

REPRESENTATIVE FOR PETITIONERS:

Paul M. Jones, Jr., Ice Miller, LLP

Matt Ehinger, Ice Miller, LLP

REPRESENTATIVE FOR RESPONDENT:

John C. Slatten, Marion County Assessor's Office

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Simon Debartolo Group, L.P.,	)	Petition Nos.:	49-600-06-1-4-08629
Debartolo Realty	)		49-600-06-1-4-08630
Partnership, LP and	)		49-600-06-1-4-08631
SPG Lafayette Square, LLC,	)		49-674-06-1-4-08633
	)		49-674-06-1-4-08634
	)		49-674-06-1-4-08635
Petitioners,	)		49-674-06-1-4-08636
	)		49-600-06-1-4-08637
	)		49-674-06-1-4-08638
v.	)		49-674-06-1-4-08639
	)		49-674-06-1-4-00644
	)		49-674-06-1-4-00645
Marion County Assessor,	)		49-674-06-1-4-00646
	)		49-674-06-1-4-00647
	)		49-674-07-1-4-02584
Respondent.	)		49-674-07-1-4-02585
	)		49-674-07-1-4-02586
	)		49-600-07-1-4-02587
	)		49-600-07-1-4-02588
	)		49-600-07-1-4-02589
	)		49-674-07-1-4-02591
	)		49-600-07-1-4-02592
	)		49-674-07-1-4-02593
	)		49-674-07-1-4-02594
	)		49-674-07-1-4-02595
	)		49-674-07-1-4-02596
	)		49-674-07-1-4-02597
	)		49-674-07-1-4-02598
	)		
	)	Parcel Nos.:	6000324, 6006675, 6006780,
	)		6007695, 6007704, 6008887,
	)		6008888, 6008889, 6008891,
	)		6008892, 6008941, 6008942,
	)		6008943 and 6009354
	)		
	)	County:	Marion
	)		
	)	Assessment Years:	2006 and 2007

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Appeal from the Final Determination of the  
Marion County Property Tax Assessment Board of Appeals

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**October 3, 2012**

**FINAL DETERMINATION**

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

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**ISSUE**

1. The issue presented for consideration by the Board is whether the assessed value of the Petitioners' property was over-stated for the 2006 and 2007 assessment years.

**PROCEDURAL HISTORY**

2. The Petitioners' representative initiated the Petitioners' 2006 assessment appeals by a letter to the Marion County Assessor dated June 6, 2007. The Marion County Property Tax Assessment Board of Appeals (the PTABOA) issued its 2006 assessment determinations on November 24, 2009. The Petitioners' representative initiated the Petitioners' 2007 assessment appeals by letter dated July 5, 2009. The PTABOA issued its 2007 assessment determinations on January 27, 2010.
3. Pursuant to Indiana Code § 6-1.1-15-1, the Petitioners' representative filed Form 131 Petitions for Review of Assessment on December 9, 2009, petitioning the Board to conduct an administrative review of the properties' 2006 assessments. The Petitioners'

representative filed Form 131 Petitions on February 19, 2010, petitioning the Board to conduct an administrative review of the properties' 2007 assessments.

4. On June 1, 2012, the Petitioners filed their "Petitioners' Motion for Determination Concerning Burden of Proof" and "Brief in Support of Petitioners' Motion for Determination Concerning Burden of Proof." On June 25, 2012, the Respondent filed its "Response to Petitioners' Motion for Determination Concerning Burden of Proof." On July 3, 2012, Petitioners filed their "Petitioners' Reply Concerning Burden of Proof." Following the hearing, on August 29, 2012, the Petitioners filed their "Petitioners' Post-Hearing Brief." The Respondent filed its "Respondent's Closing Brief" on August 31, 2012.

#### **HEARING FACTS AND OTHER MATTERS OF RECORD**

5. Pursuant to Indiana Code § 6-1.1-15-4 and § 6-1.5-4-1, the duly designated Senior Administrative Law Judge (ALJ), Carol Comer, held a hearing on July 25, 2012, in Indianapolis, Indiana.
6. The following persons were sworn in at the hearing:<sup>1</sup>

For the Petitioners:

Donna Vosper,	Vice President of Acquisitions and Dispositions for Simon Property Group,
Sara Coers, MAI,	Mitchell Appraisals, Inc.,
Steve Kingsley,	Vice President of Operations for Simon Property Group,

For the Respondent:

Eve Beckman,	Commercial/Industrial Valuation Analyst
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<sup>1</sup> Carla Bishop, Certified Tax Representative, Andrew Thompson, Assistant Property Tax Manager for Simon Property Group, Michael D. Larson, Vice President Property Tax for Simon Property Group, and Robert Larson, MBA Intern, were also present for the Petitioners and George T. Spenos, Deputy Director, Marion County Assessor, was also present for the Respondent.

