REPRESENTATIVES FOR PETITIONER: David Suess, Benjamin Blair and Abraham Benson, Faegre Drinker Biddle & Reath LLP

REPRESENTATIVE FOR RESPONDENT: Jess Reagan Gastineau, Office of Corporation Counsel

---

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Kohl's Indiana, LP,[1]	)	Petition No.:	49-800-11-1-4-00856-16
	)		49-800-12-1-4-00857-16
	)		49-800-13-1-4-00858-16
Petitioner,	)		49-800-14-1-4-00859-16
	)		
v.	)	Parcel No.:	8060388
	)		
Marion County Assessor,	)		
	)	County:	Marion
	)		
Respondent.	)	Assessment Dates:	March 1, 2011; March 1, 2012
	)		March 1, 2013; March 1, 2014

May 7, 2020

FINAL DETERMINATION

The Indiana Board of Tax Review ("Board"), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

I. INTRODUCTION

1. Kohl's Indiana, L.P. ("Kohl's") appealed the assessments for a built-to-suit big-box store that it leased. The property was located within a strip shopping center known as Fashion Mall Commons, but it was assessed as a separate tax parcel. While the Marion County Assessor disputes Kohl's' authority to bring the appeals in its own name, Kohl's was both

[1] The Form 131 petitions filed with us refer to Kohl's Indiana, LP and its sole general partner, Kohl's Department Stores, Inc. Kohl's Department Stores, Inc. originally leased the property, but it assigned its rights under the lease to Kohl's Indiana, LP before the assessment dates at issue. *See Ex. R-G5 – R-G6.*

statutorily liable for taxes on the improvements and contractually responsible for taxes on the entire parcel, which we find sufficient to qualify as a "taxpayer" under the relevant statutes governing appeals.

2. As for the merits, Kohl's offered probative valuation opinions from a qualified and experienced appraiser. Rather than offer a competing appraisal, the Assessor sought to show that the much higher price from a sale that was subject to Kohl's' lease was a better indicator of the property's market value-in-use. He pinned his hopes on receiving information through discovery showing that contract rent under Kohl's' lease was equal to market rent, including information from appraisals he assumed were prepared in connection with the property's sale. Despite knowing that the information he sought likely was in the hands of the property's owners, rather than Kohl's, he did not propound discovery to the owners. He instead embarked on a quest to either compel the information from Kohl's or delay the hearing to belatedly conduct nonparty discovery. Unfortunately for the Assessor, the appraisals he sought did not even exist, and he was left with no probative valuation evidence of his own.

II. PROCEDURAL HISTORY

3. Kohl's appealed the 2011-2014 assessments for the subject property to the Marion County Property Tax Assessment Board of Appeals ("PTABOA"). On February 26, 2016, the PTABOA issued determinations in the following amounts:

Assessment Date	Value
March 1, 2011	$6,016,300
March 1, 2012	$7,793,500
March 1, 2013	$7,902,300
March 1, 2014	$7,902,300

Unsatisfied with those determinations, Kohl's timely filed Form 131 petitions with the Board.

4. Normally, the next significant procedural event would be a hearing on the merits. These appeals are unusual in that disputes involving pretrial procedure and discovery dominated the proceedings almost to the point of overshadowing the hearing on the merits. Although our designated administrative law judge, David Pardo ("ALJ"), ruled on the parties' various motions, we discuss some of those motions further both because they shaped how the case was presented and because our discussion may help avoid a repeat of similar problems in future appeals.

A. Discovery Disputes and other Prehearing Motions

5. We deal here with the two most significant prehearing motions: (1) the Assessor's motion to compel discovery, and (2) his written requests for us to issue four subpoenas duces tecum for the hearing.[2]

1. Timeline

6. Before discussing the merits of those motions, we offer the following timeline for context:

April 6, 2016	Kohl's files appeal petitions with the Board.
November 1, 2018	The ALJ approves the parties' Appeal Management Plan, setting a hearing for May 20, 2019. The plan also sets deadlines of January 25, to identify expert witnesses and exchange expert reports, February 28 to identify rebuttal experts and exchange their reports, and April 26 to complete discovery.
January 18, 2019	The Assessor moves to extend the deadline to identify experts and exchange their reports by 90 days, through April 25. Kohl's opposed the request.
February 6, 2019	Based on the parties' agreement, the ALJ issues a Revised Appeal Management Plan, setting deadlines of March 11 to identify expert witnesses and exchange their reports, April 15 to identify rebuttal experts and exchange their reports, and May 3 to complete discovery.
February 27, 2019	The Assessor serves discovery requests on Kohl's. The

[2] The Assessor filed a motion to dismiss the morning of the hearing. We address that motion in a separate section.

	requests do not specifically refer to appraisals prepared in connection with sales of the subject property in 2011 and 2013, but Requests for Production Nos. 1 and 19 ask about appraisals prepared within the last five years of each assessment date.[3]
March 11, 2019	The Assessor identifies Frank Kelly as his expert witness but indicates there will be no expert report. Kohl's identifies Laurence Allen as its expert and provides his appraisal report.
April 5, 2019	Kohl's serves its responses to the Assessor's discovery requests. In response to Requests for Production Nos. 1 and 19, Kohl's refers the Assessor to Allen's appraisal report and to Allen's work file, which Kohl's indicates it is producing in conjunction with its responses.[4]
April 9, 2019	Counsel for the Assessor indicates that she will forward topics for a Trial Rule 30(b)(6) deposition soon.
April 24, 2019	The Assessor files his motion to compel asking the Board to order Kohl's to produce the 2011 and 2013 appraisals, or in the alternative, to continue the hearing to allow him to conduct nonparty discovery. Kohl's responded that it produced all responsive documents that it had.
May 2, 2019	The Assessor files a reply in support of his motion to compel.
May 2, 2019	The Assessor files requests for the Board to issue four subpoenas duces tecum for the May 20 hearing. Two of the four requested subpoenas name organizations (Kohl's and Kohl's Department Stores, Inc. on one subpoena and Fashion Mall Commons II, LLC on the other). The other two subpoenas name Erin Stache and Kendall Lees.
May 6, 2019	The Assessor files a supplement to his motion to compel.

[3] They included the following requests for production of documents:

> Request for Production No. 1:
> Please provide . . . any and all appraisals, evaluations, or other analyses . . . regarding the value of the property at issue within five years of each contested assessment date[]."
> Request for Production No. 19:
> Please provide . . . all . . . appraisals . . . of the subject, property rights, and property interests prepared by or for Petitioners or any other related entity or in the possession or control of Petitioners prepared within the last five years of each of the contested assessment date[].

Motion to Compel, Ex. A.

[4] Kohl's produced the bulk of its responsive documents on April 8. It produced the remaining documents after receiving a signed confidentiality agreement from Kelly on April 15.

May 9, 2019	The ALJ issues his Discovery Order addressing the motion to compel and subpoena requests.

2. Motion to compel

7. We begin with the Assessor's motion to compel appraisals prepared in connection with the 2011 and 2013 sales of the subject property.[5] Despite all the time and effort devoted to litigating the motion, the Assessor offered nothing to show that the posited appraisals even existed, much less that Kohl's possessed or controlled them.

8. At most, in a supplement to his motion to compel filed after the close of discovery (his third bite at the apple), the Assessor pointed to a Form 10-K report Kohl's Corporation filed with the SEC. The report indicates that Kohl's Corp. uses "comparable market data as provided by third-party appraisers" or "consideration received by the landlord" to estimate the fair market value of leased retail property. But that statement appears in the context of Kohl's Corp. describing how it determines whether it views a given lease as an operating lease or capital lease, which in turn affects how it treats the lease payments. For example, it does not record operating leases on its balance sheet, and it recognizes those lease payments as a straight-line expense over the lease term. By contrast, Kohl's Corp. treats property it occupies under capital leases as owned property and depreciates that property, with rent payments being recognized as a financing expense. *Ex. R-K-3 at 29-30*; *Respondent's Supplement to its Motion to Compel, at Ex. N.*

9. Nothing in the report indicates that Kohl's Corp. necessarily would have sought or received information about the subject property's market value during the period specified in the Assessor's discovery requests. It certainly does not indicate that Kohl's Corp. would have obtained appraisals from the property's owners in connection with sales to which Kohl's was not a party.

[5] The appraisals were the only documents specifically identified in the Assessor's motion. *See Motion to Compel at ¶¶ 16, 21, 27, and 33* (referring to documents "including, but not limited to, appraisals conducted at the time of the 2011 and 2013 sales of the subject property.")

10. Neither did the testimony of Erin Stache establish the existence of the appraisals. As senior property tax manager for Kohl's Department Stores, she signed Kohl's' interrogatory responses and gathered documents responsive to the Assessor's production requests. Stache testified that she did not look for appraisals or other valuation information for the subject property outside of Kohl's' property-tax-appraisal database. She generally explained that because Kohl's leases the subject property, it does not get appraisals for banking needs or have access to brokers' price opinions, comparative market analyses, or other valuation analyses. *See Tr. at 122-34.* When asked about the Form 10K report's reference to comparable market data from third-party appraisers, Stache testified that she did not know what information is provided in connection with the "lease accounting piece." *Tr. at 131-32.* While Stache could have been more thorough in her search, we do not find that Kohl's knowingly or intentionally failed to respond completely and accurately to the Assessor's discovery requests.

11. The real thrust of the Assessor's motion to compel was that Kohl's should have produced the appraisals even if they were in the hands of the property's owner. The Assessor did little to support that position, which would have required some showing that Kohl's' had the legal right to obtain the documents from its landlord. *See Thermal Design, Inc. v. Am. Soc'y. of Heating, Refrigerating & Air-Conditioning Eng'rs, Inc.*, 755 F.3d 832, 838-39 (7th Cir. 2014) (*quoting Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 542 (N.D. Ill. 2004) (defining the term "control" for purposes of Rule 34 of the Federal Rules of Civil Procedure as meaning a "legal right to obtain").[6]

12. In any case, that question was secondary to whether the appraisals actually existed. Thus, despite the Assessor's lack of diligence in conducting discovery (as outlined below), and in the interest of promoting a full airing of the appeals on their merits, our ALJ issued a pragmatic order. He directed counsel for Kohl's to attempt to determine whether the

[6] As discussed in the section addressing the Assessor's motion to dismiss, Section 8.4 of Kohl's' lease allowed Kohl's to request its landlord to bring an appeal in the landlord's name and required Kohl's to cooperate with the landlord for that purpose. *See Ex. R-G-1 at 24; Respondent's Reply Re Subpoenas, Ex. O at 24.* It did not expressly impose a reciprocal obligation. The Assessor did not develop an argument as to whether such an obligation may be implied. He instead simply asserted that the lease provided that the landlord would "assist in the protestation of any real estate taxes." *Respondent's Reply Re Subpoenas.*

appraisals existed. If counsel either (1) could not confirm whether they existed, or (2) indicated that they existed but could not be produced at or before the May 20 hearing, the ALJ would continue the hearing to allow the Assessor to seek the appraisals through nonparty discovery. We agree with the ALJ and adopt his order. As it happens, after contacting the buyer for the 2011 sale, counsel for Kohl's confirmed that the appraisals did not exist. *See Tr. at 637-39.* And there is nothing in the record to show otherwise. The hearing therefore proceeded as scheduled.

