

WHO TURNED OUT THE LIGHTS: CONSIDERING “DARK STORE” VALUATION FOR PROPERTY TAX AND ITS APPLICATION TO POST-PANDEMIC OFFICE SPACE

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“If there are big box or other chain retailers in your community, your property taxes may be going up . . . because certain commercial properties have been able to obtain special tax reductions . . . known as the ‘Dark Store Loophole.’”²

I. INTRODUCTION

All businesses pay property tax to their locality, yet, in the eyes of these local governments, not all businesses are “equal.” To illustrate, Business A and Business B are located next to each other on comparable land and occupy almost identical buildings. Common sense dictates they would have similar property values and tax liabilities. However, Business A, a national retailer, sells more products and services than Business B, a local “mom and pop” shop. Because of this difference, the local government values Business A’s property higher, resulting in a higher property tax bill. Business A wants to contribute to its community but believes it should only pay its fair share. As such, it contests its property value with the local government and submits evidence of a lower value using recent retail sales, including vacant buildings. When the area press catches wind of this appeal, it becomes front

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² Lake Mills TV, *Dark Store Tax Loophole PSA*, YOUTUBE (Sept. 12, 2018), <https://www.youtube.com/watch?v=Tca4qczqB50> [<https://perma.cc/KJ3S-6SRF>].

page news. Despite never causing trouble or need for increased municipal services and being an active sponsor of local charities, the article contains strong rebukes from local government officials who denounce the appeal and question Business A's commitment to the community. Business A likes operating in this locality, but continued overvaluation and high property taxes hurts its ability to do so. Due to high property taxes coupled with a property value far greater than the building could sell for, its managers felt they had no recourse besides appealing.

Instances like this are incredibly common. Though assessment appeals are merely property owners or occupants pursuing fee simple valuation of their property, the universal valuation standard for property tax, localities have deemed such appeals by retailers to be an abuse of the "dark store loophole."³ The term *dark store*, or *dark storing*, is derived from using sales of comparable, but vacant, properties in support of businesses' property valuation appeals.⁴ These appeals often result in reduced property values, and thus, lower property taxes.⁵ Local governments base their operating budgets on these national retailers' inflated property values, so repeated losses in court, and subsequent refunds for tax overpayments, cause a steep decrease

³ See *id.*; see David C. Lennhoff & Richard L. Parli, *Through the Looking-Glass: Debunking the "Dark Store" Idiom*, APPRAISAL J. 180, 181–82 (2019) ("[I]nappropriate incorporation of the business interest of the occupant of real estate can result in a value in use or investment value conclusion rather than a market value conclusion" of the fee simple interest).

⁴ Lake Mills TV, *supra* note 2; WisconsinEye, *WisEye: Property Tax 'Dark Store Loopholes' Ballot Referendum*, YOUTUBE (Nov. 2, 2018), <https://www.youtube.com/watch?v=QhLJLe66sxo&t=25s> [<https://perma.cc/7MCG-LAM5>].

⁵ WisconsinEye, *supra* note 4.

in expected tax revenue, draining local budgets.⁶ Because of this, the International Association of Assessment Officers (IAAO), a national organization comprised of locality assessors and appraisers, declared war on this valuation method.⁷ The organization claims dark storing is an improper appraisal theory that is detrimental to localities and their residents.⁸

What the IAAO presents as sound appraisal theory rests on shaky ground. Their position can be best summarized as follows: national retailers' properties should be valued higher because of the business they do within the buildings' four walls, not because of the actual real property itself.⁹ This is not only unfair, but also counter to property taxation's goal of value uniformity. There is no dark store loophole, only IAAO propaganda trying to distract localities' residents from the reality of their local governments' poor appraisal and budgeting practices.

The dark store loophole mythology is a topic consistently at the forefront of the property tax profession, and the COVID-19 pandemic did little to temper that. In spite of government-mandated lockdowns, expenses like

⁶ See Danedri Herbert, *Dark Store Showdown: Executive Back Bus over JoCo Tax Assessments*, THE SENTINEL (Feb. 28, 2018), <https://sentinelksmo.org/dark-store-showdown-executives-back-bus-over-joco-tax-assessments/> [<https://perma.cc/34Y2-7CDT>] (stating the Johnson County Board of Commissioners Chair Eilert's concerns that "if all retailers are assessed using dark store methods," the county's taxing jurisdictions could lose "tens of millions").

⁷ See generally Paul Welcome et al., *Commercial Big Box Retail: A Guide to Market-Based Valuation*, INT'L ASS'N OF ASSESSING OFFICERS (Sept. 2017) (identifying issues in the dark store controversy and providing IAAO procedure for valuation of big box retail properties).

⁸ *Id.* at 4–5.

⁹ Herbert, *supra* note 6 (quoting Chair Eilert commenting on "dark store theory only valu[ing] the walls and the ceiling of a commercial building" while not considering the "thousands of people going in" and "tens of millions . . . in sales" annually).

property taxes were still incurred by property owners on vacant offices and storefronts.¹⁰ With a sharp decline in revenues, businesses increasingly sought to control their property tax liability through valuation appeals.¹¹ Even now, with the country reopening, many office-based employers still have not returned to in-person work full or even part-time.¹² Some large companies are even allowing employees to permanently work remotely.¹³ With increased vacancy across all sectors of real estate, an opportunity exists to expand dark storing to other classes of property. This Note will discuss the reality of dark store valuation, why it is solidly grounded in appraisal and legal theory, and how its application can be expanded to seek property tax reductions for office space.

II. BACKGROUND

¹⁰ See Ann Carns, *Property Taxes Are Probably Still Due Despite Coronavirus*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/your-money/coronavirus-property-taxes.html> [<https://perma.cc/2ZC8-7HUC>] (discussing that while some localities may extend property tax payment deadlines, payments will still come due at some point so that local government can function).

¹¹ See Cris K. O’Neill, *3 Ways COVID Changed Property Taxes*, COM. PROP. EXECUTIVE (Sept. 1, 2021), <https://www.commercialsearch.com/news/3-ways-covid-changed-property-taxes/> [<https://perma.cc/4UZU-DS5B>] (discussing how “COVID-19 has tested and . . . expanded the valid reasons taxpayers can cite to provide property value declines and seek property tax reductions”).

¹² See Jessica DiNapoli, *PwC Offers U.S. Employees Full-Time Remote Work*, REUTERS, <https://www.reuters.com/business/exclusive-pwc-tells-us-employees-they-need-never-return-office-2021-09-30/> [<https://perma.cc/VMQ7-GE3Y>] (last updated Sept. 30, 2021) (detailing a major accounting and consulting firm’s decision to allow 40,000 employees to work remotely permanently); see, e.g., *Nestlé Updates Regarding COVID-19*, NESTLÉ, <https://www.nestleusacareers.com/covid-19-faqs/> [<https://perma.cc/M8KS-3LRY>] (last visited Oct. 18, 2021) (noting that most hires will be onboarded virtually and “may be asked to work remotely for an extended period of time” once employment begins).

¹³ DiNapoli, *supra* note 12.

Property tax is a tax paid “on the assessed value of real property, like land or real estate,” owned by an individual or entity.¹⁴ This taxation scheme is an ad-valorem tax (i.e., an according to opinion of value tax) levied by a local government official, typically an assessor or auditor, that is calculated by multiplying the property’s assessed value by the applicable tax rate.¹⁵ It is one of the only taxes in the U.S. based on a subjective value formed by an individual’s opinion.¹⁶ Thus, unlike most other taxes, property tax is subject to the realities of human bias and error.¹⁷

The assessed value of a property is “the dollar value assigned to a . . . piece of real estate for property tax purposes” based on factors like comparable sales and location.¹⁸ The majority of states calculate assessed value as a percentage of fair market value.¹⁹ For example, the assessed value of property in Ohio is equal to thirty-five percent of its fair market value.²⁰

¹⁴ Randa Kriss, *Business Property Tax: The Ultimate Guide*, FUNDERA, <https://www.fundera.com/blog/business-property-tax> [<https://perma.cc/9JD8-YPLP>] (last updated Sept. 14, 2020). The assessed value of tangible personal property used by businesses is also taxable in many states but is not within the scope of this Note.

¹⁵ See Julia Kagan, *Property Tax*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/propertytax.asp> [<https://perma.cc/YK8R-8NJ2>] (last updated May 29, 2020); see generally Julia Kagan, *Ad Valorem Tax*, INVESTOPEDIA, <https://www.investopedia.com/terms/a/advaloremtax.asp> [<https://perma.cc/R5BB-TY5R>] (last updated May 25, 2020) (discussing the basic mechanics of ad valorem taxes).

¹⁶ Sidney Richardson, *Tax Assessment: What It Is and How It Determines Your Property Tax*, QUICKEN LOANS (Apr. 15, 2021), <https://www.quickenloans.com/learn/property-tax-assessment> [<https://perma.cc/GM86-H9LB>].

¹⁷ *Id.*

¹⁸ Julia Kagan, *Assessed Value*, INVESTOPEDIA, <https://www.investopedia.com/terms/a/assessedvalue.asp> [<https://perma.cc/6NRG-6NNL>] (last updated July 12, 2021).

¹⁹ *Id.*

²⁰ OHIO REV. CODE ANN. § 5715.01(B) (2017).

Other states, like Michigan, cap the assessed value, resulting in small increases in value each year.²¹ Additionally, states, such as Wisconsin, use equalization to calculate assessments, which involves the complex process of valuing the entire municipality and subsequently generating an equalization ratio in an attempt to achieve uniform values across all assessments.²² This Note will consider such jurisdictional nuances only where necessary for explanatory purposes.

The tax rate utilized in property taxation is the mill, or millage, rate, which is defined as “the amount of tax payable per dollar of assessed value of a property.”²³ Mill rates are set by localities “based on the total value of property within their jurisdiction,” and how much of that value is needed to generate the necessary revenue to meet budgeted expenses for roads, schools, and other local services.²⁴ Depending on the state, mill rates may differ by property type and be divided by residential and commercial properties.²⁵ Such calculations of mill rates and their jurisdictional differences are contemplated by this Note solely for purpose of explanation.

