

REPRESENTATIVE FOR PETITIONER: Paul M. Jones Jr., Attorney

REPRESENTATIVE FOR RESPONDENT: Marilyn Meighen, Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

| | | | |
|-------------------------|---|-------------------|--------------------------|
| SCP 2007-C-26-002, LLC |) | Petition: | 53-005-09-1-4-00009 |
| a/k/a CVS 3195-02, |) | | 53-005-10-1-4-00055 |
| |) | | 53-005-11-1-4-00014 |
| Petitioner, |) | | 53-005-12-1-4-00173 |
| |) | | 53-005-13-1-4-00035 |
| |) | | |
| v. |) | Parcel: | 53-05-33-204-145.000-005 |
| |) | | |
| |) | County: | Monroe |
| Monroe County Assessor, |) | | |
| |) | Township: | Bloomington City |
| Respondent. |) | | |
| |) | Assessment Years: | 2009-2013 |

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

August 19, 2015

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:

ISSUE

1. The parties offered competing valuation opinions from two appraisers—Sara Coers for the Petitioner, SCP 2007-C-26-0002, LLC, also known as CVS 3195-02 (“CVS”), and Wayne Johnson for the Monroe County Assessor. Both appraisers valued the property at less than its assessment for each year, although Johnson’s opinions were much closer to those assessments than were Coers’ opinions. While the Assessor and a review appraiser validly

criticized some aspects of Coers' appraisal, we ultimately find her analysis under the income approach the most persuasive evidence of the property's true tax value.

PROCEDURAL HISTORY

2. CVS timely filed notices for review with the Monroe County Property Tax Assessment Board of Appeals ("PTABOA") for the 2009-2013 assessment years. The PTABOA issued determinations for each year. CVS then timely filed Form 131 petitions with the Board.
3. From August 13-15, 2014, our designated administrative law judge, Andrew Howell ("ALJ"), held a hearing on the petitions. Neither he nor the Board inspected the property.
4. Marilyn Meighen represented the Assessor. Paul Jones and Matthew Ehinger represented CVS.¹ The following people were sworn as witnesses: Sara Coers, Carla Higgins, Nick Tillema, Wayne Johnson, Judith Sharp, and Ken Surface.
5. CVS offered the following exhibits:

| | |
|---------------------|--|
| Petitioner's Ex. A: | Appraisal report prepared by Sara Coers, |
| Petitioner's Ex. B: | Uniform Standards of Professional Appraisal Practice ("USPAP"), 2014-15 edition with attachments, |
| Petitioner's Ex. C: | Demonstrative chart with land valuation of subject property and surrounding properties, and supporting property record cards, |
| Petitioner's Ex. D: | Rick Seltzer, <i>2 downtown Bloomington projects move forward, decision on third delayed</i> , Herald-Times, December 10, 2013, |
| Petitioner's Ex. E: | Rod Spaw, <i>REI Investments Proposes a 168-room Hyatt Place Hotel for Bloomington, Indiana</i> , Herald-Times, August 17, 2012, |
| Petitioner's Ex. F: | Property record card for parcel 53-05-33-308-010.000-005, |
| Petitioner's Ex. G: | Property record card for parcel 53-05-33-204-104.000-005, |
| Petitioner's Ex. H: | Ben Skirvin, <i>New Census Figures Show Local Effects of Recession</i> , Indiana Public Media, September 28, 2010, |
| Petitioner's Ex. I: | Korpacz Real Estate Investor Survey, Third Quarter 2007, |
| Petitioner's Ex. J: | Korpacz Real Estate Investor Survey, Second Quarter 2008, |

¹ Ehinger later withdrew his appearance. Christopher Engel and N. Davey Neal of Clark, Quinn, Moses, Scott & Grahn, LLP also appeared for CVS, submitted a supplemental brief, and then withdrew.

Petitioner’s Ex. K: Korpacz Real Estate Investor Survey, First Quarter 2009,
 Petitioner’s Ex. L: Korpacz Real Estate Investor Survey, Second Quarter 2009,
 Petitioner’s Ex. M: Korpacz Real Estate Investor Survey, First Quarter 2010,
 Petitioner’s Ex. N: Korpacz Real Estate Investor Survey, Third Quarter 2010,
 Petitioner’s Ex. O: PriceWaterhouseCoopers (“PWC”) Real Estate Investor Survey, Second Quarter 2011,
 Petitioner’s Ex. P: PWC Real Estate Investor Survey, Third Quarter 2011,
 Petitioner’s Ex. Q: PWC Real Estate Investor Survey, Fourth Quarter 2012,
 Petitioner’s Ex. R: PWC Real Estate Investor Survey, Second Quarter 2013,

6. The Assessor offered the following exhibits:

Assessor’s Ex. A: Property Record Card for subject property,
 Assessor’s Ex. B: Appraisal report prepared by Wayne Johnson,
 Assessor’s Ex. C: Addendum to appraisal report prepared by Wayne Johnson,
 Assessor’s Ex. D: Appraisal review prepared by Nick Tillema,
 Assessor’s Ex. E: Richard C. Sorenson, *Appraising the Appraisal: The Art of Appraisal Review*, (2d ed. 2010).

7. The record also includes the following: (1) all pleadings, briefs, and documents filed in the appeals, including the parties’ post hearing briefs; (2) all orders and notices issued by the Board or our ALJ; and (3) the three-volume hearing transcript.

8. The PTABOA determined the following assessments:

| Year | Land | Improvements | Total |
|-------------|-------------|---------------------|--------------|
| 2009 | \$2,252,300 | \$1,655,500 | \$3,907,800 |
| 2010 | \$2,252,300 | \$1,604,200 | \$3,856,500 |
| 2011 | \$2,252,300 | \$1,564,800 | \$3,817,100 |
| 2012 | \$2,252,300 | \$1,654,700 | \$3,907,000 |
| 2013 | \$2,252,300 | \$1,681,600 | \$3,933,900 |

OBJECTIONS

A. Assessor’s objections

9. The ALJ admitted Petitioner’s Exhibits A-B, F, and G, and Assessor’s Exhibits A-E without objection. *Vol I. at 18-24.*

10. The Assessor objected to the relevance of Petitioner’s Exhibit C—a chart showing the land assessments for the subject and surrounding properties and accompanying property record cards—because it shows only land values rather than total, bottom-line values. CVS responded that a party may offer evidence of other assessments to prove the value for a property on appeal. The ALJ took the objection under advisement.
11. Evidence of other assessments may be offered to prove the market value-in-use of a property on appeal, provided the properties are shown to be comparable using generally accepted appraisal and assessment practices. *See* Ind. Code § 6-1.1-15-18. While the ultimate question in these appeals is the property’s overall value, its site value is relevant to that determination. We therefore overrule the Assessor’s objection and admit Petitioner’s Exhibit C. *Vol. I at 255-257.*
12. The Assessor next objected to Petitioner’s Exhibits D-E and H—newspaper articles on local building projects (Ex. D) and a proposed hotel (Ex. E), and an internet article about census figures and the effects of the recession (Ex. H)—on hearsay grounds. CVS responded that hearsay is admissible under the Board’s procedural rules. CVS also made two additional arguments regarding Exhibit H: (1) evidence is only hearsay if offered to prove the truth of the matter asserted, and CVS offered the article to show unemployment levels rather than the property’s value, and (2) that the hearsay rule does not apply because CVS offered the exhibit as rebuttal to Johnson’s testimony on direct examination. The ALJ made a preliminary determination to admit the exhibits. *Vol. I at 20-21; Vol. II at 370-371.*
13. The articles contained in Petitioner’s Exhibits D and E are hearsay—they are statements offered to prove the truth of the matters asserted therein. *See* Ind. Evid. Rule 801. Despite, CVS’s claims to the contrary, that is true for Petitioner’s Exhibit H as well. To qualify as hearsay, an assertion need not be about the ultimate issue in a case, as CVS apparently believes. CVS offered the article to prove the truth of an assertion about unemployment levels. That assertion comes from the article quoting the director of the Bloomington Economic Development Corporation. Thus, the article contains at least two levels of hearsay—the author’s assertion about the director’s comments, and the director’s assertion

about unemployment levels. Similarly, CVS offered no authority, nor do we find any, for the proposition that the hearsay rule does not apply simply because a party offers evidence to rebut a witness's testimony on direct examination.²

