

NO. A11-399

State of Minnesota
In Supreme Court

Berry & Co., Inc.,

Relator,

v.

County of Hennepin,

Respondent.

RELATOR'S BRIEF

William R. Skolnick (#137182)
Amy D. Joyce (#0387862)
SKOLNICK & SHIFF, P.A.
2100 Rand Tower
527 Marquette Avenue
Minneapolis, MN 55402
(612) 677-7600

Attorneys for Relator

Michael Bernard (#253054)
Assistant Hennepin County Attorney
Office of the Hennepin County Attorney
2000A Government Center
300 South Sixth Street
Minneapolis, MN 55487
(612) 348-4621

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES..... iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS..... 3

ARGUMENT 9

I. STANDARD OF REVIEW 9

II. THE TAX COURT’S FINDING OF DEVELOPMENT POTENTIAL IS NOT
LEGALLY PERMISSIBLE AND IS CONTRARY TO DOCUMENTARY AND
TESTIMONIAL EVIDENCE PRESENTED AT TRIAL 10

III. THE TAX COURT’S DECISION IS NOT SUFFICIENTLY SUPPORTED BY
THE FACTS..... 14

CONCLUSION 30

CERTIFICATE OF BRIEF LENGTH..... 31

ADDENDUM..... 32

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).

TABLE OF AUTHORITIES

Cases

<u>City of Minnetonka v. Carlson,</u> 298 N.W.2d 763, 766 (Minn.1980).....	10
<u>Equitable Life Assurance Society of the United States v. County of Ramsey,</u> 530 N.W.2d 544 (Minn. 1995).....	14
<u>Evans v. County of Hennepin,</u> 548 N.W.2d 277, 278 (Minn.1996).....	10, 14
<u>H.R. Swaggert v. County of Hubbard,</u> 2003 WL 23094712 (Minn. Tax Regular Div.)	13
<u>Harold Chevrolet, Inc. v. County of Hennepin,</u> 526 N.W.2d 54, 57-58 (Minn. 1995)	9
<u>Hedberg & Sons Co. v. County of Hennepin,</u> 232 N.W.2d 743 (Minn.1975).....	13
<u>Marquette Bank v. County of Hennepin,</u> 589 N.W.2d 301, 304 (Minn. 1999).....	9
<u>O'Brien Family Limited Partnership v. County of Crow Wing,</u> 1998 WL 166226 (Minn. Tax).....	13
<u>Wybierala v. Comm'r of Revenue,</u> 587 N.W.2d 832 (Minn. 1998).....	9

Statutes and Rules

Minn. Stat. §271.10	9
Minn. Stat. §272.03	13
Minn. Stat. §273.08	14
Minn. Stat. §273.11	14, 20
Minn. Stat. §273.12	13, 27

RELATOR'S STATEMENT OF THE ISSUES

1. Did the Tax Court err in adopting Respondent's opinion that the property was developable despite the existence of City ordinances prohibiting the proposed development?

Result below: The Tax Court ruled incorrectly.

Most apposite authorities: Hedberg & Sons Co. v. County of Hennepin, 232 N.W.2d 743 (Minn.1975); H.R. Swaggert v. County of Hubbard, 2003 WL 23094712 (Minn. Tax Regular Div); O'Brien Family Limited Partnership v. County of Crow Wing, 1998 WL 166226 (Minn. Tax).

2. Was the Tax Court's decision sufficiently supported by the facts?

Result below: The Tax Court ruled incorrectly.

Most apposite authorities: Equitable Life Assurance Society of the United States v. County of Ramsey, 530 N.W.2d 544 (Minn. 1995); Evans v. County of Hennepin, 548 N.W.2d 277 (Minn. 1996); Minn. Stat. §§ 273.08, 273.11.

STATEMENT OF THE CASE

This appeal arises from a decision of the Minnesota Tax Court dated December 28, 2010, following a two day trial in which the court heard testimony and received exhibits related to the taxable market value of the real estate at issue on the assessment dates in question. The Respondent, Hennepin County, contended at trial through its expert that the taxable market value of the real estate was \$3,881,000 as of January 2, 2007 and \$4,153,000 as of January 2, 2008; \$1,341,000 and 1,503,000 in excess of the County Assessor's original assessed values. Relator's expert testified that the fair market value of the property was at most \$1,620,000 and \$1,550,000 for the respective assessment dates due to the property's limitations.

Both parties' experts opined that the highest and best use of the subject property is for future development. Relator presented expert testimony, the testimony of the property owner and substantial evidence that on the valuation dates and for the near term future, development of the property to maximize value is legally and financially unfeasible, as required under a highest and best use analysis. Thus, for the near term future development of the property is impossible and Relator's appraised values are based on land value alone (both experts agreed that the structures currently on the property have no value). Respondent's expert claimed, and the Tax Court found, that development of the property was possible on the valuation dates. However, in addition to the compelling contrary evidence presented by Relator, the City's expert opinion was rendered unreliable by admissions that the expert did not do a thorough analysis, that he miscalculated the developable area of the property by failing to consider a wetland buffer zone, and that his

appraisal was not “market value” as required by Minnesota law (Minn. Stat. § 272.03, subd. 8) since “no one would pay” the value he attributed to the property. Moreover, the County’s expert did not apply the appropriate adjustments to reach an appraised value. Therefore, the Tax Court’s adoption of Respondent’s appraisal was clearly erroneous, and its decision is directly contrary to the facts and Minnesota law.