13. Granted, the Assessor was stuck with counsel for Kohl's' representation that the appraisals did not exist. But that was the Assessor's own fault. The 2011 and 2013 sales were public records about which the Assessor either knew (or reasonably should have known) years before the scheduled hearing. He could not have been surprised that Kohl's, which was not a party to those sales, did not possess or control any appraisals or other information relating to the sales. Kelly even warned the Assessor's counsel of that likelihood in a February 15, 2019 email, writing:

> It looks like Kohl's is the tenant who has filed the appeals, presumably authorized by the lease. The owner is a foreign LLC. Asking for any of the owner's information (appraisals in connection with the sale' market analysis to determine the asking price; any owner income/expense information) will likely not be supplied because Kohl's doesn't have it (that is what they will say.) Maybe file non-party discovery?

Response to (Kohl's') Motion to Compel, Ex. R.

14. If having those appraisals was as crucial to the Assessor's case as he contended, he could have expeditiously tried to determine whether they existed, and if so, who possessed or controlled them. He then could have sought the appraisals from the appropriate person or entity in ample time before the deadline for exchanging expert reports, or at least well before the close of discovery and the scheduled hearing date. The appeals had been pending for more than two years, and the hearing date had been set for months.

15. The Assessor, however, waited to file his discovery requests until less than two weeks before the Revised Appeal Management Plan's deadline for parties to exchange their

experts' reports. The Assessor downplays that deadline, arguing that Kelly did not need to prepare a report. The Assessor's argument treats the exchange requirement like a request for production of documents under Trial Rule 34. That rule applies only to existing documents, and a party need not create a document simply because an opposing party requests it. The Revised Plan's requirement for exchanging expert reports, however, modifies the obligations that otherwise apply under the rules of discovery.

16. Without the exchange requirement, each party would need to use interrogatories to discover the bases underlying the opinion of an opposing party's expert. And the Rules of Trial Procedure do not impose a hard deadline for disclosing that information. For example, if an expert has not yet formed an opinion at the time interrogatories are served, the party sponsoring the expert may say so, subject to the duty to supplement its response. *See* Ind. Trial Rule 26(B)(4)(a)(allowing party to serve interrogatories requiring opposing party to identify testifying experts, the substance and facts on which they base their opinions, and a summary of the grounds for each opinion); T.R. 26(E)(1)(requiring party to seasonably supplement responses to discovery requests about the identity of trial experts and the substance of their opinions). By incorporating a deadline for exchanging expert reports, however, parties can assure themselves that they will know the bases for an opposing expert's opinion in time to hire rebuttal experts and adequately prepare cross-examination. *See Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010) (*quoting Walsh v. Chez*, 583 F.3d 990, 994 (7th. Cir. 2009) (explaining that the purpose of the requirement under the Federal Rules of Civil Procedure to provide opposing parties with written reports from testifying experts). The Revised Plan did just that. It timed the deadline for identifying rebuttal experts and exchanging their reports to fall one month after the deadline for exchanging expert reports.

17. In any case, the Assessor did not direct any of his discovery requests specifically at determining whether the appraisals in question existed, and if they did, who had them. Counsel for the Assessor first specifically asked for appraisals from the 2011 and 2013

sales in an April 24, 2019 email.[7] The Assessor filed his motion to compel the next day, still without having sought the posited appraisals from anyone involved in the transactions to which they related. That was almost three full weeks after Kohl's' April 5 responses to the Assessor's discovery, where Kohl's indicated it had only one set of documents responsive to Requests for Production Nos. 1 and 19—Allen's appraisal and work file. *See Petitioner's Response in Opposition to Motion to Compel at ¶4, Exs. 2-3; Petitioner's Response in Opposition to Respondent' Motion to Quash at ¶1.*

18. The Assessor tried to shift the blame to Kohl's for his own lack of diligence. First, he claimed that Kohl's refused to provide dates for a Trial Rule 30(B)(6) deposition until the Assessor identified the deposition topics, which he did not do until sometime after April 9, 2019. According to the Assessor, had Kohl's not unreasonably delayed the deposition, Kohl's' corporate representative could have timely explained that it did not possess or control the posited appraisals. *Motion to Compel at ¶¶ 1-5, Ex. G at 4.*

19. But it was the Assessor—not Kohl's—who acted unreasonably. Kohl's would have needed to know the deposition topics before it could identify an appropriate designee to testify on its behalf. The trial rules explicitly contemplate that the party seeking an organization's deposition will "designate with reasonable particularity the matters on which examination is requested." Ind. Trial Rule 30(B)(6). The Assessor argued that the purpose of designating topics is to protect the party taking the deposition: otherwise there would be no repercussion for a designee being unprepared to discuss a topic. *Motion to Compel at ¶ 3.* That ignores the significant interest of the party being deposed in not having its time wasted.

20. Second, the Assessor claimed that he "made many attempts to find out what defenses each party intends to use" and that Kohl's should have shared before April the "defense" that it did not possess or control the appraisals in question. *Motion to Compel at ¶¶ 28-29.* As Kohl's pointed out, it is unclear what the Assessor meant, given that none of his discovery

[7] She had asked more generally about appraisals "regarding" sales of the subject property in an email the previous day. *See Petitioner's Response in Opposition to Motion to Compel at ¶ 5, n.2, Ex. 4.*

requests asked Kohl's to identify its defenses. *See generally, Petitioner's Response in Opposition to Motion to Compel, Ex. 1.* The Assessor might have been referring to the fact that he originally proposed including in the appeal management plan something akin to the initial disclosures of claims and defenses required under Rule 26(a)(1)(A) of the Federal Rules of Trial Procedure. *See Motion to Compel at ¶ 1.* But Kohl's' position that it produced all responsive documents in its possession, custody, or control is neither a claim nor a defense. Kohl's did not even know the Assessor was specifically seeking appraisals related to the 2011 and 2013 sales until late April. In any case, Kohl's' refusal to agree to the Assessor's proposal for initial disclosures did not prevent the Assessor from expeditiously serving targeted discovery requests on those matters.

21. Finally, the Assessor argued that he could not have conducted nonparty discovery any earlier because he first needed to exhaust reasonable efforts to reach an agreement with Kohl's. For support, he pointed to an order from a different appeal in which we likened the Assessor's request for a subpoena duces tecum to a request for a motion to compel the production of documents by a nonparty witness. We denied the request because the Assessor had not shown (1) the existence of a discovery dispute, and (2) that he had made reasonable efforts to resolve the dispute without our intervention. That order aimed at stemming the emerging practice of asking us to issue subpoenas rather than first attempting to secure witnesses' attendance at depositions or the production of documents through means that do not require our intervention. The Assessor directed the subpoena duces tecum in question to the opposing party's expert witness. Those types of document requests are normally resolved informally.

22. In short, it was unreasonable for the Assessor to wait until after a point at which it would be impractical to conduct nonparty discovery to seek, informally or formally, the posited appraisals or any other information related to the 2011 and 2013 sales from the people or entities who actually had those things. Pointing to the need to reach an agreement on a discovery dispute with Kohl's is a red herring. There was never a real discovery dispute to resolve. Kohl's did not seek to avoid responding to the discovery requests at issue. To the

contrary, Kohl's represented that it produced all responsive documents that were within its possession, custody, or control.

3. Subpoena requests

23. We also adopt the ALJ's ruling denying the Assessor's request for subpoenas duces tecum. Two of the subpoenas did not even name a witness, but rather sought to compel organizations to designate an employee to testify at the hearing and produce documents.

24. The Assessor's requests were a final attempt to avoid the consequences of his failure to timely conduct discovery in accordance with the Revised Plan. The Revised Plan required discovery to be completed by May 3, 2019. A May 2 request asking us to subpoena documents to the May 20 hearing does not comply with that deadline. And only one proposed subpoena was directed toward an identified person named on the Assessor's final witness list. That person, Erin Stache, was employed by Kohl's or a related entity, and the ALJ ordered Kohl's to produce her for the hearing.[8]

B. Hearing

25. Our ALJ held a three-day hearing on the petitions, which began on May 20, 2019. Neither he nor the Board inspected the property.

26. The following people were sworn as witnesses: Eve Beckman, an employee of the Assessor; Kelly; Erin Stache, senior property tax manager for Kohl's Department Stores, Inc.; and Laurence Allen, Kohl's' expert witness.

27. Kohl's offered the following exhibits, all of which were admitted:

Exhibit P-1:	Laurence Allen's appraisal report
Exhibit P-3:	Excerpt from THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (14th ed.)
Exhibit P-5:	Respondent's Responses to Petitioner's First Requests for Admissions, First Set of Interrogatories, and First Requests for Production of Documents

[8] Stache testified remotely through video conferencing.

