

No. A11-0128

***STATE OF MINNESOTA
IN SUPREME COURT***

78th Street OwnerCo, LLC,

Relator,

vs.

County of Hennepin,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. Did the Tax Court err in holding that dismissal was required where the property tax petitioner failed to provide the County Assessor with a copy of the lease for the subject property?

Result Below: The Tax Court correctly held that the property tax petitioner was required to provide the County Assessor with a copy of the lease for the subject property under Minn. Stat. §278.05, Subd. 6(a), both pre- and post-2008 amendment.

Most Apposite Authority:

Irongate Enterprises, Inc. v. County of St. Louis, 736 N.W.2d 326 (Minn. 2007)

BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997)

Minn. Stat. §278.05, Subd. 6(a) (2003)

Minn. Stat. §278.05, Subd. 6(a) (2008)

II. Did the Tax Court err in holding that dismissal was required where the property tax petitioner failed to provide the County Assessor with a rent roll?

Result Below: The Tax Court correctly held that the property tax petitioner was required to provide the County Assessor with a rent roll for the assessment date, including the tenant name, lease start and end dates, option terms and base rent for the subject property, pursuant to Minn. Stat. §278.05, Subd. 6(a)(2008).

Most Apposite Authority:

Minn. Stat. §278.05, Subd. 6(a) (2008)

III. Did the Tax Court err in holding that dismissal was required where the property tax petitioner failed to provide the County Assessor with the percentage rent paid and how it was calculated under the lease?

Result Below: The Tax Court correctly held that the 60-Day Rule required the property tax petitioner to provide the County Assessor with the amount of percentage rent paid and how it was calculated under the lease, under Minn. Stat. §278.05, Subd. 6(a), both pre- and post-2008 amendment.

Most Apposite Authority:

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)

Kmart v. County of Douglas, 639 N.W.2d 863 (Minn. 2002)

Kmart v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002)

Minn. Stat. §278.05, Subd. 6(a) (2003)

Minn. Stat. §278.05, Subd. 6(a) (2008)

IV. Did the Tax Court's interpretation of Minn. Stat. §278.05, Subd. 6(a) render the statute unconstitutionally vague?

Result Below: This issue was not before the Tax Court.

Most Apposite Authority:

Irongate Enterprises, Inc. v. County of St. Louis, 736 N.W.2d 326 (Minn. 2007)

STATEMENT OF THE CASE

This case involves Chapter 278 petitions filed by Relator, 78th Street OwnerCo, LLC, challenging the assessor's Estimated Market Value ("EMV") for the subject property, Sofitel Hotel, for the assessment dates of January 2, 2007 and January 2, 2008.¹ Relator owns the subject property and leases it to 78th Street LeaseCo, LLC, a separate legal entity.

Respondent County of Hennepin filed a motion to dismiss the petition challenging the assessor's January 2, 2007 EMV for failure to comply with Minn. Stat. §278.05, Subd. 6(a) (2003) and to dismiss the petitions challenging the assessor's January 2, 2008 and 2009 EMV for failure to comply with Minn. Stat. §278.05, Subd. 6(a) (2008). The matters were heard on September 1, 2010 before the Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court. Respondent's motions to

¹ Relator also filed a petition challenging the EMV for the January 2, 2009 assessment date, which was included in Respondent's Motion to Dismiss before the Minnesota Tax Court. However, the petition was statutorily dismissed on October 16, 2010 for failure to pay taxes when due. (See Minn. Stat. §278.03, Subd. 1.) On June 10, 2011, Relator paid its 2010 real estate taxes, plus penalty and interest, which reinstated its challenge of the January 2, 2009 assessment. Nonetheless, that petition is not part of this appeal.

dismiss were granted by Order dated November 23, 2010. The Tax Court found that Relator's failure to provide the lease, percentage rent information and a rent roll mandated dismissal of the petitions pursuant to Minn. Stat. §278.05, Subd. 6(a).

Relator originally appealed the Tax Court decision by Petition for Writ of Certiorari on November 23, 2010, but Relator then filed a motion for discharge of the writ and remand to the Tax Court, which was granted February 2, 2011. In the Tax Court, Relator filed a Motion for Amended Findings of Fact and Conclusions of Law, which was heard on January 19, 2011, and denied by the Tax Court in an Order dated April 26, 2011. Relator then moved to reinstate its appeal, to include the orders of the Tax Court dated November 23, 2010 and April 26, 2011².

STATEMENT OF FACTS

The subject property is a hotel located at 5601 West 78th Street in the City of Bloomington. It is an uncontested fact that the subject property is income-producing and that Relator was subject to the production requirements of Minn. Stat. §278.05, Subd. 6(a).

