

REPRESENTATIVES FOR THE PETITIONER:

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**STATE OF INDIANA
INDIANA BOARD OF TAX REVIEW**

| | | | |
|-------------------------|---|-------------------|------------------------|
| SOUTHLAKE INDIANA. LLC, |) | Petition Nos.: | See Attached List |
| |) | | |
| Petitioner, |) | Parcel Nos.: | See Attached List |
| |) | | |
| vs. |) | County: | Lake |
| |) | | |
| LAKE COUNTY ASSESSOR, |) | Assessment Years: | 2011, 2012, 2013, 2014 |
| |) | | |
| Respondent. |) | | |

Appeals from Final Determinations of the
Lake County Property Tax Assessment Board of Appeals

November 21, 2018

I. Introduction

1. The subject property consists of a super-regional mall (the “Southlake Mall”) located in Hobart. The mall owner, Southlake Indiana, LLC, (the “Taxpayer”) and the Lake County Assessor (the “Assessor”), requested assessments roughly \$140M apart.
2. The parties offered competing appraisals from highly experienced, credentialed, and published appraisers. In the final analysis, the appraisers were generally in agreement as to market income and expenses. The appraisals substantially diverged in regard to what sources and allocations of income should be excluded as intangible. The degree to which

intangibles exist and should be separated from a real property valuation of a mall is not a settled question in appraisal theory. The experts retained in this case line up on opposite sides of a very contentious debate. It is not the Board's role, and it is certainly beyond the Board's expertise, to proclaim a winner. As finder-of-fact, the Board must weigh an appraiser's specific calculations and adjustments in regard to the particular facts in the case at bar. Having done so, the Board finds that the evidence compels the exclusions of some income and assets, but not others.

3. The parcels under appeal include land, an enclosed shopping mall, a department store anchor, several freestanding buildings located on outparcels, and parking. Certain other department store anchors, outlots, parking, and excess land that form the remainder of the mall are not on appeal.

II. Procedural History

4. In February of 2014, the Ross Township Assessor issued Form 113 Notices of Assessment Change ("Form 113 Notices") for the 2011, 2012, and 2013 tax years on eight parcels:

| Parcel Number | Description |
|--------------------------|--|
| 45-12-23-301-011.000-046 | Mall proper, JC Penney, Dick's Sporting Goods, parking |
| 45-12-23-301-006.000-046 | Gander Mountain |
| 45-12-23-301-002.000-046 | Tilted Kilt, Starbucks, Portrait Innovations |
| 45-12-23-326-001.000-046 | Chipotle, Potbelly's |
| 45-12-23-326-002.000-046 | Jared, Fifth Third Bank, Chick-Fil-A |
| 45-12-23-401-012.000-046 | Red Robin and others |
| 45-12-23-301-009.000-046 | Olive Garden |
| 45-12-23-401-002.000-046 | Showplace AMC (Kerasotes) |

The Form 113 notices increased the aggregate assessed value for those eight parcels from \$110,432,100 to \$239,200,000.

5. The Taxpayer filed Form 130 petitions with the Assessor contesting the assessed values for 2011, 2012, and 2013. In addition for 2013, the Taxpayer filed Form 130 petitions contesting the assessed values of four additional parcels:

| Parcel Number | Description |
|--------------------------|-------------------------|
| 45-12-23-301-008.000-046 | Retention Lake |
| 45-12-23-301-005.000-046 | Retention Lake |
| 45-12-23-376-001.000-046 | Parking and Vacant Land |
| 45-12-23-376-002.000-046 | Parking and Vacant Land |

The Lake County Property Tax Assessment Board of Appeals (“PTABOA”) issued Form 115 determinations denying the Taxpayer’s petitions for 2011-2013. On July 17, 2014, the Taxpayer timely filed Form 131 Petitions for Review of Assessment with the Board.

6. For 2014, the Taxpayer filed Form 130 petitions with the Assessor contesting the assessed values of the twelve parcels. The PTABOA did not act on the Taxpayer’s 2014 assessment appeals. Pursuant to Indiana Code § 6-1.1-15-1(o), the Taxpayer timely filed Form 131 Petitions for Review of Assessment for each of the parcels for the 2014 assessment.
7. All of the petitions for 2011-2014 were set for a single hearing. John J. Thompson, designated as the Board’s administrative law judge, held a hearing on the dates of June 19-23 and July 14, 2017, in Indianapolis. Five experts testified: David Lennhoff, Alvin Benton, Dr. Jeffrey Fisher, Mark Kenney, and Dr. Thomas Hamilton. The general manager for the Southlake Mall, Peter Karonis, and the Ross Township Assessor, Angela Guernsey, also testified. All were sworn under oath.

8. The original assessments, Form 113 assessments, and appraised values¹ are as follows:

| Year | Assessment | 113 Assessment | Kenney | Lenhoff |
|------|---------------|----------------|---------------|---------------|
| 2011 | \$110,432,100 | \$239,200,000 | \$243,927,000 | \$98,300,000 |
| 2012 | \$110,432,100 | \$239,200,000 | \$251,927,000 | \$114,500,000 |
| 2013 | \$110,432,100 | \$239,200,000 | \$238,927,000 | \$129,600,000 |
| 2014 | \$239,200,000 | | \$255,927,000 | \$146,300,000 |

9. The Taxpayer offered the following exhibits, all of which were admitted:

| | |
|----------------------------|--|
| Petitioner's Exhibit P-1: | Appraisal Report of Southlake Mall Real Property (2011-2014) prepared by David Lenhoff, Altus Group US, |
| Petitioner's Exhibit P-2: | Review of Appraisal Report of the Market Value-in-Use of Fee Simple Estate of Southlake Mall (by Mark Kenney) prepared by Alvin Benton, Benton Advisory Group, |
| Petitioner's Exhibit P-3A: | 2011 Cost of Occupancy for Southlake Mall (pre-and post-increase in taxes), |
| Petitioner's Exhibit P-3B: | 2012 Cost of Occupancy for Southlake Mall (pre-and post-increase in taxes), |
| Petitioner's Exhibit P-3C: | 2013 Cost of Occupancy for Southlake Mall (pre-and post-increase in taxes), |
| Petitioner's Exhibit P-3D: | 2014 Cost of Occupancy for Southlake Mall (pre-and post-increase in taxes), |
| Petitioner's Exhibit P-4: | Property Record Cards for the Subject Property, |
| Petitioner's Exhibit P-5A: | 2011 Form 113 Notices of Assessment, (admitted as Respondent's Exhibit R-21) |
| Petitioner's Exhibit P-5B: | 2012 Form 113 Notices of Assessment, (admitted as Respondent's Exhibit R-22) |
| Petitioner's Exhibit P-5C: | 2013 Form 113 Notices of Assessment, (admitted as Respondent's Exhibit R-23) |
| Petitioner's Exhibit P-8: | Property Tax Assessment article from http://www.agecon.purdue.edu/ , |
| Petitioner's Exhibit P-9: | Lake County, Indiana article from https://en.wikipedia.org/wiki/Lake_County,Indiana , |

¹ These are the values indicated in the appraisal reports. Kenney admitted his report contained several mathematical errors and included parcels not on appeal. Lenhoff also offered alternative values in his testimony that related to the ground lease parcels.

Petitioner's Exhibit P-10: Chicago Metropolitan Area article from https://en.wikipedia.org/wiki/Chicago_metropolitan_area,

Petitioner's Exhibit P-11: Hobart, Indiana article by World Heritage Encyclopedia from <http://central.gutenberg.org>,

Petitioner's Exhibit P-12: Emerging Trends in Real Estate 2014 – Urban Land Institute and PwC,

Petitioner's Exhibit P-13A: Email correspondence between Mark Kenney and Angela Guernsey,

Petitioner's Exhibit P-13B: Email correspondence between Mark Kenney and Angela Guernsey,

Petitioner's Exhibit P-13C: Email correspondence between Angela Guernsey and Jolie Covaciu,

Petitioner's Exhibit P-13D: Email correspondence between Mark Kenney and Angela Guernsey,

Petitioner's Exhibit P-13E: Email correspondence between Mark Kenney and Angela Guernsey,

Petitioner's Exhibit P-14B: Intangible Assets in the Shopping Center: Identification and Valuation, by David C. Lennhoff, MAI, SRA and James D. Vernor, Ph.D., MAI,

Petitioner's Exhibit P-14C: Segregating Real Estate Value from Nonrealty Value in Shopping Centers, by Robert S. Martin, MAI, SREA and Scott D. Nafe, MAI,

Petitioner's Exhibit P-15A1: Property Record Cards for The Fashion Mall,

Petitioner's Exhibit P-15A2: Demographic/Other Data for The Fashion Mall,

Petitioner's Exhibit P-15B1: Property Record Cards for Castleton Square Mall,

Petitioner's Exhibit P-15B2: Demographic/Other Data for Castleton Square Mall,

Petitioner's Exhibit P-15C1: Property Record Cards for University Park Mall,

Petitioner's Exhibit P-15C2: Demographic/Other Data for University Park Mall,

Petitioner's Exhibit P-15D1: Property Record Cards for Greenwood Park Mall,

Petitioner's Exhibit P-15D2: Demographic/Other Data for Greenwood Park Mall,

Petitioner's Exhibit P-15E1: Property Record Cards for College Mall,

Petitioner's Exhibit P-15E2: Demographic/Other Data for College Mall,

Petitioner's Exhibit P-15F1: Property Record Cards for Glenbrook Square Mall,

Petitioner's Exhibit P-15F2: Demographic/Other Data for Glenbrook Square Mall,

Petitioner's Exhibit P-15G1: Property Record Cards for Circle Centre Mall,

Petitioner's Exhibit P-15G2: Demographic/Other Data for Circle Centre Mall,

Petitioner's Exhibit P-15H1: Property Record Cards for Eastland Mall,

Petitioner's Exhibit P-15H2: Demographic/Other Data for Eastland Mall,

Petitioner's Exhibit P-15I1: Property Record Cards for Green Tree Mall,

| | |
|------------------------------|---|
| Petitioner's Exhibit P-15I2: | Demographic/Other Data for Green Tree Mall, |
| Petitioner's Exhibit P-15J1: | Property Record Cards for Tippecanoe Mall, |
| Petitioner's Exhibit P-15J2: | Demographic/Other Data for Tippecanoe Mall, |
| Petitioner's Exhibit P-16: | Excerpt from USPAP Plagiarism Rule, |
| Petitioner's Exhibit P-17: | Enlargement of Page 69 of Mark Kenney Appraisal, |
| Petitioner's Exhibit PD-1: | 2011 Mall Assessments Comparison (AV/sq.ft.), |
| Petitioner's Exhibit PD-2: | 2011 Mall Assessments Comparison (Total AV), |
| Petitioner's Exhibit PD-3: | 2012 Mall Assessments Comparison (AV/sq.ft.), |
| Petitioner's Exhibit PD-4: | 2012 Mall Assessments Comparison (Total AV), |
| Petitioner's Exhibit PD-5: | 2013 Mall Assessments Comparison (AV/sq.ft.), |
| Petitioner's Exhibit PD-6: | 2013 Mall Assessments Comparison (Total AV), |
| Petitioner's Exhibit PD-7: | 2014 Mall Assessments Comparison (AV/sq.ft.), |
| Petitioner's Exhibit PD-8: | 2014 Mall Assessments Comparison (Total AV), |
| Petitioner's Exhibit PD-9: | Map of United States, |
| Petitioner's Exhibit PD-10: | Demonstrative regarding average rents, |
| Petitioner's Exhibit PD-11: | Mortgage Constant Calculations, |
| Petitioner's Exhibit PD-12: | Mortgage Constant Calculations, |
| Petitioner's Exhibit PD-13: | Comparable Malls – Total AV, |
| Petitioner's Exhibit PD-14: | Comparable Malls – AV/sq.ft., |
| Petitioner's Exhibit PD-15: | Calculations showing impact of valuing buildings on leased ground – 2011 and 2012, |
| Petitioner's Exhibit PD-16: | Calculations showing impact of valuing buildings on leased ground – 2013 and 2014, |
| Petitioner's Exhibit PD-17: | Allocation of David Lennhoff Appraised Value to Tax Parcels, |

10. The Respondent offered the following exhibits, all of which were admitted:

| | |
|---------------------------|---|
| Respondent's Exhibit R-1: | Appraisal Report of Southlake Mall (2011-2014) prepared by Mark Kenney, American Valuation Group, including Appendices, |
| Respondent's Exhibit R-2: | Understanding Intangible Assets and Real Estate, published by IAAO Special Committee on Intangibles, |
| Respondent's Exhibit R-3: | Excerpts from PwC Survey Report for 2010, |
| Respondent's Exhibit R-4: | Excerpts from PwC Survey Report for 2011, |
| Respondent's Exhibit R-5: | Excerpts from PwC Survey Report for 2012, |
| Respondent's Exhibit R-6: | Excerpts from PwC Survey Report for 2013, |
| Respondent's Exhibit R-8: | Excerpts from Westfield Annual Report for 2012, |

| | |
|-----------------------------|--|
| Respondent's Exhibit R-9: | Excerpts from Westfield Annual Report for 2013, |
| Respondent's Exhibit R-10: | GIS Map of the Subject Property, |
| Respondent's Exhibit R-10A: | Large color version of GIS Map of the Subject Property, |
| Respondent's Exhibit R-11: | Map/Directory of the Subject Property. |
| Respondent's Exhibit R-12: | Temporary Indiana Practice Permit for Mark Kenney, |
| Respondent's Exhibit R-16A: | Demonstrative regarding average rents, |
| Respondent's Exhibit R-16B: | Hand-drawn map of Indiana, |
| Respondent's Exhibit R-17B: | Appraisal Report of Southlake Mall (2011) prepared by Mark Kenney, American Valuation Group, |
| Respondent's Exhibit R-19A: | Certificate of Mailing Form 113s, |
| Respondent's Exhibit R-19B: | Certificate of Mailing Form 113s, |
| Respondent's Exhibit R-20: | Printout from realcommercial.com.au website, |
| Respondent's Exhibit R-21: | 2011 Form 113 Notices of Assessment, (also labeled as Ex. P-5A) |
| Respondent's Exhibit R-22: | 2012 Form 113 Notices of Assessment, (also labeled as Ex. P-5B) |
| Respondent's Exhibit R-23: | 2013 Form 113 Notices of Assessment, (also labeled as Ex. P-5C) |
| Respondent's Exhibit RD-24: | Demonstrative regarding 2010 CAM Calculations, |
| Respondent's Exhibit RD-25: | Demonstrative regarding 2013 CAM Calculations. |

11. The Taxpayer objected to *Ex. R-20*, a print-out of a definition of the term "yield rate" from an Australian website, on the grounds of hearsay. The ALJ took the objection under advisement. The Board finds it is likely hearsay, though reference materials such as dictionaries are typically an excepted from hearsay. The Board overrules the objection, however, this exhibit has no bearing on the outcome of the case.
12. The Assessor conceded that Alvin Benton was qualified as an appraisal expert, but not as an appraisal review expert because he lacked a particular certification. The ALJ took the objection under advisement. It was not disputed that Benton was qualified to conduct a review appraisal compliant with USPAP standards. Benton's report and testimony was within the scope of his expertise and the objection is overruled. *Tr.* at 723-24.

13. The Taxpayer objected to Dr. Thomas Hamilton's testimony, and moved to exclude him as a witness on the grounds that he was either not qualified as an expert or that his testimony was improperly proffered as rebuttal rather than direct evidence. The ALJ took the objection under advisement. Hamilton, as an MAI, PhD, and published professor in the field of real estate, is clearly an expert. The Board finds that Hamilton's testimony was proper as rebuttal testimony challenging the intangibles theories elucidated by Taxpayer's witnesses, and overrules the objection. *Tr.* at 1279-80.

