In the Supreme Court of Wisconsin

No. 2019AP974

LOWE'S HOME CENTERS, LLC,
Plaintiff-Appellant-Petitioner

v.

VILLAGE OF PLOVER,
Defendant-Respondent

ON APPEAL FROM A DECISION AND JUDGMENT ENTERED BY THE CIRCUIT COURT FOR PORTAGE COUNTY, THE HONORABLE THOMAS T. FLUGAUR, PRESIDING, AND FROM A DECISION OF THE COURT OF APPEALS, DISTRICT IV

NON-PARTY BRIEF AND APPENDIX OF WISCONSIN MANUFACTURERS & COMMERCE, INC. IN SUPPORT OF THE PETITION FOR REVIEW

Lucas T. Vebber (WI Bar No. 1067543)
Corydon J. Fish (WI Bar No. 1095274)
501 East Washington Avenue
Madison, Wisconsin 53703
Phone: (608) 258-3400
Facsimile: (608) 258-3413
E-mail: lvebber@wmc.org

Attorneys for Wisconsin Manufacturers & Commerce, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

A. This Court should grant the Petition to Review in order to reassert the underlying principles of *Walgreen/Madison*, and to clarify and harmonize the court of appeals' decisions in *Bonstores* and others. 4

i. The court of appeals ignored the fundamental legal principles that this Court put forth in Walgreen/Madison. 5

ii. The court of appeals misapplied *Bonstores.* 7

iii. The court of appeals decision in this case also directly conflicts with several of its own unpublished decisions. 7

B. Further, this Court should review this case because the court of appeals decision imposes policy changes regarding the assessment of real property that have been expressly rejected by the legislature. 9

C. The court of appeals' decision would have a dramatic impact on our State's economy as we try to recover from COVID-19. 14

CONCLUSION 15

FORM AND LENGTH CERTIFICATION 16

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) 17

APPENDIX 19

APPENDIX TABLE OF CONTENTS 20

TABLE OF AUTHORITIES

Cases

Adams Outdoor Advertising, Ltd. v. City of Madison, 2006 WI 104, 294 Wis.2d 441, 717 N.W.2d 803 6
Bonstores Realty One, LLC v. Wauwatosa, 2013 WI App 131, 351 Wis.2d 439, 839 N.W.2d 893 ..... 2, 7
Lands' End, Inc. v. City of Dodgeville, Nos. 2013AP1490, 2013AP1491, and 2013AP1492, unpublished slip op. (WI App, May 8, 2014) 2, 7, 8
State ex. rel. Department of Natural Resources v. Wisconsin Court of Appeals, District IV, 2018 WI 25, 380 Wis.2d 354, 909 N.W.2d 114 3
Walgreen Co. v. City of Madison, 2008 WI 80, 311 Wis.2d 158, 752 N.W.2d 687 ..... passim
Walgreen Co. v. City of Oshkosh, No. 2013AP2818, unpublished slip op. (WI App, December 17, 2014) 2, 8
Waste Management of Wisconsin, Inc. v. Kenosha County Bd. of Review, 184 Wis.2d 541, 516 N.W.2 695 (1994) 6

Statutes

Wis. Stat. § (Rule) 809.62(1r) 3

Other Authorities

2009 Wisconsin Act 28 9
2017 Assembly Bill 386 10
2017 Senate Bill 292 10
2019 Assembly Bill 146 11
2019 Senate Bill 130 11
2019 Senate Bill 59 12
Joint Committee on Finance, Omnibus Budget Motion #5 (May 9, 2019). 12
Wisconsin Legislative Council, Hearing Testimony and Materials, Assembly Bill 386 11
Wisconsin Legislative Council, Hearing Testimony and Materials, Senate Bill 292 11
Wisconsin Senate Roll Call, 2019 Regular Session, Senate Bill l30, Withdraw from Committee on Agriculture, Revenue and Financial Institutions (May 15, 2019) 12

Constitutional Provisions

Wis. Const. Art. IV, § 1 13

INTRODUCTION

The Court should grant the Petition for Review in this case because it fits well within the Court's criteria for consideration, and because allowing the court of appeals decision to stand would be an affront to Wisconsin's constitutional separation of powers and harmful to our state's economic recovery from COVID-19.

The court of appeals' decision in this case adds to the growing uncertainty and confusion surrounding property tax assessment practices in Wisconsin. This case presents this Court with an opportunity to provide much needed clarity on the law.

The court of appeals' decision in this case stands in direct conflict with the principle set forth in this Court's holding in *Walgreen Co. v. City of Madison*, 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687 (herein, *Walgreen/Madison*) that the fee simple value of real property is what must be assessed, not business value. In this case, the municipality went beyond the fee simple value, and moved into the realm of taxing business interests, which is unlawful.

The court of appeals' decision in this case cites to, and misconstrues, another court of appeals decision, *Bonstores Realty One, LLC v. Wauwatosa*,

2013 WI App 131, 351 Wis. 2d 439, 839 N.W.2d 893, regarding whether or not a "vacant" property can be used as a comparable sale when conducting a property assessment. In concluding that it cannot, the court of appeals here also ignored its own unpublished decisions coming to contrary conclusions in *Lands' End, Inc. v. City of Dodgeville*, Nos. 2013AP1490, 2013AP1491, and 2013AP1492, unpublished slip op. (WI App, May 8, 2014), WMC-App 101, and *Walgreen Co. v. City of Oshkosh*, No. 2013AP2818, unpublished slip op. (WI App, December 17, 2014), WMC-App 132 (herein *Walgreen/Oshkosh*).

Finally, the court of appeals' decision in this case enacted a significant policy change, establishing a tax assessment policy that the legislature has repeatedly rejected over the past decade. This policy change, if allowed to stand, will lead to significant property tax increases on a variety of Wisconsin businesses at a time when they can least afford it as they recover from the decimating impacts of COVID-19.

As the state's largest association of businesses, *amicus curiae* Wisconsin Manufacturers & Commerce (WMC) recognizes that maintaining and improving Wisconsin's business climate requires a tax system that treats both individuals and businesses fairly and equitably. The property tax is a

key part of our state's tax system. This case brings to the forefront some significant confusion and contradiction amongst property assessors and Wisconsin courts regarding important legal issues in the property assessment process.

For the reasons stated herein, WMC requests this Court grant the Petition for Review in this case.

ARGUMENT

Supreme Court review "is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). Citing to Wis. Stat. § (Rule) 809.62(1r), this Court has been clear that it will:

> [N]ot review a case unless it presents a "real and significant question of federal or state constitutional law," or we see a need to "establish[ ], implement[ ] or chang[e] a policy within" our authority, or we need to "develop, clarify or harmonize the law," or the court of appeals' decision either conflicts with controlling authority or is in need of re-examination "due to the passage of time or changing circumstances."

State ex. rel. Department of Natural Resources v. Wisconsin Court of Appeals, District IV, 2018 WI 25 ¶ 43, n.20, 380 Wis. 2d 354, 388, 909 N.W.2d 114, 131.

This case fits well within those considerations, and is a good candidate for review by this Court. Indeed, this case presents a significant question of state law, a decision from this Court will help develop, clarify and harmonize the law and this case presents questions of law that are likely to recur unless resolved by this Court. Further, the court of appeals decision in this case is in conflict with a controlling decision of this Court and creates confusion by conflicting with several decisions of the court of appeals (including unpublished decisions, noted *supra*, which are included in the Appendix to this brief).

As this Court considers the Petition for Review, WMC submits this brief to highlight the legal uncertainty that businesses face and the need to clarify the law, to add context to the public policy debate surrounding the important legal questions involved here, and to inform the Court of the ramifications that the court of appeals' decision has in context of the broader business community.

A. This Court should grant the Petition to Review in order to reassert the underlying principles of *Walgreen/Madison*, and to clarify and harmonize the court of appeals' decisions in *Bonstores* and others.

It has long been settled law in Wisconsin that "a property assessor's task is to identify the market value of a fee simple interest…"

Walgreen/Madison, 2008 WI 80, ¶ 20. This value is the fair market value that could be ordinarily obtained at a private sale. *Id*.

Property is assessed through a three-tier system where a Tier I analysis looking at an actual sale of the property is preferred, but if not of possible, then a Tier II analysis is conducted looking at sales of comparable property, and finally if unable to make a proper analysis under that tier, then a Tier III analysis is conducted looking at other factors.

This case specifically deals with the legal requirements of a Tier II analysis, and whether sales of comparable properties may include "vacant" properties, or not. Petitioners argue, based upon a plain reading of the law, and past precedent of Wisconsin courts, that such "vacant" properties are allowed to be used in a Tier II analysis. The court of appeals disagreed. For the reasons herein, this Court should grant the Petition for Review, and clarify and reaffirm the current state of the law.

i. The court of appeals ignored the fundamental legal principles that this Court put forth in Walgreen/Madison.

While *Walgreen/Madison* primarily dealt with how to properly assess real property leased at an above-market rent, the Court still affirmed some important legal principles that are applicable in all property assessment review cases. Namely, the Court made clear that market rates matter, and that

other factors beyond the market value are not to be considered except in the rarest of cases (such as where a lease provisions lowers the market value).