14. Nonetheless, our procedural rules allow us to admit hearsay, with the caveat that if the opposing party properly objects to the hearsay and it does not fall within a recognized exception to the hearsay rule, we cannot base our determination solely on that evidence. 52 IAC 2-7-3. We therefore admit Petitioner's Exhibits D-E and H, subject to that limitation.
15. Finally, the Assessor objected to Petitioner's Exhibits I through R—copies of published investment surveys—on grounds that CVS did not identify the exhibits or provide her with copies before the hearing. CVS responded that the exhibits were rebuttal evidence offered in response to the Assessor's Exhibit B—an appraisal report prepared by her expert, Wayne Johnson. And Johnson referenced the publications at issue in his report. *See Resp't Ex. A at 148-49*. The ALJ took this objection under advisement.
16. Our procedural rules require parties to identify witnesses and exhibits at least 15 business days before a hearing and to provide copies of all their documentary evidence at least five business days before the hearing. 52 IAC 2-7-1(b). The rule is designed to prevent unfair surprises. While CVS should have identified and exchanged the exhibits, we fail to see how the Assessor was prejudiced. She reasonably should have anticipated that materials on which Johnson purported to rely³ in his appraisal would be fair game. We therefore overrule the Assessor's objection and admit Petitioner's Exhibits I-R. *Vol. II at 429-447*.

² The Indiana Rules of Evidence do exclude certain prior statements of witnesses from the definition of hearsay. *See* Ind. Evid. R. 801(d)(1).

³ Johnson testified that he did not subscribe to the investor surveys and that he actually used tables posted on the Appraisal Institute's website that were not "all inclusive of the detailed analysis in the reports." *Vol. II at 494*.

B. CVS's objection

17. CVS objected to Tillema's testimony about a conversation he had with the manager of the CVS brand store⁴ that operates at the subject property. The Assessor responded that hearsay was admissible under the Board's procedural rules but did not argue that it fit within any recognized exception to the hearsay rule. The ALJ made a preliminary determination to allow the testimony. We adopt that ruling subject to the limitations laid out in our procedural rules governing our use of hearsay. *Vol. III at 571-572.*

FINDINGS OF FACT

A. The Subject Property

18. The property contains a freestanding retail building in good repair. It is approximately 13,000 square feet and sits on approximately 1.44 acres of land between College Avenue and Walnut Street in Bloomington. During the years at issue, it was operated as a CVS brand store. Due to zoning requirements, the building was constructed to look like it has two stories from the outside. Inside, however, it is one story with a partial mezzanine. The building also has a drive-thru pharmacy. *Pet'r Ex. A at 17-30; Resp't Ex. 18-32.*
19. Hooks SuperRx, Inc bought the land for \$2,266,100 in June 2006. The purchase apparently included assemblage of what were previously separate sites. It then built the improvements. One year later, Hooks SuperRx sold the property to CVS (the Petitioner, not the operator of CVS brand stores) for \$5,436,374. In connection with that sale, Hooks SuperRx leased the property from CVS through January 1, 2033, with options to renew. Coers described the transaction as a sale-leaseback. *See Resp't Ex. B at 20; Resp't Ex. F at 1-3; Pet'r Ex. A at 10-11.*

⁴ Terminology in these appeals poses an issue. The owner of the real property, which we refer to as "CVS," is a separate entity from the business that operates a national drugstore chain under the brand name CVS. The record is unclear regarding the corporate ownership of the national chain, but it appears that Hooks SuperRx, Inc. owns and operates at least some of the stores, including the one occupying the subject property. The parties use the term "CVS" alternately to refer to the subject property's owner and to the drugstore chain. To avoid confusion, we refer to the former as "CVS" and to businesses operated by the latter as "CVS brand stores."

B. Expert Opinions

1. Coers' Appraisal

20. CVS engaged Coers, the managing director of Valbridge Property Advisors, Mitchell Appraisals Inc., to appraise the fee simple interest in the property for each year under appeal. Coers certified that she appraised the property and prepared her appraisal report in accordance with the Uniform Standards of Professional Appraisal Practice (“USPAP”). *Pet’r Ex. A at 2-3.*
21. Coers is a certified general appraiser and a Level II assessor/appraiser. She holds the MAI designation from the Appraisal Institute. She has been an appraiser for more than ten years and has appraised over 1,000 retail properties. *Vol. I at 25-26.*

a. Coers' Research and Market Overview

22. Coers began with a market overview and analysis. She described the property’s macro location by reference to the Bloomington metropolitan statistical area and its micro location as the one-mile radius around the property. She rated the property’s location as superior to its market. She also looked at supply and demand within the property’s market area, noting among other things, that no new retail space was being delivered from 2010 through 2012. She explained that even the 2009 deliveries were likely in the construction pipeline in 2007 and 2008 when the economy was better. She further explained that buyers and sellers look at things from a regional basis. And national and regional retail market conditions were characterized by a steep recession and halting recovery during the years at issue. According to Coers, Indiana, which is considered a secondary market, and Bloomington, which is a small, albeit strong, market within Indiana, were both necessarily affected by those national and regional conditions. *Pet’r Ex. A at 31-51; Vol. I at 34-37, 128, 237-39.*

b. Coers' Sales-Comparison Approach

23. Coers then turned to the three generally recognized approaches to value—the sales-comparison, income, and cost approaches. For her sales-comparison analysis, she used retail properties that sold for continued retail use. She focused on fee simple sales rather

than leased fee sales because she believes the latter capture intangibles, such as tenant quality, as opposed to just the value of the real estate. Coers also explained that from a buyer's perspective, using sales of vacant or "dark" stores is appropriate. Unlike stores that are sold subject to a long-term lease, vacant stores are available for immediate occupancy. Most of Coers' sales were vacant when sold. Several of the properties were vacant for more than one year. In some cases, the vacancy included the year leading up to the assessment date. *Pet'r Ex. A at 115-141; Vol. I at 216-224.*

24. Coers began by looking for physically similar properties in the Bloomington area. She then worked outward to comparable markets where she believed a regional buyer would also look. Her comparables included sales of a former Osco, a former Blockbuster, a dark Walgreens, and a former Goodwill, among other retail buildings. The properties were located across Indiana in markets such as Carmel, Indianapolis, Lafayette, Bloomington, Greencastle, and New Albany. One sale was from Cincinnati. Coers described various similarities between the subject property and her comparable properties as well as the various differences for which she adjusted the comparable properties' sale prices. *Pet'r Ex. A at 117-141; Vol. I at 71-72, 216-29.*

25. She came to the following value conclusions under the sales-comparison approach:

| Year | Value |
|-------------|--------------|
| 2009 | \$2,130,000 |
| 2010 | \$2,120,000 |
| 2011 | \$2,170,000 |
| 2012 | \$2,210,000 |
| 2013 | \$2,320,000 |

Pet'r Ex. A at 160; Vol. I at 76-77.

c. Coers' Cost Approach

26. Coers began her analysis under the cost approach by valuing the site as if vacant. To do so, she looked for vacant land in Bloomington that sold for retail use. She adjusted the sale prices for buyer expenditures, market conditions, and location. She used sales to the

operator of CVS brand stores with caution because she believes it has atypical motivations when buying land. Coers noted that she did not use the land sales that Johnson chose because she used only properties that sold for retail use. She did not believe it was appropriate to use land that sold for mixed use (multi-family housing with first floor commercial) to value a freestanding retail building. *Pet'r Ex. A at 64-73; Vol. I at 39-43; Vol. III 685-686.*