²¹ See generally *Assessments, State Equalized Value (SEV), Capped Value and Taxable Value*, CITY OF ANN ARBOR, <https://www.a2gov.org/departments/finance-admin-services/assessing/Pages/SEV.aspx> [<https://perma.cc/D7LV-T42W>] (last visited Oct. 19, 2021) (explaining how the capped value is calculated based on the lower of the Consumer Price Index or five percent multiplied by the prior year’s taxable value).

²² See generally *2022 Guide for Property Owners*, WIS. DEP’T OF REVENUE 15 (2022), <https://www.revenue.wi.gov/DOR%20Publications/pb060.pdf> (explaining the assessment process and use of equalized values for Wisconsin property taxation).

²³ Julia Kagan, *Mill Rate*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/millrate.asp> [<https://perma.cc/DS8L-QE2S>] (last updated June 12, 2020).

²⁴ *Id.*

²⁵ *Id.*

Because locality assessors perform both property valuation and calculation of property tax, a business' obligation is "greatly dependent on where [it] is located" and what is occurring within that specific real estate market.²⁶ A multitude of jurisdictional complications, coupled with business' lack of interaction with property tax, except when budgeting or making the payments, make it probable that the tax is simply ignored. It may come as a shock to these businesses that, during the period of July 2019 to June 2020, property tax accounted for thirty-nine percent of all state and local tax expenses, totaling a staggering \$329.2 billion.²⁷ This dollar amount represents an almost four percent increase from the prior fiscal year.²⁸ Because businesses pay so much to simply own or occupy real property in a locality, it makes sense that those aware of the high cost of local taxes seek to minimize their liability by any legally available means.

The pursuit of tax reductions came to the forefront during 2020 at the onset of the COVID-19 pandemic when many businesses were forbidden from operating at their physical locations.²⁹ Despite sitting empty, local governments still expected full payment of property tax, ignorant of the

²⁶ Kriss, *supra* note 14.

²⁷ ANDREW PHILLIPS & CAROLINE SALLEE, ERNST & YOUNG LLP, TOTAL STATE AND LOCAL BUSINESS TAXES: STATE-BY-STATE ESTIMATES FOR FY20 2 (Oct. 2021).

²⁸ *Id.*

²⁹ See generally Vincent J. Tersigni et al., *Ohio Issues Stay-At-Home Order; Non-Essential Businesses Ordered to Close*, JACKSONLEWIS (Mar. 23, 2020), <https://www.jacksonlewis.com/publication/ohio-issues-stay-home-order-non-essential-businesses-ordered-close> [<https://perma.cc/BU2F-9Q3N>] (discussing which Ohio businesses were "essential" and could remain open during the Director's Stay at Home Order).

effects of the pandemic on these businesses.³⁰ Yet, many locality assessors refused to recognize the impacts of the pandemic on office and retail properties, maintaining, and, in many cases, even raising 2021 real property assessments.³¹ In search of lower property tax liabilities, and valuations more aligned to diminished market conditions, businesses contested their assessments with local appeals bodies and beyond.³²

The appeals process varies by state, so for purposes of this Note, it shall constitute any and all formal or informal appearances by a taxpayer, or their representative, before a governmental, administrative, quasi-judicial, extra-judicial, or other judicial body where the taxpayer may lawfully contest the assessment of their real property initially issued by the local government. These proceedings typically commence with a filing to the valuing entity, usually the locality's assessor, and submission of evidence in support of a

³⁰ Carns, *supra* note 10.

³¹ See Herb Trix, *Property Assessments Increase Despite Pandemic*, WVIK: QUAD CITIES NPR (Mar. 24, 2021, 8:00 AM), <https://www.wvik.org/economy/2021-03-24/property-assessments-increase-despite-pandemic> [<https://perma.cc/9SWM-FLBD>] (properties values have gone up “an average . . . 6.5 per cent for commercial . . . property”); see also Alby Gallun, *Is Willis Tower Worth \$1.24 Billion? Fritz Kaegi Thinks So*, CRAIN'S CHI. BUS. (Oct. 19, 2021, 6:01 AM), <https://www.chicagobusiness.com/commercial-real-estate/cook-county-assessor-fritz-kaegi-hikes-assessments-willis-tower-aon-center> [<https://perma.cc/EK8W-L6TF>] (detailing the assessor's hike of Chicago's commercial property values “during a pandemic that has pushed the downtown office market into its worst slump in decades.”).

³² *The Impact of COVID-19 on Commercial Properties and Tax Assessment Appeals: The Potential for Lower Property Taxes*, MEYER UNKOVIC SCOTT (Apr. 29, 2020), <https://www.muslaw.com/the-impact-of-covid-19-on-commercial-properties-and-tax-assessment-appeals-the-potential-for-lower-property-taxes/> [<https://perma.cc/6S2P-48QK>].

lower value.³³ Such evidence frequently consists of sales of properties comparable to the appealed property.³⁴ Once a decision is rendered, the taxpayer or locality may contest the results.³⁵ The appellate body may be a specialized board, such as Ohio’s Board of Tax Appeals, or a court, like Wisconsin’s circuit courts.³⁶ No matter where the appeals process begins, the case may work its way up to a state’s supreme court to consider the taxpayer’s and locality’s arguments.³⁷ One of the most current and polarizing arguments in these valuation appeals is the utilization of the dark store valuation method.

A. *What is Dark Store?*

“The dark store theory originates from claims [by taxpayers] that [their] big box retail stores have been unfairly over-assessed by taxing jurisdictions.”³⁸ The theory posits that property assessments should be based not on the current user but instead “what the property would be worth to another prospective (hypothetical) user” in an arm’s length transaction.³⁹ The

³³ Anne Sheehan, *3 Tips for Successfully Appealing Commercial Property Taxes*, REAL PROP. TAX ADVISORS (May 18, 2016), <https://www.realpropertytaxadvisors.com/blog/3-tips-for-successfully-appealing-commercial-property-taxes> [<https://perma.cc/PM8W-BLUS>].

³⁴ *Id.*

³⁵ See Patrick J. Heery, *Ohio’s System for Challenging Property Values and Taxes*, OHIO ST. BAR ASS’N (Mar. 5, 2018), <https://www.ohiobar.org/public-resources/commonly-asked-law-questions-results/housing-and-real-estate/ohios-system-for-challenging-property-values-and-taxes/> [<https://perma.cc/Z24N-HY9F>] (“[i]f an owner is unhappy with the . . . decision, an appeal can be filed.”).

³⁶ *Id.*; *2021 Wisconsin Property Assessment Manual*, WIS. DEP’T OF REVENUE 1–12 (Dec. 2020), <https://www.revenue.wi.gov/documents/wpam21.pdf>.

³⁷ See *2021 Wisconsin Property Assessment Manual*, *supra* note 36 (listing reviewing bodies for local taxation districts, including the “State Supreme Court”).

³⁸ Welcome et al., *supra* note 7, at 4.

³⁹ *Id.*

phrase *dark store* arises from the fact that evidence of a property's worth to a secondary occupant includes the sale of vacant big box stores.⁴⁰ Much of the contention over whether businesses should be able to use these vacant properties as comparable sales results from confusion and misunderstanding of property law and appraisal doctrine.⁴¹ The below definitions serve to provide clarity and a basic understanding of relevant terminology in navigating dark store theory.

1. *Fee Simple*

Fee simple is the “broadest property interest allowed by law.”⁴² In the appraisal realm, it is an interest of “absolute ownership unencumbered by any other interest or estate” where the owner holds the right to sell, lease, or occupy the property.⁴³ Fee simple refers to the real property as it sits— vacant and available for lease.⁴⁴ This concept stands in contrast to a leased fee, which is an interest “held by the lessor, which includes the right to receive the contract rent specified in the lease plus the reversionary right when the lease expires.”⁴⁵ While real property may freely transfer regardless of any lease encumbrance, it must be recognized that real property's market value depends on the rights that transfer with it.⁴⁶ As such, “physically identical

⁴⁰ *Id.*; Lake Mills TV, *supra* note 2.

⁴¹ David Charles Lennhoff, *Valuation of Big-Box Retail for Assessment Purposes: Right Answer to the Wrong Question*, 39 REAL ESTATE ISSUES 21 (Nov. 3, 2014).

⁴² *Fee Simple*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁴³ APPRAISAL INST., DICTIONARY OF REAL ESTATE APPRAISAL 78 (5th ed. 2010); Lennhoff, *supra* note 41, at 23.

⁴⁴ Lennhoff, *supra* note 41, at 23.

⁴⁵ Gary E. Heiland II, *Property Rights Brought to Light: Principles and Misconceptions*, APPRAISAL J. 190, 193 (Summer 2019).

⁴⁶ *Id.*

real estate can have . . . different market values depending on whether a lease encumbrance exists.”⁴⁷ Because of this, the appraisal profession takes care to distinguish between fee simple and leased fee interests.⁴⁸

2. *Market Value vs. Value in Use*

A property’s market value is “[t]he most probable price, as of a specified date . . . for which the specified property rights should sell after reasonable exposure in a competitive market” where all conditions are present for a fair sale where buyer and seller “[act] prudently” with knowledge, in their own self-interest, without undue duress.⁴⁹ A lack of undue duress implies that the contemplated transaction is arm’s length and not a distress sale.⁵⁰ It is from this sale price that a property’s assessed value is usually calculated.⁵¹

Implicit within the market value concept is the parties’ awareness of the property’s highest and best use, not necessarily its current use, and that knowledge is reflected by the parties in the sales price.⁵² This stands in contrast to a property’s value in use, which is “the value of a property assuming a specific use, which . . . may not be the property’s highest and best use.”⁵³ Though value in use may equal market value, one cannot assume that

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ APPRAISAL INST., APPRAISAL OF REAL ESTATE 58 (14th ed. 2013).

⁵⁰ APPRAISAL INST., *supra* note 43, at 60.

⁵¹ Kagan, *supra* note 18.

⁵² Lennhoff, *supra* note 41, at 23.

