IN THE SUPREME COURT OF IOWA
NO. 20-1290

NATIONWIDE MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

v.

POLK COUNTY BOARD OF REVIEW,
DEFENDANT-APPELLEE.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE PAUL SCOTT
DISTRICT COURT JUDGE
CASE NO. CVCV054470

APPELLANT'S SECOND AMENDED FINAL REPLY BRIEF

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REPLY ARGUMENT

I. THE BOARD OF REVIEW DID NOT PROVIDE COMPETENT EVIDENCE UNDER THE SALES COMPARISON APPROACH IN SUPPORT OF ITS VALUATION THAT MET THE STANDARD SET BY THIS COURT IN *WELLMARK v. BD. OF REVIEW*.

Preservation of Error.

Appellee concedes Appellant preserved error on all claims.

Standard of Review.

The parties are in agreement regarding the standard of review.

Merits.

Nationwide Mutual Insurance Company ("Nationwide") and the Polk County Board of Review ("Board") have presented considerable evidence through expert reports and testimony regarding the proper valuation of 1100 and 1200 Locust under Iowa Code § 441.21, and those reports are part of the record. Rather than distill this evidence to its most important aspects and how it complied with this Court's decision in *Wellmark Inc. v. Polk County Board of Review*, 875 N.W.2d 667 (Iowa 2016), the Board seeks to misconstrue the relevant facts and argue that the sales comparison evidence supplied by its experts was "competent", while at the same time arguing it was useless. As demonstrated below and in Nationwide's opening brief, the

opinions of the Board's experts cannot be both competent and useless at the same time, and clearly failed to meet the *Wellmark* standard.

A. Under *Wellmark*, the Comparable Sales Method is the Preferred Method of Determining Actual Value

The *Wellmark* case involved a large single tenant office building in downtown Des Moines located just blocks from the two properties at issue in this case. As a result, the legal issues at play are similar, and the Wellmark opinion gives a roadmap regarding how the District Court is to analyze the appraisals performed by both parties.

In the *Wellmark* case, the experts retained by the taxpayer and the Board both used the sales comparison approach to determine value, but the problem became what comparable sales the experts utilized to arrive at a valuation. As this Court explained:

> "Wellmark's experts utilized transactions from similar geographic markets**, but the transactions involved office buildings dedicated to multitenant use.** Further, Wellmark's experts were required to make substantial adjustments with respect to comparable sales in order to support their analysis.
>
> On the other hand, the Board's expert **… presented single-occupant sales of large office buildings in large metropolitan areas that are simply not very indicative of the value of property in the much smaller Des Moines market**. **Further, some of his comparable sales involved property subject to a long-term lease, thus clouding comparability and raising the question of whether the buyer was interested in the property or the income stream generated**

> **by an advantageous lease.** We therefore conclude that the district court correctly considered other factors in its effort to establish the value of the properties."

Wellmark at 682 (emphasis added). Given the fact none of the appraisers from either side was able to establish market value through competent comparable sales, this Court in *Wellmark* could look at other factors to determine value and did so in that case. But this Court was **only** able to consider "other factors" because it found market value could not be established using comparable sales. *Wellmark* at 682. If a competent comparable sales analysis can be performed, this Court cannot consider other methods of valuation, including the cost approach urged by the Board.

B. The Board's Experts Failed To Provide Competent Evidence of Comparable Sales

In its opening brief Nationwide presented evidence the sales comparison approach performed by the Board's experts did not meet the competence standard of *Wellmark*. The Board admitted as much in its brief.

First, the sales comparisons used by Mr. Kenney were in much larger metropolitan areas than Des Moines and involved properties subject to long term leases, even though the court in Wellmark explicitly rejected these types of comparable sales. (Nationwide Brief pp. 33-36). The Board does not dispute this, and makes the following statement in its brief:

> All six comparable sales are located in bigger markets than the Central Business District of Des Moines. Three of the sales have more square feet than 1100 Locust Street and three have less. All six comparable sales were occupied at the time of sale. Mr. Kenney testified he gave his sales comparison approach less weight because of the larger markets where these six comparable sales are located."