27. To estimate replacement costs for the improvements, Coers used data from the Marshall Valuation Service published by Marshall & Swift. She used a weighted cost for the mezzanine to account for its partial use as a storage area. She then used multipliers to account for building height, floor area, location, and other factors. She estimated soft costs of 5%, which included the cost of carrying the investment, insurance, and other similar expenses. She did not think it was appropriate to include entrepreneurial incentive, explaining that entrepreneurial incentive is not always considered applicable for buildings constructed for owner-occupants or built-to-suit for tenants and that Indiana's assessment manual and guidelines do not include it. *Pet'r Ex. A at 74, 79-80; Vol. I at 46-49.*
28. Coers estimated physical depreciation separately for the improvements' short-lived and long-lived components. She then considered obsolescence. Although she believed the store had some potential functional obsolescence due to its "false" second story, she did not calculate a separate amount of obsolescence for that. She instead included it with her estimate of external obsolescence. *Pet'r Ex. A at 81-83; Vol. I at 49.*
29. Coers believed the recession caused market-wide external obsolescence. Even though Bloomington was a strong market within Indiana, it did not exist in a vacuum; it was still affected by the national recession. According to Coers, in times of market-wide obsolescence, the "techniques that appraisers are taught to calculate obsolescence" do not work. Rather than apply those techniques, she quantified total obsolescence by taking the reconciled value of her income and sales-comparison approaches and subtracting it from her estimate of the property's site value and depreciated replacement costs. She viewed this as a simplified, but acceptable technique because she did not ultimately rely on the cost

approach in reaching her final opinions of value. She instead developed the approach largely to determine the site value and depreciated replacement costs, which she used to estimate market rent under the income approach. *Pet'r Ex. A at 83-84; Vol. I at 50, 237-239.*

d. Coers' Income Approach

30. Coers began her analysis under the income approach by determining market rent for the property. She reviewed the existing lease but determined that it did not reflect market rent because it was the product of a sale-leaseback transaction. Instead, she used several techniques to estimate market rent. First, she looked to existing leases for comparable properties. She avoided build-to-suit leases because they typically contain non-market factors. After completing her review, she decided the local data was inappropriate because most of the leases she found were for physically dissimilar properties or for properties with different uses, such as offices. She expanded her search to include subleases of former CVS brand stores from Bloomington, Columbus, Indianapolis, New Albany, and South Bend. The subleases averaged \$7.56/sq. ft. *Pet'r Ex. A at 91-93; Vol. I at 52-57.*
31. Second, Coers calculated rent based on the return an investor would require on the property's land and depreciated improvement costs (not including obsolescence depreciation) as determined under the cost approach. She examined market surveys and used her own observations to determine required rates of return, settling on a range of 7%-9%. She then calculated a rent for a 7%, 8%, and 9% return for each year. Those rents ranged from \$14.92/sq. ft. to \$20.72/sq. ft., depending on the year and the rate of return. *Pet'r Ex. A at 93-96; Vol. I at 57-58.*
32. Third, Coers also calculated rent as a percentage of gross sales. CVS did not give her data for retail sales from the CVS brand store at the subject property. But she did not need that data, nor did she think it was necessarily relevant, because she wanted to avoid valuing the business enterprise. She instead estimated a typical user's gross sales from the location. To do so, she primarily relied on *Dollars & Cents of Shopping Centers/The Score*, which

published data for all drugstore/pharmacy users as well as those over 10,000 square feet. The most recent data from that publication was for 2006-2007. She adjusted that sales data upward to reflect the growth in retail and drugstore sales following those years as well as to reflect the Bloomington market, which she described as “a great market with a lot of potential.” She arrived at sales per square foot ranging from \$440 to \$495 depending on the assessment year. *Pet’r Ex. A at 96-99; Vol. I at 58-60, 216-17.*

33. *Dollars & Cents* reported percentage-rent levels ranging 1.85% to 3.10% with a median of 2.75%. Based on those percentages and her estimated gross sales, Coers arrived at rents ranging from \$8.13/sq. ft. to \$15.35/sq. ft. depending on the assessment year and percentage rent level. *Pet’r Ex. A at 96-99; Vol. I at 58-60.*
34. Coers believed that the CVS brand store subleases represented below-market rent. So, in reconciling her conclusions under the three techniques, she gave more weight to her other two techniques and settled on market rent ranging from \$16.50/sq. ft. to \$17.75/sq. ft. for the various years at issue. *Pet’r Ex. A at 99-100; Vol. I at 61.*
35. From that potential gross income, Coers subtracted allowances for vacancy and collection loss ranging from 4.3% to 6.6%. She based her estimates on the quality of tenant expected to rent this type of property, as well as the condition of the market during the years at issue. She then deducted expenses. Because she posited a triple-net lease, she did not include any tenant expenses or real estate taxes. Although she included an insurance expense of \$.20/sq. ft., she also reflected that expense as income in the form of a reimbursement to the landlord. She estimated a management fee equaling 3% of effective gross income (“EGI”), which was on the low end of what the data from comparable drugstores indicated. Because she determined that investors would not have required reserves for any year except 2012, she included them as an expense only for that year. After applying all applicable expenses, she arrived at pro forma net operating income (“NOI”) ranging from \$14.91/sq. ft. to \$16.42/sq. ft. for the various years at issue. *Pet’r Ex. A at 100-105; Vol. I at 62-65.*

36. Coers then capitalized her pro forma NOI to reach a value conclusion for each year. She drew her capitalization rates from national market surveys as well as from regional data published by RERC. She also considered sales of drugstores, including CVS brand stores and Walgreens stores. Those stores were leased at the time of sale, but the sale price was unlikely to reflect tenant creditworthiness because the lease had fewer than 10 years remaining, the tenant had subleased the property, or the store was dark because the tenant had vacated it. In addition, she relied on her own knowledge gained from interviewing people familiar with the relevant market. She settled on overall rates ranging from 8% to 9% for the years at issue. She then loaded those rates with a percentage reflecting the landlord’s share of the property tax burden (taxes paid during vacancy). Finally, she divided those loaded rates into the property’s pro forma NOI for each year to arrive at the following values:

| Year | Value |
|-------------|--------------|
| 2009 | \$2,360,000 |
| 2010 | \$2,110,000 |
| 2011 | \$2,290,000 |
| 2012 | \$2,380,000 |
| 2013 | \$2,620,000 |

Pet’r Ex. A at 105-108; Vol. I at 67-68.

d. Coers’ Reconciliation

37. Coers gave little weight to the cost approach, explaining that market participants would have given that approach little consideration during the years at issue because she felt it did not represent the motivation of market participants at the time. She felt both her sales-comparison and income approaches had good quantity and quality of data, and that they represented the actions and thinking of market participants for the years at issue. For the 2009 assessment year, she developed a trending factor of .9607 to trend the value back to January 1, 2008.

She ultimately arrived at the following values:

| Year | Value |
|------|-------------|
| 2009 | \$2,340,000 |
| 2010 | \$2,120,000 |
| 2011 | \$2,230,000 |
| 2012 | \$2,300,000 |
| 2013 | \$2,470,000 |

Pet'r Ex. A at 161-64; Vol. I at 45, 79-80, 234-35.

2. Tillema's Review

38. The Assessor engaged Nick Tillema of Access Group, LLC, to review Coers' appraisal. He holds the MAI designation from the Appraisal Institute as well as a new designation for review appraisers. He has been an appraiser since 1975. He has appraised residential, agricultural, commercial, and special-purpose properties. *Resp't Ex. D at 35-39; Vol. III at 533-45.*
39. Tillema pointed out several technical errors in the Coers appraisal. He did not argue that those errors were significant enough to make the appraisal unreliable. Instead, he focused the bulk of his criticism on how Coers valued the subject property. He found that Coers estimated the market value of the property rather than its value-in-use or true tax value. Tillema explained that true tax value is "calculated to estimate the worth of a property to the property owner." Under that standard, a property might be worth more than its market value in some cases and less than its market value in others. He described the subject property's current use in various ways, such as "a nationally known pharmacy" and a "very successful ongoing pharmacy operation that is using its location in a very specific kind of way." *Resp't Ex. D at 1-17; Vol. III at 555-567.*
40. He also criticized Coers' market overview. He noted that she did not address national concerns such as the war in Afghanistan and the historic recession for their impact on the

local market. According to Tillema, those economic factors hurt the nation's retail operations but did not strongly affect the retail pharmacy market because during a recession, consumers continue spending on non-durable goods like food and medications. In any case, he did not believe Coers appropriately related national economic factors to the local market. And he felt that she based her market overview on valuing the property as a retail operation instead of as an ongoing retail pharmacy, which he felt was "key." According to Tillema, various types of businesses could use the property, but CVS brand stores chose it for its unique qualities. *Resp't Ex. D at 10-12; Vol. III at 569-74.*