In a letter dated June 16, 2008, Mark Reichel of the City of Bloomington Assessor's Office requested information to assist in reviewing the 2007 valuation which was under appeal. (Respondent's Memorandum in Support of Motion to Dismiss (T.C. File No. 27 CV 08 13046) Reichel Affidavit ¶ 5; Ex. B, Bates p. 287.) Mr. Reichel's

² The Tax Court issued an Order dated May 5, 2011 correcting a clerical error in the Order dated April 26, 2011. (Relator's Brief Add 15-16.)

request included, in pertinent part, lease summaries and a rent roll/tenant list. (*Id.*) For petitions contesting the January 2, 2007 assessment, June 30, 2008 was the deadline for submitting information required pursuant to Minn. Stat. §278.05, Subd. 6(a)(2003). In a letter dated June 27, 2008, Relator provided: 1) profit and loss statements for Dec. 2005, May 2006, Dec. 2006, May 2007, Dec. 2007 and April 2008 including budget forecast amounts; 2) 2007 and 2008 operating budgets; and 3) asset register and depreciation reports. (Respondent's Memorandum in Support of Motion to Dismiss (T.C. File No. 27 CV 08 13046) Reichel Aff. ¶ 6; Ex. A, Bates pp. 1-74.) In the cover letter, the property was identified as a hotel, the net rentable area was identified as 220,818 square feet and the number of hotel rooms was identified as 282. (*Id.* at Bates p. 1.) The June 27, 2008 cover letter does not mention the existence of a lease even though the assessor had specifically requested lease summaries and a rent roll/tenant list. Included in the documents Relator provided in June 2008 were documents titled "ABL – HOTEL P&L RECAP US" for May 2006, December 2005, December 2006 that contained a line item titled "Building/Property Rent – Lease Expense," with corresponding monthly and annual dollar figures. (*Id.* at Bates pp. 5-10.) Relator also provided a document titled "US MANAGED-P/L-US-DETAIL BY A/C" dated "07-Jan-08" that listed line items titled "ZR652 – Building Rentals 715000 6136 Property Rent", "Total" and "Total – Property Rents," each with corresponding dollar figures. (*Id.* at Bates p. 39.)

In a letter dated May 29, 2009, Mr. Reichel requested information to assist in reviewing the 2008 valuation, which was under appeal. (Respondent's Memorandum in Support of Motion to Dismiss (T.C. File No. 27 CV 09 08071) Reichel Aff. ¶ 5; Ex. B,

Bates p. 288.) Mr. Reichel's request again included, in relevant part, lease summaries and a rent roll/tenant list. (*Id.*) For petitions contesting the January 2, 2008 assessment, June 29, 2009 was the deadline for submitting information required pursuant to Minn. Stat. §278.05, Subd. 6(a)(2008).

Enclosed with a cover letter dated June 29, 2009, Relator provided: 1) profit and loss statements for Dec. 2005, May 2006, Dec. 2006, Dec. 2007, Dec. 2008 and May 2009 including budget forecast amounts; 2) 2007, 2008 and 2008 operating budgets; and 3) asset register and depreciation reports. (Respondent's Memorandum in Support of Motion to Dismiss (T.C. File No. 27 CV 09 08071) Reichel Aff. ¶ 6; Ex. A, Bates pp. 75-162.) The cover letter identified the property as a hotel having a net rentable area of 220,818 square feet, with 282 hotel rooms. (*Id.* at Bates p. 75.) The June 29, 2009 cover letter did not mention any lease even though the assessor had specifically requested lease summaries and a rent roll/tenant list. Included in the documents Relator provided were documents titled "ABL – HOTEL P&L RECAP US" for December 2005, December 2006, May 2006, that contained a line item titled "Building/Property Rent – Lease Expense," which had a corresponding monthly and annual dollar figures. (*Id.* at Bates pp. 77-80.) Relator also provided a document titled "US MANAGED-P/L-US-DETAIL BY A/C" dated "07-Jan-08" that listed line items titled "ZR652 – Building Rentals 715000 6136 Property Rent", "Total" and "Total – Property Rents," each with corresponding dollar figures. (*Id.* at Bates p. 109.) Relator provided a document titled Budget 2009 that listed "Building/Property Rent-Lease Exp(incl guaran)" with corresponding dollar figures. (*Id.* at Bates p. 128.)

Relator did not provide a copy of the hotel lease until July 1, 2010 following a conversation between Relator's counsel and Respondent's counsel. (Respondent's Memorandum in Support of Motion to Dismiss (T.C. File No. 27 CV 08 13046) Reichel Aff. ¶ 7; Ex. B, Bates pp. 282, 290-317); (Respondent's Memorandum in Support of Motion to Dismiss (T.C. File No. 27 CV 09 08071) Reichel Aff. ¶ 7; Ex. B, Bates pp. 282, 290-317.) The lease identifies Relator, 78th Street OwnerCo, LLC, as the landlord and 78th Street LeaseCo, LLC as the tenant. (*Id.* at Bates p. 291.) The lease sets forth a monthly minimum rent (\$183,333.33) and additional rent based on a percentage of: 1) room revenue, 2) food and beverage revenue, and 3) other revenue. (*Id.* at Bates pp. 293-6.) The lease also established party responsibility for real estate related expenses. Under the lease, Relator was responsible for payment of real estate taxes and major repairs while all other expenses were the responsibility of the tenant, 78th Street LeaseCo, LLC. (*Id.* at Bates pp. 298-304.) The lease specifically stated that it was **“made exclusively for the benefit of and solely for the protection of Landlord and Tenant**, and no other person or persons shall have the right to enforce the provisions hereof by action or legal proceedings or otherwise, except for the rights of Manager under Section 13.23.” (*Id.* at Bates p. 314, emphasis added.) The lease **does not** however, provide that it was “entered into solely for purposes of compliance with rules governing REIT's under the Internal Revenue Code” as Relator claims. (*See* Relator Brief p. 5 referencing Affidavit of Barry Matkin ¶ 3, A-013-014.)