STATEMENT OF FACTS

The sole objective of the proceeding below and this appeal is to determine the market value of the subject property on the two protested valuation dates. As described below, the subject property's assessed value was excessive for the protested years. Based upon the evidence elicited during the trial, the Relator met its burden of proof and the assessed value should have been reduced accordingly.

At trial, each party submitted appraisals to support their positions regarding the market value of the subject property for assessment dates January 2, 2007 payable 2008, and January 2, 2008 payable 2009. "Market value" is defined as:

the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeable, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;
2. Both parties are well informed or well advised, and acting in what they consider their own best interests;
3. a reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in U.S. dollars, or in terms of financial arrangements comparable thereto; and
5. The price represents the normal considerations for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(Respondent's Appraisal p. 13, Trial Ex. 101/APP0227).

The appraisal submitted by the County grossly inflated the market value of the

Subject Property by failing to make required adjustments, failing to accurately calculate the total usable land area, and failing to realistically assess the development potential of the property under the highest and best use analysis. The majority of the opinions of Respondent's expert were based on subjective, unsupported personal opinion and contrary to fact. The Tax Court's reliance on Respondent's expert opinion resulted in values that are clearly erroneous.

Conversely, Petitioner's expert, James Kramer ("Kramer"), made appropriate adjustments and accurately calculated the total usable land area. Kramer's opinions were supported by local and national and his more than 45 years of experience as a commercial property appraiser. (TT. p. 70). Further, the owner of the Subject Property, Bradley Hoyt ("Hoyt") testified as to the development potential of the property. Hoyt mapped out the development possibilities on the applicable valuation dates. Hoyt's opinions were based on over 30 years of experience as a commercial real estate developer, during which he has personally built, purchased and/or sold over 500 different buildings of all types including all manner of commercial, industrial, retail, strip centers, grocery stores and other types of buildings. His testimony was the only testimony of an actual commercial property owner.

Despite the significant differences in values argued by the parties, there were a number of undisputed facts. Here are the undisputed facts:

1. Berry & Co., Inc. ("Petitioner") is the owner of the real property at issue in this case; all statutory and jurisdictional requirements have been complied with, and the Court has jurisdiction over the subject property and the parties.

2. Berry & Co., Inc. is owned by Bradley A. Hoyt (“Hoyt”).
3. The property is located at 253 Lake Street East, Wayzata, Minnesota (PID 06-117-22-23-0013) (“Subject Property”).
4. The Subject Property site area totals 53,227 square feet. (TT. pp. 237-28).
5. The subject property is a single story building built in 1940.
6. There are currently three structures on the Subject property. An office building and two pole barn / storage type structures.
7. The office building is sinking, is functionally and economically obsolete, and has no value to a potential buyer.
8. The remaining structures also have no value to a potential buyer.
9. The structures are over 70 years old.
10. A portion of the Subject Property is encumbered by wetlands and a wetland buffer zone that is undevelopable. (TT. pp. 86, 322).
11. Petitioner’s expert testified that the total usable land area is approximately 34,598 square feet. (TT. p. 77).
12. Respondent’s expert testified that the total usable land area is approximately 44,107 square feet. (TT. pp. 230-231).
13. Respondent’s expert conceded that his calculation was wrong and there was actually less than 44,107 square feet of usable land area due to the undevelopable wetland buffer zone. (TT. pp. 326, 329).
14. The Subject Property has unstable soils that will require correction. (Trial Ex. 8/APP0072).

15. The Subject Property is rectangular in shape with little frontage and excessive depth which is less desirable. (TT. 241).

16. The Subject Property has soil contamination issues that may need correction if the property is developed. (Trial Ex. 9/APP0153).

17. The Subject Property contains high ground water which makes below ground development cost prohibitive if not impossible. (TT. pp. 338).

18. Under the current zoning restrictions, the property owner can only erect a two story building with a maximum height of 30 feet. (TT. pp. 20, 333).

19. The square footage of the legally permissible two-story building is further restricted by the availability of parking, i.e. there must be five parking spaces per 1000 square foot of building. (TT. p. 19).

20. In or about 2005, Hoyt, along with an adjoining property owner, M.G. Kaminsky, submitted a joint proposal to the city of Wayzata for a Planned Unit Development (“PUD”) to develop their properties. This proposed development required both properties and could not be applied to the Subject Property alone. (TT. pp. 321-322).

21. The PUD was never approved as submitted by the property owners, but rather was approved with conditions / changes to the development plan that were unacceptable and cost prohibitive for the property owners. (TT. 313-314).

22. The PUD expired in September 2007. (TT. p. 320).

23. Hoyt has over 30 years of experience as a commercial real estate developer that has built, purchased and/or sold over 500 different buildings of all types. (TT pp. 8-

9).

24. He has constructed all manner of commercial, industrial, retail, strip centers, grocery stores and other types of buildings. His testimony was the only testimony of an actual commercial property owner and experienced real estate developer.

