

**STATE BOARD OF REAL PROPERTY TAX REVIEW**

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**WAL-MART REAL ESTATE BUSINESS TRUST,  
Petitioner,**

**Docket**

**#2018-010**

**#2019/010**

**v.**

**TOWN OF THOMASTON BOARD OF ASSESSORS,  
Respondent.**

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**MEMORANDUM OF LAW ON BEHALF OF RESPONDENT  
CONCERNING WALMART'S "DARK STORE" THEORY**

**Summary of Argument**

Wal-Mart Real Estate Business Trust ("Walmart") appeals from the Town of Thomaston's denial of its request for an abatement of its April 1, 2017 and its April 1, 2018, real property tax valuations.

Walmart challenges the Town's assessment of \$15,889,373 to April 1, 2017 and the Town's assessment of \$15,464,000 to April 1, 2018 claiming that this thriving retail store which was custom-built for its current use is worth less than half that amount: \$7,400,000. The question that immediately presents itself is: how can Walmart claim that this successful, 4 ½ year-old, 147,500 square foot retail store on 30.22 acres is worth only \$7,400,000, when the Town's

when the Town's independent appraiser determined that its fair market value was \$17,720,000 for April 1, 2017 and \$18,000,000 for April 1, 2018 and the Town assessed it at \$15,889.373 for April 1, 2017 and \$15,464,000 for April 1, 2018?

The answer is simple: rather than valuing the property in its current condition and existing use, Walmart asks the Town to treat this store differently than the Town treats all other properties - as if it were vacant, obsolete and idle, awaiting sale after closure. In other words, Walmart argues that its valuation should be based on hypothetical circumstances rather than those actually in existence. Walmart's dramatically lower valuation is the direct result of this flawed premise.

The Town assessed Walmart's property as it does all properties - by estimating its value based on its actual use and condition on April 1, as required by Maine law. If this Board were to adopt the analysis urged by Walmart, every property owner in the State of Maine could argue that his property should be valued - not based on its current use and condition - but rather as it might exist at some future date. This is known as the "Dark Store" theory because the vacant store is without electricity and therefore dark. Walmart's

asserts that any costs associated with the property's construction must be ignored as an indication of value and that a significant portion of the construction costs must be considered functional obsolescence. By this argument, a property is functionally obsolete as soon as it is constructed.

Such an approach to valuation should be soundly rejected as not only speculative and unreliable, but unconstitutional. Both the United States and Maine Constitutions require that all taxpayers be taxed equally and fairly. The Maine and federal Constitutions require that all taxpayers be assessed using the same standards and procedures, and also that all taxpayers bear their fair share of the overall tax burden.

If large retail stores were taxed differently than other properties, the Town would be unfair in its treatment of other property owners, whose properties are taxed based on their current condition and use on April 1, and other property owners would also be impacted unfairly since they would then have to bear a greater share of the tax burden because Walmart's assessment would be substantially lower if it were assessed as if closed and vacant.

This Board should reject Walmart's petition because such disparate treatment of taxpayers, and unequal impact upon taxpayers would violate the equal protection clause of the Maine Constitution.

Moreover, Walmart has presented no credible evidence that the Town's assessment is manifestly wrong. The Town's assessment was based on an independent appraisal of the Walmart property by a licensed Maine appraiser. Following a hearing at which the basis of the Town's appraisal, Walmart's competing appraisal, and relevant witnesses and information was heard and considered, the Town denied Walmart's petition for an abatement.

Accordingly, for the reasons below, this Board should reject petitioner's request for an abatement and uphold the Town's decision.

### **STATEMENT OF FACTS**

The following facts are not in dispute. The Thomaston Walmart is a big box retail store located on Route 1 in Thomaston, Maine, on 30.22 acres land, and was custom-built by the property owner as an energy-efficient "green" retail store. This Walmart "superstore" or "supercenter" includes 142,000 square feet featuring a grocery store,

pharmacy, and an adjacent enclosed 5,600 square-foot seasonal garden center. On the building permit issued in 2012, the property owner projected the cost to build the store at \$15,800,000.

Construction was completed in October 2013, meaning that the property was 3.5 years old when it was assessed on April 1, 2017 and 4.5 years old at the time of its assessment on April 1, 2018.

Since its original construction, Walmart added a new outdoor and indoor automatic pick-up facility and new dressing rooms.

The Town assessed Walmart's property in the amount of \$15,889,373 as of April 1, 2017 and \$15,464,000 as of April 1, 2018.

