

No. A11-128

STATE OF MINNESOTA  
IN SUPREME COURT

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78<sup>th</sup> Street OwnerCo, LLC,

*Relator,*

vs.

County of Hennepin,

*Respondent.*

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REPLY BRIEF AND APPENDIX OF RELATOR 78<sup>TH</sup> STREET OWNERCO, LLC

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## ARGUMENT

**I. THIS COURT HAS CONSISTENTLY HELD THAT RELEVANCE IS THE THRESHOLD CRITERIA IN DETERMINING WHAT MUST BE PRODUCED UNDER MINN. STAT. §278.05, SUBD. 6(A) (“THE 60 DAY RULE”).**

Respondent Hennepin County (the “County”) cites one line of dicta from this Court’s decision in BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997), for the proposition that relevance should be wholly ignored when determining what must be produced under the 60 Day Rule. Respondent cites that dicta alone, out of context, and not with consideration of this Court’s many other decisions interpreting the requirements of the 60 Day Rule.

The language quoted by the County in its Brief conveys a very different meaning when read in the full context. As explained in detail in Relator’s Brief<sup>1</sup>, this Court’s decisions issued both prior to and subsequent to BFW<sup>2</sup> adopt a standard that relevance not only must be considered, but that relevance is the threshold criteria in determining whether a document is required under the 60-Day Rule. The County not only failed to address in any way in its Brief the clear directions from this Court on the issue of relevance as established in the case law, but the very citation from the Irongate decision included in the County’s Brief supports the conclusion that relevance is and must be the threshold criteria that the Court should consider.

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<sup>1</sup> Brief of Relator, pp. 9-10.

<sup>2</sup> See e.g., Irongate Enterprises, Inc. v. County of St. Louis, 736 N.W.2d 326 (Minn. 2007), Kmart v. County of Becker, 639 N.W. 2d 856 (Minn. 2002) and Kmart v. County of Stearns, 710 N.W.2d 761, 766 (Minn. 2006)

As acknowledged by the County, this Court stated in Irongate, that the “lease provisions [in that case] contain additional *relevant* income and expense information . . . which were not contained in the income statements and rent rolls provided” and therefore, the leases in that case should have been produced. Respondent’s Brief, p. 11, citing Irongate Enterprises, Inc., 736 N.W.2d at 330 (*emphasis added*). In Irongate, this Court determined that the relevance of lease information was a necessary precursor to its holding that the leases must be produced. The actual ruling in Irongate is significant and was not considered in Respondent’s Brief.

**II. THE COUNTY’S POSITION FAILS TO CONSIDER THE ONLY EVIDENCE IN THE RECORD ON THE ISSUE OF RELEVANCE IN THIS CASE.**

The County repeatedly claims that the Relator is asking this Court to decide this matter on the basis of what Relator unilaterally determines is relevant. Respondent is wrong. Relator does not ask this Court to establish a standard of relevancy based on a taxpayer’s unilateral determination. Rather, Relator asks this Court to hold that the only and uncontradicted evidence that was introduced in the record on the issue of relevance in this case should have been considered by the Tax Court and formed the basis for its decision below.

Only several months ago this Court ruled that a decision of the Tax Court is erroneous and will be overturned if the Tax Court does not “carefully explain its reasoning for rejecting the appraisal testimony . . . and adequately describe the factual support in the record for its determination.” Eden Prairie Mall, LLC v. County of Hennepin, \_\_\_ N.W. 2d \_\_\_ (Minn. 2011), slip op. at 15. This Court concluded that the

Tax Court's decision must be "reasonably supported by the record as a whole," failing which that decision would be remanded back to the Tax Court for further proceedings consistent with this Court's decision. Id., at pp. 26-27. Here, the Tax Court wholly disregarded uncontroverted evidence offered into evidence on the issue of relevance. The Tax Court's failure to do so should be held reversible error.

