

STATE OF MINNESOTA  
IN THE SUPREME COURT

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BEUNING FAMILY, LP,

A11-1479  
Case No. A11-1480

Petitioner-Respondent,

and

COUNTY OF STEARNS,

Relator.

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**RELATOR'S BRIEF**

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## STATEMENT OF LEGAL ISSUES

I. Whether the record contains sufficient evidence to support the Stearns County Assessor's determination of commercial classification for the Subject Property.

The evidence and applicable case law was presented through Relator's and Respondent's partial summary judgment memoranda, responsive memoranda, memoranda in reply, and supporting affidavits. The Minnesota Tax Court ruled in favor of Respondent, granting its' motion for partial summary judgment and determining that the proper classification of the subject property was residential, despite there being no real evidence to support that ruling. To the contrary, there is substantial evidence in the record supporting the Assessor's commercial classification. Relator filed a timely appeal pursuant to Minn.Stat. §271.10 and Minn.R.Civ.App.P. 116, including a summary of the issues to be raised on appeal, which was included in Relator's Statement of the Case. The most apposite cases, statutory and rule references are: Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 874 (Minn. 2000); Minn. Stat. §273.13, subd. 33, Minn. Stat. §271.06, subd. 6, and Minn.R.Civ.P. 56.

II. Whether the record is devoid of evidence to support Respondent's contention that use of the Subject Property is prohibited, or in some way limited, by an applicable local zoning ordinance.

The evidence relating to the current zoning and planning authority for the subject

property was included in and attached to the Affidavit of Gary Grossinger, Stearns County Assessor, (RA pp. A10-A32) and the Affidavit of Anita M. Rasmussen, the Planning and Community Development Director for the City of Sartell (RA pp. A33-A60). Documentation included the Orderly Annexation Agreement which established the orderly annexation area for the City of Sartell and a Joint Planning Board, having exclusive zoning authority for that area. (RA pp. A18-A22) Additional documentation included a Memorandum of Understanding between that Joint Planning Board and the County of Stearns acknowledging the Joint Planning Board's exclusive authority and stipulating that the County's zoning is inapplicable to the orderly annexation area. (RA pp. A27-A29). The Minnesota Tax Court ruled that that the "current permitted use" was residential, despite no evidence whatsoever in the record showing that the Joint Planning Board, the sole zoning authority for the property, has enacted a zoning ordinance prohibit commercial use. Relator filed a timely appeal pursuant to Minn.Stat. §271.10 and Minn.R.Civ.App.P. 116, including a summary of the issues to be raised on appeal, which was included in Relator's Statement of the Case. The most apposite cases, statutory and rule references are: Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 874 (Minn. 2000); Minn. Stat.§414.0325, subd. 6, Minn. Stat.§462.3535, subd. 3, Minn. Stat. §462.357, and Minn. Stat. §273.13, subd. 33(b) and Minn.R.Civ.P. 56.

III. Whether a court must consider the probability and likelihood of a future zoning change.

The evidence relating to the current zoning and planning authority for the subject property was included in and attached to the Affidavit of Gary Grossinger, Stearns County Assessor, (RA pp. A10-A32) and the Affidavit of Anita M. Rasmussen, the Planning and Community Development Director for the City of Sartell (RA pp. A33-A60). Documentation included the Orderly Annexation Agreement which established the orderly annexation area for the City of Sartell and a Joint Planning Board for that area. (RA pp. A18-A22, A33-A60) The Minnesota Tax Court ruled that that the “current permitted use” was residential, despite substantial evidence in the record showing that the Subject Property cannot be put to a residential use and that the zoning and land use regulations applicable to the Subject Property will inevitably change to commercial upon sale of the property. Relator filed a timely appeal pursuant to Minn.Stat. §271.10 and Minn.R.Civ.App.P. 116, including a summary of the issues to be raised on appeal, which was included in Relator’s Statement of the Case. The most apposite cases, statutory and rule references are: Berry & Co. Inc. v. County of Hennepin, 2011 WL 3687544 (Minn.)(case filed 8/24/11; reporter cite unavailable); Hedberg & Sons Co. v. Cnty. of Hennepin, 305 Minn. 80, 92, 232 N.W.2d 743, 750 (1975); Minn. Stat. §273.11, Minn. Stat. §462.3535, subd. 3, Minn. Stat. §462.357, and Minn. Stat. §273.13, subd. 33(b) and Minn.R.Civ.P. 56.

IV. Whether Respondent has failed in its burden to produce sufficient evidence showing a genuine issue of material fact.

The evidence and applicable case law was presented through Relator's and Respondent's partial summary judgment memoranda, responsive memoranda, memoranda in reply, and supporting affidavits. The Minnesota Tax Court ruled in favor of Respondent, granting its' motion for partial summary judgment and determining that the proper classification of the subject property was residential, despite there being no real evidence to support a residential classification and in the face of substantial, uncontroverted evidence supporting a commercial classification. Relator filed a timely appeal pursuant to Minn.Stat. §271.10 and Minn.R.Civ.App.P. 116, including a summary of the issues to be raised on appeal, which was included in Relator's Statement of the Case. The most apposite cases, statutory and rule references are: Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 874 (Minn. 2000); Carlisle v. City of Minneapolis, 437 N.W.2d. 712, 715 (Minn.Ct.App 1989); City of Duluth v. P.L.F., Inc., 431 N.W.2d 135, 137 (Minn.Ct.App 1988); Minn. Stat. §273.13, subd. 33, Minn. Stat. §271.06, subd. 6, and Minn.R.Civ.P. 56.

V. Whether the Minnesota Tax Court's order and judgment requiring the Subject Property to be classified as residential as of January 2, 2008 (as opposed the correct assessment date of January 2, 2009) represents a plain error of law.

In the instant case, the Minnesota Tax Court held that "because the Subject

Property was zoned under the local ordinance as residential at the time of the Assessment Date, we find the correct classification of the property to be residential as of January 2, 2008”. (‘RA p. A143) The correct assessment date in this case is January 2, 2009. The Tax Court lacks jurisdiction, based on the instant petition, to change the Subject Property’s classification as of January 2, 2008. The most apposite statutory references are: Minn.Stat. §273.01 and Minn.Stat. §278.01

## RELATOR'S STATEMENT OF THE CASE

On April 28, 2010, Respondent Buening Family LP filed a petition (hereinafter the 'Petition', attached at pages A-1 – A-5 of Relator's Appendix (hereinafter RA pp. A1-A5), with the Minnesota Tax Court challenging 2009 real estate taxes payable in 2010 for a parcel of vacant, unused property located in Le Sauk Township, Stearns County, Minnesota (hereinafter the 'Property'). This Petition raised four primary claims: (1) that the assessed market value exceeds the actual market value; (2) that the Property has been unequally or unfairly assessed; (3) that the tax levied against the property is illegal in part; and (4) that the Property has been misclassified. (See Petition, Id.)

