Case No. A05-0442

STATE OF MINNESOTA

IN SUPREME COURT

KMART Corporation,

Relator,

vs.

County of Stearns,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

Where KMART failed to supply County with any information on expenses of operating and maintaining income producing property, did the Tax Court clearly err in concluding that the amount of these expenses were available to KMART?

I. STATEMENT OF THE CASE AND FACTS

This is a property tax appeal. It is one of approximately 104 property tax appeals filed by KMART corporation for 1999 pay 2000 and 2000 pay 2001 property taxes in various counties in the State of Minnesota.[1] The property owner is Continental Properties, who leases the space to KMART on a net lease basis. Under Minnesota Statutes Section 278.05, Subd. 6(a), KMART had a duty to supply the County with information, including real estate income and expense figures, verified net rentable areas, and anticipated income and expenses, within 60 days after the petition has been filed under this chapter.[2] KMART did not supply the County with any expense information, nor did it supply information about the anticipated income and expenses for the facility. After filing each of its tax petitions in Stearns County, KMART supplied Stearns County only with a portion of the lease between the parties. The lease provides that the tenant shall pay base rent of

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[1] See R. Appendix 1. These petitions are part of a nationwide effort by KMART to reduce its property taxes.

[2] "Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time."

$567,150 per year. (Paragraph 3). This is a net lease, passing taxes, insurance and operating expenses on to the tenant. There is a cooperation clause requiring Continental Properties to "cooperate in the institution and prosecution of any such [tax] proceedings initiated by the Tenant and will execute any documents required therefor." (Paragraph 4).

Under the lease, some expenses are paid by the landlord and reimbursed by KMART. Some of the expenses are paid by KMART directly. None of these expenses, whether paid by KMART or by the landlord were provided. The tenant must pay all real estate taxes. The tenant is responsible to maintain insurance on the facility and name the landlord as an additional named insured at tenant's expense. The landlord agrees to maintain insurance on the common areas, but the tenant is responsible to reimburse the landlord for the insurance premiums. Lease Paragraph 9. (Liability insurance); Lease Paragraph 19 (Casualty Insurance). The lease makes the tenant responsible for repairs and maintenance.[3] In order to facilitate the tenant's responsibility for utilities, the Landlord has agreed to have the common area metered directly into Tenant's meter "and Tenant shall be responsible for the cost of supplying electricity thereto." In addition, the tenant pays "all charges for utility raw materials (gas, water, sewage, telephone, electricity, etc) furnished to the demised premises during the lease term. Lease Paragraph 16. None of these expenses were disclosed as part of KMART's 60-day disclosure. KMART cannot possibly argue that it

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[3] "Tenant shall at its own expense, carry out such repairs, replacements, improvements and maintenance as it deems necessary to keep the demised premises in good order.

didn't know the amount of these expenses, because it either paid them directly or reimbursed the landlord. Indeed, it is impossible to imagine that KMART would not keep track of these expenses, because absent a record and documentation for these expenses, KMART could not deduct them on its state and federal income tax returns.

Since KMART pays many of the expenses of operating the rental facility, clearly it has those expenses ready at hand. KMART's financial records for the facility contain separate entries for these facility operating expenses It provided operating expenses for the real estate of the subject property. On page two through three of the report entitled "STORE EXPENSE ANALYSIS" for the 2004 petition, the report subcategories "Occupancy Maintenance" with line items for: filters and cleaning, painting, heating & air conditioning maintenance, general maintenance and repair, environmental cleanup, real estate taxes, building and permanent improvements. Further down, "Occupancy Expenses" are listed with line items for gas, electric, water, telephone, garbage and waste removal and sewer charges. Other expenses, reserves and property owner expenses, if absorbed by the landlord, were likewise readily available to the tenant under the cooperation clause described above. This is the very information that KMART now contends it couldn't disclose, because it was "unavailable."

In 2000, KMART filed the first of 52 Property Tax cases for properties throughout Minnesota. This was part of a wholesale nationwide effort by KMART to challenge property taxes. When the 60-day time period had expired, the Stearns County Assessor had no idea what the total rental obligation was, nor did it know anything about the facility operating expenses.[4] KMART contends that the best and most complete documentation of this information was in the hands of Continental Properties, but KMART never proved that it had attempted to trigger the cooperation clause to obtain that information. No information from Continental Properties was provided.

With 52 KMART cases pending, the Tax Court began to work its way through the various KMART cases one at a time. A significant number of KMART cases were delayed, and some are pending to this day. Another 52 cases were added in the following year. Stearns County filed a motion to dismiss for failure to comply with 60 day rule in this case but that motion was held in abeyance, while the parties made an effort to engage in settlement talks. Our motion was accompanied by detailed expert testimony (discussed below) explaining why the information we sought was customarily reviewed at the earliest stages by an assessor or appraiser in attempting to determine the value of rental property. Before the motion could be heard, KMART filed several more petitions on the same property and filed a Chapter XI bankruptcy proceedings. Once the automatic stay was lifted, we renewed our motion. The court granted that motion and their certiorari review followed.

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[4] It is common in real estate cases for the taxpayer to contend that the real estate should be downgraded in value, because there are extraordinary maintenance and repairs coming due. Thus, merely providing information about the historical expenses does not provide the required information. Here, of course, KMART didn't provide historical information or any anticipated expense information.

II. SUMMARY OF THE ARGUMENT

We moved to dismiss on the grounds that failure to comply with section 278.05 mandates dismissal. KMART argued that this information was "unavailable." Thus, this case centers around KMART's contention that it lacked any information about the operating expenses of the facility. In response to KMART's contention that this information was "unavailable" to KMART, we showed the following. (1) KMART itself paid many of the expenses in question. Under provisions of the lease, KMART was obligated to pay, in addition to its base rent, maintenance expenses, common area costs, property taxes, liability and casualty insurance, and so on. Thus, KMART clearly had this information in its own financial data, because it was actually paying for these expenses. (2) With respect to information that might be in possession of the property owner, the landlord, KMART had an airtight cooperation clause which required the property owner to supply documentary information and perform other acts necessary to perfect and maintain a challenge to property taxes. (3) KMART did not show that it had asked for such information from Continental Properties or that it could not have been obtained.[5] (4) That the expense information that we sought was maintained in the ordinary course on the monthly and annual

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[5] The fact that Continental Properties had an obligation to provide information is not essential to the Tax Court's decision, because KMART failed to provide information that KMART had in its own business records. We make this point, only because KMART asserts that the landlord's information would have provided more complete information. We simply make the point that information in the hands of the Landlord on expenses and rent is not unavailable when the lease obligates the Landlord to provide that information on request by the tenant.

financial statements of petitioner. (5) The information which KMART refused to supply was plainly relevant to evaluation of the facility.