**A. The Uncontested Evidence In the Record Is That the Lease in Issue Is Not Relevant.**

In the Irongate case, St. Louis County introduced affidavit testimony from the assessor opining that the shopping center leases in that case were relevant and the taxpayer failed to refute that testimony in any manner. Irongate, 736 N.W.2d at 331. Here, the facts are exactly the opposite. In this case, Daniel Boris, Relator's appraisal expert, testified through affidavit regarding the generally accepted appraisal practices involving the three valuation methods utilized by appraisers in valuing hotels, and opined that any lease (much less a related party lease created solely to meet the requirements of a REIT under income tax law such as the lease in issue in this case)<sup>3</sup> is completely irrelevant to the analysis of value of a hotel. Boris Aff. ¶ 5, A-017-018. Mr. Boris' affidavit testimony in these proceedings was not contradicted or even responded to in anyway whatsoever by Respondent in these proceedings. Nonetheless, the Tax Court ignored this uncontested evidence in its decision entirely and failed to address the issue of

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<sup>3</sup> Respondent questions this purpose in Respondent's Brief at p. 6. The purpose for the lease is established in the evidentiary record in the similarly uncontroverted Affidavit of Barry Malkin, ¶ 3, A-013 to 014. See discussion below.

relevance as a factor in determining whether the lease in issue should be required under the 60 Day Rule.

**B. The Uncontested Evidence in the Record Established That the Lease Was Entered Into Solely for Purposes of Compliance with REIT Rules.**

The County also contends that the lease in issue does not expressly state that it was entered into solely for purposes of compliance with REIT rules. Although the lease does not include such language, Hennepin County misconstrues the point. The *only evidence* offered on the issue of the type of and purpose of the lease was contained in the Affidavit of Barry Malkin. Malkin Aff. ¶ 3, A-013 to 014. Once again, Hennepin County introduced no evidence contradicting or responding to Mr. Malkin's Affidavit in any way whatsoever.

Hennepin County's reference to 1100 Nicollet Mall, L.L. P. v. County of Hennepin, File No. TC-29591 (Minn. Tax Ct. Order March 25, 2004), ARA-001, further misses the point. The issue in that case was whether the lease was a "true" lease rendering the property in issue income producing.<sup>4</sup> Relator agrees that the property in this case is not income producing. The only issue here is whether the lease is relevant to the process of valuation under this Court's interpretation of the 60 Day Rule. The only evidence offered on that issue in this case is testimony by Affidavit of Messrs. Malkin and Boris that the lease is a related party lease that was entered into solely for purposes of

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<sup>4</sup> Relator also notes that other Tax Court cases, such as Cypress Semiconductor v. County of Hennepin, File No. TC-27376, *et al.* (Minn. Tax Ct. Order, Dec. 16, 1999), ARA-008, held that the existence of a lease, whether it was a "true" lease or not, was not determinative, and that the real issue was whether the property produced income.

satisfying REIT income tax laws, and is not relevant in any way whatsoever to the valuation of the subject hotel.

**C. The Fact that the Lease Terms and the Actions of the Related Parties to the Lease May Not Match Supports the Conclusion that the Lease is Irrelevant.**

Respondent points out that the actual terms of the lease apparently do not match the actions of the parties to the lease with respect to which party (i.e., landlord or tenant) pays the real estate taxes. Respondent's Brief, pp. 11-12. While this fact has no direct bearing on the issues before this Court, it does support the conclusion that the lease terms themselves are not arm's length, and that the lease is irrelevant to any determination of fee simple market value of the subject hotel.

**III. THE TAX COURT'S FAILURE TO CONSIDER THE ISSUE OF RELEVANCE IN THIS CASE RENDERS ITS DECISION UNCONSTITUTIONALLY VAGUE.**

The Tax Court's failure to consider the issue of relevancy at all in this case ultimately results in its decision being unconstitutionally vague.

**A. Application of the Rule Established in Erie Mining Co. V. Commissioner of Revenue, 343 N.W.2d 261 (Minn. 1984) Does Not Prohibit This Court from Considering the Constitutionality of the Tax Court's Decision.**

As an initial matter, Respondent suggests that this Court lacks jurisdiction to consider Relator's constitutional claims, because the Petitions did not go through the process commonly known as the "Erie Shuffle." See, Erie Mining Co. v. Commissioner of Revenue, 343 N.W.2d 261 (Minn. 1984). The "Erie Shuffle" is not required in this case.