The Town's assessment took into consideration the independent appraisals provided by Steve Traub of Property Tax Advisors, a licensed Maine real estate appraiser retained by the Town for his expert opinion as to value. Traub's appraisals of the fair market value of the property were higher than the Town's assessed values; Traub valued the Walmart property at \$17,720,000 on April 1, 2017, and \$18,000,000 as of April 1, 2018.

Walmart claims that its property should be valued at \$7,400,000 on both April 1, 2017 and April 1, 2018 - less than half

the fair market value placed on the property by the Town and its appraiser.

The Town Board of Assessors conducted a public hearing at which it heard testimony from the Town Assessor regarding the basis for his valuation, considered the appraisal of Stephen Traub conducted on the Town's behalf, and Walmart's competing appraisal by Newmark Knight Frank ("NKF"). The Board of Assessors also reviewed and considered the independent Real Estate Appraisal Review Report of Walmart's appraisal prepared by David M. Cornell, which had been commissioned by the Town. *Id.*

Following the hearing, the Board of Assessors concluded that there was no credible evidence warranting a reduction in the assessed value. *Id.* The Board noted that the Thomaston Walmart was built in 2013 for its current use, and is a successful operating retail store, whereas Walmart's appraisal:

1. relied solely on vacant, obsolete or repurposed properties, rather than operating retail stores;
2. lacked sufficient geographic scope to provide comparable land sales, and failed to explain the adjustments made to the land sale prices on which it did rely;

3. improperly relied upon a foreclosure sale;
4. relied on sales of two properties which are no longer serving in their highest and best use as retail stores, but have instead been repurposed as an auto dealership and a church;
5. failed to make appropriate adjustments for the ages and conditions of the four purportedly “comparable” properties despite that all are considerably older than the Thomaston Walmart;
6. improperly relied upon a property whose deed severely restricted the use of the property for retail purposes, without adjusting for that fact;
7. included an income capitalization approach to valuation that was based on inappropriate obsolescence adjustments, utilizing a capitalization rate of 10% when a lower rate would be more appropriate for this market, and a vacancy and collection rate of 10% despite that the subject Walmart property has been continuously occupied, *none* of the 19 Walmart stores in Maine is vacant, and only 2% of the sale properties on which Walmart’s own appraiser relied were vacant.

For these reasons, the Board of Assessors denied Walmart's abatement request. <sup>1</sup> *Id.*

### **Memorandum of Law**

#### **I. It is Walmart's burden to demonstrate that the Town's valuation is manifestly wrong.**

This Board begins its review with the presumption that the assessor's valuation is correct. Under Maine law, the burden is on the taxpayer to demonstrate that the Town's assessment is manifestly wrong. *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 834 A.2d 916 (Me. 2003), *Chase v. Town of Machiasport*, 721 A.2d 636, 640 (Me. 1998), *City of Waterville v. Waterville Homes, Inc.*, 655 A.2d 365, 367 (Me. 1995).

To show that the assessment was manifestly wrong, the taxpayer must demonstrate that (i) the judgment of the assessor was irrational or so unreasonable in light of the circumstances that the property was substantially overvalued and an injustice resulted, (ii) there was unjust discrimination, or (iii) the assessment was fraudulent, dishonest, or illegal. *Terfloth v. Town of Scarborough*, 90

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<sup>1</sup> The Town does not waive, and continues to rely on, the additional grounds listed in its decision, but focuses on these grounds as being the most significant for purposes of this appeal.

A.3d 1131 (Me. 2014), *Yusem v. Town of Raymond*, 769 A.2d 865, 869 (Me. 2001), *Town of Vienna v. Kokernak*, 612 A.2d 870, 872 (Me.1992).

The Board should vacate the Town's assessment "only if the record compels a contrary conclusion to the exclusion of any other inference." *Town of Bristol Taxpayers' Ass'n v. Bd. of Selectmen/Assessors for the Town of Bristol*, 957 A.2d 977 (Me. 2008) (quoting *Weekley v. Town of Scarborough*, 676 A.2d 932, 934 (1996)).

**II. Walmart has failed to demonstrate that Thomaston's valuation is "manifestly wrong".**

**a. The Town treated Walmart like all other taxpayers, consistent with Maine's Constitutional and Statutory requirement to treat all taxpayers equally and fairly.**

The Town's assessment of the Walmart property cannot be judged in isolation. The Town assesses real property pursuant to authority granted to it by the State and Federal Constitutions for the purpose of raising funds to finance public purposes like schools, police and fire protections, and infrastructure. U.S. Const. Amend. 14; Art. IX, Section 8, Maine Const.