In January, 2011 the parties served and filed cross-motions for partial summary judgment in the instant case. (A11-1480; Tax Court File No. 73-CV-10-3592) (RA pp. A6-A60 and RA pp. A61-A89) The sole issue in the cross-motions for summary judgment was the Property's classification or, more specifically, what impact the zoning, or lack thereof, had on the Property's classification. On October 6, 2009, the Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court, heard oral argument on the motions for partial summary judgment. Transcript pp. 1-46 (hereinafter Tpp. 1-46) A separate motion for summary judgment relating to the same parcel, but for the 2008 assessment year was also scheduled and argued during the telephone conference hearing before Judge Sanberg.

Following the filing of post-hearing briefs, Judge Sanberg issued an Order and Judgment, denying Relator's motion for partial summary judgment and granting Respondent's motion for partial summary judgment in this matter. (RA pp. A136-A143) The Order was dated June 21, 2011, and was filed on July 8<sup>th</sup>, 2011. Id. The Tax Court, in the order in this case, entered partial summary judgment in favor of Respondent Buening Family LP, determining that the correct classification of the property as of 2008 was residential. Beuning Family LP v. County of Stearns, 2011 WL 2517421, Minn. Tax Regular Div., June 21, 2011 (No. 73-CV-10-3592). (RA p. A143) On August 16, 2011 the Tax Court directed final entry of judgment pursuant to Minn.R.Civ.P. 54.02. Relator Stearns County timely served and filed the Petition for Writ of Certiorari, Statement of the Case, proposed Writ of Certiorari, together with a copy of the order denying summary judgment and the Rule 54.02 order. Jurisdictional briefing has been completed in this matter.

## I. STATEMENT OF FACTS

Respondent filed its' petition with the Minnesota Tax Court in this matter on April 28, 2010 challenging real estate taxes on the property identified in the petition (hereinafter 'the Subject Property') for assessment year 2009, taxes payable in 2010. (See petition attached in Relator's Appendix at pages A-1 to A-5 (hereinafter 'RA pp A1-A5') Respondent alleged, among other things, "that said property was fully or partially improperly classified." (RA p. A3) The Subject Property is located in Le Sauk<sup>1</sup> Township, Stearns County, Minnesota.

The Stearns County Assessor, Gary Grossinger, reclassified the Subject Property in 2008, designating it as commercial property for property tax purposes. (See Affidavit of Stearns County Assessor, Gary Grossinger, hereinafter "Aff.GG", RA p. A11). It is the Stearns County Assessor's considered determination that the Subject Property's classification as commercial was, and is, appropriate as the Subject Property's highest and best use. (Aff.GG, RA pp. A10-A11) The Subject Property is vacant, unimproved and not being used for any identifiable purpose. Id. It is located in a commercial growth area for the City of Sartell, and is surrounded by commercial businesses. (Aff. GG, RA pp. A11, A13-A15, A30) (See also Affidavit of Anita M. Rasmussen, Planning and Community Development Director City of Sartell, hereinafter "Aff.AMR", RA pp A33-

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<sup>1</sup> The correct spelling of the Township in question is "Le Sauk". Several historical documents in the record incorrectly identify the Township as "LeSauk". When Relator quotes from these documents it quotes the documents as written, but does not in each instance acknowledge the error.

A34, A50) The Subject Property is visible from County Road 1 and State Highway 15, major arterial routes in the area. (Aff.GG, RA pp. A11) The Subject Property is advertised and listed for sale by Respondent as a commercial site. Id.

Le Sauk Township is designated, in its entirety, as an orderly annexation area for the City of Sartell. (Aff.GG, RA pp. A18-A22)( Aff.AMR, RA pp A34, A38-A42) On November 6, 1992, the Minnesota Municipal Board<sup>2</sup> finalized an Orderly Annexation Agreement<sup>3</sup> between Le Sauk Township and the City of Sartell. (Aff.GG, RA p. A17) (Aff.AMR, RA p. A36) Pursuant to Minn. Stat. §414.0325, subd. 5,<sup>4</sup> the Orderly Annexation Agreement designated the entirety of the Town of Le Sauk as an orderly annexation area and created the City of Sartell-Le Sauk Township Joint Planning Board, which has exclusive authority over land use and zoning issues within the orderly annexation area – i.e. Le Sauk Township. (Aff.GG, RA pp. A18-A19) (Aff.AMR, RA

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<sup>2</sup> The Municipal Board has since been abolished and its former duties transferred to the Office of Administrative Hearings.

<sup>3</sup> The ‘Orderly Annexation Agreement’ is the ‘Joint Resolution for Orderly Annexation Between the Town of LeSauk and the City of Sartell, Minnesota’. The Joint Resolution is the document that conferred jurisdiction upon the Municipal Board (now Office of Administrative Hearings) and set forth the understandings of the parties. Upon acceptance and approval of the Joint Resolution by the Municipal Board, the Joint Resolution becomes the Orderly Annexation Agreement. See generally Minn.Stat. §414.0325. The term ‘Orderly Annexation Agreement’ is used by Relator throughout this brief to refer to the ‘Joint Resolution’ found at A-18 to A-22 and A-38 to A-42 of Relator’s Appendix.

<sup>4</sup> All references to any Minnesota Statute within this brief are to the current version of the statute, unless otherwise stated.

pp. A34, A38-A39) The zoning staging plan and land use plan map for the City of Sartell identifies zoning for the Subject Property as “General Business”. (Aff. AMR, RA pp. A35-A50). According to the Sartell/Le Sauk Comprehensive Plan, “General Business” or B-2 districts provide space for concentrated general business and commercial activities. (Aff. AMR, RA pp. A35, A51-A60).

The Stearns County comprehensive plan designates the Subject Property as having R-1 zoning. See Relator’s Memorandum in Support of Partial Summary Judgment (RA p. A8) However, Stearns County does not have zoning authority over Le Sauk Township. (Aff.GG, RA pp. A20, A27-A29) (Aff. AMR, RA pp. A35, A40, A47-A49) Minnesota Statutes §414.0325 provides that, upon its creation, complete zoning authority within an orderly annexation area is vested in the joint-planning board, to the exclusion of any County zoning regulations.<sup>5</sup> Moreover, the Orderly Annexation Agreement, at paragraph 12, provides that “all prior resolutions and ordinances of the Town and City, or portions of resolutions and ordinances in conflict herewith, are hereby repealed.” (Aff.GG, RA p. A20) (Aff.AMR, RA p. A40) Additionally, in February 2001, Stearns County and the City of Sartell-Le Sauk Township Joint Planning Board entered into a Memorandum of Understanding (MOU) which specifically acknowledges that County zoning is ineffective within the orderly annexation area, Le Sauk Township. (Aff.GG,

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<sup>5</sup> As acknowledged in the Memorandum of Understanding dated February 6, 2001 between Stearns County and the Le Sauk – Sartell Joint Planning Board, Stearns County did not enact zoning regulations until April 21<sup>st</sup>, 2000 – approximately eight years after the Joint-Planning Board was established.