Based on this record, the Tax Court found, as a factual matter, that KMART had failed to provide the required data, and that the data was plainly available to petitioner. That conclusion was not clearly erroneous, in fact it was compelled by the evidence. KMART failed to provide information, including "income and expense figures....and anticipated income and expenses, for income-producing property."

KMART complicates what should be a very simple matter by claiming that the information was not available, because KMART only keeps financial records relating to the operation of its retail business. It wrongly seeks to infer that the information which it failed to supply was available only in the landlord's books and records, because the landlord keeps the records of the expenses and income of the rental property. But KMART fails directly to acknowledge that may of the expenses that it failed to provide were actually expenses of the retail business, because the lease obligates KMART to pay those expenses as rent to the landlord. And, even if KMART did not keep records of those expenses (which of course it did), nonetheless under the lease, KMART had the right to require to landlord to supply the landlord's financial information as part of the tax appeal, under a cooperation clause.

KMART also admits that there are other expenses and expenses which would have provided a more complete and accurate rendition of what the statute calls for. But the Court did not penalize KMART for failing to provide that information, even though the cooperation clause clearly requires the landlord to provide this information on request. Since KMART failed to provide its own information, the failure to use the cooperation clause to trigger the best information available is not central to this case but would provide an independent ground for affirmance.

As discussed below, the purpose of the 60-day rule was to force an earlier review of the merits by a County assessor, and to avoid the prolonged delay and backlog of cases which sometimes occurs in Tax Court. Assessors reported to the legislature that they could not examine the merits of a taxpayer challenge until they had income and expense information for income producing property. By getting this information at once, assessors would be able to decide whether to compromise early on, and Counties could more reliably predict their revenues and save litigation costs.

KMART has proposed a series of exceptions and evasions for the income and expense disclosure requirements that would essentially eviscerate the plain meaning of the statute. First, KMART seems to take the position that no expense and information in the hands of the landlord need be produced, even if the landlord is obligated to cooperate with the tax proceedings as here. If the landlord pays the expenses, then, under KMART's first rule, they need never be produced. Second, KMART (wrongly) takes the position that expenses paid by the tenant are never relevant to valuation, so if the tenant pays the expenses, then they need not be produced either. Third, KMART argues that only the base rent need be produced, even though in net leases a significant portion of the tenant's economic obligation arises from payment of expenses. Taken together, KMART's position seems to be that, even though the statute plainly requires production of expenses, in fact, when the tenant files the property tax petition, expenses need never be produced. KMART really is attempting to repeal the statute by evisceration.[6]

III. STANDARD OF REVIEW

Unlike other recent cases, KMART cannot squarely contend that the information which it failed to present is not legally required if available. Compare KMART v. County of Becker, 639 N.W.2d 856 (Minn. 2002) (legal disputes considered de novo–statute not satisfied when the taxpayer merely provides a lease and lease summary stating the amount of minimum rent required, where contingent clauses in the lease make the amount of actual rent unclear, and the taxpayer does not disclose how much rent in fact was paid); KMART v. County of Douglas, 639 N.W.2d 863 (Minn. 2002) (we continue to strictly enforce the 60-Day Rule in order to advance the legislative purpose of an adequate, speedy and simple remedy). One must surely concede that the information it failed to provide is directly and centrally related to valuation. KMART rather contends that this Court should declare the information "unavailable" because it might better have been obtained from the landlord than the tenant. The Tax Court's determination that the information was available, is plainly factual. Moreover, to the extent that KMART contends that for this particular facility, expenses are not relevant to a determination of value, that contention too would be factual and subject to limited review. If KMART is really contending that, as a matter of law, that

[6] We note that the leading opponent of the 60-day rule, and principal witness against passage was KMART's attorney.

expenses need never be provided for net leases, then that legal contention, of course, would be considered by the court de novo.

The Supreme Court's review of Tax Court decisions is limited to determining whether Tax Court lacked jurisdiction, whether Tax Court's decision was supported by evidence or in conformity with law, or whether Tax Court committed error of law. Minn. Stat. § 271.10, Subdivision 1. The standard requires this Court to uphold Tax Court decision if sufficient evidence exists for Tax Court to reasonably reach conclusion it did. Community Memorial Home v. County of Douglas, 573 N.W.2d 83 (Minn. 1997). KMART's contention that expense information was unavailable is essential a factual contention subject to the strictest standard of review.

IV. ARGUMENT

A. The Tax Court Properly Rejected KMART's Claim that Facility Expense Information Was Not Available.

KMART fundamentally mischaracterizes the nature of the expense data which was not provided by suggesting that what it failed to provide was a profit and loss statement for the retail business: cost of goods sold, personnel expenses, gross receipts and the like. Nobody contends that KMART had the obligation to provide its business expenses in general. Payroll expenses, cost of goods sold, and other such business expenses are not part of rent, and have nothing to do with the cost of operating the building. We never suggested that KMART had an obligation to provide this information. What was missing in this case was a major part of the rent and all of the operating expenses of the facility. The missing information included CAM (common area costs), casualty and liability insurance for the facility itself, routine maintenance costs, and projected maintenance costs, utilities and other expenses that are a central part of the lease obligation. When paid by the tenant, these items are both revenues to the landlord, and expenses of the facility itself. The rent is base plus payment of expenses. Thus, payment of these expenses is part of the rental obligation, and providing that information is required in order to provide full information on what the rent actually is. They are expenses also, because they are the expenses of operating the facility.

Now KMART argues that this information was not available because "KMART did not maintain expenses for operation of the real estate, but only for operation of the retail business." This argument glosses over the fact that the expenses of operation of the real estate are found as line items of the expenses of operating the business. The business pays CAM; the business pays maintenance, the business pays the cost of insuring the building. Calling these expenses "only for the operation of the retail business," masks the fact that the expenses of operating the real estate <u>are</u> in fact expenses of the retail business, and they are part of the rent, because the lease obligates the retail business to pay them. KMART fails directly to concede, what must be obvious from the facts. It had these expenses listed in its revenue and expense statements for the business. It is essentially claiming that it didn't have to provide them because they weren't listed on a document with the words "Expenses for Operation of the Real Estate" on top. These expenses are income-tax deductible expenses. Without a record of paying these expenses, KMART could not prepare its federal and state tax returns. Without keeping track of the amount of these expenses, KMART could not audit its own operations, nor could it even determine the amount of CAM and insurance that its landlord was billing. How, indeed, did KMART determine how much to reimburse the landlord for CAM and insurance, for example, if it kept no record of the amount for which it had been billed?

