

CASE NO. A07-503

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State of Minnesota  
**In Supreme Court**

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**LEONARD SCHMIEG,**

**Respondent,**

**vs.**

**COUNTY OF CHISAGO**

**Relator.**

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**RELATOR'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).

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## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES  | ii          |
| LEGAL ISSUES  | 1           |
| STATEMENT OF FACTS  | 2           |
| STANDARD OF REVIEW  | 5           |
| RELATOR'S ARGUMENT  |             |
| I.    APPLICATION OF THE PRIMARY USE TEST                               | 6           |
| A. Classification As a Function of Area Used                            | 6           |
| B. Classification Based Upon Scope of Operation<br>and Intensity of Use | 9           |
| C. Income from Activities   | 12          |
| D. Agricultural Operation Transmutation                                 | 15          |
| II.   ACTUAL AND ALLOWABLE LAND USE                                     | 17          |
| III.  APPORTIONMENT IN CLASSIFICATION                                   | 19          |
| CONCLUSION  | 22          |

## TABLE OF AUTHORITIES

### MINNESOTA STATUTES:

|                                   |                                   |
|-----------------------------------|-----------------------------------|
| Minn. Stat. §273.13 .....         | 1, 2, 7 8, 10, 13, 16, 17, 18, 21 |
| Minn. Stat. §271.06, subd. 6..... | 6, 13                             |
| Minn. Stat. §271.10, subd. 1..... | 6                                 |

### MINNESOTA DECISIONS:

|   |          |
|---|----------|
| <i>1100 Nicollet Mall, LLP v. County of Hennepin</i> ,<br>Minn. Tax Court File 30342, 2005 Minn. Tax. LEXIS 59<br>(Dec.28, 2005)..... | 21       |
| <i>Barron v. Hennepin County</i> ,<br>488 N.W.2d 290 (Minn. 1992).....  | 7, 8, 14 |
| <i>Christian Business Men's Committee v. State</i> ,<br>228 Minn. 549, 38 N.W.2d 803 (Minn. 1949).....                                | 20, 21   |
| <i>Dutcher v. County of Hennepin</i> ,<br>Minn. Tax Court File No. 12524, 1992 Minn. Tax LEXIS 90<br>(Aug. 25 1992),.....             | 11       |
| <i>Franklin D. Peterson v. County of Goodhue</i> ,<br>Minn. Tax Court Files 27975 and 28318 (Dec. 16, 1981).....                      | 10       |
| <i>Great Lake Gas Transmission L.P. v. Comm'r of Revenue</i> ,<br>638 N.W.2d 435, 438 (Minn. 2002).....                               | 6        |
| <i>Hallberg v. County of Chisago</i> ,<br>Minn. Tax Court Files CV-05-343; CV-06-312, 2007 Minn. Tax LEXIS 2<br>(Jan. 16, 2007).....  | 18, 19   |
| <i>In re Estate of Balafas</i> ,<br>198 N.W.2d 260 (Minn. 1972).....  | 6        |
| <i>In re petition of Wolf Lake Camp v. County of Itasca</i> ,<br>252 N.W.2d 261, 254 (Minn. 1977).....                                | 21       |
| <i>Lifestyle Homes v. County of Dakota</i> ,<br>Minn. Tax Court File C3-94-7835, 1995 Minn. Tax LEXIS 31<br>(June 19, 1995).....      | 21       |
| <i>Loge v. County of Kandiyohi</i> ,<br>Minn. Tax Court C1-86-549, 1987 Minn. Tax LEXIS 75 (July 27, 1987).....                       | 11       |
| <i>McQuarrie v. County of Goodhue</i> ,<br>Minn. Tax Court Files 28003 and 28297 (Feb. 12, 1982).....                                 | 10, 11   |
| <i>Morton Bldgs., Inc. v. Comm'r of Revenue</i> ,<br>488 N.W.2d 254, 257 (Minn. 1992).....  | 6        |
| <i>Prescott v. County of Beltrami</i> ,<br>Minn. Tax Court File C3-88-0492, 1988 Minn. Tax LEXIS 95<br>(July 19, 1988).....           | 12       |

|   |           |
|---|-----------|
| <i>Schleiff v. County of Freeborn,</i><br>43 N.W.2d 265 (Minn. 1950).....   | 13        |
| <i>Schneider v. County of Dakota,</i><br>Minn. Tax Court File 95660, 1984 Minn. Tax LEXIS 159 (Feb. 9, 1984).....         | 10        |
| <i>Smith v. Morrison County,</i><br>Minn. Tax Court File C8-87-392, 1988 Minn. Tax LEXIS 53<br>(April 13, 1988).....      | 9         |
| <i>SPX Corp. v. County of Steele,</i><br>Minn. Tax Court Files C1-00-350, 2003 Minn. Tax LEXIS 31<br>(July 23, 2003)..... | 18        |
| <i>Swanson v. County of Carver,</i><br>Minn. Tax Court Cx-96-452, 1996 Minn. Tax LEXIS 68 (Sep. 24, 1996).....            | 14        |
| <i>Walthall v. County of Wadena,</i><br>Minn. Tax Court File 9843 (March 20, 1985).....                                   | 7, 10, 13 |