RA pp. A27-A29) (Aff.AMR, RA pp. A47-A49) The MOU states that the “Stearns County Land Use and Zoning Ordinance . . . shall not apply within the orderly annexation area, which includes the Town of LeSauk.”<sup>6</sup> The net effect is that neither County, City nor Township zoning ordinances apply within the orderly annexation area. Only ordinances duly enacted by the Joint-Planning Board have any legal effect, impact or limitation on the Subject Property. Respondent offered no evidence to show that a zoning ordinance enacted by the Joint Planning Board exists.<sup>7</sup>

The parties in this matter filed cross motions for partial summary judgment. The motions were heard by the Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court on February 4, 2011 by way of a telephone conference call. (Transcript and Order, RA pp. A137-A143) The matter was submitted to the Tax Court, following post hearing briefs, on March 21, 2011. Id. On July 8, 2011, the Minnesota Tax Court filed its’ Order granting Respondent’s motion for partial summary judgment and denying Relator’s motion for partial summary judgment. Id. The Tax Court concluded that “because the Subject Property was zoned under the local ordinance as residential at the time of the

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<sup>6</sup> The MOU does provide for certain exceptions, none of which apply or are relevant to this case. See attachment 1 to MOU. (R.A. p. A49)

<sup>7</sup> Relator acknowledges its specific duty of candor toward the tribunal under Minnesota Rules of Professional Conduct 3.3. The rule states, in pertinent part, that a lawyer shall not “make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” If Relator had evidence of a zoning ordinance enacted by the Joint Planning Board, or even information suggesting that such an ordinance might exist, Relator’s clear ethical duty would be to disclose such evidence or information as it would pertain to a material fact in this case.

Assessment Date, we find the correct classification of the property to be residential as of January 2, 2008.” (RA p. A143) The Tax Court entered partial summary judgment on the classification claim “forthwith”, in accordance with Minnesota Rule of Civil Procedure 54.02. Relator takes this appeal from the July 8, 2011 order and judgment of the Minnesota Tax Court.

## II. ARGUMENT

The Minnesota Tax Court has committed several errors of law and fact. Relator is entitled to partial summary judgment on the claim of classification for the following reasons: (A) the record contains sufficient evidence to support the Stearns County Assessor’s determination of commercial classification for the Subject Property; (B) the record is devoid of evidence to support Respondent’s contention that commercial use of the Subject Property is prohibited under any applicable local zoning ordinance; (C) Even if it is assumed, *arguendo*, that a local zoning ordinance prohibits commercial use of the Subject Property, the Tax Court must consider the probability and likelihood that the applicable zoning will change; (D) Respondent has failed to produce evidence showing a genuine issue of material fact; and (E) the Minnesota Tax Court’s determination that Subject Property’s correct classification is “residential as of *January 2, 2008*” (RA p. A143) represents plain error. Each of these arguments will be addressed in turn.

**A. Relator County of Stearns has put forth sufficient evidence to support the Assessor's determination of commercial classification.**

The parties in this case filed cross motions for partial summary judgment on the issue of the proper classification of the Subject Property. Relator properly supported its' motion for partial summary judgment with sufficient evidence to justify the Stearns County Assessor's commercial classification determination for the Subject Property.

*1. Standard of Review.*

The Minnesota Supreme Court reviews tax court decisions to determine whether there was subject matter jurisdiction, whether the decision was supported by evidence, and whether there was an error of law. Hohmann v. Commissioner of Revenue, 781 N.W.2d 156, 157 (Minn. 2010). The Minnesota Supreme Court is not bound by the Tax Court's decisions, and will overrule the tax court if its' decision is clearly erroneous and the evidence as a whole does not reasonably support the decision. Schmieg v. County of Chisago, 740, N.W.2d 770, 772 (Minn. 2007) On review from summary judgment proceedings, the Minnesota Supreme Court must determine "whether there are any genuine issues of material fact and whether the lower court erred in its application of the law'. . . . Conclusions of law, including the interpretation of statutes, are reviewed by this court de novo. . . . The determination of whether a genuine issue of material fact exists is also subject to de novo review." Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 873-874 (Minn. 2000).

2. Legal Analysis.

The Subject Property is classified as commercial property by the Stearns County Assessor. (Aff. GG RA pp. A10-A11) The classification was changed to commercial during the 2008 assessment year. (Aff. GG RA p. A11) The assessor's classification is "prima facie" valid and correct. Minn. Stat. § 271.06, subd. 6. Petitioner has the burden of proving the Subject Property's actual classification differs from the county determination. Schnieg v. County of Chisago, 2010 WL 3219140, Minn. Tax Regular Div. July 23, 2010(No. 13-CV-09-746), citing Schleiff v. County of Freeborn, 231 Minn. 389, 43 N.W.2d 265 (Minn.1950); Borglund v. County of Scott, 1998 WL 726418, Minn. Tax Regular Div. Oct. 13, 1998(No. 98-05080). Relator has produced sufficient evidence in support of its' motion for summary judgment and the Assessor's classification of the Subject Property as commercial. See Affidavits in Support of Relator's Motion for Partial Summary Judgment. (RA pp. A10-A32, A33-A60, A98-A116)

By law, the Subject Property must be classified in accordance with its' highest and best use. Minnesota Statute §273.13, Subd. 33 states, in pertinent part, that:

. . . real property that is not improved with a structure and for which there is no identifiable current use must be classified according to its highest and best use permitted under the local zoning ordinance. If the ordinance permits more than one use, the land must be classified according to the highest and best use permitted under the ordinance. If no such ordinance exists, the assessor shall consider the most likely potential use of the unimproved land based upon the use made of surrounding land or land in proximity to the unimproved land."

Minnesota Statutes §273.13, subd. 33(b). Highest and best use is "the reasonably probable and legal use of vacant land or an improved property that is physically possible,

appropriately supported, and financially feasible and that results in the highest value.”  
The Appraisal of Real Estate, (13<sup>th</sup> ed. 2008), American Institute of Real Estate Appraisers p. 277.<sup>8</sup>

Gary Grossinger, the Stearns County Assessor, in classifying the Subject Property in 2009, noted that the property was vacant, unimproved land that was not being used for any identifiable purpose. (Aff. GG RA p. A10) The Assessor classified it according to its most probable, highest and best use as of the real estate tax assessment date, January 2, 2009. (RA p. A11) Mr. Grossinger, the Assessor, noted that “the highest and best use is that which is financially feasible, physically possible, legally permissible and maximally productive.” (Aff. GG RA pp. A10-A11) Mr. Grossinger, changed the classification of the property in 2008 to commercial in order to reflect the property’s highest and best use. Id. The Stearns County Assessor further observed that not only was the Subject Property being actively marketed by Respondent as a commercial site, but also that the Subject Property “is in a growth area for the City of Sartell, surrounded by commercial services” and visible from two major arterial transportation routes. (Aff. GG RA p. A11) Additionally, the Stearns County Assessor attached the Orderly Annexation Agreement (Exhibit 3 Aff. GG, RA pp. A18-A22); as well as the Memorandum of Understanding between the County of Stearns and the City of Sartell-Le

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<sup>8</sup> The “highest and best use” determination rest, in part, on a four-step determinative process: (1) legal permissibility; (2) physical possibility; (3) financial feasibility; and (4) maximum productivity. The Appraisal of Real Estate, supra., at 278.

