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STATE OF MINNESOTA

IN SUPREME COURT

No. A12-1507

Kohl's Department Stores, Inc.,

Relator,

vs.

County of Washington,

Respondent.

RESPONDENT'S BRIEF & ADDENDUM

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STATEMENT OF THE ISSUES

1. **Whether the Tax Court's determination of the capitalization rate utilized in its income analysis to value the subject property was clearly erroneous.**

Tax Court's Ruling:

Considering the testimony of both parties' expert witnesses and the capitalization rates of comparable properties and national surveys, the Tax Court determined that the appropriate capitalization rate to use in the income approach to value of the subject property was 8% for the assessment years 2007 and 2008 and 8.5% for the assessment year 2009, which was within the range of the capitalization rates offered by the parties' expert witnesses.

Apposite Authority:

Minn. R. Civ. P. 52.01.

Carson Pirie Scott & Co. v. Co. of Hennepin, 576 N.W.2d 445 (Minn. 1998).

Eden Prairie Mall, LLC v. Co. of Hennepin, 797 N.W.2d 186 (Minn. 2011).

Montgomery Ward & Co., Inc. v. Co. of Hennepin, 482 N.W.2d 785 (1992).

2. **Whether the Tax Court's determination of the market rent utilized in its income analysis to value the subject property was clearly erroneous.**

Tax Court's Ruling:

Considering the testimony of the expert witnesses and the rent in leases from comparable properties in the market offered by both parties' expert witnesses, the Court determined that $6.25 per square foot was the market rent to calculate the subject property's net operating income in the income approach to value the subject market

property, which was within the range of the market rents estimated and utilized by the parties' expert witnesses.

Apposite Authority:

Minn. R. Civ. P. 52.01.

DeZurick Corp. v. Co. of Stearns, 518 N.W.2d 14 (Minn. 1994).

Hansen v. Co. of Hennepin, 527 N.W.2d 89 (Minn. 1995).

Northerly Centre Corp. v. Co. of Ramsey, 311 Minn. 335, 248 N.W.2d 923 (1976).

Oliver Iron Mining Co. v. Comm'r of Taxation, 247 Minn. 6, 76 N.W.2d 107 (1956).

STATEMENT OF CASE AND FACTS

This petition for certiorari review before the Minnesota Supreme Court arises from a petition brought by the Relator under Minnesota Statutes Section 278.01 contesting the valuation of real property (hereinafter "subject property") for the purposes of *ad valorum* taxes due on the property for the assessment years 2007, 2008, and 2009.[1] The subject property was assessed by the Washington County Assessor (hereinafter "Respondent") at $6,322,200 for assessment year 2007, and at $6,445,300 for assessment years 2008 and 2009, respectively. Rel. Brief, Add-3.

The subject property is an owner-occupied retail department store located in the Gateway Commercial District in Cottage Grove, Washington County, Minnesota. *Id.* at Add-2; Exh. 101 at 28. The building on the subject property is freestanding and was constructed in 2004. *Id.* at Add-4, Add-5; Exh. 101 at 31. It is in good condition and consists of a gross leasable area ("GLA") of 88,693 square feet and total building area of 95,942 square feet. *Id.* at Add-4. The subject property is in legal conformity with local zoning ordinances and both parties agreed through their respective expert witness testimony that the highest and best use of the subject property is for continued use as a retail department store. *Id.* at Add-2, Add-6.

For the assessment years 2007 and 2008, the subject property's land area consisted of 437,692 square feet. *Id.* at Add-5. In mid-2008, an excess land outlot (hereinafter

[1] All real property subject to taxation must be assessed at the fair market value of the property as of January 2 of the preceding year the taxes become due. Minn. Stat. § 273.01.

"outlot") located on the southwest corner of the property consisting of 49,163 square feet was sold to a third party for $700,000. *Id.* As of the assessment year 2009, the subject property's land site consisted of 388,529 square feet. *Id.* Both of the parties' expert witnesses agreed at trial that the fair market value of the outlot for assessment years 2007 and 2008 was $700,000, which should ultimately be added to the final valuation of the subject property for those respective assessment years. *Id.* at Add-6; T. 136-37; T. 315.

Trial contesting the assessment of the subject property for years 2007-2009 was held before the Honorable George W. Perez, Chief Judge of the Minnesota Tax Court, on October 25 through 27, 2011. *Id.* at Add-1. The Court heard testimony from only two witnesses, Michael Amundson, licensed appraiser retained on behalf of the Relator, and Robin Swanson, licensed commercial assessor on behalf of the Respondent. T. 8, 20, 284, 296. Both witnesses prepared summary appraisals of the subject property for the assessment years at issue and both reports were admitted into evidence. Exh. 1; Exh. 101. Neither party objected or challenged that the other's respective witness was qualified as an expert in appraising real property or offering their expert opinion as to the fair market value of the subject property. T. 21; T. 312. Mr. Amundson testified and opined that the fair market value of the subject property was $5,600,000 for the 2007 assessment year; $5,400,000 for 2008; and $4,450,000 for 2009. T. 21. Ms. Swanson testified and opined that the fair market value for both the 2007 and 2008 assessment years was $8,038,000 and for the 2009 assessment year was $7,338,000. T. 312; 342.