**OTHER AUTHORITIES:**

|  |    |
|--|----|
| The Appraisal of Real Estate, 305 (12 <sup>th</sup> ed. 2001)..... | 18 |
|--|----|

## LEGAL ISSUES

I. Did the Minnesota Tax Court error when it failed to examine the specific nature of the property and the use or multiple uses to which that property has been put, together with a subjective balancing of those relative uses incorporated in the definition of Minnesota Statute §273.13, subdivision 23(c)?

II. Did the Minnesota Tax Court error when it qualified land zoned as commercial and residential as agricultural land under Minnesota Statute §273.13, subdivision 23(c)?

III. Did the Minnesota Tax Court error when it failed to apportion the property for classification?

## STATEMENT OF FACTS

Leonard Schmieg filed an appeal with the Minnesota Tax Court on a parcel of land in the City of Harris, County of Chisago, property identification number 14.00204.00, consisting of approximately 41.7 acres which is the subject of this litigation (hereinafter “subject property”) for assessment date January 2, 2005. (Trial Exhibit 6). The Honorable Sheryl Ramstad, Judge of the Minnesota Tax Court, heard this matter on September 12, 2006 at the Chisago County Government Center in Center City, Minnesota. By a decision dated February 7, 2007, the Minnesota Tax Court concluded the subject property qualified for agricultural land classification under Minn. Stat. §273.13, subd. 23(c). (Appendix pg. 1). Relator appealed this matter to the Minnesota Supreme Court by *Writ of Certiorari*.

The subject property is located on the north east intersection of Interstate 35 and County State Aid Highway 10 and is divided by Goose Creek which leaves the northern half of the property inaccessible from the southern half. (Transcript Pg. 34). Goose Creek further serves as a zoning divider on the subject parcel. (Trial Exhibit 5; Appendix pg. 8). For assessment year 2005, the half South of Goose Creek was zoned General Business and the half north of Goose Creek was zoned Residential/R1. (Trial Exhibit 5). When asked by the Court to describe the property, Mr. Schmieg stated: “Most of the property is just trees. And the creek runs through it.” (Transcript Pg. 45). When the Court inquired about the purpose to which Mr. Schmieg puts the subject property, he responded, “It’s more than just vacant land. It’s

– I hunt there and stuff. I have my bees there. I grow vegetables and I grow trees . . . that’s all I do up there.” (Transcript Pg. 5).

There is a large highway billboard on the subject property along Interstate 35 which was built in 1997 on the southern half by Mr. Schmiege’s company, Schmiege Washburn Industries, Inc. (Transcript Pg. 5-7). Mr. Schmiege’s primary source of income is from the construction of billboards such as the one on the subject property. (Transcript Pg. 6-7). At the time of service of the property tax appeal, Mr. Schmiege indicated in the filing cover letter that he received an annual income from the billboard totaling \$3,500 and \$200 in honey sales from the subject property for assessment year 2005. (Transcript Pg. 6, 17-18; Trial Exhibit 1).

In 2001, Mr. Schmiege started raising bees on the subject property as a hobby to pollinate vegetables and trees on the subject property. (Transcript Pg. 7). Mr. Schmiege started with 10 hives in 2001 and testified that it “started out as just a hobby, but it works good for anything that you put up, apple trees or any vegetables you plant. They help just to pollinate everything. So we use them that way. And we just keep the honey and some of the wax to make candles.” (Transcript Pg. 7, 11).

From 2001 through 2006, there was a gradual increase in purchasing to arrive at the 34 hives and there were no specific plans to increase in size. (Transcript Pg. 11). Mr. Schmiege testified that any increase of hives depends on how many bee packs remain from the commercial/retail sales to customers each year. (Transcript Pg. 11). Mr. Schmiege also testified that he is not a licensed bee keeper and does not plan to

have enough bees to need said licensure as required by the Department of Agriculture. (Transcript Pg. 14-15).

