

A12-0963

STATE OF MINNESOTA
IN SUPREME COURT

444 Lafayette, LLC
and
Meritex Enterprises, Inc.,

Relators,

v.

County of Ramsey,

Respondent.

REPLY BRIEF OF
RELATORS 444 LAFAYETTE, LLC
AND MERITEX ENTERPRISES, INC.

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INTRODUCTION

In its *Per Curiam* Opinion reversing and remanding the Tax Court's Findings of Fact, Conclusions of Law and Order for Judgment dated April 7, 2011 (the "Original Decision") in this matter, this Court rejected the Tax Court's verbatim adoption of value determinations presented only in Respondent's post-trial briefs, concluding that the value determinations were not adequately explained or supported by the evidence of record. This Court noted that, when the Tax Court adopts proposed value determinations and a party's post-trial arguments verbatim, the result suggests that the Tax Court failed to exercise its own skill and independent judgment in valuing the subject property. In their opening brief, Relators provided examples of how the Tax Court committed the very same errors on remand, again adopting verbatim arguments and conclusions of the Respondent which were not adequately explained or supported by the evidence in the record as a whole, rendering the April 5 and April 10, 2012 Orders on Remand (the "Remand Orders") similarly in error.

Respondent has noticeably failed to address the troubling fact that, in its Remand Orders, the Tax Court has again copied multiple arguments and passages nearly verbatim from Respondent's post-remand briefs. Moreover, despite attempting to shore up the Tax Court's explanations with isolated facts gleaned from selected portions of the evidentiary record, Respondent has not demonstrated that the Tax Court responded appropriately to this Court's mandate on remand, that the Tax Court issue a decision consistent with the standard articulated in *Eden Prairie Mall v. County of Hennepin*, 797 N.W.2d 186 (Minn. 2011) (herein referred to as *Eden Prairie Mall I*).

Because the Tax Court failed to issue findings supported by the evidence as a whole, failed to adequately explain the reasons for its value determinations and adequately describe in detail the evidence in the record upon which it relied, the Remand Orders of the Tax Court fail to reasonably comply with the guidance, directions and mandate of this Court in its previous decision in this case and this Court's decision in *Eden Prairie Mall I*. In light of the Tax Court's failures on remand, this Court should either decide the fair market values of the subject property based on the sufficient evidence in the trial record, or, in the alternative, remand the matter to the Ramsey County District court for a decision by a judicial officer of that District Court.

ARGUMENT

I. THE STANDARD OF REVIEW UPON APPEAL AFTER REMAND IS NOT ONE OF GREAT DEFERENCE TO THE TAX COURT'S FACT FINDINGS SUBJECT TO A CLEARLY ERRONEOUS STANDARD; FAILURE TO STRICTLY FOLLOW REMAND INSTRUCTIONS IS ERROR.

Respondent's statement of the appropriate standard of review urges this Court to review the Remand Orders with great deference to all Tax Court findings of fact provided there is some reasonable support for them in the evidence as a whole. *See* Respondent's Brief at pages 9 to 10. This is not the standard of review on remand, especially where no new evidence is admitted. Rather, the standard of review on remand is whether the Tax Court executed the mandate of the Supreme Court strictly according to its terms. *Jallen v. Agre*, 122 N.W.2d 207, 208 (Minn. 1963). *See* full discussion in Relator's Brief dated July 3, 2012 at pages 12 to 13.

The mandate of this Court was unmistakable. On remand, the Tax Court was guided and directed to issue a decision consistent with the standards set forth in *Eden Prairie Mall I*. The standards set forth in *Eden Prairie Mall I* and described in detail in *444 Lafayette I*¹ required the Tax Court to carefully and adequately explain the basis for its calculations supporting any value conclusions that fell outside of the range of the testimony of either party's appraiser, including an explanation of the factual support in the evidentiary record for those conclusions. This Court further confirmed the Tax Court should avoid adopting verbatim arguments and conclusions found in the parties' briefs, a practice that suggests the Tax Court fails to exercise its own skill and independent judgment. *444 Lafayette, LLC v. County of Ramsey*, 811 N.W.2d 106 (Minn. 2012).