7. The Petitioners presented the following exhibits:<sup>2</sup>

- Petitioners Exhibit 1 – Offering Memorandum for the sale of Lafayette Square Mall,
- Petitioners Exhibit 2 – Purchase Agreement and First Amendment for the sale of Lafayette Square Mall,
- Petitioners Exhibit 3 – Closing Statement and parties list for the sale of Lafayette Square Mall,
- Petitioners Exhibit 4 – Consulting Report for Lafayette Square Mall,
- Petitioners Exhibit 5 – Calculation applying trending factors to the sale price,
- Petitioners Exhibit 6 – Property Tax Appeals agenda from the Marion County PTABOA for the 2004 assessment year,
- Petitioners Exhibit 7 – Settlement Statements regarding the property's 2004 value,
- Petitioners Exhibit 8 – Recalculation of Respondent's income valuation,
- Petitioners Exhibit 9 – Income Expense Report for 2007,
- Petitioners Exhibit 10 – Excerpt of testimony given by Ms. Beckman in *Washington Square Mall v. Marion County Assessor*, Petition No. 49-700-06-1-4-01861, *et seq.*,
- Petitioners Exhibit 11 – Excerpt of testimony given by Ms. Beckman in *Washington Square Mall v. Marion County Assessor*, Petition No. 49-700-06-1-4-01861, *et seq.*

7. The Respondent presented the following exhibits:<sup>3</sup>

- Respondent Exhibit 1 – Aerial photographs of the Lafayette Square Mall,
- Respondent Exhibit 2 – 2008 Property Record Cards for the subject property,
- Respondent Exhibit 3 – 2002 Property Record Cards for the subject property,
- Respondent Exhibit 4 – Comparable sales documents,
- Respondent Exhibit 5 – Broker's description of the subject property,
- Respondent Exhibit 6 – 2006 Rent Roll Report,
- Respondent Exhibit 7 – 2007 Rent Roll Report,
- Respondent Exhibit 8 – Income analysis for the 2006 valuation of the subject property,
- Respondent Exhibit 9 – Income analysis for the 2007 valuation of the subject property,
- Respondent Exhibit 10 – Tenant Summary,
- Respondent Exhibit 11 – Floor Plan of the subject property,
- Respondent Exhibit 12 – Korpacz Real Estate Investor Surveys for the Fourth Quarter 2004-2007 and summary,

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<sup>2</sup> The Respondent's counsel object to Petitioners' Exhibits 4, 5, 6, 7, 8, 10, 11 and 13 on grounds of hearsay, relevancy and lack of foundation. All Exhibits were admitted over objection.

<sup>3</sup> The Petitioners' counsel objected to Respondent's Exhibit 13 as irrelevant and objected to Respondent's Exhibits 17, 18 and 19 because the Respondent's counsel's failed to exchange the documents. Respondent's Exhibits 13, 17, 18 and 19 were admitted over objection.

- Respondent Exhibit 13 – Property Tax Consulting Agreement,
- Respondent Exhibit 14 – Capitalization Policy,
- Respondent Exhibit 15 – Expense Ratio Analysis; Super Regional Shopping Centers,
- Respondent Exhibit 16 – Expense Ratio Analysis; Regional Shopping Centers,
- Respondent Exhibit 17 – Consumer Price Index,
- Respondent Exhibit 18 – Marshall and Swift, Comparative Cost Indexes,
- Respondent Exhibit 19 – Rent Roll Summary.

8. The following additional items are officially recognized as part of the record of proceedings and labeled as Board Exhibits:

- Board Exhibit A – Form 131 Petitions with attachments,
- Board Exhibit B – Notice of Hearing, dated April 11, 2012,
- Board Exhibit C – Hearing sign-in sheet.