Sauk Township Joint Planning Board, which clearly states that the Stearns County Zoning Ordinance Number 209 does not apply to the orderly annexation area. (Exhibit 4 Aff. GG, RA pp. A24-A29). The Stearns County Assessor, after considering all the relevant facts and local regulations relating to the Subject Property, determined that its' highest and best use was commercial. Commercial use of the Subject Property is the only use which is reasonably probable and legally permissible, and the only use which was adequately supported by the evidence introduced to the Minnesota Tax Court.

Anita M. Rasmussen, the Planning and Community Development Director for the City of Sartell, also provided an Affidavit to Relator regarding the Subject Property, supporting Relator's position. (RA pp. A33-A60) Ms. Rasmussen confirms that the Subject Property is covered by the Orderly Annexation Agreement existing between the City of Sartell and the Le Sauk Township; and that the City of Sartell-Le Sauk Township Joint Planning Board has exclusive authority over the land use and zoning issues within Le Sauk Township. (RA pp. A34-A35) Zoning of the Subject Property, once it is annexed, must be consistent with the future land use plan developed by the City of Sartell-Le Sauk Township Joint Planning Board. (Aff. AMR, RA p. A35) The future land use plan for the Subject Property calls for "general business" which permits general business and commercial activities. (RA pp. A35, A50-A60) Residential development of the Subject Property is not an allowed use under the City of Sartell-Le Sauk Township future land use plan for the Subject Property. (RA p. A35) Ms. Rasmussen testified in her Affidavit that Stearns County has no zoning authority over the property and "[t]he

Sartell-LeSauk future land use plan controls zoning and development of the property at issue.” Id.

Ms. Rasmussen included with her Affidavit, a copy of the Orderly Annexation Agreement, signed by the City of Sartell and the Township of Le Sauk. (RA pp. A38-A42). This Orderly Annexation Agreement designates the entirety of Le Sauk Township as within the orderly annexation area, establishes the joint planning board as having the exclusive power for planning and zoning within the orderly annexation area, and repeals all ordinances of the Town and City that are in conflict. (RA pp. A38, A40)

The evidence submitted in real property tax proceedings is “viewed in the context of a presumption that the county assessor, as a government official, properly performed his official duties and complied with statutory procedures.” Brookfield Trade Center, Inc., supra., 609 N.W.2d at 876. The evidentiary record is wholly devoid of evidence supporting a conclusion that a duly enacted zoning regulation limits or prevents the Subject Property’s use for commercial purposes. The Stearns County Assessor properly considered the relevant law and facts relating to the Subject Property in concluding that the Subject Property’s highest and best use was commercial.

**B. The record is devoid of any evidence to show that a commercial use of the Subject Property is prohibited, or in some way limited, under any local zoning ordinance.**

The evidentiary record contains no basis whatsoever upon which to conclude that the Subject Property’s “current permitted use” under a local zoning ordinance excludes or

limits commercial uses, within the meaning of Minn.Stat. §273.13, subdivision 33. The Sartell – Le Sauk Joint Planning Board has exclusive legal authority to enact a zoning ordinance applicable to the Subject Property. (RA pp. A19-A20, A34-A35, A39-A40) The record contains no evidence that such an ordinance exists or, if it does, that the ordinance’s provisions would exclude or limit any form of commercial use of the Subject Property.

The Minnesota Tax Court’s determination that the highest and best use, and therefore classification, permitted under the local zoning ordinance is residential (RA pp. A142-A143), is not supported by the evidence and is not in conformity with the law. This determination cannot possibly be made without first determining that a local ordinance has indeed been duly enacted by the proper zoning authority and, second, that the terms and provisions of such an ordinance limit the Subject Property exclusively to residential use. There is absolutely no evidence in the record that the Joint Planning Board, the sole zoning authority for the Subject Property, ever enacted a zoning ordinance that would limit the Subject Property’s use exclusively to residential purposes. Therefore, the Minnesota Tax Court had no basis upon which to grant Respondent partial summary judgment on its classification claim.

*1. Standard of Review.*

The Minnesota Supreme Court reviews tax court decisions to determine whether there was subject matter jurisdiction, whether the decision was supported by evidence, and whether there was an error of law. Hohmann v. Commissioner of Revenue, 781

N.W.2d 156, 157 (Minn. 2010). The Minnesota Supreme Court is not bound by the Tax Court's decisions, and will overrule the tax court if its' decision is clearly erroneous and the evidence as a whole does not reasonably support the decision. Schmieg v. County of Chisago, 740, N.W.2d 770, 772 (Minn. 2007) On review from summary judgment proceedings, the Minnesota Supreme Court must determine “whether there are any genuine issues of material fact and whether the lower court erred in its application of the law’ . . . . Conclusions of law, including the interpretation of statutes, are reviewed by this court de novo. . . . The determination of whether a genuine issue of material fact exists is also subject to de novo review.” Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 873-874 (Minn. 2000).

## 2. Legal Analysis.

The Minnesota Tax Court incorrectly alleges that Relator failed to take into consideration that portion of Minn. Stat. §273.13, subd. 33, which requires consideration of the highest and best use “*permitted under the local zoning ordinance.*” (RA p. A142) Indeed, it was the Minnesota Tax Court and Respondent who failed to properly consider this provision, and the broader text of the statute, as the record contains no evidence of the existence of a zoning ordinance applicable to the Subject Property as of the assessment date. The Tax Court's finding that the Subject Property was zoned residential is not supported by the evidence and constitutes an error of law.

*i. Purpose and Requirements of Minn.Stat. § 273.13, subd. 33.*

By law, the Subject Property must be classified in accordance with its' highest and best use. Minnesota Statute §273.13, Subd. 33 states in pertinent part that:

. . . real property that is not improved with a structure and for which there is no identifiable current use must be classified according to its highest and best use permitted under the local zoning ordinance. If the ordinance permits more than one use, the land must be classified according to the highest and best use permitted under the ordinance. If no such ordinance exists, the assessor shall consider the most likely potential use of the unimproved land based upon the use made of surrounding land or land in proximity to the unimproved land.”