In the Erie Mining Co. case, this Court confirmed its holding in In Matter of McCannel, 301 N.W.2d 910 (Minn. 1980) that the Minnesota Tax Court lacks original jurisdiction to decide constitutional issues. Thus, this Court concluded that

[i]f any party raises a constitutional issue [in a tax court case], the tax court should stay the proceedings and refer the constitutional question to the district court. The district court may either decide the constitutional issue or refer the matter back to the tax court which will then have subject matter jurisdiction to rule initially on the constitutional issue.

Erie Mining Co., 343 N.W.2d at 264.

The operative difference between Erie and this case, however, is that the Petitions in issue here were not originally filed with the Minnesota Tax Court. Instead, both Petitions involved in this case specifically included constitutional claims and were both filed first in the Hennepin County District Court. The Hennepin County District Court subsequently transferred those cases by standing order to the Minnesota Tax Court. Accordingly, the Minnesota Tax Court acquired jurisdiction to consider Relator's constitutional claims under the Erie Mining Co. case at the time the Petitions were transferred to it from Hennepin County District Court in the first instance. There was no need to transfer the Petitions back to the District Court and then back to the Tax Court a second time.

Moreover, the Erie Mining Co. case does not apply to this Court, which has jurisdiction to consider any issues it deems proper, including constitutional issues, at any time. Here, as will be explained in more detail below, it was the Tax Court's interpretation of the 60 Day Rule that rendered the statute unconstitutionally vague. The

Relator raised this constitutional issue before the Tax Court when it filed its post-hearing motion and therefore, the constitutional issue is now fairly and squarely before this Court.

**B. If the Meaning of a Statute Is Not Applied Consistently in Each Case Based on a Standard of Relevance as Determined by the Evidentiary Record Before the Court, It Becomes Unconstitutionally Vague.**

Respondent cites this Court's jurisprudence that the existence of the word "including" in both the pre-2008 and post-2008 versions of the 60 Day Rule has been interpreted to provide that the items enumerated in the statute are only a partial, and not a complete list of what is required to be produced. The standard of relevancy consistently adopted by this Court provides guidance to taxpayers that they can reasonably rely upon in determining what other information or documentation may or may not be required in any particular case. Without such guidance, the production requirement becomes an amorphous standard of simply everything – every piece of paper – every bit of information – every document of any kind – that relates in any manner what-so-ever to the property itself. "Everything" is a vague and meaningless standard that does not provide sufficient direction for compliance.

In Kmart Corp. v. County of Stearns, File Nos. CX-00-404, *et al.* (Minn. Tax Ct. Order, March 3, 2005), ARA-0014 quoted in Respondent's Brief, the Tax Court expressed the conclusion that Respondent now argues should be the law in this case. However, not only does the Tax Court's conclusion in Kmart Corp. v. County of Stearns lack precedential value, it is also wrong. Contrary to the Tax Court's conclusion, neither the BFW nor Kmart v. Becker cases hold that all information, regardless of relevance, must be produced under the 60 Day Rule. Rather, as explained in detail in Relator's

Brief<sup>5</sup>, this Court has consistently articulated a standard of relevancy as the threshold criteria to determining what must be produced under the 60 Day Rule. The threshold criteria provides constitutionally necessary guidance to taxpayers when complying with the 60 Day Rule.

**IV. THE COUNTY CORRECTLY CITES THE APPLICABLE RULE OF STATUTORY INTERPRETATION UNDER MINNESOTA LAW, AND THEN PROMPTLY IGNORES THAT SAME RULE IN ITS CONTENTIONS TO THIS COURT.**

Respondent correctly cites the applicable rule of statutory interpretation, namely that “whenever possible, no word, phrase, or sentence should be deemed superfluous, void or insignificant.” ILHC of Eagan, LLC v. County of Dakota, 693 N.W.2d 412, 419 (Minn. 2005), citing Owens v. Federated Mut. Implement & Hardware Ins. Co., 328 N.W.2d 162,164 (Minn. 1983). However, when interpreting the statute in issue, Respondent wholly disregards this same rule of construction.

**A. The County’s Interpretation of the 2008 Amendment to the 60 Day Rule Renders the Amendment Void of Any Meaning.**

Respondent argues that the 2008 amendments to the 60 Day Rule did not change the requirements of the statute, because the Legislature did not remove the word “including” from the statute when it enacted the amendment. Respondent’s position is illogical and absurd. No Legislature would amend a statute if it intended its amendatory language to change nothing and have no meaning.