9. The subject property is a retail shopping center comprised of Parcel No. 6000324, Parcel No. 6006675, Parcel No. 6006780, Parcel No. 6007695, Parcel No. 6007704, Parcel No. 6008887, Parcel No. 6008888, Parcel No. 6008889, Parcel No. 6008891, Parcel No. 6008892, Parcel No. 6008941, Parcel No. 6008942, Parcel No. 6008943 and Parcel No. 6009354, commonly known as Lafayette Square Mall located at 3919 Lafayette Road, Marion County, in Indianapolis, Indiana.
10. The ALJ did not conduct an on-site inspection of the subject property.
11. For 2006, the PTABOA determined the assessed value of the property to be \$264,600 for the land for Parcel No. 6007704; \$132,000 for the land for Parcel No. 6008943; \$735,100 for the land and \$13,900 for the improvements for Parcel No. 6008941; \$348,300 for the land and \$147,900 for the improvements for Parcel No. 6009354; \$3,300 for the land for Parcel No. 6008889; \$623,400 for the land and \$79,300 for the improvements for Parcel No. 6008888; \$125,500 for the land for Parcel No. 6008892; \$889,400 for the land and \$11,000 for the improvements for Parcel No. 6008942; \$763,900 for the land and \$200,800 for the improvements for Parcel No. 6008887; \$184,900 for the land for Parcel No. 6006675; \$5,575,000 for the land for Parcel No. 6000324; \$9,946,300 for the improvements for Parcel No. 6007695; \$1,448,400 for the land and \$1,403,300 for the

improvements for Parcel No. 6008891; and \$5,103,800 for the land for Parcel No. 6006780. The assessments of all of the parcels at issue in this appeal total \$16,197,600 for the land and \$11,802,500 for the improvements, or \$28,000,100, for 2006.

12. For 2007, the PTABOA determined the assessed value of the property to be \$264,600 for the land for Parcel No. 6007704; \$132,000 for the land for Parcel No. 6008943; \$735,100 for the land and \$4,500 for the improvements for Parcel No. 6008941; \$348,300 for the land and \$47,600 for the improvements for Parcel No. 6009354; \$3,300 for the land for Parcel No. 6008889; \$623,400 for the land and \$25,500 for the improvements for Parcel No. 6008888; \$125,500 for the land for Parcel No. 6008892; \$889,400 for the land and \$3,600 for the improvements for Parcel No. 6008942; \$763,900 for the land and \$64,700 for the improvements for Parcel No. 6008887; \$184,900 for the land for Parcel No. 6006675; \$5,575,000 for the land for Parcel No. 6000324; \$3,204,400 for the improvements for Parcel No. 6007695; \$1,448,400 for the land and \$452,100 for the improvements for Parcel No. 6008891; and \$5,103,800 for the land for Parcel No. 6006780. The assessments of all of the parcels together total \$16,197,600 for the land and \$3,802,400 for the improvements, or \$20,000,000, for 2007.
13. In hearing, the Respondent's counsel argued that the assessed value of the subject property should total \$34,600,000 for 2006 and \$30,800,000 for 2007. However, in his "Respondent's Closing Brief," Mr. Slatten contends the value of the subject property should total \$36,000,000 for 2006 and \$30,000,000 for 2007.
14. The Petitioners contend that the assessed value of their property should total \$15,281,398 for the 2006 assessment year and \$16,849,758 for the 2007 assessment year. Alternatively, the Petitioners contend the assessed value of the property should not exceed its \$18,000,000 sale price for either of the assessment years at issue in this appeal.

## JURISDICTIONAL FRAMEWORK

15. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property, (2) property tax deductions, (3) property tax exemptions, and (4) property tax credits, that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Indiana Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

## PARTIES' CONTENTIONS

16. The Petitioners contend that the assessed value of their property was over-stated for the 2006 and 2007 assessment years. The Petitioners presented the following evidence in support of their contentions:
  - A. The Petitioners' counsel contends that the value of the Petitioners' property was over-assessed for the 2006 and 2007 assessment years based on the sale of the property in December of 2007. *Jones Argument*. Mr. Jones contends the subject property sold for \$18,000,000 in a valid arm's length sale to an unrelated party. *Id.*, *Petitioners' Exhibits 1-3, Petitioners' Post-Hearing Brief*. In support of this contention, the Petitioners presented an Offering Memorandum, the Purchase Agreement, and Closing Statements for the sale. *Id.*
  - B. The Petitioners' witness, Steve Kingsley, testified that Lafayette Square Mall was a challenging asset because it was difficult to attract and retain national credit worthy retailers. *Kingsley testimony*. According to Mr. Kingsley, the amount of disposable income in the area surrounding the mall was in decline and potential retailers did not see Lafayette Square Mall as an asset. *Id.* Mr. Kingsley testified that there was a steady decline in both occupancy and foot traffic in the mall from 2003. *Id.* As

tenants came up for renewal, Mr. Kingsley testified, many did not renew their lease. *Id.*