25. Hoyt holds a Class C Commercial Contractor's license in the state of Florida. (TT. p. 9).

26. The Hennepin County Assessor placed a January 2, 2007 estimated market value on the Subject Property of \$2,540,000 and \$2,650,000 for the valuation date of January 2, 2008.

27. The Petitioner's expert appraiser James Kramer placed a January 2, 2007 market value on the Subject Property of \$1,620,000.

28. The Petitioner's expert appraiser Kramer placed a January 2, 2008 market value on the Subject Property of \$ 1,550,000.

29. The Respondent's appraiser Christopher Bennett placed a January 2, 2007 market value on the Subject Property of \$3,881,000.

30. The Respondent's appraiser Bennett placed a January 2, 2008 market value on the Subject Property of \$4,153,000.

31. Kramer, Relator's appraiser, is licensed by the State of Minnesota and has been a commercial real estate appraiser for over 45 years. He considered all three of the traditional approaches (cost, sales and income), but only applied the comparable sales method in order to arrive at his valuation conclusions.

32. Respondent's appraiser Bennett is not a licensed appraiser. He also

considered all three traditional methods but only applied the comparable sales method to arrive at his valuation conclusions.

33. Respondent's appraiser Bennett admitted the following facts:

a) He had never performed an appraisal of commercial property in the City of Wayzata. (TT p. 289-290);

b) He has no personal experience in commercial real estate having never purchased or sold a single commercial property. (TT p. 350);

c) He admitted that his appraisal of the Subject Property 2007 does not reflect the market value of the property: "**Well, nobody is going to buy it to – nobody is going to pay the 3-9 that my appraisal is to occupy those buildings long term.**" (TT. p. 343 emphasis added).

19. Petitioner retained GME Consultants, Inc., an engineering firm, to evaluate the soil properties at the Subject Property (Trial Ex. 9/APP0153). GME conducted testing and analysis of the soils and issued a report with their findings. GME found the subject property's soil is comprised of organic soils which are found to depths of 10-50 feet. (Id. at p. 9; TT. p. 40). Organic soils cannot be built on but instead require pilings. Here, it was determined that the piles could achieve a capacity of 130 tons per pile when drilled to depths of 65-70 feet. (Id.; TT. 39). GME did not opine as to the cost of the soil correction however, the cost of the pilings alone was estimated by Hoyt and Mr. Tom Ryan of RJ Ryan Construction, to be \$190,000. (Id.)

20. BA Leisch & Associates tested the soils for contamination, finding that soil correction may be an issue, but no cost analysis was provided. (Trial Ex. 8/APP0072).

21. Hoyt did a cost analysis, based on his 30+ years of experience, to determine the financial feasibility of building on the Subject Property. (Trial Ex. 3/APP0071). Hoyt's analysis, which did not include the cost to cure any environmental issues, concluded that it was cost prohibitive to develop the property in the near term future as detailed below.

22. The Respondent did not hire any engineering firm to analyze or estimate the cost to develop the subject property.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

Questions of Law

The standards of review are well established. This Court reviews a decision of the Tax Court to determine if it is justified by the evidence or not in conformity with the law. Minn. Stat. §271.10 subd. 1 (2004); Wybierala v. Comm'r of Revenue, 587 N.W.2d 832 (Minn. 1998). As to legal decisions made by the Tax Court, those decisions are reviewed de novo. Marquette Bank v. County of Hennepin, 589 N.W.2d 301, 304 (Minn. 1999).

The Supreme Court will sustain the tax court's valuation of property for tax purposes unless the tax court's decision is clearly erroneous in the sense that the evidence as a whole does not reasonably support the decision. Harold Chevrolet, Inc. v. County of Hennepin, 526 N.W.2d 54, 57-58 (Minn. 1995) The Supreme Court defers to the tax court's decisions unless the tax court has clearly overvalued or undervalued the property,

or has completely failed to explain its reasoning. Evans v. County of Hennepin, 548 N.W.2d 277, 278 (Minn. 1996). The tax court decision on valuing property will be reversed when the Supreme Court is left with a definite and firm conviction that a mistake has been committed. City of Minnetonka v. Carlson, 298 N.W.2d 763, 766 (Minn.1980).

Here, the Tax Court's decision cannot be sustained because proper application of Minnesota law prohibits its findings, which are therefore clearly erroneous. The Tax Court made a serious, unjust mistake in valuing the Subject Property that not only ignored the compelling expert testimony presented by Relator, but also ignored the law and the facts

II. TAX COURT'S FINDING OF DEVELOPMENT POTENTIAL IS NOT LEGALLY PERMISSIBLE AND IS CONTRARY TO DOCUMENTARY AND TESTIMONIAL EVIDENCE PRESENTED AT TRIAL.

The Subject Property is zoned C4A Limited Commercial Business District, directed for commercial use and located at 253 East Lake Street, Wayzata, Minnesota (PID 06-117-22-23-0013). Under the zoning restrictions in place now and on the relevant valuation dates, the property owner can only erect a two-story building with a maximum height of 30 feet. In addition, this two-story building is further restricted by the availability of parking, (i.e. there must be five parking spaces per 1000 square feet of building), limited curb exposure (the lot is excessively deep), and high water levels that prevent below ground development. Pursuant to the City of Wayzata, the first floor must consist entirely of retail while the second level may be office and/or retail. Any deviation from these restrictions requires permission from the City, which has never been obtained.