In *Walgreen/Madison* this Court affirmed the "general rule that business value should not be included in real estate assessments." *Walgreen/Madison*, 2008 WI 80 at ¶ 63, citing to *Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, ¶ 80, 294 Wis. 2d 441, 478-479, 717 N.W.2d 803, 821-822 and *Waste Management of Wisconsin, Inc. v. Kenosha County Bd. of Review*, 184 Wis. 2d 541, 565, 516 N.W.2 695, 705 (1994). This is vital, because as noted *supra*, this Court in *Walgreen/Madison* also affirmed the long-held principle that the goal of property assessment is to identify the market value of a fee simple interest in property. *Walgreen/Madison*, 2008 WI 80, ¶ 20.

In affirming the fundamental legal principal for property assessment in *Walgreen/Madison* that assessors should not that consider business value, this Court laid out clear binding precedent for Wisconsin courts to follow regarding the assessment of real property: the fee simple value is what should be assessed—nothing more.

ii. The court of appeals misapplied *Bonstores.*

Instead of applying this Court's controlling precedent as affirmed in *Walgreen/Madison*, the court of appeals went a different route in this case. Citing a previous court of appeals decision in *Bonstores*, the court of appeals in this case determined it was improper to consider vacant properties under a Tier II analysis, even if those properties were otherwise identical to an "occupied" property. Ct. Appeals Dec. at ¶ 41. However, this conclusion by the court of appeals misapplies the holding in *Bonstores*.

The question in *Bonstores* was not whether properties were vacant or not, but rather, whether those properties were *distressed*. 2013 WI App 131 at ¶¶ 21-22. Consistent with *Walgreen/Madison* the goal is to determine the fee simple value of the real estate, which is not impacted by the vacancy status of the property. The sole issue of whether a property is vacant or not does not bear on its fee simple value—rather that would be a business interest that is not taxable as part of a property assessment.

iii. The court of appeals decision in this case also directly conflicts with several of its own unpublished decisions.

Subsequent to *Bonstores*, the court of appeals itself clarified in *Lands' End* that there was no prohibition on the use of vacant properties in the Tier II approach to property assessment. *Lands' End* at ¶¶ 47-48.

Just months after the *Lands' End* decision was issued, the court of appeals issued another tax assessment decision, yet again affirming that vacant properties may be used in a Tier II assessment, in *Walgreen/Oshkosh*. In that case, the court noted the City of Oskosh argued that "the market does not value a property without a Walgreen as a tenant as highly as it does a property where Walgreen remains a tenant subject to a long-term lease." *Walgreen/Oshkosh* at ¶ 13, WMC-App 138. The court of appeals, citing this Court's *Walgreen/Madison* opinion, ruled against that argument, noting that Oshkosh's "assessment method values 'the business concern which may be using the property…'" and clearly stating that such an assessment method is not allowed. *Id.*

The court of appeals' decision in this case directly conflicts with *Walgreen/Madison*, *Bonstores*, as well as other unpublished opinions of the court of appeals discussed herein. This case presents this Court with the opportunity to clarify how municipalities are to move forward with property assessment to help bring clarity and limit the need for further litigation.

B. Further, this Court should review this case because the court of appeals decision imposes policy changes regarding the assessment of real property that have been expressly rejected by the legislature.

This Court has made clear: "The power to determine the appropriate methodology for valuing property for taxation purposes lies with the legislature." *Walgreen/Madison*, 2008 WI 80, ¶ 19. Despite that, the court of appeals in this case took it upon themselves to determine how property should be assessed. In so doing, the court of appeals adopted a policy that has been *repeatedly* rejected by the legislature. The policy ramifications of the court of appeals' changes to property value assessment are tremendous. For the past decade, various local government special interest groups have been unsuccessfully pursuing legislative changes that would allow property assessors to consider more than the fee simple value of real estate.[1]

During the years at issue in this case, 2016 and 2017, municipal special interest groups attempted to change the law to prevent vacant properties from being used as comparable properties in Tier II analyses.

[1] As far back as 2009, legislators have proposed policy changes to overturn the core real property valuation concepts outlined in *Walgreen/Madison*. A provision was inserted in 2009 Wisconsin Act 28 (the biennial budget) and subsequently vetoed by then-Governor Jim Doyle. *See* 2009 Wisconsin Act 28, § 1520d, https://docs.legis.wisconsin.gov/2009/related/acts/28.pdf; *see also* Governor Jim Doyle, Veto Message, 2009 Wisconsin Act 28, p. 44, https://doa.wi.gov/budget/SBO/2009-11%20Veto%20Message.pdf.

These groups undertook a significant public relations campaign on the issue during approximately the same time Lowes challenged their 2016 assessment, arguing (still) current law is inadequate and that they had drafted legislation in 2015 to change the law to what the court of appeals now expounds, "but the 'people they were working weren't ready to introduce it…'"[2] In other words, the legislature did not change the relevant property tax assessment laws in the 2015-16 legislative session.

Subsequently, during the 2017-18 legislative session, legislation to change the law was introduced but failed to pass either house of the legislature. 2017 Assembly Bill 386[3] and 2017 Senate Bill 292[4] expressly narrowed (and all but prohibited) when vacant properties could be included as comparable properties in a Tier II analysis. Both bills received public hearings in their respective houses of the legislature.[5] The interest group

---

[2] Cara Spoto, *Big box tax dodgers? Municipalities want to curb "dark store" property tax challenges*, Racine Journal Times (May 26, 2016), https://journaltimes.com/news/local/big-box-tax-dodgers-municipalities-want-to-curb-dark-store-property-tax-challenges/article_39952975-fcf2-53c0-9922-0182c5227a4f.html.

[3] Bill text and legislative history: https://docs.legis.wisconsin.gov/2017/proposals/ab386.

[4] Bill text and legislative historyt: https://docs.legis.wisconsin.gov/2017/proposals/sb292.

[5] According to the legislative history entries, 2017 Assembly Bill 386 received a public hearing on June 29, 2017 and 2017 Senate Bill 292 received a public hearing on August 30 2017. *See* footnotes 3 and 4.

representing municipalities, which Defendant-Respondent Village of Plover is a member of, appeared at both hearings in the Senate and Assembly and advocated support for the bills. *See* Wisconsin Legislative Council, Hearing Testimony and Materials, Assembly Bill 386[6] and Wisconsin Legislative Council, Hearing Testimony and Materials, Senate Bill 292.[7] However, neither bill received a vote before the full chamber in either house of the legislature.

Having failed to obtain this policy change during the 2017-18 legislative session, proponents of this policy change introduced substantively identical legislation in the 2019-20 legislative session (2019 Senate Bill 130[8] and 2019 Assembly Bill 146[9]), while this case was being litigated, attempting—and failing—once again to rewrite Wisconsin's property tax assessment laws to prohibit the use of vacant properties in Tier II analyses. However, in the 2019 session, neither bill received a public hearing or was

[6] Testimony and materials: https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/ab386.

[7] Testimony and materials: https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/sb292.

[8] Bill text and legislative history: https://docs.legis.wisconsin.gov/2019/proposals/sb130.

[9] Bill text and legislative history: https://docs.legis.wisconsin.gov/2019/proposals/ab146.

voted out of committee.[10] In fact, the only vote on either piece of legislation ended in a de-facto rejection, when a group of senators used a procedural vote to attempt to withdraw 2019 Senate Bill 130 from committee to bring it before the entire body for a vote, but that procedural maneuver failed 14-18. Wisconsin Senate Roll Call, 2019 Regular Session, Senate Bill l30, Withdraw from Committee on Agriculture, Revenue and Financial Institutions (May 15, 2019).[11] Governor Evers also attempted to change this law by inserting similar statutory language in his 2019-21 budget request to the legislature. 2019 Senate Bill 59, § 831.[12] The Joint Committee on Finance subsequently removed this language from the budget. Joint Committee on Finance, Omnibus Budget Motion #5, p. 5 (May 9, 2019).[13] The people of Wisconsin, through their elected officials in the policymaking branches of government, are aware of this issue and have rejected the very policy changes now imposed by the court of appeals on no less than three occasions.

Unfortunately for the taxpayers of Wisconsin, the Village of Plover's lawyers are better than their lobbyists. The court of appeals implemented the

[10] *See* footnotes 8 and 9 for legislative histories.

[11] Roll call: https://docs.legis.wisconsin.gov/raw/vote/2019/sv0024.

[12] Bill text and legislative history: https://docs.legis.wisconsin.gov/2019/proposals/reg/sen/bill/sb59.

[13] Motion: https://docs.legis.wisconsin.gov/raw/cid/1495683.

policy change in this case that the Village had been seeking from the legislature, but had failed to obtain.

The court system should not be an alternate venue for failed lobbying efforts. Such changes of policy are properly left to the legislature, and should not be imposed by the court of appeals, as has happened here. Allowing the court of appeals to impose these policy changes flies in the face of our constitutional separation of powers, vesting the legislative power in the legislature. Wis. Const. Art. IV, § 1. The court of appeals' decision also directly conflicts with this Court's own statement, as noted *supra*, that "[t]he power to determine the appropriate methodology for valuing property for taxation purposes lies with the legislature." *Walgreen/Madison*, 2008 WI 80, ¶ 19.

This Court should take this case and use it as an opportunity to clarify that when the people of Wisconsin clearly rejected a policy change, there should be no rush to the courthouse doors to get a second kick at the can. To do anything less would be to upset our separation of powers, diminish the will of voters, and harm our constitutional form of government.

C. The court of appeals' decision would have a dramatic impact on our State's economy as we try to recover from COVID-19.

Wisconsin, like all other states, has seen its economy severely impacted by COVID-19 this year. Wisconsin businesses have done all they could to stay afloat and continue to employ our friends and neighbors to keep the economy moving. Despite best efforts, however, many businesses have closed and many others are struggling to keep their doors open.