The Legislature has specified each aspect of our State's taxation system - from identifying taxable property, to determining the rate of taxation which will raise sufficient revenue to meet public needs, and finally, assessing taxpayers to raise the needed revenue. 36 M.R.S. §§ 208, 383, 502.

In *Town of Thomaston v. Bureau of Taxation*, the Supreme Judicial Court reviewed Maine's statutory and Constitutional framework for taxing real property in detail. 490 A.2d 1180 (1985). The Court emphasized that the two most important purposes of Maine's taxation system are the uniform application of tax laws and the equal treatment of taxpayers. 490 A.2d at 1182, citing *Kittery Electric Light Co. v. Assessors of the Town of Kittery*, 219 A.2d 728, 734 (Me. 1966).

The Maine Constitution guarantees that "[a]ll taxes upon real and personal estate ... shall be apportioned and assessed equally, according to the just value thereof." Maine Constitution Article IX, § 8. The Constitution therefore guarantees the equal protection of taxpayers in two ways. First, that each taxpayer will be treated similarly to every other taxpayer in how the "just" value of his

property is assessed. *Weekley v. Town of Scarborough*, 676 A.2d 932, 934 (Me.1996).

Second, taxpayers are guaranteed that the tax burden will be apportioned equally, so that no taxpayer bears a disproportionate or unequal share of the tax burden. *Shawmut Inn v. Inhabitants of Town of Kennebunkport*, 428 A.2d 384, 394 (Me. 1981); *Terfloth*, 2014 ME 57, ¶ 11, 90 A.3d 1131.

A key means by which the State ensures that all taxpayers are treated equally is that the State determines the value of all property in the State on the same day: “All real estate within the State . . . is subject to taxation on the first day of each April . . . and the status of all taxpayers and of such taxable property must be fixed as of that date.” 36 M.R.S.A. § 502, *Freeport Minerals Co. v. Inhabitants of Town of Bucksport*, 437 A.2d 642 (1981).

The Legislature requires that municipal assessors “**shall** ascertain as nearly as may be the nature, amount and value as of the first day of each April of the real estate and personal property to be taxed . . . .” 36 M.R.S. §708 (emphasis supplied).

The Supreme Judicial Court has held therefore that “All the conditions regulating municipal taxation are to be considered as they

exist on that day, and the liability determined accordingly.” *Inhabitants of Bucksport v. Woodman*, 68 Me. 33 (1877), *Finance Authority of Maine v. City of Caribou*, 694 A.2d 913, 914 (1997).

The charge of the Thomaston assessor, therefore, was to determine the fair and just value of the Walmart property as it existed on April 1 – the same obligation he had in valuing every other property in town. Walmart argues that the Town should apply a different standard to its property, however. Walmart argues that its property should be valued, not according to its actual and current use on April 1 as a thriving retail store, but based on what it *might be worth* if the store were to fail and close, and were sitting vacant.

Both the Maine courts and this Board have rejected arguments by property owners that their assessments should take into account possible future changes in the economy or real estate market. The courts and this Board have repeatedly followed the rule that all properties should be assessed based on their current use and value on April 1, irrespective of possible circumstances which might affect the property’s value in the future. *Finance Authority of Maine*, 694 A.2d 914, quoting *Connecticut Bank & Trust Co., N.A. v. City of Westbrook*, 477 A.2d 269, 272 (Me. 1984) (Maine adheres to the

“statutory scheme fixing April 1<sup>st</sup> as the date on which assessments are to be made . . . [and] on which tax obligations may be known with certainty”); *Swetsir v. Chandler*, 98 Me. 145 (1902)( it is the value of real and personal property on April 1 which is binding); *U.S. Optical Disc, Inc. v. Town of Sanford*, No. 2003-004, at 4-5 (property status and taxes should be fixed as of April 1<sup>st</sup>); *Sprague Energy Corp. v. Bucksport*, No. 2003-003, pp. 27-28 (information relevant to assessed value was that available on April 1).

Accordingly, in *Bureau of Taxation v. Town of Washburn*, the Supreme Judicial Court expressly rejected the taxpayer’s contention that significant economic changes after April 1 should have resulted in a reduced assessment. 490 A.2d 1182, 1186 (1985).

