



March 31, 2020

Ms. Amy Rasmussen, RES, AAS, FIAAO
President
IAAO
314 West 10th Street
Kansas City, MO 64105

Re: Appraisal Institute Response to IAAO White Paper

Dear Ms. Rasmussen:

In August 2019, the IAAO published a white paper titled "Setting the Record Straight on Fee Simple." As this document purports to address concepts and theories that are basic to the real property appraisal profession, the Appraisal Institute's leadership has carefully analyzed this paper and finds that it is conceptually flawed and factually inaccurate. Our concerns are set forth specifically below.

We found four overarching conceptual flaws; each will be described and then supported with examples from the IAAO white paper (the "Paper").

1. It is foundational that each appraisal assignment starts with the appraiser identifying the problem the client needs to have solved. USPAP¹ and appraisal education and guidance identify six elements to be identified in order to properly identify the problem. One of those elements is "the subject of the assignment" which includes property rights being valued². However, the first two elements listed in USPAP are the identification of the intended users and the intended use of the assignment. The Paper addresses only the ownership rights to be valued and several conclusions drawn may be inaccurate depending on the intended use and/or intended users identified in the assignment.
2. Appraisers and those attorneys whose practice includes real property appraisal issues are generally aware that different professions define "fee simple" differently and that the definitional differences may be substantive. In a legal context, the term "fee simple" can have a different meaning than the one found in *The Dictionary of Real Estate Appraisal*, 6th Edition ("AI Dictionary"). This is because legal definitions generally serve a different purpose. Where appraisal definitions serve to highlight the encumbrances on property, which may add to or detract from value, legal definitions tend to focus on duration. Legal definitions generally do not mention the four powers of government or encumbrances. Instead, in a legal setting, the fee simple interest is one that endures for an indefinite period, as opposed to a shorter estate like a life estate or term of years (lease).

Though stating that it is addressing and analyzing the effect of the use of the AI Dictionary definition, the Paper implicitly replaces that definition with the type of definition used in the legal profession throughout the paper, thereby creating logical inconsistencies in its conclusions.

¹ *Uniform Standards of Professional Appraisal Practice (USPAP)*, 2020-2021 edition, The Appraisal Foundation, Washington, DC, lines 347-354. See, also, USPAP, Standards Rules 1-2, 2-2(a)(i)-(vii) and 2-2(b)(i),(ii),(v)-(ix).

² *The Appraisal of Real Estate, 14th Edition*, Appraisal Institute, Chicago, IL, 2013 states "Any interest can be valued, even if no entity holds that interest as of the date of value" at p. 441.

3. The Paper often fails to include the guidance found in the appraisal profession's body of knowledge, even though current and historical publications included in the body of knowledge are listed as references. This results in the presentation of advice and conclusions that are inaccurate or misleading.
4. We also found internal inconsistencies in the terms used and unsupported conclusions throughout the Paper. In addition, terms that may have multiple definitions are used without citing to the specific definition relied on in the Paper. These and other drafting and logic errors are at best confusing; at worst, they may be misleading.

Specific examples are discussed below; these are examples only and not intended to be all-inclusive.

L. 1-2:

The Paper starts with the following statement. "This IAAO paper addresses issues regarding the term fee simple, or more appropriately, fee simple absolute." (emphasis added) That "fee simple absolute" is the more appropriate term is not supported in the paper. Further, Black's Law Dictionary (Black's), which is relied on as an authoritative source in the paper, has separate definitions of "fee simple" and "fee simple absolute."³ They are not the same.

As quoted in the Paper, Black's defines "fee simple," in part, as "An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute."

Fee simple absolute is defined in Black's as "An estate of indefinite or potentially infinite duration." The definition of fee simple absolute does not include the idea that it is the "broadest property interest allowed by law."

The paper does not indicate which definition is being applied and this may have an effect on the opinions and conclusions presented in the Paper.

