

REPRESENTATIVE FOR PETITIONERS:

Matthew J. Ehinger, Ice Miller, LLP

REPRESENTATIVE FOR RESPONDENT:

Nick J. Cirignano, Zeimer Stayman Weitzel Shoulders, LLP

**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

SM EASTLAND MALL, LLC,	)	Petition Nos.:	82-027-08-1-4-04339
WRIGHT MOTORS, INC. and	)		82-027-09-1-4-07615
SIMON PROPERTY GROUP	)		82-027-10-1-4-00774
	)		82-027-08-1-4-04338
Petitioners,	)		82-027-09-1-4-07602
	)		82-027-10-1-4-00778
VANDEBURGH COUNTY	)		82-027-11-1-4-03856
ASSESSOR,	)		82-027-11-1-4-03859
	)		82-027-11-1-4-03867
Respondent.	)		
	)	Parcel Nos.:	82-06-23-017-106.045-027
	)		82-06-23-017-106.018-027
	)		82-06-23-017-106.048-027
	)		
	)	County:	Vanderburgh
	)		
	)	Assessment Years	
	)	Under Appeal:	2008, 2009, 2010 and 2011

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

**May 7, 2015**

**FINAL DETERMINATION**

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

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **INTRODUCTION**

1. SM Eastland Mall, LLC, Wright Motors, Inc., and Simon Property Group (the “Petitioners”) appealed the assessments valuing Parcel Numbers 82-06-23-017-106.018-027 and 82-06-23-017-106.045-027 (the “Shopping Center Parcels”) for the 2008, 2009, 2010, and 2011 assessment years. The Petitioners also appealed the assessment valuing Parcel Number 82-06-23-017-106.048-027 (the “Restaurant Parcel”) for the 2011 assessment year. The Shopping Center Parcels and the Restaurant Parcel will be addressed separately below.

### **SHOPPING CENTER PARCELS**

#### **ISSUE**

2. The issue presented for consideration by the Board is whether the Shopping Center Parcels are correctly valued for the 2008, 2009, 2010, and 2011 assessment years.

### **PROCEDURAL HISTORY**

3. The Petitioners filed Form 130 petitions with the Vanderburgh County Assessor contesting the Shopping Center Parcels’ 2008, 2009, 2010, and 2011 assessments. The Vanderburgh County Property Tax Assessment Board of Appeals (the “PTABOA”) issued determinations for the 2008, 2009, and 2011 assessments, but failed to act on the 2010 petitions. The Petitioners timely filed Form 131 petitions with the Board for all of the assessment years.<sup>1</sup>

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<sup>1</sup> For 2010, the Petitioners had the option of waiting for the PTABOA to act or, in the alternative, filing petitions with the Board. *See* Ind. Code § 6-1.1-15-1(o) (allowing a taxpayer to appeal to the Board at any time after the maximum time for the PTABOA to hold a hearing or issue a determination has lapsed).

4. The Petitioners, by counsel, filed Petitioners’ Motion for Determination Concerning Burden of Proof with the Board on January 24, 2013. The Respondent did not file a response in opposition to the motion with the Board. On April 11, 2013, the Board issued an order granting the Petitioners’ motion determining that the Respondent has the burden of proof for the 2008 assessment year.

**HEARING FACTS AND OTHER MATTERS OF RECORD**

5. The Board’s administrative law judge, Gary Ricks (the “ALJ”), held the administrative hearing on October 22, 2014, in Evansville. Neither the Board nor the ALJ inspected the subject property.

6. The following persons were sworn in and testified at the hearing:

For the Petitioners: Sara Coers, MAI, Mitchell Appraisals, Inc. / Valbridge Property Advisors

For the Respondent: Gregory Abell, MAI, CEI Appraisal Group, Inc.  
William Fluty, Vanderburgh County Assessor  
Brian Shelton, MAI, Appraisal Company, Inc.<sup>2</sup>

7. The Petitioners submitted the following exhibits:

Petitioners Exhibit 1: Form 131 petitions and attachments for the 2008–2011 assessment dates  
Petitioners Exhibit 2: Appraisal Review Report prepared by Brian Shelton  
Petitioners Exhibit 3: Summary Appraisal Report prepared by Sara Coers  
Petitioners Exhibit 4: Demonstrative exhibit comparing Assessor’s assessed value to Appraiser’s assessed value  
Petitioners Exhibit 5: Property record card (“PRC”) for Parcel No. 82-07-30-017-162.012-027  
Petitioners Exhibit 6: PRC for Parcel No. 82-06-24-017-160.007-027  
Petitioners Exhibit 7: PRC for Parcel No. 82-05-28-007-452.015-024  
Petitioners Exhibit 8: Korpacz Real Estate Investor Survey, First Quarter, 2007  
Petitioners Exhibit 9: Korpacz Real Estate Investor Survey, First Quarter, 2008

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<sup>2</sup> Tiffany Collins, PTABOA Deputy, and Jacqueline Doty-Fox, Hearing Officer for the Vanderburgh County Assessor, were sworn in as witnesses for the Respondent, but did not testify at the hearing.

Petitioners Exhibit 10: Korpacz Real Estate Investor Survey, First Quarter, 2010  
 Petitioners Exhibit 11: Korpacz Real Estate Investor Survey, First Quarter, 2011  
 Petitioners Exhibit 12: Korpacz Real Estate Investor Survey, First Quarter, 2012  
 Petitioners Exhibit 13: Uniform Standards of Professional Appraisal Practice (“USPAP”), 2014-2015 Edition  
 Petitioners Exhibit 14: Board’s Final Determination in *Caborn Development, LLC v. Gibson County Assessor*, Pet. No. 26-024-06-1-4-00001  
 Petitioners Exhibit 15: Net lease investor overview for Applebee’s restaurant

8. The Respondent presented the following exhibits:

Respondent Exhibit A: Vanderburgh County PTABOA Recommendation for the 2008-2011 assessment years and PRCs for the subject property  
 Respondent Exhibit B: Sales ratio study for Vanderburgh County, Indiana  
 Respondent Exhibit C: Comparable sales information for Parcel No. 82-06-023-017-106.013-027  
 Respondent Exhibit D: Minutes from April 13, 2010 Vanderburgh County PTABOA meeting  
 Respondent Exhibit E: Tenancy schedule of subject property  
 Respondent Exhibit F: Summary Appraisal Report prepared by Gregory Abell  
 Respondent Exhibit G: Summary Appraisal Report prepared by Sara Coers  
 Respondent Exhibit H: Appraisal Review Report prepared by Brian Shelton  
 Respondent Exhibit I: SM Newco Bank of America sublease information related to subject property  
 Respondent Exhibit J: Other leases related to subject property  
 Respondent Exhibit K: Summary recommendation of County Assessor

9. The following items are also recognized as part of the record:

Board Exhibit 1: Form 131 petitions and attachments  
 Board Exhibit 2: Notices of Hearing  
 Board Exhibit 3: Hearing Sign-In sheet

In addition, the Board incorporates into the record all filings by the parties and all orders and notices issued by the Board or the ALJ, including, but not limited to, the following:

(1) the Order granting Petitioners’ Motion for Determination Concerning Burden of Proof; and (2) the Order granting Respondent’s Request for Extension of Time for Submission of Findings of Fact and Conclusions of Law.

10. During the years under appeal, the subject property was a part of a retail center that was formally configured as a Service Merchandise store, a small retail space, and a Marshalls store. The Service Merchandise space was subsequently subdivided and leased to Bed Bath & Beyond and David's Bridal. A portion of the former Service Merchandise was vacant during the years under appeal and was leased to Sleep Outfitters in December of 2011.
11. The PTABOA, township assessor, or county assessor, as applicable, assessed the Shopping Center Parcels for the years under appeal as follows:

<b>YEAR</b>	<b>LAND</b>	<b>IMPROVEMENTS</b>	<b>TOTAL ASSESSMENT</b>
2008	\$3,596,300	\$3,728,800	\$7,325,100
2009	\$3,596,300	\$3,728,800	\$7,325,100
2010	\$4,230,900	\$4,948,700	\$9,179,600
2011	\$3,596,300	\$3,582,500	\$7,178,800

12. The Petitioners requested the following assessments:

<b>YEAR</b>	<b>TOTAL ASSESSMENT</b>
2008	\$4,790,000
2009	\$4,170,000
2010	\$3,780,000
2011	\$4,590,000

### **OBJECTIONS**

13. The Petitioners made two objections concerning the Respondent's exhibits prior to the start of testimony. First, the Petitioners objected to Respondent's Exhibit J because it includes an email between the parties that discusses settlement. The parties agreed on the record to exclude that portion of the Respondent's exhibit containing the email.