This Board has also rejected claims by property owners that a downturn in economic conditions following the April 1 assessment should factor into a property’s valuation. *Expera Old Town v. City of Old Town*, No. 2016-002 (decision following remand)(subsequent changes to market conditions not relevant to valuation on April 1 of preceding year); *Town of Southwest Harbor v. Harbor*, 763 A.2d 115, 120 (2000)(board properly disregarded sales that took place after April 1 in determining value).

As recently as July 2019, this Board reaffirmed the rule that all property should be valued based on conditions in existence on April 1. In *Madison Paper Industries v. Town of Madison*, 2016-009, this Board held that where a business is operating successfully on April 1 in a facility that was considered “state of the art”, the valuation should be assessed based on the circumstances on April 1, even though the business owner had decided to close the facility before April 1, and the business ceased operations in May.

The Board observed that, just as a residential property owner might decide in March that he plans to demolish his house in May, so long as the house was standing and in use on April 1, it should be assessed based on its use and condition on that day, when all other properties are assessed. *Id.* at pp. 4, 21-22.

The State assesses all property on this particular day each year to ensure the fair and equal treatment of all taxpayers. Allowing Walmart’s property to be valued based on the possibility that it might someday be closed and unmarketable would violate the Constitutional guarantee that all taxpayers will be *assessed* equally - by valuing their properties based on their current and actual use on April 1.

But treating big-box retail stores like Walmart differently than other taxpayers would also result in an equal protection violation in the way taxes are *apportioned* - by unfairly shifting the burden to taxpayers who do not own big-box retail stores that might someday be vacant. If the Town were to decrease the valuations of large successfully-operating retail properties like Walmart based on hypothetical future circumstances adversely affecting value, every other taxpayer would have to pay more than its fair share to finance the Town's schools, police, fire departments and infrastructure.

The Maine Supreme Judicial Court has held that municipalities should not make distinctions between taxpayers that would result in disparate treatment of taxpayers, shifting the burden from businesses to residential homeowners based on varying circumstances, such as varying economic circumstances:

*Stability in municipal income is a factor which must always be considered. To require owners of property which is not income-producing to pick up the deficiency resulting from reducing the tax burden of income property owners each time there is a temporary downward trend in the economy would surely not be either feasible or equitable.*

*Shawmutt Inn v. Inhabitants of Town of Kennebunkport*, 428 A.2d 384, 390 (1981).

It is indisputable that if a different rule applies to big-box retail stores than to small business owners and residential property owners, those taxpayers will be forced to pick up the tab. The tax burden is not going to decrease because since Walmart is still open and operating, it continues to be a significant user of Town services such as law enforcement and fire protection. It would be tremendously unfair for it to benefit from a special rule - allowing its property to be assessed as vacant when it is not - when it is, in fact, a heavy user of taxpayer-supported services.

The Town treated Walmart as it treats every other taxpayer - by assessing the value of its property based on its actual and current use on April 1, and properly rejected Walmart's contention that its valuation should be based on an unknowable hypothetical future value if the store were to be vacant.

Because the Town's treatment of Walmart was not manifestly wrong, and applying the approach urged by Walmart would violate the equal protection clause of the Maine Constitution, this Board should reject petitioner's analysis and request for an abatement.

**a. Walmart's appraisal presents no credible evidence that the Town's assessment substantially overvalued the property.**

As set forth above, it would be unconstitutional for the Town to apply a different standard (hypothetical future circumstances) than it applies to other taxpayers (current condition and use). While reliance on this unconstitutional premise is the primary reason for Walmart's dramatically depressed valuation, the Town submits that a review of NKF's appraisal provides no other credible evidence that the Town substantially overvalued the property.

Nowhere is this more evident than in Walmart's Sales Comparison approach to value.

According to Walmart's appraiser, "*the sales comparison approach develops an indication of value by comparing the subject to sales of similar properties.*"

Walmart then employs four sales that use only abandoned, vacant and obsolete buildings with limited marketability as "comparables", rather than operating retail stores. NKF apparently contends that these properties are comparable, but which, in fact, are not.

Keeping in mind that the subject property was built in 2013 for its current use as a Walmart on Route 1 in Thomaston, and has been well maintained and renovated during its short lifespan, it is clear that the properties which formed the basis of NKF's appraisal are not comparable:

**Sale 1** is a vacant former Shaw's supermarket built in 1997, sold in October 2017 following a foreclosure.

**Sale 2** is a K-Mart built in 1971 which was repurposed for use as an automobile dealership.

**Sale 3** is a vacant retail plaza built in 1991 into which the new owner invested \$6 million to create a mega-church that seats 1,600.

