subject site. Their criticisms therefore do little to affect the weight we give to Coers' ultimate valuation opinion.

146. The Assessor and her witnesses also criticized Coers' findings on external obsolescence and her decision to essentially disregard the cost approach despite the building being only seven years old as of the first valuation date Those criticisms are related. For example, Coers did not rely on the cost approach because of what she viewed as significant external obsolescence.

147. Morlan and Coers agreed that the market for big-box retail properties was oversupplied. Similarly, Coers pointed to significant economic data regarding the 2009 recession and

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[15] When solving for the capitalization rate as the unknown variable, the basic formula is rate = income/value. *See Pet'r Ex. I (The Appraisal of Real Estate (13th ed.)) at 500*. The following example illustrates Fiene's point. Assuming that a property with gross income of \$10,000 sells for \$100,000, the extracted rate based on gross income is 10% (\$10,000 ÷ \$100,000 = .10). Using those same facts, but subtracting assumed expenses of \$1,000 from the gross income, the extracted rate is 9% (\$9,000 ÷ \$100,000 = .09).

ensuing recovery, and she tied that data to increased vacancy rates for retail properties. While she did not tie her analysis as closely to the Kokomo market as did Morlan, she adequately supported her finding that the property suffered from at least some economic obsolescence. Her conclusions under the sales-comparison and income approaches, both of which account for obsolescence without separately quantifying it, support that finding.[16]

e. Other criticisms

148. More generally, Fiene criticized Coers' use of mathematical measurements, such as averages and medians, in making several key judgments. In many instances, however, Coers persuasively justified using those measures. For example, while her reconciled values equaled essentially the average of her conclusions under the income and sales-comparison approaches, she explained that she gave equal weight to her conclusions under the two approaches because likely buyers were split roughly evenly between owner-occupiers and investors.

149. The Assessor also criticized Coers' reliance on national and regional survey data. Broadly speaking, an appraiser's reliance on such data without confirming how it applies both to the property being appraised and to the market in which that property competes may tend to impeach the credibility of her valuation opinion. Nonetheless, Coers frequently used survey data for property types that most closely mirror the subject property. And in many instances, she explained that the national data she relied on generally reflected conditions in both Kokomo and the greater market in which the subject property competes.

150. When pressed, however, Coers did not give many specifics to support those findings. She pointed instead to discussions with market participants and to her own experience

[16] While parties offered competing views from published sources about the soundness of what Fiene described as Coers' "back-door" approach to quantifying obsolescence, the Tax Court has repeatedly recognized the approach's validity. *E.g., Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269, 275 (Ind. Tax Ct. 2005); *see also Trimas Fasteners*, 923 N.E.2d at 499 n.6.

and judgment. She resorted to the same fallback in explaining some of her other judgments, such as how she quantified her location adjustments. We recognize that appraisal is as much art as science, and many judgments ultimately come down to an appraiser's expertise and experience. But Coers' failure to offer more in the way of objective support for some of her judgments detracts somewhat from the reliability of her valuation opinions.

151. In sum, the Assessor and her witnesses point to some valid concerns about Coers' valuation opinion. But she largely applied generally accepted valuation approaches in a reasonable and logical fashion, and we find her opinion, on balance, to be reliable. Of course, that is only half the question. The Assessor offered competing valuation opinions. We therefore turn to Morlan's appraisal.

2. Morlan's opinions

152. Although Morlan developed all three valuation approaches, he used the sales-comparison and income approaches only to "benchmark" his conclusions under the cost approach. He did so largely based on his understanding of true tax value. As discussed above, he described the property as a limited-market property for which sales of vacant big boxes—the only type of big box that exchanges on the market in fee-simple transactions—are not adequate substitutes. We have already explained why we disagree both with Morlan's views about Indiana's true tax value standard[17] and with his characterization of the subject property as a variant of a special-purpose property.