The policy changes to property assessment attempted by the Defendant-Respondent in this case will exacerbate the harm to our economy. At a high level, the change they are proposing, and that the court of appeals has acquiesced to in this case, will allow municipalities to increase the assessed value of a business's real property beyond market rates, and subsequently require that business to pay a higher property tax bill. *See* Judy S. Engel and Lynn S. Linne, *The Dark Store Theory and Other Lies the Government Told You*, Bloomberg BNA (August 9, 2017), https://www.bna.com/dark-store-theory-n73014462929. For businesses throughout Wisconsin that are already struggling to make it to the end of the COVID-19 pandemic, the prospect of a higher property tax bill is a bridge too far.

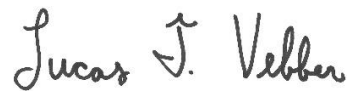
The Court should grant the Petition for Review in order to take up this important issue and provide needed clarity and understanding to the law.

CONCLUSION

For the foregoing reasons, WMC asks this Court to grant the Petition for Review in this case.

Dated this 14th day of December, 2020.

Respectfully Submitted,



Lucas T. Vebber (WI Bar No. 1067543)
Corydon J. Fish (WI Bar No. 1095274)
501 East Washington Avenue
Madison, Wisconsin 53703
Phone: (608) 258-3400
Facsimile: (608) 258-3413
E-mail: lvebber@wmc.org

Attorneys for Wisconsin Manufacturers & Commerce, Inc.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,901 words.

DATED this 14th day of December, 2020,

Lucas T. Vebber (WI Bar No. 1067543)
501 East Washington Avenue
Madison, Wisconsin 53703
Phone: (608) 258-3400
Facsimile: (608) 258-3413
E-mail: lvebber@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

DATED this 14th day of December, 2020,

Lucas J. Vebber

Lucas T. Vebber (WI Bar No. 1067543)
501 East Washington Avenue
Madison, Wisconsin 53703
Phone: (608) 258-3400
Facsimile: (608) 258-3413
E-mail: lvebber@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc

APPENDIX

APPENDIX TABLE OF CONTENTS

Title	WMC-App Page #
Lands' End, Inc. v. City of Dodgeville, Nos. 2013AP1490, 2013AP1491, and 2013AP1492, unpublished slip op. (WI App, May 8, 2014)	101
Walgreen Co. v. City of Oshkosh, No. 2013AP2818, unpublished slip op. (December 17, 2014)	132

COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2013AP1490
2013AP1491
2013AP1492

Cir. Ct. Nos. 2008CV139
2010CV214
2011CV81

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LANDS' END, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

CITY OF DODGEVILLE,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEALS and CROSS-APPEALS from a judgment of the circuit court for Iowa County: ROBERT P. VANDEHEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions; cross-appeals dismissed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Lands' End, Inc. has, since 2006, challenged the City of Dodgeville's 2005, 2006, 2007, 2008, 2009, 2010, 2011, and 2012

assessments of Lands' End's Dodgeville property. Three circuit court judges from three counties have issued decisions on the 2005 through 2010 challenges,[1] and the 2011 and 2012 challenges are pending before a fourth circuit court. In the most recently completed round of circuit court litigation concerning the City's 2007, 2009, and 2010 assessments, after a nine-day bench trial, circuit court Judge Robert P. VanDeHey determined the 2007, 2009, and 2010 fair market values and assessments of the Lands' End property by combining the City's appraiser's "opinion of value" for the warehouse/distribution buildings on the property and Lands' End's appraiser's "opinion of value" for the remaining buildings on the property.

¶2 Lands' End appeals that part of the judgment that adopts the City's appraiser's values for the warehouse/distribution buildings, and the City cross-appeals that part of the judgment that adopts Lands' End's appraiser's value for the remaining buildings on the property. Lands' End also appeals the circuit court's denial of its motions for summary judgment before trial and for judgment after trial, which Lands' End had filed on the basis that issue preclusion applies to bind the parties to the fair market value of $25,000,000 established for 2006 by the

[1] The first circuit court decision on the 2005 and 2006 assessments was affirmed on appeal, and the second circuit court decision on the 2008 assessment was reversed on appeal. *See* ***Lands' End, Inc. v. City of Dodgeville***, No. 2009AP2627, unpublished slip op. (WI App May 27, 2010), and ***Lands' End, Inc. v. City of Dodgeville***, No. 2010AP1185, unpublished slip op. (WI App Sept. 12, 2013). In this appeal we review the decision of the third circuit court as to the 2007, 2009, and 2010 assessments.

The third circuit court issued one decision and one judgment for the three cases in which Lands' End challenged the 2007, 2009, and 2010 assessments. Lands' End then filed three appeals, one for each assessment case, and the City likewise filed three cross-appeals. The appeals and cross-appeals were consolidated for briefing and disposition. For convenience, we refer in this opinion to Lands' End's appeal (singular) and to the City's cross-appeal (singular).

first circuit court and affirmed on appeal. Lastly, Lands' End appeals the circuit court's denial of Lands' End's request for interest on the resulting 2007 property tax refund.

¶3 As explained below, we conclude that: (1) Lands' End was entitled to summary judgment before trial as to the 2007 and 2009 assessments, on the basis that issue preclusion applies to bind the parties to the $25,000,000 fair market value established for 2006 in light of the evidence proffered on summary judgment; (2) issue preclusion does not apply as to the 2010 assessment in light of the evidence proffered at trial; (3) the circuit court properly weighed competing testimony and adopted the City's appraiser's values for the warehouse/distribution buildings and Lands' End's appraiser's value for the remaining buildings based on the court's reasoned consideration of that testimony as to the 2010 assessment; and (4) the circuit court lacks discretion to deny Lands' End's request for statutory interest as to the 2007 property tax refund. Accordingly, we affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.[2]

[2] In a brief explanation of terminology, at issue here are challenged determinations of fair market values that were used to produce assessment amounts using assessment ratios not in dispute; those determinations are also as shorthand sometimes referred to as challenged assessments. Throughout the litigation related to Lands' End's tax disputes with the City, the parties have argued, and the circuit courts have determined, the fair market value of the Lands' End property based on various appraisals, and then calculated the assessment by multiplying the fair market value by the assessment ratio, as that term is used in WIS. STAT. § 74.09(1) (2011-12). The issues on appeal concern the circuit court's determinations of the fair market value, not the assessment ratio used to calculate the assessments.

All references to the statutes are to the 2011-12 version unless otherwise noted.

BACKGROUND

Prior Litigation—2005, 2006, and 2008 Assessments

¶4 In 2005, the City assessed the Lands' End property based on updates to a 1995 appraisal, using square-foot estimates to assess later expansions. In 2006, the City assessed the property based on appraisals that determined a relatively small increase in value to $54,000,000 from the 2005 assessment. Lands' End challenged those assessments in a de novo proceeding before the circuit court. After a bench trial, the circuit court (referred to in this opinion as the first circuit court) rejected the City's assessments and the appraisals on which the assessments were based as not credible and containing numerous errors, credited the evidence that Lands' End introduced through its appraisers, and set a fair market value of $25,000,000 consistent with that evidence. This court affirmed. *See* ***Lands' End, Inc. v. City of Dodgeville***, No. 2009AP2627, unpublished slip op. (WI App May 27, 2010).

¶5 In 2008, the City assessed the Lands' End property based on the same 2006 appraisal on which the assessor had relied to make the 2006 assessment, and on the determination that the value of the property remained essentially unchanged from 2006 to 2008. On certiorari review,[3] the circuit court (referred to in this opinion as the second circuit court) affirmed the $54,000,000 fair market value determined by the City. This court reversed, concluding that

[3] The 2008 assessment was subject to a modified certiorari procedure that was subsequently invalidated by the supreme court in ***Metropolitan Associates v. City of Milwaukee***, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717. Lands' End's other challenges to the City's assessments since 2005 have been brought as excessive assessment actions pursuant to WIS. STAT. § 74.37(3).

Lands' End was entitled to summary judgment as to the 2008 assessment based on issue preclusion, giving preclusive effect to the first circuit court's finding in the 2006 case that the 2006 value of the property was $25,000,000, coupled with the undisputed fact that the property did not materially increase in value between 2006 and 2008. *See* ***Lands' End, Inc. v. City of Dodgeville***, No. 2010AP1185, unpublished slip op. (Sept. 12, 2013).

Current Litigation—2007, 2009, and 2010 Assessments

¶6 Lands' End challenged the City's assessments for 2007, 2009, and 2010 in separate actions, which were combined for trial. The City determined the fair market value of the Lands' End property to be $56,385,000 for 2007, $54,000,000 for 2009, and $59,806,164 for 2010. Lands' End contended at trial that the fair market value of its property was $25,000,000 in 2007 and 2009, and $20,000,000 in 2010. The circuit court determined the fair market value of the Lands' End property to be $36,258,000 in 2007, $36,138,000 in 2009, and $34,716,000 in 2010.

¶7 We address in turn: (1) Lands' End's appeal of the circuit court's denial of its motions for summary judgment as to the 2007 and 2009 assessments before trial and for judgment as to the 2010 assessment after trial based on issue preclusion; (2) as to the 2010 assessment, Lands' End's appeal of the circuit court's adoption of the City's appraiser's values for the warehouse/distribution buildings and the City's cross-appeal of the circuit court's adoption of Lands' End's appraiser's values for the remaining buildings; and (3) Lands' End's appeal of the circuit court's denial of its request for interest on the 2007 property tax refund.