Respondent's brief marshals isolated bits of evidence to provide an after-the-fact interpretation of what the Tax Court might have stated in its decision, but did not. This Court's mandate was that the Tax Court *itself* explain its own conclusions, and the bases therefor, including the evidentiary support for them, not just adopt arguments found in the Respondent's post-remand briefs. Error is not avoided by the Respondent deducing what the Tax Court might have intended to state in its findings, or explaining away mistakes and errors in the Tax Court's factual recitations and explanations. The Tax Court was itself tasked with adequately explaining its own conclusions and showing the evidentiary basis that supports those findings. Respondent's need to explain away

¹ This Court's previous opinion in this matter, *444 Lafayette, LLC v. County of Ramsey*, 811 N.W.2d 106 (Minn. 2012), is referred to throughout as *444 Lafayette I*.

mistakes and errors by the Tax Court serves only to highlight that the Tax Court failed to follow this Court's mandate. *See* discussion, *infra*, at pages 16 to 21.

II. RESPONDENT IS IN ERROR ARGUING THAT THE TAX COURT WAS JUSTIFIED IN REJECTING THIS COURT'S GUIDANCE AND DIRECTIONS WITH RESPECT TO ANALYZING TENANT IMPROVEMENTS AS PART OF DETERMINING EFFECTIVE MARKET RENT.

As described in Relators' opening brief at pages 29 to 30, *Eden Prairie Mall I* requires an analysis of effective market rents where market conditions require rent concessions including tenant improvement allowances. In its responsive brief, Respondent erroneously supports the Tax Court in its decision to reject as unnecessary this Court's mandate that the Tax Court conduct an effective rent analysis for the subject property. Respondent argues that, despite the conclusion of both parties' respective appraisers and the Tax Court that market conditions for the subject property require rent concessions in the form of tenant improvements, the Tax Court is somehow not required to analyze tenant improvements or effective market rent for the subject property in this case. This argument is directly contrary to this Court's holding in *Eden Prairie Mall I*, which held that:

Where market conditions require rent concessions, an appraiser **must** further determine a property's effective rent. Effective rent is an analytical tool used to compare leases and develop effective market rents. Generally, effective market rent is the total of base rent, or minimum rent stipulated in a lease, over the specified lease term minus rent concessions – e.g., free rent, excessive tenant improvements, moving allowances, lease buyouts, cash allowances, and other leasing incentives. Therefore, in determining effective market rent as part of valuation under the income capitalization approach, **the court must adjust for rent concessions that affect future rent receipts.**

Eden Prairie Mall, 797 N.W.2d at 192 (citations and internal quotation marks omitted, emphasis added). This Court went on to describe how effective market rent is to be determined:

We conclude that whether tenant improvement allowances should be deducted to arrive at effective market rents must be determined on a case-by-case basis. The determination of whether a tenant improvement allowance should be deducted is part of the overall determination of market rent. Thus, an appraiser must not only examine the terms of the lease, but also must conduct market research to determine whether or not tenant improvement allowances are atypical, to determine effective market rents.

Id.

In the face of this direct and unambiguous guidance and instructions in *Eden Prairie Mall I*, Respondent alleges that it was *not necessary* for the Tax Court to analyze tenant improvements or effective market rent in the present case. Respondent's Brief at 24. In fact, Respondent erroneously cites *Eden Prairie Mall I* for the unfounded proposition that no effective rent analysis need be performed if the appraiser or the Court elects to account for tenant improvement costs *by an adjustment to the capitalization rate*. Respondent's Brief at pages 21 to 22 ("Whether to deduct tenant improvement allowances to arrive at effective rent, *i.e.*, by treating tenant improvements as an above-the-line expense, or whether to account for tenant improvements by an adjustment to the capitalization rate is to be determined on a case-by-case basis. *Eden Prairie Mall*, 797 N.W.2d at 196."). The *Eden Prairie Mall I* decision does not so hold, and contains no discussion that could reasonably be interpreted to support such a statement.

This Court's guidance and directions in *Eden Prairie Mall I* with respect to the consideration of tenant improvements are unmistakably and completely to the contrary.