153. Kohl's and its witnesses offered additional criticisms of Morlan's analyses. Many of those criticisms, such as Mitchell's identification of typographical and similar errors in Morlan's report or his claim that Morlan failed to comply with certain technical reporting requirements from USPAP, do little to impeach his valuation opinion. While excessive

[17] Morlan and Matthews both pointed to their involvement in discussions surrounding the drafting of the 2002 Manual. We must look to the four corners of the Manual and to judicial decisions interpreting it to determine its meaning. Anecdotal testimony about the drafters' intent, which is not even incorporated into an official guidance from the DLGF, has no bearing on our decision.

errors can show a degree of carelessness, the errors that Mitchell identified are not particularly troubling given the length of Morlan's report. And Morlan testified at length, offsetting some of the reporting problems that Mitchell identified, such as Morlan's failure to include a summary of his analysis under the income approach. Similarly, while Morlan may not have established an express cut-off date for the data he used in his appraisal, much of that data appears to confirm trends that buyers reasonably would have considered as of the assessment date.

154. At any rate, Morlan's view of Indiana's true tax value standard led him to give little weight to his analyses under the sales-comparison and income approaches. As for his cost approach, there is little controversy about his land value—everyone agreed that the site was worth something close to the $1,550,000 that Kohl's paid for it in 2002. Similarly, aside from pointing out that he included some items of personal property, Mitchell did little to impeach how Morlan calculated the improvements' cost new or physical depreciation. The more fundamental problems with Morlan's appraisal—his understanding of true tax value and his treatment of the property as a variant of special purpose property—do not appear to have affected those calculations.

155. Those views, however, do appear to have influenced Morlan's judgment that the subject property was unaffected by any external obsolescence. Although he found signs of anticipated recovery, he still painted a relatively bleak economic picture for Kokomo, especially at the front end of the three-year period covered by these appeals. Many retail properties went dark during that period. Morlan, however, focused partly on the market segment populated by stores, such as Walmart and Target, which remained open. He attributed the viability of those stores at least partly to the businesses themselves or the products they sell. He also emphasized that the subject store's year-over-year sales remained stable from 2006 through 2012. The appraisers for Kohl's disagreed with Morlan's approach and claimed that one must take a broader view of the market in determining whether a recession has caused external obsolescence.

156. Unfortunately, none of the appraisers did much to show what generally accepted appraisal principles require when addressing external obsolescence caused by an oversupply of retail space in an economic recession. The most helpful guidance in the record comes from The Appraisal of Real Estate, which explains, "External obsolescence usually has a marketwide effect and influences a whole class of properties, rather than just a single property." *Pet'r Ex. I at 443; see also, Pet'r Ex I (Appraisal of Real Estate* (*13th ed.) at 333*) ("A recession tends to deflate all real estate prices, but specific property types or submarkets may be affected differently").

157. Even that guidance begs the question: How narrowly should we classify properties when determining the effect of an economic recession? It does not necessarily follow that segmenting the market based on the relative success of a given class of retailers' business plans, or of the particular product mix sold at a property, is a good way to determine how the recession affects *real estate* as opposed to the business operated on the property. On the other hand, if a given type of real estate is typically used by businesses that sell the types of products that are recession proof, or at least recession resistant, that approach perhaps has some facial appeal.

158. In any case, we are not persuaded that the subject property was completely unaffected by the recession. We are most troubled by the weight Morlan placed on the stability in the subject property's year-over-year retail sales, which ties back to his focus on Kohl's as the property's user. In the end, Morlan's understanding of the distinctions between true tax value and market value and his characterization of the subject property as a variant of a special-purpose property—both of which we disagree with—significantly informed his determination that the subject property did not suffer from external obsolescence.

159. As is often the case, neither of the experts' valuation opinions were problem free. Ultimately, we are more persuaded by Coers' opinions, because she premised them on an understanding of true tax value that most closely aligns with how the Indiana Tax Court

has interpreted that standard. By contrast, Morlan's misunderstanding of true tax value permeated most of the key judgments underlying his valuation opinions.

V. Conclusion

160. Both parties offered valuation opinions from qualified experts. Although they are not perfect, we are persuaded by the opinions of the expert for Kohl's, Sarah Coers, which more closely follow the Tax Court's interpretation of true tax value. We therefore find that the subject property's assessments must be reduced to the following values:

Year	Total Assessment
2010	$3,690,000
2011	$3,820,000
2012	$3,680,000

The Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date written above.

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.