L. 9:

In its second paragraph, the Paper states, "[s]pecific issues arising from the term *fee simple absolute* include whether a property should be valued as if vacant..." This "as if vacant" concept appears throughout the Paper and it is not consistent with the Appraisal Institute's body of knowledge. *The Appraisal of Real Estate, 14th Edition* (TARE)⁴ states: "When the fee simple interest is valued, the presumption is that the property **is available to be leased** at market rates" at p. 441 (emphasis added). "Available to be leased" is not equivalent to "vacant," as such an available property may be owner-occupied or subject to a short-term or month-to-month lease, among other things.

This may appear to be a minor point, but it is not. The importance of the distinction between "vacant" and "available for lease" is exemplified in section III. C. of the paper, which is titled "Fee Simple and Vacancy." By following the notion of "vacant" rather than "available," the Paper states "One of the significant controversies that has emerged from the ambiguous phrase unencumbered by any other interest or estate is the interpretation that a property encumbered by a lease is not fee

³ *Black's Law Dictionary, Eleventh Edition*, Thompson Reuters, St. Paul, MN Note: *Black's* 11th Edition was published after the issuance of the Paper. The paper cites *Black's* 10th Edition. The definitions used in the paper and in this response have not been modified between the 10th and 11th editions.

⁴ *The Appraisal of Real Estate, 14th Edition*, *Supra*.

simple, and that appraising a property in fee simple means one must assume the property is unencumbered by a lease, that is, vacant. This concept has come to be known as the dark store theory.”

Thus, by conflating “vacant” and “available,” the Paper arrives at the unsupported conclusion that the “dark store theory” is the same concept as valuing the fee simple estate of real property. This conclusion is not consistent with the Appraisal Institute’s body of knowledge. Further, “dark store theory” is not defined in the Appraisal Institute’s body of knowledge or in the Paper.

L. 10: “fee simple implies market rent”

As quoted above, the sentence in the second paragraph of the Paper lists three specific issues, or points of controversy. The first stated issue is addressed immediately above; the third stated issue is “[s]pecific issues arising from the term *fee simple absolute* include...whether fee simple implies market rent.” A more accurate statement of this issue would be whether fee simple is presumed to be *receiving* market rent or *available to be leased* at market rent. Relying on the seminal advice presented in TARE (“When the fee simple interest is valued, the presumption is that the property **is available to be leased at market rates**,” at p. 441 (emphasis added)), it becomes clear that when valuing the fee simple interest in specific real property, that property is available to receive rent at market rates.

TARE further clarifies, at p. 467, “To a certain extent, the interest being appraised determines how rents are analyzed and estimated. The valuation of fee simple interests in income-producing real estate is based on the market rent the property is capable of generating. Therefore, to value proposed projects without actual leases, properties with unleased space, and owner-occupied properties, market rent estimates are used in the income capitalization approach.”

The Appraisal Institute body of knowledge is consistent on this point. “Rent for vacant or owner-occupied space is usually estimated at market rent levels and distinguished from contract rent in the income analysis. In fee simple valuations, all rentable space is estimated at market rent levels. Any rent attributed to specific leases is disregarded in the income analysis. In a leased fee analysis, current contract rents defined by any existing leases are used for leased space, and income for vacant space is estimated at market rent.”⁵ In addition, the time, risk and costs associated with acquiring a new tenant must be considered for all space appraised as if unoccupied or otherwise available for lease.

The concept of fee simple implying market rents is repeated throughout the Paper, again leading to unsupported conclusions. The significance of this is seen in Section III.C. Section III is titled “Implications of the Appraisal Definition,” so it is expected that the opinions and conclusions presented in this section would be based on the Appraisal Institute’s definition of fee simple; this is not the case and, as seen throughout the Paper, the concepts of the definition used in the legal profession form the basis for the opinions and conclusions presented. However, as stated above, the Paper does not indicate which specific definition is being applied in its analysis.

Section III.C. is titled “Fee Simple and Vacancy.” As explained, this is not consistent with the Appraisal Institute’s body of knowledge.

L. 43-45:

⁵ *The Appraisal of Real Estate, 14th Ed., Supra*, p. 447.