- C. Mr. Kingsley further testified that the physical condition of the property was generally the same on the sale date in December of 2007 as it was on March 1, 2006, and March 1, 2007. *Kingsley testimony.* According to Mr. Kingsley, the parking lots needed work, but the building itself did not change condition or function. *Id.* In response to cross-examination, Mr. Kingsley admitted that Lafayette Square Mall was de-branded around 2005. *Id.* However, he argued, even though the property was de-branded, it was still operated as if the Simon name was on the door. *Id.*
- D. Mr. Kingsley testified that Simon Property Group's primary business structure is to manage and own quality retail real estate. *Kingsley testimony.* According to Mr. Kingsley, Simon Property Group did not see an opportunity to improve the value of Lafayette Square Mall. *Id.* Thus, Mr. Kingsley testified, the Petitioners were motivated to sell the mall in 2007 because the property no longer fit in Simon's strategic mission to hold high quality real estate. *Id.* However, Mr. Kingsley argued, Simon Property Group is not in the business of selling properties for anything less than the property's market value. *Id.* Simon "owed it to their shareholders to maximize the sale price." *Id.*
- E. The Petitioners' witness, Donna Vosper, testified that the sale of the subject property was an arms' length transaction and that the sale price represented the market value of the property. *Vosper testimony.* According to Ms. Vosper, she oversaw the entire process of the sale from the hiring of the broker to the closing of the sale. *Vosper testimony.* Ms. Vosper testified that Simon hired DTZ Rockwood as a broker and initial offers were made in spring of 2007. *Id.* Ms. Vosper testified that potential investors were provided with a two-page flyer relating to the subject property and interested parties were able to access additional materials after signing a confidentiality agreement. *Id.* A call for offers took place sometime in the fall of 2007 and Simon Property Group received two or three offers. *Id.* Ms. Vosper



testified that Simon negotiated the purchase price with the highest bidder and a sale and purchase agreement was entered into between Simon Property Group and AAC Management Corp for \$18,000,000 at the end of December 2007. *Id.*, *Petitioners' Exhibit 3*.

- F. In order to validate the sale and trend the property's December 27, 2007, sale price to the relevant assessment and valuation dates, the Petitioners' counsel called Sara Coers, an MAI appraiser with the Mitchell Group, who presented her "Sale Confirmation and Trending Analysis Report." *Coers testimony, Petitioners' Exhibit 4*. Ms. Coers testified that she interviewed a representative from Simon Property Group, the broker for the sale, an operations contractor with Lafayette Square Mall, and the current mall manager. *Coers testimony*. From these interviews, the Petitioners' expert concluded that the sale appeared to be an arms' length transaction. *Id.*, *Petitioners' Exhibit 4*. According to Ms. Coers, she did not find any evidence of a relationship between the seller and the buyer that would have affected the sale price; she did not find any indication of any inappropriate sales conditions; and she found no indication of atypical financing. *Id.* Further, Ms. Coers testified, she found that the subject property appeared to have been adequately marketed; it was exposed to the market for a typical amount of time for its submarket; and the seller and buyer were knowledgeable, willing and typically motivated participants. *Id.* Ms. Coers admitted, however, that she did not determine if the property's sale price represented the property's market value because she did not conduct an appraisal. *Coers testimony*.
- G. To develop her trending analysis, Ms. Coers testified that she calculated two sets of trending factors: one to trend the property's value from the December 2007 sale date to the 2006 and 2007 assessment dates; and one to trend the property's value from the assessment dates to the valuation dates.<sup>4</sup> *Coers testimony; Petitioners' Exhibit 4*. Ms. Coers testified that she reviewed all of the potential data sources and techniques

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<sup>4</sup> In her testimony, Ms. Coers defined trending and trending factors as a figure representing the increase in cost or selling price over a period of time.

and concluded that the average change in capitalization rates best captured how property values changed. *Id.* Ms. Coers also considered the changes in the price index from Real Capital Analytics and Moody's Investor Services, which indicated the change in retail prices as measured in dollars per square foot. *Id.* According to Ms. Coers, she used the averages of these two data sources as the factor to trend the December 2007 sale back to the assessment dates and as the factor to trend the property's value from the assessment dates to the relevant valuation dates. *Id.*