This Court held that, where rent concessions (which include tenant improvement allowances) are part of the market for a property, the appraiser and the Tax Court must analyze and quantify those allowances when valuing the property by the income approach. Whether the income should be adjusted for tenant improvements is a determination that can only be made after the appraiser concludes to a market level of tenant improvements through analyzing leases and conducting comparative research. In the present case, both experts concluded that tenant improvements were a rent concession present in the subject property's market. The salient and uncontroverted facts below, including the \$13 Million in tenant improvements and tenant-related costs paid at a pertinent time by the landlord, support no other conclusion. The analysis described in *Eden Prairie Mall I* is required.

A. Respondent's Expert Failed to Undertake the Requisite Study and Analysis in Order to Properly Analyze Tenant Improvements, Whether in Order to Properly Quantify Effective Market Rent or to Adjust the Capitalization Rate Appropriately.

Respondent's expert, Mr. Messner, agreed that tenant improvement allowances were required in the subject property's market; specifically the subject property would incur periodic re-leasing costs in the form of tenant improvements and leasing commissions. Ex. I at page 87. He did not, however, study what levels of tenant improvements were present in the subject property's market, nor did he conclude to a specific level of tenant improvements for the subject property. Tr. 630:5-19. As such, Mr. Messner could not identify or quantify the tenant improvement analysis which he claimed was accounted for in his adjustment to the capitalization rate. The most Mr.

Messner could say is that some unknown and unspecified tenant improvement allowance, along with an uncalculated amount for capital reserves and possibly other costs, was accounted for by the adjustment.

Relators' expert, Mr. Amundson, however, specifically did analyze how to adjust the capitalization rate to account for tenant improvement expenses if they were not deducted as an above-the-line expense. *See* Add – 63 (Trial Ex. 16). His testimony and analysis was that, if a market level of tenant improvements was \$10.00 per square foot, the capitalization rate would need to be adjusted upward by more than 280 basis points in each year's analysis in order to account for those tenant improvements should the appraiser decide not to deduct them as an expense. His analysis, described in his testimony at transcript page 148, line 18 through page 155, line 25, is the only market evidence-based analysis of how the capitalization rate must be adjusted to in order to properly account for a market level of tenant improvements. Add – 63 (Trial Ex. 16).

B. Respondent's Capitalization Rate Adjustment Is Not Empirically Adequate to Substitute for an Effective Market Rent Analysis Including a Determination of the Market Level of Tenant Improvements.

Respondent argues that the method by which its expert accounted for tenant improvements – by adding fifty basis points to his concluded capitalization rate – was not only endorsed by this Court's decision in *Eden Prairie Mall I*, but was also sufficient to substitute for an effective rent analysis. Both parts of this claim are demonstrably false in the context of the evidence of record regarding market levels of tenant improvements for the subject property's market. Even if *Eden Prairie Mall I* had not clearly mandated an analysis of effective market rents (including analyzing the market level of tenant improvements), the analysis Respondent's expert used, and which the Tax Court adopted, is wholly insufficient as a substitute for the effective market rent analysis directed by this Court.

As discussed in Relators' opening brief at pages 31 to 32, Relators' expert, Mr. Amundson, researched and analyzed market data to determine a market tenant improvement allowance for the subject property. Mr. Amundson considered the level of tenant improvements offered tenants in the office space within the subject property's market, including lease comparables and information from brokers active in leasing office space in the St. Paul area. Ex. 1 at page 38. He determined that a tenant improvement allowance of at least \$15.00 per useable square foot is included in quoted and achieved rental rates, and tenant improvements for the lease comparables ranged from \$4.00 per square foot of useable area to \$30.00 per square foot of useable area. He

therefore concluded that the indicated market allowance for tenant improvements under a ten year lease is \$15.00 per square foot of useable area. After accounting for a \$5.00 per square foot residual value of tenant improvements after the end of a ten-year lease, he estimated that a tenant improvement allowance of \$10.00 per square foot was necessarily recovered over the term of the lease. Ex. 1 at page 38.