Accordingly, the Board excludes only that portion of the exhibit containing the email and admits the remainder of Respondent's Exhibit J.<sup>3</sup> Second, the Petitioners objected to Respondent's Exhibit D, minutes of the April 13, 2010 PTABOA hearing, and asked that the Respondent be required to authenticate it before moving to admit it into evidence. The Respondent agreed to lay a proper foundation if the exhibit was used at the hearing. However, the Respondent did not rely on it during the hearing and failed to lay a proper foundation or otherwise authenticate it. Consequently, the Petitioners' objection is sustained and Respondent's Exhibit D will not be considered by the Board.

14. The Respondent made two objections during testimony, both of which were ruled on by the ALJ. First, the Respondent objected to Petitioners' questioning of Gregory Abell during cross-examination regarding why a tenant would renegotiate the term of a five-year option down to a two-year option on the grounds that the question called for speculation. The ALJ agreed and sustained the objection. The Board now adopts that ruling. Second, the Respondent objected to Petitioners' Exhibit 14, the Board's Final Determination in *Caborn Development, LLC v. Gibson County Assessor*, Pet. No. 26-024-06-1-4-00001, because they contend it was not introduced for purposes of impeachment. While the parties disagreed about whether it was proper for impeachment purposes, the Board need not address that issue. Pursuant to 52 IAC 2-7-4(a)(2) of the Board's procedural rules, the Board may take official notice of the record of other proceedings before the Board. The Board adopts the ALJ's decision to admit Petitioners' Exhibit 14 on those grounds. However, the Board does not give the exhibit any weight in reaching the final determination.

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<sup>3</sup> Although the parties stipulated to the exclusion of an email, neither party identified which email they were referring to with any specificity. The Board assumes for purposes of this exclusion that the parties were referring to the email from Carla Bishop to Tiffany Collins dated April 2, 2012.

## BURDEN OF PROOF

15. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that a property's assessment is wrong and what its correct assessment should be. *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). The taxpayer must explain how each piece of evidence relates to the requested assessment. *Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004). If the taxpayer makes a prima facie case, the burden shifts to the assessor to offer evidence to impeach or rebut the taxpayer's evidence. *American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *see also Meridian Towers*, 805 N.E.2d at 479.
  
16. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances. First, where the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, the assessor has the burden of proving that the assessment under appeal is correct. Ind. Code § 6-1.1-15-17.2(b). This provision may not apply if there was a change in the property's improvements, zoning or use. Ind. Code § 6-1.1-15-17.2(c). Second, the assessor has the burden where a property's gross assessed value was reduced in an appeal, and the assessment for the following assessment date represents an increase over "the gross assessed value of the real property for the latest assessment date covered by the appeal regardless of the amount of the increase..." Ind. Code § 6-1.1-15-17.2(d). This provision may not apply if the assessment was determined using the income approach to value. *Id.*
  
17. In any case, if an assessor has the burden and fails to meet it, the taxpayer may offer evidence to prove the correct assessment. If neither party offers evidence that suffices to prove the property's correct assessment, it reverts to the previous year's value. Ind. Code § 6-1.1-15-17.2(b).

18. Indiana Code § 6-1.1-15-17.2 was amended on March 25, 2014, to include the above burden-shifting language. The change applies to all appeals pending before the Board. *See P.L. 97-2014.*
  
19. Pursuant to the Board's Order on Petitioners' Motion for Determination Concerning Burden of Proof dated April 11, 2013, the Respondent had the burden of proof for the 2008 appeal. The burden of proof for each subsequent year would normally depend on the Board's determination for the prior year. However, as discussed below, the parties both presented probative evidence for the 2008, 2009, 2010, and 2011 assessment years. Therefore, this final determination depends on the weight of the evidence, not which party has the burden of proof.

#### **RESPONDENT'S CONTENTIONS**

20. The Vanderburgh County Assessor, Bill Fluty, testified that in this matter, as with all Vanderburgh County assessment matters, it is the intention of the Assessor to simply determine the correct assessment for a given property. Hence, upon obtaining the appraisal of Gregory Abell, which varied greatly from the assertions of the taxpayer, Mr. Fluty sought to have both Mr. Abell's appraisal and Ms. Coers' appraisal reviewed by an independent third appraiser to determine if either appraisal was materially flawed. To that end, the Assessor engaged Brian Shelton to perform a review of both appraisals of the subject property. *Fluty testimony.*
  
21. As indicated, the Respondent engaged Gregory Abell, MAI, to conduct an appraisal of the subject property. Due to the age of the subject property and the lack of comparable sales, Mr. Abell relied on the income approach to determine the value. Mr. Abell has been involved with appraising commercial property in the Evansville area since 1991. *Abell testimony; Resp't Ex. F at 36, 53.*



22. Mr. Abell examined the rent data at four comparable shopping centers in Evansville: Evansville Pavilion, located at 6401 E. Lloyd Expressway; Eastland Shoppes, located at 1481 N. Green River Road; Eastland Center, located at 800 N. Green River Road; and East Lloyd Commons, located at 6300 E. Lloyd Expressway. Based upon the reported rents collected at these four similar properties, and the taxpayer's reported rental rate for the Marshalls store at the subject property, Mr. Abell made a determination that the rents at the subject property are subject to a 32% discount over rents collected at newer, but similar competitive properties. Based upon rents collected at the similar properties and the Marshalls store at the subject property, Mr. Abell determined that \$8.00 per square foot was an appropriate market rent for space greater than 15,000 square feet at the subject property. Similarly, in reviewing rental rates at similar properties, and applying the 32% discount based upon the age of the subject property, Mr. Abell determined that the market rental rate for space between 5,000 and 15,000 square feet at the subject property is \$11.00 per square foot. *Abell testimony.*
23. Mr. Abell was able to obtain expense data for four Evansville shopping centers, and two shopping centers located in the cities of Prestonburg and Louisville in Kentucky, to determine if the reported expenses of the taxpayer for the subject property are consistent with the experience of other property owners in and around Evansville. The six similar properties examined revealed a mean expense of \$1.54 per square foot, excluding property taxes. Similarly, the taxpayer for the subject property reports expenses of \$1.48 per square foot, excluding property taxes. Accordingly, the expenses reported by the taxpayer for the subject property are consistent with the experience of similarly situated taxpayers in Vanderburgh County. *Abell testimony.*
24. In determining the appropriate capitalization rate to be applied in his income approach, Mr. Abell reviewed local sales relating to Evansville Pavilion in 2005 and East Lloyd Commons in 2006. Additionally, Mr. Abell looked at Korpacz/PwC survey data to identify trends from the sales of regional shopping centers to determine the applicable capitalization rate for the subject property for each of the years under appeal given the

broader economic factors. Based upon the foregoing, Mr. Abell arrived at the following market values-in-use for the subject property:

<b>YEAR</b>	<b>APPRAISED VALUE</b>
2008	\$7,650,000
2009	\$7,830,000
2010	\$6,910,000
2011	\$7,070,000

*Abell testimony; Resp't Ex. F at 53.*

25. The Respondent engaged Brian D. Shelton, MAI, to review the appraisals of Mr. Abell and Ms. Coers to determine if either appraisal was materially flawed. Mr. Shelton similarly reviewed rent data from comparable local commercial shopping centers and other properties. In addition to the properties reviewed by Mr. Abell, Mr. Shelton reviewed additional properties located in Evansville based upon data collected from various commercial realtors and other sources. *Shelton testimony.*

26. Based upon Mr. Shelton's determination of market rent for the subject property, and after adopting the estimated expenses and the capitalization rate asserted by the Petitioners, Mr. Shelton determined the assessed value of the subject property for the relevant years as follows:

<b>YEAR</b>	<b>APPRAISED VALUE</b>
2008	\$6,910,000
2009	\$6,190,000
2010	\$5,940,000
2011	\$6,900,000

*Shelton testimony; Resp. Ex. H at 20.*

27. As a general matter, the Respondent asserts that the subject property's proximity to the Eastland Mall, which has regional appeal, is relevant in considering the value of the subject property. *Abell testimony; Shelton testimony.*
28. The Respondent asserts that Ms. Coers' appraisal is designed specifically for purposes of contesting the assessed valuations. *Cirignano argument.* Ms. Coers relied upon rent data from only one property in the Evansville area. The property does not represent a valid comparison. Mr. Shelton testified that the property located at Plaza East, which was relied upon by Ms. Coers for her rent comparison, simply is not comparable to the subject property, and that the property has historically struggled to find tenants. Nonetheless, that was the property upon which Ms. Coers relied completely for her determination of market rent for the subject property. *Shelton testimony.*
29. Ms. Coers' appraisal and determination of her income approach valuation were not premised on actual leases, but rather on three theoretical leases. *Cirignano argument.*
30. Ms. Coers' use of regional data from Ohio, Michigan, and Illinois to determine property market expenses for the subject property was inappropriate, especially given the variation from the actual experience reported by the taxpayer for the subject property. Use of such regional expense data was for the sole purpose of driving up the purported market expenses and driving down the appraised value of the subject property utilizing the income approach. *Cirignano argument.*
31. The Petitioners' conclusion that Marshalls is paying above-market rent for the subject property is simply not realistic given the sophistication and size of Marshalls. Once again, the Petitioners draw such a conclusion in an effort to drive down the appraised value of the subject property. The Petitioners ignored the positive impact of its proximity to the Eastland Mall in their valuation of the subject property. *Cirignano argument.*

## PETITIONERS' CONTENTIONS

32. The Petitioners contend that the Shopping Center Parcels were over-assessed, and engaged Sara Coers to conduct an appraisal of the subject property for the years under appeal. Ms. Coers has the MAI designation and is certified as an Indiana General Appraiser. *Coers testimony; Pet'rs Ex. 3 at 95-96.*
33. Ms. Coers understands the market value-in-use standard required under Indiana law, as she has completed hundreds of market value-in-use appraisals and has testified on numerous occasions in front of the Board. Ms. Coers focuses her appraisal practice on the valuation of commercial property, and she has specialized experience in appraising complex income-producing properties, including shopping centers and malls. *Coers testimony; Pet'rs Ex. 3 at 95.*
34. Ms. Coers has appraised properties within Evansville and the surrounding area. She has also appraised commercial and retail properties on a regional basis and throughout Indiana. Ms. Coers' experience with the market value-in-use standard as well as specializing in retail and commercial properties were significant attributes when valuing the subject property. *Coers testimony.*
35. When appraising the subject property, Ms. Coers inspected both its interior and its exterior. *Coers testimony; Pet'r Ex. 3 at 16.* Ms. Coers developed an extensive understanding of the subject property, its operating history, and its market. *Coers testimony; Pet'rs Ex. 3 at 23-51.* Specifically, Ms. Coers testified to and detailed the specific condition of the subject property, including the fact that that the effective age of the building was 25 to 30 years. She also described specific characteristics of the property such as exterior framing, floors, interior finish, and overall condition of the property. *Coers testimony; Pet'rs Ex. 3 at 23-35.* For example, Ms. Coers detailed that a portion of the former Service Merchandise space had been walled off in the rear, creating

11,589 sq. ft. of “dead space” that was not rentable and did not contribute to value.  
*Coers testimony; Pet’rs Ex. 3 at 24.*

36. Ms. Coers also provided an extensive market overview for the area where the subject property is located. Her overview included an analysis of the productivity of the subject property as compared to similar properties in the market, with a specific rating and breakdown of the location of the subject property. *Coers testimony; Pet’rs Ex. 3 at 32-33.*
37. Ms. Coers also provided a detailed overview of the Evansville and Vanderburgh County markets, analyzing factors such as population, income, housing, and unemployment to provide a proper context for valuing the subject property. *Coers testimony; Pet’rs Ex. 3 at 34-39.*
38. Additionally, Ms. Coers provided a breakdown of the market for the immediate surrounding area to provide context and details of the operations within the trade area of the subject property. It provided the foundation for the location rating of the subject property that was included in Ms. Coers’ appraisal. *Coers testimony; Pet’rs Ex. 3 at 39-45.*
39. Understanding that the years under appeal occurred during the “Great Recession,” Ms. Coers provided an analysis of general market conditions and the impact of such conditions on the valuation of the subject property. *Coers testimony; Pet’rs Ex. 3 at 49-51.*
40. Based upon the physical property and the market conditions, Ms. Coers prepared a valuation using the income approach and sales comparison approach. She primarily relied on the income approach, but utilized the sales comparison approach as a check of her income valuation. She determined that the cost approach was not a good measurement of value because of the age of the building and because the market would

not view the cost approach as an accurate indicator of value for this type of property.  
*Coers testimony; Pet'rs Ex. 3 at 54-55.*

41. Under the income approach, Ms. Coers' first step was to establish market rent. She completed a thorough analysis to determine market rent. First, leases from the immediate competitive area were considered. This was necessary because, as documented and explained by Ms. Coers, the immediate competitive area has become a secondary market. The larger demand for retail space was not at or by the subject property, but rather was in the Burkhardt Road area away from the subject property, where the Eastland Pavilion and East Lloyd Commons shopping areas are located. The Burkhardt Road area had much newer construction and higher demand. The rental rates in that area were not comparable to the subject property. There was limited data for properties that were truly comparable to the subject property. *Coers testimony; Pet'rs Ex. 3 at 55.*
  
42. To account for the limited available data and to ensure that she was establishing market rent for the subject property and not the rent in the Burkhardt Road area, Ms. Coers undertook several approaches to determine market rent. First, Ms. Coers analyzed rents in the immediate competitive area. *Coers testimony; Pet'rs Ex. 3 at 56-57.* Additionally, she reviewed asking rents for individual shopping centers in the immediate competitive area. To add a third data point to the analysis, she also interviewed a local broker to better understand the rental rates for the area surrounding the subject property during the years at issue. *Pet'rs Ex. 3 at 58-60.*
  
43. She compared this market data to the historical lease data of the subject property to evaluate and determine market rent. *Coers testimony; Pet'rs Ex. 3 at 59.* Where appropriate, Ms. Coers relied on the actual lease data of the subject property when the actual rents aligned with market rents. When the market rent and actual rent diverged, she relied upon market rent as required by Indiana law. *Coers testimony.*

44. Based upon this approach, Ms. Coers established the market rent for the three retail shops located at the subject property that were smaller than 15,000 sq. ft. She identified three rent comparables as data points: two leases of similar properties in the immediate competitive area of the subject property that were executed close to the years under appeal, and a lease at the subject property that occurred immediately after the years under appeal. Ms. Coers determined these leases to be comparable because (1) they were similar to the property in question; (2) they were executed close in time to the assessment dates for the years under appeal; and (3) they were consistent with the \$8.00-10.00 per sq. ft. range identified as lease rates for these properties during the years under appeal by Ken Newcomb, a local broker. *Coers testimony; Pet'rs Ex. 3 at 60-61.*
45. After identifying these comparable leases, and understanding that markets change over time, she trended the lease rates from the lease date to each of the assessment dates for each of the years at issue. She completed the trending utilizing average capitalization rates of first-tier retail stores in the Midwest to ensure that the data reflected lease rates for the comparable properties as of the assessment dates and not the dates of execution of the leases. *Coers testimony; Pet'rs Ex. 3 at 60.* After establishing this data, adjusted for market conditions, Ms. Coers had a range of comparable leases to determine market rent for each year. The price per square foot of those leases ranged as follows:

<b>YEAR</b>	<b>PRICE/SQ. FT.</b>
2008	\$9.58-\$11.92
2009	\$8.79-\$10.94
2010	\$8.21-\$10.22
2011	\$8.49-\$10.57

*Id. at 60-61.*

46. Ms. Coers determined that the 6,552 sq. ft. retail space at the subject property warranted the highest rental rate. Similarly, she assigned the 10,234 sq. ft. retail space the highest

rental rate in the range because even though it was a larger space than the 6,552 sq. ft. space, which generally equates to a lower price per sq. ft., it had a good location. Finally, the 6,250 sq. ft. space was discounted \$.50 per sq. ft. due to its unique configuration. *Coers testimony; Pet'r Ex. 3 at 61.*