H. Applying Ms. Coers' trending factors to the property's \$18,000,000 sale price, results in a value of \$15,281,398 for the 2006 assessment year, and \$16,849,758 for the 2007 assessment year. *Jones argument, Petitioners' Exhibit 5.*

I. In his Post-Hearing Brief, the Petitioners' representative argued that the Respondent failed to establish a prima facie case for its proposed values of \$34,600,000 for 2006 and \$30,800,000 for 2007. *Jones' argument, Petitioners' Post-Hearing Brief.* According to Mr. Jones, the Respondent only presented a one page income analysis using site-specific income data and a capitalization rate pulled from a national survey. *Id.* Mr. Jones argued that the income valuation performed by the Respondent was not performed by an appraiser and was not done in conformance with USPAP. *Id.* Moreover, Mr. Jones argues, the Respondent did not present a sales comparable valuation for the property; instead the Respondent merely offered a stack of sales that were not related to the subject property. *Id.*

17. The Respondent contends that the property's value was \$34,600,000 for 2006 and \$30,800,000 for 2007.<sup>5</sup> The Respondent further contends that the sale of the Petitioners' property was too remote in time and that the property was in decline between the period of the valuation date at issue and the date of the sale. The Respondent presented the following evidence in support of these contentions:

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<sup>5</sup> In his "Respondent's Closing Brief," Respondent's counsel contends the assessed value of the subject property should be \$36,000,000 for the 2006 assessment year; and \$30,000,000 for the 2007 assessment year.

- A. The Respondent's witness, Eve Beckman, argues that the Board should disregard the property's sale price because it was not indicative of the subject property's value as of January 1, 2005, or January 1, 2006. *Beckman testimony*. Ms. Beckman argued that at the time of the sale, Simon Property Group was reaching their worst time of ownership in Lafayette Square Mall. *Id.* According to the rent rolls, Ms. Beckman argues, there was a progressive decline in occupancy starting in January of 2005 continuing until the property sold in December of 2007. *Id.*, *Respondent Exhibit 19*. In fact, the whole area around Lafayette Square Mall had been in a decline for quite some time. *Beckman testimony*. Thus, Ms. Beckman concluded, the value of the subject property decreased between the valuation date for the 2006 appeal and the December 2007 sale. *Id.* In fact, Ms. Beckman testified that, to the best of her recollection, she thought Lafayette Square Mall was appraised for \$32,000,000 in 2004. *Id.* Ms. Beckman admitted, however, that she did not have a copy of the appraisal to submit as evidence. *Id.*
- B. The Respondent further contends that the sale price of the subject property was not sufficient by itself to support a determination of the market value in use of the property as of either of the relevant valuation dates. *Slatten argument*. In support of this contention, Ms. Beckman testified that typically a regional mall would take six to twenty-four months to sell. *Beckman testimony*. If a good mall was for sale it would typically take six to twelve months to sell, Ms. Beckman contends, while a mall that is riskier and on the decline typically would take longer. *Id.* Ms. Beckman testified that the subject property appears to have sold rather quickly compared to the average rates from the Korpacz survey. *Id.*
- C. Furthermore, Ms. Beckman testified that Lafayette Square Mall changed use after the December 2007 sale. *Beckman testimony*. According to Ms. Beckman, Incredible Pizza is located in one of the anchor spaces, which, in her opinion, is not an anchor typically seen in a mall. *Id.* In fact, Ms. Beckman, testified, according to the buyer's website, the buyer specializes in refurbishing and thinking outside of the box on re-tenanting. *Id.*

- D. Additionally, Ms. Beckman argues, the Petitioners' trending method was flawed. *Beckman testimony*. According to Ms. Beckman, while Ms. Coers took an average of two factors, a proper analysis would choose one rate over another. *Id.* "Averaging is not something that would be recommended." *Id.*
- E. Instead of its sale price, the Respondent's representative argues that the Petitioners' property should be assessed for \$34,600,000 for the 2006 assessment year and \$30,800,000 for the 2007 assessment year based on its income value. *Beckman testimony*. In support of this contention, Ms. Beckman prepared an income approach valuation based on an analysis of the mall's rent rolls, its occupancy and the net operating activity at Lafayette Square Mall. *Id.*, *Respondent Exhibit 19*. Ms. Beckman testified that she used the property's operating activity and adjusted for the property tax burden to get to an adjusted net operating income, which was "about a four million dollar net operating activity." *Beckman testimony, Respondent Exhibit 8*. In determining the capitalization rate, Ms. Beckman testified that she used the higher end of the non-institutional grade assets rate in the Korpacz survey, acknowledging that the subject property was in some distress. *Beckman testimony*. Thus, applying an 11.75 percent rate to the subject property's net operating income, Ms. Beckman argues, results in a value of \$34,600,000 for the 2006 assessment year. *Beckman testimony, Respondent Exhibit 8*. Respondent's Exhibit 9 shows that Ms. Beckman used a 11.5 percent capitalization rate to capitalize the property's income, which resulted in a value of \$30,800,000 for the 2007 assessment year. *Respondent Exhibit 9*.
- F. Finally, Ms. Beckman testified that she attempted to consider a sales comparison approach. *Beckman testimony*. However, she argues, there were no malls within a five mile radius and moreover none of the malls in the area had sold recently. *Id.*