(Board Brief at p. 20). But Kenney did not give the sales approach "less" weight. That implies he gave it some serious consideration. Instead, given how useless his sales comparisons were in making a determination of value, Kenney stated in his reconciliation of value that he gave "very little weight to the Sales Comparison Approach" (Ex. A p. 154, Kenney Appraisal, App. 0896). By his own admission, Kenney's sales comparison approach did not constitute competent evidence of value.

Mr. Manternach's sales comparisons also violated the requirements of *Wellmark*. Out of all four appraisers, he was the only one who made no attempt to identify single tenant buildings as comparable sales. Instead, he used four local buildings as comparable sales and testified they were "most comparable to the subject property" even though they were multi-tenant with long term leases. (Nationwide Brief p. 45). Based on his testimony and the contents of his appraisal, it was apparent that Manternach was unaware of the *Wellmark* decision's guidance on what constituted a comparable sale for a large single tenant building.

Given the clear deficiencies in Manternach's opinion and appraisal, Nationwide agrees with the statement in the Board's brief that Manternach's sales approach is "not credible and persuasive evidence of market value and should not be given **any weight** by the court based on Wellmark." Given this admission by the Board that Manternach's sales comparison approach should be given no weight at all, and Kenney's admission he gave very little weight to the approach in his analysis, Nationwide cannot comprehend how the Board can argue in the same brief that the Board presented competent evidence of market value under the sales comparison approach. Instead, the Board has admitted they have failed to produce competent evidence of market value which should end the analysis.

II. THE DISTRICT COURT ERRED IN FINDING THE BOARD'S EXPERTS MORE RELIABLE THAN NATIONWIDE'S EXPERTS TO DETERMINE MARKET VALUE UNDER THE SALES COMPARISON APPROACH.

Preservation of Error.

Appellee concedes Appellant preserved error on all claims.

Standard of Review.

The parties are in agreement regarding the standard of review.

Merits.

In its brief, the Board takes issue with the comparable sales used by Don Vaske and Tom Scaletty, Nationwide's appraisers, in performing their comparable sales analysis while at the same time admitting the comparable sales analyses performed by its appraisers Manternach and Kenney are unreliable and useless in determining value. As set forth in Nationwide's opening brief, the comparable sales analysis performed by Vaske and Scaletty complies with the requirements found in *Wellmark* and are dispositive in this case. As demonstrated below, the criticisms of Nationwide's appraisers raised by the Board in its brief should be disregarded as it misconstrues applicable case law, mischaracterizes the facts surrounding the comparable sales used by Vaske and Scaletty, and raises as red herrings issues that have no bearing on valuation under Iowa law.

A. The Board Misconstrues *Homemakers, Soifer,* and *Lowe's Home Center*.

The Board misconstrues the holding of *Homemakers Plaza, Inc. v. Polk County Bd. of Review*, 828 N.W.2d 326; (Iowa App. 2013), in arguing that a comparable sale's use **after** the sale is somehow relevant. In *Homemakers*, the taxpayer used industrial property as comparable sales for a large retail furniture store and warehouse in Urbandale, based on their opinion the best use for the property was light industrial. The Board's expert used other furniture stores with warehouse space. The Court of

Appeals agreed with the Board and found that the best comparable properties were other furniture stores with warehouse space, which it referred to as "Retail warehouses", that had the same current use as the subject at the time of sale.

In this case, the current use of the Nationwide buildings was as single occupant buildings, and all but one of the comparable sales used by Nationwide's experts were sales of single occupant buildings. There is nothing in the *Homemakers* decision or any other Iowa case that requires the comparable sales to remain single occupant after the sale. Accordingly, the Board focus on the present use of the comparable sales properties is misleading as there is no Iowa case that stands for the proposition that the use of the comparable sale can't change AFTER the sale.