⁵³ *Id.*

the two are synonymous or that a building's current use is its highest and best use.⁵⁴ Value in use is almost never considered for property tax purposes.⁵⁵

3. *Build to Suit, Sale/Leaseback, and Second Generation Transactions*

Build to suit, sale/leaseback, and second generation transactions are all types of sales that locality assessors may use to derive the market value of a property.⁵⁶ Despite their frequent use, they are often the subject of misunderstanding.⁵⁷ Build to suit and sale/leaseback transactions are not indicative of an arm's length transaction because of the existence of a contractual arrangement outside of a standard purchase agreement.⁵⁸ Unlike office space and some smaller retail property, big box retail property is a build to suit, which is "an arrangement where a landlord builds or alters a property to the specifications of the tenant and recovers the cost" of doing so

⁵⁴ *Id.*

⁵⁵ See *Meijer Stores Ltd. P'ship v. Franklin Cty. Bd. of Revision*, 122 Ohio St. 3d 447, 453 (Ohio 2009) ("the constitutional prohibition" against value in-use "does not bar consideration of current-use value in the context of the 'special-purpose property' doctrine" where the building is used "for the foreseeable future for the unique purpose for which it was built" (quoting *Fed. Rsrv. Bank of Minneapolis v. State*, 313 N.W.2d 619, 623 (Minn. 1981))); see *2011 Real Property Assessment Manual* 6–8, IND. DEP'T OF LOC. GOV'T FIN. (Indiana uses a property's true tax value for property tax, which means "market value-in-use," or "the value of property for a specified use"); but see *Southlake Ind. LLC v. Lake Cty. Assessor*, 135 N.E.3d 692, 696 (Ind. T.C. 2019) ("Market value-in-use . . . is the value of a property for its use, not the value of its use" (quoting *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 501 (Ind. T.C. 2010)). In making this determination, "the fee simple interest in property must be valued[.]", *transfer denied*, 143 N.E.3d 961 (Ind. 2020).

⁵⁶ See generally Lennhoff, *supra* note 41.

⁵⁷ *Id.*

⁵⁸ *Id.* at 23, 26.

via rental payments.⁵⁹ Similarly, a sale/leaseback is “a financing arrangement in which real property is sold by its owner . . . who simultaneously leases the property from the buyer” for rental rates structured around construction costs, rather than the market.⁶⁰ Accordingly, build to suits and sale/leasebacks are not typically considered to be valid sales for local governments assessing the properties nor for taxpayers contesting their assessments.

Opposite to build to suit and sale/leaseback transactions are second generation sales, which are generally indicative of a property’s fair market value.⁶¹ This is the sale of real property, like big box retail or office space, to another user by the original occupant who completely finished improving the space already.⁶² Even when the subject property is sold vacant to the second generation user, such transaction is not a distress sale.⁶³ This is because the sold property typically receives “normal marketing time and typical exposure” without undue duress on the seller.⁶⁴ Because the property is

⁵⁹ HENRY S. HARRISON & JULIE S. HARRISON, ILLUSTRATED DICTIONARY OF REAL ESTATE AND APPRAISAL 35 (Reston Pub. Co., Inc. ed., 1983).

⁶⁰ APPRAISAL INST., *supra* note 43, at 175; *see also* Martin A. Skolnik & Gary E. Heiland II, *Big Box Retail Properties: Pitfalls of Valuation*, INT’L ASS’N OF ASSESSING OFFICERS, PROC. OF THE 1998 ANN. CONF., at 4–5 (Sept. 1998, Orlando, Fla.) (discussing “other considerations . . . reflected in the sales price besides real estate”).

⁶¹ Lennhoff, *supra* note 41, at 24; *see* Lennhoff & Parli, *supra* note 3, at 182 n.8; *see* William Wyatt, *Shell Space, 2nd Generation & Spec Suites: Real Estate Definitions & Benefits of Each*, AQUILA (June 8, 2018), <https://aquilacommercial.com/learning-center/shell-space-2nd-generation-spec-suites-real-estate-definitions-benefits/> [<https://perma.cc/N8P2-WJRB>].

⁶² Lennhoff, *supra* note 41, at 24.

⁶³ *Id.*

⁶⁴ *Id.*

offered on the open market in a second generation transaction, such sales represent the “best evidence” of fair market value.⁶⁵

B. *History of Dark Store Valuation Appeals*

Despite most literature on the controversy of dark store and fee simple valuation hailing from the last twenty years, the idea that property should be valued based on its fee simple marketability was contemplated decades before. In the 1920’s, the owner of the New York Stock Exchange building contested its value, arguing that the building was worthless and “does not enhance the value of the land “except ‘as a tear-down proposition.’”⁶⁶ The owner posited that the building was fit only for one use, the operations of the New York Stock Exchange, and was worthless to any other buyer.⁶⁷ Ultimately, the appeal failed because it was established doctrine in New York that where a property’s value was to be ascertained, it must be done so by a “possible and practicable” means.⁶⁸ The primary method of valuation to be utilized was not the argument presented by the owners, but instead was the cost to reconstruct the building as it sat.⁶⁹ Though advanced for its time, and ultimately unsuccessful, this appeal helped to lay the groundwork for much of the last twenty years of big box retail appeals.

⁶⁵ *Id.* at 24–25.

⁶⁶ *People ex rel. N.Y. Stock Exch. Bldg. Co. v. Cantor*, 221 A.D. 193, 195 (N.Y. App. Div. 1927), *aff’d*, 162 N.E.514 (N.Y. Ct. App. 1928).

⁶⁷ *Id.*

⁶⁸ *Id.* at 197–98.

⁶⁹ *Id.* (appellant did not present any appraisal evidence beyond the value of the land with and without the stock exchange building).

Today's fee simple valuation, or dark store, appeals occur at the local and state level, resulting in a broad array of case law based on differing state statutes and precedent.⁷⁰ The IAAO Special Committee on Big Box Valuation deemed Michigan "ground zero for the dark store/big box valuation controversy."⁷¹ This is because the state's Tax Tribunal has consistently allowed the use of vacant stores as comparable sales for occupied big box retail.⁷² In fact, the Michigan courts have gone so far as to declare that Michigan's use of cash value to establish assessments requires the use of fee simple.⁷³ In valuing real property based on its operator, it confounds value in use with the necessary value in exchange of the fee simple interest.⁷⁴

Despite the "ground zero" moniker given to Michigan, much of the early dark store case law originates in Ohio and Wisconsin.⁷⁵ Ironically, these

⁷⁰ This Note will not explore the intricacies of each state but will parse case law and statutes for common themes. This Note presents only Midwestern states' cases because the laws in most of these states allow for dark store appeals to successfully be brought.

⁷¹ Keith Robison, *Special Task Force Tackles the Dark Store Issue*, FAIR & EQUITABLE 12 (Nov. 2017), https://www.iaao.org/media/Topics/HBU/FE_Dec17_Task_Force.pdf.

⁷² See *Ikea Prop., Inc. v. Township of Canton*, No. 366639, 2012 WL 3139709, at *18–20 (Mich. Tax Tribunal July 18, 2012) (discussing comparable sales where no other comparable sales of occupied stores exist in a market); *Lowe's Home Ctrs., Inc. v. Township of Marquette*, No. 314111, 2014 WL 1616411, at *2–3, 13, 15–16 (Mich. Ct. App. Apr. 22, 2014) (affirming the Tax Tribunal's decision to consider property owner's comparable sales of closed properties, over the locality's protests, in its fee simple valuation of appealed property).

⁷³ *Lowe's Home Ctrs., Inc. v. City of Grandville*, No. 317986, 2014 WL 7442250, at *5 (Mich. Ct. App. Dec. 30, 2014) (quoting *Edward Rose Bldg. Co. v. Independence Township*, 436 Mich. 620, 640–41 (Mich. 1990)).

⁷⁴ *Lowe's Home Ctrs., Inc. v. Township of Marquette*, 2014 WL 1616411, at *11.

⁷⁵ Robison, *supra* note 71; see *Meijer Stores Ltd. P'ship v. Franklin Cty. Bd. of Revision*, 122 Ohio St. 3d 447, 453–54 (Ohio 2009) (The existence of an

states use agency or court imposed tactics to bypass assessment law in an attempt to prevent big box retail appellants from dark storing their values.⁷⁶ It remains to be seen whether these policies would withstand a direct challenge as Ohio cases only note the objection in passing and the Wisconsin Supreme Court refuses to reconsider property tax decisions by its appellate courts.⁷⁷

Other major state tax appeals boards and courts involved in the dark store controversy, such as Indiana and Kansas, take an approach similar to Michigan.⁷⁸ The Indiana Tax Court continuously rules that the sale of vacant big box stores to second generation users constitutes comparable sales in the

encumbrance does not affect a property's status as fee simple. Ohio utilizes the "special purpose property" doctrine to allow property to be valued as in-use.) (Due to the complexities of the doctrine and its creation by the Board of Tax Appeals, not Ohio law regulating assessment practices, this Note will not fully consider its implications); see *Walgreen Co. v. City of Madison*, 311 Wis. 2d 158, 206 (Wis. 2008) (confirming that property must be assessed as fee simple and without regard for sale/leaseback transactions, unless contract rent is consistent with market rent).⁷⁶ See *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision*, 12 Ohio St. 3d 270, 271–72 (Ohio 1984) (citing *Fed. Rsv. Bank of Minneapolis v. State*, 313 N.W.2d 619, 623 (Minn. 1981)) (stating that special purpose doctrine is necessary to prevent "the owner of a distinctive, but . . . useful building" from "escap[ing] full property tax liability."); see *Lowe's Home Ctrs., LLC v. Village of Plover*, 2019AP974, 2020 WL 6325685, at *2, 14 (Wis. Ct. App. Oct. 29, 2020) (concluding that despite its evidence, appellant failed to overcome the locality's presumption of correctness in its valuation per Wis. Stat. Ann. § 70.49(2)).

⁷⁷ See *Lowe's Home Ctrs., LLC v. Brooklyn City Sch. Bd. of Educ.*, No. 19AP-179, 2020 WL 703485, at *3–4, 8 (Ohio Ct. App. Feb. 11, 2020) (Lowe's alleged in its assignments of error "the 'special purpose' doctrine is a clear error of law," but the court only briefly discusses the doctrine); see *League of Wisconsin Municipalities: Supreme Court Refuses 'Dark Store' Case*, TV6 NEWS (Mar. 2, 2021, 10:48 AM), <https://www.uppermichiganssource.com/2021/03/02/league-of-wisconsin-municipalities-supreme-court-refuses-dark-store-case/> [<https://perma.cc/9A8W-YFML>] (Wisconsin Supreme Court refused to accept the appeal for *Lowe's Home Ctrs., LLC v. Village of Plover*).

