

# Highest and Best Use and Property Rights—Does It Make a Difference?

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## Abstract

Fee simple property rights application in tax appraisal is a continuing debate in the courts and taxing jurisdictions and among appraisers. The debate centers on the valuation assumption of fee simple interest in the appraisal of single-tenant properties like big-box retail. One side of this debate is that the property should be appraised considering its current use, while the other viewpoint is that the property should be appraised with the assumption that it is vacant and available for a secondary use. This article addresses the question of how highest and best use fits in this definitional debate and suggests that a supported and reasoned highest and best use analysis should dictate the methods and approaches applied in the valuation analysis—and not just definitional interpretation that assumes the property is vacant and available for a use. Big-box retail property is used as the example for this article, but other property types, such as drug stores, manufacturing facilities, or any property type that was built for use by the owner-operator, will have similar issues in tax court disputes.

## Introduction

The application of fee simple property rights in tax appraisal is a continuing debate among courts, taxing jurisdictions, and appraisers.<sup>1</sup> The debate centers on the valuation assumption of fee simple interest in the appraisal of single-tenant properties like big-box retail.<sup>2</sup> A big-box retail property will be used as the example for this article, but other property types, such as drug stores, manufacturing facilities, or nearly any property type that was built for use by the owner-operator, have similar arguments in tax court disputes.<sup>3</sup> One side of this debate is that such properties should be appraised considering their current use, while the other viewpoint is that such properties should be assumed vacant and

available for a secondary use. This article addresses the question of how highest and best use fits in this definitional debate. Whether in tax appraisals or in any market value assignment, this article proposes that a supported and reasoned highest and best use analysis should dictate the methods and approaches applied in the valuation analysis, and not just a definitional interpretation that assumes the property is vacant and available for a use, “because in any appraisal, it is the use that is being valued.”<sup>4</sup> This is not an estimate of the value of a going concern, but the going concern use, and like any commercial use appraisal, it is analyzed to see if the market is supporting its type of operation in order to determine if the cost of creating the real estate component is justified and supported by the market.

1. Tax appraisals seem to be the main context where the divergent views play out as lenders and lending regulators, banks, and condemnation courts seem to be less concerned about this issue.
2. There is similar debate regarding how to assess built-to-suit leased facilities.
3. Two case opinions, one regarding a big-box store in Michigan and one regarding a GM auto plant in New Jersey, show the courts' concern about how highest and best use is applied in market value appraisals. See *Menards Inc. v. City of Escanaba* 315 Mich. App. 512 (May 26, 2016) and *General Motors Corp. v. Linden City*, 22 N.J. Tax 95 (February 2, 2005).
4. *General Appraiser Market Analysis and Highest and Best Use* course (Appraisal Institute, 2016) Part 13, 353.