The Court cannot base its value on the assumption that approval would be granted.

The Tax Court erroneously found that on the assessment dates, the subject property had been approved for a Planned Unit Development (“PUD”) and therefore accepted the Respondent’s analysis that the property could be developed on the valuation dates. In fact, the City documents presented at trial and Respondent’s assessor’s testimony proved that the PUD was never approved for the Subject Property alone but instead required the adjacent property owned by another individual. In addition, the PUD was never approved as submitted, but rather required 15 substantial changes to the proposed development, and the proposed PUD with the City’s changes expired on September 7, 2007, a full three months before the second assessment date. Respondent’s expert testified as follows:

Q: ...[i]f Mr. Hoyt, the owner of this property, chose to try to implement this PUD making those changes without Mr. Kaminski’s property [the adjacent property], would he be able to do that?

A: Well, he would need – he would need the cooperation of Mr. Kaminski.

Q: So no he couldn’t could he?

A: No, I guess he has to work with the adjoining property owner.

(TT. pp. 321-322)

Q: As it was submitted it was not approved, correct? So they had to make these – it looks like 15 changes to their –

A: Well, they actually made the resolution to change ti to a PUD. That is what this – that is what 663 is, they amended the zoning chapter to make this a PUD.

Q: Yes, provided the property owners changed the Planned Unit Development to incorporate these 15 items, correct?

A: Okay, you are correct about that.

Q: And would you agree with me that this document [Trial Ex. 104/APP0290] also reflects that the PUD as submitted, the proposed PUD as submitted by the property owners was not, in fact, approved by the City?

A: Well, to me, again, it says approved with the conditions. If you consider that not being approved then I guess it wasn't approved.

(TT. pp. 313-314).

Q: Wouldn't it have expired in September 2007?

A: September 20th is when it expired of 2007.

Q: Thank you. So it was not in place as of January 2, 2008?

A: 2008, no.

(TT. p. 320).

The Tax Court's findings on this critical issue are not only unsupported by the record, they are contradicted by the record.

Since the zoning restrictions prohibit use of the property as Respondent's assessor opined, the Tax Court's adoption of Respondent's values violates Minnesota law. Existing valid zoning ordinances may proscribe or limit those uses which may be considered in proving market value for tax purposes; evidence of value for uses prohibited by an ordinance may be introduced and considered only where there is evidence showing a reasonable probability that the ordinance will be changed in the near

future.” Hedberg & Sons Co. v. County of Hennepin, 232 N.W.2d 743 (Minn. 1975) (emphasis added); See also H.R. Swaggert v. County of Hubbard, 2003 WL 23094712 (Minn. Tax Regular Div.) citing O’Brien Family Limited Partnership v. County of Crow Wing, Nos. C3-96-226, C0-97-1268 (Minn. Tax Ct. Apr. 8, 1998) holding that assessor cannot assume rezoning without providing evidence that rezoning would be approved). Moreover, where existing zoning restrictions circumscribe the available uses to which land may be devoted, they affect the market value of the property for tax purposes and no evidence in support of an enhanced value may be admitted where such enhanced value would be the result of a proscribed use. Hedberg, 232 N.W.2d 743 at 750; Minn. Stat. §§ 272.03, subd. 8, 273.12.

Here, Respondent’s assessor assumed, and the Tax Court improperly accepted, that the property was already approved for a PUD, but as stated above that is incorrect. Further, consideration of factors such as cost to prepare the land for development, in concert with zoning restrictions, can make development of the property remote and speculative. Hedberg, at 751. However, even arguendo, any reliance on an assumption that a PUD would be approved is misplaced and violates the law. Respondent provided no evidence of a reasonable probability that the ordinance would be changed or even that a PUD would be approved. Rather, without any direct knowledge, Respondent’s expert assumed that the City would allow the Relator to develop the property to the City’s specifications, without regard to the financial feasibility of the development under a Highest and Best use analysis.

III. THE TAX COURT'S DECISION IS NOT SUFFICIENTLY SUPPORTED BY THE FACTS.

Where the Tax Court's decision is not reasonably supported by evidence as whole, the Supreme Court will overturn the decision as clearly erroneous. Equitable Life Assurance Society of the United States v. County of Ramsey, 530 N.W.2d 544 (Minn. 1995). Here, the facts in evidence do not support the conclusions of the Tax Court. Respondent failed to appropriately apply a highest and best use analysis, failed to make appropriate adjustments to the comparable sales, failed to appraise the "market value" of the property and failed to accurately determine the total usable square footage of the property. Therefore, the Tax Court's blind acceptance of the Respondent's appraisal is clearly a mistake warranting a reversal. Evans v. County of Hennepin, 548 N.W.2d 277 (Minn. 1996).