KMART would prefer that the required information might have come from the property owner, Continental Properties. If it is true that Continental Properties had more information, more concisely presented, KMART might easily have exercised the cooperation clause and required Continental Properties to have produced its expense and income information. Had Continental Properties failed to provide that information, that would have constituted a breach of the cooperation clause exposing Continental Properties to an action for damages. But that issue is not presented, because the Tax Court dismissed for failure to produce information plainly in KMART's possession. The fact that the Landlord's books and records were available, however, provides an independent ground for affirmance.

KMART argued that it should be excused from supplying expense information because some of the expenses were "blurred" with non-rental expenses. Assuming for the sake of argument that a blurred expense argument might ever have merit, KMART's argument is not squarely presented to the Court by this case, for the Court did not dismiss because KMART presented blurred information. And KMART made no attempt to supply its expense information which was not "blurred" in the way that KMART contends.

KMART cannot escape the fact that some of the of the expenses which it was obligated to pay under the lease were unblurrable distinct obligations to the landlord, or on behalf of the landlord. For example, CAM, common area expenses, are obligations that are routinely billed by landlords to tenants and paid separately as additions to rent.

This Court has consistently held that the 60 Day Rule requires strict compliance. In BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn.1997) this Court stated "we find that the statute clearly requires the petitioner to provide all information to which the petitioner has access, even if that information might not allow the County assessor to reach a final conclusion regarding the property's value." Id. at 705. The Court held there that there is no exception in the 60 Day Rule for a situation where financial information that is required under the 60 Day Rule is inextricably intermixed with data that is not required. The petitioner is obligated to provide the county with the information it has, however mixed. This Court again affirmed the strict enforcement of the 60 Day Rule in Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002) stating:

> Strict enforcement of the 60-Day Rule, which mandates dismissal of a petition challenging a county assessor's valuation of income-producing real property if the taxpayer does not provide the assessor, within 60 days after the filing of the petition, with income and expense information regarding the property, advances the legislative purpose of providing an adequate, speedy, and simple remedy for a taxpayer who claims that real estate has been unfairly assessed.

B. The Amount Tenant Paid Expenses are Plainly Relevant to Valuation of Rental Property.

KMART says that it doesn't matter how much total rent the tenant pays; only the base rent matters according to KMART. For this reason, KMART argued in the Tax Court, the appraiser or assessor doesn't need to know whether the rent includes expenses, or doesn't include expenses, or how much those expenses are. KMART relies upon the 2004 decision of Judge Sandberg's in KMART Corporation v. Anoka County, 2004 WL 612777 which KMART argues establishes for all cases and all properties the proposition that tenant paid expenses are irrelevant to valuation of income producing property.[7] Now this remarkable proposition-- that you use the rent paid by a tenant to value a building without knowing the rent is triple net[8], or gross rent, and without knowing total rent, would eviscerate the statutory requirement. Whatever the record may have been in the Anoka case, the record before the Tax Court in this case establishes beyond any doubt that tenant

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[7] At the outset, we note that this KMART decision, nor any other decision arising out of the 52 simultaneously filed KMART tax appeals could possibly have caused KMART to believe that it could evade the plain language of the statute. Although the decision in this case was delayed, it arises out of the same complex of simultaneously filed cases.

[8] A triple-net lease in which the lessee pays rent to the lessor, as well as all taxes, insurance, and maintenance expenses that arise from the use of the property. It is a commercial real estate lease in which the tenant regularly pays not only for the space (as he does with a gross lease) but for a portion of the landlord's operating costs as well. In addition to the fact that the tenant absorbs all expenses on top of the base rent, because these costs are variable and almost never decrease, a net lease is regarded as favoring the landlord, because the owner/landlord, however, has to pay those expenses attributable to vacant space where there is no tenant. Prairieview Jack Ltd. Partnership v. County of Hennepin, 1990 WL 108058 (Minn.Tax1990) The idea that a building with a net lease is the same in the marketplace as a building with a gross lease is patently absurd. Cf MICO, Inc. v. County of Nicollet, 1990 WL 143283 (Minn.Tax 1990); Sam Miller Bag Co. v. County of Hennepin, 1993 WL 13142 (Minn. Tax Ct); Fingerhut Corp. v. County of Kanabec, 1992 WL 154087 (Minn.Tax Ct.); U.S. ex rel. Goodstein v. McLaren Regional Medical Center, 202 F.Supp.2d 671 (E.D.Mich.,2002). It is unthinkable that one would attempt to use rent to determine value unless one knew as well the amount of expenses absorbed by the tenant.

paid expenses are plainly relevant to valuation of this facility and of virtually all commercial income producing properties.

We provided extensive unrebutted testimony establishing that the amount of tenant paid real estate expenses must be considered by an assessor or appraiser in the evaluation process. Before we go into detail, it might be helpful to reduce this issue to simple essentials. When KMART rented the facility in Waite Park, Stearns County, it agreed to pay one-half million dollars in base rent per year. Assume for the sake of argument that the additional tenant paid expenses were $200,000. Now the contract rent for that facility is obviously different, depending upon whether KMART was agreeing to pay one-half million dollars for that building plus $200,000 in additional rent, or whether it was getting that same facility for one-half million dollars with the landlord paying the $200,000. In the first case, the landlord is netting $300,000 after paying expenses; in the second, the landlord is netting $500,000, because the tenant pays the expenses from the tenant's perspective. To say that the amount of tenant paid expenses is irrelevant to valuation is to assert that $700,000 in rental costs is exactly the same as $500,000 in rental costs. If a tenant is willing to pay $500,000 for the KMART building, that suggests that the building is worth way less than if the tenant is willing to pay $700,000 for that same building. When the tenant sits down to rent the building, and the landlord says, the base rent is $500,000 it's a safe bet that the next thing that the tenant is going to say is, well how much are the tenant-paid expenses? Moreover, a triple-net lease contains its own automatic escalator clause, because tenant paid expenses typically increase over the course of the lease. In a gross lease, the rent paid is constant throughout the course of the lease, despite the course of inflation. In a triple-net lease, the tenant carries most of the risk of inflationary pressures. And the amount of that risk carried by the tenant can only be determined by knowing how much of the total rent is devoted to costs that automatically increase.