Exhibit P-6:	Respondent's Responses to Petitioner's Second Requests for Admissions, Interrogatories, and Requests for Production of Documents
Exhibit P-14:	Emails with the Assessor's expert, Frank Kelly
Exhibit P-15:	Emails between counsel for Kohl's and counsel for the Assessor

28. The Assessor offered the following exhibits:

Exhibit R-A:	2011-2014 property record cards ("PRCs") for the subject property
Exhibit R-B:	Aerial photograph of the subject property
Exhibit R-C:	Printouts from CoStar
Exhibit R-D:	Summary listing of construction permits plus four permit applications and related documents
Exhibit R-E:	Unsigned sales disclosure form for November 2011 sale of the subject property and sales disclosure form for October 2013 sale
Exhibit R-G1 through R-G7:	Lease between Fashion Mall Commons II, LLC and Kohl's Department Stores, Inc.; amendments to lease; assignments and assumptions of lease
Exhibit R-H:	Property Overview for Fashion Mall Commons and Fashion Mall
Exhibit R-I:	Petitioner's Objections and Responses to Respondent's Interrogatories and Requests for Production of Documents; Petitioner's Objections and Responses to Respondent's Requests for Admissions
Exhibit R-J:	RCA CPPI
Exhibit R-K1 through R-K4:	Form 10K reports from Kohl's Corporation to the SEC
Exhibit R-L:	Chart with information about ownership, size, age, and assessed value from PRCs for other Indiana Kohl's stores
Exhibit R-M:	PRCs from other Indiana Kohl's stores
Exhibit R-N:	Sales-comparison grid with CoStar reports and other data for various properties
Exhibit R-O:	Certified administrative record *Southlake Ind., LLC v. Lake Cty. Ass'r*, Case No. 18T-TA-00016
Exhibit R-O1:	Excerpt (PRC for Kohl's store) from *Southlake* record,
Exhibit R-O2:	Excerpt (transcript of testimony by Kendell Lees) from *Southlake* record

As discussed more fully below, Kohl's objected to most of the Assessor's exhibits, and we overrule most of those objections. We ultimately admit all the Assessor's exhibits except R-N, R-O, and R-O2.

29. The record also includes the following: (1) all petitions, motions, and other documents filed in these appeals, including the parties' post-hearing briefs; (2) all orders and notices issued by the Board or our ALJ; and (3) the hearing transcript.

C. Objections

30. The parties made dozens of objections. The ALJ took several of them under advisement, which we address here.

1. Rulings on objections taken under advisement by ALJ

31. The ALJ took Kohl's' objections to the following exhibits under advisement: R-B, R-C, R-E, R-H, R-J, R-K1 through R-K4, R-L, R-M, R-N, and R-O1. Kohl's grounded its objections to most of those exhibits on some combination of (1) the Assessor's failure to produce the documents in response to its discovery requests; (2) hearsay; and (3) relevance. *Tr. 48-50, 58-62, 65-68, 75-79, 83, 95, 97-102, 105-09, 111-19, 150-56, 396-403.*

a. Failure to produce exhibits in discovery

32. Although Kohl's acknowledged that the Assessor exchanged the exhibits by the deadline set forth in the Revised Appeal Management Plan, it argued that the Assessor should have produced the documents in response to its discovery requests. Kohl's did not point to the specific discovery requests at issue, beyond generally referring to requests asking for "all documents reviewed, considered, prepared, relied upon," and asking for all documents the Assessor intended to use as exhibits. *Tr. at 59-62.*

33. We overrule Kohl's' objection on those grounds. There is no evidence that the Assessor's failure to identify or produce the exhibits in question during discovery constituted a knowingly false response. To the contrary, we have little doubt the Assessor did not know what he or any of his witnesses would consider or rely on for their testimony when he responded to Kohl's' discovery requests. His lack of urgency in preparing his case is a running theme throughout these appeals. But the Assessor did manage to identify and provide his exhibits by the relevant deadline for doing so—the one contained in the

Revised Appeal Management Plan. A party must truthfully answer discovery requests and must supplement its responses under certain circumstances. *See* Ind. Trial Rule 26(E). Where a court has issued a pre-trial order, however, that order controls the proceedings, and any required disclosure revolves around interpretation of, and compliance with, that order. *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993).

b. Hearsay

34. The Assessor did not dispute that the exhibits to which Kohl's interposed hearsay objections actually contained hearsay, although he argued that some of the exhibits were admissible under the business records exception to the hearsay rule. *See* Evid. R. 803(6). Even if the exhibits do not qualify under that exception, they may still be admissible. We may admit hearsay, with the caveat that if the opposing party properly objects and the hearsay does not fall within a recognized exception to the hearsay rule, we cannot rely solely on that hearsay evidence in reaching our final determination. 52 IAC 2-7-3. We therefore overrule Kohl's' hearsay objections, although we do not ultimately rely on any of the contested exhibits in reaching our determination on the merits.

c. Relevance

35. That brings us to Kohl's' objections as to lack of relevance. Evidence is relevant if it tends to make a fact of consequence "more or less probable than it would be without the evidence." Evid. R. 401. "This often includes facts that merely fill in helpful background information . . . even though they may only be tangentially related to the issues presented." *Hill v. Gephart*, 62 N.E.3d 408, 410 (Ind. Ct. App. 2016).

36. We overrule Kohl's' relevance objections to Exhibits R-B (aerial photograph of the subject property), R-E (unsigned sales disclosure form for 2011 sale of the subject property and signed sales disclosure form for 2013 sale), R-H (overview from the internet for Fashion Mall Commons and the Fashion Mall), R-J (Consumer Property Price Index ("CPPI") for 2000-2019), and R-K1 through R-K4 (Form 10K reports to the SEC). The aerial photograph and property overviews provide background information. The sales disclosure

forms, which Beckman got from a state database, relate directly to the 2011 and 2013 sales of the subject property. Both experts discussed the sales. The fact that one of the forms was unsigned, however, severely limits its usefulness. The CPPI data relates to changes in market conditions over time, something Kohl's' own expert considered in his valuation opinions. Of course, without any expert directly applying that CPPI data, it has little evidentiary value. Finally, while the Form 10K reports do not relate to the merits, they are at least relevant to the question of whether Kohl's complied with the Assessor's discovery requests.

37. We similarly overrule Kohl's' relevance objections to Exhibits R-C (printouts from CoStar), R-L (chart with information about ownership, size, age, and assessed value from PRCs for other Indiana Kohl's locations), R-M (PRCs for other Indiana Kohl's locations), and R-O1 (PRC for Kohl's store at Southlake Mall).

38. We routinely admit data from other properties in appeals before us. But that does not mean such data is ultimately entitled to any weight. Without testimony or other evidence to compare the data from other Kohl's stores to the subject property, that data does little to show the subject property's value. The Assessor offered the exhibits through Eve Beckman, who the Assessor identified as a fact witness only. *Tr. at 152-57, 180.* Beckman did not compare the other Kohl's stores to the subject property or explain how any differences affected value. Unlike the exhibits referencing the other Kohl's locations, the CoStar printouts purport to offer opinions as to things like comparability. Yet the Assessor offered nothing to show how those opinions were formed. Without that information, the printouts do little to show the subject property's value, and we give them no weight.

39. That leaves Exhibit R-N (sales-comparison grid with CoStar reports and other data for various properties). The exhibit compares the subject property to several other properties along various lines, and it adjusts the other properties' sale prices to account for things such as differences in location, size, and age. But Beckman prepared the exhibit. And she did so after her deposition, at which she testified she would not be offering any opinion testimony. We therefore find that offering the exhibit, which expresses Beckman's

opinion, violates the Revised Appeal Management Plan, and we exclude it on those grounds.

40. In post-hearing briefing, the Assessor claims that Kohl's did not actually object to the admission of Exhibit R-N; rather it objected only to Beckman's foundational testimony. *Respondent's Response Brief at 8.* We believe that misinterprets the clear import of Kohl's' objection. Every argument Kohl's made about Beckman's foundational testimony applied equally to the exhibit itself. The ALJ expressly took admission of the exhibit under advisement. Had the Assessor understood there to be no objection to the exhibit, he should have said so at that time. *See T.R. at 149-56.*

41. Even if we were to admit Exhibit R-N, we would give it no weight. There is nothing to explain or support any of the adjustments or other judgments from Beckman's sales-comparison grid or from any of the attachments. In any case, Allen's valuation opinions, which he prepared in conformance with the Uniform Standards of Professional Appraisal Practice ("USPAP") and generally accepted appraisal principles, far outweigh any marginal relevance Exhibit R-N might have.

42. Finally, Kohl's objected to a question from the Assessor to Kelly about whether the fact that the 2011 sale of the subject property was part of a portfolio transaction had any impact. According to Kohl's, the question called for Kelly to offer a valuation opinion. As explained below, both Kelly and the Assessor's counsel repeatedly maintained that the scope of Kelly's assignment did not involve developing an opinion of value for the subject property. Although the ALJ believed the question was close to the line, he took it under advisement, noting that Kohl's would have the opportunity on cross-examination to explore more fully whether the question and response were outside the scope of Kelly's assignment. *Tr. at 274-80.*[9]

[9]The ALJ later overruled a similar objection to a question about whether the fact that the sale was a leased-fee transaction had any impact. *Tr. at 282.*

43. While we recognize Kohl's' concerns, we overrule the objection. Kelly was retained, in part, to analyze the subject property's 2011 and 2013 sales, and the question generally addressed that subject matter. The Assessor did not ask Kelly to offer, nor did Kelly offer, any specific valuation opinion outside his analysis of the sale itself.

2. Objections ruled on by ALJ

44. As explained above, our ALJ ruled on many objections, and we summarily adopt those rulings. Nonetheless, his rulings on objections to Exhibits R-O and R-O-2, which we also adopt, merit some additional discussion. Exhibit R-O is the entire certified administrative record from *Southlake Ind., LLC v. Lake Cty. Ass'r,* a separate appeal involving a Kohl's store in Merrillville. The *Southlake* record contains roughly 3,500 pages. Kohl's objected on relevance grounds. Kohl's also argued that the record might contain hearsay or other objectionable material, and that it would be impossible to assert those objections without knowing specifically what parts of the record the Assessor was relying on. The ALJ sustained the objection to the exhibit in its entirety, explaining that the Assessor had failed to show how the record as a whole from the *Southlake* appeals was relevant and echoing Kohl's' concerns about fairness.[10] But the ALJ indicated that the Assessor could offer discrete excerpts from the record and that he would deal with any specific objections Kohl's had to those excerpts.[11]

45. The Assessor did what the ALJ suggested and offered Exhibit R-O2, an excerpt containing testimony from Kendall Lees, whom Kohl's employed at the time. The Assessor also sought to ask Kelly questions about Lees' testimony. Kohl's objected. It argued, among other things, that testimony from an appeal about another store had no bearing on the subject property's value.

---

[10] Given the size of the *Southlake* record, the ALJ did not accept a copy. As indicated by the Assessor, however, the *Southlake* record is available to the public. It is also available to the Tax Court, if necessary, for reviewing the propriety of the ALJ's ruling excluding the exhibit.