In arriving at their respective final value determinations, both experts considered the three traditional approaches to value real property: the cost approach, sales (or

market) comparison approach, and the income capitalization approach. *See Equitable Life Assurance Soc'y v. Ramsey County*, 530 N.W.2d 544, 552 (Minn. 1995); T. 25; T. 320. Ms. Swanson testified that she considered, but did not utilize the sales comparison due to lack of adequate comparable sales data available. T. 320-21. Mr. Amundson acknowledged that his cited sales comparisons were less than ideal and that his sales approach should not be given primary weight. T. 142. Both experts utilized the cost approach, but neither placed significant weight on their respective analysis. Rel. Brief, Add-9. Both Mr. Amundson and Ms. Swanson agreed that the primary weight should be given to the income approach due to the subject property being income-producing property. *Id.* at Add-10; T. 119; T. 328.

In their respective income analysis, both experts estimated a 5% vacancy rate and approximately a 2% management fee expense. *Id.* at Add-10; Exh. 1 at 70; Exh. 101 at 96-97. However, the experts deviated from the other in their estimation of the market rate and the capitalization rate utilized in their analyses. Mr. Amundson estimated that the market rent for the assessment years 2007 through 2009 were $4.75, $4.70, and $4.60 per square foot, respectively. Exh. 1 at 70. Mr. Amundson utilized a cap of 8.5% for 2007, 8.75% for 2008, and 9.0% for 2009. *Id.* at 72. Ms. Swanson determined the market rent to be $7.10 per square foot for all three assessment years and utilized at a cap rate of 7.658%. Exh. 101 at 95, 107.

To arrive at their respective market rent determinations, both experts performed a market analysis where they looked to the market to find leases to properties similar (or comparable) to the subject property. Exh. 1 at 63; Exh. 101 at 87. Mr. Amundson

additionally performed the so-called percentage of retail sales method to estimate the market rent, where he used the actual sales of the property. Exh. 1 at 67. Ms. Swanson did not factor in the gross sales of the subject property, opining that the gross sales were not an indicator of market value and that the better indicator of value was looking at the comparable leases in the market. T. 437-38. Ms. Swanson testified that there were adequate comparable leases in the subject property's market to use and was able to accurately extract the appropriate market rent to use in her income approach. T.334-35; T. 437-38.

Ms. Swanson considered four comparable leases with unadjusted rents ranging from of $6.81 to $8.93 per square foot. Exh. 101 at 87. After making the appropriate adjustments, Ms. Swanson estimated the market rent for the subject property to be $7.10 per square foot. *Id.* at 93. Mr. Amundson utilized four leases in his market analysis, ranging $5.62 to $7.51 per square foot and without explaining his adjustments, he estimated a market rent range of $5-$6.00 per square foot. Exh. 1 at 66.

In its Order filed on March 16, 2012, the Tax Court determined that the fair market of the subject property to be $6,977,800 for the assessment years 2007 and 2008 and $5,908,500 for 2009.[2] Rel. Brief, Add-13, Add-14. The Court further found that the Relator was entitled to equalization relief of 5.4% for assessment year 2009, pursuant to

[2] The value determinations for 2007 and 2008 included the outlot parcel which was agreed by both parties' expert witnesses to have a fair market value of $700,000 for each of those years. Rel. Brief, Add-13, Add-14.

Minn. Stat. § 278.05, subd. 4, thereby further reducing the assessment of the subject property for 2009 to $5,589,441.[3] *Id.* at Add-14.

In determining its final value determination, the Court gave little to no weight to either the cost approach or the sales comparison approach, thereby placing primary weight on the income approach due to the property being income-producing. *Id.* at Add-10. The Court observed that the parties agreed as to the estimated vacancy rate of 5% and management fees of 2% and that the parties' dispute was over the appropriate market rent rate and the capitalization rate. *Id.*

Noting that both expert witnesses used comparable lease data in the market to determine market rent, the Tax Court gave sole weight to the market comparable lease analysis method to derive the appropriate market rent for the subject property. *Id.* at Add-10. The Court reviewed both witnesses' comparable leases. *Id.* at Add-10, Add-11, Add-12. The Tax Court gave minimal weight to one of Ms. Swanson's leases due to the actual lease or the lease summary not being available for her review. *Id.* at Add-11. The Court found three of the four of Mr. Amundson's comparable leases problematic due to the age of the buildings when compared to the subject property's construction and that there was no discussion or explanation as to whether there was an adjustment to the leases for the building's condition or age. *Id.* at Add-11, Add-12. The Court additionally had trouble with the fact that Mr. Amundson did not provide any explanation or even