Respondent brought a motion to dismiss Relator's petition contesting the January 2, 2007 EMV for failure to comply with Minn. Stat. §278.05, Subd. 6(a) (2003).

(Respondent's Notice of Motion and Motion for Dismissal, Memorandum in support of Motion to Dismiss for Failure to Comply with Minn. Stat. §278.05, Subd. 6(a), Affidavit of Mark Reichel, City of Bloomington Assessor's Office and Proposed Order Minn. Tax Ct. File No. 27 CV-08-13046.) The motion was based on Relator's failure to timely produce the hotel lease and failure to provide calculations of percentage rent paid. Respondent brought a separate motion to dismiss Relator's petition contesting the January 2, 2008 EMV for failure to comply with Minn. Stat. §278.05, Subd. 6(a) (2008). (Respondent's Notice of Motion and Motion for Dismissal, Memorandum in Support of Motion to Dismiss for Failure to Comply with Minn. Stat. §278.05, Subd. 6(a), Affidavit of Mark Reichel, City of Bloomington Assessor's Office and Proposed Order, Minn. Tax Ct. File No. 27 CV 09 08071.) The motion was based on Relator's failure to timely produce the hotel lease, failure to produce a rent roll and failure to provide calculations of percentage rent paid pursuant to the lease terms.

Judge Kathleen H. Sanberg of the Minnesota Tax Court heard Respondent's motions on September 1, 2010 and issued an Order dismissing Relator's petitions on November 23, 2010, for failure to comply with the production requirements of Minn. Stat. §278.05, Subd. 6(a) (2003) and (2008). (Order Granting Motion to Dismiss (Nov. 23, 2010) Relator's Brief Add 1-5.) Relator sought amended findings of fact and conclusions of law, which motion was heard on January 19, 2011 and denied by Order dated April 26, 2011. (Order Denying Motion for Amended Findings (April 26, 2011) Relator's Brief Add 6-14.) On May 5, 2011 the Tax Court issued an Order correcting a

clerical error in the April Order. (Order Correcting Clerical Error in Court’s Decision (May 5, 2011) Relator’s Brief Add 15-16.)

ARGUMENT

I. STANDARD OF REVIEW

Statutory construction is subject to *de novo* review by this Court. (Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 725 (Minn. 2010), *citing* Clark v. Lindquist, 683 N.W.2d 784, 785 (Minn. 2004).) This Court stated that if the law is clear and free from ambiguity, “the plain meaning controls and is not ‘disregarded under the pretext of pursuing the spirit.’” (*Id.* at 726, *citing* Minn. Stat. §645.16 (2008); Phelps v. Commonwealth Land Title Ins. Co., 537 N.W.2d 271, 274 (Minn. 1995).) Additionally, in ILHC of Eagan, LLC v. County of Dakota, 693 N.W.2d 412, 419 (Minn. 2005), this Court stated that “whenever possible, no word, phrase, or sentence should be deemed superfluous, void or insignificant.” (*Id.*, *citing* Owens v. Federated Mut. Implement & Hardware Ins. Co., 328 N.W.2d 162, 164 (Minn. 1983); Minn. Stat. §645.16.)

II. THE TAX COURT CORRECTLY INTERPRETED MINNESOTA STATUTES SECTION 278.05 SUBDIVISION 6 (a) AS REQUIRING THE PROPERTY TAX PETITIONER TO PROVIDE THE LEASE FOR THE SUBJECT PROPERTY.

A. Minnesota Statutes Section 278.05, Subdivision 6(a) (2003) Requires Production of Leases.

For petitions filed on or after July 1, 2003 but before July 1, 2008, Minn. Stat. §278.05, Subd. 6(a) (2003) stated, in pertinent part:

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 no later than 60 days after the applicable filing deadline contained in section 278.01, subdivision 1 or 4. Failure to provide the information required in this paragraph shall result in the dismissal of the petition, unless (1) the failure to provide it was due to the unavailability of the evidence at the time that the information was due, or (2) the petitioner was not aware of or informed of the requirement to provide the information.

In the instant case, it is uncontested that Relator filed its petition contesting the January 2, 2007 EMV for taxes payable in 2008 on April 29, 2008 and the property was subject to the production requirements of Minn. Stat. §278.05, Subd. 6(a) (2003) as stated above. (Respondent's Memorandum in Support of Motion to Dismiss (File No. 27 CV 08 13046) Reichel Aff. ¶ 3; Ex. B, Bates p. 288.) In interpreting identical statutory language (except for the submission deadline), this Court found 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. To put it another way, we hold that the statute's text requires the petitioner to provide all information within its possession.