For assessment year 2005, the subject property was reclassified as commercial based upon the existence of a commercial billboard display and no other visible use. On April 20, 2005, Mr. Schmiege appeared at the City of Harris Board of Review to contest the reclassification. (Transcript Pg. 23). After the Board of Review meeting, Mr. Schmiege invited three of the Assessor's Office employees back to the property. (Transcript Pg. 23, 25). Mr. Schmiege showed the employees the three separate structures including a well house, some bee hives and approximately six spaded tree holes. (Transcript Pg. 25-27, 37-38, 41). The purpose for the site visit was to review and research the amount of agricultural use being conducted on the property. (Transcript Pg. 35).

Prior to the 2005 assessment, the Chisago County Assessor's Office had not made a physical inspection of the subject property since January 9, 2002. (Transcript Pg. 22). At that time, there was no bee hives on the subject property. (Transcript Pg. 22). There was a 20 by 40 building on the subject property which the Assessor's Office included as a structure for tax valuation purposes. (Transcript Pg. 22).

Following a motion by the County to dismiss for violation of the 60 day rule, Mr. Schmiege provided a copy of the billboard lease agreement showing annual income of \$3,500 along with a Schedule C which showed a net loss from the bee keeping commercial venture of \$1,887. (Trial Exhibits 2, 3). When asked about the

income from the billboard, Mr. Schmiege testified, "My accountant swears that it's personal income. It has nothing to do with commercial income." (Transcript Pg. 5).

At the time of the trial of this matter in September 2006, there were 34 hives on the property with an average of 5,000 bees per hive on the 2005 assessment date. (Transcript Pg. 7-8, 10). Mr. Schmiege testified that in the winter of 2005, which included the assessment date, seventy percent (70%) of the bee population was destroyed by a mite virus. (Transcript Pg. 10). Caring for the hives requires a couple of hours every two days with more time spent to when honey is being processed which is done primarily by Mr. Schmiege's business partner. (Transcript Pg. 8).

In 2006, Mr. Schmiege started a new business called Cannon Bee Honey and Supplies, Inc. which will be utilized to sell the honey produced on the subject property as well as honey making supplies. (Transcript Pg. 8-9). When asked by the Court about the purpose and plans for this separate business, Mr. Schmiege replied:

Well, we took it over from a couple of friends from ours that were retiring and getting out of business, so we just – we sell the supplies for all the boxes and the frames and everything you need for bees. And in the spring we sell the bee packages and, hopefully, we get into the farmers market and stuff like that for selling the honey.

(Transcript Pg. 8-9). Business operations for Cannon Bee Honey and Supplies, Inc. are conducted from Mr. Schmiege's business address for Schmiege Washburn Industries, Inc. in Little Canada. (Transcript Pg. 10).

## STANDARD OF REVIEW

The Minnesota Supreme Court reviews Minnesota Tax Court decisions to determine whether the tax court was without jurisdiction, whether the order of the tax court was not justified by the evidence or was not in conformity with the law, or whether the tax court committed any other error of law. Minn. Stat. §271.10, subd. 1.

With respect to the tax court's factual findings, the review by the Minnesota Supreme Court is limited to "determining whether there is reasonable evidence to sustain the findings." *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992) (quoting *Red Owl Stores, Inc. v. Comm'r of Taxation*, 264 Minn. 1, 9-10, 117 N.W.2d 401, 407 (Minn. 1962)). Minnesota Tax Court's conclusions of law are reviewed *de novo*. *Great Lake Gas Transmission L.P. v. Comm'r of Revenue*, 638 N.W.2d 435, 438 (Minn. 2002). The finding of the Minnesota Tax Court can be held to be clearly erroneous if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *In re Estate of Balafas*, 198 N.W.2d 260 (Minn. 1972).

The classification assigned by the assessor is presumed to be valid and the burden is on the petitioner to show that a different classification should be applied to the property. Minn. Stat. §271.06, subd. 6. In the present case, the order of the Minnesota Tax Court was not justified by evidence that the business conducted on the property was principally and primarily for agricultural purposes and that the commercial classification was invalid.

## RELATOR'S ARGUMENT

### I. APPLICATION OF THE PRIMARY USE TEST

#### A. Classification As a Function of Area Used

A court's determination of classification is controlled by the property tax classification statute, Minn. Stat. §273.13. Mr. Schmieg contends that he is entitled to the agricultural classification which includes property of contiguous acreage of ten acres or more used during the preceding year for agricultural purposes. Minn. Stat. §273.13, subd. 23. It is undisputed that land is not entitled to agricultural classification simply because it is rural in character. *Walthall v. County of Wadena*, Minn. Tax Court File 9843, 1985 Minn. Tax LEXIS 107 (March 20, 1985). The Tax Court is required to examine the specific nature of the property and the use or multiple uses to which that property has been put, together with a subjective balancing of those relative uses. *Barron v. Hennepin County*, 488 N.W.2d 290 (Minn. 1992).