III. Preliminary Matters

A. Form 113 Notices

14. The Taxpayer challenged the issuance of the Form 113 notices for 2012 and 2013. It argued that because the Ross Township Assessor, Angela Guernsey, relied solely on the 2011 appraisal in issuing the Forms 113 for 2012 and 2013, there was insufficient grounds to change the 2012 and 2013 assessments. More specifically, the Taxpayer argued that the issuance was "beyond her statutory powers" because she "did not have a 'belief' that the assessed values were wrong (absent Mr. Kenney's 2011 appraisal)" *Post-Hearing Br. of Pet'r* at 16.

15. An assessor's right to increase an assessment through an interim reassessment is set forth in Ind. Code § 6-1.1-9-1:

If a . . . county assessor . . . *believes* that any taxable tangible property has been omitted from or undervalued on the assessment rolls or the tax duplicate for any year or years, the official or board shall give written notice under IC 6-1.1-3-20 or IC 6-1.1-4-22 of the assessment or increase in assessment.

(Emphasis added). The Tax Court has interpreted this statute to mean that "an assessing official's belief that the subject property has been undervalued constitutes the condition precedent to the execution of an interim reassessment under Indiana Code § 6-1.1-9-1." *Charwood v. Bartholomew County Assessor*, 906 N.E.2d 946 (Ind. Tax Ct. 2009).

16. Guernsey testified that she believed the property was undervalued. *Tr.* at 610-12. The Board accepts her testimony and finds the Forms 113 were issued based on the Assessor's belief as to the value. The statute requires no more.

B. Directed Verdict

17. After the Assessor rested, the Taxpayer moved for a directed verdict. The Taxpayer argued that Kenney's appraisal report and testimony was so inconsistent with Indiana law and generally accepted appraisal principles, and his conclusions of income, expenses, cap rates and property tax loads were so factually unsupported, that his opinion of value lacked probative value. The ALJ took the Taxpayer's motion under advisement. *Tr.* at 667.
18. The Taxpayer failed to direct the Board to any authority to support the imposition of a directed verdict in an administrative hearing. A directed verdict challenges whether sufficient evidence has been placed before a *jury* under Ind. Tr. Rule 50. Indiana law has long held that a motion for a directed verdict without a jury should be treated as a motion under Ind. T.R. 41(B). *See Clark v. Melody Bar, Inc.*, 271 N.E.2d 481, 485 (Ind. Ct. App. 1971). An involuntary dismissal under T.R. 41(B) allows dismissal upon a showing that "under the weight of the evidence and the law there has been shown no right to relief." *Id.* However, the court "must consider all of the evidence and reasonable inferences in favor of the party against whom the motion is directed." *Id.*
19. Appraisals and expert testimony are substantial evidence of probative value. Kenney's opinion was based on decades of relevant experience and a comprehensive analysis of the Southlake Mall. Drawing all inferences in favor of the Assessor, the Board finds that the Taxpayer's cross-examination, as thorough as it was, did not sufficiently rebut or impeach the Assessor's evidence. The Board denies the Taxpayer's motion for directed verdict.

C. Findings of Fact and Conclusions of Law

A. Glossary of Acronyms and Terms of Art

| | |
|-------------------|---|
| Brand Media | Income from renting space for advertisements in the mall such as a movie or a union's offering of training courses |
| CAM | Common Area Maintenance and other administrative expenses charged by a landlord in addition to base rent |
| Cart | Same as RMU |
| COO | Cost Of Occupancy: the percentage of total rent and other landlord charges as a ratio of sales per s/f; an indicator of the viability of the mall, a tenant, or a lease rate. |
| FF&E | Fixtures, Furnishings, and Equipment: tangible assets of a business that are considered personal property rather than real property |
| GLA | Gross Leasable Area: the s/f of a space as measured by the lease |
| Inline Tenant | A tenant, other than an anchor tenant, occupying typical retail space located in the enclosed portion of the mall; usually excludes space over 10,000 s/f |
| Kiosk | Semi-permanent retail space constructed by the landlord in the common area |
| OAR | Overall Rate: overall capitalization rate before loading for taxes |
| RMUs | Retail Merchandising Units or "carts:" small movable sales units located in the common areas of the mall with access to electricity |
| Specialty Leasing | Rent from sources other than typical anchor and inline tenants such as TILs, cart rentals, RMUs, or Brand Media |
| TAB | Total Assets of Business: the value of all business, including real property and personal property (both tangible and intangible) |
| TIs | Tenant Incentives, Tenant Inducements, or Tenant Improvement Allowances: cash, reduced rent, or building allowances provided by a landlord to a tenant |
| TILs or TILTs | Temporary In-Lines or Temporary In-Line Tenants: temporary tenants of vacant inline stores |

B. Description of the Southlake Mall

20. The Southlake Mall is a super-regional shopping mall located at the interchange of Interstate 65 and U.S. 30 in Hobart. It is situated within the Chicago Metropolitan Statistical Area. The entire mall complex consists of roughly 130 acres and 1,380,000 s/f of improvements. However, not all of these parcels are on appeal. Three mall anchor stores (Macy's, Carson Pirie Scott, and Sears), are not owned by the Southlake Mall and are not on appeal. Additionally, the freestanding Kohl's store, a Chili's restaurant, and some parcels of excess land are not on appeal. The portion of the mall on appeal consists

of roughly 80 acres and 900,000 s/f of improvements. *Ex. R-1* at vi, 76; *Ex. P-1* at 2-3; *Ex. R-1B* at 8.

21. The enclosed portion of the Southlake Mall includes over 100 tenants. The mall also leases space for kiosks (booths in common areas) and carts (moveable retail displays set in common areas and also called “retail merchandizing units” or “RMUs”). The anchors on appeal are JC Penney and Dick’s Sporting Goods. Also on appeal are several adjacent parcels with retail buildings (outlots) owned by the mall. The Firestone is a freestanding building but is a subtenant of JC Penney. The parcels with Dick’s, The Olive Garden, Fifth Third Bank, Chick-Fil-A, and AMC Showplace have ground leases, and accordingly, the Taxpayer owns the land, and the tenant owns the improvements. *Ex. R-1* at 17-18, 130; *Tr.* at 1022.
22. The Southlake Mall is located in a premier retail location in the trade area. The transportation linkages and access are excellent. Approximately 97,000 vehicles exit I-65 onto U.S. 30 daily, and traffic counts at the Southlake Mall’s entrances off of U.S. 30 are approximately 45,000 vehicles per day. The immediate area is made up of office, retail, multifamily, and undeveloped land. The mall is in a strong competitive position with no direct competition in its market area. *Ex. R-1* at 58, 96; *Ex. P-1* at 34-35.
23. The Southlake Mall opened in 1974. In addition to subsequent minor renovations, a major [REDACTED] revitalization was completed in 2006. The outlot buildings were constructed between 1988 and 2006. The mall improvements feature adequate designs typical of today’s construction standards. The store sizes and layouts are prototypical for a super-regional shopping mall. *Ex. R-1* at 76, 96.
24. Population and household income in the area are projected to maintain moderate growth over the foreseeable future. The local economy is stable with increasing retail sales levels and stable rents. Furthermore, the supply and demand of retail space in the subject area is in relative balance. In 2009, the national and regional economies were in the midst of a recession. Economic conditions gradually improved and resulted in in market rent growth over the period. *Ex. R-1* at 96.

25. Peter Karonis, general manager of the Southlake Mall, provided an analysis of the mall that included annual inline gross sales and the square footage of leased inline space. Based on Karonis' data, the Southlake Mall's gross sales for inline tenants could be determined.

| Karonis Inline Sales Per S/F | 2011 | 2012 | 2013 | 2014 |
|------------------------------|------------|------------|------------|------------|
| Area Sq Ft / Area LY | 330,022 | 330,022 | 321,806 | 288,675 |
| Annual Sales | ██████████ | ██████████ | ██████████ | ██████████ |
| Sales per s/f | ████ | ████ | ████ | ████ |

Exs. P-3A, P-3B, P-3C, P-3D. The experts agreed that "sales classify the mall."

Pursuant to PwC publications, Class B+ malls have inline sales of \$350-\$450 per s/f.

While there was competing evidence as to inline sales, the Board relies on Karonis' data and finds that investors would generally consider the Southlake Mall to be a solidly Class B+ mall, and view 2013 as an aberration. *Tr. at 676-77, 746.*

26. Karonis provided a cost of occupancy (COO) analysis. A COO is a ratio of the total rent and other landlord charges to a tenant relative to the tenant's sales per s/f. A high COO suggests that some tenants may go out of business because the sales are insufficient to be profitable. Tenants are commonly willing and able to pay higher COOs in more successful malls because tenants will pay higher rents to have gross sales above \$350 per s/f. Karonis testified that 15% is a "good threshold" for when "the cost of occupancy impacts tenants at the mall." After weighing the competing evidence, the Board relies on Karonis to conclude that the Southlake Mall has an inline COO tolerance of 15%. Though experts reached different conclusions for the actual inline COO at the Southlake Mall, they were generally below 15%. Based on Karonis' data, the Board finds that the Southlake Mall is healthy as measured by COO.² *Ex. R-1 at 135; Exs. P-3A, P-3B, P-3C, P-3D; Tr. at 676-77.*

² Karonis' analysis suggested that the mall's overall inline COO in all 4 years would go from below 15% to above 15% based on an increase in property taxes commensurate with Kenney's valuation, meaning the mall would no longer be healthy. The mall's actual NOI ██████████ in spite of the higher property taxes in the later years, suggesting the inline tenant COO tolerance may be even higher. *Tr. 685-90; Exs. P-3A, P-3B, P-3C, P-3D.*

C. Expert Opinions

1. Kenney's Appraisal

27. The Assessor offered the testimony of Mark Kenney, MAI, and his appraisal prepared in accordance with USPAP. Kenney has thirty-five years of experience, is licensed in 5 states, and was issued a temporary Indiana license. He has appraised a variety of retail properties, including mega malls, super-regional shopping malls, regional malls, community centers, and "big box" stores. He has authored or co-authored numerous published articles. He has appraised around 70 malls. *Ex R-1Q; Tr. at 12, 35-36.*
28. The purpose of Kenney's appraisal was to determine the market value-in-use of the fee simple interest in the real property component of the Southlake Mall.³ His goal was not to determine the value of the leased fee or leasehold estates. He agreed that he was required to exclude the value of personal property and, to the extent they exist, intangibles. He used an income capitalization approach to value the Southlake Mall. *Tr. at 89, 109-112, 202, 267, 348.*
29. In estimating market rent, Kenney operated on the assumption that "rental activity at any mall is a submarket within itself, and the best source of leasing activity." He explained that the "unique characteristics" of the Southlake Mall render it not comparable to any other super-regional shopping malls.⁴ He used an overall projection of market rent rather than a separation of base and percentage rents. He largely projected market rent based upon his review of recent leases and lease renewals at the Southlake Mall. He did not adjust rent for tenant improvements allowances, which he deducted after capitalization. *Ex. R-1 at 106, 130-31; Tr. at 368-69.*
30. For the mall anchors, JC Penney and Dick's, Kenney developed market rents from "similar comparable anchor market rentals." He identified the leases of eight properties:

³ Kenney's appraisal included some parcels not on appeal that form part of the Southlake Mall. He admitted the values for those parcels should be excluded from his overall valuations. *Tr. at 69-71; Ex. R-1 (cover letter at 6-7).*

⁴ Kenney admitted on cross-examination that he used a sales comparison approach to value the Mayfair Mall in Wisconsin for the same valuation years, and the Southlake Mall was one of the five "most comparable" malls to the Mayfair mall. His conclusions regarding the Southlake Mall in his Mayfair Mall appraisal were inconsistent with his opinions in this case: he characterized the Southlake Mall as very good rather than good, and he predicted volatile rent changing at 18% rather than stable. *Tr. at 369-71, 372-73, 434-37.*

three Southlake Mall properties and five comparable locations. He did not adjust for differences in location, size, age, or economic conditions between any of his rent comparables and the Southlake Mall. He [REDACTED] the JC Penney contract rent [REDACTED] based on a comparable lease, and [REDACTED] the Dick's contract ground rent to account for the building.

| Anchor Market Rent | 2011 | 2012 | 2013 | 2014 |
|--------------------|------------|------------|------------|------------|
| JC Penney | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Dick's | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Ex. R-1 at 127-30; *Tr.* at 197-98, 421.

31. In estimating inline market rent, Kenney relied on recent leases and lease renewals at the Southlake Mall. He divided the spaces into categories based on size and location. While he claimed he also relied on data from competitive malls, *Ex. R-1H* does not contain rent data on inline spaces on a dollar per s/f basis. He admitted that his conclusions were not based on data from properties other than the Southlake Mall.

| Inline, ATM, and Kiosk Market Rent | 3/1/2011 | 3/1/2012 | 3/1/2013 | 3/1/2014 |
|------------------------------------|------------|------------|------------|------------|
| Minimum Rents - <99 SF (ATMs) | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - Kiosks | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - Food Court | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - 500-1,499 SF | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - Center Court | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - 1,500-2,999 SF | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - 3,000-4,999 SF | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - 5,000-9,999 SF | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Minimum Rents - 10,000 & Above | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Ex. R-1 at 130, *Ex. R-1H*; *Tr.* at 441.

32. In addition to traditional mall tenants, the Southlake Mall received rent from specialty leasing, which included temporary inline tenants (TILTs or TILs) of vacant stores, carts

(RMUs), kiosks, and space for advertising (referred to as “brand media”).⁵ Kenney considered all of this income to be real property rent.⁶ He also included tenant storage and other non-specific income. He looked to actual rent and did not compare the data to outside sources.

| Specialty Leasing, Other Income | 2011 | 2012 | 2013 | 2014 |
|---------------------------------|--------|--------|--------|--------|
| TIL Rents | ██████ | ██████ | ██████ | ██████ |
| Carts (RMUs) | ██████ | ██████ | ██████ | ██████ |
| Brand/MEDIA | ██████ | ██████ | ██████ | ██████ |
| Other Income | ██████ | ██████ | ██████ | ██████ |
| Storage | ██████ | ██████ | ██████ | ██████ |

Ex. R-1 at 131; *Tr.* at 463, 465.

33. Kenney’s analysis for estimating market rent for the outlot properties was scant. He considered the same 8 comparative leases used in estimating anchor store rent, but he largely followed the actual rent. He increased the ground leases to reflect the value of the improvements. He also added an income stream for the Firestone, a free-standing building subleased by JC Penney.

| Outlot Market Rent | 3/1/2011 | 3/1/2012 | 3/1/2013 | 3/1/2014 |
|--------------------|----------|----------|----------|----------|
| Firestone | ██████ | ██████ | ██████ | ██████ |
| Olive Garden | ██████ | ██████ | ██████ | ██████ |
| Jared Jewelers | ██████ | ██████ | ██████ | ██████ |
| Fifth Third | ██████ | ██████ | ██████ | ██████ |
| Chick-fil-A | ██████ | ██████ | ██████ | ██████ |
| Showplace AMC | ██████ | ██████ | ██████ | ██████ |
| Other Outlots | ██████ | ██████ | ██████ | ██████ |

Ex. R-1 at 109-10, 130, 147, 150, 153, 156; *Tr.* at 456-58.

⁵ Examples of brand media at the Southlake Mall included advertisements for movies and a union’s offering of training courses. *Tr.* at 696.

⁶ Kenney considered the carts to be personal property, however, he did not adjust the cart income. Instead, he deducted the value of all personal property, including the carts, after capitalization. *Ex. R-1* at 131.