[3] The Respondent conceded in its post-trial brief that the Minnesota Department of Revenue's published 9-month 2009 Assessment Sales Ratio Study indicated that the median ratio for sales of commercial/industrial property in Washington County was 89.6%, and that, pursuant to Minn. Stat. § 278.01, subd. 4, equalization relief would be appropriate if the fair market of the subject property was established.

indicate whether there were adjustments made to those leases when estimating the market rent. *Id.* The Court determined the market rent to be $6.25 per square foot for all three assessment years, which was used to calculate the net operating income ("NOI) of the property. *Id.* at Add-10-Add-12.

The Court then considered and reviewed the surveys and comparable market properties presented by both expert witnesses to determine the appropriate capitalization rate. *Id.* at Add-12, Add-13. The Court observed that, with the exception of one outlier, Mr. Amundson's comparable leases had cap rates ranging from 7.0% to 8.3% and that the surveys Mr. Amundson relied upon had cap rate averages ranging from 6.8 to 7.2% for 2007; 6.6% to 7.24% and 7% to 7.89% for 2009. *Id.* Ms. Swanson cap rate comparables ranged from 7.3% to 7.77% and the surveys cited by Ms. Swanson for neighborhood centers indicated a cap rate of 8% for 2006, 7.5% for 2007, and 7.1% in 2008. *Id.* at Add-13. The Court found it appropriate to place an upward adjustment to the cap rate for the subject property due to the perceived risk of the property being a single-tenant property and found that the appropriate capitalization rate was 8% for 2007 and 2008 and 8.5% for 2009. *Id.* at Add-13, Add-14.

After the Court issued its decision, Relator moved for Amended Findings of Fact, Conclusions of Law or New Trial. *Id.* at Add-16. The Tax Court granted the Relator's motion in part and amended its findings to take into consideration an estimate on operating expenses on the vacant portion of the subject property's building at 2.22% of the estimated gross income ("EGI"), thereby reducing the EGI by $12,306. *Id.* at Add-21. After recalculating the NOI, the Court amended its determination of the subject

property's fair market value to $6,834,700 for assessment years 2007 and 2008, and to $5,773,000 for 2009. *Id.* at Add-22. The Court further reduced the assessment for 2009 to $5,462,100 taking into consideration the agreed upon equalization relief pursuant to Minn. Stat. § 278.01, subd. 4. *Id.*; *see supra* n. 3. The Tax Court also clarified that its original capitalization rate finding included an upward adjustment of .158% for property taxes on the vacancy rate and that it did not give any weight to Relator's expert witness's percentage of retail sales method to determine the market rent. *Id.* at Add-24, Add-25.

From the Court's Order filed on June 29, 2012, Relator petitioned for writ of certiorari for the Supreme Court to review the Tax Court's findings. In its appeal, the Relator challenges the Tax Court's finding of the market rate and capitalization rate to use in the income approach to determine the fair market value of the subject property.

STANDARD OF REVIEW

Relator raises three issues that can simply be stated as one: whether the Tax Court clearly erred in its finding of the appropriate capitalization rate and the market rent utilized in its income analysis to determine the fair market value of the subject property. *See* Rel. Brief at 5.[4] The Tax Court's determination of the appropriate "cap" rate, the market rent, and, ultimately, of the fair market value of the subject property are findings of fact, which this Court does not set aside unless "clearly erroneous." Minn. R. Civ. P. 52.01 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses") (emphasis added); *Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (Minn. 1975) ("Assigning a specific value to an asset is a finding of fact; disputes as to asset valuation are to be addressed to the trier of fact, and conflicts are to be resolved in that court"); *Carson Pirie Scott & Co. v. Co. of Hennepin*, 576 N.W.2d 445, 447 (Minn. 1998); *Harold Chevrolet, Inc. v. Co. of Hennepin*, 526 N.W.2d 54, 57 (Minn. 1995). The Tax Court's decision is not clearly erroneous when it is reasonably supported by the record as a whole. *Carson Pirie Scott & Co.*, 576 N.W.2d at 447; *Harold Chevrolet, Inc.*, 526 N.W.2d at 57; *see Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) ("On appeal, a trial court's findings of fact are *given great deference*, and shall not be set aside unless clearly erroneous. . . . If there is reasonable evidence to support the trial court's findings of fact,

[4] Relator agrees that the two key issues in this matter are "(1) the appropriate level of market rent; and (2) the appropriate capitalization rates." Rel. Brief at 5.

a reviewing court should not disturb those findings") (emphasis added). Only when this Court is left with a definite and firm conviction that a mistake has been made will the Court reverse a lower court's findings of fact. *Northerly Centre Corporation v. Co. of Ramsey*, 311 Minn. 335, 341, 248 N.W.2d 923, 927 (1976).