47. Next, Ms. Coers focused on the two retail spaces that were over 15,000 sq. ft. at the subject property. She explained that there was even less data available for these locations. She identified two asking rents in the immediate competitive area for comparable properties with a range of \$4 to \$6 per sq. ft. She interviewed Ken Newcomb, a local broker in the Evansville area, who concluded that the range during the years at issue would be \$4 to \$6. Based upon the foregoing, Ms. Coers determined that the large retail spaces had a lease rate range from \$4 to \$6 per sq. ft. at the time the appraisal was completed in September, 2013. *Coers testimony; Pet'rs Ex. 3 at 61-63.*
  
48. As part of her analysis, Ms. Coers reviewed the available lease rates as well as the historical income of the retail locations at the subject property, including the lease rate of Marshalls, which is one of the two large retail locations. She determined the lease rate for the Marshalls was not reliable for two reasons. First, the lease was executed in the 1980s and was amended once in the 1990s. Therefore, even though the lease had renewable options, this lease rate was set more than ten years prior to the years at issue in this appeal. Additionally, there was evidence that during the years under appeal, the parties renegotiated the terms of the lease to decrease its length, possibly indicating that Marshalls was not satisfied with the existing terms of the lease. Second, the landlords under the lease were Simon Property Group and Macerich, two very large and successful public REITs that, based upon their market share, are able to negotiate above market rents for national tenants such as Marshalls, that desire to have a positive ongoing relationship with these landlords. *Coers testimony.*
  
49. Similar to the smaller retail space, Ms. Coers trended the lease range she established for the two larger retail spaces to each of the assessment dates to account for the change in



the markets. Ms. Coers chose the high end of the range for the large spaces based on their locations. *Pet'rs Ex. 3 at 63.*

50. The resulting market lease rate for each of the retail locations was:

<b>YEAR</b>	<b>6,552 &amp; 10,234 SQ. FT. SPACES</b>	<b>6,250 SQ. FT. SPACE</b>	<b>31,657 &amp; 35,150 SQ. FT. SPACES</b>
2008	\$12.00/sq. ft.	\$11.50/sq. ft.	\$6.00/sq. ft.
2009	\$11.00/sq. ft.	\$10.50/sq. ft.	\$5.50/sq. ft.
2010	\$10.25/sq. ft.	\$9.75/sq. ft.	\$5.15/sq. ft.
2011	\$10.60/sq. ft.	\$10.10/sq. ft.	\$5.30/sq. ft.

*Coers testimony; Pet'rs Ex. 3 at 77-80.*

51. The next step in Ms. Coers analysis was to determine market vacancy. She conducted an analysis of the retail market vacancy in the immediate competitive area utilizing data provided in CoStar, which is a premier provider of real estate data. *Pet'rs Ex. 3 at 63.* The average vacancy rate in the immediate competitive area was 23.8% for 2008, 22.8% for 2009, 17.5% for 2010, and 21% for 2011. She then considered the vacancy rate within a one-mile radius of the subject property, which was 13% for 2008, 14.2% for 2009, 12.3% for 2010, and 9.7% for 2011. Additionally, Ms. Coers determined it would be appropriate to add a .5% collection loss that represents rent abatements or concessions based on the significant economic circumstances that were occurring during the years under appeal. She determined the market vacancy was 18.9% for 2008, 19% for 2009, 15.4% for 2010, and 15.85% for 2011. *Coers testimony; Pet'rs Ex. 5 at 65-68.*
52. Ms. Coers then determined appropriate market expenses. She detailed historical expenses of the subject property and compared those expenses to market sources (IREM Income/Expenses Analysis: Shipping Centers for 2009-2012). When determining appropriate market expenses, Ms. Coers excluded real estate taxes because the amount of taxes owed is the subject of these proceedings. To account for this, she added the landlord's portion of the tax burden into the capitalization rate. Based upon the foregoing

analysis, Ms. Coers derived the market expenses for the subject property. *Coers testimony; Pet'rs Ex. 3 at 68-72.*

53. The next step in Ms. Coers' analysis was to determine appropriate reserves for the subject property. Based upon market sources such as the Real Estate Research Corporation, she determined that reserves were appropriate for the 2008 through 2010 assessment years, but not for 2011. Accordingly, she added the typical reserve rate for the 2008 through 2010 assessment years, as reported by Realtyrates.com Investor Survey. The amounts were \$.40 per sq. ft., \$.45 per sq. ft., and \$.50 per sq. ft. for each respective assessment year. *Pet'rs Ex. 3 at 73.*
54. The final step in her income approach was to select a capitalization rate. She examined a variety of sources. This analysis included examining comparable sales of similarly situated properties, as well as analysis from market publications such as RealtyRates.com and RERC Reports. Ms. Coers utilized the market reports to provide a range of capitalization rates both in the Midwest and on the national level for similar properties. Based on the data from these sources, she determined that the capitalization rate steadily rose from 2008 to 2010, based in part on the significant economic circumstances that were occurring. It rebounded slightly in 2011. *Coers testimony; Pet'rs Ex. 3 at 73-76.*
55. Ms. Coers determined that the applicable capitalization rates were 8.25% for 2008, 8.75% for 2009, 9.25% from 2010, and 9% for 2011. She then added in the landlords' portion of the real estate taxes because real estate taxes were removed from the market expenses. Because she determined the market would view the subject property as a triple net lease property, the landlord would only be responsible for the real estate taxes of the portion of the building that was vacant. Accordingly, Ms. Coers incorporated the taxes the landlord would be obligated to pay based on the market vacancy percentages she selected for the years under appeal. The final loaded capitalization rates were 8.73% for 2008, 9.23% for 2009, 9.67% for 2010, and 9.45% for 2011. *Coers testimony; Pet'rs Ex. 3 at 76.*

56. Based on the income approach to value, Ms. Coers determined the value of the subject property should be as follows:

<b>YEAR</b>	<b>APPRAISED VALUE</b>
2008	\$4,930,000
2009	\$4,030,000
2010	\$3,780,000
2011	\$4,590,000

*Coers testimony; Pet'rs Ex. 3 at 76-80.*

57. Ms. Coers then trended the March 1, 2008 and March 1, 2009 values to January 1 of the prior year to comply with the valuation dates for the 2008 and 2009 assessment years. She completed this trending by utilizing the change in the consumer price index and changes in capitalization rates for the applicable periods. This resulted in a final valuation of \$4,790,000 for the March 1, 2008 assessment and \$4,170,000 for the March 1, 2009 assessment. *Coers testimony; Pet'rs Ex. 3 at 84-85.*

58. Ms. Coers' final value conclusions of retrospective market values-in-use (adjusted to the appropriate valuation dates) are as follows:

<b>YEAR</b>	<b>APPRAISED VALUE</b>
2008	\$4,790,000
2009	\$4,170,000
2010	\$3,780,000
2011	\$4,590,000

*Coers testimony; Pet'rs Ex. 3 at 76-80.*

59. Ms. Coers then valued the subject property using the sales comparison approach as a test of reasonableness for the values she derived using the income approach. Ms. Coers determined that a potential buyer would be an investor and the potential market would be on a regional or national basis. Ms. Coers selected eight regional shopping centers that were similar to the subject property in age and competitive region to use as her comparison properties. *Coers testimony; Pet'rs Ex. 3 at 81.*
60. Ms. Coers' indicated value under the income approach was \$42-\$55 per square foot. She considers her analysis under the sales comparison approach confirms that the income approach results were reasonable. *Coers testimony; Pet'rs Ex. 3 at 82.*
61. The Respondent's primary witness, Gregory Abell, did not properly account for the changes in market conditions in his income approach. He utilized the exact same income, vacancy rate, and expenses for all of the years under appeal. *Ehinger argument.* Such an approach indicates that there were no changes in the market during the years under appeal when the country was experiencing what has been referred to as the Great Recession. *Coers testimony.*
62. Mr. Abell's appraisal relies primarily on leases from the Evansville Pavilion and East Lloyd Commons, which Mr. Abell himself admitted were newer construction and in an area of higher demand for rental space. *Abell testimony; Coers testimony.*
63. Further, Mr. Abell provided only the averages for the lease ranges of those properties. He did not evaluate each of the properties or the specific terms of the leases to determine which were the most comparable to the retail locations at the subject property. *Resp't Ex. F at 36-38.* Mr. Abell could not even provide the number of leases that were accounted for in each of the ranges he was using or the specific properties that were in each of the ranges, much less a detailed analysis of the properties and how they compared to the subject property. He had no explanation as to why he took the average of the ranges or a basis that justified utilizing this approach. *Ehinger argument.*