In Section II.B., the Paper presents three definitions of fee simple, the first of which appears to be a definition of “fee simple absolute.” These are all definitions found in publications used by the legal profession, which is appropriate, as the section of the paper is addressing the legal definition of fee simple. Each is somewhat different from the others, and the Paper does not indicate which definition it uses as the basis for its opinions and conclusions.

In addition, the Black’s definition is not quoted in its entirety. As noted above, the paper presents the following as the Black’s definition: “An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute.” This is followed by:

Often shortened to fee. Also termed estate in fee simple, tenancy in fee, fee-simple title; exclusive ownership, feudum simplex; estate in fee. See AND HIS HEIRS

[Fee simple] is a term not likely to be found in modern conversation between laymen, who would in all probability find it quite unintelligible. Yet to a layman of the 14th century the term would have been perfectly intelligible, for it refers to the elementary social relationship of feudalism with which he was perfectly familiar: the words “fee” and “feudal” are closely related...the estate in fee simple is the largest estate known to the law, ownership of such estate being the nearest approach to ownership of the land itself which is consonant with the feudal principle of tenure...Traditionally, the fee simple has two distinguishing features: first, the owner (“tenant” in fee simple) has the power to dispose of the fee simple either inter vivos or by will...

Black’s continues in this vein. What can be seen is that there are various, nuanced definitions of “fee simple” used by the legal profession.

L. 64:

The Paper then appears to turn from the fee simple definition(s) used in the legal profession to the one used in the inaccurately labeled “appraisal industry.” In the heading of section III.2. and elsewhere in the Paper reference is made to the “appraisal industry,” when the material actually is referencing the Appraisal Institute’s definition and its body of knowledge.

L. 61-65:

Section II.B. of the Paper addresses the “Appraisal Definition of Fee simple,” starting with what the paper presents as the “History” (Section II.B.1.) of what is the definition developed by the Appraisal Institute and its predecessor organization, the American Institute of Real Estate Appraisers. The conclusions that the definition has undergone a “transformation” from 1938 to today appears to be an inaccurate interpretation of the Appraisal Institute’s body of knowledge. This will be discussed in more depth below.

L. 78-81

The Appraisal Institute textbook, *The Appraisal of Real Estate, 8th Edition* was published in 1983, and so it is apparently the edition referenced in the fourth bullet point of the Paper’s described history of the Appraisal Institute’s definition. The Paper quotes two sentences from pages 8-9 of the textbook (“A person owning all of the rights is said to have fee simple title. Fee simple title is regarded as an estate without limitations or restrictions.” The next two sentences in the textbook are not also quoted in the paper, although they have direct bearing on the theses presented in the paper. Those sentences advise: “Less than complete estates result from partial interests that are created by selling,

leasing, or otherwise limiting the bundle of rights in the fee simple estate. An appraisal assignment may require the appraisal of fee simple title or any partial interest such as a leasehold interest or an easement.” [emphasis added]

The Appraisal Institute body of knowledge has not changed on this point. The current, authoritative edition of TARE teaches,

The sticks in the bundle of rights each have some type of value. For example, the owner of the fee simple estate (i.e., the holder of the complete set of sticks in the bundle) can trade the rights to occupy a certain amount of space within an existing building on the land in exchange for rent. In this way, the familiar relationship of landlord to tenant can be thought of as an exchange of property rights, and the appraiser can develop an opinion of the market value of the right to use and occupy the leased premises. This right does not cease to exist when the owner of the fee simple estate separates it from the complete bundle of rights. Rather, it is held by someone else, in this case the tenant. (p. 69) ...

Real property appraisal involves not only the identification and valuation of a variety of different rights, but also the analysis of the many limitations on those rights, and the effect that the limitations have on value. Some limitations on ownership, such as eminent domain, are public while others such as deed restrictions are private. These limitations on ownership are actually rights that are not held by the property owner. In other words, the owner loses the ability to do certain things by no longer holding certain sticks in the bundle of rights. For example, the government holds the right of eminent domain, and the property owner gives up the right to use and occupy the condemned portions in the event that the government exercises its right. (p. 70)

L. 107-112

As noted above, the Paper presents an inaccurate statement regarding the Appraisal Institute’s intent when editing its definition of fee simple and related guidance over time. The definition published in 1938 shows the difference from the definitions used in the legal profession in that it does not reference durability and, perhaps more importantly, includes “subject, however, to the limitations of Eminent Domain, Escheat, Police Power, and Taxation.” This establishes that the only limitations on the fee simple estate are those government powers. The addition of “unencumbered by any other interest or estate” is merely a clarification of the language used since 1938, and not a change in the long-established appraisal definition.