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<sup>5</sup> Brief of Relator, pp. 9-10.

**1. Laurie Miller's March 16, 2007 Testimony Before The House Tax Committee Supports the Conclusion That the Legislature Intended to Eliminate Any Requirement that Leases Be Produced Under the 60 Day Rule.**

Respondent points out that taxpayers' attorney Laurie Miller testified before the Minnesota House Tax Committee on March 16, 2007, before this Court issued its decision in Irongate Mall, implying that Ms. Miller's testimony somehow had nothing to do with that case. The County, however, failed to acknowledge that the Tax Court issued its decision in the Irongate case nearly a year earlier on April 28, 2006, and that by March 16, 2007, the case was already pending before this Court. Accordingly, read in full context, Ms. Miller's testimony regarding the production of leases was certainly in response to the law then developing around the Irongate case. Ms. Miller testified regarding the burden of producing leases that had been placed on her clients. Pet. Memo in Support of Mot. for Amended Findings (Dec. 8, 2010), Exhibit, A-030. Robert Rudy, then Assistant Hennepin County Attorney, further testified that not only was it his opinion that the language of the pre-2008 version of the statute did not identify leases, but also that by and large the Hennepin County Attorney's office did not require leases even under the pre-2008 version of the rule. Pet. Memo. In Support of Mot. For Amended Findings (Dec. 8, 2010) Exhibit, A-034. The fact that the legislature amended the statute subsequent to Ms. Miller's and Mr. Rudy's testimony to include a short list of prerequisite items that expressly did not include leases tends only to support the conclusion that the Legislature intended to eliminate any perception created by the Irongate decision that leases were required under the 60 Day Rule.

**2. The Fact That the Legislature Did Not Remove The Sanction of Dismissal as a Consequence for Failure to Comply With the 60 Day Rule Is Not Relevant to the Question of Whether it Intended to Remove Any Perception that Leases Be Produced.**

Respondent also implies that because the bill before the Legislature on March 16, 2007 included the removal of the sanction of dismissal as a consequence for failure to comply with the 60 Day Rule, and the final bill did not actually remove that sanction, the testimony offered during the hearing should be ignored when determining the Legislature's intent in amending the 60 Day Rule. Respondent's interpretation of events makes no sense. As Respondent correctly noted, when then Hennepin County Assessor Tom May testified at the hearing, he opposed the removal of the sanction of dismissal. Pet. Memo. In Support of Mot. For Amended Findings (Dec. 8, 2010) Exhibit, A-032. The fact that the final bill that was enacted did not remove the sanction of dismissal further supports the conclusion that the Legislature intended its amendments to satisfy the various concerns raised at the hearing itself. Those concerns included not only Mr. May's opposition to removing the dismissal sanction, but also included Ms. Miller's concerns about requiring the production of leases as well as Mr. Rudy's concurrence that leases should not be required in most cases.

**B. The County's Interpretation of the 2008 Amendment to the 60 Day Rule Ignores the Words "In the Form of" That Were Added to the Statute.**

The County focuses on the word "including," which was not removed from the amended 60 Day Rule. In doing so, the County inappropriately ignores the other words that were added to the statute in contravention of the rules of statutory interpretation.

The statute was amended to add the words “in the form of . . . [a specific list of enumerated items]” immediately following the formerly undefined phrase “income and expense figures.” As explained in detail in Relator’s Brief, the only way to properly give meaning to both the addition of the words “in the form of” and the word “including” in the amended version of the statute is to conclude that the Legislature intended that while there may be some other information, which in some circumstance might be required under the 60-Day Rule, information related to the *category* of “income and expense figures” is intended to be limited to the three enumerated items which does not require the production of leases<sup>6</sup>.

**C. The Production of a Lease Summary or Rent Roll Would Not Have Satisfied The County’s Interpretation of the 60 Day Rule.**

The County also complains that Relator did not disclose the existence of the lease through a lease summary, a rent roll or otherwise in its production under the 60 Day Rule. That complaint is unfounded. While Relator may not have expressly discussed the lease, The County admits that the profit and loss statements provided to the assessor expressly identify a rent expense for the lease. Regardless, the County’s complaint is a red herring. The County is suggesting is that had Relator produced a lease summary or a rent roll, it *might* have satisfied the requirements of the 60 Day Rule. The reality is that under the County’s interpretation of the 60 Day Rule, identification of the lease alone would not have been sufficient, because under the County’s interpretation of Irongate, complete copies of all leases in every case must always be produced.