The Board's insinuation that the decision in *Soifer v. Floyd County Bd. of Review*, 759 N.W.2d 775 (Iowa 2009) requires the Court to disregard the Scaletty and Vaske market analysis is also misplaced. In *Soifer*, the local Board of Review was assessing a McDonald's restaurant and insisted that only other fast-food franchise restaurants could be used as comparable sales. The Court disagreed and found that comparable sales of other properties used for restaurant purposes, but not for fast food, was reasonable and competent evidence to value the property.

"Because other properties need not be identical to qualify as comparable, we think it follows that the *use* of other properties need not be identical. Here, a restaurant use is sufficiently similar to a fast-food, franchise restaurant use to be considered comparable." *Soifer* at 785. So, under *Soifer*, it is not necessary for a comparable sale to have an identical use to the building being assessed. Instead, it needs to be a substantially similar use. In this case, Nationwide's experts found several comparable sales of buildings being used by single occupants and purchased by entities acquiring the properties for owner occupancy. Accordingly, those sales are competent evidence of value under Iowa law.

Finally, the Board cites to the recent decision of the Court of Appeals in *Lowes's Home Centers, LLC v. Iowa Property Assessment Appeal Board*, 2021 WL 610105 (Iowa App. Feb. 17, 2021) to argue the comparable sales used by Nationwide were flawed. But the comparable properties reviewed by Nationwide's two appraisers were nothing like the comparable used by the taxpayer in *Lowe's*. In *Lowe's*, even though the store in question was in operation, the taxpayer's appraiser determined the highest and best use of the property was as if it was vacant and used 7 other Midwest big box retail stores as comparable sales. "Each store was vacant for some time before it was sold." *Lowe's* at *1. The Board's appraiser used a different method and

assumed the property was occupied. *Id.* Also, Lowe's only had one appraiser, and the burden never shifted to the Board to prove the assessed value was excessive. As demonstrated below, none of those factors are present in the comparable sales analysis performed by Nationwide.

B. Scaletty's Comparable Sales.

The Board's attempts to discredit the comparable sales used by Scaletty are blatant mischaracterizations of the record and applicable law and should be rejected by this Court.

First, unlike the appraiser in *Lowe's*, Scaletty determined the highest and best use of the two properties was as single tenant office buildings (See Exhibit 7 p. 43, App. 0276; Exhibit 8 p. 54, App. 0432), and conducted his analysis accordingly. At no time did Scaletty value the two buildings as if they were vacant, and there is no evidence in the record to support any such claim by the Board.

Second, the Board claims that the "current use" of Comparable Sales 1, 2 and 4 used by Scaletty are "multi-tenant." While Scaletty admits that Sale 1 (400 Locust) was multi-tenant at the time of sale and needed to be adjusted for that difference, Sale 2 at 909 Locust and Sale 4 at 1963 Bell were both single tenant buildings at the time they sold. The Board's

description of Sale 2 and Sale 4 as multi-tenant office buildings at the time of the sale is simply false. Sale 2 was designed and used as a single tenant building by Voya and was sold as a fee simple. The Board's own expert Russ Manternach admitted as much when he used it in his comparable sales analysis. The fact the buyer, Federal Home Loan Bank, will partially occupy and subsequently may have leased out a portion of the space to another tenant does not change the fact it sold as a single tenant building, and nothing in Iowa case law requires that the sale of a single tenant building is somehow tainted as a comparable sale by a different future use.

The Board also criticizes Scaletty's Sale 5 as a "second-generation" property and questions its usefulness as a sale. In 2013 it sold for $72.24 million as a leased fee with a 10-year lease in place. Then Kraft, who was the tenant at the time of the 2013 sale, made a one-time rent payment of $25 million and a termination fee payment of $22.2 million to terminate their lease seven years early and vacate the building. It was then sold in 2016 for $44.7 million as a fee simple. Apparently, the Board believes the 2013 sale is a more appropriate comparable. But since Iowa law requires the Nationwide properties be valued as fee simples, and the *Wellmark* court specifically criticized using leased fees as comparable sales since they overvalue the property, the Board's criticisms are completely misplaced.

What the Board sees as a problem with Sale 5 – the sale of a fee simple interest -- is actually what makes it comparable. Using a comparable sale with a multi-million dollar lease in place would have nothing in common with what the Court is trying to value.