Ownership interests serve a different purpose to appraisal professionals than to legal professionals. The appraisal profession is concerned with the effect on value of the possession of different ownership interests which is why it is logical to use different definitions from the legal profession. As more fully stated in the quote from TARE, p. 69, above: “The sticks in the bundle of rights each have some type of value...” and appraisers can and do appropriately value the fee simple, leased fee and leasehold estates of real property regardless of the property rights currently owned.

L. 125-178:

Section II.B.2., “Appraisal Industry Definition” starts by quoting the Appraisal Institute definition of fee simple and is followed by Section II.B.3. “Unencumbered by any other Interest or Estate” which presents positions and conclusions that are not based on the relevant guidance and advice contained in the Appraisal Institute body of knowledge.

Section II.B.2. starts with the unsupported statement that “unencumbered by any other interest or estate” is “a problematic phrase.” This conclusion appears to be based on the following statement: “an implication that unspecified interests and encumbrances will result in something other than the fee simple estate.” Both USPAP and guidance in the Appraisal Institute body of knowledge require that an appraiser identify and report the “property interest to be valued.”⁶ The property interests would therefore be specified.

The Appraisal Institute’s body of knowledge historically and currently includes three defined types of property interests, fee simple, leased fee and leasehold interests. “The most common type of economic interest is created when the fee simple interest is divided by a lease...The divided interests resulting from a lease represent two distinct but related interests – the leased fee interest and the leasehold interest.”⁷ This is not problematic when using the Appraisal Institute’s definitions, which this section of the paper is addressing.⁸

However, despite section headings stating that the appraisal definitions are being discussed, the paper neglects the Appraisal Institute definitions and relies solely on the definitions used by the legal profession. For that reason, the statement that “...an interest encumbering the estate...may lessen or enhance the value of the estate, it does not change the fact that a property is held in fee simple” may be accurate for title purposes, but not when using the Appraisal Institute’s definitions and related guidance.

The Paper then states that “The courts have noted the discrepancy between the legal and appraisal definitions of fee simple” citing only *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision 2009*; *HIN, L.L.C. v. Cuyahoga Cnty. Bd. of Revision 2014*. In fact, many courts have addressed the distinctions in definitions of fee simple and many courts have held that the Appraisal Institute definition is the appropriate one to apply. The same Ohio Appellate Court that issued *Meijer Stores* distinguished *Meijer Stores* in *Rite-Aid of Ohio, Inc. v. Washington County Board of Revision*, 146 Ohio St.3d 173, 54 N.E.3d 1177 (2016); the *Rite-Aid* opinion is written using the Appraisal Institute’s definitions of ownership interests.

The Paper next contends that the concept that a “fee simple absolute estate being encumbered by another estate...is illogical.” That statement may be true using some other definition of “fee simple,” but it is not true using the Appraisal Institute’s definition. The same can be said of the remainder of this section of the Paper; the opinions and conclusions presented are not based on the Appraisal Institute’s definition and related guidance, even though this section of the Paper purports to be addressing those Appraisal Institute definitions.