Minnesota Statutes §273.13, subd. 33(b). It is undisputed in the record that the Subject Property is vacant, unimproved and has no identifiable current use. See Affidavits of Gary Grossinger and Anita M. Rasmussen (RA pp. A10, A33) The clearly stated purpose of Minn.Stat. §273.13, subd. 33 is to require an Assessor, in such circumstance, to give due and proper consideration of legally permissible uses under a duly enacted and applicable local zoning ordinance or, in the absence of such local zoning ordinance, to consider the surrounding development pattern when classifying vacant and unimproved property according to its highest and best use. Minn. Stat. §273.13, subd. 33(b) It is therefore impossible for an Assessor, or any reviewing Court, to effectuate the requirements of this statute without actually reading the specific provisions the local zoning ordinance that purportedly applies to a property in question when such an ordinance exists.

- ii. The Sartell – Le Sauk Joint Planning Board is the Exclusive Zoning Authority for the Subject Property and the Record Contains No Evidence that this Board Ever Enacted a Zoning Ordinance Applicable to the Subject Property.

Minnesota Statutes §414.0325, taken in its entirety, provides that when an Orderly Annexation Agreement creates a joint planning board, the joint planning board has complete zoning authority over the orderly annexation area, to the exclusion of city, county or township zoning regulations. Indeed, the Stearns County District Court has ruled that the Sartell – Le Sauk Joint Planning Board is the exclusive zoning authority for the orderly annexation area it covers – i.e. all of Le Sauk Township. (See District Court decision, Stoebe v. Joint Planning Commission, Stearns County Dist.Ct. File No. C5-94-4267, June 15, 1995. (RA pp. A100-A111) Respondent did not submit any evidence whatsoever to demonstrate that the Joint Planning Board has ever enacted an ordinance zoning the Subject Property, let alone whether such alleged ordinance, by its terms, actually prohibits or limits potential commercial uses of the Subject Property.

- iii. The Evidentiary Record is Replete with Evidence Demonstrating that the Sartell – Le Sauk Joint Planning Board is the Exclusive Zoning Authority for the Subject Property.

The Orderly Annexation Agreement between the Le Sauk Township and the City of Sartell, Minnesota, was finalized by the State of Minnesota Municipal Board on November 6, 1992. (RA p.p. A16, A36) The orderly annexation area encompasses the

entirety of Le Sauk Township. (RA pp. A18, A22, A38, A42) The City of Sartell and Le Sauk Township mutually agreed, as part of the Orderly Annexation Agreement, to create a Joint Planning Board to “implement zoning, subdivision, building and fire code regulations.” (RA pp. No. 8 A19, A39) The City of Sartell and the Township agreed, in the Orderly Annexation Agreement, that the Joint Planning Board shall have all the powers for municipal planning specified in Minnesota Statutes §§462.351 through 462.364. (RA pp. A19, A39) These powers expressly include development of a comprehensive plan and zoning ordinance. See Minn. Stat. §§462.3535, Subd. 3 and 462.357. Minnesota law provides that “an orderly annexation agreement is a binding contract upon all parties to the agreement and is enforceable in the district court in the county in which the unincorporated property in question is located.” Minn. Stat. §414.0325, Subd. 6. The Orderly Annexation Agreement between the Le Sauk Township and the City of Sartell specifically states that all prior resolutions and ordinances of the Town and City that conflict with the orderly annexation agreement “are hereby repealed.” (RA pp. No. 12 A20, A40) Therefore, any zoning ordinances enacted by the Le Sauk Town Board or the Sartell City Council are legally ineffective as to the Subject Property.

Stearns County has recognized the exclusive authority of the City of Sartell-Le Sauk Township Joint Planning Board. Stearns County entered into a Memorandum of Understanding (MOU) with the Joint Planning Board, expressly stipulating that the Stearns County Subdivision Ordinance, and the Land Use and Zoning Ordinance 209, and successor ordinances, with a few minor agreed upon exceptions, do not apply within

the orderly annexation area – i.e. the Town of Le Sauk.<sup>9</sup> (RA pp. A27-A29, A47-A49) The MOU expressly states that Stearns County ordinances “shall not apply within the orderly annexation area, which includes the Town of LeSauk.” (RA pp. A27, A47) The MOU between the County Joint Planning Board was finalized on February 6, 2001. Therefore zoning regulations enacted by the Stearns County Board, like zoning ordinances enacted by the Le Sauk Township Board and Sartell City Council, do not apply to the Subject Property. Only zoning regulations duly adopted by the Joint Planning Board have any direct legal effect or limitation on the Subject Property.

The foregoing is consistent with the understanding of Anita M. Rasmussen, the Planning and Community Development Director for the City of Sartell. Ms. Rasmussen provided an Affidavit to Relator regarding the Subject Property, supporting Relator’s position. (RA pp. A33-A60) Ms. Rasmussen confirms that the Subject Property is covered by the Orderly Annexation Agreement existing between the City of Sartell and the Le Sauk Township; and that the City of Sartell-Le Sauk Township Joint Planning Board has exclusive authority over the land use and zoning issues within Le Sauk Township. (RA pp. A34-A35) Ms. Rasmussen testifies in her Affidavit that Stearns County has no zoning authority over the property and “[t]he Sartell-LeSauk future land use plan controls zoning and development of the property at issue.” (RA p. No. 18 A35)

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<sup>9</sup> The noted exceptions were those relating to floodplain and shoreland overlay districts, animal feedlots, driveway and access standards, sewage treatment systems, spreading of petroleum contaminated soils, and platting requirements. (RA pp. A29, A49) These limited exceptions do not affect the classification of the Subject Property.

Ms. Rasmussen includes with her Affidavit, a copy of the Orderly Annexation Agreement, signed by the City of Sartell and the Township of Le Sauk. (RA pp. A38-A42). The Orderly Annexation Agreement designates the entirety of Le Sauk Township within the orderly annexation area, establishes the joint planning board as having the exclusive power for planning and zoning within the orderly annexation area, and repeals all ordinances of the Town and City that are in conflict. (RA pp. A38, A42, No. 12 A40)

Additionally, attached to Ms. Rasmussen's Affidavit is a copy of the Memorandum of Understanding Between Stearns County and the City of Sartell-LeSauk Township Joint Planning Board. (RA pp. A47-A49). This document specifically states that the Stearns County Land Use and Zoning Ordinance Number 209; or successor ordinances, with limited exceptions (not applicable here), "shall not apply within the orderly annexation area, which includes the Town of LeSauk." (RA p. A47).

Any prior zoning designations for the Subject Property within the orderly annexation area have been repealed or, in the case of Stearns County, were never effective to begin with, as the County did not enact county-wide zoning until many years after the Joint Planning Board was established. (See supra, footnote 3) The Tax Court's finding that the current permitted use for the Subject Property was residential, was both an error of law and not supported by the evidence.