DISCUSSION

I. Issue Preclusion

¶8 Before this court issued the September 2013 opinion applying issue preclusion in Lands' End's challenge to the City's 2008 assessment, so as to bind the parties to the resolution of the dispute over the fair market value of the property in 2006, the circuit court in this case denied Lands' End's motions for summary judgment before trial and for judgment after trial. Lands' End's motions in this case were based on the application of issue preclusion, and now, following the analysis in our September 2013 opinion, we conclude that Lands' End was entitled to pretrial summary judgment based on issue preclusion as to the 2007 and 2009 assessments, but not to post-trial judgment based on issue preclusion as to the 2010 assessment.

A. Standard of Review

¶9 "The doctrine of issue preclusion, formerly known as collateral estoppel, is designed to limit the relitigation of issues that have been actually litigated in a previous action." ***Aldrich v. LIRC***, 2012 WI 53, ¶88, 341 Wis. 2d 36, 814 N.W.2d 433. The availability of issue preclusion "is a mixed question of law and fact in which legal issues predominate." ***Id.***, ¶91.

¶10 "The first step in the analysis of issue preclusion is to 'determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment.'" ***Id.***, ¶97 (quoted source omitted). Whether issue preclusion is a potential limit on litigation in a particular case is a question of law

that we review de novo. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶15, 281 Wis. 2d 448, 699 N.W.2d 54.

¶11 Once the initial requirement for the application of issue preclusion is met, the second step in the analysis calls on the court to determine whether the application of the doctrine under the particular circumstances of the case is consistent with fundamental fairness. ***Aldrich***, 341 Wis. 2d 36, ¶98. In assessing fundamental fairness, the court may consider five factors:

> 1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;
>
> 2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
>
> 3) Do significant differences in the quality or extensiveness of proceedings between two courts warrant relitigation of the issue;
>
> 4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and
>
> 5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Id., ¶110. No single factor is dispositive; factors one, two, and four are questions of law; and factors three and five involve questions of fact and policy and require discretionary determinations. ***Id.***, ¶112. "We thus review the circuit court's final decision on an erroneous exercise of discretion standard, reexamining de novo the questions of law implicit in that decision," and reversing if the exercise of discretion is based on an error of law. ***Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 306, 592 N.W.2d 5 (Ct. App. 1998); ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 356, 560 N.W.2d 309 (Ct. App. 1997).

The party asserting issue preclusion, here Lands' End, has the burden of showing that the doctrine applies. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999).

B. Pretrial Motions for Summary Judgment as to the 2007 and 2009 Assessments

¶12 We review a grant or denial of summary judgment as a question of law subject to de novo review. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The burden is on the moving party, here Lands' End, to establish the absence of a genuine disputed issue as to any material fact. ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). The purpose of summary judgment is to avoid a trial "'where there is nothing to try'" because there are no material facts in dispute. ***Yahnke v. Carson***, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102 (quoted sources omitted).

¶13 In our 2013 decision, also a review of a summary judgment decision, we determined that the first requirement for the application of issue preclusion was met because the parties fully litigated the 2006 fair market value of the property and the first circuit court's finding as to the 2006 fair market value of the property was necessary to the prior judgment. ***Lands' End, Inc.***, No. 2010AP1185, unpublished slip op. ¶¶15, 23. We also were satisfied that Lands' End established that it was fundamentally fair to apply issue preclusion in that case. ***Id.***, ¶27. We then proceeded to explain that, "[o]ur conclusion that [the 2006] finding of fact has a preclusive effect is significant because it is undisputed that the value of the

property essentially stayed the same between 2006 and 2008." ***Id.,*** ¶28. Based on those two predicates, we concluded that the value of the property in 2008 must have been $25,000,000, the same value as in 2006. ***Id.***, ¶29.

¶14 In this case, Lands' End moved for summary judgment as to the 2007 and 2009 assessments, based on the preclusive effect of the first circuit court's decision as to the 2006 fair market value of the property and on evidence showing that the property's value had not materially changed since 2006. As noted above, in our 2013 review of the decision as to the 2008 fair market value we gave preclusive effect to the first circuit court's finding that the 2006 value of the property was $25,000,000. The City offers no developed reason for us to disturb that conclusion; indeed the City neither cites our 2013 decision nor expressly addresses the elements of the issue preclusion analysis set out above. Accordingly, we follow our 2013 decision and conclude that issue preclusion prevents the parties from relitigating the first circuit court's finding that the 2006 fair market value of Lands' End's property was $25,000,000.

¶15 In addition, just as it was then undisputed that the value of the property remained the same between 2006 and 2008, *see* ***id.***, ¶28, so here, based on the record on summary judgment in this case, it was undisputed that the value of the property essentially stayed the same between 2006 and 2007, and between 2006 and 2009.

¶16 Here, the record on summary judgment included the transcripts of the hearings before the City Board of Review. The City assessor testified in those hearings that in setting the assessment for the property in 2007, he adopted the same value placed on the property as was set forth in the 2006 appraisal on which the City relied in setting the 2006 assessment because, based on data from the

Wisconsin Department of Revenue, there was essentially no difference in the market from 2006 to 2007. He concluded that in setting the 2007 assessment, "I think that [the 2006] number is still true, in spite of some errors by [the City's then appraiser]." Similarly, the City assessor testified that in setting the assessment for the property in 2009, he relied on that same 2006 appraisal and value, along with Department of Revenue data showing that the value of the property was essentially unchanged from 2006 to 2009. Thus, in 2007 and 2009, as in 2008, the City assessor set the assessment of the Lands' End property based on a 2006 appraisal that valued the Lands' End property at $56,400,000.

¶17 Accordingly, we again follow the analysis in our 2013 decision and conclude that, "[g]iving preclusive effect to [the first circuit court's] finding that the 2006 value of the property was $25,000,000, and combining that finding with the undisputed fact in this case that the value of the property essentially stayed the same" from 2006 to 2007 and from 2006 to 2009, the value of the property in 2007 and 2009 "must be $25,000,000." *See* ***Lands' End, Inc.***, No. 2010AP1185, unpublished slip op. ¶29.

¶18 As we have already noted, the City offers no argument why we should not follow the analysis in our 2013 decision as set forth above with respect to the 2007 and 2009 assessments at the summary judgment stage prior to trial. Rather, without citing to the 2013 decision, the City makes several general issue preclusion arguments that we summarize and reject for the following reasons.

¶19 First, the City argues that the evidence that was presented *at trial* showed that the facts as to the 2007, 2009, and 2010 assessments were significantly different from the facts as to the 2006 assessment. However, in reviewing Lands' End's summary judgment motion we are limited to the evidence

presented on summary judgment *prior to trial*, and the City makes no argument that the pretrial submissions present a material factual dispute that would defeat the reasoning we applied in our 2013 decision or that we apply above.[4]

¶20 Second, the City argues that a new fact arose that was not present in the litigation as to the 2006 assessment, namely, an alleged communication calling into question the appropriateness of the first circuit court's reliance on a comparable identified as the Harvard sale in determining that the value of the Lands' End property was $25,000,000 in 2006. However, the City inaccurately asserts that "the information about the [Harvard] facility did not come to light during the 2005-2006 litigation." As the City itself acknowledged in previous appeals, the City did bring its concerns about both the sale and the alleged communication to the attention of the first circuit court, refuting its assertion of a new fact as to either the sale or the alleged communication.

¶21 As to the Harvard sale, the City extensively argued why the sale, independent of the alleged communication, was not a valid comparable in its appeal of the first circuit court's decision, and this court rejected those arguments on appeal. ***Lands' End, Inc.***, No. 2009AP2627, unpublished slip op. ¶¶10-11. The City's arguments in that first appeal also included its concerns about the implications of the alleged communication. Most significantly, the City noted that it had raised those concerns to the first circuit court before the court issued its final findings of fact, conclusions of law and judgment. As the City stated in its brief in that appeal, "The City brought this document [the alleged communication] to the

[4] Moreover, the City does not point to any trial evidence that contradicts the factual basis that underlies our summary judgment analysis.

circuit court's attention after the court issued its memorandum decision, but before it entered judgment. The circuit court did not comment on the document at any time."[5] However, the City did not in that appeal contend that the circuit court in any way erred in its failure to consider the alleged communication. That the City raised the alleged communication before the first circuit court but did not preserve on appeal any asserted error in that court's failure to consider the alleged communication, does not render the alleged communication a new fact that should defeat the application of issue preclusion to the City's attempt to relitigate the 2006 assessment in defending its 2007 and 2009 assessments.

¶22 Third, the City makes a set of arguments opposing the application of issue preclusion to bind parties to an assessment from a prior year, based on the tax statutes that provide for annual assessments and on the assertion that determinations of value are opinions based on evidence that is "constantly changing." We rejected similar arguments in our 2013 decision, and the City does not point to any error in that decision. As we noted in that decision, the City's arguments fail to acknowledge that the *issue* that has already been litigated, and to which issue preclusion applies, is solely the correct value for purposes of the 2006 assessment, not the assessments in the years that followed. ***Lands' End, Inc.***, No. 2010AP1185, unpublished slip op. ¶20. The City was not precluded from litigating the proper assessed value for years after 2006. However, when the City chose to use the value of the property in 2006 and then take the position that the

[5] The City similarly stated in its Respondent's Brief in the appeal of the second circuit court's decision on the 2008 assessment, that the City "did attempt to bring the [alleged communication] to the circuit court's attention after the 2005-2006 trial. The circuit court refused to consider it, stating: 'in making its findings of fact, the Court has not considered any reference by any party to facts that were not admitted into evidence during the trial in this matter.'"

only other fact that mattered was that property values had essentially remained the same, the question arose whether the City could use a higher 2006 valuation, a valuation that had already been the subject of litigation. In this opinion, as in our prior opinion, we determine that issue preclusion principles prevent the City from relitigating its own starting point, the value of the property for purposes of the 2006 assessment.