Respondent's expert generally agreed on this issue, having similarly determined that market conditions required rent concessions, i.e., tenant improvements, must be considered. Ex. I at page 87. However, he elected to account for tenant improvements (as well as leasing commissions and reserves for replacement of short-lived items) by adding a number of basis points to his chosen capitalization rate applied to the net operating income. Mr. Messner selected 50 basis points as the aggregate adjustment to account for the value of tenant improvements, and also leasing commissions, and also reserves for replacements of short-lived capital items. However, he admitted in oral testimony that, under his method of analysis, those 50 basis points could account for an allowance of only a total of \$.43 per square foot to cover tenant improvements, and leasing commissions, and reserves for replacements. Tr. 615:22-616:5. He further admitted he had never analyzed or determined whether this was a reasonable level of tenant improvements for the subject property's market, and he did not know what level of tenant improvement allowance was accounted for by his adjustment to the capitalization rate. Tr. 630:5-19.

Since the undisputed evidence of record is that tenant improvements in the subject property's market ranged from \$4.00 per square foot to \$30.00 per square foot, it is

apparent that Mr. Messner's adjustment, equivalent to an allowance of only \$.43 per square foot, is inconsistent with the evidence and wholly insufficient to account for a market-based tenant improvement allowance. Had the Tax Court adequately considered Trial Exhibit 16 quantifying the requisite analysis (Add - 63), or independently considered the effective rent analysis required by *Eden Prairie Mall I* using the undisputed market evidence of record regarding typical tenant improvement expenses, then the Tax Court would have realized that a 50 basis point addition to the capitalization rate was grossly insufficient to substitute for an effective rent analysis. By rejecting this Court's requirement that tenant improvements and effective market rents be analyzed as part of an income approach to value, the Tax Court erred as a matter of law.

III. THE TAX COURT FAILED TO FOLLOW THE MANDATE OF THIS COURT WHEN IT ADOPTED A PARKING INCOME ANALYSIS NOT TESTIFIED TO BY ANY EXPERT APPRAISER AND NOT OTHERWISE SUPPORTED BY THE EVIDENCE OF RECORD AS A WHOLE.

A. The Tax Court Disregarded this Court's Explicit Guidance and Directions in *444 Lafayette I*.

In *444 Lafayette I* this Court specifically rejected the Tax Court's finding on parking income which fell outside the range of the testimony presented by either of the parties' appraisers. This Court found that the Tax Court's explanation for its parking income conclusion was found only in the County's post-trial brief, not in the evidence presented at trial. *444 Lafayette, LLC*, 811 N.W.2d at 106 ("...[A]lthough the court's reasoning included findings on individual valuation factors that fell outside the range of testimony presented by either of the parties' appraisers, the court failed to present an adequate explanation or identify factual support in the record for its conclusions on these

factors. For example, the court provided no explanation, other than arguments raised by the County in its post-trial brief, for its decision to adopt estimated parking income values above the testimony of the appraisers.”). As described in Relators’ opening brief, on remand the Tax Court failed to correct its error on this issue, again adopting estimated parking income amounts above the testimony of the appraisers based only on arguments raised by the County, this time found instead in post-remand briefs.

B. The Tax Court Did Not Modify Two Parking Analyses from the Record to Reach a Composite Analysis; It Adopted Verbatim Arguments of Counsel Not Found in the Record.

Respondent argues erroneously that the Tax Court’s parking income conclusions on the Remand Orders were not a rejection of the only expert testimony about parking revenue and expenses, but were rather a *modification* of Respondent’s expert’s appraisal analysis:

The Tax Court found Mr. Messner’s testimony more persuasive on most issues and drew significantly from his appraisal, *but modified it* by using Mr. Amundson’s vacancy rates and **by attributing additional income from a parking easement based on the parking easement information in Mr. Messner’s appraisal and testimony from Mr. Amundson regarding market rates for parking contracts. . . . [A]ll of the elements of the Tax Court’s valuation of the Subject Property were taken from evidence presented by the appraisers in the record.**

Respondent’s Brief at page 4 (emphasis added).

This argument is remarkably untrue with respect to the issue of parking income. This argument does not address the fact that there is no parking analysis by Mr. Messner (or anyone else) to support the Tax Court’s findings on the issue. Mr. Messner’s appraisal and testimony contained absolutely no parking income analysis that could be

modified to reach the Tax Court's parking income conclusion in the Remand Orders. Respondent has admitted that its expert, Mr. Messner, did not "properly include parking income in his analysis." Respondent's Brief at page 18. Nor does the Tax Court reference any instance where Mr. Messner supposedly included information about the parking easement in connection with any parking analysis.