BFW Co. v. County of Ramsey, 566 N.W.2d 702, 705 (Minn. 1997). In BFW, this Court affirmed the Tax Court's dismissal, holding that "the statute required BFW to provide those income and expense figures within its possession on the date of the deadline, **along with the other information required by the statute**" and that "the plain meaning of the statute **requires a petitioner to provide the county assessor with all information within its possession.**" (*Id.* at 703, 705-6 (emphasis added).) This

Court's decision in BFW went further than merely addressing the petitioner's failure to produce income and expense information and held that a petitioner was required to provide **all information** within its possession **even if it may not allow** the assessor to reach a final conclusion of value. (*Id.* at 705.) Thus this Court's holding in BFW does not support Relator's claim that Minn. Stat. §278.05, Subd. 6(a) requires the production of only "relevant" information; i.e., that information which a petitioner unilaterally decides is relevant to a final conclusion of value. Rather, Relator was required to produce **all information** within its possession, including the lease which contained rent, percentage rent, and expense responsibility clauses. In the instant case not only did Relator fail to timely provide the lease, it failed to even disclose the existence of the lease even though the assessor requested lease summaries and a rent roll/tenant list to assist it in completing a timely review of the valuation.³ (Reichel Affs. ¶ 5; Ex. B, Bates pp. 287 – 8; *See also*, Relator's Appendix page 10.)

This Court's holding in Irongate Enterprises Inc. v. County of St. Louis, 736 N.W.2d 326, 330 (Minn. 2007) also makes clear that Relator was required to produce its lease:

[T]he information described in the 60-day rule is only a partial list, and the rule is intended to be broader than what is enumerated, as indicated by the preceding word 'including.' Further, Irongate's argument fails to consider that information in **leases** may also be relevant to the categories of information described in the 60-day rule, including income and expense figures.

³ Despite the fact that the assessor was not statutorily obligated to request income and expense information, a reminder letter was sent to Relator as a courtesy.

In Irongate, the tax petitioner argued that leases did not need to be provided under the statute because they were duplicative of information contained in the income statements and rent rolls it had already provided. However, this Court rejected that argument, and agreed with the county's position that "lease provisions contain additional relevant income and expense information...which were not contained in the income statements and rent rolls provided." (*Id.*; see also Kmart Corp. v. County of Stearns, 710 N.W.2d 761 (Minn. 2006) (affirming the Tax Court's dismissal where petitioner provided the lease but failed to provide statements establishing the amount spent on real estate expenses.))

In the instant case, Relator provided far less information than the petitioner in Irongate because it did not disclose the existence of the hotel lease or provide a lease summary or a rent roll, thus the assessor was unaware that the profit and loss statements provided were not Relator's but those of a tenant. Relator leases the subject property to 78th Street LeaseCo, LLC and in return receives income in the form of base rent plus additional percentage rent based on room revenue, food and beverage revenue and other revenue; therefore rent is an expense of the tenant. (*See Hotel Lease*, Bates pp. 293-6.) Relator's lease also sets forth party responsibility for expenses related to the real estate - taxes, utilities, maintenance and repair obligations. However, the profit and loss statements provided by Relator list real estate taxes as an expense item, where the lease

establishes Relator as the apparent party responsible for their payment.⁴ (See Hotel Lease, Bates pp. 298-302; profit and loss statements - Bates pp. 5-12.)

Relator claims that this Court's holding in Irongate does not apply in the instant case because the property at issue is a hotel and not a shopping center. (Relator's Brief pp. 8-9.) There is nothing in the Irongate decision that would support such a narrow reading, nor is there any reason to conclude that the statute applies differently to different types of properties.

Relator next acknowledges the Irongate Court set a broad standard of relevance requiring "that petitioners provide all information in the possession of petitioners bearing on the income and expenses attributable to the property" but then gratuitously adds a qualifying phrase, "in the valuation analysis under generally accepted appraisal practices," which is not found anywhere in this Court's Irongate decision. (Relator's Brief pp. 8-9 *citing* Irongate, 736 N.W.2d at 331.) Relator's efforts to distort the holding in Irongate must be rejected as without merit. (*Id.* at 8.) Irongate dealt with a property owner's failure to provide leases, and the facts in this case are indistinguishable.