Finally, the Board claims property 5 was vacant "for several years" when it sold, despite the fact there is no evidence in the record to support that claim. It is undisputed the property sold in February of 2016, and there is nothing in either Scaletty's or Vaske's reports indicating the property was vacant at that time. While the Board does claims at page 64 of its Brief that Scaletty admitted at trial it was vacant when sold, that misstates Scaletty's testimony. Scaletty did NOT say it was vacant when sold, only that the prior tenant did eventually vacate:

> **Q.** Sir, would you agree that sales comp five was vacant at the time of sale; is that correct?
>
> **A. I don't have the exact date of when Kraft vacated.** However, I do know that they paid an exit fee to get out of the property.
>
> **Q.** I think I read in your appraisal, sir, that they made a one-time – they made one rent payment and then an exit fee in 2013?
>
> **A.** Yes. Kraft made a one-time rent payment of 25 million and a $22.2 million termination fee to exit the property. **I don't have the date of when – but what I was getting at is, I don't have the date of when they did that as it pertains to the sale date.** So I

> don't know if it was vacant or how long it had sat vacant, but the tenant was – the single tenant was exiting the property.

(Tran Vol I p. 158-59; App. 0157-0158). In fact, local news reports indicate the property was not vacated until the first few weeks of 2016 at the time of the sale.[1] There is simply no basis for the Board's assertion the property sat vacant for years.

Taken as a whole, Scaletty provided the Court with a sales analysis that used comparable sales of single occupant buildings as well as using one multi-tenant sale in Des Moines (400 Locust) that was adjusted due to its use at the time of the sale. Scaletty avoided the use of single tenant buildings that were sale-leaseback transactions or leased fees since they are not helpful in valuing a fee simple per the guidance of the Appraisal Institute. Accordingly, under Iowa Code § 441.21 Scaletty has provided competent evidence of market value for both Nationwide properties.

C. <u>Vaske's Comparable Sales.</u>

The Board's criticisms of Vaske's comparable sales are similarly flawed and cannot withstand analysis. Like Scaletty, Vaske determined the highest and best use of the two properties was continued use as a corporate home office. (See Exhibit 9 p. 48, App. 0586; Exhibit 10 p. 43, App. 0681),

[1] https://www.chicagotribune.com/business/ct-kraft-heinz-chicago-headquarters-0717-biz-20150716-story.html

Vaske never valued the two buildings as if they were vacant, and there is no evidence in the record to support any such claim by the Board.

Vaske's Sale 2 is the same as Scaletty's Sale 2 and was a single occupant building when sold. Vaske's Sale 9 is the same as Scaletty Sale 5 and is a comparable sale of a single occupant fee simple property, adjusted for location, currently used by a single occupant. Vaske's Sale 10 was a single occupant building when it sold and is a single occupant building now. As Vaske testified regarding Sale 10, Travelers Insurance sold the building to Ecolab for owner occupancy. Travelers agreed to lease some of the floors while Ecolab's lease expired in other properties, but Ecolab's intentions were to occupy the entire property and it is 100% owner-occupied. (Trans Vol. II at p. 97; App. 0174). Vaske specifically sought out comparable sales that were occupied when sold, and the Board's description of the building as multi-tenant is inaccurate. Like Scaletty, Vaske has provided competent evidence of market value for both Nationwide properties under Iowa Code § 441.21.

D. <u>Recurring Board Criticisms</u>

The Board's Brief also contains rote statements criticizing the comparable sales used by Scaletty and Vaske based on age, size, location, whether it was "built to suit", whether it is "second generation" and whether

it is "vacant." Differences in age, size and location were the subject of adjustments in the analysis performed by Vaske and Scaletty and need no further discussion. The other criticisms', however, require a response.

Criticizing a comparable sale because they are not "built to suit" or because it is a "second generation" sale are curious criticisms. First, whenever a single occupant building sells to a new buyer as a fee simple, it will by definition be a second-generation sale. Frankly, Nationwide is unaware of how the sale of an existing building could be anything but a second generation sale and cannot fathom how that would make such a sale inappropriate in a comparable sales analysis.