## BURDEN OF PROOF

18. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that his property's assessment is wrong and what its correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). Effective July 1, 2011 however, the Indiana General Assembly enacted Indiana Code § 6-1.1-15-17, which has since been repealed and re-enacted as Indiana Code § 6-1.1-15-17.2.<sup>6</sup> That statute shifts the burden to the assessor in cases where the assessment under appeal has increased by more than 5% over the previous year's assessment:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.

Ind. Code § 6-1.1-15-17.2.

19. In this case, the Petitioners' counsel argues that the Respondent should have the burden of proof in the 2006 assessment appeals because the properties' assessed values in 2006 increased more than five percent over the properties' 2005 assessed values. *Brief in Support of Petitioner's Motion for Determination Concerning Burden of Proof*. In support of this argument, Mr. Jones presented 17-T forms showing that the properties' 2005 assessed values were lowered after a conference with the township assessor. *Id.*, *Exhibit A*. However, the forms also show that the properties' assessed values were the same for most of the parcels, and in fact were higher for several parcels in 2005, before the parties negotiated their agreement lowering the values. Determining which party has

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<sup>6</sup> HEA 1009 §§ 42 and 44 (signed February 22, 2012). This was a technical correction necessitated by the fact that two different provisions had been codified under the same section number.

the burden of proof, therefore, rests upon a determination of whether the Board is to compare the assessed value of the property in the year at issue to the assessed value of the property in the prior year; or whether the Board is to compare the assessed value of the property in the year at issue with the values agreed to by the parties for the previous year.

20. The clear language of the statute states that the burden shifts to the county when the assessed value of a property increases more than five percent “over the assessed value determined by the county assessor or township assessor for the immediately preceding assessment date.” Ind. Code § 6-1.1-15-17.2. Thus, the Board finds that it is the prior year’s assessed value, rather than any value later negotiated by the parties that determines where the burden lies. To hold otherwise might chill the willingness of parties to enter into settlements. As the Indiana Supreme Court held:

The law encourages parties to engage in settlement negotiations in several ways. It prohibits the use of settlement terms or even settlement negotiations to prove liability for or invalidity of a claim or its amount. Ind. Evidence Rule 408. It provides that a settlement is neither a judgment nor an admission of liability. *Four Winns, Inc. v. Cincinnati Ins. Co.*, 471 N.E.2d 1187, 1190 (Ind. Ct. App. 1984), *transfer denied*. The Tax Court pointed out a strong policy justification for denying settlements precedential effect in property tax cases: “to allow the Taxpayers to use the settlement would have a chilling effect on the incentive of all assessing officials to resolve cases outside the courtroom.” *Boehning v. State Bd. of Tax Comm’rs*, 763 N.E.2d 502, 505 (Ind. Tax Ct. 2001).

*Dep’t of Local Gov’t Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1227 (Ind. 2005); *See also* Indiana Rules of Evidence, Rule 408 (“Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.”) Therefore, the Petitioners have the burden of proof in both assessment years at issue in this appeal.

## ANALYSIS

21. In Indiana, assessors value real property based on the property's market value-in-use, which the 2002 Real Property Assessment Manual defines as "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." MANUAL at 2. Thus, a party's evidence in a tax appeal must be consistent with that standard. *Id.* A market-value-in-use appraisal prepared according to Uniform Standards of Professional Appraisal Practice (USPAP) will often be probative. *Kooshtard Property VI v. White River Twp. Ass'r*, 836 N.E.2d 501,506 n. 6. (Ind. Tax Ct. 2005). A party may also offer actual construction costs, sales information for the subject property or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
  
22. Regardless of the method used to rebut an assessment's presumed accuracy, a party must explain how its evidence relates to the property's market value-in-use as of the relevant valuation date. *O'Donnell v. Dept' of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also, Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For the March 1, 2006, assessment date, the valuation date was January 1, 2005, and for the March 1, 2007, assessment date, the valuation date was January 1, 2006. 50 IAC 21-3-3.
  