64. Mr. Abell admitted that some leases he considered may have intangible value and could be build-to-suit properties, both of which would have value in the lease payments that would not be supported in the market for a general retail property. Mr. Abell detailed in his report that the tenants in some of the leases he relied upon had attempted to renegotiate their rents, which could indicate that the leases are above market. He did not adjust his market rent determination based upon these circumstances. *Ehinger argument.*
65. Several of the leases Mr. Abell relied upon were executed prior to the years under appeal. Ms. Coers testified that older leases may not be indicative of market rent for the years under appeal, as the market can change over time and affect the lease rates. *Ehinger argument.*
66. After determining the market rent for the Evansville Pavilion and East Lloyd Commons retail spaces, Mr. Abell made a 32% downward adjustment to the market rental rate, based upon the difference between the average rental rate at Evansville Pavilion and East Lloyd Commons and the rental rate of the Marshalls store that was located at the subject property. By making this adjustment, Mr. Abell ultimately relied upon the actual income/lease rate of a single retail location at the subject property to determine the market rent. Mr. Abell offered no support that the Marshalls lease actually represented the market rent. In fact the opposite is true. The Marshalls lease was negotiated in the 1980s and was amended in the 1990s. Therefore, the rental rates for the Marshalls lease were negotiated over a decade prior to the years under appeal in this case. Ms. Coers testified that this type of lease rate is not appropriate to use because the markets can change significantly between the time the lease was originally executed and the years currently under appeal. Therefore, the lease rate may not reflect the market during the years at issue. Ms. Coers also testified that the landlords of the subject property were Simon Property Group and Macerich, both of which presumably have significant leverage when negotiating leases, which might result in above-market rents for their

properties. Mr. Abell did not investigate whether the Marshalls lease represented market rent for the years under appeal. *Coers testimony; Ehinger argument.*

67. The lease rate that Mr. Shelton relies on in his appraisal is similarly flawed. When determining his market rent, Mr. Shelton utilizes essentially the same information as Mr. Abell, adding only a few additional leases to “bracket” the subject property between likely superior and likely inferior properties. Mr. Shelton offered little explanation as to any adjustments he made to the leases of the properties he offered as comparable to the subject property. After listing the leases, Mr. Shelton merely offered his “market rent” with no explanation as to how he arrived at his rental rates. Conclusory statements without appropriate substantiation and analysis are not probative evidence. *Ehinger argument.*
68. Moreover, Mr. Shelton determined that Mr. Abell's market rent determination was reasonable based upon the historical income and expenses of the subject property. The historical income and expenses, however, were not in Mr. Abell’s appraisal. Rather, Mr. Shelton had to obtain such information from Ms. Coers’ appraisal. Additionally, Mr. Shelton was not aware of the lease terms or when the leases were entered into when making the statement that relying on actual income of the Shopping Center Parcels was appropriate. Specifically, he was not aware that the Marshalls lease rate terms were negotiated in the 1980s and 1990s. *Id.* As Ms. Coers testified, the reliance on lease rates that were negotiated over a decade prior to the years under appeal is not an accurate indicator of the current market rents. *Coers testimony; Ehinger argument.*
69. Mr. Shelton critiqued one of Ms. Coers’ lease comparables that had a comparable size to the subject property and was in the immediate competitive area. In contrast, Mr. Shelton’s and Mr. Abell’s comparables were much newer than the subject property and in significantly superior locations. Mr. Shelton’s critique was based upon the fact that the comparable had a history of vacancy issues. Yet, when asked about the property’s vacancy during the years under appeal or specifics regarding the vacancy issues, Mr.

Shelton could not provide additional information. In contrast, Ms. Coers thoroughly vetted the comparable property and deemed it to be a very good comparable to the subject property. *Coers testimony; Ehinger argument.*

70. The market vacancy rate cited by Mr. Abell and Mr. Shelton had no empirical support. In his appraisal, Mr. Abell quoted a market vacancy of 10%, a figure he stated he obtained from another appraiser. The same 10% vacancy rate was utilized for each of the years under appeal, suggesting there was no change in vacancy during the years at issue. Actually, there were significant changes in the market during that time. *Ehinger argument.*
71. Eastland Pavilion, one of the primary properties that Mr. Abell relied on in his appraisal, and that he testified was superior to the subject property, had a vacancy rate of 20% for the 2008 and 2009 assessment years. While he testified that the subject property was in an inferior location and was older than this comparable property, Mr. Abell continued to use a 10% vacancy factor for the subject property without any explanation or analysis as to the basis for such a figure. *Ehinger argument.*
72. Mr. Shelton, a review appraiser hired by the Respondent, determined it was more appropriate to use market expenses calculated by Ms. Coers rather than those calculated by Mr. Abell. This was also true for the capitalization rates, where Mr. Shelton again used those of Ms. Coers rather than those of Mr. Abell. *Ehinger argument.*
73. The capitalization rates utilized by Mr. Abell in his income approach were not adequately substantiated. He only utilized the sales of two properties to determine a capitalization rate, and then he simply took the average of those rates without any analysis or basis for such an approach. *Ehinger argument.*
74. In confirming the capitalization rates he utilized, Mr. Abell cited to the capitalization rates reported by the Korpacz investor survey, but he utilized capitalization rates of

regional malls from that survey. *Id.* The Korpacz investor survey also has the capitalization rates of strip centers and power centers, which are more comparable to the subject property than to regional malls. Mr. Abell did not use this more appropriate data, and instead relied upon capitalization rates of non-comparable properties. *Ehinger argument.*

75. While Mr. Shelton determined Ms. Coers' capitalization rates were more appropriate than Mr. Abell's, his use of Ms. Coers' loaded capitalization rates was inappropriate. Ms. Coers' loaded capitalization rates incorporated the applicable taxes that would be borne by the landlord based upon the vacancy of the subject property. *Pet'rs Ex. 3 at 73-76.* Mr. Shelton utilized a different vacancy factor than Ms. Coers, therefore his loaded capitalization rate should have been adjusted from Ms. Coers', but no such adjustment was made. *Coers testimony; Ehinger argument.*
76. Neither Mr. Shelton nor Mr. Abell completed a sales comparison approach. Ms. Coers used the sales comparison approach to value as a check of reasonableness, which illustrates the care and analysis Ms. Coers put into her appraisal. Mr. Shelton noted in his testimony and in his report that Ms. Coers' appraisal provided more detail than did Mr. Abell's appraisal. *Ehinger argument.*

#### **ANALYSIS**

77. Real property is assessed based on its "true tax value," which means "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property." 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2); *see also* Ind. Code § 6-1.1-31-6(c). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. MANUAL at 2. Any evidence relevant to the true tax value of the property as of the assessment date may be presented to rebut the presumption of correctness of the assessment, including an



appraisal prepared in accordance with generally recognized appraisal standards.  
MANUAL at 3.

78. Regardless of the method used to prove a property's true tax value, a party must explain how its evidence relates to the subject property's market value-in-use as of the relevant valuation date. *O'Donnell v. Dep't 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, 2008 assessment and March 1, 2009 assessment, the valuation dates were January 1, 2007 and January 1, 2008, respectively. *See* 50 IAC 21-3-3 (2006) (making the valuation date for assessments after March 1, 2005, January 1 of the year preceding the assessment date). The March 1, 2010 assessment and March 1, 2011 assessment, however, value the property as of the assessment date. Ind. Code § 6-1.1-4-4.5(f); 50 IAC 27-5-2(c).
79. An appraisal performed in conformance with generally recognized appraisal principles is often enough to establish a prima facie case. *Meridian Towers*, 805 N.E.2d at 479. In this case, both parties offered USPAP-compliant appraisals valuing the subject property for the years under appeal. Thus, both parties established a prima facie case and it is unnecessary to analyze which party had the burden of proof in each assessment year. However, "[t]he valuation of property is the formulation of an opinion; it is not an exact science. When there are competing opinions as to how a property should be valued, the Indiana Board must determine which opinion is more probative." *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 502 (Ind. Tax Ct. 2010). Therefore, the Board must weigh the evidence to determine which party presented the most credible and reliable opinion of the subject property's market value-in-use for the 2008, 2009, 2010 and 2011 assessments years.
80. While the Petitioners' appraiser developed an income approach and a sales comparison approach, both parties' appraisers ultimately relied on their income approaches in

determining a final value. Accordingly, the Board will focus its analysis on those income approaches.