- iv. *In the Absence of an Applicable Local Zoning Ordinance Prohibiting or Limiting Potential Commercial Uses of the Property, the Stearns County Assessor's Determination of a Commercial Classification of the Subject Property Remains Unequivocally Valid.*

Minnesota Statute 273.13, Subd. 33 states, in pertinent part, that “real property that is not improved with a structure and for which there is no identifiable current use must be classified according to its highest and best use permitted under the local zoning ordinance.” Minn. Stat. §273.13, subd. 33(b). In those cases where there is no current local zoning ordinance, this statute provides the following: “If no such [zoning] ordinance exists, the assessor shall consider the most likely potential use of the unimproved land based upon the use made of surrounding land or land in proximity to the unimproved land.” Minn. Stat. §273.13, subd. 33(b). Highest and best use is “the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value.” *The Appraisal of Real Estate*, (13<sup>th</sup> ed. 2008), American Institute of Real Estate Appraisers p. 277. (RA p. A148)

The Stearns County Assessor, in classifying the Subject Property in 2009 noted that the property was vacant land that was not being used for any identifiable purpose. (Aff. GG RA p. A10) The Assessor classified it according to its “reasonably probable and legal use” on the real estate tax assessment date. *Id.* The Stearns County Assessor noted that “the highest and best use is that which is financially feasible, physically

possible, legally permissible and maximally productive.” (Aff. GG RA pp. A10-A11)

The Assessor changed the classification of the property in 2008 to commercial, in order to reflect the property’s highest and best use. (RA p. A11) The Stearns County Assessor noted not only that the Subject Property was being actively marketed by Respondent as a commercial site, but also that the Subject Property “is in a growth area for the City of Sartell, surrounded by commercial services” and visible from two major arterial transportation routes. (Aff. GG RA pp. A11-A15, A30) Additionally, the Stearns County Assessor attached the Orderly Annexation Agreement (Exhibit 3 Aff. GG, RA pp. A18-A22); as well as the Memorandum of Understanding between the County of Stearns and the City of Sartell-Le Sauk Township Joint Planning Board (Exhibit 4 Aff. GG, RA pp. A27-A29). The Stearns County Assessor, after considering all the relevant facts relating to the Subject Property, determined that its’ highest and best use was commercial.

The evidence submitted in real property tax proceedings is “viewed in the context of a presumption that the county assessor, as a government official, properly performed his official duties and complied with statutory procedures. . . “ Brookfield Trade Center, Inc., supra., 609 N.W.2d at 876. The record is devoid of any evidence showing any local zoning ordinance that would prohibit or limit the Subject Property’s use for commercial purposes. To the contrary, the record reflects that the Subject Property’s reasonably probable and legal use is commercial. The Stearns County Assessor properly considered

the relevant law and available facts relating to the Subject Property in concluding that the Subject Property's highest and best use was commercial.

**C. Even if it is assumed, *arguendo*, that a local zoning ordinance prohibits commercial use of the Subject Property, courts must consider the probability and likelihood that the applicable zoning will change.**

1. *Standard of Review.*

The Minnesota Supreme Court reviews tax court decisions to determine whether there was subject matter jurisdiction, whether the decision was supported by evidence, and whether there was an error of law. Hohmann v. Commissioner of Revenue, 781 N.W.2d 156, 157 (Minn. 2010). The Minnesota Supreme Court is not bound by the Tax Court's decisions, and will overrule the tax court if its' decision is clearly erroneous and the evidence as a whole does not reasonably support the decision. Schmieg v. County of Chisago, 740, N.W.2d 770, 772 (Minn. 2007) On review from summary judgment proceedings, the Minnesota Supreme Court must determine "whether there are any genuine issues of material fact and whether the lower court erred in its application of the law'. . . . Conclusions of law, including the interpretation of statutes, are reviewed by this court de novo. . . . The determination of whether a genuine issue of material fact exists is also subject to de novo review." Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 873-874 (Minn. 2000).

2. Legal Analysis.

Classification of real property is part of the statutory process for assessing the value of property. Summit House Apartment Company v. County of Hennepin, 312 Minn. 358, 361, 253 N.W.2d 127, 128-129 (Minn. 1977). The property at issue is classified as commercial property by the Stearns County Assessor. The assessor's classification is "prima facie" valid and correct. Minn. Stat. § 271.06, subd. 6. The taxpayer challenging property tax classification has the burden of proving the Subject Property's actual classification differs from the county determination. Schmieg v. County of Chisago, 2010 WL 3219140, Minn.Tax Regular Div. July 23, 2010 (No. 13-CV-09-746), citing Schleiff v. County of Freeborn, 231 Minn. 389, 43 N.W.2d 265 (Minn.1950); Borglund v. County of Scott, 1998 WL 726418, Minn.Tax Regular Div. Oct. 13, 1998 (No. 98-05080).

The Minnesota Tax Court, in its' order denying Relator's motion for partial summary judgment and granting Respondent's motion for partial summary judgment on the issue of classification, held: "Because the Subject Property was zoned under the local ordinance as residential at the time of the Assessment Date, we find the correct classification of the property to be residential as of January 2, 2008." (RA p. A143) It is Relator's position, as set out in the prior arguments, that there is no evidence in the record to support a finding that any zoning was in place for the Subject Property at the time of the assessment in the current case, or even at the time the classification for the Subject Property was changed to commercial in 2008. However, even if a valid local zoning

ordinance did apply to the Subject Property, which Relator does not concede, the Tax Court's decision concerning classification is premised on two errors of law.

i. Zoning Does Not Denote Classification.

The Tax Court's decision grants Respondent partial summary judgment as to the classification claim, finding that the Subject Property is properly classified residential. (RA p. A143) The Tax Court's decision is based on the legal conclusion that a property's zoning designation denotes the property's classification for real property tax purposes. (RA pp. A142-A143) Zoning is not determinative of classification. Brackey v. County of Washington, 2008 WL 2573299, 2 (Minn.Tax Regular Div. June 23, 2008)(No. C4-06-7837). The Tax Court has previously held that it finds "no authority, and Petitioner cites none, that zoning and classification are interchangeable." Id. The Tax Court's legal conclusion equating classification with zoning is legally untenable.

ii. The Tax Court Must Consider the Probability and Likelihood Of Future Zoning Changes.

Classification of real property is part of the statutory process for assessing the value of property. Summit House Apartment Company v. County of Hennepin, 312 Minn. 358, 361, 253 N.W.2d 127, 128-129 (Minn. 1977). Current zoning is simply a factor to be considered in classification and valuation of a parcel of property, but is not wholly determinative. The Minnesota Supreme Court has recently opined that "the tax court may consider 'evidence of value for uses prohibited by an ordinance' when there is 'evidence showing a reasonable probability'. . . [that approval for] deviation from

existing zoning requirements would be granted in the ‘near future.’” Berry & Co. Inc. v. County of Hennepin, \_\_ N.W.2d \_\_, 2011 WL 3687544 (Minn.2011)(A11-0399, Aug. 24, 2011); citing, Hedberg & Sons Co. v. Cnty. of Hennepin, 305 Minn. 80, 92, 232 N.W.2d 743, 750 (Minn.1975) In the instant case, the evidence is uncontroverted that future land use regulations for the Subject Property will mandate commercial use.