[11] In a similar vein, when the Assessor voiced his intent to offer approximately 2,600 pages from Allen's work file as an exhibit without any sponsoring witness, the ALJ suggested the Assessor offer the exhibit, or any discrete portions thereof, during Allen's cross-examination. The Assessor ultimately did not offer the entire work file. He did offer a portion of that work file (Exs. R-G1 through R-G7), which the ALJ admitted without objection. *Tr. at 112-16, 605-06.*

46. In his offer to prove, the Assessor proffered that Kelly would testify about what the Assessor characterized as Lees' admission that Kohl's does not pay any more than market rent for its stores. But Kelly had no special expertise in interpreting the testimony of a witness from another case. And despite the fact that the *Southlake* record was publicly available at least four months before Kelly's deposition, he indicated in his deposition that he had not yet reviewed Lees' testimony. *See Tr. at 421-26.* We therefore agree with the ALJ's decision to exclude both the exhibit and any questions to Kelly about it.

47. Regardless, any error in excluding the transcript of Lees' testimony is harmless. As we discuss below in addressing the merits, the Assessor premised his valuation theory on contract rent from Kohl's' lease of the subject property being equal to the property's market rent. Even if we were to give the most generous interpretation (from the Assessor's point of view) to Lees' testimony,[12] Lees also testified that there were circumstances where Kohl's paid above-market rent under its build-to-suit leases. *Ex. R-02 at Record 1707-11, 1733-34.* The Assessor offered no evidence to negate that Kohl's' lease of the subject property represented one of those instances. Even if Kohl's negotiated market rent when it entered the lease, the lease was between 14 and 17 years old as of the valuation dates at issue. The only evidence in the record examining market rent as of those valuation dates comes from Kohl's' expert, Laurence Allen, who found a substantial disparity between market rent and contract rent under the lease. *See Tr. at 547-56; Ex. P-1 at 78-82.*

III. Motion to Dismiss

48. On the morning of the hearing, the Assessor filed his motion to dismiss Kohl's' appeals. He claimed that Kohl's failed to state a claim on which relief could be granted because Kohl's lacked statutory standing to bring its petitions.

[12] The Tax Court has rejected that interpretation. *See Southlake Ind., LLC v. Lake Cty. Ass'r*, 135 N.E.2d 692, 698 (Ind. Tax Ct. 2019).

49. Before dealing with the substance of the Assessor's motion, we will address its timing. Both at hearing and in its post-hearing briefing, Kohl's took issue with the Assessor having waited until the morning of the hearing to contest its authority to bring these appeals. We agree that the Assessor's tardiness in filing the motion is at least partly symptomatic of his general lack of urgency in preparing his case. But we sympathize a little with the Assessor in this instance. On one hand, Kohl's claimed a sufficient interest in the matter to appeal in its own name property owned by another. On the other hand, it disclaimed a sufficiently close relationship with the owner that would allow appraisals or other documents held by the owner to be deemed within Kohl's' control. Frustration with the second position may have been what led the Assessor to question Kohl's' authority to bring the appeals in the first place. Even then, however, the Assessor waited several weeks to file his motion.

50. Whatever concerns we or Kohl's have about the Assessor's timeliness in filing his motion to dismiss, Kohl's does not argue that the Assessor actually waived his right to contest Kohl's' authority to bring the appeals. We therefore turn to the substance of the Assessor's motion.

51. We begin with the relevant statutes. Although the Assessor couches his argument in terms of "standing," the judicial doctrine of standing does not apply here. Where a statute identifies who may pursue an administrative proceeding, the statute controls. *Huffman v. Ind. Office of Envtl. Adjudication*, 811 N.E.2d 806, 809-10 (Ind. 2004). Kohl's initially filed its appeal under Ind. Code § 6-1.1-15-1, which has since been repealed. At all relevant times, that statute provided that a "taxpayer" could obtain review of a county official's action. I.C. § 6-1.1-15-1(a) (2011 through 2016). After the PTABOA issued its determinations, Kohl's appealed to us under Ind. Code § 6-1.1-15-3. That statute similarly gives a "taxpayer" the right to obtain review of a county PTABOA's determination. I.C. § 6-1.1-15-3(a).

52. The legislature does not define "taxpayer" for purposes of those statutes. But one of our procedural rules—52 IAC 2-2-13—implicitly interprets that term in defining who qualifies as a party in proceedings before us. It defines a party as a participant in an appeal governed

by our rules, including the owner of a property under appeal, the "taxpayer responsible for the property taxes payable on" the property, and "any other party with a statutory right to appeal from or defend a determination." 52 IAC 2-2-13.

53. As the Assessor, Kohl's, and our procedural rule all acknowledge, the term "taxpayer" encompasses more than just a property's owner. Had the legislature intended to limit the right to appeal to a property's owner, it would have said so. It has imposed similar limitations in other contexts. For example, in laying out the procedures for requesting an exemption, the relevant statute requires a property's owner to file an application and prohibits the owner from delegating the authority to sign the application except by an executed power of attorney. I.C. § 6-1.1-11-3(a), (b).

54. The parties, however, disagree about whether Kohl's qualifies as a non-owner taxpayer under the statutes and our procedural rule. According to the Assessor, the lease defines the landlord as the taxpayer because it (1) calls for the landlord to "pay or cause to be paid" all real estate taxes, and (2) explains that any appeals are to be made in the landlord's name. *Ex. R-G1 at 22, 24-25.* For the second proposition, the Assessor points to the following language from Section 8.4 of the lease:

> At Tenant's request or at Landlord's election, Landlord shall contest in good faith by appropriate proceedings, or in any other manner permitted by Law, at Tenant's expense, in Landlord's name, any taxes assessed or levied against the Shopping Center and Tenant agrees to cooperate with Landlord and to execute any documents reasonably required for such purpose.
> ...
> Any tax refund and all costs, fees and expenses (including reasonable counsel fees) actually incurred and paid by Landlord in connection with such contest, shall be apportioned between Landlord and Tenant upon the basis of allocability of such taxes under Section 8.1.[13] Landlord shall notify Tenant promptly of any increased assessment of all or any part of the Shopping Center in sufficient time for Tenant to request Landlord to contest the assessment.

Ex. R-G-1 at 24; Respondent's Reply Re Subpoenas, Ex. O at 24.

[13] Although the reference to this section number is largely illegible, a reading of the lease as a whole indicates that the reference is to Section 8.1.

55. Kohl's disagrees that the lease requires appeals to be brought only in the landlord's name, noting that the cited language from Section 8.4 contemplates appeals where the leased premises is not identified as a separate tax parcel from the rest of the strip center. Section 8.1 of the lease requires the landlord to use its best efforts to have the subject property assessed separately, and the subject property was assessed as a separate tax parcel for the years under appeal. Kohl's also argues that the Assessor ignores language from Sections 8.1 and 8.3 of the lease requiring Kohl's to reimburse the landlord for all taxes that are attributable to the subject property. Aside from the terms of the lease, Kohl's points to Ind. Code § 6-1.1-2-4(c), which makes a person who holds, possesses, controls, or occupies a real property improvement or appurtenance to land owned by another jointly liable with the landowner for taxes on that improvement or appurtenance.

56. We agree with Kohl's. Kohl's was authorized to bring the appeals in its own name because it is statutorily liable under Ind. Code § 6-1.1-2-4(c), and contractually responsible under the lease, for the taxes based on the property's assessment.

57. As for the first point, absent clear direction to the contrary, we doubt the legislature intended to preclude an entity that is statutorily liable for taxes from contesting the basis for its liability. Of course, Kohl's did not appeal only the assessment of the improvements it occupied and for which it was statutorily liable; it instead appealed the parcel's overall assessment. But we do not view Kohl's' lack of statutory liability for taxes on the land as impeding its right to appeal the assessment for the property as a whole. To hold otherwise would artificially force a lessee like Kohl's into separately valuing a parcel's individual components on appeal. That runs counter to the underpinnings of our current assessment system, which relies on market value-in-use as the external benchmark by which to measure property wealth. *Westfield Golf Practice Ctr. v. Wash. Twp. Ass'r*, 859 N.E.2d 396, 399 (Ind. Tax Ct. 2007) ("Beginning in 2002, however, Indiana's overhauled property tax assessment system incorporates an external, objectively verifiable benchmark—market value-in-use."). Two of the three primary methods for determining market value-in-use—the sales-comparison and income approaches—value improved properties as a whole

without necessarily allocating that value between land and improvements. *See* 2011 REAL PROPERTY ASSESSMENT MANUAL at 8-10 (describing the cost, sales-comparison, and income approaches). It makes even less sense to impose such artificiality here, where the entity possessing and controlling the improvements is contractually responsible for taxes that are based on the parcel's overall assessment.

58. Indeed, interpreting the term taxpayer to include lessees who are responsible for the taxes on the property they lease comports with settled practice before the tax court and the Board. *See, e.g. CVS Corp. #6618-02 v. Madison Cty. Ass'r*, pet nos. 8-022-10-1-4-01341-16 etc. (IBTR October 15, 2019); *Lowe's Home Centers, Inc. as Taxpayer and Lessee to Whitehall Pike, LLC*, v. *Monroe Cty. Ass'r*, pet. nos. 53-012-14-1-4-00001 etc. (IBTR March 29, 2019); *CVS 6475-02 v. Elkhart Cty. Ass'r*, pet. nos. 0-012-12-1-4-00001 (IBTR May 25, 2018) *aff'd CVS Corp. v. Searcy*, 137 N.E.3d 1053 (Ind. Tax Ct. 2019); *Kerasotes Showplace Theatres, LLC v. Grant Cty. Ass'r*, 27-023-06-1-4-00825 (IBTR July 15, 2009) *aff'd Grant Cty. Ass'r v. Kerasotes Showplace Theatres, LLC* 955 N.E.2d 876 (Ind. Tax Ct. 2011); *c.f. Kokomo Urban Dev., LLC v. Heady,* 125 N.E.3d 15, 16 n.1 (Ind. Tax Ct. 2019).

59. In the first four cases, the lessees appealed in their own names, and neither the assessor, the Board, nor the Tax Court questioned their authority to bring the appeals.[14] In the last case, the Tax Court noted that documents in the record identified a different entity than the petitioner, Kokomo Urban Development, as the property's owner. But it further noted (1) that Kokomo Urban explained it was the party who paid taxes on the property and was therefore the "taxpayer" for purposes of the appeal, and (2) that neither the assessor nor the Board contested Kokomo Urban's standing. *Kokomo Urban Dev.*, 125 N.E.3d at 16 n.1.