Second, the Board does not cite to any Iowa law or case that rejects a comparable sale of an assessed property in a market value analysis because it is not "built to suit." In fact, in valuing a fee simple estate, an appraiser should not look at built to suit sales at all. As Scaletty states in his report (Exhibit 7 pp. 53 and 54; App. 0286 and 0287) built to suit comparable sales do not accurately reflect the fee simple value, since they also reflect the value of the underlying lease. So, if a sale was either built to suit; a sale lease-back arrangement; or a second generation leased fee, it would NOT be comparable and the value would have to be adjusted. What the Board

argues is a flaw in the analysis prepared by Scaletty and Vaske is actually a benefit.

Finally, the Board criticizes some comparable sales because the property was vacant when the sale closed. Other than the *Lowe's* case discussed above, the Board does not cite any case for this unremarkable proposition, and it's unclear why it matters. As Scaletty testified, the sale of a single occupant fee simple property always results in it being vacant if the buyer intends to use it. "It's either going to be vacant when they start negotiations or vacant when they take possession. That's the norm." (Trans Vol. II p. 15; App. 0166). The Board's insistence that this makes the sale unusable has no basis in logic or law.

E. <u>The Board's Comparable Sales Analysis</u>

As discussed above and in Nationwide's opening brief, Nationwide followed the *Wellmark* decision and performed a market analysis based on comparable sales that provided competent and credible evidence of the value of 1100 and 1200 Locust. The Board, in contrast, admits it did not offer "credible or persuasive evidence of market value when using the sales comparison approach." (Board Brief at p. 69). Nationwide agrees with the Board's assessment of evidence provided by its appraisers.

III. THE DISTRICT COURT ERRED IN FINDING THE BOARD OF REVIEW PROVIDED COMPETENT AND PERSUASIVE EVIDENCE OF MARKET VALUE UNDER THE COST APPROACH.

Preservation of Error.

Appellee concedes Appellant preserved error on all claims.

Standard of Review.

The parties are in agreement regarding the standard of review.

Merits.

The Board argues the District Court was correct in relying on the cost approach utilized by the Board's appraisers to value 1100 and 1200 Locust. The Board, however, ignores the fact the District Court never explained why it relied on the cost approach, and ignores the fact the District Court never stated *why* the value of the buildings could not be readily established by a comparable sales analysis. Further, as confirmed in Nationwide's opening brief, the cost approach utilized by Kenney had insurmountable errors that corrupt his entire cost valuation, while Manternach admits he placed little weight on the cost approach when reaching his conclusions. Given these undisputed facts, this Court cannot rely on the Board's experts and their cost approach analysis to set the value for 1100 and 1200 Locust.

A. The Cost Approach Used by the Board's Experts Utilizes Flawed Data and is Therefore Unreliable

All four appraisers prepared a cost approach to value the two Nationwide properties and came up with similar figures for the value of the vacant land. They also all used Marshall and Swift data to arrive at a replacement cost of both buildings, and straight-line depreciation to determine physical depreciation. For the most part, all four appraisers used a similar analysis up to that point. The biggest difference among the appraisers was how they calculated total depreciation, which includes functional and external obsolescence, to arrive at a final value under the cost approach. And the data used by an appraiser to determine functional and external obsolescence must be valid in order to arrive at the correct valuation under the cost approach.

To compare, Vaske and Scaletty used valid and quantifiable data to determine functional and external obsolescence and determine values for the properties under the cost basis. But by the Board's own admission, the comparable sales data and income data used by Kenney and Manternach to calculate functional and external obsolescence is fatally flawed and unreliable. If the basis of Kenney and Manternach's obsolescence

calculations are flawed, their final conclusions regarding value using the cost approach is similarly flawed and collapses like a house of cards.