⁷⁸ *Meijer Stores Ltd. P'ship v. Smith*, 926 N.E.2d 1134, 1137 (Ind. T.C. 2010) (finding that the Indiana Board's rejection of property owner's comparable, but vacant, big box retail sales was improper); *In re Prieb Prop., LLC*, No. 105, 298, 275 P.3d 56, 62 (2012).

valuation of big box retail property.⁷⁹ Though Indiana's legislature attempted to codify that the cost of reconstruction was the true value of any property over 50,000 square feet, which conveniently included most big box stores, the law was later repealed in favor of a prohibition of comparable sales outside the property's market or submarket.⁸⁰ Accordingly, the Indiana Tax Court returned to its state of affairs before the 2015 legislation.⁸¹ However, the Indiana State Senate is once again attempting to stop dark store appeals, presenting legislation that would prevent anything but cost approach valuation for retail properties over 100,000 square feet for the first ten years of the original owner's occupancy.⁸² This bill was just recently introduced in January, 2022, so it remains to be seen whether the legislature will again attempt to regulate big box stores in this manner given the repeal of the prior law.⁸³ In Kansas, the judiciary continues to affirm that the proper analysis of real property's value is fee simple.⁸⁴ When valuing the subject property, the appraiser must determine the difference between the value of a property in a

⁷⁹ *Meijer Stores Ltd. P'ship v. Smith*, 926 N.E.2d at 1137; *Meijer Stores Ltd. P'ship v. Marion Cty. Assessor*, No. 49-440-02-1-4-00573 2, 9 (Ind. Bd. of Tax Rev. Dec. 1, 2014) (finding that the use of vacant big box retail sales was acceptable).

⁸⁰ IND. CODE § 6-1.1-4-43 (2015) (repealed 2016); IND. CODE § 6-1.1-31-6(b) (2020).

⁸¹ *Monroe Cty. Assessor v. SCP 2007-C-26-002, LLC*, 62 N.E.3d 478, 481 (Ind. T.C. 2016) (explaining that the repeal of Ind. Code § 6-1.1-4-43 suggests that the legislature did not intend to overturn *Meijer Stores Ltd. P'ship v. Smith*).

⁸² S.B. 145, 122nd Gen. Assemb., 2022 Sess. (Ind. 2022).

⁸³ *Id.*; IND. CODE § 6-1.1-4-43 (2015).

⁸⁴ *In re Prieb Prop., LLC*, No. 105, 298, 275 P.3d 56, 62 (2012) (though Kansas statutes do not use the term fee simple, "it is clear that the legislative intent underlying the statutory scheme of ad valorem taxation . . . has always been to appraise the property as if in fee simple.").

hypothetical vacant condition compared to the value when occupied, and isolate that difference as business value, which is not real property value.⁸⁵

C. The Continuing Controversy of Dark Store

The status of the dark store theory remains in flux as state legislatures debate what action to take, if any. Without a solution on the horizon, the IAAO and other locality organizations seek to fill the vacuum, lobbying legislators and waging a public relations war against big box retail over their supposed unfair valuation appeals.⁸⁶ In doing so, the IAAO struck at dark store appeals with position papers on big box valuation and fee simple interests.⁸⁷ In the latter, the IAAO argues that a leased fee interest is essentially the same as fee simple unencumbered and that valuing a fee simple estate does not require valuation of a big box retail property as vacant.⁸⁸

In response to what it deemed “an attempt to support new legal/appraisal theories to gain an advantage in pending litigation and to shape public opinion to support” these novel theories, the American Property Tax Counsel, led by Linda Terrill, pointed out many flaws in the IAAO’s draft,

⁸⁵ *In re* Equalization Appeal of Target Corp., No. 116,607, 410 P.3d 939 (Kan. Bd. of Tax App. Dec. 29, 2017).

⁸⁶ Lake Mills TV, *supra* note 2; WisconsinEye, *supra* note 4; Welcome et al., *supra* note 7.

⁸⁷ Welcome et al., *supra* note 7; see INT’L ASS’N OF ASSESSING OFFICERS, SETTING THE RECORD STRAIGHT ON FEE SIMPLE (Aug. 2019).

⁸⁸ INT’L ASS’N OF ASSESSING OFFICERS, *supra* note 87, at 12–13 (“The mere fact that there are renters in a commercial property does not detract from fee simple ownership.”).

all of which made it into the published version.⁸⁹ She wrote that the fee simple concept is already established, so in releasing this paper the IAAO generates confusion where there is none.⁹⁰ In arguing that the fee simple is the same as the leased fee interest, the IAAO is ignoring the established definitions accepted in most states and encouraging its members to violate state statutes by arguing otherwise.⁹¹ The response reasoned that by ignoring uniformity, the fundamental aspect of assessment, the IAAO was trying to legislate through its paper without regard to jurisdictional nuances.⁹²

Armed with supporting documentation, the IAAO and American Property Tax Counsel present such strongly contrasting views of the fee simple interest that both cannot be correct.⁹³ In fact, this is exactly the case as the arguments presented by the IAAO are fundamentally flawed. This cursory review of their arguments serves to lay the groundwork for this Note and its argument in favor of the American Property Tax Counsel's view of fee simple valuation. This method of valuation must be used to assess all classes of real property in furtherance of property taxation's desire of uniform assessments.

III. THE FEE SIMPLE ESTATE REQUIRES VALUATION AS IF VACANT

⁸⁹ Linda Terrill, *APTC Response to IAAO May 2019 Exposure Draft: Setting the Record Straight on Fee Simple*, AM. PROP. TAX COUNS. (June 13, 2019), <https://www.aptcnet.com/property-tax-resources/aptc-announcements/aptc-response-to-iaao-may-2019-exposure-draft-setting-the-record-straight-on-fee-simple> [<https://perma.cc/29GA-BLPH>].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Compare id.*, with INT'L ASS'N OF ASSESSING OFFICERS, *supra* note 87.

To its credit, the IAAO rightly acknowledges that “the fee simple estate is the foundation of what assessors . . . are asked to examine” in their determination of their localities’ property assessments.⁹⁴ Its issue stances from there, however, are built upon a refusal to accept the fundamental tenet of property taxation— that fee simple appraisal requires the consideration of the building as it sits, not *who* sits within its walls.⁹⁵ Attempts by the IAAO to argue otherwise do not rest on sound appraisal theory, but are instead propaganda targeted at branding appropriate property valuation appeals as unfair exploitation of appraisal doctrine. For there to truly be uniform assessments, all classes of real property must be valued based on the true definition of fee simple unencumbered.

A. *What the IAAO Gets Wrong*

The IAAO wastes no time in making false statements to support its flawed assertions about property valuation. Beginning with a winding discussion on the history of fee simple, the IAAO makes much of the appearance and eventual removal of the word “unencumbered” from appraisal definitions of fee simple.⁹⁶ It takes the position that “unencumbered by any other interest or estate” is a problematic phrase within the definition, and that appropriate interpretation treats “interest” and “estate” as synonyms.⁹⁷ The IAAO argues that in doing so, such a phrase can be

⁹⁴ INT’L ASS’N OF ASSESSING OFFICERS, *supra* note 87, at 1.

⁹⁵ *Id.*; Lennhoff, *supra* note 41, at 23 (“[T]he fee refers to the building/property vacant.”).

⁹⁶ INT’L ASS’N OF ASSESSING OFFICERS, *supra* note 87, at 2–6.

⁹⁷ *Id.* at 5.

“plausibly interpreted to mean that the fee simple estate cannot be encumbered by another freehold estate.” To them, a leasehold interest in a property, such as one held by a big box retail tenant, is not an estate and therefore cannot devalue the fee simple estate.⁹⁸ Rather, it is a source of benefit through income generation for the fee simple owner.⁹⁹

The IAAO somehow concludes that “estate” and “interest” hold the same meaning yet states that a leasehold interest cannot be an estate under the definition of encumbrance.¹⁰⁰ Of course, the IAAO is silent as to why this magical exception is not contrary to the point the organization makes about the terms being synonymous. That is because such a distinction is illogical under even the most basic of property law doctrine, which includes the leasehold as one of four possessory estates.¹⁰¹ Appraisal definitions of a leased fee also support the lack of such distinction, referring to the leased fee as “a freehold (ownership interest),” where ownership interest is used interchangeably with *estate*.¹⁰² Thus, a lease has always been an encumbrance that is to be isolated and removed when determining property assessments as fee simple unencumbered.¹⁰³

⁹⁸ *Id.* at 6.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 6, 12–13.

¹⁰¹ Terrill, *supra* note 89; JESSE DUKEMINIER ET AL., PROPERTY, CONCISE EDITION 210 (3d ed. 2021) (“The common law recognized only the four possessory estates . . . the fee simple, the fee tail, the life estate, and the leasehold. This remains true today.”).

¹⁰² Terrill, *supra* note 89; Lennhoff, *supra* note 41, at 23–24; APPRAISAL INST., *supra* note 43, at 111; DUKEMINIER ET AL., *supra* note 101 (“[L]eases are considered to be conveyances of estates.”).

¹⁰³ *In re Equalization Appeal of Target Corp.*, No. 116,607, 410 P.3d 939 (Kan. Bd. of Tax App. Dec. 29, 2017).

Armed with this blatantly wrong conclusion, the IAAO then applies it to all manner of situations designed to give localities an edge over the dark store theory.¹⁰⁴ The IAAO reasons that because “the fee simple estate has nothing to do with . . . any other encumbrance or distribution of property rights,” it is not affected by mortgages, liens, easements, deed restrictions, and, of course, leases.¹⁰⁵ But, fee simple unencumbered serves as the basis for all property tax liens.¹⁰⁶ In property taxation, a property’s assessment generates a tax lien that attaches itself to the real property as an *in rem* obligation, or one that affects the property.¹⁰⁷ If not paid, the locality, usually through a sheriff’s sale, sells the tax lien to satisfy the lien, and the purchaser becomes the new owner of the property.¹⁰⁸ When the lien is sold, it is done so “free and clear of all other liens and encumbrances.”¹⁰⁹ This does not include contractual rights like leases or mortgages whose agreements expressly make them subordinate to the lien.¹¹⁰ Because property tax may not be computed to include an asset to which a tax lien cannot attach, property assessments do not include leasehold encumbrances.¹¹¹

¹⁰⁴ Terrill, *supra* note 89 (the IAAO’s report is “nothing more than an attempt to support new legal/appraisal theories to gain an advantage in pending litigation”).