"Decisions of the Tax Court are accorded the same finality and deference as those of the district court." *DeZurick Corp. v. Co. of Stearns*, 518 N.W.2d 14, 16 (Minn. 1994) (citing Minn. Stat. § 271.01, subd. 5 (1992). The reviewing Court is not permitted to substitute its judgment on the facts for that of the lower court. *Oliver Iron Mining Co. v. Comm'r of Taxation*, 247 Minn. 6, 23-24, 76 N.W.2d 107, 118 (1956). Deference is given to the trier of fact as to the weight placed on the testimony of expert witnesses. *Id.*; *see also Hansen v. Co. of Hennepin*, 527 N.W.2d 89, 94-95 (Minn. 1995) ("the tax court is wholly capable of assessing the weight of conflicting expert testimony and reaching an intelligent conclusion"). It is not the province of this Court to reconcile conflicting evidence or second guess the lower court's credibility decisions. *Fletcher*, 589 N.W.2d at 101; *Dreyling v. Comm'r of Revenue*, 711 N.W.2d 491, 494 (Minn. 2006) (citing *Manthey v. Comm'r of Revenue*, 468 N.W.2d 548, 550 (Minn. 1991) ("The tax court sits in a better position to judge credibility and sincerity")).

Appraising real estate is an "inexact value determination." *Harold Chevrolet, Inc.*, 526 N.W.2d at 59. The trier of fact is not required to accept any one particular valuation approach as the sole basis for determining market value. *DeZurick Corp.*, 518 N.W.2d at16; *see also American Express Financial Advisors, Inc. v. Co. of Carver*, 573 N.W.2d 651,558 (Minn. 1998) (the Tax Court is "not bound to accept the valuation of either

appraiser"). The Tax Court brings its own expertise and judgment to the proceedings. *Carson Pirie Scott & Co.*, 576 N.W.2d at 451. The reviewing Court will affirm the Tax Court's determination of the market value when it falls between the values presented by the parties' respective expert witnesses. *Northerly Centre Corp.*, 311 Minn. at 341, 248 N.W.2d at 927 (court affirmed the Tax Court's determination of value where it was "well within the perimeters of the opinions given by the real estate appraisers."); *Hertz*, 304 Minn. at 145, 229 N.W.2d at 44 ("the market valuation determined by the trier of fact should be sustained if it falls within the limits of credible estimates made by competent witnesses even if it does no coincide exactly with the estimate of any one of them"); *Hansen*, 527 N.W.2d at 95 (adoption of a market value fell between the values presented by experts represented reasoned result); *Halla v. Co. of Hennepin*, 306 Minn. 533, 534, 237 N.W.2d 348, 349-50 (1975), *rehearing denied* (Dec. 12, 1975) (Tax Court's compromise in valuation has evidentiary support and is not unreasonable or clearly erroneous when it is confronted with conflicting appraisals between the assessor and the petitioners) (citation omitted).

ARGUMENT

The issues in this appeal are not nearly as convoluted and complex as Relator sets them out to be and they do not involve questions of law. The record and Relator's brief clearly establish that the crux of this matter is the capitalization rate and market rent rate to utilize in the income approach, which appears to be the agreed primary method to determine the fair market value of the subject property. Therefore, Relator's appeal is simply a challenge to the Tax Court's cap rate and market rent findings of fact. These are fact questions and as established *supra*, the standard of review when a challenging a lower court's finding of fact is clearly erroneous. Thus, the proper issue before the Court is simply whether the record reasonably supports the Tax Court's capitalization rate and market rent determinations.

As will be demonstrated, the Tax Court's findings were adequately explained and fell well within the permissible range of estimates offered by both parties' expert witnesses and, therefore, were not clearly erroneous. *See Hertz*, 304 Min. at 145, 229 N.W.2d at 44 ("the market valuation determined by the trier of fact should be sustained if it falls within the limits of credible estimates made by competent witnesses even if it does not coincide exactly with the estimates of any one of them"); *see also Northerly Centre Corp.*, 311 Minn. at 342, 428 N.W.2d at 927 (when the Tax Court's valuation determination is "within the perimeters of the opinions given by the real estate appraisers," the court's determination is supported by the evidence). The Court should affirm the Tax Court's findings.

I. The Tax Court's finding of 8% as the appropriate market capitalization rate for the assessment years 2007 and 2008 and 8.5% for the assessment year 2009 is reasonably supported by the record.