Relator asks this Court to create a new rule of law that the only information a petitioner needs to produce under Minn. Stat. §278.05, Subd 6(a) is information that **the petitioner** deems to be relevant to the valuation process. Relator claims that a related

⁴ The profit and loss statements provided by Relator, when viewed in conjunction with the Hotel Lease, appear to be a combined statement of landlord and tenant expenses.

party lease “created solely for income tax purposes”⁵ was not relevant to the valuation of a hotel and was therefore not subject to the production requirement of Minn. Stat. §278.05, Subd. 6(a). This claim lacks any legal support. The Tax Court consistently has rejected petitioners’ attempts to limit the production requirement of Minn. Stat. §278.05, Subd. 6(a), to the information that the petitioner deems relevant. (See Larson Leasing, Inc. v. County of Dakota, File No. C1-95-7231 (Minn. Tax Ct. Order Aug. 24, 1995)(“Section 278.05, Subd. 6 requires income and expense data for all income-producing properties, not just the income and expense data that Petitioner deems relevant.”); T & L Investments v. County of Dakota, File No. C9-95-7347 (Minn. Tax Ct. Order Aug. 25, 1995)(“Unless the data is provided to the assessor, the assessor cannot reach a conclusion based on the facts. Section 278.05, subd. 6, requires that all income and expense data be given to the assessor, not just the income and expense data that petitioner deems relevant.”).) Instead, the Tax Court has explicitly held that contemplating a valuation process at such an early stage in the tax appeal is not appropriate because it artificially narrows the definition of relevance:

What is relevant for the 60 Day Rule is determined on a case-by-case basis. The definition of relevance for the purposes of the 60 Day Rule is broad so that the rule can evolve along with valuation processes and conform to

⁵ As noted, the lease document does not contain any clause indicating the lease was created solely for income tax purposes. The document provides for rent, specifies the real estate to be leased and contains provisions normally found in a lease document. (See 1100 Nicollet Mall, L.L.P. v. County of Hennepin, File No. TC-29591 (Minn. Tax Ct. Order March 25, 2004)(rejecting petitioner’s claim that the lease was not a true lease but a document providing for a loan repayment, where the lease contained the provisions normally found in a lease and did not contain terms and indicia of a loan document.)

individual subject properties challenging assessments. Indeed, establishing a valuation process during the 60 Day period, and thus limiting the information produced, would be premature and would restrict the petitioner and the respondent from making an accurate valuation, thereby in direct contravention to the policy underlying the 60 Day Rule. [*Kmart v. County of Becker*, 639 N.W.2d 856, 859-60 (Minn. 2002)]. We decline to read a narrower definition of relevancy into the 60 Day Rule. Instead we will continue to apply the holdings of *BFW* and *Becker*, which reason that for purposes of the 60 Day Rule, **relevant information is any and all available information relating to the income-producing subject property.**

Kmart Corp. v. County of Stearns, File Nos. CX-00-404, CX-01-1465, C2-02-1387 (Minn. Tax Ct. Order March 3, 2005) (Emphasis added.)

Moreover, a narrow determination of relevancy is not supported by this Court's decision in Irongate:

[T]he 60-day rule '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.**' *BFW Co.*, 566 N.W.2d at 705.

736 N.W.2d at 331. (Emphasis added). The precedential decisions of this Court make clear that Relator was required to provide all available information, including the lease, for the subject property.

B. Minnesota Statutes Section 278.05, Subdivision 6(a) (2008) Requires Production of Leases.

The Minnesota Legislature amended Minn. Stat. §278.05, Subd. 6(a) effective for petitions filed on or after July 1, 2008 to read:

In cases where the petitioner contests the valuation of income-producing property, information, including income

and expense figures in the form of (1) year-end financial statements for the year prior to the assessment date, (2) year-end financial statements for the year of the assessment date, and (3) rent rolls on the assessment date including tenant name, lease start and end dates, option terms, base rent, square footage leased and vacant space, verified net rentable areas in the form of net rentable square footage of the buildings or buildings, and anticipated income and expenses in the form of proposed budgets for the year subsequent to the year of the assessment date, must be provided to the county assessor no later than 60 days after the applicable filing deadline contained in section 278.01, subdivision 1 or 4.

It is uncontested that Relator's petition challenging the January 2, 2008 Assessor's EMV was filed on April 10, 2009, therefore the 2008 amendment to Minn. Stat. §278.05, Subd. 6(a) applies. (Respondent's Memorandum in Support of Motion to Dismiss (File No. 27 CV 09 08071), Reichel Aff. ¶ 3; Petitioner's Memorandum in Support of Motion for Amended Findings of Fact and Conclusions of Law, Relator's Appendix A-021.) The Tax Court dismissed Relator's petition for failure to provide the lease, citing the Minnesota Supreme Court's decision in Irongate, as well as Relator's additional failure to provide rent rolls, lease information or rent calculations. (Order Denying Motion for Amended Findings (April 26, 2011) Relator's Brief Add 13.)

Relator's claim that the amended statute is a "complete list of items required to satisfy the 'income and expense figures' portion of the 60-Day rule" is without merit. (Relator's Brief p. 17.) The Legislature retained the preceding word "including" in its amended language, knowing that the Irongate Court specifically found it indicated the 60-day rule was only a partial, non-exhaustive list. (Irongate at 330.) Thus, had the Legislature intended to amend Minn. Stat. §278.05, Subd. 6(a) to embody an exclusive

list, it would have changed the “including” language, as it did in a subsequent 2011 statutory amendment for petitions contesting the 2010 assessment (which is not before this Court)⁶. As a result, Relator’s failure to provide the lease mandates dismissal of its petition pursuant to Minn. Stat. §278.05, Subd. 6(a) (2008).