**Sale 4** involves the sale of a vacant Home Depot built in 1997 to an owner who then leased the property to BJ's Wholesale Club. This real property transfer included significant deed restrictions on potential use which were not disclosed in the NKF appraisal report. See Real Estate Appraisal Review Report of David M. Cornell, p. 18.

***NKF's reliance on vacant retail stores not being put to their highest and best use dramatically skewed value downward.***

NKF's Sales Comparison approach to valuation is deeply flawed and seems in nearly every respect designed to drive the valuation of the Walmart property downward.

First, NKF never disclosed the scope of their Sales Comparison Approach and failed to describe the criteria of selecting the sales used. Steve Traub, the Town's appraiser, completed a proper Sales Comparison analysis. He begins with the general scope of sales: big box sales between 2014 and 2018 in northern New England.

Perhaps most significantly, NFK's appraisal relies exclusively on vacant retail stores despite that the subject property is and was a successfully-operating retail store when assessed by the Town of Thomaston on April 1, 2018.

Three of these four sales involve vacant stores – *i.e.* stores that have failed and are now being sold again at bargain-basement prices. Sale # 2 does not involve a vacant store but instead involves a retail store that has been repurposed as an automotive dealership.

The restraints of the Sale Approach require that the properties sold be like the subject property. Compare this successful Walmart

Supercenter to the sale of failed, vacant big box stores? No reasonable person would accept that sale price received for failed, vacant, big-box stores as being at all relevant to a determination of the market value of this property in its current use. This is a sure way of arriving at a value that is fraction of the real worth of the property.

Walmart's Sales Comparison approach requires the Town to pretend that in the future the present Walmart Store will no longer be viable and will become vacant, and no longer desirable to potential buyers. Walmart claims it should be taxed as if its property were vacant.

This viewpoint maintains that real property assessments should not be based on what the property is worth to the current user, but on what the property would be worth to another prospective (hypothetical) user in the open market. The argument alleges that the latter is a true reflection of value-in-exchange or market value. This would mean that any costs associated with the property's construction must be ignored as an indication of value, and a considerable portion of those costs must be considered functional obsolete. They claim that vacant big box stores have a highest and best use different from those occupied ones.

Even the International Association of Assessing Officers in a publication dated September 2017 entitled “Commercial Big-Box Retail: A Guide to Market-Based Valuation” provides:

*“Most big-box improvements are in fact not unique (with the likely exception of signage). Further, the value of the property is as of the date of valuation, not as of a future date, to a hypothetical prospective buyer. It will be for the market to determine whether the improvements are in demand, and it will be for the future buyer to make the economic decision to purchase the property and retrofit, demolish, or continue to use the improvements.”* See copy of a Guide to Market-Based Valuation dated September 2017 attached hereto as Exhibit A.

In addition to asking the Town to base its assessment on speculation that someday in the future this Walmart might be vacant, foreclosed, or repurposed, Walmart’s appraiser contends that the valuation should be based on sales that bear little resemblance to this property in other ways.

Maine law and professional real estate appraisal standards stress the importance of valuing property by referencing comparable properties currently employed in their “highest and best use”. 36 M.R.S. § 701-A; The Appraisal of Real Estate, 14<sup>th</sup> Ed., p. 43.

NKF's appraisal states that the highest and best use for the subject property is "*continued retail use.*" Nevertheless, the appraisal relies on sales prices obtained in Sales 2 and 3, both of which were vacant at the time of the sale, and have been repurposed to uses which are radically different from a big-box retail store. The Sale 3 property has been repurposed into a church, and the Sale 2 property is now being an automobile dealership. These current uses and conditions have no bearing on the value of a fully-operational Walmart in Thomaston. *MHC Narrows Too, LLC v. Town of Trenton*, No. 2012-013, at 16 – 17 (highest and best use looks to all permissible uses and is the foundation upon which any true analysis of fair market value rests).

To project a value premised on a vastly different – older, foreclosed, vacant, or repurposed property onto this property triggers a dramatically depressed value, the very opposite of a comparable sale, and should be rejected. *Louisiana Pacific v. Town of New Limerick*, 2016-102, p. 21-22 (2019) (where the subject property is occupied, properties which were vacant at the time of the sale are not truly comparable); *Harold MacQuinn, Inc. v. Town of Hancock*, No.

2009-014, at 26 (fair market value must be determined according to highest and best use); at 27 n.11.

Because the properties on which NKF's appraisal relies do not involve properties which are currently occupied and being put to their highest and best use, the values resulting from those sales are not comparable or relevant to the value of the Thomaston Walmart.