34. Tenants at malls are typically responsible for a share of the mall's operating expenses as additional charges referred to as Common Area Maintenance ("CAM"). CAM expense reimbursements may be a profit center above the mall's actual costs and include additional administrative overages. All of Kenney's projections of CAM and other additional charges were based on historical operating figures and individual tenant reimbursements. He adjusted for vacant spaces based on the average CAM income unit rate. He applied his market vacancy and collection rates against the combined CAM reimbursement amounts. *Ex. R-1* at 132-33.
35. Food court tenants have additional CAM charges for expenses such as janitorial services and supplies. Malls typically charge additional rent for central plant usage, which includes HVAC and maintenance, and it may include a profit to the mall. Malls commonly purchase electric power at a wholesale utility rate and charge a retail rate to the tenants for a profit. Kenney considered the profits from all of these categories to be real property income. In addition, the mall receives income for insurance, water and sewer, fire alarm and sprinkler, construction, and trash removal.⁷

| Tenant Reimbursements | 3/1/2011 | 3/1/2012 | 3/1/2013 | 3/1/2014 |
|-----------------------|----------|----------|----------|----------|
| CAM | ████████ | ████████ | ████████ | ████████ |
| Food Court CAM | ████████ | ████████ | ████████ | ████████ |
| Central Plant | ████████ | ████████ | ████████ | ████████ |
| Electricity | ████████ | ████████ | ████████ | ████████ |
| Insurance | ████████ | ████████ | ████████ | ████████ |
| Fire Alarm/Sprinkler | ████████ | ████████ | ████████ | ████████ |
| Water/Sewer | ████████ | ████████ | ████████ | ████████ |
| Construction Revenue | ████████ | ████████ | ████████ | ████████ |

Ex. R-1 at 133-35, 147, 150, 153, 156; *Tr.* at 208.

36. As a check on his estimates of market rent, Kenney performed a COO analysis. Based on data for 2011, 2012, and 2013, the average costs of occupancy for *all mall tenants* was

⁷ Because the real estate taxes are under appeal and in dispute, Kenney excluded both real estate tax revenue and real estate tax expense from his appraisal income statements. He unsuccessfully attempted to load the overall capitalization rate with the owner's share of real estate tax. *Ex. R-1* at 134.

between 7.3% and 9.0%, and Kenney considered the rates to be low when compared with typical industry benchmarks. He believed that higher occupancy costs could be tolerated by the tenants. *Ex. R-1* at 136-37.

37. In establishing vacancy and collection loss rates, Kenney considered the market and historical vacancy data, survey data,⁸ and what he characterized as “financial vacancy rates.” He applied a single vacancy and collection rate across all categories of income. His conclusions were generally lower than market vacancy and collection loss, but he also applied them to tenant categories with less turnover such as anchor stores and outlots.

| Vacancy and Collection Loss | 2011 | 2012 | 2013 | 2014 |
|------------------------------------|------|-------|-------|------|
| Actual Vacancy | ████ | ████ | ████ | ████ |
| Actual Financial Vacancy | ████ | ████ | ████ | ████ |
| Market Vacancy | 8.0% | 12.0% | 10.5% | 8.0% |
| Market Collection Loss | 0.5% | 0.5% | 0.5% | 0.5% |
| Kenney Vacancy and Collection Loss | 8.5% | 12.5% | 11.0% | 8.5% |

Ex. R-1 at 38.

38. Kenney’s operating expenses were based on market standards and the actual operations of the Southlake Mall. The 2011 appraisal CAM expense was stabilized based on 2011 actual expenses, and the 2012-2014 CAM were similarly stabilized based on actual expenses. He also included food court CAM expenses, landlord expenses, and specialty leasing expenses. Partnership marketing expenses reflected the mall’s contribution towards marketing. The Net Marketing expenses category included both marketing revenue from the tenants and the mall’s marketing expenditures (thus reflecting a net expense rather than the total marketing expenditure). He also included categories for

⁸ Kenney referenced survey data on vacancy and collection rates that were typically selected by investors “in their pricing models” which ranged from 3%-10% and averaged 6%. *Ex. R-1* at 138.

central plant, electricity, fire alarm/sprinkler, and construction.⁹ *Ex. R-1* at 138-40, 147-56.

39. Because typical, competent management is always assumed in an appraisal and the Southlake Mall would likely be leased and managed by an institutional owner or professional manager, Kenney presumed management to be competent. Management fees typically range from 2% to 5% of minimum rents, percentage rents, effective gross income, or gross rents. Based on recent investor criteria, he estimated management and leasing fees of 3%, 3%, 3.5%, and 4% respectively for 2011-2014.

| Operating Expenses | 2011 | 2012 | 2013 | 2014 |
|------------------------------|--------|--------|--------|--------|
| Landlord Expenses | ██████ | ██████ | ██████ | ██████ |
| Specialty Leasing Expenses | ██████ | ██████ | ██████ | ██████ |
| Partnership Marketing | ██████ | ██████ | ██████ | ██████ |
| Marketing Expense (Net) | ██████ | ██████ | ██████ | ██████ |
| CAM Expenses | ██████ | ██████ | ██████ | ██████ |
| Food Court Cam Expenses | ██████ | ██████ | ██████ | ██████ |
| Central Plant Expenses | ██████ | ██████ | ██████ | ██████ |
| Electricity | ██████ | ██████ | ██████ | ██████ |
| Fire Alarm/Sprinkler Expense | ██████ | ██████ | ██████ | ██████ |
| Water/Sewer | ██████ | ██████ | ██████ | ██████ |
| Construction Expense | ██████ | ██████ | ██████ | ██████ |
| Management Fee | ██████ | ██████ | ██████ | ██████ |

Ex. R-1 at 133-35, 140-41, 147, 150, 153, 156.

40. Having determined market rent and expenditures, Kenney arrived at his NOI for each year. A reserve for replacement of short-lived items was not included. Survey data indicated that the majority of investors (over 80%) report that they capitalize NOI before considering replacement reserves. *Ex. R-1* at 141.

⁹ Bad debts were excluded from Kenney's appraisal income statement because it is accounted for in his appraisal collection loss allowance. *Ex. R-1* at 141.

41. Kenney selected his capitalization rate based on the premise that the Southlake Mall was a Class B+ mall with inline retail sales of [REDACTED] per s/f. This was based on the sales per s/f of “specialty” stores as disclosed in the mall owner’s financial statements. Kenney did not independently calculate gross sales for the inline mall spaces. His capitalization rates were developed within the framework of all accepted methods, but most directly from a band of investment technique. He also considered investor survey data. He concluded to rates of 6.5%, 6.4%, 6.6%, and 6.3% respectively for 2011-2014. *Ex. R-1* at 131, 170; *Ex. R-1C*.
42. Kenney admitted that his appraisal report valuation failed to properly load his capitalization rates in capitalizing his NOI in each year under appeal. Due to the error, his appraisal report overvalued the property by several million dollars. Additionally, Kenney inconsistently estimated the vacancy percentage (owner’s share) of real estate taxes. For 2011, he used his estimated mall-wide vacancy and collection loss rate of 8.5%. For 2012-2014, he used the percentage the Taxpayer actually paid, which was [REDACTED]. *Tr.* at 545-50.
43. After capitalizing income, Kenney made two deductions. To remove the mall’s furniture, fixture, and equipment (“FF&E”) and other personal property, he deducted the amounts reported on the Taxpayer’s business tangible personal property tax returns. He admitted that this deduction would not remove the income attributable to the personal property. Second, he deducted tenant incentive allowances (“TIs”). In some leases, the mall owner may provide the tenant with cash incentives, building allowances, or reduced rent to offset the tenant’s cost of build out and furnishing the space. The appraisal report did not apply a TI for 2011 despite the expenditure of roughly [REDACTED] on TIs. Kenney admitted the [REDACTED] TI deduction for 2011 should be applied.

| Deductions from Capitalized NOI | 2011 | 2012 | 2013 | 2014 |
|---------------------------------|------------|------------|------------|------------|
| Personal Property | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Tenant Incentives (corrected) | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Tr. at 277-80, 338, 493-94, 555-56; *Ex. R-1* at 141-42.

44. In explaining his decision not to make further deductions to remove personal property and intangibles, Kenney stated he employed the “Rushmore Approach” in his valuation. The Rushmore Approach, also known as the “Management Fee Method” is based on the premise that any intangible value arising from a going-concern can be measured by capitalizing the management fee necessary to compensate a third party to run the business. Theoretically, any value arising from the management of the business is excluded through the management fee. Kenney contributed to the recent IAAO (“International Association of Assessing Officers”) publication entitled Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professionals. That work noted that despite criticism, the Rushmore approach has been widely accepted by the courts. *Tr.* at 132; *Ex. R-2* at 11-14.
45. Finally, for each year, Kenney added \$3,927,000 to account for the excess parcels containing vacant land, parking, retention ponds, and a water storage tank. Some of these parcels are not on appeal. He based his values on the actual assessments and not on a market analysis. *Ex. R-1* at 185-92.
46. Due to several errors conceded by Kenney, the final values in his report were incorrect. The Assessor argued in his brief that the corrected values for 2011-2014 respectively were: \$224,273,000; \$239,273,000; \$227,273,000; 243,273,000. *Assessor’s Post-Hearing Br.* at 90.
47. The Taxpayer argued that Kenney violated several USPAP rules. The Taxpayer extensively documented Kenney’s wholesale plagiarism of a number of sources of demographic and economic data without attribution. Kenney did not present the data as though it were original research, and the Taxpayer did not challenge the accuracy of the data. The Taxpayer also argued that Kenney failed to establish competency by suitably brushing up on Indiana law or associating with an Indiana appraiser. *Tr.* at 311-12, 325-28.
48. The Taxpayer argued that Kenney relied on contract rent without determining whether the rents were at market rent, and he relied too heavily on renewals (which were not exposed to the market), rather than new leases. The Taxpayer argued that Kenney’s

capitalization rates were not specific enough to malls or the subject property. *Post-Hearing Br. of Pet'r* at 12-13.

2. Review of Kenney's Appraisal by Alvin Benton, MAI, and Dr. Jeffrey Fisher

49. The Taxpayer offered the expert testimony and report of Alvin Benton, MAI, who has been an appraiser since 1961. He is licensed in four states and served on the Appraisal Institute's Appraisal Review Committee. He has appraised approximately 400 to 500 retail properties, including approximately 75 super-regional shopping centers. He has also completed approximately twenty-five appraisal review assignments. *Tr.* at 718-22.
50. Benton prepared a review appraisal of Kenney's appraisal in accordance with Standard 3 of USPAP. He testified that Kenney's report was not credible, displayed bias, and failed to meet several USPAP standards. He identified several minor mathematical errors and typos, which indicated carelessness, and he disputed conclusions regarding economic conditions and parking spaces. *Tr.* at 716, 768-69; *Ex. P-2* at 8-11, 17.
51. Benton criticized Kenney's development and conclusion of market rent. He argued that Kenney simply averaged the actual rent rates without any additional adjustment or analysis. He claimed market rent must be based on lease data from "other malls." Overall, he concluded that Mr. Kenney should have undertaken a "more meaningful analysis of market rent." Benton did not develop an opinion of market rent. *Tr.* at 728-32, 734, 736-38, 838.
52. Benton argued that Kenney failed to properly analyze the costs of occupancy because Kenney looked at the mall as a whole rather than just the inline tenants. Benton constructed his own COO analysis of the mall's inline tenants. Many of his conclusions were based on his premise that the Southlake Mall is a Class B Mall with a COO tolerance of 13%, including his belief that "the cap rate should be probably a lot higher than what Mr. Kenney used." *Tr.* at 744, 746-47, 757-61, 763-64; *Ex. P-2* at 15-16.
53. Benton testified that Kenney overstated the value of the ground leases by including rental income allocated to the improvements. He explained that, "[i]f the mall does not own it, you can't consider it as income." *Tr.* at 740-41, 837.

54. Benton stated that any “profit” where a line item expense is less than the income received should be considered “part of the business of operating a mall.” It was error for Kenney to include the profit “without any adjustment.” *Ex. P-2* at 15, 17.
55. The Taxpayer also offered the expert testimony of Dr. Jeffrey Fisher, professor emeritus at Indiana University’s School of Business where he founded and served as the director of the Center for Real Estate Studies. He has authored or co-authored several textbooks, including Income Property Valuation, which was co-authored with an MAI appraiser, and Real Estate Finance and Investment Analysis. He was also a founding trustee of the Appraisal Foundation, which became the self-regulatory agency for the appraisal industry. Fisher consulted with Benton and specifically focused on Kenney’s methodology and whether it appeared consistent with his expectations from an academic perspective. He wrote a 3-page memo on his thoughts regarding Kenney’s appraisal. *Tr.* at 726-27, 897, 900-1, 907-8, 910-12; *Ex. P-2*.
56. Fisher testified that a mall’s management creates value by developing an appropriate tenant mix, and that value is an intangible. He contended that deducting a management fee accounts for “just maintaining the value, but it’s already been created, and so you’ve got to think about what value has already been created.” For that reason, Kenney failed to remove the intangible or business value attributable to an already-assembled tenant mix. *Tr.* at 915-17.
57. In addition to tenant mix, Fisher believed that a mall’s non-real-estate assets include operating and cross-easement agreements, brand name, customer base, management company, mall profit centers, push carts, and percentage rents. Fisher believed that even rent “paid by tenants represents more than just payment for mall space.” Because “the success of the mall depends on the success of each tenant’s business,” they are “in business together” and, ergo, “real property (land and buildings) are only part of the equation.” *Ex. P-2*.
58. Fisher believed that the capitalization rate for a mall’s total going concern would be lower than a mall’s real estate capitalization rate. Fisher explained that getting a real estate-only capitalization rate from a going concern rate would not necessarily be as

simple as just adding one percentage point, but that adding a point would be “going in the right direction.” *Tr.* at 955.

59. Fisher explained that the band of investment method employed by Kenney mathematically results in a capitalization rate, but the result is entirely dependent on assumptions about the mortgage term, amortization term, interest rate, and loan-to-value ratio. In Fisher’s opinion, “to try to extract from the market appropriate assumptions to use that technique I think [is] really difficult” particularly “when you can just say what people are paying as cap rates for comparable properties.” *Tr.* at 929-32.

3. Lennhoff’s Appraisal

60. The Taxpayer retained David Lennhoff, MAI, to value the Southlake Mall with a USPAP compliant appraisal. He has been an appraiser for forty-three years, and is a “practicing life member” of the Appraisal Institute. He is a licensed appraiser in thirteen states, including Indiana. He has appraised over 100 retail properties, including over 25 regional or super-regional malls, and has appraised properties on behalf of both taxpayers and governmental entities. *Tr.* at 970-74
61. Lennhoff has authored and contributed to numerous appraisal courses and regularly teaches such courses. He served as a technical consultant and section reviewer on the 11th, 12th, 13th, and 14th editions of The Appraisal of Real Estate, and he authored the section that addresses intangibles and the different assets of a going concern. Among the courses developed by Lennhoff for the Appraisal Institute was Course 833: *The Fundamentals of Separating Real Property, Personal Property, and Intangible Business Assets*. Lennhoff also wrote the textbook for the course: David Lennhoff & James Vernor, A Business Enterprise Value Anthology (2011). *Tr.* at 513, 970-71, 976-77, 979-81; *Ex. P-1*.
62. Lennhoff characterized the appraisal assignment as complex because a super-regional mall is a property type consisting of an amalgamation of real property, tangible personal property, and intangible personal property. The income from successful super-regional malls includes income to the total assets of the business (“TAB”), which includes both tangible and intangible property. A mall is unlike a more conventional property, like an

industrial building, where an appraiser could just begin with the value of the real property. For properties such as the Southlake Mall, there is no rent for just the real property. *Ex. P-1* at 4; *Tr.* at 996-98.