In the record, an appraiser explains this in a more complex, appraisal-science based way. As Mr. Dahlen explained, at the beginning of the appraisal process, an appraiser (or assessor) collects basic information needed to guide further analysis. See, e.g., *IAAO Property Appraisal and Assessment Administration*, Chapter 11. In this context, he explained, the assessor needs information about both income and expenses. The basics of that early process are explained, he testified, in a number of fundamental treatises. See *IAAO Property Appraisal and Assessment Administration*, Chapter 11. "As that treatise points out, appraisers analyze income and expenses to calibrate the income model. "We try to estimate potential gross rent, the rent that would be collected if the property were fully occupied at market rent, of course. Our ultimate result is not driven in the final analysis by actual gross income, because we are actually trying to determine potential gross income. In estimating potential gross income, the appraiser distinguishes between market rent (sometimes called economic rent) and contract rent. Market rent is the <u>rate prevailing in the market</u> for comparable properties and is used in calculating market value by the income approach. Contract rent is the <u>actual amount agreed to by the landlord</u> and tenant."

Appraisers look at contract rent, Dahlen explained because it gives the appraiser information about the market. Contract rents are analyzed to determine (1) if the lease amount is typical for the type of property and (2) if the lease agreement provides for any consideration other than the lease of the subject property. Contract rents are compared with market rents for comparable properties. The treatise Property Assessment and Administration puts it this way, he explained: "Contracts are examined just as sales data are in the sales comparison approach. The appraiser verifies that the contract is bona fide, that the parties to the contract are unrelated and that there were no undue influences on either party."

But contract rent is simply one piece of the appraiser's puzzle. "The function of the appraiser, however, is to appraise the property, not the contract," Dahlen continued. "We aren't appraising the lease, we are appraising the property. We look at contract rent, because it is part of the information that we need to understand a transaction which occurred in connection with that property. But when we consider contract rent, we do not consider it in isolation. We look at contract rent in the context of the other information which helps us understand the landlord-tenant transaction:

> "We are trying to understand the lease in the context of the entire transaction, as I have said. The contract rent may have been established in earlier lease negotiations that no longer reflect current lease levels. The rent may have been set lower than prevailing market rates to allow the lessee to provide site improvements or as part of the financing for a future purchase by the lessee. We want to know the entire background of the transaction.

In this context, the appraiser wants to know about operating expenses no matter what the form of the lease, Dahlen testified. "Under the lease contract, these expenses may be allocated to owner, to tenant, or apportioned in some respect between them. But no matter to whom they are allocated, we want to know what they are so that we can understand the dynamics of the lease transaction we are studying. The list of potential operating expenses for real estate includes common area maintenance (cam), administration, repairs and maintenance, utilities, insurance, property taxes and replacement reserves. The appraiser compares expenses reported for the subject property to expense information for comparable properties. We cannot make this comparison if we don't have the information."

The requirement that the taxpayer provides expense information "logically flows from our need to understand the economics of the property and the lease transaction affecting that property. This information is critical at the beginning of the appraisal process not solely because the expenses might be allocated to the owner. We need them no matter where they have been allocated. How we use that information, of course, depends on the terms of the lease, on the market and the particulars of the property. But we want this information, if available, in all circumstances." Dahlen Affidavit, App. 62.

"The assessor or appraiser compares the expense information to expense information for comparable properties, as stated above. "The information about comparables may be obtained from reports published by trade organizations and from fee appraisers, property managers, assessment jurisdictions and other professionals.....The appraiser analyzes the external environment and underlying economic conditions to estimate expenses for a property type as of the appraisal date and judges whether any expense items are likely to change substantially in the near future. The historical costs of operations of the subject are examined to determine if reporting practices have been consistent throughout the period..." Dahlen's central point, however, is that expense information is needed by the appraiser, however it is allocated, whether to the landlord or to the tenant. "The allocation of these expenses within the lease tells us about the contract rent, but we are ultimately looking at market rent. And the market rent is going to be strongly influenced by the actual operating expenses, because market rent is the sum of expenses and rent paid triple net." Dahlen affidavit. When the taxpayer says you don't need to know the operating expenses because I pay them, the taxpayer is ignoring the fact that the job of the appraiser is to analyze the contract rent and expenses and try to understand them in light of market rent.

> When you look at the lease transaction to determine what contract rent tells you about market rent, you are examining the transaction from both the landlord and the tenant's perspective, then, just as when you look at a sales transaction, you must examine both the buyer and the seller's perspective. The appraiser wants to know what the landlord gets. But the appraiser wants to know also the total costs to the tenant. The costs to the tenant are the sum of the operating expenses (taxes, insurance, utilities, tenant roof repair, painting, shovelling, and so on), and the net rent paid. If a building has very high operating expenses, then a contract rent of $5.00 per square foot for the building has a different meaning from the same contract rent with very low operating expenses.

Dahlen continued to explain that providing this information is necessary for an appraiser to do his job, whether considering a net lease or a gross lease:

> Suppose for example the subject property in this case has a lower net rent to a nearby property. The Taxpayer may argue that the reason for the lower net rent is that the subject property is locationally inferior to the comparable. In order to understand the two properties, and make a judgment, we need to know more about these two facilities. We need information to make sure

> that the leases are arms length transactions. We need information to help us understand whether the two properties have comparable expenses, and whether any differences are attributable to differences in the building, to differences in the allocation of common area expenses, to management and administration, or to other factors. While I cannot read the minds of legislators, from an appraiser's perspective requiring this expense information makes a tremendous amount of sense. It provided the basis that we need to have to launch our more comprehensive review, if that is necessary. There is no basis in appraisal science for contending that the appraiser should not have this information simply because the lease allocates expenses to the tenant. We use the information differently, depending on the nature of the lease, but we still need the information. Dahlen Affidavit, App. 62.