***NKF improperly relied on the price obtained at a foreclosure sale, which does not represent a property's true market value.***

While sale 1 is being used for retail purposes, it was a foreclosure sale, and there is no indication that an adjustment was made to take this into account. The Maine courts have long recognized that the “[p]rice obtained at a foreclosure sale is not the measure of true market value; it is less.” *McCullough v. Town of Sanford*, 687 A.2d 629, 631 (Me. 1996). Likewise, this Board has held that bank sales should not be relied upon in valuations. *Central Way Realty Associates v. City of Lewiston*, Nos. 93-37--40, consolidated with *KNL Associates v. City of Lewiston*, Nos. 93-41-93-49 & 92-55-92-64, at 4.

Accordingly, NKF's inclusion of the price obtained at a foreclosure sale should be disregarded.

***NKF failed to take into account significant deed restrictions adversely affecting the sale value of the Sale 4 property.***

Maine Law requires that in determining just value, a municipal assessor must consider all relevant factors, including limitations on the use of the property such as deed restrictions. 36 M.R.S.A. 201-A; *Yusum v. Town of Raymond*, 769 A.2d 865 (2001).

This Board has also held that owner-imposed restrictions may distort the market price, rendering the sales comparison approach inapplicable. *Madison Paper Industries*, 2016-009 (2019), *see also GGP Maine, LLC v. South Portland*, 2008-01 (2011)(determination of "just value" must include all relevant factors including restrictions on the use of the property).

Professional appraisal standards also require private appraisers to take into account the nature of the property right being conveyed in order to reach a fair and credible valuation. *The Appraisal of Real Estate 14<sup>th</sup> Edition*, Chapter 20; Review Report, p. 20.

NKF's appraisal incorrectly stated that the Sale 4 property transferred in fee simple and did not disclose deed restrictions that had a profound impact on that property's sale price and marketability. See copy of these deed restrictions attached here, and p. 21 of Review Report.

In fact, the buyer of that property was prohibited from competing with Home Depot. The reviewing appraiser observed that these deed restrictions likely eliminated a number of potential buyers, rendering it likely that the sale price was less than it would have been absent such restrictions. See Review Report, pp. 20 – 21.

NKF's reliance on a sale price without noting or compensating for significant deed restrictions is further evidence that NKF's appraisal of the Thomaston Walmart property is unreliable and used incomparable properties to obtain a reduced value.

***The NKF appraisal did not fully account for or explain other adjustments.***

NKF's appraisal also failed to make proper adjustments for the fact that the Thomaston Walmart is much newer, larger, and reflects

better construction and conditions than any of the properties on which its valuation relied.

The Thomaston Walmart was built as an energy-efficient “green” facility in 2013 for its current use, and has since been renovated to add an enclosed garden nursery, indoor and outdoor pick-up areas, and new dressing rooms. The property is 147,511 square feet, and the NKF report characterizes the construction as of “good quality”. Review Report, p. 19 [cite NKF report].

**Age of Building** NKF made upward adjustments to the closing prices of sales 2 and 3 due to the ages of those properties. However, NKF made no such adjustments to the closing prices of Sales 1 and 4 despite that both buildings were built in 1997 and therefore significantly older than the 2013 Walmart building.

Walmart’s appraiser, NKF, included the following adjustment grid on page 57 of its report:

## AGE ADJUSTMENTS

Sale	Description	Built	Age
#1	Shaw's Supermarket	1997	21
#2	K-Mart	1971	47
#3	Bobs and Homegoods	1991	27
#4	Home Depot	1997	21
Subject	Walmart Thomaston	2013	4.5 years

Walmart's appraiser made upward adjustments to Sales 2 and 3. There is no explanation why Sales 1 and 4 were not adjusted. Both of these buildings were built in 1997 and significantly older compared to the subject.

**Size** The four sale properties ranged in size from 55,899 to 114,448 square feet, compared to the 147,511 square feet of the Walmart building. All sales were adjusted downward as a result of these differences, but the adjustments were not explained.

**Building Quality** Although the appraiser characterizes the Walmart property as being of good construction, none of the sales characterized as of "average" quality were adjusted.

**Location** The NKF appraiser made downward adjustments for all four sales for location, deeming their locations as superior to the subject property, although the report provides no explanation or

analysis to support these adjustments. [cite NKF report]; Review Report, p. 19. The Thomaston Walmart is on Route 1 in Thomaston, the commercial center of Knox County, through which 13,940 vehicles travel per day according to the Maine DOT.