63. Lennhoff noted that the Southlake Mall and its immediate neighbors helped maintain a stable economy and partially minimized the recent downturns of the national economy. He projected population and income to increase slowly. He forecasted that growth in population and income would bring the retail market back to a balanced supply and demand assuming new retail development is carefully curtailed. With the economy at the local, state, and national levels showing signs of slight improvement, Lennhoff's outlook for the mall was one of guarded optimism. *Ex. P-1* at 23-24
64. Lennhoff considered the Southlake Mall's competitive position and economic viability to be generally positive because of the lack of regional mall competition in its primary and secondary trade area. However, he noted that on the dates of value, there was significant pressure from big-box competitors, lengthy economic stagnations, decreased consumer spending, and constantly changing industry demands. The age of the Southlake Mall and changing market conditions would likely require considerable reinvestment to maintain current sales volumes. *Ex. P-1* at 60.
65. Lennhoff used an income approach to value the Southlake Mall because it is the method buyers and sellers usually use for investment property. The starting point in an income approach is the identification of the income to the total assets of the business ("TAB"), and then a deduction from income for tangible and intangible personal property and financial assets. Once net income to the real property is identified, it can be capitalized into an indication of market value by dividing by an appropriate real property capitalization rate. *Ex. P-1* at 14.
66. Lennhoff believed that malls have significant intangible assets such as assembled workforce, licenses, franchises and business name, non-realty contracts, non-realty leases, customer lists, branding, resales of utilities, stroller rental fees, marketing association fees, operating agreements, anchor inducements, leases above market, monopoly and attractive site location, naming rights, net working capital, trade secrets, value of profit centers, image and reputation, markup on management fees or expense

recoveries, return of and on start-up costs, and percentage rent above market rent. He believed that start-up costs included permitting, licensing, buying the land, constructing the building, adding FF&E and other personal property, hiring staff, marketing, and operating for business. Likewise, management and marketing contribute to the value of the real estate operated as a going concern in the same way they contribute to the value of a goods-producing company. *Ex. P-1* at 6, 12-13.

67. For each tax year, Lennhoff considered the operating history from the three prior years and forecasted income and expenses as a TAB figure. He then transitioned from the historical operation of the business to stabilized operation of the real property through a series of adjustments. This process projects the stabilized operation of the TAB, and then estimates market rent with adjustments to reflect only the income to the real property. The adjustments were intended to remove income from renting carts, strollers, vending, etc., which is primarily business income with only a small real property component. He also intended to remove tenant concessions. *Ex. P-1* at 68-69, 110-11, 152-53, 196-97.
68. Lennhoff arrived at a regional mall classification of “B”¹⁰ based on inline sales falling in the range of [REDACTED] per s/f. However, he also considered other sources such as Real Estate Research Corporation (“RERC”) in arriving at that classification. When classifying regional malls, he noted that RERC disaggregates malls into first, second, and third tiers. He concluded that the Southlake Mall would be classified as “B” or “C” under the RERC criteria. *Ex. P-1* at 76-77; *Tr.* at 1046.
69. Lennhoff’s “conclusion of market rent” for inline, ATM, and food court tenants was based on “new and renewal rent levels, the size of space, analysis of tenant cost of occupancy benchmarks, and factors-in contract rent.” *Ex. P-1* at 80.
70. For inline mall space, Lennhoff looked at data from the Southlake Mall: contract rent and a selection of recent leases. Each year he chose the median or weighted average rent from his table of recent Southlake Mall leases. His recent leases were adjusted to reflect tenant incentives of approximately [REDACTED] spread over the lease terms. Based on

¹⁰ Lennhoff stated that should the Board decide that the evidence supported the mall being classified as “B+” it would “probably not” change his overall analysis. *Tr.* at 1205.

undisclosed samplings from other malls, he deducted an additional \$1.00 per s/f for “termination fees, future reabsorption, reconfiguration, and repositioning of the tenant mix.” He described this as an “additional potential loss” that reflected uncollected TIs and expenses in “redoing.” Additionally, he examined the COO for the inline tenants and found in each year that the Southlake Mall was “similar to the national and regional averages.” He then conducted a rent sustainability analysis that cited survey data, though it did not impact his estimate of market rent. *Ex. P-1* at 71-72, 74, 78, 114, 116, 119, 155, 158, 161, 199, 202, 206.

71. Lennhoff looked at actual rent, market data, and discussions with the Taxpayer in assigning market ATM rent. His rates were below the actual and survey data. *Ex. P-1* at 79, 121, 162, 206.
72. For the food court tenants, Lennhoff reviewed the Southlake Mall’s existing contract rent, recent leases, and *The Dollars and Cents of Shopping Centers (“Dollars & Cents”)*, a national survey of shopping center data last published in 2008. All but one of the leases were recent. The contract rent was very close to the survey data. *Ex. P-1* at 79, 121, 162, 207.
73. In estimating market rent for JC Penney, Lennhoff referenced data from *Dollars & Cents* and the actual lease. JC Penney’s income was slightly above the median average. He applied roughly contract rent for 2011-2013, and base rent for 2014. *Ex. P-1* at 84, 126, 168, 212.

| ATM, Inline, Food Court, JC Penney | 2011 | 2012 | 2013 | 2014 |
|------------------------------------|--------|--------|--------|--------|
| ATM | ██████ | ██████ | ██████ | ██████ |
| Inline Rent | ██████ | ██████ | ██████ | ██████ |
| Food Court Rent | ██████ | ██████ | ██████ | ██████ |
| JC Penney | ██████ | ██████ | ██████ | ██████ |

74. In estimating rent for the free standing units, Lennhoff separately valued Gander Mountain and the smaller tenants. He considered data from *Dollars & Cents* and contract rent. He considered each tenant individually, but he did not offer independent market rents for each tenant. His estimate for Gander Mountain was close to contract rent. The

market rent for smaller units was roughly [REDACTED] the weighted average for contract rent in each year except 2014, which was close to contract rent.

| Free Standing Unit Market Rent | 2011 | 2012 | 2013 | 2014 |
|--------------------------------|------------|------------|------------|------------|
| Gander Mountain | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Smaller Free Standing Units | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Ex. P-1 at 88, 130, 172, 217.

75. In estimating market rent for the parcels with ground leases, Lennhoff noted that the Taxpayer did not own the improvements. However, at the termination of the ground lease, the improvements revert to the mall. In determining market rent, he looked at recent actual performance and national publications disaggregated by type of tenant. After determining market rent, he deducted 75% to determine the value of the ground lease. When he compared that percentage to actual performance he found the analysis to be “quite tight.” Based on data from *Dollars & Cents*, he arrived at the same rate for both AMC Theaters and Dick’s. For the smaller ground lease tenants, he used the same rent analysis and market rent as his smaller Free Standing Units. For ease of comparison, the Board converts Lennhoff’s land area to gross leasing area (GLA).¹¹

| Ground Rent Parcel Land | 2011 | 2012 | 2013 | 2014 |
|------------------------------|------------|------------|------------|------------|
| AMC and Dick’s in land area | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| AMC and Dick’s in GLA | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Smaller Tenants in land area | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Smaller Tenants in GLA | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Ex. P-1 at 88, 92, 131, 177, 220; Tr. at 1063, 1065.

76. While Lennhoff did not concede that fee simple market rent (rather than market ground rent) was necessary to value the ground lease parcels in a property tax valuation, he did provide valuations that included the improvements. He did not itemize how the

¹¹ For example, Lennhoff estimated [REDACTED] of annual rent for AMC and Dick’s in 2011, which when divided by their 95,476 s/f of GLA equals [REDACTED] per s/f. He estimated [REDACTED] for the smaller parcels, which when divided by their 23,263 s/f of GLA equals [REDACTED] per s/f.

additional rent for improvements was calculated, but those can be roughly deducted.¹² The math does not follow his presumption of a 4-1 improvement to land ratio for estimating ground rent.¹³ *Ex. PD-15; Ex. PD-16; Tr. at 1066, 1069, 1135.*

77. Lennhoff deducted a 5% vacancy and collection loss for the JC Penney and the ground leases based on his experience. For freestanding units, he estimated vacancy and collection loss at [REDACTED]¹⁴ consistent with the mall’s actual total vacancy rate and the CoStar mall market survey. His calculation of vacancy for inline space was difficult to follow. He examined prior year actual vacancy and forecast vacancy for the following year. In each year, the forecast was in fact the actual for the same year. His market rates were [REDACTED] to the actuals in 2011, 2012, and 2014, but [REDACTED] points [REDACTED] for 2013. He also looked at vacancy rates for total mall spaces but the data did not segregate inline spaces.¹⁵

| Vacancy Rates | Actual | Forecast | Market | Chicago Mall | Lennhoff |
|---------------|------------|------------|--------|--------------|----------|
| 2010 | [REDACTED] | | | 2.7% | |
| 2011 | [REDACTED] | [REDACTED] | 27% | 4.3% | 12% |
| 2012 | [REDACTED] | [REDACTED] | 25% | 4.1% | 14% |
| 2013 | [REDACTED] | [REDACTED] | 21% | 4.2% | 15% |
| 2014 | | [REDACTED] | 20% | | 14% |

Ex. P-1 at 81-82, 123-24, 165-66, 209-10.

78. Lennhoff estimated market rent for “specialty leasing.” This category included income from kiosks and carts. He considered the kiosks to be personal property akin to carts.¹⁶

¹² For example, in 2011, based on the changes in *Ex. PD-15*, \$108,663,492 - \$99,586,178 = \$9,077,314. At the cap rate for 2011, the additional income for the improvements can be calculated as follows: \$9,077,314 x [REDACTED] = [REDACTED].

¹³ Lennhoff’s original income from all ground rent parcels was rounded to [REDACTED]. If the ground rent was calculated as 25% of market rent, then the total market rent should have been roughly [REDACTED] (or put more simply: [REDACTED] x .25 = [REDACTED]).

¹⁴ For 2013, Lennhoff’s appraisal report narrative estimated a 7% vacancy and collection loss rate, but the appraisal report calculations applied a [REDACTED] rate. *Ex. P-1 at 172-73.*

¹⁵ For 2011, Lennhoff included a Co-Star graph of vacancy rates for mall, power center, specialty center, general retail, and total market for 2006-2010. This did not include rates for inline space. For 2012-14, Lennhoff’s chart depicts “NNN Rental Rates” rather than vacancy rates, which was clearly an error. *See Ex. P-1 at 82, 124, 166, 210.*

¹⁶ When asked if the built-in kiosks are reported as personal property, Lennhoff stated that he did not know and that he had not reviewed any personal property returns to see if they were. *Tr. at 1150.*

He characterized this income as “license and use fees” rather than rent. While he conceded that the income included a real estate component, he argued it was mostly business income. He estimated a “rent” that was intended to represent the real property component. This was based on the Southlake Mall’s historical gross cart and kiosk sales.¹⁷ He theorized that the portion of specialty leasing attributable to the real property could be determined by applying the average inline COO ratio to specialty gross sales.¹⁸ He stated that temporary tenant (TIL) income was “captured in the in-line space.” *Ex. P-1* at 92-93; *Tr.* at 1223-26, 1229.

79. Lennhoff included projections of “other income” and storage. He included under operating expense recoveries a category for “Marketing Revenue” which he described as a tenant’s contribution to the mall’s promotional efforts.¹⁹ He also included miscellaneous revenue from fire detection reimbursement.²⁰ All of these were projected based on historical income.

| Specialty Leasing, Other Income | 2011 | 2012 | 2013 | 2014 |
|--|--------|--------|--------|--------|
| Specialty Leasing: Carts & Kiosk | ██████ | ██████ | ██████ | ██████ |
| Storage and Other Income | ██████ | ██████ | ██████ | ██████ |
| Marketing (Brand Media) | ██████ | ██████ | ██████ | ██████ |
| Miscellaneous Revenue / Fire Detection | ██████ | ██████ | ██████ | ██████ |

Ex. P-1 at 68, 93-94, 135-36, 178-79, 222-23.

80. Lennhoff estimated gross CAM recoveries without itemization. He projected the revenue based on historical income. In his testimony, he could not remember many of his

¹⁷ Because Lennhoff did not itemize, it is unclear how he calculated the income or how much came from carts, kiosks, or promotions.

¹⁸ Lennhoff did not cite to any treatise or other authority to support this theory.

¹⁹ It appears Lennhoff conflated Brand Media with Net Marketing expenses, which are separate categories under the mall’s operating statement. Brand Media refers to income from renting advertising space. Net Marketing refers to the expenses of advertising the mall and its tenants. The operating statements do not have an income entry for “Marketing” because tenant charges and expenditures, for whatever reason, are listed as a net entry under expenses.

²⁰ Lennhoff stated that this category typically included income such as stroller income, gift certificate sales, late fees, and other services, but the only income included was fire detection reimbursement. *Ex. P-1* at 94.

calculations or what adjustments he made to them. He then deducted a management fee because it was not a reimbursable expense.

| CAM Income | 2011 | 2012 | 2013 | 2014 |
|-----------------------------------|----------|----------|----------|----------|
| Prior to Deducting Management Fee | ████████ | ████████ | ████████ | ████████ |
| Final Estimate | ████████ | ████████ | ████████ | ████████ |

Ex. P-1 at 93-94, 136, 179, 223; *Tr.* at 1192-94, 1197.

81. Lennhoff based his analysis of operating expenses primarily on historical data.²¹ His projection for CAM included several categories but did not follow the itemization in the operating statement. He made separate projections for Food Court CAM, Marketing, Promotional, and Specialty Leasing, which followed the categories in the operating history. He made a projection of “Other Owner Expenses – Marketing & Promotion, General & Administrative, Operating and Taxes (Non-Recoverable)” which was not explained and was not found in the operating statement. Finally, he deducted a management fee.²² Lennhoff’s explanation of the double deduction of the management fee from both income and expenses was difficult to follow.²³ Real estate taxes were excluded and projected through a loaded cap rate. Based on a PwC survey, no deduction for replacement allowance was taken because most investors capitalize income prior to a deduction for reserves.

²¹ He noted that the Southlake Mall’s operating expenses were ██████████ than *Dollars & Cents* and SCORE data. *Tr.* at 1076.

²² Lennhoff consulted *Dollars & Cents*, PwC, and actual data in estimating management fees. The data suggested that non-recoverable management fees typically range from 0.8% to 4.6% of effective gross revenues. *Ex. P-1* at 97; *Tr.* at 1078.

²³ It appears he considered the management fee to be akin to a profit center because it is not directly charged to the tenants as an additional line item. Lennhoff failed to include any explanation of the double-deduction in his appraisal report. *Tr.* at 1195-97.

| Operating Expenses | 2011 | 2012 | 2013 | 2014 |
|-----------------------------------|----------|----------|----------|----------|
| CAM | ████████ | ████████ | ████████ | ████████ |
| Food Court CAM | ████████ | ████████ | ████████ | ████████ |
| Marketing, Promotional, Specialty | ████████ | ████████ | ████████ | ████████ |
| Other Owner Expenses | ████████ | ████████ | ████████ | ████████ |
| Management Fee | ████████ | ████████ | ████████ | ████████ |

Ex. P-1 at 68, 95-97, 137-39, 180-82, 224-27; *Tr.* at 1194-97.

82. Lennhoff deducted from income a return of and on FF&E. He stated that “return of” means getting one’s money back while “return on” means additional money above and beyond that. He relied on the Southlake Mall’s historical personal property tax returns. He estimated a 9-year average life expectancy. Based on an estimated chattel mortgage rate (calculated at the average retail mortgage rate for East North Central region plus 200 basis points), he predicted an amortized rate of return to reflect the “payment” of a return of and a return on the FF&E. *Ex. P-1* at 99-103; *Tr.* at 1084.
83. Lennhoff deducted from income an amount attributable to “start-up costs” which is “the initial marketing or grand opening event.” These “marketing program” expenses also occur when a mall property is repositioned. This expense does not reflect other intangibles such as “the value of the assembled tenant mix.” Based on several other malls Lennhoff appraised, he estimated this cost at \$1,250,000.²⁴ Lennhoff used a term of 15 years (the length of a typical anchor agreement) and a rate 300 basis points above the retail mortgage rate. *Ex. P-1* at 100-1; *Tr.* at 1090.
84. Lennhoff deducted from income an amount he attributed to “favorable contracts.” Favorable contracts refers to inducements necessary to attract and retain anchor tenants at a mall. He explained that losing, or not having, an anchor tenant can greatly impact the stabilized income of the inline stores. Anchor stores represent a generative element to the mall because they bring in business. Many inline tenants have leases that allow them to vacate if an anchor closes. In effect, developers subsidize anchors in order to generate

²⁴ These malls were not disclosed, but Lennhoff stated that the other malls considered in arriving at his estimate consisted of only malls classified as “B” or higher. *Tr.* at 1232.

revenue from the inline stores. Accordingly, “if you don’t have the anchors, you don’t have a mall.” Based on this concept, Lennhoff believed that a “favorable contract” deduction was necessary to deduct from net income the value of the four anchor leases at the Southlake Mall. *Ex. P-1* at 101; *Tr.* at 1094-95, 1098.