There is another reason, more simple and direct, why information about the cost of building maintenance past, current and projected is important to the assessor and appraiser's task. A building that has high maintenance costs is not as valuable as a building that has low maintenance costs. High expenses may result from an HVAC that is out of repair, it may reflect poor insulation, it may reflect poor ventilation, or a flat roof in a poor state of repair. Inevitably, when these cases go to trial, the taxpayer is using these expenses as proof that the facility is worth less than other similar facilities. Even if absorbed by the tenant during the term of the lease, they will ultimately impact the landlord's interest in the building returns to the landlord's possession whether via termination at the end of the term, or through repossession upon non-payment, or as has occurred in the case of many KMART leases, through rejection of the lease by the trustee in bankruptcy. Past expenses are important, because the tell us about the cost of operating the facility. Future anticipated expenses, are important, because they tell us whether there are certain out of the ordinary expenses falling due which impacts facility value. The suggestion that operating expenses have nothing to do with value was properly rejected by the Tax Court.

The Tax Court had ample evidence before upon which to conclude that expense information is necessary to the appraisal process. Dahlen's explanation squares with the statutory language itself. Let's go back to Section 278.05, Subdivision 6 itself. The statute says:

> Information, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor within 60 days after the petition has been filed under this chapter. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless the failure to provide it was due to the unavailability of the evidence at that time.

The statute provides that "information, including income and expense figures...and anticipated income and expenses for income-producing property must be provided..." But petitioner apparently contends that this statute means "information, including income and expense figures...and anticipated income and expenses for income-producing property must be provided, ***except for net leases.***" Since net leases are extremely common, if not more common than gross leases, the legislature's use of the broad term "income-producing property" without including restrictive language is powerful, indeed conclusive, evidence that the legislature did not intend to so restrict the disclosure requirement.

The KMART cases still pending before the Tax Court provide stark illustration of the evil that the disclosure rule was designed to remedy. Here we have 52 KMART tax cases pending, clogging up the court system. Actually, we have 52 KMART cases times the number of additional petitions added on during the process of delay. Because the Tax Court could not get to all of these cases, the Court worked through them County by County, one at a time. Other cases were continued, and petitions from one year and then another were added on to each tax court case for the backlogged counties. As the backlog mounted, individual counties had no idea how much property tax revenues might ultimately be returned, making budgeting extraordinarily difficult. Under KMART's view of the law, it could comply with the expense and information statute simply by providing the base rent for net leased commercial facilities, and the backlogged counties would be forced to wait their turn to obtain full financial information. For without that expense information, the expense information that the legislature required to be provided, the assessor simply cannot even begin the informal process of discussion that the legislature intended would proceed. And without that information, even a preliminary estimate of value, upon which to engage in settlement would be impossible. Expense and total rent income, as Dahlen explained, is critical to the preliminary estimate of value. This circumstance describes exactly the evil which the 60-day rule was designed to address:

Before the Senate, one assessor testified as follows:

> Uh in dealing with these in calendar year 1993 Hennepin County adjusted and refunded a little over $108,000,000.00 tax dollars due to that and as assessors and a committee we have gotten together to look at this and the remedy to this as we see it is to try to speed up the time line um with dealing with Tax Court Petitions. Under the current system and if we use 1993 assessment as kind of a base year assessment to give you an example. Of course the assessor sets the estimated market value in January 2 of 1993, value notices are mailed to the tax payers in the spring of 1993, there is local Boards and Review and County Boards and Review that are held. In

> November of 1993 tax payers would receive a Truth in Taxation Notice it would put a proposed tax together with that valuation. Again under the current system they would have till the following May 15th or May 15th of 1994, to file their Petition. Once that is filed then the process starts with the Tax Court to schedule that for a Tax Court hearing. Presently that would probably occur in the following year or in the spring or summer of 1995. In the current law, an income producing property the tax payer would be required to provide the Assessor with income and expense data 45 days prior to that trial date. In many cases if we have continuances of trials then of course that 45 days would start over again. <u>So basically for the 1993 assessment we are ending up getting income and expense data or the most important data for the case well into 1995.</u> So we are already talking about a correction of the 1993 assessment, the 1994 assessment and the 1995 assessment so we end up with multi-year settlements in many cases. Testimony of Tom May, Assistant County Attorney, Senate File 2613 Legislative Hearing, App. 104-105.

The purpose of this law was to provide assessors with income and expense data immediately. They wouldn't have to wait for assignment of a County Attorney, or in many counties the retention of outside counsel; they wouldn't have to wait for the County Attorney to set aside other more pressing business, to commence discovery, they would get the income and expense data they required right away, so that they could make an attempt to decide whether to contest or settle. There is absolutely no suggestion in the legislative history that expense data wasn't important. It was mentioned, equally, with income data as being critical to the 60 day rule:

> So the <u>income and expense data is very critical to establishing the value of a property.</u> The Assessor's job is to value all real estate all taxable real estate at what its market value is and what it is worth and that hasn't changed any. It is important for us to be able to value property accurately by using the pertinent information and <u>income and expense data is a very intrical part of that picture</u>. ...this income and expense data which we all recognize as being instrumental in determining whether the property value is correct this data would have to be supplied to the assessor in a much more timely fashion

within 60 days after the filing of the Testimony of Stephen Kuak, Cass County Assessor, Id., App. 105 - 106.

Lawyers who are used to collecting information through discovery tend to underestimate the importance of the 60-day rule. We tend to assume that the information is ultimately coming via discovery in any event, so what's the big deal? But the legislature was attempting to address a significant problem in the administration of the property tax system that derives from relatively high transactional costs associated with litigating real estate taxes and the adverse consequences inflicted on the County budgetary process when cases are not resolved as soon as possible. There are several elements of the problem that the legislature sought to address. The first is that it is relatively inexpensive for a taxpayer to initiate a property tax litigation. The cases are commonly initiated on a contingency basis with generic pleadings.[9] The disclosure rule forces the taxpayer early on to examine the merits of its own case. Moreover, by encouraging early collection of this data, the 60 rule indirectly encourages the taxpayer to bring that information forward in the adjustment process which provides for relief in advance even of Tax Court proceedings.