¹⁰⁵ INT’L ASS’N OF ASSESSING OFFICERS, *supra* note 87, at 7.

¹⁰⁶ Terrill, *supra* note 89.

¹⁰⁷ *Id.*; see *In Rem*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁰⁸ Terrill, *supra* note 89.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Were the IAAO's desired valuation methodology to come to fruition, it would shred the very fabric of the property taxation system.¹¹² This may sound dramatic, but treating a leasehold interest as anything but an encumbrance to a fee simple estate destroys uniformity of assessment, the ultimate goal in property taxation.¹¹³ Regardless of whether properties are classified as residential, commercial, or some other kind, assessment must be uniform across classes for consistency of valuation.¹¹⁴ It is illogical that one taxpayer is taxed more than their neighbor because one leases their property, despite otherwise being comparable.¹¹⁵ Such a value-in-use standard is contrary to mountains of case law that provide otherwise and is tantamount to double taxation whereby businesses would pay property tax *and* income tax based on their business earnings.¹¹⁶ To prevent this, uniformity dictates that each property in a locality is valued by the same metrics regardless of use, and here, the unencumbered fee simple must be the gold standard.¹¹⁷

¹¹² *Id.* (arguing that the IAAO's position "contravenes [the] basic principle of *ad valorem* taxation").

¹¹³ *Id.* (noting that without fee simple unencumbered as the "white canvas" standard, assessors would be left with no basis . . . to comply with uniformity"); this Note only explores uniformity and its entanglement with dark store and does not consider the resulting constitutional issues involving real property valuation, such as equal protection and due process claims.

¹¹⁴ See generally Robin L. Einhorn, *Species of Property: The American Property-Tax Uniformity Clauses Reconsidered*, 61 J. OF ECON. HIST. 974, 974–75 (2001) ("[T]he property tax had to be assessed by value . . . at a single ("uniform") rate on the value of every form of taxed property."); see generally WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1769 (2d ed. 1984) (recognizing the "strict uniformity for property taxation").

¹¹⁵ Terrill, *supra* note 89.

¹¹⁶ *Id.*; Lennhoff & Parli, *supra* note 3, at 182; Lennhoff, *supra* note 41, at 23.

¹¹⁷ Lennhoff, *supra* note 41, at 31 ("The credibility of the assessment is compromised when value in use of the leased fee interest is substituted for market value of the fee interest."); Terrill, *supra* note 89.

B. *Correctly Defining Fee Simple Unencumbered*

It is so easy to say that real property should be assessed based on the market value of its fee simple interest that even the IAAO does not stray from this core concept.¹¹⁸ Many states, such as Ohio, explicitly require locality appraisers to value the fair market value of “the fee simple estate, as if unencumbered”, for assessment purposes.¹¹⁹ In practice, however, those with nefarious purposes try to confound local governments and their taxpayers, leading to assessment practices that produce a valuation for something other than the value of the fee simple interest.¹²⁰ To avoid such confusion, this Note will derive an appropriate definition of fee simple unencumbered for purposes of property taxation.

In property law, the fee simple is an interest in land that is the largest possible estate.¹²¹ Implicit within this definition is the interest’s alienability, or freedom to transfer.¹²² Similarly, in appraisal doctrine, fee simple is a possessory interest of “absolute ownership unencumbered by any other interest or estate” where the owner holds the right to sell, lease, or occupy the property.¹²³ Like the property law definition, the appraisal definition is concerned with the property’s ability to transfer.¹²⁴ In valuing real property based on its hypothetical sales price, an appraiser is to isolate any

¹¹⁸ INT’L ASS’N OF ASSESSING OFFICERS, *supra* note 87, at 1.

¹¹⁹ OHIO REV. CODE ANN. § 5713.03 (2020).

¹²⁰ Terrill, *supra* note 89.

¹²¹ *Fee Simple*, *supra* note 42; DUKEMINIER ET AL., *supra* note 101, at 192.

¹²² DUKEMINIER ET AL., *supra* note 101, at 193.

¹²³ APPRAISAL INST., *supra* note 43.

¹²⁴ *Id.*; Lennhoff, *supra* note 41, at 22.

encumbrance, which is a “property right . . . not an ownership interest.”¹²⁵ Though not all states rely on appraisal industry guides to define these concepts, most appraisers have utilized the Appraisal Institute’s definitions for decades.¹²⁶

Despite the synergies between property law’s fee simple definition and that of the appraisal industry, deference must be given to the phrasing and terminology used by the Appraisal Institute due to its historically strong presence in state and local appraisal practices. The fee looks to the building as it sits and assumes the building is vacant and available for lease.¹²⁷ This is because any lease “would compromise the interest, as the owner would no longer have the right to occupy” the building.¹²⁸ The property is subject to neither enhancements nor hindrances, except those “imposed by the governmental powers of taxation, eminent domain, police power, and escheat.”¹²⁹ Thus, contrary to the IAAO’s claims, neither ownership nor class is of significance.¹³⁰ From this, we may derive that the correct definition of fee simple unencumbered for appraisal and assessment purposes is absolute ownership of a property as it sits for the owner to lease, sell, or occupy, and

¹²⁵ *Encumbrance*, BLACK’S LAW DICTIONARY (11th ed. 2019); *In re Equalization Appeal of Target Corp.*, No. 116,607, 410 P.3d 939 (Kan. Bd. of Tax App. Dec. 29, 2017).

¹²⁶ Terrill, *supra* note 89. While appraisers may be bound by their respective state law definitions of the concepts discussed herein, this Note will not contemplate such jurisdictional differences to the extent they differ from the Appraisal Institute’s definitions.

¹²⁷ Lennhoff, *supra* note 41, at 23.

¹²⁸ *Id.*

¹²⁹ *Id.*; APPRAISAL INST., *supra* note 43.

¹³⁰ Lennhoff & Parli, *supra* note 3, at 182; Lennhoff, *supra* note 41, at 23.

that such ownership is only limited by an action of the government. This definition will now be applied in the context of the dark store theory.

C. Why Dark Store Valuation is Valuation as Fee Simple Unencumbered

Difficulties arise in valuing big box retail properties because of the “misapplication of sales . . . data” by localities, and subsequent vilification of their owners or occupants for filing valuation appeals in pursuit of correcting such errors.¹³¹ Typically, these big box stores are “located in areas of high economic activity, and the desire [by the locality] to maintain this productivity is high.”¹³² When one closes its doors, assessors often incorrectly conclude that the vacancy is the result of distress because otherwise, the store would have remained open.¹³³ While this certainly can occur in the era of the “retail apocalypse,” it is also possible that the retailer moved to a nearby, newly-constructed build to suit storefront.¹³⁴ The resulting sale of the old, vacant property is typically not out of distress, but the lack of a need for continued ownership of the space.¹³⁵ The business

¹³¹ Skolnik & Heiland, *supra* note 60, at 11.

¹³² Stephen W. Grant, *Who’s Afraid of the Dark?: Shedding Light on the Practicality and Future of the Dark Store Theory in Big-Box Property Taxation*, 38 VA. TAX REV. 445, 451 (2019).

¹³³ *Id.*

¹³⁴ *Id.* at 451–52; see Bethany Biron, *The Last Decade Was Devastating for the Retail Industry. Here’s How the Retail Apocalypse Played Out*, BUS. INSIDER (Dec. 23, 2019, 12:48 PM), <https://www.businessinsider.com/retail-apocalypse-last-decade-timeline-2019-12> [<https://perma.cc/JD3U-8MYP>] (summarizing the record rate at which malls and other traditional retail stores closed during the 2010’s as a result of “the wide-reaching impacts of the 2008 financial crisis” and “the meteoric rise of e-commerce”).

¹³⁵ Grant, *supra* note 132.

would rather sell the big box space to a second generation user, who will purchase it in an arm's length transaction for a reasonable price.¹³⁶

As previously discussed, dark store theory begins with a clear misunderstanding of what encompasses a fee simple interest, and then uses that flawed starting point to incorrectly assess big box properties. Using the definition of fee simple unencumbered developed earlier, the value of such retail property, or any property for that matter, is based on the four walls as they sit for its owner to utilize, hindered only by certain government action. The value of the fee simple unencumbered, and thus of the property in question, is based on what its ownership rights would sell for in the market.¹³⁷ When the sale occurs, only the fee interest transfers, not the contractual rights of the property's lease, if any.¹³⁸ Whatever occurs with the property's tenancy is handled separately from the actual purchase of the property's absolute ownership interest.¹³⁹

When a property is valued using the correct definition of fee simple unencumbered, the cracks in the dark store argument begin to emerge. "The truth is the Dark Store Theory has a lot in common with the tooth fairy . . . [i]t's just a pivot and diversion from what is happening with property values in retail" during the age of growing e-commerce.¹⁴⁰ In situations giving rise to dark store valuations, appraisers are using the sales comparison approach

¹³⁶ Lennhoff, *supra* note 41, at 24.

¹³⁷ *Id.* at 22–23; Herbert, *supra* note 6.

¹³⁸ Lennhoff & Parli, *supra* note 3, at 186.

¹³⁹ *Id.* at 187–88.

¹⁴⁰ Herbert, *supra* note 6; Biron, *supra* note 134.

to value the retail property.¹⁴¹ When appraisers search for comparable sales, they look for arm's length sales within the same market that are similar in characteristic and use to the subject property.¹⁴²

Contrary to what proponents of dark store theory propose, there is no divergence from common appraisal techniques in performing a sales comparison appraisal that views vacant properties as comparable.¹⁴³ In fact, the localities' common arguments against businesses using dark store valuation appeals are easily refuted by correcting the IAAO's fee simple fallacy. Assessors claim that retailers are excluding the sale of leased properties when in fact their exclusion is necessary for fee simple valuation to avoid valuing the subject property as a leased fee.¹⁴⁴ They also assert that retailers restrict their comparable properties to generic retail when the subject is build-to-suit, but such big-box stores are typically marketed as generic retail, so such sales are the most comparable to the subject.¹⁴⁵ Where the first-generation user still occupies the space, assessors argue that comparable sales must only involve first-generation users, but such transactions are not

¹⁴¹ Lennhoff & Parli, *supra* note 3, at 183; Lennhoff, *supra* note 41, at 26; Grant, *supra* note 132, at 460.