41. Tillema also contended that a thorough highest and best use analysis is the "focal point" of a market value-in-use appraisal. It allows an appraiser to decide whether a property's market value-in-use will be lower or higher than the value for its highest and best use. He also believed that a more complete highest and best use analysis would have resulted in a "better" conclusion. *Resp't Ex. D at 14-19; Vol. III at 576-81.*
42. Turning to Coers' cost approach analysis, Tillema took issue with her land valuations. Her report neither shows whether she confirmed sales transactions for her comparable sites nor includes a sales history. He also criticized her market-conditions adjustments. *The Appraisal of Real Estate* does not recognize her technique of developing that adjustment based on changes in retail capitalization rates, and he did not "buy it." She used national data that he believed was too broad to be applied to the local market and the subject property. Her technique led to negative adjustments of such a degree that he found them difficult to understand. *Resp't Ex. D at 19-20; Vol. III at 582-89.*
43. Tillema reiterated that the proper way to appraise the land would be to value it not merely as a commercial tract of land, but as the value of a "successful ongoing CVS operation." Tillema pointed out that Hooks SuperRx bought the site for \$2,236,100⁵ or \$1,552,847/acre in 2006. Yet Coers estimated its value at only \$1,010,000 to \$1,160,000 for the years under appeal. As he explained, the "difference between what the local market says a

⁵ Coers reports the purchase price for the assembled parcels as \$2,266,100. *Pet'r Ex. A at 10.*

...one-acre tract is worth and what national chain pharmacies are willing to pay is phenomenal.” *Resp’t Ex. D at 19-20; Vol. III at 582-89.*

44. Turning to Coers’ replacement cost calculations, Tillema criticized her decision not to include entrepreneurial profit, explaining that CVS would have expected profit from the building if it were ever sold. Also, given the zoning requirements, he questioned her conclusion that the building’s second story created functional obsolescence. His main criticism of Coers’ analysis, however, was that her technique for calculating obsolescence by reference to her value conclusions under the sales-comparison and income approaches had been “discredited.” *Resp’t Ex. D at 22-23; Vol. III at 591-99.*
45. Tillema next found that Coers did not clearly explain several calculations in her analysis under the income approach, which he felt led to some ambiguity. He also disapproved of the way she mixed valuation approaches in her cost-based rental technique. He similarly believed that it was not viable to calculate rent as a percentage of gross sales without using the sales from the subject store. He criticized her use of vacancy rates for general retail as opposed to something more appropriate to an ongoing pharmacy operation. He leveled a similar criticism at her expense estimates, saying they were more appropriate for general retail than for a CVS brand store. As for Coers’ selection of capitalization rates, Tillema reiterated his criticism that she was treating the property as general retail instead of as an ongoing CVS brand store. *Resp’t Ex. D at 24-26; Vol. III at 599-610.*
46. Moving to the Coers’ sales-comparison approach, Tillema argued that she used sales of properties that were not sufficiently comparable to the subject property. For example, he pointed to a sale from Carmel, which he described as a “dramatically different community” than Bloomington. Similarly, Coers used the sale of what Tillema described as a “shell” in Cincinnati that was turned into a Goodwill store, which he thought was a “long way from being a CVS.” He summed up his critique by saying, “The basis for all of that is that those sales comparisons don’t reflect an ongoing CVS, which is what true tax asks us to do. They not only don’t reflect it, they are not adjusted to reflect anyway[sic].” Indeed, he explained that was really the heart of his problem with Coers’ sales-comparison analysis,

indicating, “Again, I think what Sara did with this sales comparison approach is perfectly all right if you were going to value a...general retail operation. But it didn’t cut it as far as true tax value was concerned.” *Resp’t Ex. D at 27-30; Vol. III at 610-17.*

47. Tillema concluded by reviewing Coers’ final reconciliations. She gave the most weight to her analyses under the sales-comparison and income approaches. But Tillema did not believe there were sufficient sales or fee simple leases to do a proper analysis under those approaches if one appropriately considers the property as an ongoing pharmacy operation. Thus, he believed that the cost approach was the most appropriate method by which to value the property. Coers, however, relied on a flawed economic obsolescence adjustment, which he found made her analysis under that approach unreliable. *Resp’t Ex. D at 31-32; Vol. III at 617-20.*

3. Coers’ Response

48. Coers responded to Tillema’s allegations about various technical and minor errors in her report. *Vol. III 651-688.*
49. She also addressed many of his more significant criticisms. In support of her market analysis, Coers explained that USPAP gives her the latitude to report her conclusions the way she believes “fits the intended use and intended users.” Although she did not include a thorough analysis of the national recession in her report, she believed her description of the national retail conditions and their effect on Bloomington was sufficient. *Vol. III 664-66.*
50. Coers explained that her understanding of market value-in-use was different than Tillema’s, saying “My understanding of it is that it is – valuing for its use means you’re valuing it for what the building could be used for, not who’s exactly using it right then.” In her view, “the relative success of the business shouldn’t factor in, because it is what stands there...It is the sticks and bricks that should be important. Undue focus on the actual business in place means that you could end up taxing them based on, you know, that they

sell more goods than everybody else rather than...the actual real estate they are occupying.” *Vol. III 652-67.*

51. Coers agreed with Tillema’s assertion that national pharmacies are willing to pay more for land than a typical user. But in her view, that fact did not make the site’s market value-in-use greater than its market value. She disagreed with Tillema’s assertion that she should have included entrepreneurial incentive, reiterating her earlier explanation. She similarly reiterated her explanation for her non-traditional method for quantifying obsolescence. In any case, she did not include an obsolescence deduction in the costs she used for her cost-based rental analysis, which was ultimately the only thing from her cost-approach analyses that she used in her final opinions of value. *Vol. III 675-79.*
52. Turning to Tillema’s criticisms of her analysis under the income approach, and specifically her estimate of market rent based on a percentage of sales, Coers reiterated that using actual sales from the subject store would have risked valuing the business operating at the store instead of just the real property. *Vol. III 680-81.*
53. As for Tillema’s criticisms of her sales-comparison analyses, Coers explained that she chose her comparable sales for their physical similarity to the subject property. She did not believe it was necessary to use sales of ongoing pharmacy operations. In her view, including buildings that were converted to other types of retail use was appropriate, because the subject property has utility beyond a CVS brand store. *Vol. III 652-53; 681-82.*

4. Johnson’s Appraisal

54. The Assessor engaged Wayne Johnson of First Appraisal Group, Inc. to appraise the market value-in-use of the fee simple interest in the property. He holds MAI, RM, and MRICS designations and is an Indiana licensed appraiser. He is also a member of the Indiana Real Estate Appraiser Certification Board. He has been an appraiser for over

twenty-eight years and has appraised properties for the Indiana Department of Transportation, local courts, cities, towns, and law firms. *Vol. II at 265-77.*

a. Johnson's Research and Market Overview

55. Johnson identified the property's macro location as Monroe County and rated it as above average. He noted several contributory factors, including available social services, proximity to Lake Monroe, and the myriad opportunities available at Indiana University. He found that Bloomington's economy was unique because of the large student population and that it did not compare to other mid-sized cities in Indiana. He also made several points about the neighborhood, including that its population was increasing and that there was new construction of multi-family housing. *Resp't Ex. B at 11, 37-64; Vol. II at 268-69, 293-99.*

b. Johnson Cost Approach

56. Like Coers, Johnson developed all three generally recognized approaches, starting with the cost approach. He first valued the land using sales of nine vacant sites ranging from .18 acre (7,841 square feet) to .89 acre (38,768 square feet). Six of the nine sites were .35 acre (15,246 square feet) or smaller. They sold for prices ranging from \$17.45/sq. ft. to \$47.83/sq. ft. All of the sites were from the same neighborhood as the subject property, so he did not believe it was necessary to adjust any of the sale prices for location. He similarly determined that size adjustments were unnecessary, because he did not believe the data supported the typical notion that smaller parcels sell for higher per-unit prices. He thought that might have been due to the cost of assembling multiple lots for the larger sales. The majority of the properties Johnson used in his land valuation sold for residential or mixed use. When questioned about this, Johnson stated that he was unable to find perfect data of local properties with the same use as the subject property. Without this perfect data, he believed it was better to use less similar, local sales than to look outside Bloomington for more comparable properties. *Resp't Ex. B at 68-93; Vol. II at 304-312, 464-465.*