The Minnesota Supreme Court’s holdings in Berry, supra. and Hedberg, supra. concerning probable zoning changes is consistent with appraisal practices throughout the country. The American Institute of Real Estate Appraisers observes that:

In investigating the reasonable probability of a zoning change, the appraiser must consider trends and the history of zoning requests in the market area as well as documents such as the community’s comprehensive or master plan. Uses that are not compatible with the existing land uses in the area (such as a gas station in the middle of an exclusive single-family residential subdivision) and uses for which zoning changes have been requested but denied in the past . . . can usually be eliminated from consideration as potential highest and best uses. On the other hand, a zoning change from residential to commercial may be reasonable if other properties in the market area have received a similar zoning change recently or if a community’s comprehensive plan designates the property for a use other than its current use. For example, consider a site zoned single family residential in a transitional neighborhood where the zoning on several similar sites has been changed recently to commercial. Also, the city’s comprehensive plan designates the property as lying within a future commercial corridor. Both these factors may support an appraiser’s conclusion that there is a reasonable probability of rezoning the subject site for commercial use.

The Appraisal of Real Estate, (13<sup>th</sup> ed. 2008), American Institute of Real Estate Appraisers p. 282. (RA p. A150) The foregoing quoted example squarely fits the instant case, with the exception that the Subject Property is not located in a “transitional neighborhood”. The locality has already transformed to a commercial business district.

See map. (RA p. A116)

Zoning of the Subject Property, once it is annexed, must be consistent with the future land use plan developed by the City of Sartell-Le Sauk Township Joint Planning Board. (Aff. AMR, RA p. A35) The future land use plan for the Subject Property is “general business” which proscribes general business and commercial activities. (RA pp. A35, A50-A60) Residential development of the Subject Property is not an allowed use under the City of Sartell-Le Sauk Township future land use plan for the Subject Property. (RA pp. A50-A60) Although the Subject Property is vacant property and is not currently being used for any identifiable purpose, it is located in a designated commercial growth area for the City of Sartell, and is surrounded by commercial businesses properties, which have themselves already been annexed to the City of Sartell. (Aff. GG, RA pp. A11-A15, A30-A32, Aff. AMR, RA pp. A32-A35, A50-A60) There is simply no doubt that the moment the Subject Property is sold and put to active and productive use, it will be as a commercial property located within the City of Sartell. Respondent has offered no evidence to the contrary. Indeed, Respondent is actively marketing the property for commercial purposes. The Tax Court’s legal conclusion equating classification with current zoning, coupled with its refusal to consider uncontroverted evidence that future land use regulation will proscribe commercial use and prohibit residential development, constitute material errors of law.

**D. Respondent has failed to meet its burden to produce proper evidence to support its motion for partial summary judgment or, conversely, to demonstrate a genuine issue of material fact sufficient to defeat Relator’s motion for partial summary judgment.**

*1. Standard of Review.*

The Minnesota Supreme Court reviews tax court decisions to determine whether there was subject matter jurisdiction, whether the decision was supported by evidence, and whether there was an error of law. Hohmann v. Commissioner of Revenue, 781 N.W.2d 156, 157 (Minn. 2010). The Minnesota Supreme Court is not bound by the Tax Court’s decisions, and will overrule the tax court if its’ decision is clearly erroneous and the evidence as a whole does not reasonably support the decision. Schmieg v. County of Chisago, 740, N.W.2d 770, 772 (Minn. 2007) On review from summary judgment proceedings, the Minnesota Supreme Court must determine “whether there are any genuine issues of material fact and whether the lower court erred in its application of the law’. . . . Conclusions of law, including the interpretation of statutes, are reviewed by this court de novo. . . . The determination of whether a genuine issue of material fact exists is also subject to de novo review.” Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 873-874 (Minn. 2000).

*2. Legal Analysis.*

The Subject Property is classified as commercial property by the Stearns County Assessor. The Minnesota Tax Court, in denying Relator’s motion for summary judgment

and granting Respondent's motion for partial summary judgment, determined that Respondent's argument – that the permitted use as of the Assessment Date is limited to residential – was more persuasive. (RA p. A142) However, it takes more than mere argument to support a position for purposes of summary judgment. The party moving for summary judgment has the burden of establishing that there is an absence of an issue of material fact. Minn.R.Civ.P. 56; Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 874 (Minn. 2000). Respondent, unlike Relator, failed to provide adequate evidence in support of its proposed classification of the Subject Property. See memoranda and submissions of Respondent. (RA pp. A61-A93, A117-A131) The evidence submitted by Respondent does not rebut, nor even raise a metaphysical doubt as to the commercial classification assigned by the Stearns County Assessor, whose classification of the property is deemed by law to be prima facie valid and correct. See Minn. Stat. §271.06, subd. 6.

Respondent, as support for his motion for partial summary judgment, offered only an affidavit from Sheila Holt, President of Beuning Properties, Inc, and a general partner of Beuning Family Limited Partnership and two affidavits from counsel, Mr. David Galle. (RA pp. A67-A71, A72-A89, A121-A131) Ms. Holt's affidavit does not speak to the Subject Property's classification at all, but simply provides that the Subject Property is vacant and has not yet been annexed into the City of Sartell. (RA p. A67) The Minnesota Supreme Court has held that "although a court may not weigh evidence on a motion for summary judgment, 'the court is not required to ignore its conclusion that a

particular piece of evidence may have no probative value'. . . . “ Brookfield Trade Center, Inc., supra., 609 N.W.2d at 876-877. As the Holt Affidavit makes no attempt to address classification, it is not at all probative on the issue of classification.