It is not possible, therefore, for the Tax Court to have modified an analysis that was never present in Mr. Messner's appraisal report or oral testimony in the first place. For Respondent to suggest that the Tax Court adopted a composite of Mr. Messner's parking income analysis and Mr. Amundson's net parking income analysis is wholly without support in the evidentiary record. The Tax Court had no analysis from Mr. Messner to consider in the evidentiary record at trial, and no additional evidence was taken on remand that could possibly support this theory.

Respondent instead claims that one selected fact found in each of the experts' respective appraisals, taken together, provide a basis for calculating parking income using a market rent and a number of parking spaces. This is a misleading recitation of the evidence as a whole and presupposes appraisal analysis never presented by any expert or any other witness at trial. Mr. Messner's appraisal, in an isolated instance found in his sales comparison approach analysis, states that 979 parking spaces were provided to the subject property by virtue of a parking easement agreement. Ex. I at page 113. Nowhere did he analyze or testify to parking rates, parking vacancy level, parking contracts or historically demonstrated levels of parking revenues. It is not accurate or candid to imply that he intended an isolated mention of 979 parking spaces in a sales comparison

approach section to substitute for an analysis of parking income. Mr. Messner did not perform, and did not pretend to have performed, any analysis of parking income for the subject property. *See* Tr. 361:23-362:1 (“I guess it was my opinion that the income being generated from parking for off site parking would be income to the parking lots, not necessarily income to this office building.”).

Similarly, Mr. Amundson did state that \$25.00 per month was a market parking rate for a parking stall located in St. Paul in 2007, 2008 and 2009. It is not, however, accurate or candid to suggest that Mr. Amundson contended that this monthly rent could be accurately applied to every available parking space in an analysis of estimated parking income attributable to the subject property. Mr. Amundson’s appraisal report and testimony set forth his professional appraisal analysis, which squarely did not use a “rate multiplied by number of stalls” analysis; he researched and relied upon historical amounts of parking revenue to project amounts a potential buyer would reasonably expect as of the assessment dates at issue. The only expert analysis about parking revenue or income was that of Mr. Amundson.

Respondent’s claim that the Tax Court harmonized the two experts’ testimony to reach its parking income conclusions is baseless. What the Tax Court did was to adopt an argument raised only by counsel in a brief; as this Court recognized in *444 Lafayette I*, this was not an adequate basis or explanation for concluding to parking revenues or net parking income after expenses at levels substantially higher than those presented at trial. With no other evidence in the trial record, and no evidence admitted on remand, the only analysis of parking revenue and income in the evidentiary record is that of Mr.

Amundson. No composite analysis is possible with reasonable support from the evidence of record.

Instead, what the Tax Court again did on remand was to adopt, verbatim, a parking income analysis found only in argument in Respondent's post-remand brief. The argument was set forth in Respondent's post-remand brief thusly:

Messner's appraisal indicates that the Subject Property benefits from an easement granting it access to 979 parking spaces.

. . . [T]he Court should attribute to the Subject Property market level income from the 979 parking spaces provided by the easement. . . . Thus the market level of annual income for parking can be determined by taking the number of parking spaces provided by the easement without regard to actual contracts in place, 979, and multiplying it by the market rate of income provided per space on a yearly basis, \$300 ($\25×12).

A079, A081 (Respondent's Memorandum on Remand).

In its Remand Orders, the Tax Court adopted this argument verbatim as its basis for its parking income determination: "Because the Subject Property benefits from an easement granting it access to 979 parking spaces, we determine the market level of annual income for parking to be \$293,700." In a footnote following this finding, the Tax Court explained that "To obtain this figure, we multiply the 979 contracts in place by the monthly market rate of parking (\$25) by the number of months in a year (979 spaces \times $\$25 \times 12 = \$293,700$)." Add – 15-16. At no point in the Remand Orders did the Tax Court identify any portion of the trial record that supports the finding that 979 parking contracts were ever in place or the evidentiary source of this analysis.