57. Johnson did adjust the sale prices by 2% per year to reflect differences in market conditions between the sale dates and the valuation date for each year at issue. He based that adjustment on “the demographic data, the indications of what housing rates have done, based on sales and resales, paired datasets of land, and improved properties as well.” He explained that while the economy slowed the rate at which real estate appreciated in Bloomington, it did not cause real estate to depreciate. Johnson arrived at adjusted site values ranging from \$30.75/sq. ft. to \$34.25/sq. ft., which translated to total site values ranging from \$1,925,000 to \$2,150,000 for the years at issue. *Resp’t Ex. B at 68-93; Vol. II at 304-12.*
58. Turning to the improvements, Johnson estimated their cost new using data from the Marshall Valuation Service. He considered the store to be a “good” drugstore property, from which he derived a base cost. He used a normal building height to account for the second story not being fully used. He then added costs for sprinklers, a canopy, and a reduced-rate mezzanine. He also applied multipliers for floor area, current cost, and local cost. He added an amount equaling 5% of hard costs to account for miscellaneous soft costs, and 12% percent for entrepreneurial profit. *Resp’t Ex. B at 94-97; Vol. II at 312-15.*
59. Johnson then used the age-life method to calculate physical depreciation. He extracted the building’s anticipated economic life from three sales of office buildings. He explained that his conclusion of 50 years was a little higher than what Marshall and Swift indicated, but he believed it was within an acceptable range and that data abstracted from the local market was more reliable than published data. After adding his final cost figures to his estimated site value, Johnson arrived at the following values for each year:

| Year | Value |
|-------------|--------------|
| 2009 | \$3,900,000 |
| 2010 | \$3,900,000 |
| 2011 | \$3,900,000 |
| 2012 | \$3,900,000 |
| 2013 | \$3,900,000 |

Resp’t Ex. B at 97-100; Vol. II at 315-17.

c. Johnson's Sales-Comparison Approach

60. Johnson also developed the sales-comparison approach, but he did not give it significant weight because of the lack of sufficiently comparable sales in the local market. *Resp't Ex. B at 129; Vol. II at 317-18, 330-31.*
61. All of Johnson's sales were from Bloomington. They included four strip centers, a former Ponderosa that was converted to a Post Office, and a Bedroom One. He believed there might have been issues with two of the strip centers sales, so he did not give them much weight. He reported sales involving two CVS brand stores, but he excluded them from his analysis because he thought they were leased fee transactions. *Resp't Ex. B at 102-110; Vol. II at 318-21.*
62. He adjusted the sale prices for location, market conditions/time, size, and effective age/condition. Based on those adjusted sale prices, Johnson settled on values ranging from \$2,850,000 to \$3,160,000 for the years at issue. *Resp't Ex. B at 97-100, 111-17; Vol. II at 315-17, 321-22.*

d. Johnson's Income Approach

63. Johnson began his analysis under the income approach by examining the property's lease. Like Coers, he ultimately did not use the lease in his valuation because he was valuing a fee simple, rather than a leased fee interest in the property. He also examined leases for other CVS brand stores, but came to the same conclusion. *Resp't Ex. B at 130; Vol. II at 322.*
64. Johnson therefore turned to leases for other Bloomington-area properties. They included freestanding retail buildings, units within strip centers, and an office building. The properties were between 7,500 sq. ft. and 19,292 sq. ft., and the lease rates ranged from \$6.00/sq. ft. to \$28.25 /sq. ft., with an average \$14.57/sq. ft. He ultimately chose rent of \$20/sq. ft. to \$22/sq. ft. for the subject property, depending on the assessment year. Although he acknowledged those rates were at the high end of his range, he believed they

were appropriate based on his knowledge of the area, the comparable properties, and typical rates of return. He would have preferred data for larger rental properties in retail areas. But that data was not available, and he believed it was more important to use local data than to use data for more physically similar, but distant properties. *Resp't Ex. B at 130-43; 156-58; Vol. II at 323-26, 489-94.*

65. Based on his opinion of the local market, Johnson deducted 2.5% of potential gross income to account for vacancy and collection loss, 3% of EGI to account for management and administration expense, and 1.5% of EGI for reserves. *Resp't Ex. B at 143-45; Vol. II at 326-327.*
66. In developing his capitalization rate, Johnson examined leases of CVS brand store, but once again did not rely on them because he was valuing a fee simple, rather than a leased fee interest in the property. Instead, Johnson examined national survey data from PWC and Realty Rates. Johnson also used a band-of-investment technique to develop an overall rate based on mortgage rates and desired equity yields. Finally, Johnson extracted overall rates from the market by examining sales from his appraisal files. Those sales included office buildings, a professional building, a retail building, and a strip center. After reconciling his conclusions under those three techniques, Johnson arrived at a capitalization rate of 7% for each year under appeal. He then divided that rate into his estimated NOI to arrive at the following values:

| Year | Value |
|-------------|--------------|
| 2009 | \$3,500,000 |
| 2010 | \$3,600,000 |
| 2011 | \$3,675,000 |
| 2012 | \$3,765,000 |
| 2013 | \$3,850,000 |

Resp't Ex. B at 145-59; Vol. II at 327-31.

e. Johnson’s Reconciliation

67. In reconciling his conclusion under the three approaches, Johnson gave the most weight to the cost approach, which he felt was supported by the income approach. As explained above, he gave little weight to his conclusions under the sales-comparison approach. He settled on the following amounts as his final opinions of value:

| Year | Final Opinion |
|-------------|----------------------|
| 2009 | \$3,700,000 |
| 2010 | \$3,750,000 |
| 2011 | \$3,800,000 |
| 2012 | \$3,825,000 |
| 2013 | \$3,875,000 |

Resp’t Ex. B at 160-62; Vol. II at 331.

C. Higgins and Surface Testimony

68. Carla Higgins, a certified tax representative for CVS, and Ken Surface, a consultant for the Assessor, both testified about various assessments in the Bloomington area. *Vol. I. 251-53; Vol. II 514-27.* But CVS has not asked for an equalization adjustment, and evidence of other assessments bears far less weight on the question of the property’s true tax value than the competing appraisals. Therefore, we will not recount that evidence here.

CONCLUSIONS OF LAW AND ANALYSIS

A. Burden of Proof

69. Generally, a taxpayer seeking review of an assessing official’s determination has the burden of making a prima facie case both that the current assessment is incorrect and what the correct assessment should be. If the taxpayer makes a prima facie case, the burden shifts to the assessor to offer evidence to impeach or rebut the taxpayer’s evidence.

70. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances. Where the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, the assessor has the burden of proving that the assessment under appeal is correct. I.C. § 6-1.1-15-17.2(b). The assessor similarly has the burden where a property's gross assessed value was reduced in an appeal, and the assessment for the following year represents an increase over "the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase...." I.C. § 6-1.1-15-17.2(d).
71. In any case, if an assessor has the burden and fails to meet it, the taxpayer may offer evidence of the correct assessment. If neither party offers evidence that suffices to prove the property's correct assessment, it reverts to the previous year's value. *See* I.C. § 6-1.1-15-17.2(b).
72. Here, the parties agreed, and property record cards confirm, that CVS has the burden for 2009. Under Ind. Code § 6-1.1-15-17.2(d), the burden for each succeeding year turns on our decision for the preceding year. For example, if we order a reduction for 2009 that lowers that assessment below the 2010 level, the Assessor will have the burden in the 2010 appeal. In a case like this, where both sides offer appraisals from highly qualified experts, the burden question is largely theoretical. We must weigh the evidence to determine what most persuasively shows the true tax value for each year under appeal.

B. Tillema Review and Indiana's True Tax Value Standard

73. Before we weigh the merits of Johnson's and Coers' appraisals, we address Tillema's key criticism of Coers' appraisal—that she effectively appraised the property's market value rather than its true tax value.
74. Tillema's criticism stems from his and Coers' different understandings of Indiana's true tax value standard. The legislature has directed that real property be assessed based on its true

tax value, “which does not mean fair market value,” but rather “the value determined under the rules of the [Department of Local Government Finance (“DLGF”)].” I.C. § 6-1.1-31-7(c).⁶ Thus, the legislature left it to the DLGF to create a constitutionally acceptable standard for true tax value. The DLGF did so in the 2002 and 2011 Manuals, defining true tax value as:

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

2002 MANUAL at 2; *see also*, 2011 MANUAL at 2.⁷

75. The 2002 Manual offers further guidance regarding that standard. For example, it defines “market value-in-use,” “value in use,” and “use value,” as being synonymous. 2002 MANUAL at 6-8. It also speaks to measuring property wealth by the utility obtained from a property. It offers guidance for when a property’s true tax value will equal its value-in-exchange, such as when properties are frequently exchanged and used for the same purposes by the buyer and seller. It similarly offers examples of when the two will differ, such as when a property qualifies as special-purpose or in markets where sales are not representative of utility. *Id.* at 2, 4. The 2011 Manual has a more condensed discussion about true tax value. *See* 2011 MANUAL at 2-3. We do not find that by condensing the discussion the DLGF intended to change the true tax value standard, whether in response to judicial interpretations of the 2002 Manual or otherwise.
76. When one considers the applicable statutes and the language from the 2002 and 2011 Manuals, the following picture emerges. True tax value is something other than purely market value or value-in-use. Given mandates from the Indiana Supreme Court and the legislature, the DLGF created a valuation standard that relies heavily on what it terms objectively verifiable data from the market, but that still maintains the notion of property

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

⁷ The definition in the 2011 Manual is identical except for one word: “The market value-in-use of a property for its current use, as reflected by the utility received by the owner or *by* a similar user, from the property.” 2011 MANUAL at 2 (emphasis added).

wealth gained through utility, and therefore recognizes situations where true tax value will differ from market value.