60. We are not persuaded by the Assessor's claim that the lease somehow designates the landlord as the taxpayer to the exclusion of Kohl's. We agree with Kohl's that the cited language under Section 8.4 contemplates multiple leased premises within Fashion Mall Commons being taxed under the same parcel number. Under those circumstances, Kohl's

[14] No petition for judicial review was filed in *CVS #6618-02.* A petition for judicial review is pending in *Lowes Home Centers.*

could not bring an appeal that included property in which it had no interest. Section 8.4 therefore gives Kohl's the right to direct the landlord to bring an appeal. We do not read the language as prohibiting Kohl's from bringing an appeal in its own name where, as is true for all the years at issue, the subject property was assessed as a separate parcel. Nor do we find it significant that the lease calls for Kohl's to reimburse the landlord for taxes paid on the subject property rather than pay those taxes directly to the treasurer. Either way, the result is the same: Kohl's is responsible for the taxes.

IV. FINDINGS OF FACT

A. The Subject Property

61. The property contains a 94,699-square-foot big-box discount-retail building within Fashion Mall Commons together with 6.22 acres of land. Approximately 87,003 square feet of the building are on the ground floor, with the remainder of the space composing a storage mezzanine. It was built to suit for Kohl's, which signed its lease in 1996 before construction began. The building was completed in 1997. *Tr. at 459; Ex. P-1 at 25, 30; Ex. R-G1.*

62. Fashion Mall Commons is located in a densely populated neighborhood on Indianapolis' north side. The neighborhood has a high concentration of retail development, including the upscale Fashion Mall at Keystone. The property is also approximately 2.5 miles west of Castleton Square Mall, another regional mall. *Tr. at 453; Ex. P-1 at 23, 25.*

63. The property's address is 8487 Chapel Road. Chapel Road is a minor commercial road off E. 86th Street, just east of Keystone Ave. The building sits 750 feet south of E. 86th St., which has a daily traffic count of 32,108 vehicles. The building has an unusual and undesirable setup for truck access along a narrow road behind Fashion Mall Commons. *Tr. at 452-58; Ex. P-1 at 25, 30.*

64. Kohl's' lease runs for [redacted] years with [redacted] options for renewal. It calls for fixed rent of [redacted] during the entire [redacted] term. In November 2011, Fashion Mall Commons II,

LLC sold the property to Arloma Corporation and James Huck, LLC for $15.3 million. According to Bob Kirkbride, who was hired by James and Jerry Huck, the Hucks had sold oil and gas leaseholds for $70 million, and they wanted to defer capital gains on the profits from those sales. They hired Kirkbride to locate and negotiate a price for the purchase of $70 million of real estate through an exchange of like-kind property under section 1031 of the Internal Revenue Code. The Hucks only had 45 days to accomplish that task. They ended up buying nine properties, with the subject property being the most expensive. *Tr. at 480-84; Ex. P-1 at 6, 78; Ex. R-G1 at 1-2, 12-13; Ex. R-G2 at 2.*

65. Because of their 45-day deadline, the Hucks did not have enough time to negotiate the lowest possible price, as they normally would. They paid the asking prices for many of the properties, although they paid less than the asking price for the subject property. According to Kirkbride, the Hucks' primary considerations were the income streams from the properties, the corporate guarantees of those streams, and the time remaining on the leases. They paid cash for the properties because their goal was to use up the entire $70 million. They did not get appraisals. *Tr. at 480-84; Ex. P-1 at 6.*

66. In November 2013, James Huck, LLC essentially bought out Arloma's interest. In structuring the transaction, the parties shifted around their interests in the various properties. The subject property was not offered on the market. The parties allocated $15.3 million to the subject property—the same amount as listed for the 2011 sale. The portfolio price was determined based on the present value of the portfolio's total income stream. *Tr. at 487-88; Ex. P-1 at 6.*

B. Expert Opinions

1. Allen's appraisal

67. Kohl's hired Allen to appraise the market value-in-use of the fee-simple interest in the subject property. Allen is licensed to perform appraisals in Indiana and several other states. He holds an MAI designation from the Appraisal Institute, as well as other professional designations. He has appraised a wide range of retail properties, including regional

shopping malls and department stores. He has also appraised more than 100 big-box stores, which he defined as big, open stores of at least 80,000 square feet that are used for retail. He has worked as a real estate broker to locate sites for big-box stores and has spoken to representatives of big-box retailers about what they look for when choosing potential locations. Allen certified that he performed his appraisal and prepared his report in conformity with USPAP.[15] *Tr. at 435-45, 452; Ex. P-1 at 9-10, 111-12.*

68. Allen acknowledged that he had testified on Kohl's' behalf at a Trial Rule 30(B)(6) deposition in these appeals. He did not believe that doing so prevented him from providing an independent appraisal, noting that he prepared the appraisal before he was designated to appear for Kohl's at the deposition, and that his testimony at the hearing was based on that appraisal. *Tr. at 612-13.*

a. Market overview and highest-and-best-use analysis

69. Allen determined that the property's current and highest-and-best uses as improved would be the same—as a discount retail store. The improvements were not so specialized as to prevent another retailer from using the property, and the property was of a type commonly exchanged in the market. *Ex. P-1 at 48.*

70. After analyzing economic and demographic information, Allen generally concluded that the Indianapolis-Carmel-Anderson metropolitan statistical area ("Indianapolis MSA") was a desirable market for big-box users and development. He similarly concluded that retail and commercial uses dominated the subject property's neighborhood, with the Fashion Mall being an influence. *Pet'r Ex. 1 at 14-24; Tr. at 464-66.*

71. Because Allen was appraising the fee-simple interest in a property with an existing building, he focused on the markets for the sale and lease of existing buildings rather than on the market for build-to-suit construction. According to Allen, build-to-suit leases are financing transactions with lease rates based on the cost of development. Tenants of build-

[15] While Mark Wylie assisted Allen, all the value conclusions were Allen's. *Tr. at 448-49; Ex. P-1 at 4.*

to-suit properties, such as big-box retailers, are motivated to have the stores built to their specific business models so they can generate retail sales and operating profits. Developers, in turn, are motivated to build the stores because they can sell the income stream from the long-term lease, which often has strong corporate backing. Because developers are unlikely to make a profit from selling the real estate, they generally do not build big-box stores on speculation. *Tr. at 473-80; Ex. P-1 at 49.*

72. By contrast, Allen explained that the market for the sale or lease of existing buildings is a function of supply and demand and the open interaction between buyers and sellers or lessors and lessees. According to Allen, when a big-box retailer buys an existing building, it is buying a shell to reconfigure to its specific retail concept. Conversely, passive investors generally are not interested in buying existing buildings without a long-term lease in place. When passive investors buy an existing building subject to a lease (a "leased-fee" sale), they care about the lease rather than about the real estate itself. In fact, they often do not even look at the real estate. All else being equal, there tends to be higher demand for properties sold with long-term leases in place than for vacant properties that are available for lease. The sale prices are also higher for properties with leases in place. According to Allen, the increment between the two prices is not attributable to the real estate. *Tr. at 473-76, 492, 541-42; 618; Ex. P-1 at 49.*

b. Valuation approaches

73. To analyze the subject property's market value-in-use, Allen developed three generally recognized valuation methodologies—the cost, sales-comparison, and income approaches. *Ex. P-1 at 49.*

i. Sales-comparison approach

74. Allen began with the sales-comparison approach. Although he investigated the sales of the subject property from 2011 and 2013, he did not rely on them. He determined that the 2011 sale was a leased-fee sale that was based on Kohl's' above-market build-to-suit lease. According to Allen, the lease was a financing transaction that was negotiated at a time

when interest rates were higher than they were on the valuation dates. The lease had [redacted] years remaining as of the first valuation date at issue, and it was backed by Kohl's' credit. Allen therefore did not believe that the sale price reflected the market value-in-use of the fee-simple interest in the property. The 2013 sale suffered from the same problems. Plus, it was between related parties and was part of a portfolio transaction in which the parties did not price the properties individually. *Tr. at 485-87; Ex. P-1 at 6.*

75. According to Allen, it also would have been inappropriate to estimate the property's value by capitalizing the difference between the build-to-suit contract rent and the property's market rent and then subtracting that amount from the sale price. He further explained that other factors were involved in the sale price beyond the lease's above-market rent. For example, because the lease was a financing device, its [redacted] term was not typical of market leases. *Tr. at 543.*

76. In choosing comparable sales, Allen looked for fee-simple transfers of similar properties that were available for retail use. He looked at both Indiana and surrounding states because buyers look at this type of property on a regional basis. He avoided leased-fee sales, explaining that prices from those transactions typically are based on above-market rent, the creditworthiness of the tenants, and other factors. He similarly stayed away from sale-leaseback transactions. *Tr. at 491; Ex. P-1 at 50-51.*

77. Allen did not include sales of any properties used as Kohl's stores, explaining that he was valuing the real estate—not Kohl's—and that he was not aware of any comparable properties bought or sold by Kohl's. While the Assessor pointed to property record cards for Kohl's stores from Columbus, Goshen, and Warsaw that sold between 2012 and 2018, the Assessor did not show that Kohl's was a party to any of those sales. *Tr. at 621-28; Ex. R-M.*

78. Allen settled on eight fee-simple sales, two from Indiana, two from Michigan, and one each from Illinois, Ohio, Tennessee, and Wisconsin. Before each sale, a large retailer, such as Kroger, Builder's Square, K-Mart, Lowe's, Value City, or Target used the property. The

buyers also used the stores for retail purposes post-sale, usually after renovating the building to fit the new user's image and business plan. The following table summarizes much of the relevant comparative information for the subject property and Allen's comparable properties:

	Subject	**Sale 1**	**Sale 2**	**Sale 3**	**Sale 4**
Location	Kohl's Indianapolis	Builder's Sq. Kochville Twp. MI	Super K-Mart Portage, IN	Kroger Ft. Wayne, IN	Lowe's Brown Deer, WI
Sale Date		July, 2012	Dec. 2011	Jan. 2014	Dec. 2013
Bldg. Area (sq. ft.)	87,003	94,284	192,814	65,111	139,571
Year Built	1997	1988, 1995	1993	1999	2006
Land (acres)	6.22	10.02	16.64	8.13	11.05
Sale Price/sq. ft.		$27.94	$37.21	$35.32	$28.66
Community Data[16]					
Population	181,036	82,106	85,622	59,811	154,777
Households	82,687	32,392	32,392	24,139	59,923
Median Income	$65,299	$45,001	$56,179	$68,848	$52,059
Daily Traffic	32,108	47,435	30,395	35,614	27,900

	Sale 5	**Sale 6**	**Sale 7**	**Sale 8**
Location	Target G'Town Twp., MI	Value City Orland Park, IL	Target Memphis, TN	Target Cinn. OH
Sale Date	Oct. 2013	Dec. 2009	June 2014	Nov. 2010
Bldg. Area (sq. ft.)	104,113	122,902	124,287	103,240
Year Built	1989	1993	2005	1997
Land (acres)	10.68	15.36	15.16	9.37
Sale Price/sq. ft.	$27.37	$40.68	$37.11	$26.64
Community Data				
Population	123,297	197,286	184,141	226,244
Households	46,166	74,745	70,271	92,240
Median Income	$58,805	$76,282	$64,365	$43,897
Daily Traffic	17,718	31,800	69,762	43,716

See Tr. at 492-510; Ex. P-1 at 51-61.