Minnesota Statute Section 273.11 dictates how property is to be valued. The statute provides in relevant part:

Subdivision 1. Generally. Except as provided in this section or section 273.17, subdivision 1, all property shall be valued at its market value. The market value as determined pursuant to this section shall be stated such that any amount under \$100 is rounded up to \$100 and any amount exceeding \$100 shall be rounded to the nearest \$100. In estimating and determining such value, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall the assessor adopt as a criterion of value the price for which such property would sell at a forced sale, or in the aggregate with all the property in the town or district; but the assessor shall value each article or description of property by itself, and at such sum or price as the assessor believes the same to be fairly worth in money. The assessor shall take into account the effect on the market value of property of environmental factors in the vicinity of the property. In assessing any tract or lot of real property, the value of the land, exclusive of structures and improvements, shall be determined, and also the value of all structures and improvements thereon,

and the aggregate value of the property, including all structures and improvements, excluding the value of crops growing upon cultivated land.... All property, or the use thereof, which is taxable under section 272.01, subdivision 2, or 273.19, shall be valued at the market value of such property and not at the value of a leasehold estate in such property, or at some lesser value than its market value.

Minn. Stat. § 273.08 dictates the duties of the assessor and requires him/her to determine the market value of all real property listed for taxation. Moreover, both appraisals define market value: “the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeable, and assuming the price is not affected by undue stimulus.” Supra

Both the Petitioner’s and the Respondent’s appraisers utilized the sales comparison method to determine the market value of the subject property. However, Respondent’s appraiser failed to assess the feasibility of developing the Subject Property under a highest and best use analysis, failed to apply the appropriate adjustments and failed to accurately calculate the total usable land area, reaching a skewed result that does not represent the market value of the Subject Property.

A. Highest and Best Use.

When undertaking to appraise the value of commercial real estate, the appraiser must perform a highest and best use analysis. The highest and best use of real estate is defined as:

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported and financial feasible and that results in the highest value.

Highest and best use of land or site as though vacant. Among all reasonable, alternative uses, the use that yields the highest present land value, after payments are made for labor, capital, and coordination. The use of a property based on the assumption that the parcel of land is vacant or can be made vacant by demolishing any improvements.

Highest and best use of property as improved. The use that should be made of the property as it exists. An existing improvement should be renovated or retained as is so long as it continues to contribute to the total market value of the property, or until the return from a new improvement would more than offset the cost of demolishing the existing building and constructing a new one.

(Trial Ex. 101, p. 32/APP0227).

Further, the appraiser must consider whether the use of the property is legally permissible, physically possible, financially feasible and maximally productive.

Legally permissible: Primary considerations are private restrictions, zoning ordinances, building codes, historic district controls and environmental regulations.

Physically possible: Consideration is given to the size, shape, topography/soils and accessibility of the property.

Financially feasible: The use must generate a positive return.

Maximally Productive: The use that generates the highest return.

Based on the conditions present on the assessment dates, Relator's expert determined that the highest and best use of the subject property: as if vacant is commercial development at some time in the future. The highest and best use "as is" is estimated to be interim occupancy of the existing buildings for the near term future. (Trial Ex. 1 at p. 29/APP0001). This position is consistent with the analysis explored by the property owner, Hoyt, in determining the maximum development potential of the Subject Property. According to Hoyt, based on the

current zoning, he is restricted to a two story building with a footprint of approximately 4400 square feet or a total of 8800 square feet for the two stories. If Hoyt were to construct this building he would have to generate rents several times the going rate of \$18-22 psf to realize a positive return. Thus, development of the property was and is financially unfeasible and the use must remain as is for the foreseeable future.

Respondent's expert ("Bennett") determined that the highest and best use of the subject property "as is" and as improved is for development. Further, Bennett opined that the property could have been developed on the assessment dates. Bennett bases his opinion on non-existent facts and a fatally flawed analysis. First, Bennett states that the development of the property would include a three story building. However, as stated above, applicable zoning laws on the relevant dates prohibits structures over 30 feet or two stories. Second, Bennett states that development of a three-story building is financially feasible. However, aside from the fact that a three-story building is not a legal use of the property, Bennett does not explain how it would be financially feasible. Hoyt testified that it would cost him \$2.7 million to develop this property under the current zoning restrictions. (TT. pp. 26-32). Based on this model, the end value of the development would be worth \$1,372,000, less than half of the cost to develop the property. (TT. pp. 31-32). Thus, development of the property is neither financially or legally feasible. The Tax Court committed clear error by adopting Bennett's analysis.

B. Respondent Failed to Make Appropriate Adjustments.

When using the comparative sale method of valuation, under the Uniform Standards of Professional Appraisal Practice (“USPAP”), it is necessary to make adjustments to comparable sales so as to make the comparables as similar to the subject property as possible. Adjustments can be both quantitative and qualitative, such as adjusting for size, shape and slope, soil condition, and other factors that directly affect the value of the appraised property. Respondent’s expert either refused or failed to make these necessary adjustments to reach his appraised value, thereby improperly inflating the value of the Subject Property.

a. Size Adjustment

It is widely accepted that smaller parcels of land demand a higher price per square foot. Bennett testified:

Q: And wouldn’t you agree with me that a smaller property is more valuable?

A: Normally you would assume that.

(TT. pp. 357). Similarly, Kramer testified:

A: ...I find that in the past for the most part smaller sites tend to sell for more per square foot than bigger sites...generally speaking the similar sized site you wouldn’t have any adjustment, but for a smaller site its always been my experience in the past nearly all the time that a smaller site tends to sell more per square foot than the bigger sites, so that was comparing that property of Sale 1 at 13,323 square feet to the subject at 34,598, I had a negative 20 percent adjustment to that.