23. Here the Petitioners argue that their property was over-assessed in 2006 and 2007 based on the property's \$18,000,000 sale price in December of 2007. In order to show that the sale was a valid, arms' length transaction, Mr. Kingsley testified that the property was sold because it was not a strategic asset, but the property's use remained a regional mall after the sale. In addition, Ms. Vosper testified that the property was offered by a broker to a large number of prospective purchasers; bids were taken from interested parties; and Simon negotiated a final purchase price with the highest bidder. Both Mr. Kingsley and Ms. Vosper testified that Simon's goal in the sale was to "maximize the selling price" of the mall. Finally, the Respondent's expert testified that the sale appeared to have been an arms' length transaction. According to Ms. Coers, there was no evidence of a

relationship between the seller and the buyer and there was no indication of inappropriate sales conditions or atypical financing. Moreover, Ms. Coers testified that she found that the property was adequately marketed and the seller and buyer were knowledgeable, willing and typically motivated participants.

24. In order to explain how the property's sale price related to the property's value as of January 1, 2005, and January 1, 2006, the Petitioners presented testimony from Ms. Coers, who explained how she trended the subject property's December 27, 2007, sale price back to the March 1, 2006, and March 1, 2007, assessment dates and from the assessment dates to the relevant valuation dates of January 1, 2005, and January 1, 2006. Ms. Coers testified that she used the average change in capitalization rates and the changes in the price index from Real Capital Analytics and Moody's Investor Services to develop her trending factor. The Petitioners' representative then applied Ms. Coers' trending factors to the property's purchase price, concluding that the value of the subject property was \$15,281,398 for the 2006 assessment year and \$16,849,758 for the 2007 assessment year.
25. The sale of the subject property is often the best evidence of the property's value. *See Hubler Realty Co. v. Hendricks County Assessor*, 938 N.E.2d 311, 315 (Ind. Tax Ct. 2010) (finding that the Board's determination assigning greater weight to the property's purchase price than its appraised value was proper and supported by the evidence). The Petitioners presented sufficient evidence that the property was sold in a valid, arms' length transaction and the Petitioners trended the sale price to the relevant valuation dates for both of the assessment dates at issue in this appeal. Thus, the Board finds that the Petitioners raised a prima facie case that the property's true tax value was \$15,281,398 for the 2006 assessment year and \$16,849,758 for the 2007 assessment year.
26. Once the Petitioners establish a prima facie case, the burden shifts to the assessing official to rebut the Petitioners' evidence. *See American United Life Insurance Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). To rebut or impeach the Petitioners' case, the Respondent has the same burden to present probative evidence that the Petitioners



faced to raise their prima facie case. *See Fidelity Federal Savings & Loan v. Jennings County Assessor*, 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005).

27. The Respondent's counsel first argues that the property's sale price was not sufficient by itself to support a determination of the market value in use of the subject property as of either of the relevant valuation dates. According to the Respondent's witness, the subject property was offered on the open market for insufficient period of time because the average time for a mall to sell was between six and twenty-four months. On cross-examination, Ms. Beckman conceded that the sale of the subject property encompassed roughly a nine month period. Thus, even given Ms. Beckman's time frame for a valid sale, the sale of the subject property fits within this time frame. Moreover, the Petitioners' witnesses credibly testified that the subject property was aggressively marketed to obtain the maximum amount of profit possible.
28. On cross-examination the Respondent's representative also sought to prove that, because the subject property was de-branded in 2005, it was in decline. However, Petitioners' witness Mr. Kingsley testified that, while the subject property was in fact de-branded in 2005, the property was still operated as a mall and run as if the Simon name remained on the door. Moreover, the Petitioners established that the buyer of the property intended to continue to run the subject property as a mall.
29. Ultimately, much of the Respondent's criticisms of the property's sale price in 2007 centered on the Assessor's belief that the property was performing better in the years leading up to the sale. And, in fact, Mr. Kingsley testified that the property had been declining steadily. But the Respondent's evidence fails to show any significant deterioration during the relevant time period sufficient to disregard the sale price. For example, the Respondent's evidence shows that Lafayette Square Mall's total occupancy was reported to be 61% on March 1, 2006, 59% on March 1, 2007, and 60% in October of 2007. *Respondent's Exhibit 19*. Similarly, the Respondent's evidence shows that the mall's total income was \$7,912,283 on March 1, 2006, \$7,943,392 on March 1, 2007, and \$7,918,947 in October of 2007. *Id.* And while it is true the Mall was debranded by

Simon Property Group, that debranding occurred in 2005 – which is prior to the assessment years at issue in this appeal.