For example, Vaske arrived at functional obsolescence by looking at sales data for two Des Moines owner-occupied properties that were comparable to 1100 and 1200 Locust and arrived at a total accrued depreciation figure of 67%. (Ex. 9 pp. 59-61, Vaske Appraisal of 1100 Locust, App. 0597-0599). In his reconciliation and final value estimate, Vaske explained that since obsolescence was a major issue, and he calculated obsolescence using a sales comparison, the Sales Comparison approach was an overall better measure of value:

> The subject property…suffers from external obsolescence as a result of its size, especially in its smaller market. The amount of accrued depreciation, especially in terms of external obsolescence, is considered to be best reflected within the Sales Comparison Approach. **For this reason, less consideration will be given to the Cost Approach in the final estimate of value**."

(Exhibit 9 p. 89; App. 0627).

To estimate external obsolescence, Scaletty "compared the value estimates from the Sales Comparison Approach and Income Approach" ... with the resulting difference "reflected as external obsolescence or depreciation due to the market." Based on his sales comparisons, Scaletty came up with a figure of 63% for external obsolescence. (Exhibit 7 p. 51-

52; App. 0284-0285). In his reconciliation and final value opinion, Scaletty explained that because of the significant estimate of depreciation from varying causes, he gave the least consideration to the cost approach. Instead, due to the existence of comparable sales, the sales approach "was considered to provide the most reliable indication of market value. (Exhibit 7 p. 91; App. 0324).

In contrast to the explanation and data supporting the methodology used by Vaske and Scaletty to arrive at functional obsolescence, Manternach seemed to pull his functional and external obsolescence figure of 25% out of thin air. (Exhibit Z; App. 1515-1517). At trial, Manternach was asked about this figure, and he really had no good answer:

> **Q.** And then we get to the functional and external obsolescence. Now, in this, I will represent to you, Mr. Manternach, that the other appraisers all had kind of a formula they used. They kind of show how they arrive at the external obsolescence number, and you really don't.
>
> So I guess my question is: You say you think it's between 15 and 25 (%) of a physically depreciated cost and reconciled to 25. So what do you base that on?
>
> **A. We base it on extraction from sales, which I haven't shown here. But we have extracted obsolescence from sales.**
>
> And it's partially judgment based on factors I talked about before, that there is a demand for office buildings down here, vacancy rates are low, so that tends to lead there can't be a whole lot of obsolescence, but that there are incentives involved for most

large developments and that it's a large office building. So there's less users for a very large office building than smaller buildings.

Q. And you said you looked at – you derived it from some sales, but you didn't include those in here, correct?

A. That's correct.

(Tran Vol IV p. 150-51; App. 0210-0211). So Manternach admits his obsolescence number -- which is a key factor in arriving at a value under the cost approach -- is based on an "extraction from sales", i.e. a review of his sales comparison numbers.

But if his obsolescence figure is based on sales comparison numbers, and this Court is supposed to rely on the valuation under the cost approach reached by Manternach using his obsolescence calculation, don't those sales comparison numbers have to be reliable? Nationwide has argued throughout this case that the sales comparisons used by Manternach are flawed in that he relied on multi-tenant properties with long term leases which inflated the value of those properties. But in its brief, the Board **agrees** Manternach's sales comparison approach -- from which he extracted his sales to determine obsolescence -- is not "credible or persuasive evidence of market value under the sales comparison approach." Board Brief at p. 29, 69. If the Board agrees Manternach's sales figures are not credible, how can they be

used to arrive at a valuation using the cost approach that should be accepted by this Court to set the value under Iowa law?

Manternach himself does not believe the cost approach is reliable and said so in his report regarding 1100 Locust:

> This approach is generally most reliable when there are good indications of land value and the improvements suffer from minimal accrued depreciation. **This approach is weakened for this assignment since the property suffers from substantial amounts of accrued depreciation. This approach will be given less weight than the other two approaches to value.**

(Exhibit B p. 78; App. 1242). Instead, Manternach stated he would give more consideration to sales comparison approach and income approach. (Exhibit B p. 78; App. 1242). But, in addition to the Board's admission above that Manternach's sales comparison approach is not credible, the Board admits in its brief that Manternach's income approach is also "not persuasive and credible evidence of market value." Board Brief at p. 30.