81. The income approach is used for income producing properties that are typically rented. It converts an estimate of income, or rent, the property is expected to produce into value through a mathematical process known as capitalization. MANUAL at 2. 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. It considers the subject property as an investment and, to that end; its value is based on the rent it will produce for the owner. MANUAL at 10. Under USPAP Standard Rule 1-4(c),

“When an income approach is necessary for credible assignment results, an appraiser must:

- (i) analyze such comparable rental data as are available and/or the potential earnings capacity of the property to estimate the gross income potential of the property;
- (ii) analyze such comparable operating expense data as are available to estimate the operating expenses of the property;
- (iii) analyze such comparable data as are available to estimate rates of capitalization and/or rates of discount;
- (iv) base projections of future rent and/or income potential and expenses on reasonably clear and appropriate evidence.

*Pet’rs Ex. 13 at U-19.*

82. Here, the appraisers’ income approaches produced values that differ significantly from each other. A large part of this difference can be attributed to how the appraisers estimated the gross income potential of the subject property. All three appraisers relied on similar market rents for the three retail properties containing less than 15,000 sq. ft. Mr. Abell utilized a market rent of \$11 per sq. ft. for all the years under appeal; Mr. Shelton utilized \$10.75 per sq. ft. in 2009 and 2010 and \$11 per sq. ft. for 2008 and 2011. Ms. Coers’ values ranged from \$9.75 per sq. ft. to \$12 per sq. ft. during the years at issue. The range for market rents in the two spaces greater than 15,000 sq. ft. is more varied.

Mr. Abell utilized \$8 per sq. ft. for these spaces. Mr. Shelton's market rents for these spaces were \$7.75 in 2009 and 2010, and \$8.00 per sq. ft. for 2008 and 2011. Ms. Coers' valued these larger spaces between \$5.15 and \$6.00 per sq. ft.

83. The Board is faced with three divergent, but well-reasoned, opinions of value by established and capable appraisers. Overall, the Board finds that Mr. Shelton's analysis, which acknowledges the strengths and weaknesses in the analyses of both Mr. Abell and Ms. Coers, is the most persuasive.
84. The Board notes that the approaches taken by Ms. Coers to determine market rent rely on her interview with Ken Newcomb, a local broker, to determine the range of market rent. It appears that Mr. Newcomb's opinion differed significantly from the opinions of Mr. Shelton and Mr. Abell who also have knowledge of the area. Mr. Shelton also interviewed Jan Meeks of Summit Real Estate regarding retail market leasing activity during the relevant period. Neither party offers a satisfactory analysis as to why the opinions are so divergent. All things considered, the Board finds the evidence weighs in favor of the opinions of Mr. Shelton and Mr. Abell as to the range of market rent.
85. Ms. Coers placed significant emphasis on the "Great Recession." Her analysis includes data on "asking rent" for the years at issue. She bases her lease rate range on the "asking rates" data and Mr. Newcomb's opinion. While it is clear that there was a rise in vacancies and many tenants re-negotiated the terms of their leases during this period, there is no evidence that the "asking rate" data accurately reflects the market rate of income for the years at issue. Because Ms. Coers' analysis relies so heavily on "asking rates" rather than market rent,<sup>4</sup> the Board finds Ms. Coers' analysis less persuasive.

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<sup>4</sup> In a multi-unit commercial property, leases are not typically renewed or renegotiated every year. A focus solely on new leases in a given year, rather than all leases in the market, may or may not accurately reflect the market level of income from rent for the property. For these reasons, a comparable analysis of actual leases is a better indicator of market rent than market-wide "asking rate" data.

86. The Board finds that neither Mr. Shelton nor Ms. Coers was overly demonstrative in how the final market rates were reached. Mr. Shelton appears to have adopted Mr. Abell's rates with slight reductions based on additional comparable leases and in light of overall market conditions. Mr. Shelton's appraisal also indicated that "the actual income of the [property] should be considered as an indication of the performance of the [property] in the market." *Respondent Ex. H at 7*. His selection of higher rental rates reflects a higher estimate of NOI than that of Ms. Coers. The differences in income largely hinged on the selection of vacancy loss rates. While it is unclear how Mr. Shelton and Mr. Abell arrived at the 10% vacancy loss rate adopted in their analyses,<sup>5</sup> it appears that a great deal of weight was accorded to the property's actual history, which had a vacancy rate of 3.7%. On the other hand, Ms. Coers' vacancy loss rates are based on the overall market. An analysis of "total available competing space" has its own weaknesses, because it provides an accurate gauge of vacancy only if limited to reasonably similar properties. Overall, the Board finds it was not in error to consider the actual performance of the property<sup>6</sup> and that Mr. Shelton's overall analysis is more persuasive.
87. The Board agrees with the Petitioners' criticism that Mr. Shelton implemented the capitalization rates developed by Ms. Coers without adjusting for a different vacancy rate. However, the Petitioners failed to calculate how a correction would adjust Mr. Shelton's opinion of value, and the Board is not persuaded that such error rendered Mr. Shelton's appraisal less reliable than that of Ms. Coers.
88. The Board recognizes that there are strengths and weaknesses with all three appraisals. Although all three appraisers are properly licensed and back their opinions with certifications, education, training, and significant experience, when considering all of the

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<sup>5</sup> It was evidently based on the estimate of another appraiser but the methodology was not disclosed.

<sup>6</sup> The Board finds the Petitioner's arguments regarding the probative value of the Marshalls lease unpersuasive. A lease entered into long before the relevant appraisal date may or may not reflect market rent. However, "an investigation of market rent levels starts with the subject property" and a review of its "current rent schedule." *The Appraisal of Real Estate, 14<sup>th</sup> Ed., Appraisal Institute, p. 465*. It cannot be simply disregarded due to its age. Furthermore, Petitioner's arguments regarding the relative bargaining powers of Simon Property Group and Marshalls are entirely speculative.

evidence, the Board finds that Mr. Shelton's appraisal is the most credible evidence of the subject property's true tax value for the 2008, 2009, 2010, and 2011 assessments years.

#### **CONCLUSION: SHOPPING CENTER PARCELS**

89. After weighing the evidence, the Board is more persuaded by the valuation opinion of the Respondent's review appraiser. The Board therefore holds that the correct valuations of the subject property are \$6,910,000 for 2008, \$6,190,000 for 2009, \$5,940,000 for 2010, and \$6,900,000 for 2011.

#### **RESTAURANT PARCEL**

##### **ISSUE**

90. The issue presented for consideration by the Board is whether the Restaurant Parcel is correctly valued for the 2011 assessment year.

#### **PROCEDURAL HISTORY**

91. The Petitioners filed a Form 130 petition with the Vanderburgh County Assessor contesting the Restaurant Parcel's 2011 assessment. The PTABOA issued a determination for the 2011 assessment on June 22, 2013. The Petitioners timely filed a Form 131 petition with the Board on June 28, 2013.

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

92. The Board's ALJ held the administrative hearing on October 22, 2014, in Evansville. Neither the Board nor the ALJ inspected the subject property.