¹⁴² Lennhoff & Parli, *supra* note 3, at 183; Grant, *supra* note 132, at 460 (“An appropriate sales comparison will look at properties that share, among other things, arm's length market transactions, sales that are close in time, the geographic relevance of the sales, and similar property rights.”).

¹⁴³ Lennhoff & Parli, *supra* note 3, at 182; Grant, *supra* note 132, at 460 (“Using vacant big-box stores as comparables to appraise an occupied store provides appraisers with the most competent data when determining the appropriate market value of fee simple. By comparing big-box properties to similar properties that are vacant and available, and making various adjustments to compensate for the differences between the two properties, appraisers are best equipped to determine a property's true market value as if it were sold in a private transaction.”).

¹⁴⁴ Lennhoff & Parli, *supra* note 3, at 183–84; Lennhoff, *supra* note 41, at 23.

¹⁴⁵ Lennhoff & Parli, *supra* note 3, at 184.

reflective of fee simple valuation because of their build to suit or sale/leaseback nature.¹⁴⁶ Assessors also claim that the only comparable sales are of buildings fully leased at market rental rates by the entity for whom it was constructed.¹⁴⁷ However, to be valued as fee simple, “it is the physical use that is being studied, not the business taking place in the real estate.”¹⁴⁸

The final mischaracterization by localities represents a fundamental misunderstanding of the frequency with which first-generation occupants sell property to second-generation buyers.¹⁴⁹ Assessors operate under the false assumption that if “the hypothetical buyer has the right to occupy, then the comparable sales used must be vacant stores . . . [that] are distressed properties and not representative of market value.”¹⁵⁰ Similar to home sales, many of these properties simply are not vacant when they are sold and only need be made available to the buyer upon settlement.¹⁵¹ The distress sale presumption also cannot stand as many second-generation transactions involve healthy, maintained properties marketed by brokers.¹⁵² Unlike IAAO members, appraisers correctly applying appropriate techniques understand

¹⁴⁶ *Id.* (explaining that “prospective buyers often do not even inspect the real estate, relying instead on the quality of the income stream.”); Lennhoff, *supra* note 41, at 23, 26.

¹⁴⁷ Lennhoff & Parli, *supra* note 3, at 184.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; Grant, *supra* note 132.

¹⁵⁰ Lennhoff & Parli, *supra* note 3, at 184.

¹⁵¹ *Id.*

¹⁵² *Id.*; Lennhoff, *supra* note 41, at 24; Grant, *supra* note 132.

that these sales are representative of market value while actual distress sales are to be discarded.¹⁵³

Even if the assessor comes to understand that these sales are not of distressed properties, the next hurdle thrown at taxpayers is that the sales still are not comparable because they are second-generation sales, and therefore, have a different highest and best use than the subject.¹⁵⁴ Such an argument “confuses the success of the business taking place within the building” with the actual highest and best use of the real property.¹⁵⁵ Real property often transacts without a change in use; second-generation buyers are looking for already finished spaces to avoid substantial refurbishment costs.¹⁵⁶ The concept of highest and best use relates to “what is done physically with real estate,” which is not to be confounded with the buyer’s and seller’s motivations for transacting.¹⁵⁷ Because first-generation users may move to a new storefront before the sale is finalized, this will include vacant, non-distressed properties, or dark stores.¹⁵⁸ So long as the occurring sale is an arm’s length transaction, it is representative of the value of the property’s

¹⁵³ Lennhoff & Parli, *supra* note 3, at 184; *Guide Note 11 Comparable Selection in a Declining Market*, APPRAISAL INST., <https://www.appraisalinstitute.org/assets/1/7/guide-note-11.pdf> [<https://perma.cc/86U4-KAV3>] (last updated 2020) (explaining that though they have their uses in a declining real estate market, distress sales like “foreclosures and short sales usually do not meet the conditions outlined in the definition of market value.”).

¹⁵⁴ Lennhoff & Parli, *supra* note 3, at 184

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; Lennhoff, *supra* note 41, at 24; Skolnik & Heiland, *supra* note 60, at 11 (noting that the “assessor must seek out . . . sales of other retail owner-to-retail owner transactions” in valuing the fee simple interest of a big box retail property); Grant, *supra* note 132.

¹⁵⁷ APPRAISAL INST., *THE APPRAISAL OF REAL ESTATE* 334 (14th ed. 2013).

¹⁵⁸ Lennhoff & Parli, *supra* note 3, at 184.

ownership rights, and therefore, its fee simple unencumbered valuation.¹⁵⁹ Though assessors may lament lowering commercial values, possibly at the expense of all property owners' tax liabilities slightly increasing, it is what must be done to achieve uniform assessments amongst property classes.¹⁶⁰ These commercial taxpayers should never have been footing such a large portion of the bill for localities' budgeted activities. There is no dark store loophole, only assessors' and localities' inability to understand that they cannot continue to take advantage of commercial properties and rob them blind.¹⁶¹ Fee simple unencumbered mandates they pay no more than their fair share of property tax, and typically, that requires a lower assessment.

IV. RECOMMENDATION: LOOKING BEYOND RETAIL TO OFFICE SPACE

Despite big box retail properties dominating the discussion surrounding dark store and fees simple valuation, the concept may actually be applied to any class of property. As discussed earlier, property taxation strives for uniformity in assessments, and fee simple is the only metric that transfers across different classes of property in furtherance of that goal.¹⁶² In valuing other commercial properties as fee simple unencumbered, the basic principles established herein for big box retail properties may be utilized to

¹⁵⁹ *Id.* at 183–84; Grant, *supra* note 132, at 477–78.

¹⁶⁰ See Herbert, *supra* note 6; see Terrill, *supra* note 89.

¹⁶¹ Herbert, *supra* note 6 (quoting commercial tax attorney, Linda Terrill, comparing localities asking for legislative changes to allow for continued non-fee simple unencumbered taxation so as to not impact their budgeting practices to a bank robber telling the prosecutor he already spent the money and asking the legislature to legalize bank robbing to avoid restitution.).

¹⁶² See *supra* pp. 15–16 and notes 113–17.

value practically any property. Because of the COVID-19 pandemic resulting in greatly underutilized, and even vacant, office space, this Note will provide business owners seeking a lower property tax liability on their now useless real property with an application of fee simple unencumbered principles to office properties.

A. *Diminished State of the Office Real Estate Market*

Since March 2020, millions of square feet of office space have sat empty nationwide as company and governmental mandates brought on by the COVID-19 pandemic forced employees to work from their homes.¹⁶³ The initial wave of the pandemic, followed by the rise of the delta and omicron variants, along with increasing cases during the holiday season, have kept a large portion of the workforce performing their duties remotely.¹⁶⁴ In fact, many companies are considering transitioning to a smaller office footprint as greater swaths of their workforce continue to work remotely at least some of

¹⁶³ See Lawrence Yun et al., *Commercial Real Estate Trends & Outlook*, NAT'L ASS'N OF REALTORS (Apr. 2021), <https://cdn.nar.realtor/sites/default/files/documents/2021-04-commercial-real-estate-trends-and-outlook-04-27-2021.pdf> [<https://perma.cc/NFJ5-LT9X>]; see Ryan Kailath, 'Do I Really Need This Much Office Space?' *Pandemic Emptied Buildings, but How Long*, NPR (Sept. 1, 2020, 5:00 AM), <https://www.npr.org/2020/09/01/906767790/do-i-really-need-this-much-office-space-pandemic-emptied-buildings-but-how-long> [<https://perma.cc/2ENC-22RT>].

¹⁶⁴ Madison Hoff, *People Are Still Working from Home as the Delta Variant Pushes Back Employers' and Workers' Office Plans*, BUS. INSIDER (Sept. 6, 2021, 1:16 PM), <https://www.businessinsider.com/people-still-working-home-delta-variant-covid-office-plans-2021-9> [<https://perma.cc/C8T2-S26W>]; see *As COVID Cases Rise, Officials Fear a Possible Holiday Surge*, N.Y. POST (Nov. 19, 2021, 2:20 PM), <https://nypost.com/2021/11/19/as-covid-cases-rise-officials-fear-a-possible-holiday-surge/> [<https://perma.cc/R4RS-YFUC>].

the time.¹⁶⁵ Because companies require less office space for workers to perform their functions than before the start of the pandemic, there has been a steep decline in the demand for office properties.¹⁶⁶ Though emerging markets in places with less stringent COVID-19 protocols like Florida and Texas are seeing some rise in occupancy, major cities like New York, Washington D.C., and San Francisco continue to suffer declines.¹⁶⁷

Nationally, office vacancy sits around 12.4%.¹⁶⁸ Rental rates have fared better in smaller and emerging real estate markets, but major markets have been in steady decline since the second quarter of 2020.¹⁶⁹ In an effort to fill vacancies, landlords have increasingly been providing rent concessions at a greater rate than before the pandemic.¹⁷⁰ In addition to leasing declines, there has been a slight uptick in the number of distress sales.¹⁷¹ The volume of office sales plummeted thirty-six percent from the first quarter of 2020 to

¹⁶⁵ See Nikodem Szumilo & Thomas Wiegelmann, *Do You Really Need All that Office Space?*, HARV. BUS. REV. (July 2, 2021), <https://hbr.org/2021/07/do-you-really-need-all-that-office-space> [<https://perma.cc/KKH2-5AX6>]; see Lydia Saad & Ben Wigert, *Remote Work Persisting and Trending Permanent*, GALLUP (Oct. 13, 2021), <https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx> [<https://perma.cc/F5FY-38BH>] (finding that “45% of full-time employees work[ed] partly or fully remotely”).

¹⁶⁶ See, e.g., Ari Levy, *San Francisco Tech Companies Are Sitting on Record Amounts of Empty Office Space and Offering Perks to Lure Tenants*, CNBC (May 14, 2021, 11:11 AM), <https://www.cnbc.com/2021/05/14/san-francisco-tech-companies-sitting-on-record-amounts-of-empty-space.html> [<https://perma.cc/9ZC6-PJRV>].

¹⁶⁷ Scholastica Cororaton, *Commercial Weekly: Thriving Office Market in Secondary Cities*, NAT’L ASS’N OF REALTORS (Sept. 24, 2021), <https://www.nar.realtor/blogs/economists-outlook/commercial-weekly-thriving-office-market-in-secondary-cities> [<https://perma.cc/28G9-NEDB>].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; Yun et al., *supra* note 163, at 5, 8.