*Barron* involved a tract of 20 acres of open land zoned residential and situated in a neighborhood considered to be "upper bracket" in Medina, Minnesota. *Barron*, 488 N.W.2d at 290. Following purchase of the land, a home was constructed which occupied, with its yard space, one acre of the property. *Id.* The year following completion of the home, the owners used the remaining 19 acres to plant grass, oats and alfalfa for sale. *Id.* Over the next three years, the crops generated \$650, \$ 1,150, \$2,850 in income to the landowners. *Barron*, 448 N.W.2d at 290. In the third year of production, the local county assessor determined that, "despite the agricultural use, the primary or principal use of the property was as 'residential homestead' and further

that in comparison of the agricultural use with the residential use, the agricultural use was insignificant for purposes of *Green Acres* qualification. *Id.*

Following an appeal to the Minnesota Tax Court, the Minnesota Supreme Court in *Barron* reversed the decision of the Tax Court and allowed *Green Acres* status. In support of their holding, the Court announced “the ‘primary use’ test incorporated in Minn. Stat. § 273.13, subd. 23(c) implies an examination of the specific nature of the property and the use or multiple uses to which that property has been put, together with a subjective balancing of those relative uses.” *Barron*, 448 N.W.2d at 290. In support of its finding of primary use as non-agricultural, the Supreme Court opined that while 19 out of the 20 acres of the parcel were used for agricultural purposes, the crops provided almost insignificant income when compared with the valuation of the homestead situated on the remaining acre. *Id.*

In the present case, there was no subjective balancing by the Tax Court in regards to the use but rather, merely a summary finding asserting that since Mr. Schmieg used approximately half of the 42 acres for the bee keeping operation and the billboard display involved only a minimal amount of land that the primary use was agricultural. This determination was not supported by the evidence.

There was not a scintilla of evidence that the bee keeping operation encompassed 21 acres. The 34 hives were in very close proximity to each other on the subject property. (Trial Exhs. 6 & 7). Chisago County deputy assessor Gregg Carlson testified regarding his impressions of the scope of operations as follows, “So I

mean it looks like there is nothing going on on the property other than the billboards, and he had the little building there.” (Transcript Pgs. 46-47).

In the case of *Smith v. Morrison County*, Minn. Tax Court File C8-87-392, 1988 Minn. Tax LEXIS 53 (April 13, 1988), a property owner owned 7.97 acres which was improved with a house, two detached garages and a shed used for storage and a honey operation. *Id.* The landowner had been keeping bees on the property for 12 years prior to the appealed assessment year including 30 hives and held a permit from the Minnesota Department of Agriculture to keep bees. *Id.* at 2. In refusing to allow an agricultural classification, the Minnesota Tax Court found *no* support in statute or case law that the bees traveled 4 square miles from their hives and that the bees in the 30 hives therefore covered approximately 2,500 acres. *Id.* at 6-8. Similar to *Smith*, there was no evidence provided in this case as to the area covered by the bees on the subject property. The determination by the Tax Court that 21 acres of the subject property is used for bee keeping was without factual or legal basis.

A determination of classification based solely upon the land area occupied by each use is an invalid measure. The Tax Court allowed an agricultural classification based upon the highway billboard occupying a “very small portion” and “minimal amount of land” yet made no analysis of the land occupied by the bee hives. (Tax Court Memorandum, Pages 6-7). A 10.6 by 36-foot highway billboard that is on a supporting structure and requires a road to access it would undoubtedly occupy as much space as 34 hives, a small shed that is moved around to process honey and a well shack. (Transcript Pgs. 27-28).

There was no reasonable evidence to sustain a finding based solely upon classification as a function of area used. This was error.