Despite acknowledging that size effects the price of property, Bennett failed to adjust for the fact that 4 of his 5 comparables were significantly smaller than the subject

property. Bennett provided no support for this position:

A: ...but I don't think that's the case on Lake Street.

Q: So it's based on your personal, professional opinion, and it's highly subjective, correct?

A: No, it's anything but subjective. I mean it's subjective in a way, but I think I have a good basis to why I didn't make an adjustment---

Q: Okay.

A: -- based on the market. If you look at the -- I put every property on Lake Street from one end to the other on a spreadsheet, and I sorted them by size, and you have a majority of the properties are small out there.

Q: What spreadsheet are you referring to?

A: It's a spreadsheet in my files here.

Q: So it's not a document that is in evidence?

A: It's not in my appraisal, not; but it's something that I used to decide not to make a size adjustment.

Q: Okay. Well, let me ask you it [sic] look at Page 54 of your appraisal.

A: Okay.

Q: When you look at, for example, you have got 801 Lake Street, which looks like it traded twice during the time period that you have considered on this chart, correct?

A: The Wayzata Bay Center, yes.

Q: That is 628,747 square feet of usable?

A: Correct.

Q: That traded between \$24 and \$38 or at 24.25 and 38.17?

A: Right.

Q: Then if you look at, for example, 332 Broadway, it's 4,906 square feet, and that was \$244.60 per square foot?

A: Right.

Q: Doesn't that evidence that smaller properties sell for a much higher amount per square foot?

A: No, because there is numerous differences between these properties. That doesn't prove a thing.

(TT. pp. 357-358). In summary, Bennett agrees that smaller properties sell at a higher per square foot amount, the premise is proven by his own comparables and yet he refuses to make the appropriate size adjustment. This inconsistency belies the accuracy of his appraisal as a whole.

Conversely, Relator's expert, analyzed each of his comparables for size and made adjustments where appropriate and necessary so that a reasonable comparison between the properties could be made.

b. Shape and Slope Adjustment

Appraisers for both parties agreed that the shape of the Subject Property is a negative consideration since the property has relatively little frontage compared to the excessive depth, which allows for little street exposure:

Q: ...Does a rectangularly [sic] shape, does that automatically make the property less marketable?

A Bennett: Well, it's not as good. It's not as desirable as maybe one that had less depth and more frontage, but it's – it's very developable in its current configuration.

(TT. p. 241).

However, only Kramer adjusted those comparables that contained better frontage. Bennett provided no explanation for his failure to make adjustments to those properties with more frontage and less depth, merely opining that the subject property was developable in its current state. (Id.)

c. Soil Correction Adjustment

Soil adjustments were appropriate due to the organic soils and the probable presence of contaminants. (Neither party adjusted for contamination due to unknown extent of contamination and unknown cost to cure). The cost of correction is removed from the land value because a buyer in the market would pay less for land that will have correction costs that generate no economic return. (TT. p. 91). This is consistent with the requirements of Minn. Stat. Sec. 273.11.

Organic Soils

Both appraisers testified that the soil on the Subject Property consisted of organic soils that would require correction. Relator provided an analysis of the cost of such correction, including but not limited to the use of pilings. In addition, the correction would require that all plumbing pipes and “everything else that is normally just put in the dirt has to actually be hung from these structure slabs. A very very expensive process.” (TT. pp. 39-40) Hoyt determined that the pilings alone would cost in excess of \$190,000. (Id. at p. 40). This testimony was consistent with Kramer, who testified to the same process. Kramer estimated that the cost would run approximately \$15 per square foot based on his recent appraisal of similar property (Lexus Dealership) with the same

condition. (TT. pp. 90-91).

Bennett, although in agreement with the principal that correction costs would reduce the value of a property, opted not to adjust any of the comparable properties:

Q: On Page 28 of your report you state that the soils will require ground improvements; is that correct?

A: Correct.

Q: And did you make any adjustments for those ground improvements to your comps?

A: No, I didn't.

(TT. p. 344).

Relator provided a logical, fact-supported reason for adjustments for soil correction:

A: ... The subsoil correction, it's regarded the subject since we have adjusted -- I've already adjusted the rear parts of the land out of the land area valuation at a 9 percent discounted in value, I adjusted 65 -- regarded 65 percent of the subject property that is usable land area to have a subsoil correction cost of \$15 a square foot of that land area, and --

Q: If I could just briefly ask you a question about that.

A: Yes.

Q: How did you come to that \$15 figure?

A: Well, I've ran into this many times in the suburbs along the freeways people using -- having subsoil construction costs, and the latest I was aware of was the Lexus dealership which is in Wayzata not so far away on 394, they remodeled the building and they have expanded it and put a parking ramp in there, and it had poor subsoil. They had to fill in it from 394 that was constructed. They piled it, deep pilings because there is a huge swamp behind it, a big wetland area, and they piled it to quite a depth. They had had to hang the mechanicals

under the ground floor whatever was there for the parking ramp, and they had to have structural floor slabs and huge grade beams were different and slabs are thicker. Anyway, that whole cost ended up being about \$15 a square foot of land area for that property. I saw the construction statement. I figured that out. So it's not that much different from other properties I have seen, probably a little bit more, so I used \$15 a square foot for subsoil construction costs regarded to be piling, dealing with the below grade conditions and the extra cost of offsetting that cost as far as added construction costs basically I am taking it off the land value. People pay less for land that you have got to put more cost in that doesn't generate any economic return, so that is an adjustment. It ended up being Sale Number 1 had similar subsoil conditions. It's the same 150 feet away or 200 feet away, and so I used the same \$15 figure. The only difference there was a 10 percent difference in usable land area, so that ended up being a negative 3.4 percent adjustment to the original sale price. So that is similar to the other sales that we did too.