So, as far as Manternach's opinion is concerned, here is what we know:

- Manternach testified and stated in his report that the cost approach was the worst method to determine value and not reliable.

- Manternach stated in his report that the sales comparison approach and income approach gave the best indication of value.
- The Board admits Manternach's sales comparison approach is not persuasive or credible evidence.
- The Board admits Manternach's income approach method is not persuasive or credible evidence.
- A major component of Manternach's cost approach valuation is based on the extraction of obsolescence from sales, although the Board admits his sales comparisons are not persuasive or credible.

Given the above, this Court simply cannot rely on Manternach's cost approach opinions as credible and persuasive evidence of the market value of 1100 and 1200 Locust.

Kenney's cost approach valuation suffers from a similar problem regarding his calculation of functional and external obsolescence. In his analysis, Kenney found $49,232,401 of combined external obsolescence for both 1200 and 1100 Locust, which he then apportioned between the two properties. Nationwide opening brief describes the crucial calculation error Kenney made in apportioning obsolescence between the two properties, and that will not be repeated here.

However, the Court should note another problem with Kenney's analysis. To determine external obsolescence for the properties, Kenney calculated a "feasibility rent" net operating income ("NOI") of $14,590,923 by multiplying the cost of the buildings by a 7.7% capitalization rate. Kenney then subtracted from that figure the $10,800,105 NOI he calculated using his Income Approach and divided the difference ($3,790,818) by his capitalization rate of 7.7% to arrive at obsolescence of $49,232,401. (Exhibit A at 151-52; App. 0893-0894).[2]

The entire calculation was contingent on net operating income calculated under Kenney's Income Approach, and that is the problem. The Board admits that in his Income Approach, Kenney "used single-tenant rental comparables from larger markets with rents that are not indicative of the smaller Des Moines rental market" and "were not persuasive and credible evidence of market value for the subject properties." (Board Brief at p. 30). As set forth in Nationwide's opening brief, Kenney's Income Approach considered the office rental rates at three buildings in the Austin Texas area and a separate building in Indianapolis. Kenney also used a low capitalization rate based on national markets rather than a higher cap rate

[2] In its brief, the Board mistakenly claims at page 73 that Kenney calculated functional and external obsolescence using the Marshall and Swift Valuation Services Manual. As indicated on pages 151 and 152 of Kenney's report, Kenney used a feasibility rent analysis to calculate obsolescence.

indicated by the Des Moines market. (Vol. IV pp. 25-26; App. 0191-0192). Those higher rental rates would result in an inflated NOI under the Income Approach, which when divided by a low capitalization rate would result in an inflated value.

Since a higher Income Approach NOI coupled with a low cap rate results in a lower obsolescence figure, the entire process is fatally flawed. In short, if one of the major components of Kenney's cost approach (obsolescence) is based on an admittedly unreliable NOI and a capitalization rate derived from Kenney's Income Approach, it cannot be the reliable basis for determining market value under Iowa law.

The Board wants to have it both ways when it comes to valuing 1100 and 1200 Locust. First, the Board is adamant that all the appraisals in this case based on the sales comparison method or the income method, including the appraisals of Kenney and Manternach, are *per se* unreliable and not credible. But then the Board turns around and argues with a straight face that the cost approach appraisals of Kenney and Manternach – which are based on those same unreliable sales comparisons and income methods – are the gold standard in determining value. Except when performing a cost approach analysis, you must base obsolescence on something, and the Board

has effectively negated every other appraisal performed by Manternach and Kenney that are the only possible bases for their cost approach calculations.

That leaves the appraisals provided by Nationwide. The District Court found Nationwide provided two disinterested witnesses that indicated the market value of the property was less than the market value determined by the Assessor, which shifted the burden to the Board to uphold the assessment. As established above, the Board has failed to provide any competent evidence to dispute Nationwide's claim.

B. The Board's Reliance Solely On The Cost Approach Violates Iowa Law.

The Board admits Kenney and Manternach failed to provide credible or persuasive evidence of value using the sales comparison and income approach, and instead argue the Board should prevail based solely on at Kenney and Manternach's cost approach analysis. However, under Iowa law, the actual value of a property cannot be determined using only one approach. As a result, the Board's proposed assessment must be rejected.