85. Lennhoff’s deduction for favorable contracts was based on data from 6 malls.²⁵ The inducements were based on “a combination of cash, site improvements, and building improvements.” Lennhoff did not review the actual operating agreements of the Southlake Mall anchor tenants, and he had no knowledge of the terms of any anchor lease or anchor inducement at the Southlake Mall. He projected anchor inducements of \$5,000,000 for Sears, \$7,000,000 for Carson, \$5,000,000 for JC Penney, and \$10,000,000 for Macy’s, for a total of \$27,000,000. He amortized those expenses over 15 years at his rate for start-up costs. *Ex. P-1* at 102-3; *Tr.* at 1153-54, 1218.

| Deductions from Total Assets of Business | 2011 | 2012 | 2013 | 2014 |
|--|-------------|-------------|-------------|-------------|
| Furniture Fixtures & Equipment | ██████ | ██████ | ██████ | ██████ |
| Start-Up Costs | \$152,000 | \$143,000 | \$138,000 | \$143,000 |
| Favorable Contracts | \$3,281,000 | \$3,085,000 | \$2,983,000 | \$3,080,000 |

Ex. P-1 at 100-3, 142-45, 185-88, 230-33.

86. In developing his capitalization rate, Lennhoff consulted the PwC Emerging Trends in Real Estate survey, the CB Richard Ellis survey, the IRR Viewpoint survey, and the Realty Rates survey. The capitalization rates in the market surveys ranged from 5% to 10.5%. He noted that the published rates reflect cap rates for a sale of the total assets of the mall, including non-real-property income. Based on the value of the “anchor agreements and growth of other non-realty income,” he selected rates above the mall-enterprise rates reflected in the survey data. He based the owner’s effective share of the property tax burden at a market rate of 15% (presuming 15% vacancy and owner’s share

²⁵ Lennhoff’s data included the following: the recent payment of \$1M to Macy’s from the Montgomery Mall in Maryland; the undated payment of \$28M to Macy’s from an undisclosed mall in Century City, CA; the undated payments totaling \$15M to Macy’s and Bloomingdales from an undisclosed mall in Valley Fair, CA; the 1999-2000 initial inducements of \$55M to the 6 tenants of the Stonebriar Center in Frisco, TX; the 1996-97 payments totaling \$15M to 4 anchor tenants from the Wolfchase Galleria Mall in Memphis, TN; and the 1999 payment of \$11M to Von Maur from the Eden Prairie Mall in Eden Prairie, MN.

of tax liability). Lennhoff concluded to cap rates of [REDACTED] ([REDACTED] loaded), [REDACTED] ([REDACTED] loaded), [REDACTED] ([REDACTED] loaded) and [REDACTED] ([REDACTED] loaded) for 2011-2014 respectively. *Ex. P-1* at 103-6, 145-48, 188-91, 233-36; *Tr.* at 1108-9.

87. Because the Southlake Mall's actual vacancy was [REDACTED] his market vacancy, Lennhoff concluded a [REDACTED] adjustment was necessary for stabilization. He calculated what the [REDACTED] would be for a year by taking the rental rate for inline space and multiplying it by 88% which represented the square footage that would have to be leased to achieve 12% vacancy. He then converted that to a nine month equivalent and deducted that amount for each year. He also concluded that a demising adjustment was necessary to account for the pending loss of the Borders store and the vacant Big Dollar space. He believed that the mall could not fill the vacancies unless the space was subdivided into smaller units. Based on a cost estimate from Marshall & Swift, Lennhoff deducted the cost of reconfiguring the space as a demising adjustment. *Ex. P-1* at 107-8, 149-50, 192, 237; *Tr.* at 1118-20.
88. Finally, for 2013 and 2014, Lennhoff valued the additional parcels on appeal. Three of the parcels are retaining ponds that have no independent value, and he did not assign them any value. However, the other two parcels are parking areas that consist of otherwise buildable land. Based on comparable sales data, Lennhoff valued those parcels and added them to his overall valuation. *Ex. P-1* at 194, 239; *Tr.* at 1124.

| Stabilization, Demising, Vacant Parcels | 2011 | 2012 | 2013 | 2014 |
|---|------------|------------|------------|------------|
| Stabilization | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Demising | \$182,000 | \$56,000 | \$57,000 | |
| Vacant Parcels | | | \$978,000 | \$978,000 |

89. In conclusion, Lennhoff arrived at the following values for 2011-2014 respectively: \$98,300,000; \$114,500,000; \$129,600,000; \$146,300,000. In the alternative, should the Board find the ground lease parcels require a fee simple valuation including the buildings, the Taxpayer requested the Board adopt the following valuations for 2011-2014 respectively: \$107,400,000; \$123,800,000; \$138,200,000; \$156,900,000. *Ex. P-1* at 109, 150, 195, 240; *Post-Hearing Br. of Pet'r* at 25.

90. The Assessor endeavored to impeach Lennhoff with evidence suggesting that his deductions for intangibles were unsupported and controversial and had been rejected by other tax authorities. The Assessor also pointed to the financial statements prepared by Lennhoff's own firm for the Southlake Mall's parent company that indicated [REDACTED] cap rates and self-reported valuations of [REDACTED]. The statements also disclosed a [REDACTED] mortgage pegged at a roughly [REDACTED] loan to value ratio. *Assessor' Post-Hearing Br.* at 33-36, 41-43 88-90; *Ex. R-1C*; *Ex. R-1K*.
91. The Assessor criticized Lennhoff's exclusion of kiosk income and his use of inline COO to estimate specialty rent. The Assessor also noted discrepancies and a lack of transparency in the Southlake Mall data used by Lennhoff. On cross-examination, Lennhoff was frequently unfamiliar with some of the numbers in his appraisal. Lennhoff also seemed to contradict himself as to his treatment of TIL income and CAM profit centers. The Assessor emphatically objected to the double-deduction of the management fee. Likewise, the Assessor argued that ground lease rent cannot value the fee simple of a parcel for property tax purposes. *Assessor' Post-Hearing Br.* at 50-52, 54-56, 62-63, 65-66, *Tr.* at 1178-80, 1193, 1224.

4. Benton's Assessment Comparison

92. In addition to the review of Kenney's appraisal, Benton presented an analysis of comparable mall assessments. His testimony was intended to be pursuant to Ind. Code § 6-1.1-15-18, which allows the Board to consider evidence of comparable assessments. He believed his analysis was consistent with generally accepted appraisal practices. However, he did not offer a valuation of the Southlake Mall, and his report was not compliant with USPAP. *Tr.* at 771, 802, 865.
93. Benton identified 10 comparable malls, most of which had 3 or more anchors and at least 700,000 s/f of GLA. He adjusted the data to exclude anchors when necessary to make the properties comparable to the the portion of the Southlake Mall on appeal. He developed a list of 18 to 20 characteristics he used to determine which malls were superior, inferior, or similar to the Southlake Mall. He did not compare the malls based on inline sales or COOs. The finished product was a listing of his adjusted total assessed values and the

assessed values per square foot of the malls. *Tr.* at 773-74, 778-80, 814-16, 866; *Ex. PD-13; Ex. PD-14; Ex. PD-15.*

94. Benton concluded that the Southlake Mall's assessed value was "obviously considerably higher" than the other malls. Its assessed value was more than three times the median and average of the superior malls. It had the highest assessed value, both on a per-square-footage basis and a gross assessment basis, of any mall in Indiana for the years at issue, including the Fashion Mall. *Tr.* at 820-822; *Exs. PD-1 to PD-8; Ex. PD-14; Ex. P-15A2.*

5. Hamilton's Rebuttal of Benton and Lennhoff

95. The Assessor called Dr. Thomas Hamilton as a rebuttal witness. Hamilton is a professor at Roosevelt University in Chicago. He holds an M.S. in real estate and a Ph.D. in urban land economics. Hamilton is not an appraiser but is an MAI. The Assessor offered Hamilton as an expert in real estate valuation and appraisal theory. Hamilton did not submit a report, and he acknowledged that his testimony was not intended to comply with USPAP rules governing review appraisals. *Tr.* at 1268-69, 1272, 1277-79, 1326-27.
96. Hamilton testified that the value of real property is related to the "rights and interests in the property." He further testified that there is no business value in a mall because malls are purchased for their income stream and that income is tied to the lease. He also testified that all income from things like CAM, Central Plant, RMUs, kiosks, etc. would not exist "but for the real property," and by implication the income is attributable to the real property. *Tr.* at 1288-89, 1301.
97. Hamilton's testimony included his opinion regarding the changing nature of malls relative to the importance of anchors. He emphasized that the demand of the mall was not limited to the anchors but to the "whole economic unit." Smaller stores like "an Apple or a Bed, Bath, & Beyond" might be an important draw to a mall. The impact of removing a mall anchor depends on the particular mall. For instance, while the loss of "a Nordstrom's or a Sak's" would likely be detrimental for any mall, the loss of "a Sears or a Penney's" might free up space for a better draw for some malls. *Tr.* at 1323-25.

D. Conclusions of Law and Analysis

1. Burden of Proof

98. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that the assessment is wrong and what the 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). A burden-shifting statute creates two exceptions to the rule. Ind. Code § 6.1-1.1-15-17.1. The Assessor conceded it had the burden of proof. *Tr.* at 11. Because both parties offer probative appraisals from highly qualified experts, the Board finds the statute has no effect here.

2. Conclusions of Law

99. In Indiana, assessments are based on a property's "true tax value." True tax value does not mean fair market value. Ind. Code § 6-1.1-31-6(c). Nor does true tax value mean the value of the property to the user. Ind. Code § 6.1-1.1-31-6(e). Subject to these somewhat tautological directives, the Legislature relies on the Indiana Department of Local Government Finance ("DLGF") to define true tax value. Ind. Code § 6-1.1-31-6(f). The DLGF defines true tax value 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." *2002 Manual* at 2; *2011 Manual* at 2.²⁶
100. The *Manual* offers further guidance. It defines "market value-in-use," "value in use," and "use value," as being synonymous. *2002 Manual* at 6-8. But it also states that a property's true tax value will equal its value-in-exchange when properties are frequently exchanged and used for the same purposes by the buyer and seller. *Id.* at 2, 4.
101. True tax value is something other than purely market value or value-in-use. Given the mandates from the Indiana Supreme Court and the Legislature, the DLGF created a valuation standard that relies heavily on what it terms as objectively verifiable data from

²⁶ Because the *2011 Manual* was adopted in 2012, the *2002 Manual* applies to the 2011 tax year. They do not materially differ in regard to the definition of true tax value.

the market, but still maintains the notion of property wealth gained through utility, and therefore recognizes situations where true tax value will differ from market value.

102. In Indiana “each assessment and each tax year stands alone” and the Board “evaluates each property's value based on its specific facts and circumstances.” *CVS Corp. v. Monroe Cty. Assessor*, 83 N.E.3d 1286, 1292 (Ind. Tax Ct. 2017). The Board is “not bound to reach the same conclusions regarding the persuasive value of an appraiser's reports and valuation methods for different tax years or different properties.” *Id.* The Tax Court has held that the “valuation of property is an opinion and not an exact science.” *Monroe Cty. Assessor v. SCP 2007-C-26-002, LLC*, 62 N.E.3d 478, 482 (Ind. Tax Ct. 2016). Therefore, “it is up to each party to convince the Indiana Board why its opinion . . . is more probative.” *Id.* Furthermore, the Board must determine what portions of an appraisal are supported by the evidence:

The Indiana Board is Indiana's property valuation and assessment expert. Consequently, when the Indiana Board ascertains . . . that parts of an appraisal are not probative, it should not then accept those parts of the appraisal to value the property.

Marion County Assessor v. Wash. Square Mall, LLC, 46 N.E.3d 1, 14 (Ind. Tax Ct. 2015).

103. “Indiana's property tax system taxes the value of real property — and not intangible business value, investment value, or the value of contractual rights.” *Switzerland Cty. Assessor v. Belterra Resort Ind., LLC*, 101 N.E.3d 895, 905, (Ind. Tax Ct. 2018). Accordingly, the Tax Court has rejected arguments that assessments should include something more than “the value of the ‘sticks and bricks.’” *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 501 (Ind. Tax Ct. 2010). Rather, an assessment must value only the “real property rights for ad valorem taxation.” *Grant County Assessor v. Kerasotes Showplace Theatres, LLC*, 955 N.E.2d 876, 882 (Ind. Tax Ct. 2011) (noting that sale lease-back transactions normally include more than just the real property).
104. Under the income approach, the value of the sticks, and bricks, and mud is measured by the more ephemeral stream of income. As every first year law student learns, “the law views ‘property’ as a bundle of rights.” *Indiana Waste Sys. v. Indiana Dep't of State Revenue*, 633 N.E.2d 359, 365 (Ind. Tax Ct. 1994). Consequently, “the word ‘property’

is inherently ambiguous” because it “refers to physical objects [and] also encompasses the complex group of jural relations between the owner of the physical object and all other individuals.” *Id.* (citing *In re Marriage of McDonald* 415 N.E.2d 75, 77 (Ind. Ct. App. 1981)). One of those relations is between lessor and lessee.

105. Appraisal theory follows these distinctions. *Real estate* is defined as “an identified parcel or tract of land, including improvements, if any.” The Dictionary of Real Estate Appraisal (5th Edition) at 159. *Real property* is defined as “the interests, benefits, and rights inherent in the ownership of real estate.” *Id.* at 161. In contrast, personal property “consists of every kind of property that is not real property . . . subdivided into tangible and intangible.” *Id.* at 145-46. Rent from real property, and by extension the value associated with that income stream, is a real property right and benefit. However, if the rent is above market, the above-market portion of the income is “attributable to the particular lease contract” and considered intangible personal property. See *Kerasotes Showplace Theatres, LLC*, 955 N.E.2d at 881 (quoting The Appraisal of Real Estate).
106. While it is settled law that intangibles like above-market-rent must be excluded, the Tax Court has not adopted a particular standard for identifying intangible assets.²⁷ Moreover, it is unlikely that any particular standard could uniformly apply to the laundry list of potential intangibles involved in a mall: above-market rent, CAM charges, cart rentals, utility profits, tenant mix, anchor inducements, start-up costs, branding, etc. While the parties direct the Board to case law from other jurisdictions, the Board finds that the evidence presented in each case, in terms of what intangibles are identified and how they are estimated, is unique. No two properties are the same, and no two appraisals are the same. The exclusion of intangibles in this case must turn on the evidence presented, and how it conforms to generally accepted appraisal principles. In other words, the Board will decide the issues as it does in any other complex valuation case.

²⁷ The Tax Court concluded in a footnote that low-income tax credits are not intangible property because “they do not constitute a right to a payment of money, have no independent value, and are not freely transferable upon receipt.” *Hometowne Assocs., L.P. v. Maley*, 839 N.E.2d 269, 279 n. 17 (Ind. Tax Ct. 2005); quoting *Rainbow Apartments v. Illinois Property Tax Appeal Bd.*, 326 Ill. App. 3d 1105, 762 N.E.2d 534, 537, 260 Ill. Dec. 875 (Ill. App. Ct. 2001). The Assessor advocates that the Board should adopt the intangibles test promoted by the IAAO. While the Board finds it has some similarities to the considerations noted in *Hometowne*, the Board declines to declare a winner in the ongoing debate over intangibles in real property.