(TT. pp. 90-91).

Bennett conceded the cost of pilings would be approximately \$180,000, but refused to adjust his values because he believed they would be a "wash." (TT. p. 253)

Q: And did you make any adjustments for those ground improvements to your comps?

A: No, I didn't.

In essence, Bennett concocted a hypothetical situation wherein he created facts.

He then went to GME and asked them, based on the hypothetical not the conditions on the subject property, what the cost would be.

Q: So it's a completely hypothetical situation that you have?

A: The 12,500 was hypothetical, yes.

* * *

A: It's getting a little out of control up here. Okay. I talked to him on 8/5 of '08, and he said – I gave him the hypothetical 12,500

footprint, and he said I would need between 35 and 40 of the 16-inch auger-casts. You know, this is just a ballpark thing. I wasn't trying to build a building. I'm just trying to get an idea of what the cost is to fix the soil.

Q: Okay. And would you agree with me that more things needed to be done than pilings to fix the soil problem?

A: Well, the pilings are going to fix the soil. You're still going to need a foundation, if that's what you're talking about.

Q: Actually I am referring to Mr. Kramer's testimony that in addition to the pilings there is going to be other -- there is going to be other necessary steps that have to be taken. For example, he testified that the plumbing and all of the utilities would have to be hung from the structure underneath because of the ground water.

A: Well, the report that I used they say in there that the utility lines should be piled. They didn't talk about any suspension.

Q: And that is also because there were never structural drawings completed, correct?

A: I don't think they knew where the -- yeah, I'm not aware of where the utility lines are going to be. Yeah, I have got in my notes here it says utility lines need to be piled. They don't know where they're going to be, where they're going to run, so that is true.

Q: So there are other costs that you haven't considered?

A: Well, I've considered it. I know there is going to be additional costs besides the pilings.

Q: And did you undertake to do any analysis of how much those additional costs might be?

A: No.

(TT. pp. 344-348).

Bennett then failed to include the substantial additional costs that make development of the subject property financially cost prohibitive.

d. Razing Adjustment

Neither party attributed any value to the buildings currently occupying the Subject Property. The reasoning by both appraisers was primarily that the buildings would be razed by any purchaser of the property. Kramer testified that he adjusted for razing costs because demolition of the buildings adds to the cost of the property. (TT. p. 96). In fact, Kramer reviewed each of the comparables and determined the approximate cost for razing the buildings compared to the cost to raze the buildings on the Subject Property and adjusted where appropriate. (Trial Ex. 1/APP0001). Bennett on the other hand, testified that he believed the costs to raze the buildings on the Subject Property versus the costs to raze the properties on the comparables were the same:

Q: Okay. Now I notice that you didn't adjust the sale price for the cost of razing; is that correct?

A: That is correct.

* * *

Q: ...why not include the razing costs?

A: Well, this is a -- normally you would, but this is a -- it turns out that both the subject and all the comparables have modest buildings that needed to be tore down, so that are essentially the same in that respect, so there is no adjustment needed.

(TT. pp. 262-263). However, this is not the case. Each of the comparable properties consist of different structures with different demolition requirements necessitating the need for adjustments.

Bennett further stated that “[a]ll of these razing costs are such a miniscule amount, I don't think these guys would even think about it. They're worried about hundred [sic] of thousands of dollars, not 10,000.” Neither of these positions was

supported by anything other than Bennett's opinion.

e. Time Adjustment

Time adjustments were made by Kramer to account for the difference between the land sale and the effective date of valuation. (TT. p. 84). Different time periods have different rates of land value increase, so a percentage is used to adjust land sales to the valuation date based on market indicators. (TT. pp. 84-85). Kramer determined that the market indicated a 5% per year adjustment was appropriate for comparable land sales in the City of Wayzata Central Business District prior to 2007. (Trial Ex. 1, at p. 32/APP0001). Kramer projected a declining trend with negative -5% appreciation rates in 2008 and thereafter. (Id.) This position was supported by Kramer's analysis of the resale of the Wayzata Village Shoppes real estate which sold in 2003 and again in 2007 reflecting a 5% per year appreciation and the general collapse of the real estate market at that time. (Id.)

Bennett applied a 7% appreciation rate. Bennett also considered the Wayzata Village Shoppes sale, but also used Hennepin County Commercial Growth Statistics compiled by the Hennepin County Assessor (26.6%; average yearly change of +8.67%) to reach the 7% time adjustment. This analysis also purports to support his increase in value for the valuation date of January 2, 2008. However, Bennett's analysis includes the entire County which creates a falsely inflated increase in property values and completely ignores the reality of the real estate market on the relevant dates.