B. Classification Based Upon Scope of Operation and Intensity of Use

Agricultural purpose is defined as “the raising or cultivation of agricultural products.” Minn. Stat. §273.13, subd. 23. However, the Minnesota Tax Court has repeatedly held that maintaining several horses, or maintaining a few animals such as a dozen rabbits, a half-dozen sheep, or breeding of several dogs or cats, does not qualify property for agricultural classification. (*McQuarrie v. County of Goodhue*, Minn. Tax Court Files 28003 and 28297 (Feb. 12, 1982) [12 acres of which 6 were wooded and of which 6 were used to raise ducks, chickens and egg production, plus pasturing for 4 horses, does not constitute sufficient agricultural activity]; *Franklin D. Peterson v. County of Goodhue*, Minn. Tax Court Files 27975 and 28318 (Dec. 16, 1981) [25 acres of land of which 5 acres were rented out for crops, the balance being woodland and a home site, was held residential and was not accorded agricultural classification]; *Walthall v. County of Wadena*, Minn. Tax Court File 9843 (March 20, 1985) [32 acres of land of which 15 were timber, 7 swamp, 7 used for raising 50 Canadian geese, and 3 acres used as a home site, was ruled to be residential and did not qualify for agricultural classification]. The Tax Court illuminated this point in *Schneider v. County of Dakota*, Minn. Tax Court File 95660, 1984 Minn. Tax LEXIS 159 (Feb. 9, 1984), when it stated, “If the property is not primarily utilized in an agricultural pursuit, it is not classified as agricultural.”

In the case of *Dutcher v. County of Hennepin*, Minn. Tax Court File No. 12524, 1992 Minn. Tax LEXIS 90 (Aug. 25 1992), a land-developer purchased a 35 acre parcel along Hennepin County Road 15 which had been farmed with alfalfa on 7 acres. Following the purchase, land-owner ceased alfalfa operations and planted seedlings on the 7 acres, resulting in a reclassification of the land to agricultural non-homestead. *Id.* The Minnesota Tax Court reiterated that the “applicable law is clear. To obtain an agricultural classification the land must be used *primarily* for agricultural purposes.” *Id.* at 4. (emphasis added). In *Dutcher*, the Tax Court concurred with the assessor’s determination that the land was being primarily used for real estate development purposes and that “no significant agricultural use” was present. *Id.* at 5.

The Relator submitted an advisory letter by the Minnesota Department of Revenue to the Tax Court as an attachment to its trial memorandum in this matter. (Appendix pg. 9). In that April 4, 2005 letter, State of Minnesota Appraiser Melisa Rediske discussed the classification of 20.4 acres of land used containing 10 bee hives and 2-3 cows as not primarily agricultural in nature.

The Tax Court has made clear that while another use on the land will not necessarily preclude an agricultural classification, the agricultural use must be significant such that a recreational vegetable garden or raising horses for recreational use would not be significant for purposes of agricultural classification. See *McQuarrie, supra.* (see similarly *Loge v. County of Kandiyohi*, Minn. Tax Court C1-86-549, 1987 Minn. Tax LEXIS 75 (July 27, 1987) [portions were used for

agricultural purposes, however that portion devoted to grain processing for purposes of selling seed were commercial operations and should be classified accordingly.])

In this case, Mr. Schmieg compared his parcel with the billboard to those with a primarily agricultural use and not vacant land in support of his position that the billboard should not change his classification. Specifically, he testified, "A lot of farmers have them, and they don't get rezoned because they have them on their farm land. I know farmers that have four of them on their farm and it's agricultural. You have to drive through the corn to get to it and they don't get rezoned for billboards." (Transcript Pg. 5, 37).

In the Minnesota Tax Court case, *Prescott v. County of Beltrami*, Minn. Tax Court File C3-88-0492, 1988 Minn. Tax LEXIS 95 (July 19, 1988), a landowner of 101.25 acres consisting primarily of woodland, waste and a residence appealed a classification of land from agriculture to residential. In determining that a residential classification was correct, the Tax Court opined:

No agricultural crops are apparently grown on the property on a regular basis. Occasionally some hay is cut from some of the meadows and low land. Petitioners do maintain a large garden of approximately 400-500 feet long by 100-150 feet wide. The produce grown in this garden is used for home consumption, and excess produce is sold to neighbors, restaurants and retail stores. Mr. Prescott testified that the proceeds of these sales range from \$1,000 - \$2-3,000.

*Id.* at \*9. The *Prescott* court reiterated that agricultural activity on the parcel must be of sufficient intensity so as to constitute an agricultural operation and that a garden comprising several acres was not the kind of agricultural intensity that warrants agricultural classification.

Despite guidance by the Department of Revenue and other Minnesota Tax Court cases regarding scope of operation and intensity of use, the Tax Court in this case failed to consider the factors of intensity of use and scope of operation. The assessor's classification is presumed to be valid and the petitioner bears the burden to show that a different classification should be applied. Minn. Stat. §271.06, subd. 6; *Schleiff v. County of Freeborn*, 43 N.W.2d 265 (Minn. 1950). In this case, Mr. Schmieg did not show that the scope of operation and intensity of use for agricultural purposes was the principal use of the land and therefore outweighed the use for a commercial billboard.