3. Analysis

107. This case ultimately hinges on three factors: Net Operating Income, Capitalization Rates, and Deductions for Intangibles. The Board must review the evidence and arguments in order to determine which appraiser offers the most persuasive estimate on each of those issues.
108. When looking at competing appraisals, particularly when the outcomes are \$140M apart, it is best to place the appraisals side-by-side. Because the appraisers do not materially change their methods across the years on appeal, it is sufficient to look closely at the 2011 appraisals to determine how the appraisers differ in their analysis and their conclusions. Below, the Board has created a spreadsheet reflecting the Southlake Mall's historical operating statements,²⁸ Kenney's market estimates,²⁹ Lennhoff's TAB projections, and Lennhoff's market/realty-only estimates. This allows a rough comparison of how Kenney's and Lennhoff's conclusions compare to each other and the historical performance of the Southlake Mall.

²⁸ The Board notes that Lennhoff and Kenney were evidently presented with different operating statements from the Taxpayer. Comparing Kenney's restatement (*Ex. R-1* at 146) with Lennhoff's restatement (*Ex. P-1* at 152) reveals that none of the entries align for 2010-2012. The entries align for 2009, except that Lennhoff entered \$0 for Media and did not include a category for interest income. *Ex. P-1* at 68. Because Kenney included the statements and notations for his calculations in *Ex. R-1K*, the Board relies on Kenney's restatement.

²⁹ Because Kenney itemized income prior to vacancy and collection loss, a separate column itemizes the income after the vacancy and collection loss is applied, which allows an apples-to-apples comparison of line-item income.

| 2011 Valuation | Actual 2010 | Actual 2011 | Kenney 2011 Appraisal | Kenney 2011 Appraisal | Lennhoff 2011 Appraisal | Lennhoff 2011 Appraisal |
|-----------------------------|-------------|-------------|--------------------------|--------------------------|----------------------------|----------------------------|
| <u>Rental Revenue</u> | | | | | | |
| Base Rent | | | | | | |
| Kiosk ATM | | | | | | |
| Straight Line | | | | | | |
| Percentage Rent | | | | | | |
| Specialty Leasing (In Line) | | | | | | |
| Specialty Leasing (Carts) | | | | | | |
| Specialty Leasing (Media) | | | | | | |
| Other Income | | | | | | |
| Storage Rent | | | | | | |
| CAM | | | | | | |
| CAM (Vacant Space) | | | | | | |
| Food Court CAM Revenue | | | | | | |
| Insurance | | | | | | |
| Central Plant | | | | | | |
| Electricity | | | | | | |
| Alarm/Fire/Sprinkler | | | | | | |
| Water & Sewer | | | | | | |
| Trash Removal | | | | | | |
| Construction | | | | | | |
| Inc. Property Taxes | | | | | | |
| <u>Operating Expenses</u> | | | | | | |
| Landlord Expense | | | | | | |
| Specialty Leasing | | | | | | |
| Partnership Marketing | | | | | | |
| Marketing Expense | | | | | | |
| CAM Expense | | | | | | |
| Food Court CAM | | | | | | |
| Property Taxes | | | | | | |
| Insurance | | | | | | |
| Central Plant | | | | | | |
| Electricity | | | | | | |
| Alarm/Fire/Sprinkler | | | | | | |
| Water & Sewer | | | | | | |
| Construction | | | | | | |
| Management Fees | | | | | | |
| Bad Debt | | | | | | |
| Including Property Taxes | | | | | | |
| <u>NOI (before taxes)</u> | | | | | | |

109. The first conclusion from this restatement is that Lennhoff's method of analysis is much less transparent than Kenney's. It is very easy to understand Kenney's conclusions, and how they compare to the Southlake Mall's historical operations in each category of income or expense. The second conclusion is that Kenney's income is conservative and comes in roughly [REDACTED] below actual 2011, while Lennhoff's income is nearly [REDACTED] below 2011.³⁰ Because Lennhoff's adjustments to NOI involve a combination of adjustments for both market rent and intangibles, the Board must decipher the degree to which the NOI estimates diverge for each category.

a. Market Rent

110. Both appraisers are criticized for the degree to which their projections of market rent are *not* based on market data. Kenney argued that a mall is a market within itself, and recent leases at the mall, including renewals, provide sufficient objective market data. He also included a fairly cursory review of 8 comparable leases that were not quantitatively or qualitatively compared with any of the rent categories at the Southlake Mall. He also checked the reliability of his estimates through a mall-wide COO analysis.

111. Lennhoff likewise substantially relied on the actual rents at the Southlake Mall. Like Kenney, Lennhoff did *not* look to comparable lease data from other malls. Though Lennhoff routinely cited to *Dollars & Cents*, he also stated that he did not, "in any of the situations," use the *Dollars & Cents* data "as the direct evidence for the market." *Tr.* at 1256. Thus, both appraisers looked to leases at the Southlake Mall as direct evidence of market rent. The Board further notes that the *Dollars & Cents* data was aggregated from out of date, un-trended, pre-recession survey data from locations across the country.³¹ The Board cannot find that Lennhoff's use of *Dollars & Cents* was measurably superior to Kenney's 8 comparable leases. Lennhoff, like Kenney also relied on a COO analysis which supported the premise that the Southlake Mall rents were generally at market. In addition, Lennhoff sporadically relied on survey data that was national in scope and

³⁰ Even based on prior year data, Lennhoff was [REDACTED] below actual 2010.

³¹ Lennhoff claimed that the 2008 data is "about where they are on the dates of appraisal" and that "the metrics are good." *Tr.* at 1042. This is logically inconsistent with his aggressive projections of increased NOI during the years on appeal.

amalgamated from many properties that would not be remotely comparable to the Southlake Mall and its outlots.

112. The Board agrees with Lennhoff and Kenney that recent leases at the Southlake Mall, including renewals, are probably the most relevant data. Regardless, the Board finds that these arguments about market rent are misplaced. Once the two appraisals are placed side-by-side, it becomes clear there is substantial agreement between the appraisers as to market rent.

113. The Board first considers the largest source of income which comes from the inline tenants.

| Income Source | Kenney | | | Lennhoff | | |
|------------------------|--------|------------|-----|----------|------------|-----|
| | PGI | \$ per s/f | s/f | PGI | \$ per s/f | s/f |
| <99 SF (ATMs) | █ | █ | █ | █ | █ | █ |
| Food Court | █ | █ | █ | █ | █ | █ |
| <1000 SF - > 10,000 SF | █ | █ | █ | █ | █ | █ |
| 500 - 1,499 SF | █ | █ | █ | █ | █ | █ |
| Center Court | █ | █ | █ | █ | █ | █ |
| 1,500 - 2,999 SF | █ | █ | █ | █ | █ | █ |
| 1,500 - 4,999 | █ | █ | █ | █ | █ | █ |
| 5,000 - 9,999 | █ | █ | █ | █ | █ | █ |
| >10,000 | █ | █ | █ | █ | █ | █ |
| Vacancy/loss | █ | █ | █ | █ | █ | █ |
| Total Inline/Food/ATMs | █ | █ | █ | █ | █ | █ |
| Rounded | █ | █ | █ | █ | █ | █ |

Kenney and Lennhoff are nearly identical in their projections of market rent (█ versus █). If the appraisers' adjustments for tenant incentives and "tenant mix" are considered, which is necessary to compare apples to apples, the projected rent after vacancy and collection loss is nearly identical.³²

³² Lennhoff deducted \$1 for "additional potential loss," which, at 373,115 s/f of GLA, equals \$373,115. *Tr.* at 1040. After deducting vacancy loss, the value is █. When added back in before rounding, Lennhoff's estimated inline income is █ compared to Kenney's █. Additionally, Kenney conceded that █ should be deducted for TIs for inline stores, which at his cap rate, is the equivalent of adjusting annual inline rent downward by █. Thus, absent Lennhoff's "additional potential loss" deduction, he was roughly █ in his projection of market inline rent.

114. Regardless of how the tenant incentives are considered, the discrepancy between Kenney and Lennhoff of 5,507 s/f GLA (384,766 s/f v. 379,259 s/f) appears to be mostly the result of an error by Lennhoff. At one point in his report, Lennhoff estimated 383,314 s/f of inline space, which is just slightly below Kenney's estimate. *Ex. P-1* at 47. But in his calculation of annual market rent for inline space for 2011-2013, he used 379,259 s/f.³³ *Ex. P-1* at 80. This error accounts for [REDACTED] of the difference.³⁴ If Lennhoff's rounding down of [REDACTED]³⁵ is ignored, the appraisers are only [REDACTED] apart, and they are 97% in agreement as to the market rent from inline, food court, and ATM revenue.
115. Turning to the anchor stores, the appraisers diverge as to market rent mostly because Lennhoff relies on contract rent rather than his survey data.

| Income Source | Kenney | | | Lennhoff | | |
|---------------------------|------------|------------|------------|------------|------------|------------|
| | PGI | \$ per s/f | s/f | PGI | \$ per s/f | s/f |
| JC Penney/Firestone | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| JC Penney | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Firestone | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Vacancy/loss | | 8.5% | | | 5% | |
| Total JC Penney/Firestone | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Rounded | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Lennhoff pegged the contract effective rent for JC Penney at [REDACTED] per s/f. The *Dollars & Cents* data suggests market rent would be \$4.46 per s/f, which is [REDACTED] to Kenney's estimate. *Ex. P-1* at 84. The main dispute is how the Firestone parcel, a freestanding building subleased by JC Penney, should be included. Though there is competing evidence, the Board is persuaded that the JC Penney is actually 151,248 s/f and the Firestone is 14,879 s/f. *Tr.* at 194-95, 558-59; *Ex. P-17*. The Board finds that the Firestone is not an anchor store, and it should be assessed under a fee simple valuation as

³³ Lennhoff specifically stated that the total GLA for inline space "decreased to 380,878 SF in the 2014 valuation," and he used that number in his 2014 calculation of NOI. *See Ex. P-1* at 47, 208 (emphasis added).

³⁴ $5,507 \times [REDACTED] = [REDACTED] \times [REDACTED] = [REDACTED]$

³⁵ The Board must note that this cavalier rounding (at his cap rate of [REDACTED]) [REDACTED] his ultimate valuation by [REDACTED]

an outlet. Kenney's rent for the Firestone is well within Lennhoff's rates for outlets.³⁶ However, Kenney's estimate of rent for the JC Penney and Firestone must be corrected to reflect their actual sizes. The difference in Kenney's market rent, before vacancy and collection loss, is [REDACTED].³⁷

116. As for the outlets, once again, the appraisers reach very similar rates that are consistent with the contract rent.

| Income Source | Kenney | | | Lennhoff | | |
|-----------------|------------|------------|------------|------------|------------|------------|
| | PGI | \$ per s/f | s/f | PGI | \$ per s/f | s/f |
| Gander Mountain | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Smaller Outlots | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Chili's | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Vacancy/loss | | 8.5% | | | 9% | |
| Total Outlots | [REDACTED] | | | [REDACTED] | | |
| Rounded | | | | [REDACTED] | | |

Kenney's erroneous inclusion of the income from the Chili's property is easily deducted.

117. The appraisers are further apart in regard to the ground lease parcels. The Board converted Lennhoff's land area to gross leasing area to compare with Kenney's numbers. Lennhoff initially did not include income related to the improvements, but he offered evidence of the value of the buildings during his testimony. *Ex. PD-14; Ex. PD-16.*

³⁶ Lennhoff's Smaller FSUs rent was [REDACTED] per s/f and his Gander Mountain rent was [REDACTED] per s/f. *Ex. P-1* at 88.

³⁷ The actual JC Penney (151,248 s/f at [REDACTED] per s/f) is [REDACTED]. The actual Firestone (14,897 s/f at [REDACTED] per s/f) is [REDACTED]. Combined, the total is [REDACTED], and the difference from Kenney's appraisal report ([REDACTED]) is [REDACTED] before vacancy and collection loss.

| Income Source | Kenney | | | Lennhoff | | |
|---------------------------|--------|------------|-----|----------|------------|-----|
| | PGI | \$ per s/f | s/f | PGI | \$ per s/f | s/f |
| AMC Theatre & Dick's | | | | | | |
| AMC Theatre | | | | | | |
| Dick's | | | | | | |
| 5/3, Olive, Jared, Chick | | | | | | |
| Fifth Third Bank | | | | | | |
| Jared's | | | | | | |
| Olive Garden | | | | | | |
| Chick-fil-a | | | | | | |
| All Ground Rent Parcels | | | | | | |
| Vacancy/loss | | 8.5% | | | 5% | |
| Total Ground Rent Parcels | | | | | | |
| Rounded | | | | | | |
| Building rent | | | | | | |
| Total Ground Rent Parcels | | | | | | |

First, the Board concludes that all parcels must be assessed at their fee simple value. Otherwise, any parcel subject to a ground lease would escape its fair valuation if only the ground lease income was valued.³⁸ After adding in Lennhoff's building rent of [REDACTED],³⁹ Lennhoff actually projected a higher market rent.⁴⁰ Furthermore, the *Dollars & Cents* data supports Kenney's estimated market rent.⁴¹

³⁸ Benton conceded that if the value of the building is assessed to the mall rather than the ground tenant, then "somehow the mall has to reconcile that." *Tr.* at 837.

³⁹ As reflected in *Ex. PD-15*, which adds the value of the buildings to Lennhoff's appraisal, the difference in "projected market value before adjustments" is \$108,663,492 - \$99,586,178 = \$9,077,314. At Lennhoff's loaded cap rate for 2011, the income for the buildings can be calculated as follows: \$9,077,314 x [REDACTED] = [REDACTED]

⁴⁰ Comparing the rent per s/f after vacancy and Lennhoff's improvements, Kenney is at [REDACTED] per s/f while Lennhoff is at [REDACTED] per s/f.

⁴¹ The *Dollars & Cents* survey data for median total rent for a cinema was [REDACTED] which supports Kenney's conclusion of [REDACTED] per s/f. *Ex. P-1* at 89. The survey data for median total rent for a sporting goods store was [REDACTED], which is halfway between Kenney's and Lennhoff's estimates.

118. It is on the issues of kiosks and specialty leasing where the appraisers disagree most. As illustrated below, Lennhoff's estimate of specialty and kiosk rent was about 20% of Kenney's estimate.

| Income Source | Kenney | | | Lennhoff | | |
|-----------------------------------|--------|------------|-----|----------|------------|-----|
| | PGI | \$ per s/f | s/f | PGI | \$ per s/f | s/f |
| <u>Kiosk, Specialty TIL Cart</u> | | | | | | |
| <u>Kiosks</u> | █ | █ | █ | █ | █ | █ |
| <u>Specialty TILs</u> | █ | █ | | | | |
| <u>Specialty Carts</u> | █ | █ | | | | |
| Vacancy/loss | | 8.5% | | | | |
| Total Specialty/Kiosk | █ | █ | | █ | █ | |
| Rounded | | | | █ | █ | |
| <u>Brand Media</u> | █ | █ | | █ | █ | |
| Vacancy/loss | | 8.5% | | | | |
| Total Brand Media | █ | █ | | █ | █ | |
| <u>Storage & Other Income</u> | | | | █ | █ | |
| <u>Storage</u> | █ | █ | | | | |
| <u>Other Income</u> | █ | █ | | | | |
| Vacancy/loss | | 8.5% | | | | |
| Total Storage/Other | █ | █ | | █ | █ | |
| <u>Misc/Fire</u> | █ | █ | | █ | █ | |
| Vacancy/loss | | 8.5% | | | | |
| Total Misc./Fire | █ | █ | | █ | █ | |

This is not a disagreement about market rent because both appraisers relied on the Southlake Mall's actual performance.⁴² This is a disagreement as to whether the income from temporary tenants, carts, and kiosks should be considered real estate rental income or business income. While the Taxpayer emphasized that this income is not an item listed on the rent rolls, this ignores the fact that it is itemized as "Specialty Leasing." See

⁴² Kenney's estimates tracked 2011 actual rent (Ex. R-1 at 146) and Lennhoff projected a 2% increase from 2010 actual sales (Ex. P-1 at 94).

Ex. R-1K (page 1 of each ledger year). To the extent the characterization on the operating statement has any relevance, income from leasing is by definition rent.