A. The record reasonably supports the Tax Court's cap rate finding.

The Tax Court's determination of the appropriate capitalization rates is reasonably supported by the record. Focusing primarily on the sales of comparable properties to extract the cap rate, Ms. Swanson determined the appropriate rate to be 7.658% for all three of the assessment years at issue, which included a tax rate percent of .158 payable on the vacant space. Exh. 101 at 99. In support of her estimation, Ms. Swanson reviewed the capitalization rates of three comparable sales ranging from 7.30% through 7.75%. *Id.* As a check on her analysis, Ms. Swanson performed the Band of Investment and Debt Coverage Ratio Analysis and cited Collier's survey of retail market capitalization rates for 2006 through 2008 for the Twin Cities metropolitan area. *Id.* at 100-07; T. 519. Ms. Swanson's Band of Investment and Debt Coverage Ratio Analysis yielded a cap rate of 7.99% and 7.67%, respectively, and the surveys showed an average cap rate of 7.53%. *Id.*

Mr. Amundson utilized a capitalization rate of 8.5% for 2007, 8.75% for 2008 and 9.0% for 2009. Exh. 1 at 72. In support of his opinion, Mr. Amundson offered five comparable lease sales, four of which had capitalization rates ranging from 7.0% through 8.3% and the fifth lease sale had a cap rate of 11.83%. *Id.* at 71. Mr. Amundson further cited Korpacz Survey, which is a national survey that lists average cap rates for neighborhood strip centers, community centers, strip shopping centers, power centers,

and retail. *Id.* at72. The average of the five categories for the fourth quarter prior to the assessments dates ranged from 6.8% to 7.2% for 2007, 6.6% to 7.24% for 2008 and 7.0% to 7.89% for 2009. *Id.*

Relying on the comparable lease sales cap rates, with the exception of the 11.83% outlier offered by Mr. Amundson,[5] and the surveys cited by both expert witnesses, the Tax Court found 8.0% to be the appropriate capitalization rate for 2007 and 2008, and 8.5% for 2009. Rel. Brief, Add-13, Add-14. The Tax Court determined that an upward adjustment to the cap rate extracted from the cited comparable lease sales and surveys was warranted because of the perceived risk due to the subject property being a single-tenant property,[6] as well as adjusting for property taxes paid during period of vacancy. *Id.*; Add-24.

The Tax Court's determination of the capitalization rate reflects the Tax Court exercising its discretion to bring its own judgment and expertise to these proceedings. The Court did not accept at face value either party's estimated capitalization rates; rather,

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[5] Relator argues in its brief that the Tax Court erred in not relying on this comparable sale. On its face, it is obvious that this cap rate is an anomaly and not reflective of the *market* capitalization rate. It is over 3 to 4 percentage points (about 50%) higher than the cap rate of all of the other comparable lease sales offered by both expert witnesses, as well as all of the cited surveys. It was also vacant and subject to a short term lease at the time of its sale. Exh. 1 at 71. It clearly should not be relied upon to determine the market capitalization rate and the Tax Court's decision not to give it weight was not an error.

[6] The Respondent does not concede that the subject property's status as a single-tenant creates a perception of risk that warrants an upward adjustment to the cap rate and argued against making this adjustment in its post-trial brief to the Tax Court. Notwithstanding, the Respondent does not dispute that the Tax Court's finding and adjustment was nonetheless reasonably supported by the record and, thus, was not clearly erroneous.

it relied on the reliable market data presented at trial and made its own reasonable determination of the appropriate cap rate. The Tax Court's findings and adjustments are adequately justified and clearly fall within the perimeters of established in the record. *See Carson Pirie Scott & Co.*, 576 N.W.2d at 451 (Tax Court's adoption of a cap rate well below of the rate used by the taxpayer's expert witness was not clearly erroneous when supported by the range of rates offered by the experts' testimony and national survey rates); *see also Eden Prairie Mall, LLC v. Co. of Hennepin*, 797 N.W.2d 186, 199 (2011) (Tax Court's adoption of an appraiser's estimated cap rate was held as supported by the record when supported by the appraiser's testimony and consistent with the Korpacz Investor Surveys).[7] Therefore, the Tax Court capitalization rate finding is not clearly erroneous and should be affirmed.

B. The Tax Court did adjust the capitalization rate to include the property taxes payable by the owner on the vacant space.

The Tax Court clarified in its memorandum attached to its Order granting in part Relator's Motion for Amended Findings of Fact that the Court did consider and include the property taxes paid during period of vacancy in its final capitalization rate determination (hereinafter referred to as "property tax adjustment"). Rel. Brief, Add-24. The record reasonably supports the Tax Court's finding. [8]

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[7] While the Court did not reverse the Tax Court's cap rate finding, the Court did permit the Tax Court to revisit the issue if it determined appropriate to do so when it remanded the matter on another issue. *Eden Prairie Mall, LLC,* 797 N.W.2d at 199.