79. Next, Allen considered various grounds for adjusting the comparable properties' sale prices. Although the buyers paid to renovate the stores to fit their specific images and business plans, Allen did not adjust for those expenditures because anyone buying the subject store would renovate it for the same reasons. According to Allen, an adjustment for

[16] The data for population, households, and median household income reflect a five-mile radius around the properties.

buyer's expenditures is necessary only if the remodeling and renovations represent deficiencies in the property at the time of sale and are for items that both the buyer and seller recognize need to be addressed immediately. None of the re-imaging expenditures for Allen's comparable sales met those criteria. *Tr. at 511-12; Ex. P-1 at 62.*

80. Allen adjusted the prices for Sales 2 and 8 upward by 8% each to account for deed covenants restricting the retail use of the properties. He based his adjustment on two studies: one by Brent Harrington, which focused on big-box stores, and another by Situs RERC, which included big- and junior-box stores. Those studies indicated that deed restrictions depressed sale prices by an average of 6% and 9%, respectively. *Tr. at 513-14; Ex. P-1 at 62, 70-73.*

81. Because the sales occurred over a six-year period, Allen examined differences in market conditions between the sale dates and each valuation date. To quantify his adjustments, he reviewed market sales, publications, and changing market factors. *Tr. at 515-18; Ex. P-1 at 63-67.*

82. Turning to building size, Allen's research showed no difference in unit price attributable to size differences for buildings between 80,000 and 200,000 square feet. But he did find size-related differences between unit prices for big-box stores and those for junior boxes. He adjusted the sale prices accordingly. *Tr. at 519-20; Ex. P-1 at 67-68, 70-73.*

83. Next, Allen compared the subject property to the other properties in terms of arterial, demographic, and submarket attributes. He rated each comparable property as inferior, superior, or equal to the subject property in terms of those attributes and adjusted their sale prices accordingly. For arterial attributes, he considered factors such as access, visibility, and traffic volume. *Tr. at 521-23; Ex. P-1 at 68-73.*

84. For demographics, Allen looked to things like population density, including the number of households in the surrounding area, and median household income. Because retailers look closely at the number of rooftops, he gave population density and number of households

the greatest weight. As for median household income, he explained that big-box retailers, which tend to be discount stores, view middle-income markets as ideal. The market surrounding the subject property was smaller than the markets surrounding three of the comparable properties, but its primary trade area had higher median household income than all but two of the comparable properties' trade areas. He rated six of the eight properties as inferior and adjusted their sale prices upward. He rated one as superior and adjusted its price downward. *Tr. at 523-25; Ex. P-1 at 69-73.*

85. For submarket attributes, Allen analyzed total commercial retail space, asking rent, and vacancy rates in the area surrounding each property. He gave the greatest weight to effective rent, which he calculated as each market's average rental rate divided by its average vacancy rate. He determined that the subject property's submarket attributes were superior to those for all the properties except Sale 6, which had a similar amount of surrounding retail space, as well as similar asking rents and vacancy rates. He adjusted the prices for the other seven sales upward. *Tr. at 525-26; Ex. P-1 at 68-73.*

86. Finally, Allen adjusted each sale price by 1% per year to account for differences in age. In estimating age, however, he considered each building's overall maintenance as well as any renovations. For example, he viewed the subject building's effective age as being two years younger than its actual physical age because its roof and HVAC RTU systems had been replaced in March 2011. *Tr. at 527; Ex. P-1 at 32, 69-73.*

87. In reconciling his adjusted sale prices, Allen considered every sale. He reported the range for each year as well as the average price. He gave the greatest weight to the sales from Indiana (Sales 2 and 3) and to Sale 6, which required the lowest overall adjustment. He settled on a value of $45/sq. ft., which generally was closer to the upper end of the range for each year. Allen multiplied his concluded unit value by the subject building's 87,003 square feet. He then discounted his unit value by 65% and multiplied the discounted rate by the 7,696 square feet of mezzanine. He added the two numbers together to arrive at an estimate of $4,040,000 for each valuation date. *Tr. at 533-34; Ex. P-1 at 70-76.*

ii. Income approach

88. Because Allen was valuing the fee-simple interest in the property, he began his analysis under the income approach by estimating market rent. Allen examined Kohl's' lease. But for reasons already explained, he believed that build-to-suit leases generally call for above-market rent. In addition, Kohl's' lease was [redacted] old as of the first valuation date and called for flat rent throughout the term. And it was negotiated at a time that did not reflect market conditions on the valuation dates. Allen therefore did not rely on the lease. *Tr. at 538-43; Ex. P-1 at 78.*

89. He instead looked to the market to determine the rates for which comparable properties rented. Because Allen was valuing an existing building, he looked to the market for existing buildings instead of build-to-suit construction. To illustrate the difference, he compared the adjusted rates for four build-to-suit leases to the adjusted rates for ten existing buildings. Most of the existing buildings were older than the subject building was, although Allen explained that age is not as significant a factor for leased buildings as it is for buildings offered for sale. The build-to-suit rates averaged $7.10/sq. ft., while the rates for existing buildings averaged $4.63/sq. ft. *Ex. P-1 at 78-79.*

90. Allen selected four of the ten leases of existing buildings for further analysis. Two involved older leases (executed in July 2006 and October 2007) but were from strong retail locations in Indianapolis. The other two were from strong retail locations in the Cincinnati, Ohio and Des Moines, Iowa markets. All were triple-net leases. *Tr. at 547-51; Ex. P-1 at 79-82.*

91. Allen adjusted the lease rates to account for characteristics similar to the ones he considered under his sales-comparison analysis, using mostly the same methodology. He gave the greatest weight to the two leases from Indianapolis and settled on a rate for the main building area of $5.50/sq. ft. for each year. He discounted that rate by 65% for the mezzanine. To that base rent, Allen added reimbursements for common-area maintenance ("CAM") and insurance, both of which the tenant would reimburse the landlord for under a

triple-net lease. In estimating those reimbursements, he relied on data from published sources, his review of other income and expense statements, and his experience with similar developments. *Tr. at 551-61; Ex. P-1 at 79-84.*

92. Next, Allen estimated effective gross income ("EGI") by adjusting the potential gross income from base rent and reimbursements to account for vacancy and collection loss. Based on (1) his review of the subject property's market, particularly its strong retail location, and (2) his conversations with brokers, Allen estimated the property's market vacancy and collection loss at 6%. He viewed the property as being subject to more vacancy risk than a typical retail property, explaining that it takes longer to find a tenant for such a large building. *Tr. at 558-59; Ex. P-1 at 82-85.*

93. Allen arrived at net operating income ("NOI") by subtracting two categories of operating expenses from the property's EGI: a management fee and reserves for capital improvements. Management fees typically range from 3% to 5% of EGI. Based on data from Korpacz's Real Estate Investment Survey and the subject building's age, Allen estimated reserves of $.25/sq. ft. *Tr. at 560-62; Ex. P-1 at 84.*

94. Having estimated NOI for each year, Allen turned to estimating an appropriate rate by which to capitalize that income. He looked to five leased-fee sales where the remaining lease terms were between 24 and 69 months. The buyers knew either that the tenant was leaving, or that there was at least a risk the tenant would leave at the end of the term. In Allen's view, the short remaining lease terms made those sales closer to fee-simple sales in many respects. The RERC study, which analyzed 407 leased-fee sales based on remaining lease terms, showed that capitalization rates increase as the remaining lease term decreases, supported that notion. Allen also looked at overall rates from investor surveys. Finally, he built a capitalization rate by analyzing bands of investment, using survey data from Realtyrates.com for interest rates, loan-to-value ratios, and equity dividend rates. *Tr. at 563-68; Ex. P-1 at 85-89.*

95. Allen settled on overall rates of 10% for 2011-2012 and 9.5% for 2013-2014. He then loaded those rates to reflect that the landlord would bear the expense of property taxes during periods of vacancy. He divided each year's projected NOI by his loaded cap rate to arrive at the following values:

	2011	**2012**	**2013**	**2014**
NOI	$414,640	$414,362	$414,161	$413,936
Cap Rate	10.11671%	10.12094	9.63202%	9.62367%
Rounded Value	$4,100,000	$4,090,000	$4,300,000	$4,300,000

Tr. at 563-70; Ex. P-1 at 89-90

iii. **Cost approach**

96. Under the cost approach, Allen first determined the market value of the land. He used four sales of comparable sites and adjusted their sale prices along some of the same lines he used to adjust his improved sales. He only prepared an adjustment grid for the March 1, 2011 valuation date. The adjusted sale prices ranged from $258,047/acre to $324,191/acre, with an average of $281,312/acre. He settled on $275,000/acre or $1,710,000 for the site. He used the same value for the rest of the valuation dates as well. *Tr. at 573-80; Ex. P-1 at 91-96.*

97. To determine the building's replacement cost, Allen used cost schedules from Marshall Valuation Service ("MVS") for an average quality class-C discount store. He similarly determined replacement cost for the site improvements. He added soft costs not included by MVS, such as a leasing commission and entrepreneurial incentive, which he estimated at 5% of replacement cost. The replacement cost for the building ranged from $5,489,790 to $5,950,999 for the four valuation dates. The replacement cost for site improvement ranged from $876,566 to $950,209. *Tr. at 584-85; Ex. P-1 at 96-99*