¹⁷⁰ Yun et al., *supra* note 163, at 9.

¹⁷¹ *Id.* at 4.

2021 with a decline in the average sales prices.¹⁷² The outlook for 2022 is no more promising as office vacancy is expected to remain above ten percent nationally.¹⁷³ Perhaps in an attempt to entice tenants, large amounts of office space are undergoing construction.¹⁷⁴ If these projects are purely “speculative, it will add to the already-elevated vacant inventory and will continue to depress rents” and sales prices in primary markets.¹⁷⁵

B. *Applying Dark Store Methodology to Office Space*

The beauty of the dark store methodology is that it can be applied to any class of property, not just big box retail properties. This is because its core tenets mandate that property be valued as it sits, or as fee simple unencumbered, so that dissimilar properties may be consistently valued.¹⁷⁶ Specifically for office buildings, this means the valuation of the space itself, not the value a tenant brings by occupying it.¹⁷⁷ Thus, in valuing office space, one must look to the building sitting vacant and available for lease.¹⁷⁸ The best evidence of value is, therefore, non-distress sales of vacant office buildings, without the encumbrance of a lease to add value beyond its four walls.

¹⁷² *Id.* at 3–5.

¹⁷³ Cororaton, *supra* note 167 (this article was written before the emergence of the more contagious omicron variant, so revised numbers may indicate higher vacancy given the new variant’s higher transmission rates).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See supra* pp. 15–16 and notes 113–17.

¹⁷⁷ *Id.*

¹⁷⁸ Lennhoff, *supra* note 41, at 23.

However, merely because a sales price exists does not necessarily confirm its comparability to an appealed property. Much like retail sales, one must look to sales between first and second generation users where the property continues to be used as office space.¹⁷⁹ One unique issue resulting from the pandemic is that older office properties are being purchased and renovated or outright demolished and redeveloped.¹⁸⁰ Sales followed by demolition are never comparable because of the ulterior motive in purchasing the property.¹⁸¹ While this certainly is a demonstration of low demand and diminished sales prices, its purchase is merely for the land and is not indicative of fee simple unencumbered for purposes of this Note. Perhaps somewhat more useful are purchases of older office spaces by landlords who intend to renovate them and transform the space into a “work experience.”¹⁸² Though this category cannot be wholly disregarded in the context of an appeal, each transaction must be investigated to ensure it is not an outlier

¹⁷⁹ *Id.* at 24; Grant, *supra* note 132, at 451–52.

¹⁸⁰ See Chip Cutter & Konrad Putzier, *That Big Office Building? It's an E-Commerce Warehouse Now*, WALL ST. J. (Dec. 10, 2021, 5:33 AM ET), <https://www.wsj.com/articles/covid-is-making-many-offices-obsolete-heres-what-happens-to-old-offices-11639079017> [<https://perma.cc/JQV7-YPPR>]; see Will Hendrickson, *There's Been a Shift from Selling Office Space to Selling Experiences*, D. MAG. (May 27, 2021), <https://www.dmagazine.com/commercial-real-estate/2021/05/theres-been-a-shift-from-selling-office-space-to-selling-experiences/> [<https://perma.cc/B27R-KZGU>].

¹⁸¹ See *Is That Improved Comparable Sale Actually a Land Sale?*, BOS. APPRAISAL SERV. (Feb. 4, 2019), <https://www.bostonappraisal.com/commercial-appraisals/is-that-improved-comparable-sale-actually-a-land-sale/> [<https://perma.cc/87R6-84WJ>].

¹⁸² Hendrickson, *supra* note 180 (describing the evolution of the office space into “the ideal space for collaboration . . . [and] an inviting place where employees want to be” by offering flexible workspaces and short-term suites with the option for long-term custom spaces for branding).

when judged against other comparable transactions.¹⁸³ If in line with other comparable sales, these transactions may be used as additional evidence in a valuation appeal, but not as the crux of an argument for a valuation reduction.

The COVID-19 pandemic's effect of depressing office sales prices is evidence that real estate investors are not looking to put money into spaces with a high rate of disuse during a crisis of public health. This is only amplified by the uncertainty of governmental mandates, risks of future lockdowns in periods of rising cases, and growing amounts of office space on the leasing market.¹⁸⁴ Similar to the insecurity generated by the retail apocalypse and its effect on retail vacancy, it seems likely that these market conditions will create a similar trend of vacant office sales. Because of this, a prime opportunity exists for office landlords and tenants to seek reductions in their property tax liabilities through an application of dark store principles to office space.

C. *An Example of the Tax Savings at Stake*

With all of the controversy surrounding dark store, one might wonder whether the tax savings are worth filing a valuation appeal given the possibility of a lengthy court battle. To put the savings at stake into

¹⁸³ See Josh Panknin, *Commercial Property Comparative Analysis*, ALTUS GROUP (Oct. 2, 2020), <https://www.altusgroup.com/argus/insights/commercial-property-comparative-analysis> [<https://perma.cc/3XAY-KFHK>] (discussing the nuance involved in identifying and adjusting comparable sales to generate a list of good comparable properties).

¹⁸⁴ See *COVID-19 Restrictions*, USA TODAY, <https://www.usatoday.com/storytelling/coronavirus-reopening-america-map/> [<https://perma.cc/68XL-6R7U>] (last updated Feb. 21, 2022) (showing growing COVID-19 cases in forty-nine states and providing updates on lifting and tightening of restrictions in every state); Cororaton, *supra* note 167.

perspective, in 2018 alone, the city of Wauwatosa stood to refund retailers \$22.5 million in tax overpayments if the values of their big box properties were reduced to the levels requested.¹⁸⁵ Though Wauwatosa's litigation is not the norm, hundreds of thousands of dollars may be at stake for commercial property owners.¹⁸⁶ While retail properties have been successively appealed in mass, office properties have yet to be appealed using dark store principles on a wide scale. Given the success of retailers in demonstrating fee simple unencumbered valuations lower than their current assessments across multiple jurisdictions, it stands to reason that office properties' owners may also take advantage of these arguments.

For example, a search of recent sales of Ohio-based, high-vacancy office properties reveals an average value per square foot of fifty-three dollars and a median value per square foot of thirty-five dollars.¹⁸⁷ No distress sales were considered in this search. Both figures are noticeably below the \$83.91 average per square foot sales price for all Ohio office properties.¹⁸⁸ The

¹⁸⁵ Laura Bliss, *After the Retail Apocalypse, Prepare for the Property Tax Meltdown*, BLOOMBERG (Nov. 14, 2018, 10:29 AM EST), <https://www.bloomberg.com/news/articles/2018-11-14/to-cut-taxes-big-box-stores-use-dark-store-theory> [<https://perma.cc/N255-HNCB>].

¹⁸⁶ *Id.*; Lake Mills TV, *supra* note 2; Herbert, *supra* note 6.

¹⁸⁷ *Ohio High Vacancy Office Sale Comps Map & List Report*, COSTAR, <https://www.costar.com/> [<https://perma.cc/FXH4-R8Z8>] (last visited Oct. 5, 2021) (follow "Sales Comps" hyperlink; then search "Ohio," set property type to "Office," and set criteria to "high vacancy"). Typically, appeals are filed utilizing only comparable sales within the subject property's market or submarket; however, since this example is premised upon an Ohio property only, with no market specified, it will consider a statewide average only.

¹⁸⁸ *Cleveland Office Rent Price & Sales Report*, COMMERCIALCAFE, <https://www.commercialcafe.com/office-market-trends/us/oh/cleveland/> [<https://perma.cc/SY6R-T2MA>] (last visited Jan. 2, 2022) (displaying the decrease in Ohio's average price per square foot from \$101.40 to \$83.91, a 17.25% drop resulting from the COVID-19 pandemic).

difference in price is due to the inclusion of already leased properties in the average for all office properties figure. Purchasers will often pay a premium for property already occupied by a tenant for its immediate cash flow, a limited risk of near-term vacancy, and avoidance of leasing up costs.¹⁸⁹ If property is to be appropriately valued as fee simple unencumbered, the premium attributed to existing occupancy must be disregarded entirely.¹⁹⁰

In valuing a property as it sits, and not according to who occupies it, sales of vacant properties must be given weight in determining a property's fee simple valuation. Returning to the above Ohio example, a 20,000 square foot office building is valued for property tax purposes at eighty-four dollars per square foot based on sales of all office properties, resulting in a total value of \$1,680,000. If the property were to be valued as fee simple, based on the argument presented in this Note, it would be assessed at fifty-three dollars per square foot, or \$1,060,000. This reduction in value of \$620,000 equates to an estimated annual tax savings of \$16,268 (based on Ohio's average effective tax rate).¹⁹¹ Ohio assesses real property using a six-year cycle

¹⁸⁹ See Dave Welk, *How to Use Discounted Cash Flow Analysis in Commercial Real Estate*, ORIGIN INV. (Feb. 1, 2018), <https://origininvestments.com/2018/02/01/how-to-use-discounted-cash-flow-analysis-in-commercial-real-estate/> [<https://perma.cc/6VA8-N9X2>] (discussing discounted cash flow analysis where the price paid for an investment property is based on its potential future value, not its actual value in an open market between a willing buyer and seller).

¹⁹⁰ *In re Equalization Appeal of Target Corp.*, No. 116,607, 410 P.3d 939 (Kan. Bd. of Tax App. Dec. 29, 2017).

¹⁹¹ See, e.g., OHIO REV. CODE ANN. § 5715.01(B) (2017); *Property Tax Millage Rates*, OHIO DEP'T OF TAX'N, <https://tax.ohio.gov/wps/portal/gov/tax/researcher/tax-analysis/tax-data-series/all-property-taxes/pr6/pr6cy20> [<https://perma.cc/EGZ9-9JF6>] (last visited Jan. 5, 2022) (showing the average statewide tax rate, after reduction factors, for

divided into two periods of three years, each a triennium, with a value trending update separating them.¹⁹² If this office property's value was appealed in the first year of either triennium, and the reduction granted by the jurisdiction, the potential tax savings for the full triennium would be \$48,804.¹⁹³

Though helpful, this example must be caveated. It assumes that the average tax rate and per square foot figures are representative of the location of the appealing business. Tax rates and markets vary across localities and states, as do assessment cycles and appeal processes.¹⁹⁴ This example does, however, provide businesses with a means of determining the thousands of tax dollars that are potentially at stake and should be seen as illustrative, not instructive.