[8] Assuming *arguendo* that the Tax Court did not adjust for the property tax in its cap rate determination, the Court's failure to do so would not be clearly erroneous due to the

The property tax adjustment to the cap rate is a small fraction of a percent, specifically, .158%. The record demonstrates that the Court did make this small adjustment to its final cap rate determination. Ms. Swanson testified at trial that her estimated capitalization rate of 7.658% did include the property tax adjustment, which is also explicitly reflected in her appraisal report. T.470; Exh. 101 at 107. The Tax Court ultimately found the cap rate to be 8% for 2007 and 2008 and 8.5% for 2009. Rel. Brief, Add-13, Add-14. Since the Court's finding was significantly higher than what Ms. Swanson estimated the rate to be (with the adjustment), it is evident that the Tax Court's cap rate determination does include this small fraction of a percent property tax adjustment. Therefore, the Court did not error in refusing to further adjust the cap rate in response to the Relator's Motion to Amend.

C. The record does not reasonably support a finding of "neighborhood excessive vacancy and perceived blight" surrounding the subject property.

The record does not support a finding of neighborhood excessive vacancy or perceived blight to warrant an increase in the subject property's capitalization rate. According to the testimony of both expert witnesses, the market area surrounding the subject property was growing during the assessment years and has been for many years. T. 25-26; 319. According to Relator's expert, the growth exceeded the 13-county metropolitan area and the market area was stable. T. 25-26; 135. Ms. Swanson, who is

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Relator's expert witness failing to make this adjustment in his estimated cap rate. T.113; *see Montgomery Ward & Co., Inc. v. Co. of Hennepin*, 482 N.W.2d 785, 791 (1992) (the Tax Court's exclusion of certain expense deductions is not clearly erroneous when taxpayer's own expert witness fails to make such deductions in his analysis).

very familiar with the market area surrounding the subject property, determined that the retail market was growing and that the sales of the subject property and the closing of Hollywood Video and Home Depot near the subject property[9] were not a factor in her analysis. Exh. 101 at 25; T. 445, T. 448. Mr. Amundson testified that he only recognized a "small element of risk" regarding those vacant properties, so small that he did not even quantify or explain the amount of an adjustment, if any, he placed on his estimated cap rate for this so-called perceived blight. T. 101. Mr. Amundson's summary appraisal report is totally silent as to whether he made any adjustment for these business closings in his capitalization rate analysis. *See* Exh. 1 at 71-72.

The Tax Court did not err when it refused to recognize an increased adjustment for the vacancy of the Hollywood Video and Home Depot properties. It is well accepted and understood, even by Relator's own expert, that Hollywood Video's business model is obsolete due to the video industry significantly changing. T. 28. Furthermore, the record shows that the retail demand for a Home Depot is different than the demand for a department store like the subject property because the merchandise is completely different. T. 447. The Home Depot's closing would not have any significant factor in the demand in the subject property's retail sales. *Id.* Moreover, the record clearly establishes that the Home Depot did not close until mid-2008, which could not have had any possible effect on the subject property for the assessment years 2007 and 2008. T. 29; T. 444; *see supra* n. 1.

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[9] Relator mischaracterizes location of these businesses to the subject property. The record shows that these properties were located at least a quarter to a third of a mile away from the subject property, not across the street as asserted in Relator's brief. T. 28, 30.

However, the Court clarified in its order filed on June 29, 2012, that its cap rate finding included an upward adjustment based upon the parties' offered comparable lease sales and surveys. Rel. Brief, Add-26. Notwithstanding the Respondent's position that there is no upward adjustment warranted, the record demonstrates that the Tax Court did take into consideration the Hollywood Video and Home Depot vacancies and adjusted its cap rate finding accordingly.[10] The Court's final capitalization rate determination is on average approximately .5 to 1% higher than the leases of the comparable sales and the surveys offered into the record. This .5 to 1% certainly accounts for an increase in the subject property's risk that the even Relator's witness considers a "small element."[11] Therefore, given the record as a whole, the Tax Court's capitalization rate determination reasonably accounts for this so-called excess vacancy adjustment.

For the above-stated reasons, the Tax Court's cap rate finding is not clearly erroneous and should be affirmed.

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[10] Since Home Depot did not close until mid-2008, it would account for the Tax Court finding that the cap rate increased from 8% to 8.5% for the assessment year 2009. Rel. Brief, Add-13, Add-14.

[11] So small that apparently Mr. Amundson did not believe it significant enough to quantify or reference in his estimated cap rate calculation in his appraisal.

II. The Tax Court's finding of $6.25 per square foot as the market rent for the subject property is reasonably supported by the record.