It is impossible to evaluate the fairness or accuracy of adjustments made without explanation, which failure alone renders the values suspect.

**Access / Exposure** Sale 4 was adjusted upward as a result of having inferior access and exposure.

**Economic characteristics** An upward adjustment to sale 2 was made for “economic conditions”. This adjustment was made as a result of the property operating as an Applebee’s, but there is no analysis to quantify or support this adjustment.

As this Board has observed, the sales approach is only as good as the comparables identified. *MHC Narrows Too, LLC v. Town of Trenton*, No. 2012-013, at 20. Because NKF’s four comparison sales were all vacant properties, one of which was a foreclosure sale and one of which had significant restrictions on potential uses by prospective buyers, and three of the four of which are not now being put to their

highest and best use, the sale figures on which NKF relied are not truly comparable.

NKF's further failures to adjust or explain for differences in building size, age, construction quality, location, and economic conditions, render NKF's ultimate appraised value of the Thomaston Walmart unreliable. *Id.* See also *U.S. Optical* at 32 (inadequately explained methodology unreliable).

In short, the numerous flaws in NKF's analysis defeat the entire appraisal and fail to meet the credible-evidence standard necessary to prove the Town's assessment manifestly wrong. *Northeast Empire Ltd. Partnership #2 v. Town of Ashland*, 818 A.2d 1021, (2003).

**NKF's income approach is based on incorrect assumptions and documentation, resulting in an inaccurate valuation.**

The NKF appraisal also purports to rely on the income approach for determining value.

The income approach converts an estimate of income, or rent, a property is expected to produce into value through a process known as capitalization. 2011 Real Property Assessment Manual. The three major components of this approach are the potential income which

can be generated by the property, operating expenses, and a capitalization rate.

The income factor is calculated based on the assumption that the property is fully occupied at market rate. Operating expenses are those that must be paid to maintain the income-producing capability of the property. The capitalization rate converts the future income to a present market value by dividing that income by an appropriate rate of return (capitalization rate). See Valuation of Real Estate, Maine Property Tax Training and Certification Manual, revised June 2019, p. 95 - 96.

[https://www.maine.gov/revenue/propertytax/trainingcertification/pt103\\_text.pdf](https://www.maine.gov/revenue/propertytax/trainingcertification/pt103_text.pdf)

***NKF's projected gross income rate per square foot is unsupported.***

NKF estimated Walmart's potential gross rental income based on the rent per square foot for six big-box retail stores that are, again, significantly different from this property. All of the properties are less than half the size of the Walmart and offer fewer types of goods (Dicks Sporting Goods, Hobby Lobby, Burlington Coat factory, Ocean State Job Lot, and a vacant store). None include a grocery store, pharmacy,

optical store, combined with home goods, clothes, hardware and paint, as well as a nursery. Nowhere does NKF take note of the fact that as a large retail store selling so many types of goods, Walmart has virtually no competition in the area.

Moreover, since this is an owner-occupied property, which has been continuously occupied, it is questionable to rely on significantly different types of retail stores in projecting rental income for this property at all.

Taking this list of very different, much older retail stores<sup>2</sup>, NKF then projects the future gross income of the Thomaston Walmart based on adjustments to the rent-per-square-foot of these six properties, showing downward adjustments for five of the six rents with minimal explanation and no analysis to support the adjustments. The appraiser then selected a rental per square foot figure in the middle of this range, resulting in a projected rent-per-square-foot for the Thomaston Walmart of \$6.25. See Review Appraisal Report, pp. 24 – 25.

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<sup>2</sup>The six buildings referenced by NKF are considerably older than this property, dating as far back as 1962, 1971 and 1985 .

Because the properties on which the gross income projections are based are not comparable to this much larger owner-occupied retail store that sells a much broader array of products, are considerably older, and NKF's appraisal includes minimal explanation for its reliance on these properties or its projections, NKF's appraisal income projections are not supportable.

***NKF projects a 10% vacancy rate for this property despite its 100% occupancy rate since inception, and the fact that none of Maine's Walmart stores are vacant.***

NKF then reduces this unreliable potential gross income figure by a projected vacancy rate of 10%. There is no evidence to support a 10% vacancy rate for this property. The Thomaston Walmart has been 100% occupied since being built in 2013. Not one of Maine's 19 Walmart stores is vacant. Even an examination of the vacancy rates of the six properties on which NKF relied for its income valuation showed an average occupancy rate of 98%. Review Appraisal Report, pp. 24 -25.