C. Post-Trial Motion for Judgment as to the 2010 Assessment Based on Issue Preclusion

¶23 After trial, Lands End moved the circuit court for judgment as to the 2010 assessment based on issue preclusion. For the reasons stated above, the first circuit court's determination of the 2006 value of the Lands' End property was entitled to preclusive effect. However, issue preclusion did not require that the 2010 value of the property be set at the 2006 level because the evidence at trial showed that, unlike the 2007 and 2009 assessments, for the 2010 assessment the City assessor did not start with the 2006 appraisal, but instead relied on new appraisals and information. Therefore, following the analysis in our 2013 decision, we conclude that Lands' End was not entitled to judgment as to the 2010 assessment based on issue preclusion.

¶24 However, Lands' End maintains that it was entitled to a 2010 assessment of $25,000,000 based on issue preclusion, because the only difference on which the circuit court relied to deny its motion for judgment as to the 2010 assessment based on issue preclusion, was the City's "new highest and best [use] theory," and the circuit court erred in relying on that difference because the circuit court rejected the City's highest and best use in its final decision. The problem with this argument is that it is not an issue preclusion argument. If anything, this

argument attacks the circuit court's reasoning based on the new evidence. And, even in this respect, the argument misses the mark.

¶25 We understand the circuit court to be referring to the new appraisals undertaken based on new information referred to above, which included conclusions about the Lands' End property's highest and best use which differed from the 2006 appraisal. As stated above, it is in part precisely because the City relied on new appraisals and information to determine the 2010 assessment, different from those it relied on to determine the 2006 assessment, that Lands' End was not entitled to judgment as to the 2010 assessment based on the preclusive effect of the 2006 assessment. Accordingly, Lands' End does not persuade us that the circuit court erred in denying its motion for judgment as to the 2010 assessment based on issue preclusion.

II. The 2010 Assessment Determined at Trial

A. Background

¶26 The Lands' End Dodgeville property contains six buildings: two warehouse distribution buildings, two office buildings, an activities center, and a day care center. The warehouse distribution buildings comprise sixty-nine percent of the total building square footage. The circuit court and the parties refer to the two warehouse distribution buildings as "warehouse/distribution" buildings or space, and the remaining buildings as "office" buildings or space, and we follow their lead.

¶27 For the 2010 assessment of the Lands' End property, the City relied on its appraiser's determination that the value of the property was $59,806,164. Lands' End appealed to the Dodgeville Board of Review, contending that the

value of the property remained at the $25,000,000 value determined for 2006. The Board upheld the City's assessment, and Lands' End brought an action pursuant to WIS. STAT. § 74.37 in circuit court, arguing that the 2010 assessment was excessive. During the nine-day trial to the court, Lands' End and the City presented the testimony of expert witnesses, who testified about their respective valuation methods and their opinions as to the fair market value of the property, and about their critiques of the opposing experts' methods and opinions.

¶28 Lands' End's appraisal expert, supported in part by testimony from other Lands' End experts, testified that in his opinion: (1) the property was most accurately valued as a whole, with the warehouse/distribution space driving any sale and little additional value attributable to the office space; (2) treated as a whole, the property had one uniform square foot value across all of the buildings on it; (3) the most relevant comparable sales involved large warehouse/distribution/manufacturing properties; and (4) the fair market value of the Lands' End property in 2010 was $20,000,000, down from $25,000,000 in 2009.

¶29 The City's appraisal expert testified that in his opinion: (1) the property was most accurately valued as the combined values of individual buildings, with the warehouse/distribution space having more value than, but being sold separately from, the office space; (2) each building had a separate square foot value; (3) the most relevant comparable sales involved small stand-alone warehouse or office building properties; and (4) the fair market value of the Lands' End property in 2010 was $59,806,164.

¶30 The circuit court issued a detailed and cogent decision and order that reviewed and analyzed the extensive and often conflicting evidence presented by

the parties' experts. The court found that the highest and best use of the Lands' End property is its "current use as a corporate headquarters and distribution facility," and that, "It is more likely that the property would be offered as a whole and purchased by a business interested in operating a warehouse/distribution center. The owner would then try to sell or lease the other holdings." The court "reconcile[d] the evidence by finding [the City's appraiser's] values better supported as they pertain to the warehouse/distribution buildings, but [Lands' End's appraiser's] values carrying more weight concerning the balance of the property." Using the City's appraiser's values for the two warehouse/distribution buildings and Lands' End's appraiser's values for the balance of the property,[6] the court determined that the fair market value for the Lands' End property for 2010 was $34,716,600.

B. Standard of Review

¶31 We will not overturn the circuit court's findings of fact unless they are clearly erroneous. ***Bloomer Housing Ltd. P'ship v. City of Bloomer***, 2002 WI App 252, ¶12, 257 Wis. 2d 883, 653 N.W.2d 309. In addition,

> [w]here, as here, there is conflicting testimony, the fact finder is the ultimate arbiter of credibility and when more than one reasonable inference can be drawn, "the reviewing court must accept the inference drawn by the trier of fact." The weight and credibility to be given to the opinions of expert witnesses is "uniquely within the province of the fact finder."

[6] The circuit court used Lands' End's appraiser's values for 2009, explaining that "his reduction of $5 million from 2009 to 2010 is not adopted because it was not supported by the evidence and would be unfairly duplicative as [the City appraiser] already made appropriate downward adjustments." Lands' End does not challenge the court's use of Lands' End's appraiser's 2009 values in determining the property's value in 2010.

Id. (citations omitted).

¶32 Each party challenges the circuit court's partial reliance on the other party's appraisal. We address Lands' End's sole argument, followed by the City's two arguments, in turn.

C. *Lands' End's Argument Against the Circuit Court's Reliance on the City's Appraiser's Value of the Warehouse/Distribution Buildings*

¶33 Lands' End argues that the circuit court erroneously accepted the City's appraiser's value of the warehouse/distribution buildings because that value "impermissibly represents the value in use or intrinsic value of the space, not its fair market value." This argument fails because it mischaracterizes the circuit court's reasoning and because Lands' End does not show that the evidence relied on by the circuit court relates to intrinsic rather than market value.

¶34 The concept that underlies Lands' End's argument is the provision in WIS. STAT. § 70.32(1) that "[r]eal property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual ... at the full value which could ordinarily be obtained therefor at private sale." Consistent with this directive, "'property shall be assessed with reference to purposes for which it may be sold rather than the purposes to which it presently may be devoted.'" ***State ex rel. Northwestern Mut. Life Ins. Co. v. Weiher***, 177 Wis. 445, 448, 188 N.W. 598 (1922) (quoted source omitted). The former, according to the Wisconsin Property Assessment Manual, is a property's value in exchange, defined as, "[t]he value, in terms of money, of a commodity to persons generally; as opposed to use value of a specific person." The value based on present use, according to the Manual, is a property's use value, defined as, "[t]he actual value of a commodity to a specific owner, as opposed to its value in exchange."

¶35 Lands' End contends that the City's appraiser's values of the warehouse/distribution buildings which the circuit court adopted represent their use value rather than their value in exchange. Lands' End bases its argument on testimony by the City's appraiser that he assumed market demand for the Lands' End property, and Lands' End infers from this testimony that that assumed market demand was based on Lands' End's demand, or "demand created by the use of the property" rather than market demand. Lands' End contends that the circuit court's statements in its decision that, "Lands' End's value is largely dependent on whether it is occupied," and "[n]ot even [Lands' End's appraiser] could seriously believe that a person could walk into [Lands' End] with $20 million and walk out with a deed to Lands' End," indicate that the circuit court was considering "the idiosyncratic value of the property ascribed to its current owner," which is improper because the "value to Lands' End ... is not the same as market value or value in exchange."[7]

¶36 Lands' End's approach takes certain statements by the circuit court out of context and obscures the actual extensive, and proper, basis for the circuit court's determination of value of the warehouse/distribution space on the Lands' End property.

[7] The City responds that in this case, the value in use and the value in exchange are the same, because both Lands' End's appraiser and the circuit court determined that the property's current use is its highest and best use, and according to the Wisconsin Property Assessment Manual, "[i]f the current use is the highest and best use of the property, use value will equal" value in exchange. At trial, Lands' End's appraiser disagreed, without elaboration, with this statement in the Manual, and the City's appraiser explained that here, where he is appraising the market value of the property, the fact that its current use is its highest and best use means that the value in exchange will equal use value. We need not resolve this dispute, because as we go on to explain, neither the City's appraiser nor the circuit court valued the warehouse/distribution space according to its value to Lands' End (value in use) as opposed to its market value (value in exchange).