Relator's Opening Brief to this Court at page 20 discusses the number of parking contracts that were indicated by the total parking revenues for the years at issue; during

the salient years between 659 and 831 parking spaces were ever even possibly under contract. The Tax Court does not cite to the evidentiary record because its analysis is nowhere found in the appraisals or testimony of either appraiser. It is only found in arguments of counsel, which are not evidence. The actual historical parking revenues of record, and the possible number of parking contracts derived therefrom, soundly refute the analysis which the Tax Court adopted from Respondent's briefs.

Additionally, Respondent's brief does not adequately address the Tax Court's failure to also take into account parking expenses when determining the parking income net of expenses attributable to the subject property. The Tax Court devoted merely one sentence to explaining its failure to separately determine parking expenses, stating without reference to the record that Mr. Messner indicated that his operating expenses included expenses related to parking. Add – 47. Respondent's attempt to shore up the Tax Court's analysis with evidence from the record is inaccurate and unpersuasive.

Respondent claims that Mr. Messner concluded to levels of market operating expenses for the office building which included expenses associated with the costs of the parking lots, the shuttle service and the cafeteria, citing to pages 86 and 87 of his appraisal report (Exhibit I) and his testimony at page 365, lines 5 to 11. However, Mr. Messner's appraisal report, Exhibit I, contains absolutely no reference to parking, shuttle or cafeteria expenses, nor does the report in any way acknowledge that parking income or expenses are part of his analysis. His initial testimony was that he understood "nonrecoverable expenses" as "having to do with providing for the cafeteria, the shuttle service, the parking lots . . . et cetera." These statements were contradicted, however,

when he subsequently clarified his testimony on cross-examination to state that the non-recoverable expense deductions he considered were for items “required by the lease” of the 444 Lafayette building, specifically, cafeteria and shuttle expenses. *See* Tr. 409:5-14. Parking contracts, and parking income and expenses, are not part of the lease between Relators and the Minnesota Department of Human Services. The evidentiary record taken as a whole, including both Mr. Messner’s appraisal report and testimony, confirms that he considered neither parking income nor parking expenses as part of his analysis.

By adopting Respondent’s unsupported argument as the explanation for its parking income conclusions – conclusions at variance with the only expert testimony on the net parking income issue from Mr. Amundson – the Tax Court failed to follow this Court’s mandate that it explain deviations from the expert testimony regarding parking income and adequately describe the factual support in the record for its determination. As a result, the Remand Orders are in error.

IV. RESPONDENT FAILED TO MEANINGFULLY ADDRESS SIGNIFICANT ERRORS IN THE TAX COURT’S EXPLANATIONS PURPORTEDLY SUPPORTING ITS FINDINGS IN THE REMAND ORDERS.

Respondent attempted to explain away numerous factual errors in the Tax Court’s explanations for its post-remand findings, but those explanations fall short of support in the evidentiary record. The Tax Court’s Remand Orders simply do not adequately explain the factual basis in the record for its conclusions. The mistakes and factual inconsistencies left unresolved include the following:

- **The Tax Court erred in its finding that there were 979 parking contracts in place at the subject property.**

Respondent acknowledges that the Tax Court incorrectly described the evidence of record, but claims the error is insignificant. Respondent's Brief at page 17. To the contrary, where the Tax Court was expressly tasked with explaining the basis for its parking income analysis, recitation of facts found nowhere in the trial record is significant and problematic. No witness, expert or otherwise, testified that parking income could be estimated based on the total potential number of parking contracts.

The actual historical parking revenues, which are not disputed in the evidentiary record, indicate that only 659 parking contracts could have been in place in 2006, 831 in 2007, and 720 in 2008. *See* Relators' Opening Brief at page 20, fn. 12. Even if the Tax Court intended to refer to 979 as the number of parking *spaces* allocated to or available to the subject property as of the date of the 2004 reciprocal easement agreement, the error is highly significant: that number is 33%, 15%, and 26% higher than the possible number of actual parking contracts indicated by the historical levels of parking revenue collected. No expert testified to the theory of valuation used by the Tax Court with respect to parking income. *See* discussion at pages 10 to 13, *supra*.