119. Lennhoff's treatment of kiosks and carts was largely opaque. His discussion of the issue lumped carts and kiosks together with baby strollers and vending machines as he concluded the whole category was primarily "business income with only a small real property component." *Ex. P-1* at 69. This is irrelevant because none of the kiosk or cart income related to strollers or vending machines. He did not offer a comprehensive analysis of why the rent from carts, kiosks, and temporary tenants should be treated differently from traditional tenants due to intangible or personal property concerns. He offered no theory for identifying or separating business from real estate income. He simply ignored the actual rent and offered a COO analysis to estimate a market *real estate* rent. He presented no objective evidence or authority to support this model for predicting rent.⁴³ Because Lennhoff neither identified nor separated the business or personal property from the income stream, the Board finds his approach irredeemably flawed.
120. The Board can find no support for Lennhoff's treatment of kiosk income.⁴⁴ Because a kiosk is a structure in the mall that is rented by a tenant for retail purposes, the Board finds that kiosk rent is real property income and must be included in NOI.
121. As for the carts, the Board is persuaded that a tenant is primarily interested in renting the physical space in the mall where the cart will be placed. While the cart itself is certainly personal property, and that component must be deducted from the overall valuation of the Southlake Mall, the Board cannot find that most of the rent should be attributed to the personal property.⁴⁵ Both appraisers endeavored to deduct the personal property value of

⁴³ When asked as a hypothetical whether a COO could be used to estimate rent for a different "strata of tenants," Benton stated that he would not and that it would likely be irrelevant. *Tr.* at 853. The Board finds it very unlikely that the COO of a typical 2,000 s/f inline store can be applied to a cart or kiosk to estimate rent because their business models and overhead are completely different.

⁴⁴ Benton took issue with Kenney's reliance on actual revenue rather than comparable mall leases for kiosks, but he never challenged its inclusion as real estate income. *Tr.* at 860-62.

⁴⁵ Benton stated that due to the risk of specialty leasing for carts and brand media, he would attribute "about 50 percent to real estate." *Tr.* at 756. He did not argue that the rent was mostly attributable to personal property.

the carts, and the Board is persuaded that a return on and of the cart, and all other personal property, should be deducted later in the analysis.

122. The Board must likewise conclude that a temporary tenant who rents a retail space in a mall is paying rent that reflects real estate income. While there may be grounds to treat this rent differently in terms of risk, it is undeniably real estate rent that should be included in the income approach.⁴⁶ The evidence before the Board suggests that the Southlake Mall consistently leases temporary space, and its income must be included in NOI.

b. Other Income

123. Turning to CAM income, the appraisers both rely on Southlake’s historical operating statements rather than market data.

| <u>Income Source</u> | <u>Kenney</u> | <u>Lennhoff</u> |
|---------------------------------|---------------|-----------------|
| <u>CAM, Ins. Util, Food CAM</u> | | |
| Management Fee | | |
| | | |
| <u>CAM</u> | | |
| <u>CAM (Vacant Space)</u> | | |
| <u>Food Court CAM Revenue</u> | | |
| <u>Insurance</u> | | |
| <u>Central Plant</u> | | |
| <u>Electricity</u> | | |
| <u>Water & Sewer</u> | | |
| <u>Construction</u> | | |
| | | |
| Vacancy/loss | 8.5% | |
| <u>Total CAM/Ins./Util</u> | | |

Once again, Kenney’s calculations are transparent and Lennhoff’s are not. The Board cannot ascertain why there is such a large discrepancy in Lennhoff’s estimate of CAM income (other than his deduction of the management fee). It appears Lennhoff removed intangible “profit centers,” but he failed to itemize, and the Board cannot state with

⁴⁶ Benton stated that due to the uncertain nature of temporary rent, an appraiser should “account for that, either in the cap rate or you take a portion of it [out].” *Tr.* at 755. While his later testimony equivocated on this issue, Benton did not support Lennhoff’s wholesale exclusion of rent from temporary tenants. *Tr.* at 857-59.

certainty what he did. Whether any of these items should be removed as intangibles is considered later in the analysis.

124. The remaining income categories are unremarkable as both appraisers rely on the Southlake Mall's historical operations and reach similar conclusions.

| <u>Income Source</u> | <u>Kenney</u> | <u>Lennhoff</u> |
|-----------------------------------|---------------|-----------------|
| <u>Storage & Other Income</u> | | |
| <u>Storage</u> | | |
| <u>Other Income</u> | | |
| Vacancy/loss | 8.5% | |
| Total Storage/Other | | |
| <u>Misc/Fire</u> | | |
| Vacancy/loss | 8.5% | |
| Total Misc./Fire | | |

c. Expenses

125. Both appraisers based their expenses on the Southlake Mall's historical operations. Their conclusions were proportional to their income estimates: Kenney at [REDACTED] and Lennhoff at [REDACTED].⁴⁷ The differences in expenses are merely reflective of their opinions on income.

⁴⁷ For Kenney, expenses of [REDACTED] divided by income of [REDACTED] equals [REDACTED]. For Lennhoff, [REDACTED] = [REDACTED].

| <u>Expenses</u> | <u>Kenney</u> | <u>Lennhoff</u> |
|-----------------------------------|---------------|-----------------|
| <u>CAM, utilities, ins</u> | | |
| <u>CAM Expense</u> | | |
| <u>Insurance</u> | | |
| <u>Central Plant</u> | | |
| <u>Electricity</u> | | |
| <u>Water & Sewer</u> | | |
| <u>Construction</u> | | |
| <u>Alarm/Fire/Sprinkler</u> | | |
| Total CAM, utilities, ins. | | |
| Food Court CAM | | |
| <u>Marketing, Specialty</u> | | |
| <u>Marketing</u> | | |
| <u>Specialty Leasing</u> | | |
| Total Marketing, Specialty | | |
| <u>Other Landlord Expenses</u> | | |
| <u>Landlord Expense</u> | | |
| <u>Partnership Marketing</u> | | |
| Total Landlord Other | | |
| Management Fees | | |

126. The Board concludes that Lennhoff's double deduction of the management fee is unsupported. This error significantly undervalued the property.⁴⁸ A counter-intuitive deduction such as this, with no explanation in his appraisal report, let alone citation to a treatise or other authority, negatively impacts Lennhoff's credibility.

127. In later years, Lennhoff projected much stronger growth than Kenney:

⁴⁸ At Lennhoff's loaded cap rate, [REDACTED] / [REDACTED] = [REDACTED]. Considering Lennhoff's total valuation for 2011 was \$98,300,000, that error alone undervalued the property by [REDACTED].

| | 2010 | 2011 | 2012 | 2013 | 2014 |
|------------------------|------------|------------|------------|------------|------------|
| Actual NOI | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Change from prior year | -1.4% | 3.4% | 11.1% | -15.4% | |
| Kenney NOI | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Change from prior year | | | 3.1% | -2.6% | 2.0% |
| Lennhoff NOI | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Change from prior year | | | 8.1% | 7.8% | 7.2% |

Lennhoff's bullish predictions of growth resulted in a significant narrowing of the disparity between Lennhoff's and Kenney's NOI, and between Lennhoff's and the mall's actual NOI, in later years. For 2011, Lennhoff came in [REDACTED] the mall's prior year actual NOI, but for 2014, he came in only [REDACTED] the mall's prior year actual NOI. This is inconsistent with Lennhoff's overall predictions of stable economic growth.

128. Overall, the Board finds that the appraisers were in agreement as to market operating income for the Southlake Mall for 2011. While Kenney's analysis of income had a number of flaws, it was largely supported by Lennhoff's income estimates and survey data. The appraisers diverged through Lennhoff's deductions from income, particularly in regard to kiosk, TIL, and CAM income. These deductions were conclusory and unsupported. Lennhoff's overall lack of transparency made his analysis less persuasive than Kenney's. For later years, the Board finds Kenney's conservative predictions to be better supported.⁴⁹ After weighing the evidence, the Board must find that Kenney presented the more persuasive estimate of NOI for each year on appeal.

d. Deductions for Personal Property and Intangibles

129. It is recognized that "the appropriate method of valuing and allocating intangible assets has been highly controversial among real property appraisers, particularly over the past 30 years." The Appraisal of Real Estate at 710. Kenney and Hamilton line up in this

⁴⁹ The Board notes that if Lennhoff's NOI were adopted, and the income from the kiosks, TILs, carts, and CAM were included, the NOI would be substantially higher than Kenney's in the later years.

debate as what might be described as intangibles-skeptics.⁵⁰ They believe that while intangibles may exist in a mall, they are minimal and sufficiently excluded through a management fee deduction and exclusion of personal property. Lennhoff, Benton, and Fischer might be described as intangibles-advocates.⁵¹ They believe that all business enterprises, including the complex operations of a mall, have substantial intangible assets, and the list of intangibles is limited only by the imagination of the appraiser.

130. The Appraisal of Real Estate recognizes that the management fee approach is “used by many appraisers on certain property types to separate income attributable to intangible assets and capitalize or discount the remaining net operating income.” *Id.* at 712. The Appraisal of Real Estate also recognizes the parsing income method that allocates “income and expenses to each of the asset classes.” *Id.* at 713. The Appraisal of Real Estate also directs readers to Lennhoff’s work.⁵² In the debate between the intangibles advocates and skeptics, Lennhoff admits that the Appraisal Institute remains neutral:

At present there is no course, seminar, monograph, or text from the Appraisal Institute that treats intangible assets and how to remove them from a going concern of TAB in order to isolate real property when it is necessary.

Ex. P-14B (treatise page 284). Fisher likewise testified that in estimating a return of and on intangibles, “there’s a lot of different approaches,” but he did not believe “there’s any standard right now.” Rather, “it’s really up to the judgment of the appraiser and the data that’s available” *Tr.* at 927.

131. Lennhoff approvingly quotes Richard Sorenson in his chapter on shopping malls. Sorenson noted that a mall valuation should exclude intangibles such as “fixtures that will revert at the end of the lease, the value of the management team acquired, if any, and anything paid for retail operations independent of the business of renting space.” *Ex. P-*

⁵⁰ Lennhoff describes his opponents as “skeptics of intangible asset theory [who] demean it as a tactic just to reduce property taxes.” *Ex. P-14B* (treatise page 285).

⁵¹ Lennhoff’s call to arms can only be described as advocacy: “In the short run it will be important for owners of intangible assets to pick their battles carefully—with the right assets, in the right political jurisdictions, and in the right courts.” *Ex. P-14B* (treatise page 298).

⁵² David Lennhoff & James Vernor, A Business Enterprise Value Anthology; The Appraisal Institute. (2011). *Ex. P-14B*.

14B (treatise page 288). However, he concluded that business value intangibles such as these “represent only a small portion of a shopping center’s total value.” *Id.*

i. Tenant Improvements

132. Kenney identified annual inline tenant improvement allowances (TIs) ranging from roughly [REDACTED] to [REDACTED]. *Ex. R-1* at 142-43. He deducted them below-the-line after capitalizing income. Because the Board has adopted Kenney’s market rent and NOI, the Board must also adopt Kenney’s TI adjustments.

ii. CAM and Utility Profit Centers

133. CAM charges are common in commercial leases and often include administrative charges that are above the actual expenses. The Dictionary of Real Estate Appraisal at 37. The Board does not find that an overall CAM profit center deduction should be made, and in any event, there is no expert testimony as to what a market CAM profit would be.

134. When a regional shopping center resells electricity at a profit, “the appraiser should consider whether the profit component represents income to the business or income to the real property.” The Appraisal of Real Estate at 482. In this case the Southlake Mall charged a flat 15% fee on both electricity and water for each year under appeal.

| Profit Center | 2011 | 2012 | 2013 | 2014 |
|---------------|------------|------------|------------|------------|
| Electricity | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Water | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Total | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| 15% Profit | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

Ex. R-1K. Unlike other CAM charge overages that might be attributed to typical administrative overhead, and may be inflated to cover cost fluctuations from year to year, the utilities reflect a consistent straight profit. While recognizing that this is a close call,⁵³ the Board finds the profits from the utilities should be deducted as business income.

⁵³ Lennhoff conceded in his treatise that case law generally reveals “a reluctance to accept the concept of intangible business value,” and that “utility resales and other business activities have seldom been separated from real estate incomes.” *Ex. P-14B* (treatise page 284).

iii. Personal Property

135. In explaining the idea of a return of and a return on an investment, Lennhoff gave the example of a mall owner buying benches for the mall. “The only reason a mall owner would put benches into the mall is if he expects that by doing it” he will generate more sales. *Tr.* at 1085. Theoretically, it is reasonable to presume that some portion of the [REDACTED] in sales at the mall is attributable to a bench, and that value is in addition to the value of the bench itself.
136. Kenney made a straight deduction of personal property from the overall value of the mall based on the Southlake Mall’s actual 2011 personal property return of [REDACTED]. Lennhoff looked to the prior year personal property return and applied an amortization schedule that resulted in an annual deduction of [REDACTED] from NOI. At his capitalization rate of [REDACTED] this adjustment results in a deduction of [REDACTED] from his overall real estate valuation. If a real estate operation requires a half million dollars of personal property, it is reasonable to attribute some of the profits to the personal property. The Board finds that Lennhoff’s method of deducting personal property is reasonable.⁵⁴

iv. Start-Up Costs

137. Lennhoff made an intangibles deduction from NOI for start-up costs which he defined as the marketing for a “grand opening event” or for when the mall is “repositioned.” *Ex. P-1* at 100. He justified this deduction as something that would be necessary under the cost approach, and he calculated this from “sort of a loosey-goosey cost approach” that he “did in another appraisal.” *Tr.* at 1089, 1091. In explaining why the cost approach is irrelevant to valuing a mall, Lennhoff stated that “no buyer would care what it costs to build this thing.” *Tr.* at 1026. The Board fails to see why the costs of a grand opening merits discussion either. Lennhoff fails to make a logical or even cogent argument for this deduction.⁵⁵

⁵⁴ Kenney conceded that a return on and a return of personal property would be another accepted practice. *Tr.* at 211.

⁵⁵ When asked if there was support for this in his appraisal literature, he replied “Yeah. Absolutely.” but failed to direct the Board to such authority. *Tr.* at 1092.

v. Favorable Contracts

138. Lennhoff made an intangibles deduction for what he defined as “favorable contracts.” This was an endeavor to amortize the expenses originally paid to anchor stores in the form of land, long term leases at a nominal rates, or construction allowances. It also included further inducements “in situations of redevelopment.” He was emphatic that this deduction was “not controversial.” *Tr.* at 1106. He relied on a 1996 article by Martin & Nafe in support. *Ex. P-14C*. The first line in their article states that “Segregating real estate value from nonreality value in shopping centers is a controversial issue.” Other than appearing in a list of “possible sources of intangible assets in any type of property,” Lennhoff’s chapter on valuing shopping centers provided no specifics as to the process of excluding favorable contracts as intangibles. *Ex. P-14B*.
139. There is no dispute that a mall owner must build, or pay to build, the entire mall, including the huge improvements that will contain the anchor tenants. The mall then will either give away the land and building to the anchor, or lease it at a nominal rate. In return, the anchor tenants obligate themselves to operate their stores, even at a loss, over the term of the contract. At the expiration of the contract, the mall owner may need to make new inducements to retain an anchor, in cash, improvements, or rent concessions, particularly if the anchor is not profitable.
140. These inducements are clearly related to the real estate. The purpose is to maximize *rent* from the inline tenants through securing the anchors. The mall has no profit and derives no value from its favorable contracts with the anchors except in the margin of *real property rent* generated from the inline tenants. Lennhoff, or at least Martin & Nafe, argue that the subsidy to the anchors should be deducted from inline rent as an intangible because it is *above-market*.⁵⁶
141. The Board first observes that the anchor subsidy is in fact reflected in the *anchor’s* rent. If the mall owns the anchor building, the rent is nominal. If the mall gave the building to the anchor, the rent is zero. The mall is simply trading its lost (market) rent from the

⁵⁶ Martin & Nafe operated on the assumption that the inline stores have “above market rental rates” attributable to the anchor stores. *Ex. P-14C* (treatise page 2). Lennhoff argued that because the anchors are subsidized by the mall owners, the subsidy must be deducted as an intangible. *Tr.* at 1098-99.

anchors for higher rent from the inline stores.⁵⁷ If what the mall would have earned from a free-standing anchor store is simply transferred to the rent of the inline stores, then there is no net effect on mall income, and no above-market rent for the mall as a whole.