¶37 First, Lands' End's argument is premised on a mischaracterization of the circuit court's reasoning. As noted above, WIS. STAT. § 70.32(1) requires that property be assessed at its full market value. "This value must reflect its 'highest and best use.'" ***Forest Cnty. Potawatomi Cmty. v. Township of Lincoln***, 2008 WI App 156, ¶10, 314 Wis. 2d 363, 761 N.W.2d 31 (quoted source omitted). Lands' End's appraiser considered Lands' End's highest and best use of the property to be for warehouse/distribution; the City's appraiser considered Lands' End's highest and best use to be a business park. The circuit court determined that "the property's current use as a corporate headquarters and distribution facility is its highest and best use," and that, consistent with Lands' End's appraiser's opinion, any sale would be driven by the warehouse/distribution space: "It is more likely that the property would be offered as a whole and purchased by a business interested in operating a warehouse/distribution center. The owner would then try to sell or lease the other holdings." Lands' End identifies nothing in this determination of the court, based on Lands' End's own appraiser's opinion, that relies on the intrinsic value of the property to Lands' End.

¶38 Second, Lands' End's argument fails to show that the circuit court did not rely on credible evidence of the property's market value. WIS. STAT. § 70.32(1) requires that market value be determined based on the consideration of "recent arm's-length sales of reasonably comparable property." The record of the trial is replete with testimony supporting and critiquing the various comparable sales selected by the parties' appraisers to support their determinations of value. The circuit court acknowledged that the differences in properties offered by the parties as comparables flowed from their differences in opinion concerning highest and best use, and reviewed the conflicting testimony about the comparables. The circuit court reviewed the testimony that undermined both the City's appraiser's

opinions regarding Lands' End's office space and Lands' End's appraiser's opinions regarding Lands' End's warehouse/distribution space. Lands' End identifies nothing in this review that relies on the intrinsic value of the property to Lands' End.

¶39 WISCONSIN STAT. § 70.32(1) requires that market value be determined based on the consideration of "all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed." These factors include "cost [of improvements], depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus and appraisals produced by the owner." ***State ex rel. Mitchell Aero, Inc. v. Board of Review***, 74 Wis. 2d 268, 278-79, 246 N.W.2d 521 (1976). Here, the appraisers and the court considered location, population and labor availability, transportation and access, the economic down-turn, the different markets for warehouse/distribution space versus for office space, cost of improvements, and depreciation. Lands' End fails to explain what aspect of these considerations relied on the intrinsic value of the property to Lands' End.

¶40 The statements cited by Lands' End and quoted above, relate to the part of the circuit court's discussion in which it notes the challenge posed by the uniqueness of the Lands' End property in rural Iowa County and in which it expresses doubt that either party's value, $20,000,000 or $62,000,000, realistically reflects the property's value on the market. The circuit court then continues its review of both parties' appraisers' testimony to determine which part of each appraiser's testimony it could use to best calculate the property's market value. Lands' End fails to show that, taken as a whole, the circuit court's decision did not

rely on credible evidence to ascertain the property's value in the market, based on the factors identified in WIS. STAT. § 70.32(1).

¶41 Finally, Lands' End looks to the decision in ***State ex rel. Northwestern Mut. Life Ins. Co.***, 177 Wis. 445, to support its use value argument. In that case, our supreme court affirmed the circuit court's lowering the city's assessment by half, because the city based its assessment on the intrinsic worth of the "fine, substantial, artistic building, gracing half a block in the city of Milwaukee, built to meet the peculiar needs of its owner," to "one who might need it just as it is," whereas the circuit court looked at those same facts and determined the building's "sale value, taking into consideration the actual situation as it existed in Milwaukee at the time." ***Id.*** at 449-50. Lands' End's reliance on ***Northwestern*** is unavailing. From our summary of the circuit court's reasoning here, it is apparent that the court looked at the Lands' End property as Lands' End developed it, and considered the parties' testimony as to highest and best use, comparables, and other statutory factors, so as to determine the property's value not specially to "one who might need it just as it is," but in the real market where "there would likely be some demand for Lands' End's warehouse/distribution buildings."

¶42 For these reasons, we affirm the circuit court's reliance on the City's appraiser's values regarding the warehouse/distribution buildings.

D. *The City's Arguments Against the Circuit Court's Reliance on Lands' End's Appraiser's Value of the Balance of the Property*

¶43 The City makes two arguments in support of its assertion that the circuit court erroneously adopted Lands' End's appraiser's value of the office space on the Lands' End property. We address and reject each in turn.

¶44 The City's first argument focuses on the failure of Lands' End's appraiser to differentiate office space from other types of structural space on the property. The City faults Lands' End's appraiser for failing to present any value of the stand-alone office buildings separately or to present any comparable sales involving stand-alone office buildings, even though the Lands' End property includes two stand-alone office buildings. Therefore, the City contends that "[t]here is no evidence to sustain Lands' End's Appraiser's opinions of value as to the office space," and that the circuit court's determination of value for office space based on the Lands' End's appraiser's undifferentiated value for the property as a whole, must be reversed.

¶45 The problem with the City's argument is that these asserted failures followed from Lands' End's appraiser's testimony that there was no demonstrated independent market demand for the office space on the Lands' End property, so as to warrant separate valuation of, and separate comparables for, the office space. The City's appraiser similarly was not able to present any evidence of demand for the Lands' End office space. The circuit court found that the City's appraiser's values "assume a demand that simply does not exist, at least for the office space," and that the City's appraiser was not convincing "when explaining why he thought it likely that almost one-half million square feet of office property would be readily sold in a market with essentially zero absorption." The circuit court relied on both appraisers to conclude that "the warehouse/distribution buildings would be marketable" and would drive the sale of the property as a whole, so that the lower "blend[ed]" per square foot value presented by Lands' End's appraiser "carr[ied] more weight concerning the balance of the property," which itself contained more than only office space.

¶46 It is apparent from the circuit court's decision that, based on its weighing of the varied and conflicting testimony by the parties' experts (some of which is selectively cited by the parties in their briefs), the circuit court determined that the warehouse/distribution space should be valued differently from the balance of the property (including the office space), but that the lower "blend[ed]" per square foot value for the property as a whole resulted in the most reliable measure of the value of the non-warehouse/distribution space. We will not disturb the circuit court's determinations of credibility and weight as among competing experts, or its drawing of reasonable inferences from their testimony. ***Bloomer Housing Ltd. P'ship***, 257 Wis. 2d 883, ¶12.

¶47 Second, the City challenges Lands' End's appraiser's value for the Lands' End property as a whole to the extent that it is based on sales of properties that "are not comparable because they are second generation, vacant, dark properties that were distressed." The circuit court acknowledged that the City's appraiser "did a convincing job of discrediting [Lands' End's appraiser's] selection of comparables, particularly for" the two warehouse/distribution buildings. However, the circuit court found that at least one of Lands' End's appraiser's comparables supported the appraiser's opinion "that a large amount of office space in an area of little demand would likely be viewed as a negative," and that his "values carr[ied] more weight" concerning the non-warehouse/distribution portion of the property. As with its first argument above, the City's second argument fails because we will not disturb the circuit court's determinations of credibility and weight as among competing experts. ***Id.***

¶48 Accordingly, we conclude that the City fails to provide a basis to disturb the circuit court's reliance on Lands' End's appraiser's "blend[ed]" value "concerning the [non-warehouse/distribution] balance of the property."

III. Interest

¶49 In the "Claim for an Excessive Assessment" that Lands' End submitted to the City regarding the 2007 assessment, Lands' End stated, "The amount of this claim is approximately $565,000 plus interest thereon." In the complaint that Lands' End filed with the circuit court after that claim was disallowed, Lands' End alleged:

> 3. This action is brought under Wis. Stat. § 74.37(3)(d), for a refund of excessive real estate taxes imposed on Lands' End by the City for the year 2007, plus statutory interest ....
>
> ....
>
> 82. Lands' End is entitled to a refund of 2007 tax in the amount of $676,740, or such greater amount as may be determined to be due to Lands' End, plus statutory interest of .08% per month.
>
> WHEREFORE, Lands' End requests the following relief:
>
> ....
>
> B. Judgment in the amount of $676,740, or such greater or lesser amount as may be determined to be due to Lands' End, plus statutory interest.

¶50 Following the issuance of the circuit court's post-trial decision and order, Lands' End submitted its proposed findings of fact, conclusions of law and judgment, and included in its proposed findings the award of statutory interest on

the refunds payable to Lands' End. The statutory annual interest rate applicable for the 2007 refund was 9.6%. WIS. STAT. § 74.37(5) (2005-06).[8]

¶51 The City objected to the award of interest on the 2007 refund, and the circuit court awarded interest on the 2007 refund at the 2.00004% annual rate applicable for 2009 and 2010. Following Lands' End's motion to reconsider its decision applying that rate to the interest on the 2007 refund, the circuit court denied interest on the 2007 refund altogether. The circuit court concluded that the use of "may" in WIS. STAT. § 74.37(5) indicates that the awarding of interest is discretionary with the court, and determined that the equities did not justify the awarding of interest at the "really substantial" annual rate of 9.6%.

¶52 The parties dispute as a matter of statutory interpretation whether the circuit court has discretion to deny a request for interest under WIS. STAT. § 74.37(5). To resolve this dispute, we must interpret the statute and apply it to the undisputed facts, which is a question of law reviewed de novo. *See* ***Barritt v. Lowe***, 2003 WI App 185, ¶6, 266 Wis. 2d 863, 669 N.W.2d 189.