Since Relator's expert considered only the applicable data in determining the appropriate time adjustment, versus Respondent's inclusion of data that applies to the

entire metropolitan area, the Tax Court's reliance on Respondent's analysis is clearly erroneous.

f. Motivated Sale Adjustment

The definition of market value is the most probable price a property would bring in an open market. A motivated sale is one that takes place outside of the open market or contains non-traditional financing. Kramer adjusted the comparables for motivated sales based on this definition. When there is a contract for deed, for example, it is assumed that the buyer received more favorable terms than available through a bank and therefore a negative adjustment is appropriate. Likewise, when the adjacent land owner buys the property, it is assumed that the land has more value for that individual and the comp must be adjusted accordingly.

Bennett refused to adjust for motivated sales:

Q: Did you make any adjustments for motivated sales?

A: No, I didn't.

Q: And that is despite the fact that, for example, on Comp 1 the buyer owns the adjacent property?

A: Well, I think that is a misnomer that just because an adjacent buyer buys a property that it was some unusual motivation. Nobody had a gun to their head. He approached the owner and they negotiated out a price, and that is very common out there. It doesn't mean he over paid.

Pursuant to Minnesota law, appraisers are required to apply the appropriate adjustments when valuing property to determine the market value for tax assessment purposes: "It shall be the duty of every assessor and board, in estimating and determining

the value of lands for the purpose of taxation, to consider and give due weight to every element and factor affecting the market value thereof..." Minn. Stat. § 273.12. Here Respondent admittedly failed to do so, rendering the Tax Court's reliance on Respondent's appraised value clearly erroneous.

C. Respondent Failed to Accurately Determine the Total Usable Area of the Subject Property.

When determining the market value of real property, it is essential to determine the total usable land area because that is what a willing buyer is purchasing.

Respondent's expert acknowledged:

Q: So why did you use usable land instead of total land area?

A: Because that's what -- that is the unit of comparison that is normally used—

Q: Okay.

A: -- for commercial land.

(TT. p. 267). Bennett testified that the total usable land area he used to calculate the market value of the property was 44,107. Bennett's process was flawed, leading to an inaccurate result.

To calculate the total usable land area, Bennett used an aerial view of the property and attempted to replicate the wetland area in order to determine how much of the property was unusable. First, Bennett merely looked at the wetland area which was deemed to be approximately $\frac{1}{4}$ of an acre of the Subject Property and attempted to draw that area on the aerial map. (Trial Ex. 110/APP0309). Bennett did not use a survey or any other acceptable means of determining this area. Second, Bennett failed to include

the wetland buffer zone, an area which he admits is not developable and should have been subtracted from his calculation to determine the total usual land area:

Q: Would you agree with me that you can't develop in the buffer zone?

A: Right. Well, you're allowed to push into that buffer if you get approval to do it.

Q: But there is no approval on this property that you're aware of to push into that buffer, correct?

A: No.

Q: So that would be an additional square footage that they cannot develop on this property that you have not accounted for in your appraisal, correct?

A: Well, I think I have accounted for it because there is -- I'm just -- none of these comparables or most of these comparables are not going to be able to use every square foot of the site.

Q: Sir, you have testified that there is 44,107 square feet of usable land on the subject property, correct?

A: Right.

Q: You've also just testified that you cannot develop in the wetland buffer zone without some sort of approval from the City, correct?

A: You have to get approval for that from the Minnehaha Watershed District.

Q: So without that approval you cannot develop within that buffer zone, correct?

A: That is true.

Q: As far as you know, there is no approval to develop in that buffer zone?

A: No, there is not, not that I know of.

(TT. pp. 326-327).

Bennett admitted at trial that he failed to use the total usable land area:

Q: Okay. So there is actually less than 44,107 square feet on this property that actually can be developed by a developer, correct?

A: That is correct.

(TT. p. 329).

, Kramer on the other hand, utilized the maps approved by the City to calculate the wetland area and the wetland buffer zone. Kramer then subtracted the undevelopable area from the total land area to determine the correct usable land area as 34,598 square feet. (TT. p. 77).

Since Bennett admitted that he did not properly calculate the total usable land area, his values are wrong, and the Tax Court's adoption of his valuation was clearly erroneous

CONCLUSION

The Tax Court's determination of the value of the Subject Property is not supported by Minnesota law or the facts presented at trial. Relator respectfully requests that this Court reverse the decision of the Tax Court for the reasons set forth above.

SKOLNICK & SHIFF, P.A.

Date: March 29, 2011

By: 

William R. Skolnick #137182
Amy D. Joyce, #0387862
2100 Rand Tower
527 Marquette Avenue South
Minneapolis, MN 55402
(612) 677-7600

ATTORNEYS FOR APPELLANT

**STATE OF MINNESOTA
SUPREME COURT**

Berry & Co., Inc.,

Relator,

vs.

County of Hennepin,

Respondent.

**CERTIFICATE OF
BRIEF LENGTH**

**Appellate Court
Case No: A11-399**

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 7,689 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2000 software.

SKOLNICK & SHIFF, P.A.



William R. Skolnick, #137182
Amy D. Joyce, #0387862
2100 Rand Tower
527 Marquette Avenue
Minneapolis, MN 55402
(612) 677-7600

Dated: March 29, 2011

ATTORNEYS FOR RELATOR