93. The following persons were sworn in and testified at the hearing:

For the Petitioners: Sara Coers, MAI, Mitchell Appraisals, Inc. / Valbridge Property Advisors

For the Respondent: Gregory Abell, MAI, CEI Appraisal Group, Inc.  
William Fluty, Vanderburgh County Assessor  
Brian Shelton, MAI, Appraisal Company, Inc.<sup>7</sup>

94. The Petitioners submitted the following exhibits:

Petitioners Exhibit 1: Form 131 petitions and attachments for the 2008–2011 assessment dates  
Petitioners Exhibit 2: Appraisal Review Report prepared by Brian Shelton  
Petitioners Exhibit 3: Summary Appraisal Report prepared by Sara Coers  
Petitioners Exhibit 4: Demonstrative exhibit comparing Assessor’s assessed value to Appraiser’s assessed value  
Petitioners Exhibit 5: PRC for Parcel No. 82-07-30-017-162.012-027  
Petitioners Exhibit 6: PRC for Parcel No. 82-06-24-017-160.007-027  
Petitioners Exhibit 7: PRC for Parcel No. 82-05-28-007-452.015-024  
Petitioners Exhibit 8: Korpacz Real Estate Investor Survey, First Quarter, 2007  
Petitioners Exhibit 9: Korpacz Real Estate Investor Survey, First Quarter, 2008  
Petitioners Exhibit 10: Korpacz Real Estate Investor Survey, First Quarter, 2010  
Petitioners Exhibit 11: Korpacz Real Estate Investor Survey, First Quarter, 2011  
Petitioners Exhibit 12: Korpacz Real Estate Investor Survey, First Quarter, 2012  
Petitioners Exhibit 13: USPAP, 2014-2015 ed.  
Petitioners Exhibit 14: Board’s Final Determination in *Caborn Development, LLC v. Gibson County Assessor*, Pet. No. 26-024-06-1-4-00001  
Petitioners Exhibit 15: Net lease investor overview for Applebee’s restaurant

95. The Respondent presented the following exhibits:

Respondent Exhibit A: Vanderburgh County PTABOA Recommendation for the 2008-2011 assessment years and PRCs for the subject property  
Respondent Exhibit B: Sales ratio study for Vanderburgh County, Indiana  
Respondent Exhibit C: Comparable sales information for Parcel No. 82-06-023-017-106.013-027  
Respondent Exhibit D: Minutes from April 13, 2010 Vanderburgh County PTABOA meeting

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<sup>7</sup> Tiffany Collins, PTABOA Deputy, and Jacqueline Doty-Fox, Hearing Officer for the Vanderburgh County Assessor, were sworn in as witnesses for the Respondent, but did not testify at the hearing.

Respondent Exhibit E:	Tenancy schedule of subject property
Respondent Exhibit F:	Summary Appraisal Report prepared by Gregory Abell
Respondent Exhibit G:	Summary Appraisal Report prepared by Sara Coers
Respondent Exhibit H:	Appraisal Review Report prepared by Brian Shelton
Respondent Exhibit I:	SM Newco Bank of America sublease information related to subject property
Respondent Exhibit J:	Other leases related to subject property
Respondent Exhibit K:	Summary recommendation of County Assessor

96. The following items are also recognized as part of the record:

Board Exhibit 1:	Form 131 petitions and attachments
Board Exhibit 2:	Notices of Hearing
Board Exhibit 3:	Hearing Sign-In sheet

In addition, the Board incorporates into the record all filings by the parties and all orders and notices issued by the Board or the ALJ, including, but not limited to, the Order granting Respondent's Request for Extension of Time for Submission of Findings of Fact and Conclusions of Law.

97. The subject property is a Longhorn Steakhouse located at 320 N. Green River Road, Evansville.

98. The PTABOA determined the 2011 assessed values to be \$578,200 for land and \$487,000 for improvements, for a total of \$1,065,200.

### OBJECTIONS

99. The Petitioners made two objections concerning the Respondent's exhibits prior to the start of testimony. First, the Petitioners objected to Respondent's Exhibit J because it includes an email between the parties that discusses settlement. The parties agreed on the record to exclude that portion of the Respondent's exhibit containing the email.<sup>8</sup>

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<sup>8</sup> Although the parties stipulated to the exclusion of an email, neither party identified which email they were referring to with any specificity. The Board assumes for purposes of this exclusion that the parties were referring to the email from Carla Bishop to Tiffany Collins dated April 2, 2012.

Accordingly, the Board excludes only that portion of the exhibit containing the email and admits the remainder of Respondent's Exhibit J. Second, the Petitioners objected to Respondent's Exhibit D, minutes of the April 13, 2010 PTABOA hearing, and asked that the Respondent be required to authenticate it before moving to admit it into evidence. The Respondent agreed to lay a proper foundation if the exhibit was used at the hearing. However, the Respondent did not rely on it during the hearing and failed to lay a proper foundation or otherwise authenticate it. Consequently, the Petitioners' objection is sustained and Respondent's Exhibit D will not be considered by the Board.

100. The Respondent made two objections during testimony, both of which were ruled on by the ALJ. First, the Respondent objected to Petitioners questioning of Gregory Abell during cross-examination regarding why a tenant would renegotiate the term of a five-year option down to a two-year option on the grounds that the question called for speculation. The ALJ agreed and sustained the objection. The Board now adopts that ruling. Second, the Respondent objected to Petitioners' Exhibit 14, the Board's Final Determination in *Caborn Development, LLC v. Gibson County Assessor*, Pet. No. 26-024-06-1-4-00001, because they contend it was not introduced for purposes of impeachment. While the parties disagreed about whether it was proper for impeachment purposes, the Board need not address that issue. Pursuant to 52 IAC 2-7-4(a)(2) of the Board's procedural rules, the Board may take official notice of the record of other proceedings before the Board. The Board adopts the ALJ's decision to admit Petitioners' Exhibit 14 on those grounds. However, the Board does not give the exhibit any weight in reaching the final determination.

#### **BURDEN OF PROOF**

101. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that a property's assessment is wrong and what its correct assessment should be. *Meridian Towers*, 805 N.E.2d at 478; *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). The taxpayer must explain how each



piece of evidence relates to the requested assessment. *Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004). If the taxpayer makes a prima facie case, the burden shifts to the assessor to offer evidence to impeach or rebut the taxpayer's evidence. *American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *see also Meridian Towers*, 805 N.E.2d at 479.

102. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances. First, where the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, the assessor has the burden of proving that the assessment under appeal is correct. Ind. Code § 6-1.1-15-17.2(b). This provision may not apply if there was a change in the property's improvements, zoning or use. Ind. Code § 6-1.1-15-17.2(c). Second, the assessor has the burden where a property's gross assessed value was reduced in an appeal, and the assessment for the following assessment date represents an increase over "the gross assessed value of the real property for the latest assessment date covered by the appeal regardless of the amount of the increase..." Ind. Code § 6-1.1-15-17.2(d). This provision may not apply if the assessment was determined using the income approach to value. *Id.*
103. In any case, if an assessor has the burden and fails to meet it, the taxpayer may offer evidence to prove the correct assessment. If neither party offers evidence that suffices to prove the property's correct assessment, it reverts to the previous year's value. Ind. Code § 6-1.1-15-17.2(b).
104. Indiana Code § 6-1.1-15-17.2 was amended on March 25, 2014, to include the above burden-shifting language. The change applies to all appeals pending before the Board. *See P.L. 97-2014.*
105. The subject property's assessment was increased from \$683,600 for the 2010 assessment to \$1,065,200 for the 2011 assessment, which represents an increase of more than 5%.

Consequently, the Respondent has the burden of proving that the 2011 assessment is correct.<sup>9</sup> However, to the extent that the Petitioners seek an assessment below the previous year's value, they bear the burden of proving that lower value.

### **RESPONDENT'S CONTENTIONS**

106. The Respondent engaged Gregory Abell to conduct an appraisal of the subject property. He has been involved with appraising commercial property in the Evansville area since 1991. Mr. Abell appraised the subject property using a sales comparison approach and an income approach. *Abell testimony; Resp't Ex. F at 36, 53.*
107. For his sales comparison approach, Mr. Abell initially considered nine restaurant sales in the Evansville area. Because restaurant equipment is not included in the valuation, the sales that may have included equipment were excluded. *Resp't Ex. F at 46.* Mr. Able further culled this data to exclude properties that significantly differed from the subject property in terms of size or age. The two properties remaining were: an Applebee's restaurant, located at 5727 Pearl Drive, Evansville, which sold for \$1,075,000 in 2010; and a Raffi's restaurant, located at 1100 N. Burkhardt Road, Evansville, which sold for \$760,000 in 2009. *Resp't Ex. F at 46.* The comparable properties consist of 3,909 square feet and 5,220 square feet respectively. Mr. Abell made adjustments to account for difference in square footage, and developed a price per square foot for the subject property of \$210.30. *Abell testimony; Resp't Ex. F at 47.*
108. Mr. Abell asserts that the Applebee's sale and the Raffi's sale are the most relevant comparables due to the age, location and use of the properties. The range of unit prices is relatively large, but no superior data was found. A typical market participant would

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<sup>9</sup> The parties apparently proceeded under the assumption that the Board's Order on Petitioners' Motion for Determination Concerning Burden of Proof dated April 11, 2013 applied to the Restaurant Parcel. However, the Order only addressed the burden issue as to the Shopping Center Parcels for the 2008 assessment year.