L. 235:

Section III.B. contains the following conclusion, “In a jurisdiction where market rent is the criterion for the calculation of rental income in an appraisal, sales of leased properties can and should be used as comparables, provided economic adjustments are made for above- and below-market rents, but this

⁶ USPAP, SR 1-2(e)(ii) and SR 2-2(a)(iv), SR 2-2(b)(iv)

⁷ *The Appraisal of Real Estate, 14th Edition*, p. 70,72

⁸ USPAP uses the same terminology and definition as the Appraisal Institute’s body of knowledge with regard to property interests. See, SR 1-4(d), lines 540-541, SR 5-6(c), lines 1154-1155 and 1156-1158, FAQ 196, FAQ, 240 and FAQ 251. These examples use “fee simple,” “leased fee” and “leasehold estate” the same way those terms are used in the body of knowledge and also are based on the premise that the fee simple estate cannot be subject to a lease.

is not a fee simple issue.”⁹ In addition to addressing market rent and then presenting a conclusion regarding sales comparables, the conclusion that “this is not a fee simple issue” is not consistent with the Appraisal Institute’s body of knowledge. TARE, at p. 390 (for one example) advises “The basic elements of comparison that should be considered in sales comparison analysis are as follows: real property rights conveyed: fee simple estate, leased fee interest, leasehold interest...” An adjustment for property rights conveyed is included in nearly all, if not all adjustment grids and discussion of adjustments in presentations of sales comparison approaches to value.

Perhaps more significantly, the advice to use sales of leased properties to support market rent value estimates with only making “economic adjustments” for “above- and below- market rents” is inconsistent with the body of knowledge. According to TARE, p. 406, “If the sale of a leased property is to be used as a comparable sale in the valuation of the fee simple estate of another property, the comparable sale can only be used if reasonable and supportable market adjustments for the differences in rights can be made.” Reasonable and supportable adjustments might include not just those accounting for the market orientation of the comparable’s rent, but also for the fact that the comparable is leased at all.

L. 261-262:

The Paper states, “The interpretation of fee simple as meaning vacant, even when the property is not, assumes a condition that is contrary to what exists, a hypothetical condition.” This advice is inaccurate; an appraisal of the fee simple estate of a leased property is not premised on a hypothetical condition.

As set forth in USPAP, the appraisal development process begins with properly identifying the problem to be solved.¹⁰ One of the assignment elements required to be identified in every appraisal is the subject of the assignment.¹¹ USPAP Advisory Opinion 23 teaches “...the definitions of *real property* and *real estate* provided in USPAP require that the subject of a real property appraisal is a specific ownership of a right (or rights) in identified real estate.”¹²

The identification of the property rights to be appraised precedes and is separate from assignment conditions, which include hypothetical conditions.¹³ The property rights appraised are not premised on a hypothetical condition; they are identified after consultation with the client in order to learn what property rights the client needs to have appraised in order to solve a specific problem. As noted in the introduction to this response, TARE sheds more light on this on p. 441 where it states, “Any interest can be valued, even if no entity holds that interest as of the date of value. The interest to be valued depends on the intended use and intended user of the appraisal.”

The Paper is conflating the concept of “occupancy” with leased status. Most opinions of market value are predicated on a theoretical sale of the property between knowledgeable sellers and buyers. If a property is not leased as of the effective date of value, it would transfer vacant, pure and simple - that’s not hypothetical, it’s a fact.

⁹ The implication that the use of sale data to support a market rent opinion is illogical, as the appraisal profession’s body of knowledge indicates that recently negotiated leases are the best sources of support for market rent opinions.

¹⁰ USPAP, Scope of Work Rule, line 347.

¹¹ *Ibid.*, line 370.

¹² AO 23, lines 39-40.

¹³ USPAP, Scope of Work Rule, lines 370, 371,378.

L. 344-346:

The final substantive section of the Paper is titled "Property Tax is based on Assessing the Property to One 'Owner.'" While this topic does not appear to be relevant to a discussion of the fee simple estate, it is used to support the conclusion that "it is irrelevant whether the term *fee simple absolute* implies the absence of a lease." The Appraisal Institute definition, the definition being addressed in this subsection of Section III, Implications of the Appraisal Definition, makes it clear that the estate, as defined in the Appraisal Institute's body of knowledge is free of all encumbrances, including leases, but for the enumerated four governmental powers. How taxing authorities assess and collect real property tax has no relevance to or effect on the definition of "fee simple," how that definition is applied or which methods and techniques should be used to develop an opinion of value of the fee simple ownership interest in specified real property.

Sincerely,



Jefferson L. Sherman, MAI, AI-GRS
2020 President