A. The record reasonably supports the Tax Court's market rent finding.

The Tax Court's determination of the subject property's market rent is reasonably supported by the record. Both Mr. Amundson and Ms. Swanson considered and utilized the rents of leases from comparable properties to derive the appropriate market rent for the subject property (otherwise known as the "market rent analysis"). Ms. Swanson considered four comparable leases with unadjusted rents ranging from $6.81 to $8.93 per square foot. Exh. 101 at 87. After making the appropriate adjustments, Ms. Swanson estimated the market rent for the subject property to be $7.10 per square foot. *Id.* at 95. Mr. Amundson utilized four leases, ranging $5.62 to $7.51 per square foot and estimating, without explaining his adjustments, a market rent range of $5-$6.00 per square foot. Exh. 1 at 66.

Mr. Amundson additionally performed a percentage of the subject property's retail sales analysis. Reconciling his market rent analysis with his percentage of retail sales analysis, Mr. Amundson estimated a market rent of $4.75 per square foot for assessment year 2007, $4.70 for 2008, and $4.60 for 2009. Exh. 1 at 70. Ms. Swanson testified that she did not employ the percentage of retail sales analysis to determine the market rent. T. 367; 437. In her opinion Ms. Swanson believed that surveying the rent on comparable properties within the subject property's market is a better indication of value and that if market lease data is available, the market analysis method is the preferred for determining market rent. T. 367; *see also* Exh. 47.

Noting that both expert witnesses were able to find and utilize comparable lease data in the market, the Tax Court gave sole weight to the market analysis method to derive the appropriate market rent for the subject property and found $6.25 per square foot to be the market rent for the subject property. Rel. Brief, Add-12, Add- 25. In making its determination, the Court carefully considered and reviewed both witnesses' comparable leases. The Court gave minimal weight to one of Ms. Swanson's leases due to the actual lease or the lease summary not being available for her review. *Id.* at Add-11. The Court found three of the four of Mr. Amundson's comparable leases problematic due to the age of the buildings when compared to the subject property's construction and that there was no discussion or explanation of whether there was an adjustment to the leases for building condition or age. *Id.* The Tax Court additionally had trouble with the fact that Mr. Amundson did not provide any explanation or even indicate whether there were adjustments made to those leases when estimating the market rent. *Id.* at Add-12.

It is clear from the record that the Tax Court carefully reviewed and weighed the evidence and reached a reasoned determination of the market rent. The Court stayed well inside the range of the testimony and evidence offered at trial and sufficiently explained its reasoning. The Court is not required to adopt one party's methodology or opinion in its entirety over the other. *DeZurick Corp.*, 518 N.W.2d at16; *see also American Express Financial Advisors, Inc.*, 573 N.W.2d at 558 (Minn. 1998). Value determination is in approximation and as long as the Tax Court's determination falls within the limits or perimeters of the credible estimates made by the expert witnesses, the record sufficiently supports the court's determination. *See Northerly Centre Corporation*, 311 Minn. at

341, 248 N.W.2d at 927; *Hertz*, 304 Minn. at 145 229 N.W.2d at 44; *Hansen*, 527 N.W.2d at 95; *Halla*, 306 Minn. at 534, 237 N.W.2d at 349-50; *contrast with Eden Prairie Mall, LLC,* 797 N.W.2d at 194 (matter remanded when the Tax Court did not explain its factual support for its value determination that was significantly higher than the appraisal opinions offered at trial).

The Tax Court's determination of the market rent to use in the income approach to value the subject property is not clearly erroneous and should be affirmed.

B. The Relator's challenge to the Tax Court's market rent determination is merely a challenge to the Tax Court's discretion, as the trier of fact, to weigh the conflicting evidence and determine credibility of the witnesses.

Relator argues that the Tax Court committed an error by relying on Ms. Swanson's testimony because she was somehow not competent to appraise the subject property. Relator's argument should be summarily rejected for failure to preserve this issue for appeal, as was held by this Court in *Continental Retail, LLC v. Co. of Hennepin*, 801 N.W2d 395 (Minn. 2001). Relator neither objected at trial nor raised as an issue in its Motion for Amended Findings of Fact, Conclusions of Law or New Trial that Ms. Swanson was not competent to testify or offer her expert opinion as to the fair market value of the subject property. T. 312; Rel. Brief, Add-16. Relator's failure to raise this issue constitutes a waiver and appellate review is precluded. *Id.* at 399 ("evidentiary rules made at trial must be assigned as error in in a motion for a new trial or amended findings in order to properly preserve an objection for appellate review. The failure to bring such a motion precludes appellate review") (citation omitted).