⁶ Minn. Stat. §278.05, Subd. 6 (2011) **Dismissal of petition; exclusion of certain evidence.** (a) In cases where the petitioner contests the valuation of income-producing property, the following information must be provided to the county assessor no later than August 1 of the taxes payable year:

- (1) a year-end financial statement for the year prior to the assessment date,;
- (2) a year-end financial statement for the year of the assessment date,;
- (3) a rent roll on or near the assessment date listing the tenant name, lease start and end dates, base rent, square footage leased and vacant space;
- (4) identification of all lease agreements not disclosed on a rent roll in the response to clause (3), listing the tenant name, lease start and end dates, base rent, and square footage leased;

- (5) net rentable square footage of the building or buildings; and
- (6) anticipated income and expenses in the form of a proposed budget for the year subsequent to the year of the assessment date.

(b) The information required to be provided to the county assessor under paragraph (a) does not include leases. Failure to provide the information required in paragraph (a) shall result in the dismissal of the petition, unless (1) the failure to provide it was due to the unavailability of the information at the time that the information was due, or (2) the petitioner was not aware of or informed of the requirement to provide the information. If the petitioner proves that the requirements under clause (2) are met, the petitioner has an additional 30 days to provide the information from the time the petitioner became aware of or was informed of the requirement to provide the information, otherwise the petition shall be dismissed.

(c) If, after the August 1 deadline set in paragraph (a), a county assessor determines that the actual leases in effect on the assessment date are necessary to properly evaluate the income-producing property, then a county assessor may require that the petitioner submit the leases. The petitioner must provide the requested information to the county assessor within 60 days of a county assessor's request. The tax court shall hear and decide any issues relating to subsequent information requests by a county assessor. Failure to provide the information required in this paragraph shall be addressed under Rules of Civil Procedure, rule 37.

Even if this Court were to consider the legislative history of the 2008 amendment, based on a conclusion that Minn. Stat. §278.05, Subd 6(a) is ambiguous with respect to leases, nothing in the legislative record supports Relator's claim that the 2008 amendment "was meant to eliminate the requirement that leases be provided." (Relator's Brief p. 15.) First, the March 16, 2007 testimony before the Legislature, referenced by Relator, predates the Supreme Court's August, 2007, Irongate decision, which explicitly required production of leases. (Relator's Appendix A 028-036.) Despite the fact that the Supreme Court decision in Irongate had not yet issued, Laurie Miller, an attorney with Fredrikson & Byron (the same firm representing Relator), specifically testified that because of earlier Tax Court decisions interpreting the 60-Day rule, "we're telling our clients you have to produce every single lease." (Relator App A-30.) Ms. Miller's testimony evidences knowledge that, even prior to Irongate, the 60-Day rule required the production of leases.

Second, the testimony of Representative Marquart and Laurie Miller indicate that the proposed language sought to remove the sanction of dismissal as a consequence for failure to comply with the production requirements of the 60-Day Rule. (*Id.* A 028-032.) As a result, Hennepin County Assessor, Tom May, testified in opposition to the proposed amendment because it sought to "gut the 60 day rule by taking out the requirement for dismissal...if the petitioner does not comply with the 60 day rule." (*Id.* A 032-033; Respondent's Memorandum in Opposition to Petitioner's Motion for Amended Findings of Fact and Conclusions of Law p. 2; H.F. No. 1947.) Ultimately, the Legislature maintained the dismissal consequence for non-compliance in the

statutory language. There simply is no testimony in the legislative record to support Relator's claim that the 2008 amendment eliminated the requirement that leases be provided.

III. THE TAX COURT CORRECTLY INTERPRETED MINNESOTA STATUTES SECTION 278.05 SUBDIVISION 6 (a) (2008) AS REQUIRING THE PROPERTY TAX PETITIONER TO PROVIDE A RENT ROLL FOR THE SUBJECT PROPERTY.

With respect to Relator's petition for the January 2, 2008 EMV, it is undisputed that Relator never provided a rent roll as explicitly required by Minn. Stat. §278.05, Subd. 6(a) (2008). As discussed above, Minn. Stat. §278.05, Subd. 6(a) was amended in 2008 to specifically require production of "rent rolls on the assessment date including tenant name, lease start and end dates, option terms, base rent, square footage leased and vacant space."

Relator claims that the information required under this statutory provision was "unavailable" because Relator did not prepare "rent rolls" and was therefore under no obligation to provide one. (Relator's Brief Add 11 - 13.) The Tax Court rejected that argument because Relator did not and could not claim that the **information** specifically required to be included in the rent roll (tenant name, lease start and end dates, option terms or base rent) was unknown or unavailable. All of the information required to be produced in a rent roll is found in the hotel lease that Relator failed to timely produce. (See Hotel Lease, Bates pp. 290-317.) Relator included other information, such as the net rentable area, on the cover letters submitted with the profit and loss statements and operating budgets. Relator could have included rent roll information in the same

manner. Alternatively, Relator could have prepared a document listing the tenant name, lease start and end dates, option terms, base rent and square footage leased. The statute seeks **information**, not a particular document, and there is no claim that the **information** was unavailable. (See Kmart v. County of Mower, File Nos. C1-01-467, C3-00-489, C4-02-540 (Minn. Tax Ct. May 31, 2007) (“Whether the information is provided through a lease, an expense analysis or any other method of maintaining income and expense figures, the 60 Day rule requires Petitioner to provide the information to the County Assessor unless unavailable.”) Instead, Relator disclosed nothing and the Tax Court correctly dismissed its petition.