There was no reasonable evidence regarding the scope of operation and intensity of use to sustain a finding of agricultural classification. This was error.

C. Income from Activities

While Minn. Stat. § 273.13, subd. 23 does not strictly impose an income criteria, the potential income from the property is a factor to be considered in determining whether a significant agricultural activity is occurring. In the case of *Walthall v. County of Wadena*, Minn. Tax Court File 9843, 1985 Minn. Tax LEXIS 107 (March 20, 1985), a landowner challenged a decision to reclassify 32 acres including 7 acres used for raising Canadian Geese. In sustaining the classification by the assessor, the Minnesota Tax Court did not find any significant profit motive which the Tax Court found necessary to determine the use and classification. In this case, Mr. Schmieg's 2005 Schedule C for his honey bee operation did not show any income, only expenses. (Transcript Pgs. 16-18; Trial Exh. 2). This is inconsistent

with the testimony of Mr. Schmieg at trial where he indicated receiving \$200 for honey sales in 2005. (Transcript Pgs. 16-18; Trial Exh. 1). This purported ag income is not reflected on his tax return and no further evidence was produced of any income from this purported agricultural activity before the Tax Court.

In the case of *Swanson v. County of Carver*, Minn. Tax Court Cx-96-452, 1996 Minn. Tax LEXI 68 (Sep. 24, 1996), 40 acres was reclassified from farm homestead to residential homestead. Following the reclassification, the landowner admitted that the agricultural use of the property was minimal and included selling honey from bee hives from time to time but asked the Tax Court to determine how much agricultural use was required to maintain a farm homestead classification. *Id.* at \*4-5. In responding, the Tax Court looked at the definition of agricultural land under the statute and cited to the primary use test set forth in *Barron v. Hennepin County*, 288 N.W.2d 190 (Minn. 1992), stating, “the assessor and this Court, in determining the correct classification of the land, must look to the “use” of the property and determine what use is primary and what use, if any is secondary or incidental.” *Id.* at \*5. The Tax Court went on to analyze that the value of the property derived from the agricultural use versus the any other use is the key consideration. In *Swanson*, the landowners admitted that they have virtually no income from the agricultural use and that they earned their income from non-agricultural activities off the land. *Id.*

The evidence in this case clearly supported a finding that Mr. Schmieg is not principally occupied as a farmer but rather a commercial billboard sign builder and not primarily engaged in agricultural activities the subject property. In fact, Mr.

Schmieg's company, Schmieg Washburn Industries constructed the billboard on the subject property and for many of the farmers along highways in Minnesota. "I build the billboards. I put them up for a living. That's what my company does . . . I build them so I know." (Transcript Pgs. 6, 45). When asked by the Judge about his farming operation, Mr. Schmieg testified, "It's a farm, it's bees... We don't do a lot on the farm other than farm . . . It's not an operation. We just do vegetables, corn, sweet corn. But mostly trees. We've been buying these trees from Chisago County and planting them for the last two or three years." (Transcript Pgs. 3, 12).

In the 2005 Schedule C provided by Mr. Schmieg to Chisago County in June 2006 provided that the business of honey bees for 2005 showed a loss of \$1,887 with no income while at the same time acknowledging income of \$3,500 pursuant to the billboard lease with 3M Media. Mr. Schmieg can be most aptly described as a hobby farmer who simply sought to have his property taxes lowered by seeking agricultural classification through recreational or hobby farming while making his primary income on building billboards through his company Schmieg Washburn Industries.

When the Tax Court was inquiring of the deputy assessor Gregg Carlson regarding when the subject property would be eligible for reclassification as the purported farm operation took over more and more of the property and Mr. Carlson responded, "If he had cattle or crops and he sold any of them to receive income...", at such time, Mr. Schmieg interjected, "We're going to have cattle in Harris . . . If that's what it takes." (Transcript Pgs. 48-49). Mr. Schmieg's actions and statements provided clear evidence to the Tax Court of his intent to circumvent the legislative

intent and public policy behind the agricultural classification for property tax purposes.

There was no reasonable evidence to sustain a finding of agricultural classification based upon the income received and the primary source of income from Mr. Schmieg. This was error.