¶53 "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted); ***Barritt***, 266 Wis. 2d 863, ¶6 (we construe statutory language based on its common and ordinary meaning). In conducting

[8] Lands' End also sought refunds for 2009 and 2010, plus statutory interest. The statutory interest rate applicable to the 2009 and 2010 refunds is pegged to the average annual discount rate determined by the relevant auction of six-month U.S. Treasury bills. Wis. Stat. § 74.37(5) (2009-10); 2007 Wis. Act 86, §§ 10-11. The circuit court's determination of interest at the annual rate of 2.00004% for the 2009 and 2010 refunds was not contested.

this analysis, we read statutory language not in isolation but as it relates to the statute as a whole. ***Kangas v. Perry***, 2000 WI App 234, ¶8, 239 Wis. 2d 392, 620 N.W.2d 429.

¶54 The City's argument that the imposition of interest is discretionary is easily rejected. As we explain below, the City relies on the use of "may" in the statute, but that reliance is flawed because "may" does not refer to the actions of the circuit court, but rather is used with respect to the party making a claim. Such a party "may" seek interest. Nothing in the statutes suggests that a court, having awarded a refund, has discretion to deny interest sought on that refund.

¶55 It is the language in the statute as a whole that makes it clear that, where a claim is allowed or granted, neither the taxation authority nor the circuit court has discretion to deny the part of the claim that comprises interest. WISCONSIN STAT. § 74.37 is entitled, "Claim on excessive assessment," and begins with subsection (1), which reads:

> DEFINITION. In this section, a "claim for an excessive assessment" or an "action for an excessive assessment" means a claim or action, respectively, by an aggrieved person to recover that amount of general property tax imposed because the assessment of property was excessive.

¶56 Subsection (2)(a) provides that, "[a] claim for an excessive assessment may be filed against the taxation [authority] which collected the tax," and sets forth the conditions that such a claim must meet. Subsection (3) prescribes the action to be taken on a claim: if the claim is allowed, the taxation authority "shall pay the claim not later than 90 days after the claim is allowed;" if the claim is disallowed, "the claimant may commence an action in circuit court to recover the amount of the claim not allowed." WIS. STAT. § 74.37(3)(c) and (d).

¶57 Subsection (5) (2005-06), which applies to the 2007 assessment, provides: "INTEREST. The amount of a claim filed under sub. (2) or an action commenced under sub. (3) may include interest computed from the date of filing the claim against the taxation district, at the rate of 0.8% per month."[9] Thus, subsection (1) defines the "claim," and subsection (5) allows interest to be part of that "claim;" subsections (2) and (3) describe how that "claim" is presented and processed.

¶58 The parties do not dispute that under subsection (5), the claimant may choose whether to include interest in its claim. Under subsection (2), the claimant must "[s]tate as accurately as possible the amount of the claim," which plainly means that the claimant must include interest in its statement of the amount of the claim if the claimant so chooses. Under subsection (3), the claimant must make its choice (to include interest) clear, and the taxation authority must honor that choice. If the taxation authority allows the claim, then under subsection (3)(c) it "shall pay the claim," which plainly means the whole claim including interest if interest is part of the claim, at the statutory rate stated in subsection (5). If the taxation authority disallows the claim, then under subsection (3)(d) the claimant may commence an action in circuit court "to recover the amount of the claim not allowed," which plainly means the whole claim including interest if interest is part

[9] In 2007 Wis. Act 86, § 10, the legislature amended WIS. STAT. § 74.37(5), effective for tax year 2008, by changing the interest rate and the time that the interest obligation begins, as follows: "The amount of a claim filed under sub. (2) or an action commenced under sub. (3) may include interest at the average annual discount rate determined by the last auction of 6-month U.S. treasury bills before the objection per day for the period of time between the time when the tax was due and the date that the claim was paid."

of the claim that was disallowed. The parties dispute whether the circuit court must honor the claimant's choice to include interest in the claim.

¶59 We discern no language in the statute that gives either the taxation authority or the court such discretion. Rather, the plain language of subsection (5) permits a claimant to include interest in its claim before the taxation authority and before the circuit court; the plain language of subsection (2), by requiring that a claimant state the amount of its claim "accurately," requires that a claimant that seeks to include interest along with the refund, state the amount of its claim to include interest; and the plain language of subsection (3), by referring consistently to "the claim" in describing the action that a taxation authority may take and that a claimant seeking judicial action may take, does not allow either the taxation authority or the circuit court to sever interest from a claim that seeks a refund along with interest under the statute.

¶60 Reading the plain language of these subsections together, it is clear that once a claimant includes interest in its claim, the request for interest becomes an unseverable part of "the claim" before the taxation authority and before the circuit court. By setting both the interest rate and the starting date in subsection (5), the statute establishes how the interest portion of a claim is to be computed. Where a claim includes interest, there is no language in the statute as a whole that authorizes either the taxation authority or the circuit court to decline to complete this mechanical calculation in allowing or granting "the claim" referred to in WIS. STAT. § 74.37.

¶61 The City makes two arguments in support of its proposition that the circuit court has discretion to deny a request for interest when otherwise granting a claim for a refund resulting from an excessive assessment. First, the City contends

that the use of the word "may" in WIS. STAT. § 74.37(5) is permissive. The City specifically contrasts the legislature's use of the word "shall" in WIS. STAT. § 74.11(11)(a) (delinquent taxes "shall be paid, together with interest"), with the use of the word "may" in WIS. STAT. § 74.37(5) ("[t]he amount of a claim ... may include interest"). However, both sections cited by the City refer to actions by the taxpayer. In the former, the taxpayer is required to pay delinquent taxes along with interest to the taxation authority; in the latter, the taxpayer has the choice whether to request interest along with the tax refund in its claim seeking payment from the taxation authority. The City points to no language in WIS. STAT. § 74.37 that gives the circuit court discretion to sever interest from that claim.

¶62 Second, the City relies on a footnote in an excessive tax assessment case, ***Trailwood Ventures, LLC v. Village of Kronenwetter***, 2009 WI App 18, 315 Wis. 2d 791, 762 N.W.2d 841 (WI App 2008). In that case, we reviewed the question whether a circuit court may increase the assessment challenged in an excessive assessment action under WIS. STAT. § 74.37. We concluded that a circuit court may either enter judgment for the claimant for overpayment or enter judgment for the taxation authority if there is no overpayment, but that a circuit court may not increase the tax burden over that imposed by the taxation authority. ***Trailwood Ventures, LLC***, 315 Wis. 2d 791, ¶¶12-13. Before reaching that conclusion, we reviewed the procedure for challenging an assessment as excessive, which we explained may culminate in a trial de novo before the circuit court. ***Id.***, ¶¶4-8. We noted that WIS. STAT. § 74.39 permits the court to order reassessment before entering judgment, and that if "the reassessment shows the taxes paid were excessive, a refund is awarded to the taxpayer." ***Trailwood Ventures, LLC***, 315 Wis. 2d 791, ¶8. In a footnote following this sentence, we

stated: "Interest may also be added to the award. *See* WIS. STAT. § 74.35(4)."[10] ***Trailwood Ventures, LLC***, 315 Wis. 2d 791, ¶8 n.3.

¶63 This footnote is consistent with our conclusion above, that the judgment may include interest if the claimant included interest in its claim. The footnote does not establish that the circuit court has the discretion to remove interest from the award where the claimant included interest in its claim. Rather, the footnote was incidental to the issue addressed in ***Trailwood***, and was not connected to any concern with the issue here, namely the authority of a circuit court to deny interest requested as part of a claim.

¶64 In sum, the City's arguments do not counter our interpretation of the plain language of WIS. STAT. § 74.37, and our conclusion that nothing in that language gives a circuit court discretion to deny interest included in a claim filed under that statute.

CONCLUSION

¶65 For the reasons explained above, we conclude that Lands' End was entitled to pretrial summary judgment based on issue preclusion as to the 2007 and 2009 assessments, but not to post-trial judgment based on issue preclusion as to the 2010 assessment; that the circuit court's post-trial determination of the 2010 assessment is supported by the evidence and is consistent with applicable law; and

[10] The subsection referenced in this footnote, WIS. STAT. § 74.35(4), is in the statute concerning recovery of unlawful taxes, and was in 2005-06 identical to WIS. STAT. § 74.37(5) in the statute concerning claims for excessive assessment. Because the action in ***Trailwood*** concerned an excessive assessment under WIS. STAT. § 74.37, it is likely that the intended reference was to WIS. STAT. § 74.37(5).

that the circuit court lacks the discretion to deny interest as requested in Lands' End's 2007 property tax refund claim. Therefore, we affirm in part and reverse in part.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions; cross-appeals dismissed.

Not recommended for publication in the official reports.

COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2818 **Cir. Ct. No. 2010CV1391**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WALGREEN CO.,

PLAINTIFF-RESPONDENT,

V.

CITY OF OSHKOSH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. This case examines one skirmish in the war between Walgreen Co. and tax assessors throughout Wisconsin over how real property taxes are assessed against the national drugstore giant. This skirmish is fought

after our supreme court in ***Walgreen Co. v. City of Madison*** (***Walgreen/Madison***), 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687, established the rules of battle. In ***Walgreen/Madison***, the court determined that where contractual rights inflate the value of leased retail property, assessors must look to the market to reach their valuations. "[A]n assessor's task is to value the real estate, not the business concern which may be using the property." ***Id.***, ¶65 (citation omitted).