98. Next, Allen estimated depreciation for the building and site improvements. He relied on the age-life method to estimate incurable physical depreciation. He believed the property

suffered from two additional forms of depreciation—functional and external obsolescence. He identified several causes of obsolescence. For example, he explained that the property is oversized for what the market generally requires. And it has various features, such as the façade and interior layout, that are specific to Kohl's' business model. *Tr. 585-87; Ex. P-1 at 99-101.*

99. Allen quantified obsolescence by capitalizing deficient income, a method recommended by the treatise, THE APPRAISAL OF REAL ESTATE and taught by The Appraisal Institute. He ended up with obsolescence ranging from a high of $1,686,516 for 2011 down to $1,126,082 for 2014. That translated to between 16% and 26% of the improvements' replacement costs and between 13% and 21% of the cost for the property as a whole, including land. Allen found that those calculations were within the range of discounts shown by two other methodologies: (1) comparing the difference in rental rates between build-to-suit leases and leases from the market for existing buildings, and (2) extracting obsolescence from sales of Source Club stores in the early 1990s. *Tr. at 587-97; Ex. P-1 at 100-04.*

c. Reconciled values

100. In reconciling his conclusions under the three approaches, Allen gave the sales-comparison approach the greatest weight. He believed his conclusions under that approach were reliable, and he explained that owners of properties like the subject property more commonly sell them than re-lease them to a single user. *Tr. at 598-600; Ex. P-1 at 106.*

101. Allen gave his conclusions under the income approach less weight. Although there is an active leasing market for big-box stores, appraisers have more difficulty getting lease data than getting sales data, which is public record and is tracked by various services. Allen also pointed to the relative lack of lease data for similarly large retail space in Indiana and the surrounding region. He further noted that his market rental rates did not include an adjustment for tenant improvements and therefore likely led to him overstating the property's value. Similarly, Allen explained that reported capitalization rates for big-box

properties reflect tenant credit and do not directly reflect the underlying real estate's value. *Tr. at 550-51, 599-600; Ex. P-1 at 106-07.*

102. Finally, Allen did not give much weight to his conclusions under the cost approach. He did not consider it reliable, and he explained that buyers and sellers for properties like the subject property do not rely on that approach. *Tr. at 599-600; Ex. P-1 at 106-07.*

103. Allen settled on the following reconciled values:

Valuation Date	Reconciled Value
March 1, 2011	$4,050,000
March 1, 2012	$4,050,000
March 1, 2013	$4,100,000
March 1, 2014	$4,100,000

Ex. P-1 at 106-07.

2. Kelly's opinion

a. Kelly's background and qualifications

104. The Assessor offered Frank Kelly as his expert. Kelly has masters and doctorate degrees in economics. He described his specific area of interest as the study of sale prices in real estate markets. Kelly is not, and has never been, a licensed appraiser, although about 30% to 40% of his work involves mass-appraisal for assessment purposes. Kelly was retained to analyze "the sales of the subject property to explain how a leased-fee sale compares to a fee simple sale," although he testified that a recent publication from the International Association of Assessing Officers characterized references to fee-simple sales as inappropriate because fee-simple is an estate in property rather than a valuation concept. In any case, both Kelly and the Assessor's counsel reiterated that the scope of Kelly's assignment did not involve developing an opinion of value for the subject property. Kelly even suggested to counsel that the Assessor hire an appraiser. *Tr. at 194-197, 208, 210-11, 312, 314-20, 339, 347, 357-58.*

105. Kelly previously testified for the Calumet Township Assessor in a bankruptcy proceeding for the Majestic Star Casino. Kelly had advised the assessor in preparing that riverboat casino's assessment, and he testified about its value. The bankruptcy court found that Kelly's conclusions "were agenda-driven, i.e., to dramatically drive up the property taxes on the vessels." Kelly disagreed with the court's conclusions, noting that he had been told the judge simply signed verbatim findings drafted by counsel. Kelly also believed the court had taken out of context an email he sent to the assessor in which he wrote,

> FYI, for the North Township casinos, i.e., the Horseshoe and Ameristar Riverboat vessels, also located in Lake County, Indiana, we ended up simply applying an override pricing to get the desired assessment (much higher than cost). They appealed, of course, and it was eventually settled.

Tr. at 371-79.

106. Kelly tried to explain that the cost he was referring to in the email was the amount from the Department of Local Government Finance's ("DLGF") guidelines. The guidelines cost was only about $19 million, while a balance sheet for the Blue Chip Casino indicated actual construction costs of more than $81 million. According to Kelly, the assessor was entitled to adjust the DLGF's guidelines to get to market value. But as the bankruptcy court pointed out and Kelly acknowledged, the cost number from Blue Chip was a single line item from its balance sheet, and Blue Chip's casino was physically dissimilar to the Majestic Star. *Tr. at 373, 373-78, 384-387, 387-94.*

107. The bankruptcy court indicated that it had similar concerns to those expressed by the DLGF when it ordered a reassessment of all property in LaPorte County for the March 1, 2006 assessment date. Kelly and his firm, the Nexus Group, did the original assessment for the county. The DLGF characterized their work as the intentional and unjustifiable manipulation of assessment elements in order to reach a bottom-line number. *Tr. at 367-71, 377.*

b. Substance of Kelly's opinions

108. Turning to the substance of his assignment in these appeals, Kelly testified that where a property sells in an arm's-length transaction between parties who are knowledgeable, are not under duress, and are acting in their own self-interests, the sale price is the property's market value. From what Kelly gathered from the disclosure form for the subject property's 2011 sale and from Allen's discussion of it in his appraisal report, the sale appeared to have been at arm's length. *Tr. 234-35, 273.*

109. Kelly acknowledged that Allen described the sale as part of a larger portfolio transaction that was a section 1031 exchange. People often say that properties in Section 1031 exchanges sell above market value. But Kelly has seen no research to support that notion. According to Kelly, it does not make economic sense. Section 1031 allows a person to defer capital-gains taxes from the sale of capital assets by using the proceeds to buy like-kind property. Kelly explained that there is no incentive to overpay for the like-kind property, because the buyer would essentially lose its tax advantage. Similarly, Kelly has seen no evidence to support the proposition that portfolio sales are not market transactions. According to Kelly, the parties to those sales spend significant time arranging the sales and assigning values. He pointed to a survey using CoStar data from 2007-2010. The survey concluded that, contrary to popular belief, most properties from portfolio sales actually sold at a discount. *Tr. at 248-52, 254-56, 281.*

110. Kelly, however, acknowledged that portfolio sales sometimes include personal property and intangibles. He typically looks to sales disclosure forms and buyers' balance-sheet information from around the time of a sale to see what the buyer actually claimed for depreciation and allocation between real property, personal property, and intangibles. The fact that the subject property sold in a portfolio transaction tended to "muddy the water." Kelly explained that he would need to dig deeper to determine whether the sale included personal property or intangibles and whether the buyer's allocation was a bona fide attempt to allocate the sale price across the portfolio. Ideally, he would have obtained that information from the buyer's balance sheets. He did not receive that information through

discovery. And he did not contact any of the parties to the transaction, which he believed would have been outside the scope of his employment. *Tr. at 254-55; 380-81.*

111. While Kelly acknowledged that the property sold subject to an existing lease, he observed that most properties sell subject to some type of encumbrance. He explained that where a property sells subject to an existing lease, the leased-fee and leasehold values may be above, below, or equal to market value, depending on the level of contract rent. If the contract rent equals market rent, the leased-fee value will equal market value. But Kelly acknowledged that contract rent might differ from market rent where the market has changed over the term of a lease. There will be a positive leased-fee interest if the market declined and a negative leased-fee interest if the market improved. One could value a positive leased-fee interest using a discounted cash flow or net present value analysis to differentiate between the underlying property's value and the value of the lease in place. *Tr. at 239-43, 334.*

112. Kelly testified that there could have been a positive leased-fee interest in the subject property from the 2011 sale. To make that determination, he would have looked for evidence, preferably from the time of the sale, to show whether there was a difference between contract and market rent. Kelly, however, did not analyze the subject property's market rent. He similarly did not know what factors generally go into determining the lease rate for a build-to-suit property, although he believed financing should be considered. More importantly, he did not know any of the factors that went into determining the rental rate under Kohl's' lease. Nonetheless, he agreed that there were changes in economic conditions for the subject property's market between 1996-97, when the lease was negotiated and construction was completed, and 2011. Indeed, he acknowledged that 14-year span included a recession. Kelly also agreed that online retail sales had increased drastically during that period, although he did not evaluate the extent to which that increase affected the subject property's value. He further agreed that supply and demand change constantly, but he did not research how they had changed during the period. *Tr. at 282, 339-43, 350-52.*

113. Finally, Kelly recognized that Allen estimated the subject property's market rent at $5.50/sq. ft., which was significantly less than the [redacted] rent under Kohl's' lease. Although it might have been possible to capitalize the difference in rent if Kelly had received everything the Assessor sought in discovery, other assumptions and conditions would have been required, such as an appropriate discount rate. Looking only at the difference in contract and market rent, Kelly believed a broad range of outcomes was possible. According to Kelly, observing that market rent was [redacted] would not necessarily indicate that the sale price was [redacted] what it otherwise would have been. But that would be in the "general ballpark." *Tr. at 291-305.*

V. Conclusions of Law and Analysis

A. Burden of Proof and Valuation Standard

1. Burden of proof

114. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proof. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to an assessor in two circumstances: (1) where the assessment under appeal represents an increase of more than 5% over the prior year's assessment, or (2) where it is above the level determined in the taxpayer's successful appeal of the prior year's assessment, regardless of the size of the increase. I.C. § 6-1.1-15-17.2(b), (d). If an assessor has the burden of proving the assessment is correct and fails to do so, it reverts to the previous year's level or to another amount shown by probative evidence. *See* I.C. § 6-1.1-15- 17.2(b).

115. The parties agree the Assessor has the burden for Kohl's' appeal of the 2011 assessment. The burden for later years necessarily depends on how we resolve the 2011 appeal. In any case, the question is largely moot. Assigning the burden typically matters only where the parties fail to offer probative evidence from which to determine the appealed property's true tax value. As explained below, we have sufficient evidence to make that determination for each year.