- **The Tax Court erred in its finding that its adoption of Mr. Messner's operating expense figures were "lower" than Mr. Amundson's and that adopting them gave the "benefit of the doubt" to Relators.**

In purporting an explanation for selecting Mr. Messner's operating expense conclusions over those used by Mr. Amundson in his income approach to value, the Tax Court referred to facts not found in the record and which contradicted the evidence of

record about Mr. Amundson's operating expense conclusions. Respondent admits that the Tax Court erred in this explanation, but again claimed that this was not a meaningful error. *See* Respondent's Brief at page 20 (arguing that the Tax Court meant to refer to the subject property's historical operating expenses, and not those operating expenses actually estimated by Mr. Amundson for the assessment years at issue). Respondent argues that the support in the record is not affected by this mischaracterization; however, this mischaracterization itself is one of the grounds the Tax Court explained as the basis for its selection of Mr. Messner's operating expenses. Where the Tax Court explains its findings based on an erroneous statement of the facts in the record, the Tax Court has not adequately explained the factual basis in the record in a reliable manner consistent with this Court's guidance and directions.

- **The Tax Court erroneously determined that the capitalization rates Mr. Amundson determined from the sale of the subject property were “in line with” Mr. Messner's concluded capitalization rates.**

In justifying and attempting to support its determination to accept Mr. Messner's concluded capitalization rates, the Tax Court mistakenly recited the evidence in the record as showing that the capitalization rate Mr. Amundson extracted from the subject property's sale was “in line with” the capitalization rate selected by Mr. Messner, therefore supporting the ultimate conclusion. As discussed in Relators' Opening Brief at pages 34 to 36, this comparison was mathematically dubious and ignored (i) the 50 basis point adjustment for tenant improvements, leasing commissions, and reserves for replacement, and (ii) the distinction between leased-fee and fee simple capitalization rates. Ramsey County acknowledges the Tax Court's characterization is questionable

and does not defend it, but instead states that this comment by the court was “inconsequential and it was not a significant factor in [the Tax Court’s] selection of the capitalization rates.” Respondent’s Brief at page 27.

The plain language of the Tax Court’s Remand Orders indicates that this rationalization was indeed a factor supporting the Tax Court’s selection of capitalization rates. It is certainly fair and reasonable to conclude that the reasoning stated by the Tax Court in its decision was significant to the Tax Court, otherwise it would not have been mentioned. The fact remains that the comparison is an erroneous and unfair one, and if corrected, contradicts the Tax Court’s findings on this issue.

- **The Tax Court made an erroneous finding that the Korpacz study reported capitalization rates for property sales.**

Relators also discussed in their opening brief the Court’s mischaracterization of the Korpacz capitalization rate study as one based on “properties” sold as opposed to survey responses from investors as to hypothetical risk and return requirements for different categories of properties. Relators’ Opening Brief at pages 39-40. Respondent acknowledges this finding is in error, but insists that the reference is without consequence because the “proposition for which the court was referencing the survey is true, that the majority of the participants in the survey” did not include tenant improvements and replacement reserves as above-the-line expenses.” Respondent’s Brief at page 29.

To the contrary, the Tax Court makes a crucial error in describing the Korpacz study, which forms a significant basis for the Tax Court’s selected capitalization rate. Moreover, the explanation offered by Respondent to better explain the Tax Court’s

reasoning, that the “majority of participants in the survey” approached tenant improvements as below-the-line expenses, is not supported by the evidence taken as a whole. Mr. Messner admitted that the Korpacz survey information he presented in his report identified only selected respondents, and admitted that in his appraisal report he personally omitted a category of respondents that was reported in the actual Korpacz survey. *See* Ex. I at page 89 as compared with Ex. 61; Tr. 601:4-602:11. He further acknowledged that as a result of his purposeful omission of a category of respondents, the averages and comparisons he drew from that data were erroneously skewed.

The result was that the conclusions Mr. Messner drew from the data would have yielded a different proportion of above-the-line to below-the-line respondents, and would have indicated a higher average capitalization rate overall. *See* Tr. 600:22 – 604:9; 606:15 – 607:2; *see also* Ex. 61. The Tax Court’s misunderstanding and mischaracterization of the Korpacz study is significant and made particularly troubling in light of the Tax Court’s pattern of adopting verbatim one party’s arguments in determining the subject property’s capitalization rate and overall value.