77. Tillema and Coers differ on what those situations are. Tillema consistently asserts that the subject property should be valued as an “ongoing retail pharmacy.” He argues that Coers has erred by appraising the store as a general retail operation, and in doing so, failed to capture all of the utility received by the property’s occupant.
78. Coers interprets the true tax value standard more broadly, and the Tax Court agrees. *See Meijer Stores Ltd. P’ship v. Smith*, 926 N.E.2d 1134 (Ind. Tax Ct. 2010); *Stinson v. Trimas Fasteners*, 923 N.E.2d 496, 497 (Ind. Tax Ct. 2010); and *Millenium Real Estate Investment, LLC v. Benton County Assessor*, 979 N.E.2d 192 (Ind. Tax Ct. 2012).
79. In *Meijer Stores*, the Board had rejected the sales-comparison analysis of Meijer’s appraiser because he relied on sales of vacant big-box stores originally owned by Walmart and Lowes to “secondary” users, such as Big Lots or Hobby Lobby. *Meijer Stores*, 926 N.E.2d at 1137. The Tax Court disagreed. It initially quoted from the portion of the 2002 Manual explaining that the sales-comparison approach may be used to determine a property’s market value-in-use “[w]hen others could feasibly use the property for the same *general* commercial or industrial purpose e.g. [,] light manufacturing [or] general retail[.]” *Id.* at 1136 (*quoting* 2002 MANUAL at 4) (emphasis added). The Court went on to explain:

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

926 N.E.2d at 1137 (emphasis in original, citations to record omitted). Put another way, a property's market value-in-use "should be measured against properties with a comparable use, as opposed to properties with identical users." *Shelby County Assessor, v. CVS Pharmacy, Inc.* #6637-02, 994 N.E.2d 350, 354 (Ind. Tax Ct. 2013).

80. In *Trimas Fasteners*, an assessor appealed from the Board's determination involving a 200,000-square-foot owner-occupied manufacturing facility. *Trimas Fasteners*, 923 N.E.2d at 497. The parties had offered competing appraisals (two from the assessor and one from the taxpayer). The Board found the taxpayer's appraisal, which used sales of manufacturing facilities without leases in place, more persuasive than the other appraisals, which relied on sale-leasebacks. *Id.* at 498-99.
81. On judicial review, the assessor contended that the vacant facilities used by the taxpayer's appraiser did not reflect the market value-in-use of the property under appeal, which was occupied. *Id.* at 501. The Court rejected that argument. Among other things, it found that the assessor misunderstood "the concept of market value-in-use on its most basic level." *Id.* As the Court explained, "[g]enerally speaking, market value-in-use, as determined by objectively verifiable market data, is the value of a property *for* its use, not the value *of* its use." *Id.* (citing 2002 MANUAL at 2-3) (emphasis in original). For support, the Court pointed to the 2002 Manual's statement that, "in markets where property types are frequently exchanged and used by both buyer and seller for the same *general purpose*, a sale will be representative of utility and market value-in-use will equal value-in-exchange." *Id.* at n.10 (citing 2002 MANUAL at 2-3) (emphasis added). The Court recognized that the Manual provided an exception to that rule and that sales will generally not represent utility for special-purpose properties. *Id.* The appraisers, however, agreed that the property at issue was not special purpose. *Id.*
82. Finally, in *Millenium Real Estate*, a taxpayer claimed that because Indiana's assessment system is based on market value-in-use, the Board had erred in relying on an appraisal that estimated the property's market value. *Millenium Real Estate*, 979 N.E.2d at 195-96. The Court disagreed, explaining, "[w]hile Indiana assesses real property on the basis of its

market value-in-use, this does not mean that a subject property's assessed value and its market value will never coincide." *Id.* at 196. Thus, "when a property's current use is consistent with its highest and best use, and there are regular exchanges within its market so that ask and offer prices converge, a property's market value-in-use will equal its market value because the sales price fully captures the property's utility." *Id.* at 196 (*citing* 2002 MANUAL at 2). By contrast, when a property's current use and highest and best use are inconsistent with each other, "market value-in-use will not equal market value because the sale price will not reflect the property's utility." *Id.*

83. Read together, *Meijer Stores*, *Trimas Fasteners*, and *Millenium Real Estate* mean that where a non-special-purpose property is put to its highest and best use and is of a type that regularly exchanges for the same *general* use, the property's true tax value will equal its market value. See *In re Majestic Star Casino, LLC*, 457 B.R. 327, 363 (Bankr. D. Del. 2011) *findings adopted* 2013 U.S. Dist. LEXIS 174894 (D. Del. Dec. 10, 2013) ("Taken together, *Trimas Fasteners* and *Meijer Stores* clearly direct that what matters most for purposes of determining "market value-in-use" is not whether the sales comparables were in business and operating on the date of sale, but whether the properties' 'use'—both before and after sale—was generally the same (*i.e.* retail use, manufacturing use, gaming use.")).⁸ The Assessor's own experts, including Tillema, acknowledged that this was not a special-purpose property. See *Vol. II at 455, Vol. III at 637.*
84. Indeed, the view expressed by Tillema and the Assessor appears to be less an attempt to follow the Tax Court's decisions than an argument that those decisions are wrong. Another assessor made a similar claim in *CVS Pharmacy*. In that case, the assessor argued that because the property under appeal was "tailored to the wants and needs of CVS, its market value-in-use [could] be measured only in relation to other CVS stores, not to participants in the commercial/retail market generally." *CVS Pharmacy*, 994 N.E.2d at 353. The Board

⁸ *Majestic Star* involved the assessment of a riverboat casino. Indiana Code § 6-1.1-4-39.5 generally defines the true tax value of those properties as the lowest valuation determined by applying the cost, sales-comparison, and income-capitalization approaches. We cite to *Majestic Star* for its analysis of how the Tax Court has interpreted the DLGF's true tax value standard. We make no finding regarding how that standard relates to the statutory definition of true tax value for riverboat casinos.

had rejected the assessor's use of the property's actual rent from a sale-leaseback, which the Board found captured more than just the value of the real property. The Tax Court held that the Board's findings were supported by the record as well as its decisions in *Meijer Stores, Trimas Fasteners, and Grant County Ass'r v. Kerasotes v. Showplace Theatres, LLC*, 955 N.E.2d 876, 882-83 (Ind. Tax Ct. 2011). The Court noted the assessor was really arguing that those cases were wrongly decided and were impermissibly attempting to convert Indiana's market value-in-use system to a fair market value system. The Court disagreed and stood by its holdings. *CVS Pharmacy*, 994 N.E.2d at 354 n.5.

85. We do not mean to imply that the degree of similarity between the subject property's use and the uses of comparable properties is irrelevant. All else being equal, sales or leases of drugstores, as opposed to more general types of retail operations, might be the best indicators of the subject property's true tax value. But that does not mean sales and leases of other retail properties are irrelevant or that an appraiser's reliance on them necessarily means she is appraising something other than the property's true tax value.
86. After the Tax Court decided the cases discussed above, the General Assembly enacted 2015 Ind. Acts 249,⁹ relevant parts of which are codified in Ind. Code § 6-1.1-4-44 as follows:
- (a) This section applies to a real property assessment of commercial nonincome producing real property, including a sale-leaseback property, for:
 - (1) the 2014 assessment date and assessment dates thereafter; or
 - (2) any assessment date, if an assessment appeal is pending before the county property tax assessment board of appeals or the board of tax review.
 - ...
 - (c) As used in this section, "sale-leaseback" means a transaction in which one (1) party sells a property to a buyer, and the buyer leases the property back to the seller.
 - (d) In determining the true tax value of real property under this section which has improvements with an effective age of ten (10) years or less under the rules of the department, a comparable real property sale may not be used if the comparable real property:

⁹ The Governor signed the Act on May 6, 2015, and the relevant portions apply to all appeals pending before the Board.