In smaller and out state counties the initiation of a commercial property tax

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[9] Technically, under Rule 11, the lawyer should be requiring his client to demonstrate prior to initiating the case that there is actually a good faith basis for the claim. Thus, for income producing property, due diligence would seem to require that expense and income information would have already been assembled before commencing a property tax appeal for income producing property. How, after all, does the taxpayer come to the conclusion that his property has been overvalued, if the taxpayer doesn't even have this information available when the taxpayer makes the decision to appeal.

litigation can also be the occasion for seeking outside counsel and outside specialized expert appraisal assistance. For many of these counties, especially tax poor counties, a single appeal can create a cloud over a significant portion of the County property tax budget and the cost of hiring outside expert assistance, legal and appraiser, can also be a significant financial undertaking. For those Counties who choose to litigate using an in-house assistant county attorney, one of these cases can represent the one and only major commercial property tax litigations in the career of the assistant county attorney, and the assessor may need to compete with pressing other civil matters for county attorney attention. In smaller counties, merely getting county attorney assistance, against the press of other business, and assembling discovery requests appropriate to the particular facility involved, may be a major undertaking. Then too, there is the concern that the County will be forced to pay ten or twenty thousand dollars or more in expert fees, to its own witness or through taxation of costs. The 60-day rule is designed to address these problems by requiring immediate disclosure of expense and income information, so that the assessor can review as soon as possible, and as cost effectively as possible, whether to negotiate and settle, or whether to engage in full throttle litigation.

C. The Tax Court Properly Rejected Other Miscellaneous Arguments.

At page 5, petitioner argues that the statute is unclear, but it is not. In fact, this court has recognized already that the income and expense requirement is crystal clear:

> "When interpreting statutes, Minnesota law requires us to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (1996). In doing so, we must first look to a statute's text, and only if we find those

words to be ambiguous, are we to look into other matters to determine such intention. *Id.* If we find the words of the statute to be "free from all ambiguity," the legislature has directed us to not disregard "the letter of the law. . . under the pretext of pursuing the spirit." *Id.*" BFW at 705.

Indeed, it is KMART that is almost single-handedly leading a legal charge designed to make what is patently a clear statute arcane and unclear. By devising a series of clever exemptions, KMART threatens to take a simple requirement: produce facility related income and expenses into a complex web of ambiguous rules that only a specialist lawyer could understand. It is understandable that, presented with the consequences of a dismissal rule, an individual Tax Court judge might occasionally be inclined to show some mercy by carving out a unique exception applicable to the particular case at hand, but going down that road ultimately will discourage compliance by undermining the disclosure requirement itself.

The term income and expense is not ambiguous. Respondent argues that the failure to explain the meaning of these terms in the legislative history is proof that the terms cannot be defined. On the contrary, the fact that parties appearing before the Senate and House, taxpayers and assessors, did not ask for further clarification is itself proof that everyone recognized that the terms had plain meanings. Counsel for KMART himself appeared before the House and Senate and gave detailed testimony: had he believed these terms to be ambiguous, surely he would have articulated that fear at the time. Indeed, the testimony of Mr. Wilhelmy before House and Senate focused on his concern that unsophisticated taxpayers might be unaware of the requirement at all: but he conceded that those taxpayers familiar with tax law, such as KMART, would have no trouble complying. MN House Tax Committee Hearing: 3/25/94 PM, R. App. 4. The decision of the tax court does not purport to broaden the statutory definition of expenses. KMART is not being dismissed because it failed to produce an expense item that would shock the ordinary taxpayer as being irrelevant. KMART failed to produce such routine expense items as CAM, building maintenance, and property insurance, and KMART failed to disclose these items whether they were tenant paid obligations or landlord paid obligations.[10]

Petitioner cites Menards, Inc. v. County of Sherburne for the proposition that "revenue generated through the sale of goods, unlike rental of the property was not the kind of income contemplated by the [60 Day Rule]." Petitioner's Brief at 15. The Tax Court never held, nor did we ever argue, that revenue generated through the sale of goods, constituted income that must be disclosed. Moreover, the real holding of this case was that owner occupied property that produces no rental income was not income producing within the meaning of Minn. Stat. § 278.05, Subd. 6.

Petitioner cites Minnesota Timberwolves Ltd. Partnership v. County of Hennepin for the proposition that income and expense of the business operation were not required to overcome a 60 Day Rule motion. Petitioner's Brief at 15. The Minnesota Timberwolves

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[10] Petitioner cites commissioner of revenue cases stating that ambiguity should be resolved in favor of taxpayer. Petitioner Brief at 39-40. This misstates what has long been the law as to property tax appeals where the petitioner bears the burden of proving that an assessment is excessive. In re Objections and Defenses to Real Property Taxes for 1970 Assessment, 306 Minn. 184, 186, 235 N.W.2d 390, 392 (1975). The petitioner also bears the burden of providing evidence that refutes the original valuation. BFW at 705.

case involved a motion to compel discovery. The County wanted information about receipts collected from events held at the Target Center and the Court denied that motion, because the profit and loss information of the event business was not related to the value of the facility. In denying the motion to compel, the Court held "Petitioner has actual and complete expense and income information relating to the Target Center for an appraiser to complete the income capitalization approach. For example, Petitioner has information on (i) the amount Ogden has spent to maintain and repair the Target Center and (ii) income generated from leasing the Target Center including parking garage revenue." Minnesota Timberwolves Ltd. Partnership v. County of Hennepin, 1999 WL 236600, *2 (Minn.Tax) (Minn.Tax,1999) (emphasis added). Once again, KMART confounds the distinction between income and receipts of the business conducted in the facility on the one hand and lease rentals and property related expenses on the other.

KMART contends that the Tax Court broke new ground and required taxpayers to disclose information of marginal relevance at the risk of dismissal. KMART fails to recognize that the cases it cites derive from the 104 parallel KMART cases filed together and heard and decided in no particular order. See R. Appendix 1. The Tax Court decision in one of these cases is no more precedential than the Tax Court decision in another, because they all involve the same tax years.

We put to one side the fact that KMART's reading of these cases is far broader than the Tax Court itself believes them to be. We are hard put to assign a meaning to those cases broader than the Tax Court assigns to those very cases. We cannot improve upon the

Tax Court's own explanation of the holdings of these cases: the Tax Court did not believe that it was implementing radical new principles. Largely, we think this confusion derives from KMART's own confusion between cases which hold that expenses associated with operating a business are not required to be produced, but expenses associated with maintaining the facility are required to be produced. The mere fact that facility operating expenses may be a small part of business expenses, does not thereby mean that they need not be produced.

However, we are not bashful in suggesting that if any of these KMART cases can be read to hold that expenses need not be produced simply because they are paid by the tenant, then those cases are flat out dead wrong. They would then be contrary to common sense; they would be contrary to the plain language of the statute; they would be contrary to the unrebutted evidence presented in this case which demonstrates that regardless of who pays expenses, that information is critically important to evaluation.