- **The Tax Court made an erroneous finding that Mr. Amundson expressly relied on significantly lower capitalization rates found elsewhere in the RERC reports, when in fact he unequivocally relied upon the actual survey results for the Minneapolis and Midwest markets in his appraisal report and testimony.**

In their Opening Brief, Relators showed that the Tax Court recited incorrect facts and misstated the evidence when it stated that Relators’ expert relied heavily on two capitalization rates reported in the RERC report for 2007 – 6.9% and 7.4%, respectively, but then concluded to a supposed significantly higher rate of 8%. Relators’ Brief at page

38. This explanation by the Tax Court significantly mischaracterized Mr. Amundson's written report and testimony, in which he unmistakably stated that he relied on the capitalization rate surveys for the Minneapolis and Midwest markets found in the RERC reports, which surveys reported a higher capitalization rate of 7.8% for both surveys in 2007. Indeed, those are the only two survey results reproduced in his appraisal report (see Ex. 1 at page 41), and he testified that the Minneapolis and Midwest surveys were the relevant figures. Tr. 110:14-21.

Respondent attempts to fabricate factual support for the Tax Court's explanation in error by selective citation to Mr. Amundson's general testimony that he relied on the RERC reports received into evidence as trial exhibits. The factual record, however, taken as a whole, shows that the Tax Court's purported explanation (i.e., that the RERC rates Mr. Amundson used were too low) is without factual basis in the record, is based on a misunderstanding of the testimony, and is therefore in error.

CONCLUSION

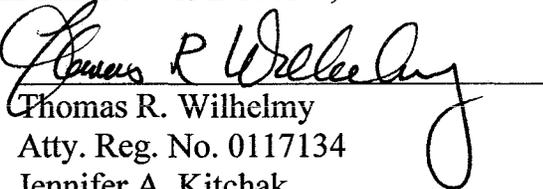
The Tax Court simply failed to comply with this Court's guidance and instructions to comply with the *Eden Prairie Mall I* standards by: (1) failing to adequately explain the reasons for its value determinations, and the grounds for reaching a conclusion of value higher than either of the experts, based upon the evidence in the record taken as a whole; (2) failing to describe in detail the evidence in the record to support its value determinations; (3) failing to make any findings on the issue of effective market rent; (4) failing to determine whether or not tenant improvements are atypical; (5) failing to adjust for rent concessions (such as tenant improvements) that affect future rent receipts;

(6) failing to adequately explain the reasons for rejecting the uncontroverted appraisal testimony of Relators' expert on the issues related to parking income; and (7) adopting once again on remand verbatim arguments from Respondent's briefing which had no support in the evidentiary record as a whole.

Because the Tax Court failed to issue findings supported by the evidence as a whole, failed to adequately explain the reasons for its value determinations, and failed to adequately describe in detail the evidence in the record upon which it relied, the Tax Court's Remand Orders fail to reasonably consider the guidance, directions and mandate of this Court in *444 Lafayette I* and in *Eden Prairie Mall I*. In light of the Tax Court's failures on remand, Relators respectfully request that this Court either decide the fair market values of the Subject Property as of January 2 in 2007, 2008 and 2009 based on the sufficient evidence in the trial record, or, in the alternative, remand the matter to the Ramsey County District Court for a decision by a judicial officer of that Judicial District based on the evidence in the trial record and the guidance and instructions of this Court.

Dated: August 9, 2012

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STATE OF MINNESOTA
IN SUPREME COURT

444 Lafayette, LLC and
Meritex Enterprises, Inc.

CERTIFICATION OF BRIEF LENGTH

Relators,

v.

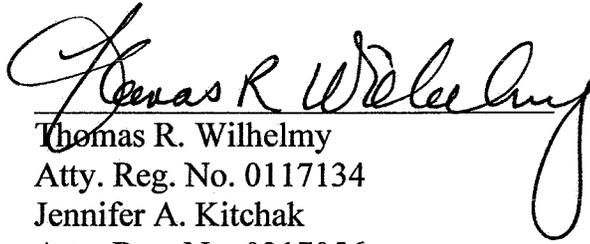
County of Ramsey,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,045 words. This brief was prepared using Microsoft Word 2010.

DATED: August 9, 2012

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