30. The Respondent’s counsel also argues that the property’s December 2007 sale price should be disregarded because the purchase price did not represent the property’s market value-in-use. In support of this contention, Respondent’s representative presented an income approach analysis. “The income approach to value is based on the assumption that potential buyers will pay no more for the subject property ... than it would cost them to purchase an equally desirable substitute investment that offers the same return and risk as the subject property.” MANUAL at 14. The income approach thus focuses on the intrinsic value of the property rather than the Petitioners’ operation of the property because property-specific rents or expenses may reflect elements other than the value of the property “such as quality of management, skill of work force, competition and the like.” *Thorntown Telephone Company, Inc. v. State Board of Tax Commissioners*, 588 N.E.2d 613, 619 (Ind. Tax Ct. 1992). See also MANUAL at 5 (“[C]hallenges to assessments [must] be proven with aggregate data, rather than individual evidence of property wealth. ... [I]t is not permissible to use individual data without first establishing its comparability or lack thereof to the aggregate data”). Here, Ms. Beckman based her opinion entirely on the rent rolls from tenants at the mall. She made no attempt to show how the rents or expenses she used compared to the market.
  
31. Ms. Beckman also failed to adequately support her choice of capitalization rates. A capitalization rate “reflects the annual rate of return necessary to attract investment capital and is influenced by such factors as apparent risk, market attitudes toward future inflation, the prospective rates of return for alternative investments, the rates of return earned by comparable properties in the past, the supply of and demand for mortgage funds, and the availability of tax shelters.” See *Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269, 275 (Ind. Tax Ct. 2005). Here Ms. Beckman testified that she chose her capitalization rate from the Korpacz survey for the 4<sup>th</sup> quarter of 2004. And Respondent’s Exhibits 8 and 9 show that she used an 11.75 percent rate in 2006 and an 11.5 percent rate in 2007. However, the Respondent’s Exhibit 12, shows that

capitalization rates for Non-Institutional Grade Regional Malls ranged from seven percent to 13.5 percent for 4<sup>th</sup> quarter 2004 and 4<sup>th</sup> quarter 2005. And they ranged from 6.5 percent to 13.5 percent in 2006. While the rules of evidence generally do not apply in the Board's hearings, the Board requires some evidence of the accuracy and credibility of the evidence. *See Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E.2d 1113, 1119 (Ind. Tax Ct. 1998). Thus, it was incumbent upon Ms. Beckman to fully support her choice of capitalization rate.

32. Further, while Ms. Beckman's analysis may not differ significantly from the calculations made by a certified appraiser in an appraisal report, the appraiser's assumptions are backed by his education, training, and experience. The appraiser also typically certifies that he complied with the uniform standards of professional appraisal practice. Thus, the Board, as the trier-of-fact, can infer that the appraiser used objective data, where available, to quantify his adjustments. And where objective data was not available, the Board can infer that the appraiser relied on his education, training and experience to estimate a reliable quantification. Here, however, there is no evidence that Ms. Beckman is a certified appraiser; she did not establish that she has any particular expertise in applying generally accepted appraisal principles; and she did not certify that she complied with USPAP in performing her valuation analysis. Consequently, Ms. Beckman's income analysis is less reliable than the property's sale price, which was trended to the relevant valuation dates by the Petitioners' appraiser.

### CONCLUSION

33. The Petitioners raised a prima facie case that the parcels at issue in this appeal were over-valued for the March 1, 2006, and March 1, 2007, assessment years. The Respondent failed to rebut or impeach the Petitioners' evidence. The Board finds in favor of the Petitioners and holds that the properties' assessed values total \$15,281,398 for the 2006 assessment year and \$16,849,758 for the 2007 assessment year.

## FINAL DETERMINATION

In accordance with above the findings of fact and conclusions of law, the Indiana Board of Tax Review determines that the assessed values of the Petitioners' property should be lowered for the 2006 and 2007 assessment years.

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

### Appeal Rights -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>