V. THE CHEVRON DECISION HAS ABSOLUTELY NOTHING TO DO WITH APPLICATION OF A DECISION TO THE PARTIES BEFORE THE COURT WHEN A DECISION IS MADE: IT DEALS WITH APPLICATION OF THAT DECISION TO PARTIES IN OTHER CASES.

We now launch into a discussion of KMART's retroactivity argument. As we stated in the last section, the whole issue of retroactivity is a red herring, because the decision in this case is parallel with the decisions in the simultaneously filed KMART cases listed in Respondent's Appendix 1. Moreover, as the Tax Court pointed out, the decision here merely follows established Supreme Court precedent and implements the plain meaning of the statute itself. Nonetheless, for completeness, we feel the need to respond to KMART's suggestion that Stearns County should not have the benefit of the decision in this case, because the court apply decisional law only retrospectively. That contention misunderstands entirely how the common law adversarial system operates. Common law courts rest upon the theory that Courts adjudicates cases and controversies. One rationale for this system is that Courts make decisions best when adversarial parties, each with a concrete stake in the outcome of the Court's decision, press their arguments upon the Court. Courts do not try cases in the abstract. They do not make declaratory decisions that don't matter to the adjudicating parties. In fact, Article III courts actually lack jurisdiction to make decisions posed by parties who don't stand to lose, or win, from the decision. This concept, that the outcome of a Court's decision benefits the litigants, then, is fundamental to the way our judicial system works. If the Courts were to adopt a practice whereby the holdings of a decision applied only to future parties, then the parties before the Court would be bringing their cases in essence to establish declaratory future relief. They would lose that concrete stake in the outcome that comes from litigating about things that matter concretely to the parties right now. The suggestion that a decision should not apply to the parties before the court is an assault on the very foundation of how our judicial process works.

Throughout this discussion, one must always keep in mind that we regard this case as involving a routine factual determination flowing directly and immediately from the language of the statute applied to the facts and evidence which were before the Court. In a criminal case, a first defendant may raise the insanity defense based upon his claim that he suffers from depression, but put on unpersuasive psychiatric testimony. The court may rule that based on that testimony, the defendant has not established that depression was sufficient to establish an insanity defense. But in the second case, a different defendant may put on different testimony, from a more competent and persuasive expert, and the Court may then find, in that case, that the defendant is entitled to assert his defense. The law has not been changed: in the first case the defendant failed to prove his case; in the second, the defendant provided persuasive evidence. And, it would be ridiculous in the second case, would it not, for the Court to say to the second defendant, well, we can't let you proceed on the insanity defense, because in the first case, the defendant didn't do an adequate job of presenting evidence. Cases are decided by courts on the evidence before the Court in the case at hand.

The cases where retroactivity has been at issue typically involve groundbreaking and fundamental changes in major legal issues, and then primarily as we shall see, involved the effective date of application <u>to parties not before the court.</u> KMART thus confounds and confuses the application of so-called retroactivity decisions. In almost all situations where the courts are confronting retroactivity questions, the decision has been applied to the parties before the Court: the issue of "retroactivity" deals with application of the decision to other parties not before the Court. A review of some of the leading cases will illustrate this point. Again, we caution that in these cases, the Court is dealing with new and groundbreaking decisions, and even there, the new decision is applied to the parties who first raise them to the Court.

Chevron Oil Company v. Huson, 404 U.S. 97 (1971) involved the court's determination as to the effective date to apply rules established in a previous case involving fundamental restructuring of how certain Continental Shelf personal injury and wrongful death cases would be handled. The Chevron decision does not hold that the Court denies application of its decision to the parties, as the history of Chevron plainly shows. Two years before Chevron, in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), two injured parties brought claims for injuries suffered while working on artificial island drilling rigs located on the outer Continental Shelf off the Louisiana Coast. The injured plaintiffs sought to use remedies assuredly available to them under Louisiana law made applicable (they claimed) to the outer shelf under the "Outer Shelf Lands Act." Until the Rodrigue decision, the Courts of Appeals had held that such injured workers could only utilize the federal Death on the High Seas Act. Under these decisions, the law of admiralty applied, not state law, and thus the federal courts had been applying to these cases the entire panoply of procedural requirements and rules of decision from admiralty law. Even though the injured parties were not sailors, were not on the high seas, the courts had nonetheless been treating them as if they were subject to admiralty law.

However, Rodrigue held that the Outer Shelf Lands Act provided such injured workers a separate remedy, and conferred on them the right to utilize state law remedies in State Court. The State remedies provided more a more liberal measure of damages. But they also brought with them an entirely different set of procedural rules as well as substantive rules of decision. Rodrigue basically held that state law, not federal admiralty law applied to injuries occurring to employees working on the Continental Shelf.

It was the Rodrigue court, not the Chevron court, which enunciated new law, as of course Supreme Court decisions virtually always do. Significantly, the Rodrigue decision was applied to the parties before the Court. The Rodrigue Court did not regard that as "retroactive" application of law; indeed the Court's decision nowhere discusses the issue of retroactivity. Courts routinely apply their decisions to the parties before their court as part of our common law adversarial system. Indeed, imagine the stark changes which would flow from the administration of our judicial system if the Courts refused to apply decisions to the parties who brought issues before them? Since Supreme Court cases typically involve novel disputes and important new legal principles, in virtually every case there would be two arguments: the first which party should prevail, the second, whether the prevailing party should nonetheless lose, because a new legal principle was enunciated.

In fact, the Chevron case which followed dealt with the question whether Rodrigue would be applied retroactively to **other parties**, not before the Court at the time of the Rodrigue decision. The effect of the Rodrigue decision was to incorporate state law into such cases, and the employer defendants argued that Rodrigue should be applied retroactively to other parties so as to adopt the short one year statute of limitations from Louisiana. The effect would be to require dismissal of certain cases filed before Rodrigue and still pending in the federal system. The Chevron court simply ruled that Rodrigue would not be applied "retroactively" to other cases pending in the federal system where parties had not raised Rodrigue issues until after the Rodrigue decision. The retroactivity principles articulated in Rodrigue did not deal with whether a party before the Court gets the benefits of arguments raised by that party: on the contrary, as we have said, the Rodrigue decision was fully applied to both defendants and plaintiffs who were before the Rodrigue court.