- (1) has been vacant for more than one (1) year as of the assessment date or in the case of industrial property vacant for more than five (5) years;¹⁰
- (2) has significant restrictions placed on the use of the real property by a recorded covenant, restriction, easement, or other encumbrance on the use of the real property;
- (3) was sold and is no longer used for the purpose, or a similar purpose, for which the property was used by the original occupant or tenant; or
- (4) was not sold in an arm's length transaction.

I.C. § 6-1.1-4-44.

87. This statute is relevant to these appeals. It limits the sales that may be used in determining the true tax value for properties, like the subject property, that have been part of a sale-leaseback transaction. As discussed below, that has ramifications for the experts' sales-comparison analyses in these appeals. But it does not purport to significantly change the true tax value standard as interpreted by the Tax Court.
88. Tillema criticized various other aspects of Coers' appraisal. As Tillema himself admitted, however, his major point of contention was with Coers' understanding of true tax value, and many of his specific criticisms flow from that dispute. Because we find that Tillema's interpretation of true tax value departs from the Tax Court's, we are not persuaded by any of Tillema's criticisms that are based on his difference of opinion with Coers on that point. We also note that Tillema's core criticism would apply with equal force to much of Johnson's appraisal. He too viewed the property as a general retail building. Indeed, his sale and lease comparables strayed even further afield from a national retail pharmacy use than did Coers' comparables.
89. Finally, Tillema asserted that Coers' land values under her cost approach were inconsistent with the 2006 purchase price of the subject land. While Coers did not heavily rely on the cost approach, we discuss this criticism in order to address the disparity between the 2006 purchase price of the land and our final determinations of value. As discussed above, neither we, nor Coers and Johnson, hold with Tillema's view that this non-special purpose

¹⁰ We address subsection (1) in our analysis of Coers' sales-comparison technique below.

property can only be valued as a national retail pharmacy. The land is not “national retail pharmacy land”, it is land zoned for commercial use in Bloomington, Indiana. Both Coers and Tillema assert that CVS is willing to pay more for land than other actors in the local market. Tillema even goes so far as to characterize that difference as “phenomenal.” We do not find that the willingness of one specific type of business to overpay for land necessarily makes that land more valuable under the market value-in-use standard. The local market still dictates the value of non-special purpose property. And as discussed above, all of the experts agreed this was not a special purpose property. Moreover, because neither Johnson nor Coers attempted to value the subject property using this 2006 pre-recession sale, we do not give that sale price any weight.

C. Coers’ Conclusions under the Income Approach are more Reliable than Johnson’s Valuation Opinions

90. Having dismissed Tillema’s main criticisms, we must still weigh Johnson’s and Coers’ appraisals. There are legitimate criticisms to both and we will address those criticisms, as well as the strengths of each appraisal, in turn. As explained below, we ultimately find Coers’ conclusions under the income approach to be the best evidence of the property’s true tax value.

1. Coers’ Opinions

a. Coers’ Sales Comparison Approach

91. As discussed above, the legislature recently enacted Ind. Code § 6-1.1-4-44, which limits the sales that may be used to determine the true tax value of certain nonincome producing properties. On its face, the statute applies to “any assessment date, if an assessment appeal is pending before ... the board of tax review.” I.C. § 6-1.1-4-44(a)(2). We had already held the hearing and the parties had submitted their briefs before the statute was enacted. We therefore gave the parties opportunity to file supplemental briefs on how the statute affects these appeals.

92. Despite having that opportunity, CVS merely argued (1) that the statute was unconstitutional,¹¹ and (2) that it did not apply to the subject property because the property was leased, and therefore was “nonincome producing.” As explained above, the property was part of a sale-leaseback transaction, and the statute expressly applies to the assessment of “commercial nonincome producing real property, *including a sale-leaseback property.*” I.C. § 6-1.1-4-44(a). CVS argues that the reference to sale-leaseback properties describes a subset of “nonincome producing” properties rather than an additional class of properties to which the statute applies. Under CVS’s interpretation, however, it is difficult to posit what that subset would be, given that the existence of a lease would automatically exclude a property from being “nonincome producing,” and sale-leaseback properties are leased by definition. We find the legislature plainly intended the statute to apply to leased properties where the lease arose from a sale-leaseback.
93. Having committed itself wholly to the argument that Ind. Code § 6-1.1-4-44 does not apply, CVS neglected to analyze how the provisions in subsection (d)(1) affect Coers’ comparable sales. A party must walk the Board through its evidence; it cannot assume the evidence speaks for itself. *See Long v. Wayne Twp. Ass’r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). Given what we view as the statute’s general applicability to these appeals, Coers’ comparable sales cannot stand on their own without some analysis of Ind. Code § 6-1.1-4-44(d)(1). We will not make a party’s case for it, so we give no weight to Coers’ conclusions under the sales comparison approach.¹²

b. Coers’ Cost Approach

94. The Assessor made much of the fact that Coers quantified obsolescence based on her conclusions under the sales-comparison and income approaches. The Tax Court has recognized the validity of Coers’ methodology. *E.g., Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269, 275 (Ind. Tax Ct. 2005); *see also Trimas Fasteners*, 923 N.E.2d at

¹¹ As an administrative agency, we cannot declare a statute unconstitutional on its face. *Bileski v. Zorn*, 627 N.E.2d 880, 888 (Ind. Tax Ct. 1994).

¹² The Assessor made a number of arguments that Ind. Code 6-1.1-4-44 rendered Coers’ sales comparison approach unreliable. Because we give Coers’ conclusions under that approach no weight, we need not address the Assessor’s arguments.

499 n.6. In any case, as Coers repeatedly explained, she did not ultimately rely on her obsolescence quantification in forming her opinions of value. Indeed, she relied on the cost approach only to the extent she used the site value and physically depreciated replacement costs as part of her cost-based method for estimating market rent under the income approach. She did not include obsolescence in that analysis.

95. The Assessor also took issue with Coers' use of sales from various areas around Bloomington without making location adjustments. We find that troubling. Coers herself acknowledged the superiority of the property's location within Bloomington. Unlike her quantification of obsolescence, her conclusions on land value affected her ultimate valuation opinions because they factored into the overall costs used in her cost-based method for estimating market rent.

c. Coers' Income Approach

96. The Assessor found fault with the techniques Coers used to calculate market rent. Both she and Tillema criticized Coers' use of CVS brand store subleases. Coers, however, acknowledged that the subleases were low and explained that she relied more heavily on rent estimates based on a return on cost and percentage of gross sales. Although the Assessor and Tillema faulted Coers for estimating rent as a percentage of gross sales without using the subject store's actual sales, we are persuaded by her explanation that doing so would have risked valuing the operator's business enterprise instead of just the real property. As explained above, however, Coers' rent estimate as a function of return on cost concerns us in light of the shortcomings in her determination of land values, which was one of the components of that cost. Nonetheless, she used other methods to estimate market rent and we find her ultimate estimate sufficiently reliable.
97. The Assessor also takes issue with Coers' choice of capitalization rates. Coers relied on national and regional data, while Johnson combined regional and national data with rates extracted from the local market. Of course, Johnson extracted his local data largely from sales of properties that were dissimilar to the subject property, including office and

professional buildings. Leaving that aside, the Assessor raises a valid concern, and not just regarding Coers' choice of capitalization rates. The Assessor faults Coers for relying on aggregate national and regional data throughout her report. Broadly speaking, an appraiser's use of national or regional survey data, without confirming how that data applies to the market in which the property being appraised competes, may detract from the reliability of her valuation opinion. But here, the experts, and Johnson in particular, explained at length that Bloomington receives significant regional and national investment. Under those circumstances, we find Coers' use of regional and national data reasonable.