142. With the Southlake Mall, it appears JC Penney has a current subsidy of both below market anchor rent and the income from a sublessor (the Firestone). Logically, the income attributed to the JC Penney could be less, conceivably even a net negative, in determining the mall's NOI. But that evidence is not before the Board. In fact, there is no evidence before the Board regarding the actual subsidies or contract terms between the anchors and the mall.
143. The only evidence before the Board is a few anecdotal examples over the last 20 years where Lennhoff happened to have been retained as an appraiser. Lennhoff fails to establish that there is an industry standard applicable to all malls. In fact, he establishes the opposite: the amount of subsidy varies with the mall. The cost of retaining a Macy's might be \$1M or \$28M. *Ex. P-1* at 102. Likewise, Hamilton testified that anchors may have varying impacts on inline rent as a draw to the mall. It only stands to reason that if an anchor is dying because so many customers no longer shop there, then that anchor is not likely contributing many customers to the inline stores either. Without an analysis of the degree to which the *Southlake Mall anchors* are subsidized and contribute to online rents, Lennhoff fails to persuade the Board that his numbers are correct.
144. Finally, the Board agrees with Sorenson that any calculation of business value intangibles should represent "only a small portion of a shopping center's total value." Lennhoff's deduction for start-up costs and favorable contracts is a deduction of \$39,446,168.⁵⁸ Based on a real property valuation of \$99,568,178, the Board would be required to conclude that 28%⁵⁹ of the mall's value is attributable to those intangibles. This is even more pronounced after the parade of additional intangibles Lennhoff excluded through

⁵⁷ Martin & Nafe inquire into what the inline stores would pay in rent for a location outside of the mall. The first question should be what an anchor tenant would pay for a location outside of a mall (not subsidized by the mall).

⁵⁸ [REDACTED] + [REDACTED] = [REDACTED] / [REDACTED] = \$39,446,168.

⁵⁹ \$99,568,178 + \$39,446,168 = \$139,014,346. \$39,446,168 / \$139,014,346 = .28.

adjustments to income (personal property, kiosk, profit centers) and his cap rate (real estate rather than going concern).

e. Capitalization Rates

145. The Board has previously found as a matter of fact, from the sales reported in Karonis’ tables, that the Southlake mall is a Class B+ mall. Benton stated that Kenney’s capitalization rates were “correctly calculated,” but he believed the rate better suited a “class A or class B+ mall.” *Ex. P-2* at 15. Lennhoff chose capitalization rates based on the presumption that the mall was Class B in 2011-2013, and Class B+ in 2014, but also stated that his analysis would not change if the Board concluded the Southlake Mall was a Class B+ mall. Additionally, Lennhoff, Benton,⁶⁰ and Fisher⁶¹ all concluded that a real estate capitalization rate would be higher than a mall’s going concern rate. Lennhoff pinned this on two factors: the value “secured by the operating agreements,” and the “upside potential for business revenue.” *Tr.* at 1111.
146. The cap rate survey data establishes a broad range of rate averages for different regions and classes:

| Capitalization Rate | 2011 | 2012 | 2013 | 2014 |
|-------------------------------------|-------------|-------------|-------------|-------------|
| Emerging Trends US Regional Mall | 7.21% | 6.6% | 6.37% | 5.33% |
| IRR Viewpoint Chicago Regional Mall | 8% | 7.5% | 7.25% | 6.5% |
| PwC Class A & A+ Regional Mall | 6.99% | 6.45% | 5.95% | 5.95% |
| PwC Class B & B+ Regional Mall | 8.64% | 8.13% | 7.47% | 7.13% |
| PwC Class B+ Regional Mall | | 7.75% | 7.08% | 6.71% |
| RERC First Tier | 8.9% | 8.2% | 7.7% | 7.8% |
| RERC Second Tier | 9.2% | 9.1% | 8.5% | 8.6% |
| Kenney | ■ | ■ | ■ | ■ |
| Lennhoff | ■ | ■ | ■ | ■ |

Kenney’s cap rates were lower than the Regional Mall A/A+ average for 2011 and 2012, and lower than the B+ average in 2013 and 2014. He was lower than the Chicago

⁶⁰ Benton stated that a real estate rate would be higher than the going concern rate “because you’re getting all the intangible benefits” *Tr.* at 765.

⁶¹ Fisher stated that he “would expect a cap rate for just real estate, you know, where you’re not expecting growth in business, to have a higher cap rate” *Tr.* at 930.

Regional Mall averages, and 1-2 points lower than the First Tier averages. While Kenney's selections are within the wide spread of cap rates for B+ and First Tier regional malls, the Board does not find that the Southlake Mall should be considered significantly more valuable than the average mall within its class. The Board rejects Kenney's capitalization rates. Lennhoff selected ranges above the average B+ or Chicago Regional Mall. This is consistent with his premise that a higher real-estate-only-rate effectively results in a lower valuation due to the exclusion of the intangibles associated with the anchor agreements and business operations. The Board adopts Lennhoff's capitalization rates.⁶²

f. Stabilization, Demising, and Excess Parcel Adjustments

147. Lennhoff testified that stabilization adjustments were necessary. The Board finds that these are reasonable to achieve the projected occupancy rates. However, the Board is not persuaded by Lennhoff's demising projections. He is not a mall operator, and the Board does not find him qualified to make such a determination. Furthermore, the Board must consider the property at its current use and construction.
148. The Board agrees with Benton that the value of the 5 excess parcels for 2013 and 2014 is largely reflected in the income of the mall because the retention ponds and excess parking, in their current use, contribute to the overall economic unit of the mall. *Ex. P-2* at 8. Absent evidence that there is demand for development of the excess parking parcels as outlots, it is reasonable to assign a marginal value to this acreage. The Board adopts Lennhoff's analysis for the excess parcels.

g. Conclusions of Value

149. The Board finds that Kenney's corrected estimates of income are more transparent and credible, and investors would agree with his moderate growth expectations. The Board rejects Lennhoff's treatment of specialty leasing, ground leases, CAM, and expenses. The resulting NOI must be adjusted to deduct Lennhoff's personal property adjustment and utility profits. Lennhoff's cap rates are best supported by the evidence, and these

⁶² The Board likewise adopts Lennhoff's conclusion of a reasonable vacancy rate for real estate taxes (owner's share) and his loaded rates.

reasonably remove intangibles associated with the anchor agreements and business operations. Finally, the capitalized income must be adjusted for Kenney's tenant incentives, Lennhoff's stabilization calculations, and Lennhoff's excess parcel values.

150. In accordance with these conclusions, the Board reaches the following values for the Southlake Mall.⁶³

| Assessment Year | 2011 | 2012 | 2013 | 2014 |
|----------------------------|----------------|----------------|----------------|----------------|
| Kenney Income | | | | |
| Chili's Adj. | | | | |
| JC Penney/Firestone Adj. | | | | |
| Kenney Expenses | | | | |
| Utilities Profits | | | | |
| Lennhoff Personal Property | | | | |
| Adjusted NOI | | | | |
| Lennhoff Loaded Cap Rate | | | | |
| Total | | | | |
| Kenney TIs | | | | |
| Lennhoff Stabilization | | | | |
| Excess Parcels | | | \$ 978,000 | \$ 978,000 |
| Total | \$ 173,497,036 | \$ 180,400,178 | \$ 179,367,932 | \$ 190,620,448 |

h. Checks on Valuation

151. Both parties presented evidence purporting to act as objective checks on the reasonableness of an appraiser's valuation. The Assessor placed much weight on the financial disclosures created by Lennhoff's own company that place the value of the Southlake Mall [REDACTED]. Furthermore, the filings include evidence of a mortgage of nearly [REDACTED] with a roughly [REDACTED] loan to value ratio, which might indicate an [REDACTED] value. However, the evidence clearly established that those valuations included a number of retail parcels not on appeal. Without evidence of the value of the parcels not on appeal, the data from the financial disclosures is not probative as a check on the appraisers' valuations.

⁶³ The Chili's adjustments equal Kenney's market rent [REDACTED], less his vacancy and collection loss for each year. The JC Penney/Firestone adjustments equal the correction as calculated in paragraph 115 ([REDACTED]), less Kenney's vacancy and collection loss for each year. The utilities profits adjustments are as calculated in paragraph 138.

152. The Taxpayer placed much weight on Benton’s review of the assessments of other malls.⁶⁴ Both Lennhoff and Kenney declined to base their valuations on data from comparable malls. Benton’s analysis failed to consider the two factors that all of the experts, including Benton, agreed were the most critical in comparing and categorizing malls: inline sales and COO rates. Benton admitted he did not conduct a USPAP compliant analysis, and he did not offer a valuation based on his comparative assessment approach. The Board finds this exercise merely proved a fact not in dispute: an income approach valuation might reach a different result than a Guidelines cost approach valuation. While the statute requires the admission and consideration of comparable assessments, it does not require the Board to give it more weight than a USPAP compliant appraisal.
153. The final question is whether the Board sufficiently excluded intangible property in accordance with Indiana law. The best check is a comparison between the Board’s concluded values and estimated TAB values. Unfortunately, and perhaps deliberately, the Taxpayer has not established a TAB valuation. Lennhoff projected TAB revenue and expenses for each year, but his capitalization rates reflected real estate rather than TAB rates. The evidence does not include Lennhoff’s opinion of a TAB cap rate. However, Fisher testified that “adding a point” to a TAB rate to reach the real estate rate would be “going in the right direction.” *Tr.* at 955. From this, the Board finds that it would be reasonable, as a check, to presume that Lennhoff’s real estate cap rate is one point higher than a market TAB cap rate. Through this, the Board can roughly determine how much business value was removed from the Southlake Mall in the real property values adopted by the Board.⁶⁵

⁶⁴ The Taxpayer did not directly raise a uniformity and equality argument, and consequently the Board will not address the issue. *See Post-Hearing Br. of Pet’r* at 16-19.

⁶⁵ For 2011, based on *Ex. P-1* at 68, the 2011 Altus Forecast of total revenue is [REDACTED]. After deducting real estate taxes of [REDACTED] the income is [REDACTED]. Likewise, the total expenses [REDACTED] less real estate taxes of [REDACTED] is [REDACTED] in expenses. Thus NOI (net of taxes) is: [REDACTED] - [REDACTED] = [REDACTED]. Based on *Ex. P-1* at 106, Lennhoff’s loaded cap rate was [REDACTED], and if reduced by one point, is [REDACTED]. The TAB is calculated as: [REDACTED] / [REDACTED] = [REDACTED]. The difference between TAB and the real estate value is calculated as: [REDACTED] - [REDACTED] = [REDACTED]. As a percentage, [REDACTED] / [REDACTED] = [REDACTED].

| TAB Check on Intangibles | 2011 | 2012 | 2013 | 2014 |
|---------------------------|------------|------------|------------|------------|
| TAB Income (net of tax) | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| TAB Expenses (net of tax) | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| TAB NOI (net of tax) | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| TAB Loaded Rate | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| TAB Value | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Board Real Estate Only | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Business/Intangible Value | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| Percentage | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |

The Board finds that the real estate only valuation adopted herein excludes between [REDACTED] of business and intangible assets and a range of [REDACTED] of the TAB.⁶⁶ In addition, the management fee also likely deducts a portion of the intangible value not reflected in the table above. The Board finds that the valuations adopted herein properly remove intangibles as required by Indiana law.

D. Conclusion

The Board finds the true tax value of the parcels on appeal to be as follows: \$173,497,036 for 2011; \$180,400,178 for 2012; \$179,367,932 for 2013, and \$190,620,448 for 2014.⁶⁷

⁶⁶ For simplicity, the TAB estimate does not include adjustments for the Board's acceptance of below the line adjustments for Kenney's TIs, Lennhoff's stabilization, and the excess acreage for 2013-2014.

⁶⁷ Because the mall is valued as a single economic unit, the Board expresses no opinion on the valuation of any particular parcel. The Assessor has discretion to assign values so long as the sum of the parcels' assessments equal the value set forth in this determination.

ISSUED: NOVEMBER 21, 2018

Ted J. Holaday
Chairman, Indiana Board of Tax Review

Betsy J. Brand
Commissioner, Indiana Board of Tax Review

Matthew R. Cleveland
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 not later than forty-five (45) days after 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>>.

| Petition Number | Petitioner Name | Parcel Number |
|------------------------|------------------------|--------------------------|
| 45-046-11-1-4-00013 | Southlake Indiana | 45-12-23-301-002.000-046 |
| 45-046-12-1-4-00010 | Southlake Indiana | 45-12-23-301-002.000-046 |
| 45-046-13-1-4-00013 | Southlake Indiana | 45-12-23-301-002.000-046 |
| 45-046-14-1-4-20535-15 | Southlake Indiana | 45-12-23-301-002.000-046 |
| 45-046-13-1-4-00012 | Southlake Indiana | 45-12-23-301-005.000-046 |
| 45-046-14-1-4-20533-15 | Southlake Indiana | 45-12-23-301-005.000-046 |
| 45-046-11-1-4-00012 | Southlake Indiana | 45-12-23-301-006.000-046 |
| 45-046-12-1-4-00009 | Southlake Indiana | 45-12-23-301-006.000-046 |
| 45-046-13-1-4-00008 | Southlake Indiana | 45-12-23-301-006.000-046 |
| 45-046-14-1-4-20534-15 | Southlake Indiana | 45-12-23-301-006.000-046 |
| 45-046-13-1-4-00009 | Southlake Indiana | 45-12-23-301-008.000-046 |
| 45-046-14-1-4-20531-15 | Southlake Indiana | 45-12-23-301-008.000-046 |
| 45-046-11-1-4-00011 | Southlake Indiana | 45-12-23-301-009.000-046 |
| 45-046-12-1-4-00008 | Southlake Indiana | 45-12-23-301-009.000-046 |
| 45-046-13-1-4-00007 | Southlake Indiana | 45-12-23-301-009.000-046 |
| 45-046-14-1-4-20532-15 | Southlake Indiana | 45-12-23-301-009.000-046 |
| 45-046-11-1-4-00010 | Southlake Indiana | 45-12-23-301-011.000-046 |
| 45-046-12-1-4-00007 | Southlake Indiana | 45-12-23-301-011.000-046 |
| 45-046-13-1-4-00006 | Southlake Indiana | 45-12-23-301-011.000-046 |
| 45-046-14-1-4-20530-15 | Southlake Indiana | 45-12-23-301-011.000-046 |
| 45-046-11-1-4-00009 | Southlake Indiana | 45-12-23-326-001.000-046 |
| 45-046-12-1-4-00006 | Southlake Indiana | 45-12-23-326-001.000-046 |
| 45-046-13-1-4-00005 | Southlake Indiana | 45-12-23-326-001.000-046 |
| 45-046-14-1-4-20529-15 | Southlake Indiana | 45-12-23-326-001.000-046 |
| 45-046-11-1-4-00008 | Southlake Indiana | 45-12-23-326-002.000-046 |
| 45-046-12-1-4-00005 | Southlake Indiana | 45-12-23-326-002.000-046 |
| 45-046-13-1-4-00004 | Southlake Indiana | 45-12-23-326-002.000-046 |
| 45-046-14-1-4-20536-15 | Southlake Indiana | 45-12-23-326-002.000-046 |
| 45-046-13-1-4-00011 | Southlake Indiana | 45-12-23-376-001.000-046 |
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| 45-046-13-1-4-00010 | Southlake Indiana | 45-12-23-376-002.000-046 |
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| 45-046-13-1-4-00002 | Southlake Indiana | 45-12-23-401-012.000-046 |
| 45-046-14-1-4-20525-15 | Southlake Indiana | 45-12-23-401-012.000-046 |