In short, if Chevron were applied to this case, as KMART suggests, (and if this case actually presented a retroactivity issue, which it does not) then this Court's decision would be applied to Kmart versus Stearns County: the question would merely be whether this Court would extend the benefits of that decision to other Counties with cases pending before the Court, where the parties had not raised the issue until after the court's decision issued. Chevron-Rodrigue simply do not offer relief to KMART; together they stand for the proposition that a party which raises an issue gets the benefit of the Court's decision. The issue rather is under what circumstances the Court will apply that decision to other parties in cases previously brought.[11] We can see this same principle at work in Hoff v. Kempton, cited by KMART, 317 N.W.2d 361 (Minn. 1982). Hoff dealt with whether a new decision by the United States Supreme Court dealing with the use of certain attachment procedures to gain quasi-in-rem jurisdiction. In Rush v. Savchuk, 444 U.S. 320 (1980), the

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[11] We note in passing that if KMART were correct, then the Tax Court should have dismissed Otter Tail. For the Tax Court should have said, well, we've never applied the 60-day rule this way before. We must apply our decision prospectively, and thus the case should be dismissed.

United States Supreme Court dealt with the question whether personal injury plaintiffs could acquire jurisdiction in Minnesota to litigate their injury claims by attaching the insurance policy obligation in Minnesota, instead of a state actually connected to the dispute. Plaintiffs were using this device because they believed that Minnesota provided a more hospitable forum for their claims. The United States Supreme Court decision was applied to the parties before it. The Court ruled that the jurisdictional device could be used, and the plaintiffs lost their case. The retroactivity question presented had nothing to do with the parties before the Court in Rush—it had to do with what would happen to other cases founded on similar jurisdictional theories also pending in Minnesota. The Hoff decision dealt with a party injured in Indiana. Dismissal of his Minnesota case not only would deny him a Minnesota forum, but it also denied him any redress in any State. Nonetheless, the Hoff court, utilizing the Chevron factors, applied the Rush decision retroactively (that is to parties other than Rush with pending Minnesota cases) and required dismissal. The Hoff court stated that generally, absent special circumstances or specific pronouncements by an overruling court that a decision is to be applied prospectively only, such decision is to be given retroactive effect. Hoff v. Kempton, 317 N.W.2d 361, 363 (Minn. 1982). But when it did so, it was dealing with application of decisions to parties not before the court in the original case.[12]

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[12] And even as to these other parties, prospective application of a ruling is justified in very limited circumstances. Turner v. IDS Fin. Serv., Inc., 471 N.W.2d 105, 108 (Minn.1991). The United States Supreme Court has articulated a three-part test for determining when the general rule favoring retroactivity does not apply. Chevron Oil Co. v.

That brings us to the sovereign immunity case Spanel v. Mounds View School District, 118 N.W.2d 795 (Minn. 1962) also cited by KMART as justifying some kind of relief. Contrary to KMART's assertion, Spanel did not involve a Supreme Court over-ruling of legal precedent. Actually, in Spanel, the Court decided that it would NOT yet overrule that precedent, but would rather warn the legislature of its intent to do so, to stimulate a legislative cure to a problem which had been lying unresolved for several decades.

A reading of the Spanel decision will show how markedly it differs from the decision before this Court. In the first place, Spanel involved a major societal issue of significance on which the legislature had refused to act. Unlike the case before this court, there was no legislation telling the Courts what to do. Instead, the Courts had been reduced to applying old outmoded judicial principles fashioned under the British monarchy. For several decades, the judicial branch had been repeatedly forced to choose between applying these unjust judicially fashioned principles, and for several decades, the Supreme Court had urged the legislature to act and to provide a statutory solution. Frustrated by the failure of

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Huson, 404 U.S. 97, 106-07 (1971). Only if each of the three factors weigh in favor of limiting the decision to prospective application will it be applied prospectively. Summers v. R & D Agency, Inc., 593 N.W.2d 241, 245 (Minn. Ct. App. 1999). First, the decision must establish a new principle of law, either by overruling clear past precedent, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, the court must weigh the merits by looking at the prior history of the rule, its purpose and effect, and determine whether retroactive operation will further or retard its operation. Third, the court must weigh the equities imposed by retroactive application, and avoid "injustice or hardship" with a holding of nonretroactivity. Id. (quoting Chevron Oil, 404 U.S. 97, 106-07). Because the Petitioner meets none of these tests, as demonstrated below, the motion for reconsideration must be denied.

the legislative branch to pass a statute on sovereign immunity, Spanel involved the Supreme Court's deliberation over whether it should at long last reverse hundreds of years common law precedent, dating to British pre-colonial common law, establishing sovereign immunity for the state and its political subdivisions. The impact of the decision would be to expose schools, hospitals, cities, park boards, libraries and numerous other institutions to uninsured liability, because of course those institutions had no reason to purchase insurance under a regimen of sovereign immunity.

The Court was dealing, then, with judicial doctrine from the 1700's upon which the entire structure of government had come to rely. As the Court explained, a change in the rule without accompanying legislation would have catastrophic results:

> Some of the arguments advanced for retaining sovereign tort immunity are these: Stare decisis and stability in the law require it. There are no funds available to satisfy claims. The discretionary activities of administrative officials would be seriously circumscribed by the specter of tort liability for mistakes in judgment. The functions of government are mandatory under our system, involving many dangerous and hazardous undertakings, exposing vast numbers of persons to potential harm. It is a practical impossibility to police all of the activities of school children. Many units of government do not have sufficient resources to absorb a substantial loss without the threat of bankruptcy.

Spanel v. Mounds View School Dist. No., 118 N.W.2d 795, 799 (Minn. 1962).

The Court could not possibly implement a change in this centuries old rule without first giving the legislature an opportunity, one more time, to pass implementing legislation. Removing the judicially created doctrine would create chaos. And for this reason, the Court informed the legislature that judicially created immunity would be removed, but only after the end of the current legislative session. In short, the decision to defer implementation in Spanel v. Mounds resulted from judicial deference to the legislature. The Spanel decision has absolutely nothing in common with the issues before this Court[13].

VI. CONCLUSION

The Tax Court's decision should be affirmed in all respects.

Dated: May 9, 2005

Respectfully Submitted,

RINKE-NOONAN

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[13] Petitioner also cites Cambridge State Bank v. Roemer, 457 N.W.2d 716 (Minn. 1990), a case that was reversed by the Minnesota Supreme Court at 501 U.S. 1246 (1991). That case dealt with the complex issue of how to sort out and provide appropriate relief when a tax is determined to be unconstitutional. But in any event, as inChevron the retroactivity issue in Roemer had to do with application of a decision previously made to parties to another case.

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).