D. Agricultural Operation Transmutation

Minnesota Statute §273.13, subdivision 23, paragraph (f) states in part that:

If a parcel used for agricultural purposes is also used for commercial or industrial purposes, including but not limited to: (1) wholesale and retail sales; (2) processing of raw agricultural products or other goods; (3) warehousing or storage of processed goods; and (4) office facilities for the support of the activities enumerated in clauses (1), (2), and (3), the assessor shall classify the part of the parcel used for agricultural purposes as class 1b, 2a, or 2b, whichever is appropriate, and the remainder in the class appropriate to its use.

*Id.*

The County submitted an advisory letter by the Minnesota Department of Revenue to the Tax Court as an attachment to its trial memorandum. (Appendix pg. 10). In the April 11, 2005 letter, State of Minnesota Principal Appraiser Stephanie Nyhus discussed the classification of 10.1 acres which included two honey bee hives that are used to cultivate honey for commercial sale. Specifically, Ms. Nyhus made clear that “the production and sale of honey and honey byproducts would be considered to be a commercial use of the property and should be classified as such.” Despite guidance by the Department of Revenue and other Minnesota Tax Court cases regarding agricultural operation transmutation, the Tax Court in this case did not make such a finding.

In this case, the Tax Court failed to examine the specific nature of the property and the use or multiple uses to which that property has been put, together with a subjective balancing of those relative uses. Consistent with the above-cited decisions and the facts of this case, the Tax Court should have found that the subject property did not have sufficient agricultural activity, or agricultural activity of sufficient intensity, to qualify for the agricultural classification under Minnesota Statute §273.13, subdivision 23(c).

Even assuming *arguendo* that the subject property included a minimal amount of truly agricultural activity, the transmutation of that agricultural use to commercial had occurred and ultimately no longer qualified the subject property for agricultural treatment under §273.13, subdivision 23(c). Generally the commercial phase of an agricultural operation begins at the end of the agricultural operation, that is, when the cow is sent to market, when grain has been harvested, and the processing for sale or manufacture into a product commences. The question remains -- What about when the honey is extracted for final sale or when the actual refined honey and other bees wax products are created from the raw honey as Mr. Schmieg has done here? Mr. Schmieg claims to have sold the honey, yet does not claim it as income on his taxes and when asked by the Tax Court about honey sales, he testified, "Right now, we don't have a total amount to sell because it's small." (Transcript Pg. 8).

There was no reasonable evidence regarding the allowable use for agricultural operations based upon the transmutation from agricultural to commercial of the apiary activity to sustain a finding of agricultural classification. This was error.

## II. ACTUAL AND ALLOWABLE LAND USE

While value was not the basis for Mr. Schmieg's appeal, the Tax Court, when it qualified land zoned as commercial and residential as agricultural land under Minnesota Statute §273.13, subdivision 23(c). The highest and best use of a property is "the reasonable probable and legal use of vacant land or an unimproved property is physically possible, legally permissible, appropriately support, financially feasible, and that results in the highest value." THE APPRAISAL OF REAL ESTATE, 305 (12<sup>th</sup> ed. 2001); *SPX Corp. v. County of Steele*, Minn. Tax Court Files C1-00-350, 2003 Minn. Tax LEXIS 31 (July 23, 2003).

In the case of *Hallberg v. County of Chisago*, Minn. Tax Court Files CV-05-343; CV-06-312, 2007 Minn. Tax LEXIS 2 (Jan. 16, 2007), the Minnesota Tax Court was required to consider what the legally and physically permissible use of land to determine highest and best use. The Tax Court relied upon the specific language of the zoning ordinance to determine what a legally permissible use of the property and made clear such analysis was necessary. *Id.* at 8. Ultimately, the Tax Court in *Hallberg* rejected the argument to consider a highest and best use which did not conform to current zoning regulations stating, "A use that does not fall within the guidelines of the zoning ordinances set forth above would not be legal." *Hallberg*,

2007 Minn. Tax LEXIS at 9-10. (See also *Hedberg v. Hennepin*, 232 N.W.2d 743 (Minn. 1975)).

Upon review of an aerial view zoning map the subject property has a distinct North and South half. As is indicated on the map and as testified to at trial, Goose Creek acts as a physical divider of the property breaking the 40+ acre parcel in two parcels of approximately 20 acres. (Trial Exh. 6). Goose Creek also provides a zoning divider for the City of Harris. *Id.* For the assessment year, the South half of the property was zoned General Business and the North half was zoned Residential-R1. (Appendix pg. 8).