D. Recommendation: Appeal Your Office Properties!

It is the recommendation of this Note that businesses and landlords look to appeal their office properties using the tenets of fee simple valuation. When one considers that businesses pay about \$8 billion in property taxes in

commercially assessed property as 7.497% for taxes payable in calendar year 2020; the effective rate equals 7.497% multiplied by a 35% assessment ratio, which equals approximately 2.62395%.

¹⁹² OHIO REV. CODE ANN. § 5713.01(B) (2011).

¹⁹³ *Property Tax Millage Rates*, *supra* note 191 (calculating total triennium tax savings by multiplying the estimated annual tax savings of \$16,268 by three).

¹⁹⁴ See generally *50-State Property Tax Comparison Study For Taxes Paid In 2018*, LINCOLN INST. OF LAND POL'Y AND MINN. CTR. FOR FISCAL EXCELLENCE (2019), at 1–3 (presenting why property tax rates vary across cities and the reasons for such variance where property tax rates are the highest and lowest nationally); see generally *State Tax Profiles*, MARVIN F. POER & CO., <https://www.mfpoer.com/statetaxprofiles/statetaxprofiles.html> [<https://perma.cc/2KS8-F88L>] (last visited Jan. 7, 2022) (providing information on each state's unique property tax and valuation characteristics).

Ohio alone, and that property taxes continually comprise the plurality of a business' state and local taxes, such savings can prove substantial, especially if sought on a portfolio of properties.¹⁹⁵

When deciding whether to file a valuation appeal, business owners and landlords must perform a cost benefit analysis to determine whether the potential savings outweigh the costs associated with appealing.¹⁹⁶ Costs associated with the appeals process may include filing fees, attorney fees, whether contingent or hourly, and appraisal costs, including writing the report and appraiser testimony.¹⁹⁷ These costs may increase where a taxing entity such as a local school district is permitted to, and chooses to, file a counterclaim to the valuation appeal.¹⁹⁸ Local taxing entities constantly fight against commercial assessment reductions in front of various appeals boards and courts.¹⁹⁹ There are also intangible costs, such as negative press coverage

¹⁹⁵ Phillips & Sallee, *supra* note 27, at 3, 11.

¹⁹⁶ See *Appeal Costs & Process Overview*, MCCLELLAN LEGAL, https://mcclellanlegal.com/lawyer/Appeal-Costs--Process-Overview_cp7072.htm [<https://perma.cc/NV8J-JQAX>] (last visited Jan. 7, 2022).

¹⁹⁷ *Id.*

¹⁹⁸ See Scarinci Hollenbeck, *Property Owners – Be Careful What You Wish For*, SCARCINI HOLLENBECK ATT'YS AT LAW (May 25, 2013), <https://scarincihollenbeck.com/law-firm-insights/commercial-real-estate/real-property-tax-appeals/property-owners-be-careful-what-you-wish-for> [<https://perma.cc/BG8C-PEM4>] (“[a] municipality has the right to file a counterclaim . . . can argue for an increase in the assessment even without having filed a counterclaim.”); OHIO REV. CODE ANN. § 5715.19(A)(1) (2021) (granting taxing jurisdictions the ability to appeal property valuations at the Board of Revision); OHIO REV. CODE ANN. § 5717.01 (2018) (granting any taxing jurisdiction with the ability to appeal a property value before the Board of Revision an appeal of the Board’s decision to the Board of Tax Appeals).

¹⁹⁹ See Herbert, *supra* note 6; see *League of Wisconsin Municipalities*, *supra* note 77.

claiming big box stores are not paying their fair share of taxes, and other forms of retaliation by locality government officials and residents.²⁰⁰

Fortunately for commercial property owners, some states are beginning to ease many of these costs to appeal through taxpayer-friendly legislation. While the previously discussed Indiana legislation restricting valuation to the cost of reconstruction during a tenant's initial occupancy is cause for concern, the size requirement of greater than 100,000 square feet is massive.²⁰¹ With the average office space needed per employee already shrinking during the last decade due to flexible working arrangements, and the pandemic cementing such decreases, it seems unlikely that this is cause for concern except for the largest of office buildings.²⁰² Just across the Indiana border, Ohio lawmakers have sent a bill to the governor which would prohibit anyone other than the owner of a property from contesting its value to the county, or any subsequent appellate body.²⁰³ Wisconsin lawmakers also proposed legislation to mandate certain assessment practices, such as the

²⁰⁰ See Chastity Pratt, *Lawmakers to Big Box Stores: Pay Your Fair Share of Taxes!*, BRIDGE MICH. (Aug. 11, 2015), <https://www.bridgemi.com/business-watch/lawmakers-big-box-stores-pay-your-fair-share-taxes> [<https://perma.cc/CL3Z-PY2U>]; see also *Dark Store Theory: The Move Big Box Retailers Are Making That Could Cost You Big Bucks*, FOX 6 MILWAUKEE (Dec. 4, 2016), <https://www.fox6now.com/news/dark-store-theory-the-move-big-box-retailers-are-making-that-could-cost-you-big-bucks> [<https://perma.cc/SA8C-BF7L>].

²⁰¹ S.B. 145, 122nd Gen. Assemb., 2022 Sess. (Ind. 2022).

²⁰² See Mike Petrusky, *How Much Office Space Do We Need Per Employee?*, IOFFICE + SPACEIQ (Nov. 24, 2020), <https://www.iofficecorp.com/blog/office-space-per-employee> [<https://perma.cc/PN64-B6X4>] (identifying the decline in office space per employee needed, but suggesting the social distancing requirements of the COVID-19 pandemic may cause it to increase again); but see DiNapoli, *supra* note 12 (suggesting that employers will actually need even less office space as employers, like PwC, allow large swaths of employees to work remotely permanently, not just during the COVID-19 pandemic).

²⁰³ H.R. 126, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

use of arm's length sales that an appraiser would use in determining valuation, according to professionally acceptable appraisal practices.²⁰⁴ Such a law change would prohibit use of build to suits and sale/leasebacks in the assessment of commercial properties. The law would even go so far as assert statutory superiority to any assessment manuals promulgated by the state Department of Revenue.²⁰⁵ While both bills have yet to become law, perhaps they are reflective a new trend of taxpayer favorable legislation that makes office spaces appeals more attractive.

With the continuing trend of office vacancies, there is an opportunity for commercial property owners to be the “first to market” with pursuing this type of appeal. This comes with challenges similar to what the owners of the New York Stock Exchange faced in being the first to argue new assessment theory.²⁰⁶ However, unlike that case, this is not the first time appeals bodies will be hearing arguments using sales of vacant properties in justification of a reduction. By relying on much of the case law and literature already in existence for retail properties, owners of office space can pursue reductions in a similar fashion, particularly in states like Indiana and Michigan which are already receptive to such arguments.²⁰⁷

²⁰⁴ A.B. 610, 2021–2022 Leg. Sess. (Wis. 2021); S.B. 630, 2021–2022 Leg. Sess. (Wis. 2021).

²⁰⁵ A.B. 610; S.B. 630.

²⁰⁶ *People ex rel. N.Y. Stock Exch. Bldg. Co. v. Cantor*, 221 A.D. 193, 195 (N.Y. App. Div. 1927), *aff'd*, 162 N.E.514 (N.Y. Ct. App. 1928).

²⁰⁷ *See Ikea Prop., Inc. v. Township of Canton*, No. 366639, 2012 WL 3139709, at *18–20 (Mich. Tax Tribunal July 18, 2012) (discussing comparable sales where no other comparable sales of occupied stores exist in a market); *see Meijer Stores Ltd. P'ship v. Marion Cty. Assessor* No. 49-440-02-1-4-00573 2, 9 (Ind. Bd. of Tax

This is not to suggest that difficulties may not persist in places like Ohio which have special purpose doctrine precedent.²⁰⁸ However, the opportunity to file some of the first “dark office” appeals in localities more intensely focused on dark store retail appeals may allow for large returns if these appeals go under the radar. The thought is that these localities will be more attuned to retail appeals, with much of the press and resident backlash aimed at big box stores and less so at office buildings. Many individuals who would otherwise express outrage are fairly accustomed to the realities of remote work in the COVID-19 pandemic, so they may be more sympathetic towards these appeals.²⁰⁹ Whatever the case may be, office property owners should greatly consider filing an appeal using dark store arguments in pursuit of reductions to their ever-growing property tax liabilities.²¹⁰

V. CONCLUSION

The COVID-19 pandemic changed many things about our world, but one thing it did not alter is businesses’ obligation to pay property taxes to the localities in which they operate. It certainly did not move the needle on the debate about commercial property valuation appeals. The controversy over fee simple valuation continues to be at the forefront of these appeals with localities, backed by the dubious propositions of the IAAO, pushing for

Rev. Dec. 1, 2014) (finding that the use of vacant big box retail sales was acceptable).

²⁰⁸ *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision*, 12 Ohio St. 3d 270, 271–72 (Ohio 1984) (quoting *Fed. Reserve Bank of Minneapolis v. State*, 313 N.W.2d 619, 623 (Minn. 1981)).

²⁰⁹ See DiNapoli, *supra* note 12; see also Saad & Wigert, *supra* note 165.

²¹⁰ Phillips & Sallee, *supra* note 27.

greater consideration of occupancy in valuation. The false dark store narrative they present to distract residents is a push to turn them against commercial taxpayers when their appeals are nothing more than the pursuit of a fee simple unencumbered valuation of their property. Structures should be valued based on their four walls, not who sits within them, nor how much or how little money they earn by occupying them. Use of vacant properties comparable to an appealed property is a perfectly legitimate means of seeking a reduction in property tax liability.

Until now, retail has been the primary property type to take advantage of vacant sales in appeals. This is because of the abundance of vacant sales data coming out of the retail apocalypse. Now, with the COVID-19 pandemic keeping office workers at home, and office spaces continuing to remain dark, the new frontier of fee simple assessment appeals is the use of vacant office sales to justify reductions in these properties' valuations. It is through the use of these vacant sales that commercial property owners may finally begin to be taxed not based on their name or occupancy of a space, but uniformly through the actual value of their structures.