2. Valuation standard

116. "Indiana's property tax system taxes the value of real property—and not intangible business value, investment value, or the value of contractual rights." *Switz. Cty. Ass'r v. Belterra Resort Ind., LLC*, 101 N.E.3d 895, 905, (Ind. Tax Ct. 2018); *see also*, *Kerasotes* 955 N.E.2d at 882 (noting that sale-leaseback transactions may include more than just the real property). Accordingly, the Tax Court has rejected arguments that assessments should include something more than "the value of the sticks and bricks." *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 501 (Ind. Tax Ct. 2010).

117. Property is assessed based on its "true tax value," which is determined under the DLGF's rules. I.C. § 6-1.1-31-6(f). True tax value does not mean "fair market value" or "the value of the property to the user." I.C. § 6-1.1-31-6(c) and (e); I.C. § 6-1.1-31-5(a). The DLGF defines "true tax value" as "market value-in-use," which it in turn defines as "[t]he market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property." 2011 REAL PROPERTY ASSESSMENT MANUAL 2. Evidence in an assessment appeal should be consistent with that standard. For example, USPAP-compliant market-value-in-use appraisals often will be probative. *See id*; *see also, Eckerling v. Wayne Twp. Ass'r,* 841 N.E.2d 674, 678 (Ind. Tax Ct. 2008). Parties may also offer other evidence compiled in accordance with generally accepted appraisal principles, such as the cost, income, and sales-comparison approaches. *See id.*

118. A sales-comparison analysis for an improved property does not reflect true tax value if the purportedly comparable sales "have a different market or submarket than the current use" of the property under appeal based on "a market segmentation analysis." I.C. § 6-1.1-31-6(d). Market segmentation analyses "must be conducted in conformity with generally accepted appraisal principles" and are not limited to the categories of markets and submarkets laid out in the DLGF's rules or guidance materials. *Id.*

B. Allen's appraisal opinions are the only probative evidence of the property's market value-in-use

119. Allen's appraisal opinions are probative of the subject property's market value-in-use. He prepared a USPAP-certified appraisal report estimating the property's market value-in-use as of each relevant valuation date. In doing so, he developed three generally accepted approaches to value, ultimately giving the greatest weight to his conclusions under the sales-comparison approach. He based his conclusions on objective market-derived data as well as on his professional judgment gained through years of appraising commercial properties, including many big-box stores like the subject property.

120. The Assessor did little to impeach Allen's valuation opinions. He pointed out that Kohl's designated Allen as its 30(B)(6) witness, apparently in an attempt to show that Allen was biased because he believed his answers would bind Kohl's. Even if Allen's deposition testimony would bind Kohl's, something we need not decide here,[17] that fact would not necessarily align Allen's interests with Kohl's' interests in a way that would affect his independence. Without more, we do not find that Allen's designation as Kohl's' witness for a 30(B)(6) deposition significantly impeached his credibility.

121. The Assessor also highlighted Allen's lack of awareness of sales involving three Kohl's locations from Indiana. But the Assessor did not show that those sales met any of the criteria Allen was looking for in choosing comparable sales. Indeed, Kohl's is not listed as a party in any of those transactions. Thus, it is likely that the transactions were similar to the 2011 and 2013 sales of the subject property, in that the stores were sold subject to build-to-suit leases. And Allen decided against directly using the subject property's sales, or any other leased-fee sales for that matter, in his sales-comparison analysis.

---

[17] *Compare Everage v. Northern Ind. Pub. Serv. Co.*, 825 N.E.2d 941, 950 (Ind. Ct. App. 2005) ("We agree with the Seventh Circuit and conclude that the testimony of an Ind. Trial Rule 30(B)(6) designee does not bind a corporation in the sense of a judicial admission.") *with Town of Montezuma v. Downs*, 685 N.E.2d 108, 116 (Ind. Ct. App. 1997) ("Given that Nichols was designated by Montezuma as its representative for the deposition, his statements are binding upon it.").

122. In his post-hearing brief, the Assessor makes five additional arguments concerning Allen's credibility. First, he argues that Allen "failed to adjust and explain why purportedly comparable properties were comparable." *Respondent's Post-Trial Brief* at 7-8. That unsupported assertion ignores both Allen's appraisal report and testimony. Allen explained the key characteristics he looked for in finding substitutes for the subject property, such as building size and age, access and locational factors, and use for retail purposes. He similarly explained the bases for his decisions about whether to adjust sale prices or lease rates to account for relevant differences in those characteristics.

123. Second, the Assessor argues that Allen violated USPAP Standards Rule 1-5(b), which requires an appraiser to analyze any sales of a property being appraised that occurred within three years of the appraisal's effective date. Presumably, the Assessor was referring to the 2011 and 2013 sales of the subject property. But Allen did more than "simply list[] the sale price" as the Assessor suggests. *Respondent's Post-Trial Brief at 9.* Instead, he researched the sales. His research included talking to the broker hired by the principles of James Huck, LLC, which was a party to both sales. Based on that research, Allen concluded the sales were not valid indicators of the market value-in-use of the fee-simple interest in the property.

124. Third, the Assessor argues that Allen used sales from the wrong market segment because he included only buyers of fee-simple interests. Allen was estimating the market value-in-use of the fee-simple interest in the subject property. He excluded leased-fee sales because of his opinion that they likely involved payment for things beyond the fee-simple interest in the real estate itself. He believed he found enough data for fee-simple sales of big-box retail properties that competed with the subject property to allow him to estimate the subject property's value reliably. This type of conclusion is within an appraiser's judgment.

125. Fourth, the Assessor argues that a taxpayer cannot claim obsolescence without identifying the underlying causes and quantifying the amount. Once again, the Assessor ignores Allen's appraisal report and testimony where Allen (1) identified several factors, such as

the existence of features specific to Kohl's business model, that he believed caused the property to suffer from obsolescence, and (2) quantified their effect by capitalizing deficient income. In any case, Allen gave little weight to his conclusions under the cost approach in reaching his valuation opinions.

126. Finally, the Assessor argues that Allen proposed a leasehold value of [redacted], which was entirely without support. But Allen did not purport to value either Kohl's' leasehold interest or the owner's leased-fee interest. He instead estimated the market value-in-use of the fee-simple interest in the real property. He simply responded to a question on cross-examination as to whether the 2011 sale included [redacted] worth of intangibles and leasehold interest by saying that to the degree the excess between the sale price and the value of the fee-simple interest in the property represented intangible value, the statement would be true. *Tr. at 616.*

127. In reality, the Assessor wants us to infer that the sale was unlikely to have included so much intangible value and that Allen's opinion of the real property's value therefore must be too low. That argument might have some appeal in a vacuum. But we do not operate in a vacuum. The Assessor needed to offer concrete evidence to support his position. And he failed to do so.

128. Indeed, the Assessor offered no probative valuation evidence whatsoever to counter Allen's appraisal. Although the Assessor offered Kelly as an expert, he pointedly did not offer Kelly for purposes of valuing the subject property. Indeed, Kelly did not offer an opinion on much of anything beyond testifying that the sale of a property subject to a lease may reflect the property's market value if contract rent is equal to market rent. Kelly apparently hoped to get appraisals or balance-sheet information from around the time of the sales, which he believed might have shed light on the property's market rent. But he did not get that information. Nor did he do any research of his own.

129. Kelly did not even know whether contract rent from Kohl's' build-to-suit lease was at market level in 1996 when the lease was signed and the [redacted] flat rate was established.

Indeed, he knew little about what goes into determining rent under build-to-suit leases generally and nothing about what went into determining rent under Kohl's' lease specifically. Even if Kohl's' rent was at market level when the lease was signed—a proposition for which the Assessor offered no evidence—Kelly failed to connect that rent to the market as of the 2011 and 2013 sales or as of any of the valuation dates at issue. Kelly testified that financing should be considered in setting rent for a build-to-suit lease. Yet he acknowledged that financing considerations had likely changed between 1996 and the valuation dates at issue. Allen confirmed as much. Economic conditions and relevant market conditions, such as supply and demand, had also likely changed.

130. The only evidence about market rent as of the valuation dates at issue comes from Allen's appraisal. Allen estimated market rent at $5.50/sq. ft.—[redacted] Kelly testified generally that one might be able to calculate the amount of the sale price attributable to the above-market rent by capitalizing the difference between contract and market rent. He did not perform that calculation, which would have required various assumptions, such as what an appropriate discount rate would be. Nor could he have done so, given that the Assessor repeatedly represented that Kelly would not offer a valuation opinion and did not disclose any such opinion before the hearing.[18] At most, Kelly testified that cutting the sale price in half would be in the "general ballpark." That does not support a finding that the price from the 2011 or 2013 sales reflected the property's market value-in-use. Nor does it support any other valuation. It certainly does not outweigh Allen's USPAP-certified appraisal.

131. In sum, rather than offer an independent valuation opinion, the Assessor opted to try to prove the property's market value-in-use through the 2011 and 2013 sales of the subject property. But he did not offer an expert to determine independently whether the contract rent under Kohl's' existing lease equaled market rent—a crucial assumption underlying his

[18] We disagree with the Assessor's claim that a person testifies to valuation only if he applies the cost, sales-comparison, or income approaches to value. *See Tr. at 299-300; Respondent's Response Brief at 4.* The case he cites for that proposition, *Scott-Reitz Ltd. v. Rein Warsaw Assoc.* says no such thing. The court in that case simply recognized that all three of those approaches "have been approved by this Court as a method of determining a property's fair market value." *Scott-Reitz Ltd. v. Rein Warsaw Assocs.*, 658 N.E.2d 98, 105 (Ind. Ct. App. 1995).

theory. He instead pinned his hopes on the chance that (1) the property had been appraised in connection with the 2011 and 2013 sales, (2) the appraisers had analyzed market rent, and (3) he could get copies of those appraisals and other information relating to the sales through discovery. It turned out the appraisals the Assessor sought did not even exist.

132. Thus, the Assessor was left without probative evidence, despite having the burden of proof. Because Kohl's did offer substantial probative evidence in the form of Allen's valuation opinions, we find for Kohl's and order the assessments reduced to amounts determined by Allen.

VI. Conclusion

133. Because we find that the valuation opinions from Allen's USPAP-certified appraisal are the only probative evidence of the subject property's true tax value, we order the assessment for each year changed to the amount estimated by Allen:

Valuation Date	Value
March 1, 2011	$4,050,000
March 1, 2012	$4,050,000
March 1, 2013	$4,100,000
March 1, 2014	$4,100,000

We issue this Final Determination on the date written above.

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

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