In *Lowes's Home Centers, LLC v. Iowa Property Assessment Appeal Board*, 2021 WL 610105 (Iowa App. Feb. 17, 2021), the Court of Appeals set out the framework for assessing a property's market value – the comparable sales approach and the other factors approach. *Id.* at *3 (citing

Equitable Life Ins. Co. v. Bd. of Rev., 281 N.W.2d 821, 823 (Iowa 1979) with the comparable sales approach being the preferred method of valuation as stated in *Wellmark*. But if sales prices of comparable sales are unavailable, Section 441.21(2) provides an alternative approach:

> In the event market value of the property being assessed cannot be readily established in the foregoing manner, then the assessor may determine the value of the property using ... all other factors which would assist in determining the fair and reasonable market value of the property **but the actual value shall not be determined by use of only one such factor.**

Id. In this case, the Board claims that the only factor this Court is to consider is the cost approach and that the Court must disregard completely the other factors considered by its own expert appraisers.

Since the single factor analysis is explicitly barred by the statute, this Court should reject the Board's argument in its entirety. Instead, this Court should look to the general rule found in *Bartlett & Co. Grain v. Bd. of Rev.*, 253 N.W.2d 86, 88 (Iowa 1977) and *Wellmark*, which states the other-factors approach can be used "if and only if" the comparable-sales approach is inadequate" … and "requires a fact-finder to first determine that the comparable-sales approach is unworkable before considering other factors." *Lowes* at p. *3. (*citing Bartlett* and *Wellmark*). In this case, the District Court never found the sales comparison approach used by Nationwide's

experts was unworkable or inadequate. Accordingly, it should be the basis of this Court making a finding of actual value.

C. Nationwide's Decision To Not Protest The County's 2015 Assessment Is Irrelevant.

It is undisputed Nationwide did not protest the 2015 property tax assessments for 1100 and 1200 Locust. But the decision not to protest the 2015 assessment has no bearing on this Court's determination of value for 2017. Instead, as set forth in Nationwide's opening brief and above, Nationwide has the burden of offering competent evidence by two disinterested witnesses that the market value of the property is less than the value determined by the assessor. Once that is done, the burden shifts to the Board.

While it is true that when the value of a property has been previously set **by the court**, there is a presumption that a court established valuation from a prior year continues to be the true value in subsequent years unless a change in value is shown (*see Metropolitan Jacobson Development Venture v. Bd. of Review*, 524 N.W.2d 189 (Iowa 1994). But there is no Iowa statute or case that says the same presumption applies absent a valuation by a court, and it is undisputed the valuation in 2015 was set by the assessor, not a court or tribunal.

CONCLUSION

Under Iowa law, "market analysis is the preferred method of determining actual value. If market analysis can provide a reliable estimation of value, the process is at an end. **"Other factors" may be considered *if, and only if*, market value cannot be readily established through the preferred market analysis.**" *Wellmark, Inc. v. Polk County Board of Review*, 875 N.W.2d 667, 679 (Iowa 2016.)

The *Wellmark* decision did not change Iowa law regarding the preference for market analysis to set value. But it did set the framework for what types of properties to utilize when performing a market analysis for large single tenant properties. In this case, Nationwide's experts determined market value using comparable sales, the District Court found Nationwide had shifted the burden to the Board, and that should end the analysis. Accordingly, Nationwide respectfully requests that the decision of the District Court be reversed, and that this Court sets the assessed value of 1100 Locust at no more than $49,000,000, and set the assessed value of 1200 Locust at no more than $26,000,000, with the understanding the value for 2017 and 2018 is subject to a minimum assessment of $78,500,000 for 1100 Locust and $36,000,000 for 1200 Locust.

Dated this 15th day of April, 2021.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on April 15, 2021, I electronically filed this Second Amended Final Reply Brief in accordance with Chapter 16 of the Iowa Rules of Court, which will electronically serve the attorneys of record.

/s/ *Angie Walker-Springer*

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