During the trial, the testimony from Mr. Schmieg and the assessor's employees Gregg Carlson and Patrick Poshek revolved primarily around the South half of the subject property. (Transcript Pgs. 34, 45). More specifically, the testimony provided clear evidence that Mr. Schmieg was utilizing the South half for a commercial billboard along with secondary use for bee keeping, honey production, tree sales and accessory structures to complete those tasks. Pursuant to the Harris Zoning Ordinance, permitted uses in the South half General Business District include: retail sales and services; and limited industry. (Trial Exh. 5). The County would argue that all of the purported commercial use to which Mr. Schmieg testifies he utilizes the South half of the subject property would be considered permitted uses under the General Business zoning regulations. The testimony would support a finding that the actual and best use to which the South half of the property is as commercial as the actual uses are allowable uses under the General Business zoning class with the

exception of the agricultural pursuit. There is no provision for urban agriculture as there is in the Residential/R1 zoning class.

Pursuant to the Harris Zoning Ordinance, permitted uses in the Northern or Residential/R1 section relevant to the subject property include “urban agriculture.” (Trial Exh. 5). There was not one scintilla of evidence that Mr. Schmieg was utilizing this part of the subject property for agricultural pursuit. In fact, the Tax Court made a specific finding that Mr. Schmieg’s apiary activities utilized only “half of his 42 acres of land” yet granted him agricultural status for the entire 42 acres. (Appendix pg. 7). When asked the Court about the purpose to which Mr. Schmieg puts the subject property, he responded, “It’s more than just vacant land. It’s – I hunt there and stuff. I have my bees there. I grow vegetables and I grow trees . . . that’s all I do up there.” (Transcript Pg. 5).

There was no reasonable evidence regarding the allowable use for agricultural operations based upon the zoning for the subject parcel to sustain a finding of agricultural classification. This was error.

### III. APPORTIONMENT IN CLASSIFICATION

The Minnesota Supreme Court, in the case of *Christian Business Men's Committee v. State*, 228 Minn. 549, 38 N.W.2d 803 (Minn. 1949), held that where a substantial portion of a parcel of property is put to one use, and a substantial portion of that parcel has been put to a different use, the classification will be split between the respective uses. In *Christian Business Men's Comm. of Mpls.*, the Minnesota

Supreme Court adopted the rule that apportionment according to uses was an appropriate analysis for the Tax Court. 38 N.W.2d at 811 (Followed by *1100 Nicollet Mall, LLP v. County of Hennepin*, Minn. Tax Court File 30342, 2005 Minn. Tax. LEXIS 59 (Dec. 28, 2005). The Minnesota Supreme Court has consistently made clear that, “The purpose of the general statutory scheme here is to classify property according to use.” *In re petition of Wolf Lake Camp v. County of Itasca*, 252 N.W.2d 261, 254 (Minn. 1977) (A 1957 Minnesota Attorney General found that splitting a parcel into two classes was appropriate even if the statute required an exclusive use for one of the classes).

In the present case, the South half of the subject property is unequivocally being used primarily for commercial purposes – a highway billboard. Similarly, while the raw honey itself is an agricultural commodity, the extractor used by Mr. Schmiege to create products sold by his business Cannon Bee Honey is a commercial transaction (see discussion I, D. *supra*).

As to the North half of the subject property, Mr. Schmiege testified that he was minimally able to access the North half due to Goose Creek dissecting the property and not having a bridge or road crossing of any significance for general use. This was consistent with the impression of the county assessor’s office.

Minnesota Statute §273.13m subd. 33(b) provides that “real property that is not improved with a structure and for which there is no identifiable current use must be classified according to its highest and best use permitted under the local ordinances.” (See *Lifestyle Homes v. County of Dakota*, Minn. Tax Court File C3-94-7835, 1995

Minn. Tax LEXIS 31 (June 19, 1995)). In this case, the North half is presently zoning Residential/R-1. There was no apportionment afforded to the subject property in the absence of any identifiable use for the North half. If not given commercial classification, the North half should have at least been classified as Residential/R-1.

Despite the lack of any identifiable current use on the North half of the subject property, the Minnesota Tax Court classified land zoned as Residential/R-1 with no identifiable use as agricultural. This was error.

## CONCLUSION

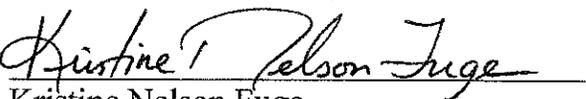
Based upon the foregoing, the facts of this case support a finding that the Chisago County Assessor correctly determined the classification of the subject property when the primary use of the property was commercial with the agricultural use secondary or incidental for assessment year 2005.

In the present case, the order of the tax court was not justified by the evidence and should be reversed.

Respectfully submitted,

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