IV. THE TAX COURT CORRECTLY INTERPRETED MINNESOTA STATUTES SECTION 278.05 SUBDIVISION 6 (a) AS REQUIRING THE PROPERTY TAX PETITIONER TO PROVIDE PERCENTAGE RENT INFORMATION FOR THE SUBJECT PROPERTY.

It is uncontested that the hotel lease established the base rent at \$183,333.33 per month or \$2,199,999.96 per annum, plus percentage rent based on room revenue, food and beverage revenue, and other revenue.⁷ It is also uncontested that profit and loss statements listed “property rent” of \$2,814,609 for 2004⁸, \$2,804,812 for 2005⁹, \$2,316,432 for 2006¹⁰, \$3,004,442 for 2007¹¹ and \$2,674,443 for 2008,¹² each of which

⁷ Respondent’s Memorandum in Support of Motion to Dismiss (T.C. File No. 27 CV 08 13046)(27 CV 09 08071); Ex. B, Bates pp. 293-6.

⁸ *Id.* at Ex. A, Bates pp. 6, 77.

⁹ *Id.* at Ex. A, Bates pp. 9, 78, 81.

¹⁰ *Id.* at Ex. A, Bates p. 39.

¹¹ *Id.*

¹² *Id.* at Ex. A Bates p. 128.

exceeded the base rent. Thus, additional percentage rent was paid, however Relator failed to provide the assessor with any information about the income Relator received pursuant to the terms of a lease.

Relator also failed to provide the assessor with any information that would have allowed the assessor to ascertain that the rent figures were related to a single lease of the subject property or that the figures represented a total rent comprised of a base rent plus percentage rent for each year, despite the fact that the assessor requested lease summaries and rent rolls for reviewing the value of the property. Relator's claim that information describing how the total rent was calculated would be duplicative and redundant is without merit. (Relator's Brief p. 29.) The assessor had no knowledge that the rent figures were total rent figures comprised of a base rent plus percentage rent because Relator failed to timely provide the hotel lease and failed to provide a lease summary or rent roll. Given the inadequacy of Relator's disclosures, the rent figures were simply not redundant or duplicative of any information provided by Relator.

The instant case is analogous to the Kmart trilogy, i.e., Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002); Kmart Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002); and Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002). The Minnesota Supreme Court affirmed the Tax Court dismissal in each of the Kmart cases where the petitioner provided the assessor with a copy of the lease and lease summary which contained percentage-rent clauses, but failed to indicate whether or not the percentage-rent clauses had been invoked. In the Kmart cases, while the assessor was provided a copy of the lease, the petitioner failed to provide sufficient

information to enable the assessor to interpret the lease and determine what total rent had been paid. Here Relator, arguably, provided total rent figures but then failed to provide the assessor with any information to enable him to interpret the figures in a meaningful manner; i.e. failed to timely provide a copy of the lease or a lease summary from which the assessor could figure out that the property was subject to a lease that contained base rent plus percentage rent clauses. Based on this Court's holdings in the Kmart trilogy, the Tax Court correctly dismissed Relator's petitions.

V. THE TAX COURT'S INTERPRETATION OF MINNESOTA STATUTES SECTION 278.05, SUBDIVISION 6(a) DOES NOT RENDER THE STATUTE UNCONSTITUTIONALLY VAGUE.

Relator claims that the Tax Court rendered the statute unconstitutionally vague in both its pre- and post-2008 form, through its interpretation of the disclosure requirements. (Relator's Brief p. 29-33.) Relator did not request nor did the Tax Court implement an Erie Shuffle and the Tax Court did not address Relator's constitutional claims. (Erie Mining Co. v. Commissioner of Revenue, 343 N.W.2d 261, 263-4 (Minn. 1984)(The Minnesota Supreme Court held that if a party raises a constitutional issue, the tax court should stay the proceeding and refer the question to the district court which may either decide the constitutional issue or refer the matter back to the tax court which would then have subject matter jurisdiction to rule on the issue.) Despite the fact that Relator's claims were not considered by the Tax Court, these constitutional claims must be rejected as without merit.

"A statute is not unconstitutionally vague where the words are commonly understood, are judicially defined, or have a settled meaning in law." (Irongate, 736

N.W.2d at 332, *citing* Invention Mktg., Inc. v. Spannaus, 279 N.W.2d 74, 80 (Minn. 1979).) Relator specifically argues that the Tax Court rendered the statute vague by requiring “everything related to the ownership, operation and leasing of a property.” (Relator’s Brief p. 32.) However, Relator’s due process challenge is as applied, *see* Relator’s Brief pp. 30-31, thus Relator’s true argument is that the Tax Court rendered the statute vague by interpreting it to include (1) the lease, (2) percentage rent calculations, and (3) rent roll information.