98. Finally, the Assessor claims that Coers based her sales-comparison analysis on data prohibited by Ind. Code § 6-1.1-4-44. Because she came to similar value conclusions under the income approach, the Assessor argues that we should dismiss Coers' finding under that approach as well. We disagree.
99. Foremost, the Assessor bases her position on flawed logic. Assuming her underlying premise is correct—that Coers used sales data prohibited by the newly enacted statute in her opinion under the sales comparison approach—that fact does not affirmatively prove that a similar value determined under the income approach is also invalid. Rather, the Assessor must show that the income approach opinion is invalid because Coers relied on prohibited sales data in her income approach. The Assessor has failed to make such a showing. The Assessor has failed to direct the Board to the comparable property sales Coers specifically relied upon in her income approach or to provide evidence of the periods during which the properties were vacant relative to the assessment date. Because the Assessor has failed to show that Coers “used” prohibited comparable sales, the Board does not find that Coers' opinion under the income approach must be disregarded under Ind. Code 6-1.1-4-44.

d. Coers' Reconciliation

100. Coers relied primarily on the sales-comparison and income approaches. In her opinion, market participants would have given the cost approach little weight when valuing the subject property during the years at issue in these appeals. The cost approach assumes

potential buyers will pay no more for a property than it would cost to buy an equally desirable substitute parcel of vacant land and build an equally desirable substitute improvement. *See* 2002 MANUAL at 13. As Coers explained, retail property was not being built in the subject property's market area during most of the years at issue, which spanned an historical recession and its aftermath. We therefore find it reasonable to conclude that the income and sales-comparison approaches better capture market influences during the years at issue than does the cost approach. Although we give no weight to Coers' sales-comparison analysis, her analysis under the income approach is credible.

2. Johnson's Opinions

101. Johnson gave little weight to his conclusions under the sales comparison approach, relying instead most heavily on the cost approach, and to a lesser extent on the income approach. There are significant problems with his analyses under both approaches. For those reasons, which we explain in more detail below, we find his opinions less reliable than Coers' conclusions under the income approach.

a. Johnson's Cost Approach

102. Johnson relied so heavily on the cost approach in part because he did not feel that he had as reliable data for the other two approaches. We acknowledge that an appraiser must work with the data available and should not rely on an approach that has insufficient or low quality data. Johnson, however, did not look beyond Bloomington for sales or lease data.¹³ We have no qualms with his preference for local data. But we are not persuaded that the Bloomington market is so distinctive as to preclude using properly adjusted data from other markets. Also, as explained above, we are persuaded by Coers' opinion that buyers were unlikely to have relied very heavily on the cost approach. That is particularly true during the first few years at issue, where there was little newly constructed retail space other than projects that were already in the pipeline before the recession.

¹³ The Assessor suggests in her brief that Johnson chose certain comparable sales based on his past familiarity with those transactions and property owners. We do not find that local knowledge removes the requirement that appraisers must support their conclusions with reliable data. An appraiser's reliance on experience and accumulated file data is not a substitute for a probing analysis.

103. CVS offered two significant criticisms of Johnson’s analysis under the cost approach. First, it took issue with Johnson’s land sales because the properties were not sold strictly for retail use and were all significantly smaller than the subject site. Second, it argued that Johnson should have accounted for physical depreciation and economic obsolescence.¹⁴
104. We agree that that Johnson’s choice of land sales is problematic. The Appraisal of Real Estate explains, “Whenever possible, an appraiser should avoid using sales that differ substantially in size from the appraised parcel. Parcels of greatly different size appeal to different sectors of the market and command much different unit prices.” *Pet’r Ex. A at 53 (Appraisal of Real Estate, 14th ed. at 44)*. Johnson justified his choice of comparables on grounds that the sale prices did not support the conclusion that parcel size affected unit price. But none of his sales involved parcels that were even three quarters the size of the subject parcel. In fact, six of the nine sales involved parcels of less than .35 acres. Under those circumstances, we cannot say with any confidence that Johnson had sufficient data to justify his conclusions. The size disparity is even more troubling when one considers that none of the sites appears to have been bought with the intent of constructing a freestanding retail building or that doing so would even have been physically possible.
105. CVS’s criticisms of Johnson’s market-conditions adjustment and his judgment that the property did not suffer from external obsolescence also have merit. Johnson supported his market-conditions adjustment in several ways. He pointed to economic data, including the increase in student population and continued construction of multi-family housing projects, to show that Bloomington was unique in its resistance to the recession. He also pointed to the trend line for his land sales, which continued upward through the recession. Finally, he analyzed paired sales for three vacant parcels and five office buildings.

¹⁴ CVS also incorrectly claimed that Johnson neglected to include physical depreciation for each year. CVS’s confusion may arise from the fact that he also included a positive market-conditions adjustment to his land sales, which after rounding, led to identical total values for each year.

106. The economic data, however, is a mixed bag. CVS and Coers pointed to the decline in housing permits, and a rise in unemployment, albeit one that was less than the state average. Coers also testified that national and regional economic conditions necessarily affected the Bloomington market. Indeed, all the expert witnesses stressed how Bloomington received significant outside investment. Those facts make it less likely that Bloomington was as impervious to the recession as Johnson suggests. Similarly, his analysis of paired sales for a single property type (office buildings) does little to support his broader conclusions about appropriate market-conditions adjustments or the lack of economic obsolescence. In any case, while much of his data came from paired sales that spanned several years, he simply applied an average rate of annual appreciation. That is both imprecise, and given economic volatility during the years spanning these appeals, difficult to believe.
107. The dissimilarity in size between most of Johnson's purportedly comparable sites and the subject site, coupled with our concerns about Johnson's market-conditions adjustment and determination that the subject property was free from external obsolescence, significantly detract from the reliability of his conclusions under the cost approach.

b. Johnson's Income Approach

108. CVS also pointed out serious problems with Johnson's analysis under the income approach. He estimated market rent by examining leases in the local market. But the majority of those leases were not from comparable properties. For example, he primarily used leases of strip centers and offices instead of freestanding buildings leased to retail users. As discussed above, Johnson acknowledged the shortcomings in his data but felt it was more important to use local data than to find properties from farther away that were more physically comparable to the subject property. As also discussed, we are not persuaded that Bloomington is so distinct as to preclude using properly adjusted data from other markets. Even if we were to accept Johnson's premise that his flawed data is the best available, it does not make the data any less flawed or his decision based on it any more reliable.

109. In addition, as CVS pointed out, the average rental rate for Johnson's leases was \$14.57/sq. ft. Only three of his 22 leases were above \$19.00/sq. ft., and they were some of the least comparable properties, including a lease for an office of less than 2,500 square feet. Yet Johnson used a range of \$20.00/sq. ft. to \$22.00/sq. ft. to estimate market rent for the subject property.

c. Johnson's Sales-Comparison Approach

110. We agree with Johnson's judgment that his sales-comparison data was too dissimilar to the subject property and required adjustments that were too significant for it to carry much weight.

d. Johnson's Reconciliation

111. There are significant problems with Johnson's analyses under the two approaches to which he gave real weight. And given the economic conditions, including the dearth of new construction, we find the cost approach to be generally less reliable as an indicator of true tax value, particularly for the first few years at issue in these appeals.

C. Conclusions

112. We recognize that this is a difficult valuation assignment. And both sides have convincingly pointed to at least some problems that detract from each appraiser's valuation opinion. Ultimately, we find Coers' conclusions under the income approach more reliable than Johnson's valuation opinions. Those conclusions are based on more reliable, albeit less locally targeted, data, and for the first three years at issue in particular, are premised on an approach that more likely reflected the thinking of market participants. The assessments must therefore be changed to correspond to Coers' conclusions under the income approach.
113. That is a straightforward proposition for 2010-2013. For 2009, a little more is required. The valuation date for that year was January 1, 2009. In applying the income approach, however, Coers valued the property as of March 1, 2009. She adjusted her reconciled conclusion for that year, which she based on changes in market surveys of capitalization

rates and the consumer price index to reflect a value as of the appropriate valuation date. We use the same divisor (.9607) to adjust her value conclusion under the income approach.

114. We therefore order that the subject property's assessments be changed to the following values:

| Year | Total Assessment |
|-------------|-------------------------|
| 2009 | \$2,456,542 |
| 2010 | \$2,110,000 |
| 2011 | \$2,290,000 |
| 2012 | \$2,380,000 |
| 2013 | \$2,620,000 |

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review 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>>.