therefore likely give equal weight to each sale. The value of the subject property using the sales comparison approach is \$1,165,000. *Abell testimony; Resp't Ex. F at 47.*

109. Mr. Abell's income approach focused on the same nine restaurants used in his sales comparison approach. Mr. Abell obtained this data from local appraisers and excluded those sales for which no income data was available. Excluding those properties results in a list of six properties. From this list, Mr. Abell excluded the two oldest buildings and properties that may have included personal property such as furniture, fixtures, and equipment. Once again, Mr. Abell asserted that the Applebee's restaurant and the Raffi's restaurant represented the most comparable properties. *Abell testimony; Resp't Ex. F at 48.*
110. Mr. Abell developed two income approaches, a potential gross rent multiplier ("PGIM") and a capitalization analysis. The PGIM is the sale price of a substitute property divided by its rental. Such a factor will reflect buyer and seller reactions to property characteristics at the time of the sale. From the two comparables, Mr. Abell was able to calculate a mean price per square foot of \$19.41, and a mean PGIM of 11.0. Multiplying the subject property's square footage by \$19.41 and the PGIM of 11.0 produced a value of \$1,183,000 for the subject property. *Abell testimony; Resp't Ex. F at 48, 49.*
111. For his capitalization analysis, Mr. Abell developed a capitalization rate of 8.1%. His capitalization rate takes into account deductions for market vacancy of 5%, management fees of 3%, and reserves of 3%. Mr. Abell calculated that the effective gross income of the subject property was \$102,170. Expenses accounted for 6% of the effective gross income, so the actual net operating income ("NOI") was \$96,040. Mr. Abell determined a value by dividing the NOI by the capitalization rate, resulting in a value of \$1,186,000 for the subject property. He then trended the value conclusion to March 1, 2011 and arrived at a final valuation for the subject property of \$1,207,000 for the 2011 assessment year. *Abell testimony; Resp't Ex. F at 49-51.*

112. While the sales comparison approach and income approach yielded similar values, Mr. Abell placed greater weight on his income approach because a typical market participant would likely give the income approach more weight. *Abell testimony; Resp't Ex. F at 50.*
113. The Respondent also engaged Brian Shelton, MAI, to review Mr. Abell's appraisal of the subject property. Mr. Shelton concurred with Mr. Abell's appraisal, although he did not perform a separate analysis of the data. *Shelton testimony.*
114. The Respondent, through cross-examination of the Petitioners' witness, Sara Coers, confirmed that the Petitioner had no actual personal knowledge that the sale of the Applebee's restaurant that was relied upon in Mr. Abell's appraisal was a sale-leaseback transaction, and that such assertion by the Petitioners was mere speculation. *Cirignano argument.*

#### **PETITIONERS' CONTENTIONS**

115. The Respondent's appraisal is flawed because the appraiser failed to determine whether the sale of the Applebee's was a sale-leaseback transaction. The Respondent's appraiser acknowledged that he had no knowledge whether the Applebee's sale represented a sale-leaseback transaction. *Ehinger argument.*
116. Ms. Coers, MAI, is generally knowledgeable about Applebee's restaurants. It is very common that Applebee's restaurants are subject to sale-leaseback transactions. *Coers testimony.*
117. A sale-leaseback transaction is often described as a financing vehicle. It is a common technique that retailers and restaurant owners use to free up capital that they would typically have to invest in paying the mortgage on the property. A sale-leaseback is a tactic to free up operating capital by not owning the real estate on which they have built a restaurant or other business. *Coers testimony.*

118. As detailed on the Applebee's PRC, the property was purchased by Applebee's, the national company, in 2008. The property was then sold by Applebee's to DBApplebee LLC in 2010. *Pet'rs Ex. 7*. After the sale, it continued to be operated as an Applebee's. Accordingly, more than the real property had to be transferred in the sale if the property continued to be operated as an Applebee's after the sale. Licensing rights and other intangible rights and value should not be included when valuing property for Indiana property tax purposes. *Ehinger argument*.
119. Sale-leaseback transactions should not be relied upon to determine market value-in-use of a property because such an arrangement does not involve a willing buyer and seller who have no prior relationship. The property is never really exposed to the market. In the Kerasotes case, the IBTR determined that sale-leaseback transactions are not considered valued sales for Indiana property tax purposes. *Coers testimony*.

#### ANALYSIS

120. Real property is assessed based on its "true tax value," which means "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property." 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2); *see also* Ind. Code § 6-1.1-31-6(c). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. MANUAL at 2. Any evidence relevant to the true tax value of the property as of the assessment date may be presented to rebut the presumption of correctness of the assessment, including an appraisal prepared in accordance with generally recognized appraisal standards. MANUAL at 3.
121. Regardless of the method used to prove a property's true tax value, a party must explain how its evidence relates to the subject property's market value-in-use as of the relevant

valuation date. *O'Donnell v. Dep't 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). The valuation date for a 2011 assessment was March 1, 2011. Ind. Code § 6-1.1-4-4.5(f); 50 IAC 27-5-2(c).

122. As explained above, the Respondent had the burden of proving that the subject property's 2011 assessment was correct. In support of their assessment, the Respondent presented an appraisal performed by Gregory Abell. The most effective method to establish value can be through the presentation of a market value-in-use appraisal, completed in conformance with USPAP. *Kooshtard Property VI, LLC v. the White River Twp. Ass'r*, 836 N.E.2d 501, 506 (Ind. Tax Ct. 2005). An appraisal performed in conformance with such generally recognized appraisal principles is often enough to establish a prima facie case. *Meridian Towers*, 805 N.E.2d at 479.
123. Here, the Respondent offered Mr. Abell's USPAP-compliant appraisal valuing the subject property at \$1,207,000 for the 2011 assessment year. The Board finds Mr. Abell's appraisal to be probative evidence of the subject property's market value-in-use. Thus, the Respondent made a prima facie case that the correct value for the subject property is \$1,207,000. Accordingly, the burden shifts to the Petitioners to offer evidence to impeach or rebut the Respondent's evidence.
124. The Petitioners' main contention was that the Applebee's sale relied on by Mr. Abell in his determination of value was a sale-leaseback transaction. Ms. Coers argued that it is common for Applebee's sales to be sale-leaseback transactions. She also argued, citing the Board's decision in the Kerasotes case, that a sale-leaseback should not be used to determine the market value-in-use of a property. However, the Petitioners argument that the Applebee's sale was a sale-leaseback transaction was little more than speculation. Although Ms. Coers credibly testified that it is common for Applebee's restaurants to be the subject of sale-leaseback transactions, the Petitioners offered no substantive evidence that this particular Applebee's restaurant was the subject of such an arrangement. In fact,

the only evidence introduced by the Petitioners regarding this specific Applebee's restaurant was the PRC, which did nothing to definitively disclose whether the property was the subject of a sale-leaseback.

125. A taxpayer cannot rebut the presumption that an assessment is correct simply by contesting the assessor's methodology in computing the assessment. *Eckerling v. Wayne Twp. Assessor*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006). Instead, to successfully make a case for a lower assessment, a taxpayer must "demonstrate that their suggested value accurately reflects the property's true market value-in-use." *Id.* The Petitioners presented various arguments attacking the Respondent's appraisal, but they did not offer credible evidence of their contention that the sale of the Applebee's was a sale-leaseback. Furthermore, the Petitioners wholly failed to offer any substantive, market-based evidence of the subject property's market value-in-use. Thus, the Petitioners failed to effectively rebut the Respondent's evidence.

#### **CONCLUSION: RESTAURANT PARCEL**

126. The Respondent established a prima facie case that the 2011 assessment should be \$1,207,000, and the Petitioners failed to rebut the Respondent's evidence. Therefore, the Board finds for the Respondent and orders that the 2011 assessment be changed to \$1,207,000.

#### **CONCLUSION**

127. With regard to the Shopping Center Parcels, the correct valuations of the subject property are \$6,910,000 for 2008, \$6,190,000 for 2009, \$5,940,000 for 2010, and \$6,900,000 for 2011. With regard to the restaurant parcel, the 2011 assessment will be changed to \$1,207,000.

The Final Determination of the above-captioned matter is issued by the Indiana Board of Tax Review on the date written above.

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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 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 Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.