Counsel for Respondent, Mr. David Galle, submitted two affidavits on behalf of his client. Mr. Galle, in his first affidavit submits copies of two e-mails, addressed from Anita Rasmussen, Planning and Community Development Director, City of Sartell. (RA pp. A74-A75) Mr. Galle, in his e-mail to Anita Rasmussen states he attaches a Le Sauk zoning map and asks her “what the zoning is for parcel R 17.09237.0000 . . . “ The responding e-mail simply states: “It appears the *township* has it zoned as R-1, Residential.” [emphasis added] This e-mail then goes on to explain that there is an Orderly Annexation Agreement and development requires annexation. “The future land use plan guides this property for commercial/office”. (RA p. A74) Then, in the next e-mail, Mr. Galle states: “Just to make sure I understand, the current zoning is based upon the *township* zoning map, and it is zoned R-1.” [emphasis added] (RA p. A75) He goes on to state that the property would need to be annexed by the City in order to be developed: “Once annexed, the property would be rezoned under the Sartell plan as commercial/office. However, it is not currently zoned commercial/office because it is still part of the township correct?” (RA p. A75). The responding e-mail states that the Subject Property is not yet within the City, as that occurs at the election of the owner. (RA p. A75) The email continues: “Technically, the property is vacant, with a zoning designation of R-1 (Township). Again, the future land use calls for the property to be

commercial/business/office (which is consistent with the adjacent developed property). The future land use plan is a mutually adopted plan between the Township and the City.” (RA p. A75)

The series of e-mails attached to Mr. Galle’s Affidavit do more to substantiate the position of Relator than Respondent, supporting the designation of the Subject Property as commercial rather than residential. To the extent, they make mention of an R1 zoning designation in relation to the Subject Property, they attribute this designation to Le Sauk Township and not the Joint Planning Board. (RA. pp. A74-A75) As discussed earlier in this brief, Le Sauk Township does not have legal authority to zone the Subject Property. (RA pp. A33-A35, No.8 A39) See Minn.Stat. §§462.351 through 462.364.

Mr. Galle did not provide a copy of the map he e-mailed to Anita Rasmussen, as described in his e-mail, to either Relator or to the Minnesota Tax Court. (RA pp. A72-A89). However, the references he makes to the zoning of the Subject Property in his memorandum refer to the Stearns County Zoning Ordinance No. 209. (RA p. A64) Stearns County has no zoning authority over the property. (RA pp. A27-A29, A35) The remainder of information attached to Mr. Galle’s first affidavit generally relates to the application process for annexation of property into the City of Sartell. (RA pp. A85-A89) Mr. Galle’s second affidavit includes pages from the Sartell/Le Sauk Comprehensive Plan dated 2003, which also supports Relator’s position in that it guides the Subject Property for future commercial development. (RA pp. A123-A126)

The affidavits of counsel are problematic for two reasons. First, to survive a motion for summary judgment, a party opposing the motion “. . . must offer significant probative evidence tending to support its [position]”. Carlisle v. City of Minneapolis, 437 N.W.2d. 712, 715 (Minn.Ct.App 1989). As stated, the information contained in the affidavits from counsel do not constitute “significant probative evidence” supporting Respondent’s position. Rather, the affidavits – to the extent they are probative at all – tend to support Relator’s position concerning classification. Second, because the affidavits are from counsel, they are not based on personal knowledge. Minnesota Rule of Civil Procedure 56.05 provides that:

supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith.

Minn.R.Civ.Pro 56.05 [emphasis added]. The Minnesota Court of Appeals has held that affidavits of counsel containing opinions, beliefs or allegations are not based on personal knowledge and are therefore insufficient to support or defeat summary judgment. See City of Duluth v. P.L.F., Inc., 431 N.W.2d 135, 137 (Minn.Ct.App 1988). Moreover, the documents referred to by the affidavits have not been certified or properly sworn. Neither the substance of the affidavits, nor the attachments are inadmissible in evidence. Therefore, these affidavits are fatally defective under Minn.R.Civ.Pro 56.05 and it was an error of law for the Minnesota Tax Court to rely on them.

A careful examination of the record reveals that Respondent has not provided sufficient grounds to support its motion for partial summary judgment, nor has Respondent offered information sufficient to raise a genuine issue of material fact as against Relator's motion for partial summary judgment. The Minnesota Tax Court's reliance on Respondent's non-probative and defective affidavits constitutes a clear error of law.

**E. The Minnesota Tax Court's determination that Subject Property's correct classification is residential "as of January 2, 2008" is an error of law.**

*1. Standard of Review.*

The Minnesota Supreme Court reviews tax court decisions to determine whether there was subject matter jurisdiction, whether the decision was supported by evidence, and whether there was an error of law. Hohmann v. Commissioner of Revenue, 781 N.W.2d 156, 157 (Minn. 2010). The Minnesota Supreme Court is not bound by the Tax Court's decisions, and will overrule the tax court if its' decision is clearly erroneous and the evidence as a whole does not reasonably support the decision. Schmieg v. County of Chisago, 740, N.W.2d 770, 772 (Minn. 2007) On review from summary judgment proceedings, the Minnesota Supreme Court must determine "whether there are any genuine issues of material fact and whether the lower court erred in its application of the law'. . . . Conclusions of law, including the interpretation of statutes, are reviewed by this court de novo. . . . The determination of whether a genuine issue of material fact exists is

also subject to de novo review.” Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 873-874 (Minn. 2000).

## 2. Legal Analysis.

In the instant case, the Minnesota Tax Court held that “because the Subject Property was zoned under the local ordinance as residential at the time of the Assessment Date, we find the correct classification of the property to be residential as of *January 2, 2008*”. (‘RA p. A143) [emphasis added] The correct assessment date in this case is January 2, 2009. See Minn. Stat. §273.01. The Tax Court lacks jurisdiction, based on the instant petition, to change the Subject Property’s classification as of January 2, 2008. See Minn. Stat. §278.01.

It is not clear whether the Tax Court intended to change the classification going back to 2008 or whether it is perhaps a clerical error<sup>10</sup>. In any event, the following should be noted: (1) there is pending tax petition from Respondent for the January 2, 2008 assessment date; (2) the aforementioned petition is the subject of a companion appeal to the Minnesota Supreme Court (Case No. A11-1479); (3) Respondent did not

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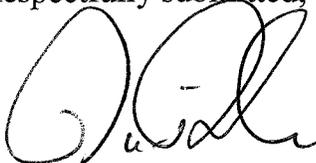
<sup>10</sup> It is possible this is simply an unintended clerical error on the part of the Tax Court. For instance, the Tax Court’s Order and Judgment in this case indicates that the matter was heard on February 4<sup>th</sup>, 2011 and that “Marcus W. Miller, Assistant Stearns County Attorney, represented” Stearns County at the hearing. On February 4<sup>th</sup>, 2011 Assistant Stearns County Attorney Marcus Miller was not working for the Stearns County Attorney’s Office. Rather, he was completing an 18 month active-duty mobilization with the United States Army. Assistant Stearns County Attorney Brenda Theis appeared at this hearing for Stearns County. It seems plausible that the Tax Court was modifying a prior document and merely neglected to change the appearances and assessment date.

move for partial summary judgment in the companion case and, therefore, is not entitled to it; (4) the two cases concerning the Subject Property pending before the Minnesota Tax Court are separate and have not been consolidated. The Minnesota Tax Court's ruling to change the classification of the Subject Property from commercial to residential "as of January 2, 2008" is plain error.

### **III. Conclusion**

For the foregoing reasons, the Minnesota Supreme Court has authority to reverse the order and judgment of the Minnesota Tax Court and grant Relator partial summary judgment on the claim of classification.

Respectfully submitted,



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