In BFW Co. v. County of Ramsey, the Minnesota Supreme Court did not find Minn. Stat. §278.05, Subd. 6(a) to be vague or ambiguous. Rather, the Court found its plain meaning “requires the petitioner 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.” (566 N.W.2d at 705.) As discussed, *supra*, Minn. Stat. §278.05, Subd. 6(a) was amended in 2003, however that amendment only changed the deadline for submission of information. Thus the relevant language of the statute remained unchanged, with respect to Relator’s petition challenging the January 2, 2007 EMV and Relator’s vagueness challenge must be rejected.

In Irongate, the Tax Court dismissed the petitions because of the petitioner’s failure to provide leases, in spite of the fact that income statements and rent rolls were timely provided. In Irongate, the petitioner raised an argument similar to that raised by Relator, by claiming that the Tax Court’s interpretation of Minn. Stat. §278.05, Subd. 6(a) (2003) rendered the statute unconstitutionally vague and overly broad because, essentially, a petitioner cannot anticipate what information must be produced to comply

with the statute. (Irongate, 736 N.W.2d at 332; Relator's Brief p. 31.) The Minnesota Supreme Court rejected the petitioner's constitutional argument and affirmed the Tax Court's dismissal, finding that Irongate could reasonably anticipate providing leases under the 60-day rule because leases provide information bearing on income and expense data. The same is true here; the statute is not vague because Relator could reasonably anticipate providing the hotel lease, particularly in light of this Court's Irongate decision.

In the Kmart trilogy, the Supreme Court affirmed the Tax Court's dismissal of the petitions based on the petitioners' failure to provide sufficient information for the assessor to interpret the rent and percentage rent clauses of a timely provided lease. Thus, Relator could reasonably anticipate that providing rent and percentage rent information was required pursuant to Minn. Stat. §278.05, Subd. 6.

Minn. Stat. §278.05, Subd. 6(a) was amended in 2008 to specifically require production of a rent roll. Any constitutional challenge based on vagueness must be rejected as illogical, based on the statute's explicit language.

In Kmart v. County of Mower, File Nos. C1-01-467, C3-00-489, C4-02-540 (Minn. Tax Ct. May 31, 2007), the Tax Court dismissed the petitions for failure to provide tenant-paid real estate expense figures where petitioner's lease, which was provided, required petitioner to pay certain real estate expenses. The Tax Court rejected the petitioner's claim that the information was unavailable and rejected the petitioner's claim that Minn. Stat. §278.05, Subd. 6 was unconstitutionally vague and overly broad. The Tax Court found nothing vague in how the Minnesota Supreme Court consistently

applied the 60 Day Rule, noting that the same constitutional claim, which Relator raises here, had been repeatedly raised and rejected as early as BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997) and in Kmart v. County of Stearns 710 N.W.2d 761 (Minn. 2006) as well as in Irongate Enterprises v. County of St. Louis, 736 N.W.2d 326 (Minn. 2007). Thus, based on the rulings in BFW, the Kmart trilogy, and Irongate, Relator's constitutional challenge to the statute must be rejected.

The Minnesota Supreme Court decisions in BFW, the Kmart trilogy and Irongate made it abundantly clear that a petitioner must produce all information to which it has access, not just the information that it deems relevant, which includes leases because they contain information bearing on income and expense data, percentage rent information because it is income or expense data, and rent rolls because they are explicitly required in the 2008 amended statutory language. Relator's constitutional claims cannot stand.

CONCLUSION

The Minnesota Tax Court correctly interpreted Minn. Stat. §278.05, Subd. 6(a) (2003), as well as the Minnesota Supreme Court decisions in BFW, the Kmart trilogy, and Irongate, and dismissed Relator's petition contesting the January 2, 2007 EMV for Relator's failure to timely provide the hotel lease as well as its failure to provide information regarding rent calculations.

The Minnesota Tax Court also correctly interpreted Minn. Stat. §278.05, Subd. 6(a) (2008) and dismissed Relator's petition contesting the January 2, 2008 EMV for

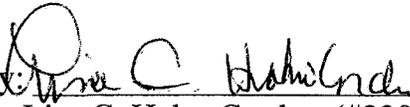
Relator's failure to provide a rent roll as well as its failure to timely provide the hotel lease and failure to provide information regarding rent calculations.

Respondent respectfully requests that the Tax Court decisions be affirmed.

Respectfully submitted,

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Dated: August 5, 2011

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A11-0128
STATE OF MINNESOTA
IN SUPREME COURT

78th Street OwnerCo, LLC,
Relator,

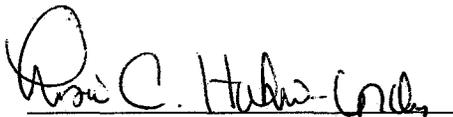
vs.

**CERTIFICATION OF BRIEF
LENGTH**

County of Hennepin
Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,432 words. This brief was prepared using Microsoft Word 2003, Times New Roman font face size 13.

Dated: August 5, 2011


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