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<sup>6</sup> Brief of Relator, pp. 20-23.

**V. THE COUNTY INACCURATELY DESCRIBES THIS COURT'S HOLDINGS IN THE KMART TRILOGY.**

The County argues that Relator failed to satisfy the requirements of the 60 Day Rule because it did not disclose the percentage rent clause in the lease itself. Respondent misinterprets the law.

**A. This Case is Not Analogous to the Kmart Trilogy; It is the Exact Opposite.**

Respondent claims that this case is analogous to the Kmart trilogy, a set of three Kmart cases<sup>7</sup> all addressing the issue of percentage rents under the 60 Day Rule. The County is wrong. This case is not analogous to the Kmart trilogy. It is the exact opposite.

In the Kmart cases, the taxpayer produced lease information identifying a percentage rent clause, but failed to provide information regarding how much total rent was actually paid, including base rent and percentage rent. Under these circumstances, this Court held that Kmart did not satisfy the requirements of the 60 Day Rule, because the total rent amount was never provided. Here, total rent figures were admittedly provided in the profit and loss statements. That fact is not here in dispute. Accordingly, the Kmart trilogy is precedent against dismissal here. Here, information regarding how the total rent was calculated is unnecessary, since that information would be duplicative and redundant. The 60 Day Rule has never been held to require a taxpayer to produce the same information in multiple forms.

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<sup>7</sup> Kmart Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002); Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002); and Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002).

**B. The Specifics of the Lease in Issue in This Case Are Not Relevant to a Determination of Fee Simple Value in This Case.**

Ultimately, Respondent fails to provide any basis for its claim that information regarding the percentage rent clause should have been produced under the 60 Day Rule other than its misstatement of the Kmart trilogy cases discussed above. The County did not produce any evidence or even argue that information regarding the percentage rent clause is relevant to the determination of value in this case, because it is not.

The valuation issue in this case, as in all property tax cases, is the value of the fee simple interest in subject property, not the leased fee. See, TMG Life Ins. Co. V. County of Goodhue, 450 N.W.2d 848 (Minn. 1995). Accordingly, the specific percentage rent clause in the instant lease is not relevant; the relevant inquiry is what total rent is typical in the market. Id., relying upon Crossroads Center (Rochester), Inc. v. Commissioner of Tax, 176 N.W.2d 530 (Minn. 1970). The only evidence in the evidentiary record in this case explains that in valuing a hotel property, the revenue employed in the income approach when determining the fee simple market value relates to room revenues plus several other ancillary revenue sources, such as food and beverage sales, telephone charges and other miscellaneous income contemporaneous to the effective date of appraisal. Boris Aff. ¶ 5, A-017-018. The percentage rent clause in a related party lease entered into solely for REIT income tax purposes simply has no relevance whatsoever, since it plays no part in the valuation analysis.

It is also noteworthy that in both the 2008 and 2011 amendments to Minn. Stat. §278.05, subd. 6(a), the rent roll that is required to be produced includes information

regarding base rent alone. There is no explicit requirement that percentage rent information be produced. If percentage rent information was important or relevant, the Legislature presumably would have required that it be produced.

**CONCLUSION**

Based on the foregoing, the Relator respectfully requests this Court reverse the Tax Court's orders dismissing Relator's 2008 and 2009 property tax appeals, reinstate the Relator's 2008 and 2009 property tax appeals, and remand the cases for determination of tax valuation of the taxable real property.

Dated: August 15, 2011

Respectfully submitted,



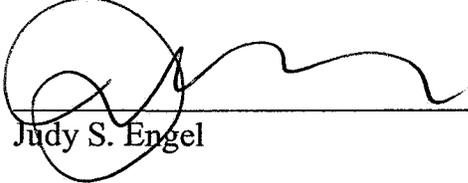
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**CERTIFICATE OF COMPLIANCE  
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that Reply Brief of Relator submitted herein contains 3,866 words, exclusive of the pages containing the table of contents and table of authorities, and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Office Professional Edition 2003, the word processing system used to prepare this Brief.

  
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Judy S. Engel