¶2 The circuit court found that the City of Oshkosh did not follow this rule in valuing Walgreen properties as its assessments relied on sale prices and leases that included contractual rights that inflated the properties' values. On appeal, the City argues that the court erred as Walgreen did not present evidence that its lease agreements increase its sale prices or provide for above-market rents when compared to other investment-grade real estate, which is the market for Walgreen properties. We affirm the circuit court's extensive, thorough, and reasoned decision. In confining Walgreen's market to one that trades in investment-grade real estate rather than looking to the broader retail market for its assessments, the City improperly valued Walgreen's business concern.

BACKGROUND

¶3 At issue are two stores operated by Walgreen in the City of Oshkosh that were built to Walgreen's specifications and are subject to long-term leases that allow Walgreen to remain in the properties for decades to come. The store at 315 West Murdock Avenue (Murdock property) was sold in 2005 for $2,923,459. The store at 950 South Koeller Street (Koeller property) was sold in 2006 for $4,325,000. The leases for both properties require that Walgreen pay all operating expenses—utilities, property taxes, insurance, and maintenance—and are signed before site development begins. Walgreen's leases call for it to pay $18.78 per

square foot for the Murdock property and $22.12 per square foot for the Koeller property in annual rent.

¶4 The City assessed the Murdock property at $2,920,500 and the Koeller property at $4,093,600 in 2009. After Walgreen objected, the City reduced the assessments to $2,700,000 for the Murdock property and $3,074,000 for the Koeller property and refunded some of the taxes paid by Walgreen. The assessments remained at the reduced levels for 2010. Walgreen challenged the 2009 and 2010 assessments for both properties, subsequently bringing this WIS. STAT. § 74.37 (2011-12)[1] action for excessive assessments after the City rejected Walgreen's appeals and claims.

¶5 At the court trial, City Assessor Steven Schwoerer testified that in assessing the Murdock property, his valuation "probably" gave most weight to Walgreen's rental payments, and that this valuation was supported when he time-adjusted the 2005 sale price and compared it to sales of other Walgreen properties in the state. For the Koeller property, Schwoerer testified that he based his assessment almost solely on the 2006 sale price.

¶6 Walgreen's expert appraiser, Paul Bakken, valued the Murdock property at $1,675,000 in 2009 and $1,585,000 in 2010 and the Koeller property at $1,750,000 in 2009 and $1,655,000 in 2010. He based his valuations largely on analyzing what comparable retail properties would receive in rent without considering properties leased by national credit-worthy tenants such as Walgreen. Bakken testified that he gave no weight to the prior sales of the Murdock and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Koeller properties as the sale prices reflected the added value of leases with above-market rents and custom building features that would not be valued as highly by the broader marketplace. Bakken estimated the 2009 market rent at $11.50 per square foot for the Murdock property and $13.25 for the Koeller property.

¶7 The circuit court found that the City's assessments violated the Property Assessment Manual (Manual)[2] and ***Walgreen/Madison*** because the assessor had not investigated beyond the sale prices and "utilize[ed] the lease," resulting in "a business value assessment as opposed to a real property assessment." The court ordered a reassessment pursuant to WIS. STAT. § 74.39(1). The City subsequently "reassessed" the properties at the same values of $2,700,000 for the Murdock property and $3,074,000 for the Koeller property, and Walgreen objected. The court agreed with Walgreen that the City's reassessments contained the same flaws as the original assessments and that they did not follow ***Walgreen/Madison***. Finding Bakken's appraisal to be more consistent with the Manual and case law, the court made adjustments to that appraisal to arrive at valuations of $2,131,000 in 2009 and $2,024,000 in 2010 for the Murdock property and $2,200,000 in 2009 and $2,097,000 in 2010 for the Koeller property. The court awarded a $69,548.99 refund to Walgreen. The City appeals.

[2] State law mandates that the department of revenue prepare and publish the Manual, which "shall discuss and illustrate accepted assessment methods, techniques and practices with a view to more nearly uniform and more consistent assessments of property at the local level." WIS. STAT. § 73.03(2a). The Manual requires amendment "from time to time to reflect … court decisions concerning assessment practices…." ***Id.***

DISCUSSION

¶8 Under WIS. STAT. § 70.32(1), Wisconsin tax assessors must value real property in accordance with the Manual, absent conflicting law. ***Walgreen/Madison***, 311 Wis. 2d 158, ¶3. Assessments are presumed correct, *see* WIS. STAT. § 70.49(2), unless they do not conform with the Manual or the law, ***Allright Props., Inc. v. City of Milwaukee***, 2009 WI App 46, ¶12, 317 Wis. 2d 228, 767 N.W.2d 567. On appeal, we defer to the circuit court's findings of fact, but review independently whether those facts establish that the assessor failed to follow the law. ***Id.***, ¶13.

¶9 The City contends that the circuit court erred in not presuming its assessments are correct and in not valuing the properties according to their highest and best use as "existing freestanding pharmac[ies]." We disagree as the City's method of assessing the properties, including its identification of their highest and best use, was based on Walgreen's business value in direct contravention of ***Walgreen/Madison***.

¶10 In ***Walgreen/Madison***, our supreme court identified the correct methodology for assessing leased retail property when the leases involve payments significantly above market rental rates. ***Walgreen/Madison***, 311 Wis. 2d 158, ¶18. The court defined the question on appeal as whether an assessment of retail property leased at above-market rents should be based on market rents or on the "contract rent" of Walgreen's actual leases. ***Id.***, ¶2. The court concluded that "the assessor must use the market rent, not the contract rent," and that all of the necessary information could be obtained and verified by the assessor in the marketplace. ***Id.***, ¶82.

¶11 The fact that retail property may be income-producing does not render the contractual benefits of an above-market lease equal to a higher property value. ***Id.***, ¶47. "[A] lease never increases the market value of real property rights to the fee simple estate." ***Id.*** (citation omitted). Any increase in the value of real property attributable to a particular lease constitutes contractual rather than real property rights, even though those rights may run with the land. ***Id.***, ¶48.[3] This is because "[r]ent is not a right in realty; it is what is exchanged for an encumbrance upon a right in realty." ***Id.***, ¶45. While "a lessor may be more than fully compensated for an encumbrance through above market rent," that fact "does not transform a lease from an encumbrance to part of the 'bundle of rights' appertaining to a property, nor does it transform the rent payments into anything more than compensation for an encumbrance. Rather, it may just make the property owner a wise investor." ***Id.***

¶12 The City argues that its assessments comply with the Manual and ***Walgreen/Madison*** even though they rely on the contract rents and actual sales of the subject properties because, according to the City's analysis, Walgreen does not pay above-market rents and its leases do not increase the sale prices of its properties. To reach this conclusion, the City defines the highest and best use of Walgreen's properties as "their *continued* use as 1st generation freestanding drug stores," and analyzes Walgreen's rents and sales against properties with this same use.

[3] This is distinguished from when a lease "actually encumber[s] the property" by providing below-market rents. *See* ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶¶43-44, 46, 311 Wis. 2d 158, 752 N.W.2d 687.

¶13 The problem with the City's argument is that this narrow definition of highest and best use restricts the market for Walgreen properties to one that, in the City's own words, includes only "investment grade real estate" where "[t]he value of the investment is determined by the value of the real estate, the creditworthiness of the tenant and the value of the lease itself." Tellingly, the City's assessor testified at trial that in order to transform the sale prices of vacant freestanding drug stores into valid sales comparisons for the Walgreen properties, he would "have to do an economic adjustment for the differences in the income stream" so as to "add value to your vacant sale to bring it up to the same quality as your subject." In other words, the market does not value a property without Walgreen as a tenant as highly as it does a property where Walgreen remains a tenant subject to a long-term lease. The City's assessment method values "the business concern which may be using the property." *See* ***id.***, ¶65 (citation omitted). This it cannot do.

¶14 As the evidence presented at trial showed that the City's assessments relied on above-market sale prices and contract rents and did not comply with applicable law, the circuit court properly found that they should not be afforded a presumption of correctness. The court did not err in rejecting the City's highest and best use for the properties, which required valuation of Walgreen's business concern in addition to its real property in contravention of ***Walgreen/Madison***.[4]

[4] A further problem with the City's argument is that, where its assessment methodology conflicts with ***Walgreen/Madison***, it relies on post-***Walgreen/Madison*** changes to the Manual and argues that "***Walgreen***[***/Madison***] must now be interpreted in light of the revised Manual." This may be true in some circumstances, but not to the point of gutting ***Walgreen/Madison***. Where there are conflicts between the Manual and the law, "common law which accurately reflects the state of the law" and WIS. STAT. § 70.32(1) control. ***City of West Bend v. Continental IV Fund Ltd. P'ship***, 193 Wis. 2d 481, 487, 535 N.W.2d 24 (Ct. App. 1995).

¶15 Lastly, we address the City's contention that the circuit court erred in its property valuations by failing to formally identify the highest and best use of the properties and by "[m]aking arbitrary adjustments" to what it considers to be Walgreen's faulty appraisal. We note that the circuit court's valuations were within the ranges introduced into evidence by the experts at trial, that the City was given a chance to correct its assessments to comply with the law, and that the City continues to hold up the same assessments as valid that we have determined violate ***Walgreen/Madison***. The circuit court did not clearly err in arriving at its valuations; the court admirably shouldered a task that the City refused to perform.

¶16 We decline both parties' invitation to publish this decision. We do no more here than apply the precedent of ***Walgreen/Madison*** that "[a]n assessor's task is to value the real estate not the business concern which may be using the property." ***Id.***, ¶65 (citation omitted). We make no new law nor do we address any novel legal issue. If the City wishes to relitigate ***Walgreen/Madison***, this is not the correct forum. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.