Because NKF's vacancy rate is not supported even by the data on which it purports to be rely, it must be rejected as unsound.

***NKF's 10% capitalization rate is well above the market rate and unsupportable***

NKF arrived at a capitalization rate of 10% by extracting rates from sales and the band of investment method. See independent reviewer's report, p. 26. The rates from sales profiled in the NKF appraisal are based on eight New Hampshire properties, and two properties in Maine that NKF contends are comparable based on little or no explanation.

It is well known that the higher the capitalization rate, the lower the estimated value will be. *MHC Narrows Too, LLC v. Town of Trenton*, No. 2012-013, at 19. This Board has held that, where a mall is well established, monopolizes a market and generates reliable income, the capitalization rate should not be too high. *GGP-Maine Mall, LLC v. City of South Portland*, No. 2008-001 (*Maine Mall I*), at 9.

According to David Cornell, the independent reviewer who evaluated NKF's appraisal on behalf of the Town, NKF's band of investment method analysis rested on assumptions which "substantially increased the capitalization rate" and was supported by only one of the ten sales. Report at p. 27.

Maine courts have stressed that it is important to use accurate income and expense figures to project income into the future. *South Portland Associates v. City of South Portland*, 550 A.2s 363, 368 (1988).

Selecting an appropriate capitalization rate is one of the most important parts of the appraisal assignment. The income formula is: Value (V) = Net Operating Income (I) / Capitalization rate (R), or:

$$V = I/R$$

Minor changes in capitalization rates have significant impacts on value estimates. For example, a property with a net operating income (I) of \$100,000 is valued at \$2,000,000 using a 5% capitalization rate ( $\$100,000 / .05$ ), but only \$1,000,000 using a 10% capitalization rate ( $\$100,000 / .10$ ). Incorrect capitalization rates result in erroneous value estimates. There are no exceptions to this principle.

The NKF report identifies capitalization rates of ten (10) comparable properties. They are displayed in the below chart:

<b>NKF's Capitalization Rate Comparable</b>				
<b>No.</b>	<b>Property Name</b>	<b>City</b>	<b>State</b>	<b>Cap Rate</b>
1	Falmouth Shopping Center	Falmouth	ME	7.75%
2	3 Tanger Outlet Centers	Kittery	ME	10.40%
3	Plaistow Commons	Plaistow	NH	6.55%
4	Spitbrook Shopping Center	Nashua	NH	6.47%
5	Centerra Marketplace	Lebanon	NH	6.58%
6	Shoppes at Hooksett Landing	Hooksett	NH	8.00%
7	Tractor Supply	Greenland	NH	6.01%
8	Barnes & Noble	Nashua	NH	7.59%
9	Tractor Supply	Hillsborough	NH	6.10%
10	Gilford Shaw's Plaza	Gilford	NH	7.34%
<b>Averages</b>				<b>7.28%</b>

The capitalization rates range from 6.01% to 10.40%, and average 7.28%, Nine (9) of the ten (10) properties have capitalization rates of 8.0% or lower. Only one (1) sale, an outlier, has a capitalization rate over 10% (Sale 2).

In selecting a capitalization rate of 10% for a relatively new Walmart, NKF appears to disregard all capitalization rate comparables, except the one outlier. NKF's selected 10% capitalization rate is not supported by the sales in their report. Simply put, NFK selects an incorrect and unsupported capitalization rate. Accordingly, this results in an erroneous and unsupported market value.

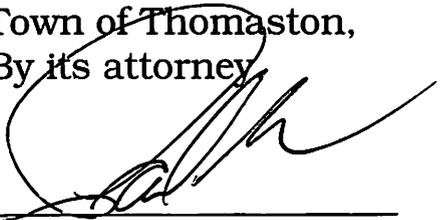
Because petitioner has presented no credible evidence that the Town's assessment is manifestly wrong, its challenge of the Town's assessment must be rejected. *Yusum*, 769 A.2d 865, 870-72. *Chase v. Town of Machiasport*, 721 A.2d 636, 640 (1998) (taxpayer must present sufficient credible evidence to convince the Board that the property is substantially overvalued).

**CONCLUSION**

For the foregoing reasons, based on the record before this Board and the law of the State of Maine, petitioner has failed to meet its burden of demonstrating by credible evidence that the assessment of the Town of Thomaston is manifestly wrong. Accordingly, its request for an abatement should be rejected by this Board.

Dated: *March 2, 2021*

Respectfully submitted,  
Town of Thomaston,  
By its attorney



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Paul Gibbons, Esq.