Ms. Swanson clearly was competent to testify as an expert witness on the value of the subject property. Ms. Swanson is a licensed and accredited assessor, who has been employed as a commercial assessor for the County of Washington for the last 9 years. T. 285. She is trained and experienced in the field of commercial appraisal and the standards of USPAP.[12] *Id.* at 285, 291. Ms. Swanson has regularly prepared appraisals of commercial properties similar to the subject property in the course of her regular duties as a commercial assessor for Washington County. *Id.* She is trained in all three of the traditional methods to appraise property and is extremely familiar with the subject property, the market area surrounding the subject property and the market areas throughout Washington County. *Id.* at 285-86.

Relator's challenge to the Tax Court's finding of the market rent is no more than a challenge to the Tax Court's discretion to weigh the evidence and determine credibility of the witnesses. Relator's credibility argument completely ignores the standard of review of this appeal and is entirely without merit. "Due regard" is to be given to the trier of fact to "judge of credibility of the witnesses." Minn. R. Civ. P. 52.01. The reviewing court is not permitted to substitute its judgment on the facts for that of the lower court. *Oliver Iron Mining Co.*, 247 Minn. at 23-24, 76 N.W.2d at 118. Deference is given to the trier of fact as to the weight placed on the testimony of expert witnesses. *Id.* ("determination of the probative force to be given to the expert testimony submitted . . . is for the trier of fact"); *see also Hansen*, 527 N.W.2d at 94-95 ("the tax court is wholly capable of assessing the weight of conflicting expert testimony and reaching an intelligent

[12] Uniform Standards of Appraisal Practice ("USPAP").

conclusion"). It is not the province of this Court to reconcile conflicting evidence or second guess the lower court's credibility decisions. *Fletcher*, 589 N.W.2d at 101; *Dreyling*, 711 N.W.2d at 494 (citing *Manthey*, 468 N.W.2d at 550 (Minn. 1991) ("The tax court sits in a better position to judge credibility and sincerity")).

The Tax Court's decision to give sole weight to the market analysis methodology to determine the market rent is reasoned and supported by the record.[13] Both expert witnesses determined that there were adequate comparable leases in the market to utilize the market methodology to arrive to a reliable estimation of the market rent. T. 76, 81, 94; T. 335. According to the testimony of Ms. Swanson, when there is adequate market information, considering the level of the subject property's retail sales is not the preferred method of determining market rent. T. 367, 437; *see also* Exh. 47; *The Appraisal of Real Estate*, p. 472 (Appraisal Inst., 13th ed. 2008). Ms. Swanson further testified that 99% of the new leases to date no longer contain percentage of rent clauses and the market participants typically do not base their rents on the property's gross sales. T. 456; 458.[14]

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[13] It is further endorsed by the Appraisal Institute. *See The Appraisal of Real Estate*, p. 472 (Appraisal Inst., 13th ed. 2008) ("When a market rent estimate for the subject property is required, the appraiser gathers, compares, and adjusts *comparable rental data*." "The rents of comparable properties can provide a basis for estimating market rent for a subject property once they have been reduced to the same unit basis as applied to the subject property.") (emphasis added).

[14] According to Ms. Swanson, a survey was performed on the market players, landlords, and developers and they confirmed that they look to comparable properties rather than the properties gross sales to determine the market rent. T. 437-38; *see also* Exh. 47 (assessor from Hennepin County confirming with local market participates that they look to comparable leases in the market to determine market rent).

The record also shows that the business on the subject property does not typically enter into percentage of rent leases. [15]

Mr. Amundson was unable provide any authoritative support for his opinion that the percentage of retail sales methodology is more reliable than the market analysis other than to cite an article that he himself authored.[16] Mr. Amundson conceded that his assertion was not supported or even referenced in *The Appraisal of Real Estate*, (The Appraisal Institute, 13th Edition 2008), a text that Mr. Amundson considers authoritative and Relator frequently cites as authority in its brief. *See* T. 166-67; *see also The Appraisal of Real Estate*, p. 472 (the appraiser may look to other data to estimate the market rent when sufficient, closely comparable rental data is not available).

Therefore, it is not unreasonable for the Tax Court to give sole weight to the market rent analysis in order to determine the market rent when the record establishes that the business on the subject property typically does not enter into percentage of rent leases and that there were adequate comparable leases available in the market to extract the market rent. *See Northerly Centre Corporation*, 311 Minn. at 341, 248 N.W.2d at

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[15] Ms. Swanson reviewed the leases of four Kohl's Department Stores within the market and all of them had fixed rents. Exh. 101 at 87-91. Mr. Amundson reviewed two other Kohl's Department Stores in his lease comparable analysis and both of those stores had fixed rents. Exh. 1 at 66; *see also Kohl's Department Stores v. County of Ramsey*, C1-05-656, *et al.*, *6 (Minn. Tax Crt., Oct. 31, 2008) (the Tax Court rejected Petitioner's appraiser's percentage of retail sales analysis in favor of Respondent's market comparable analysis due to the subject property typically not being subject to percentage of sales leases) (copy of case attached in Addendum to Respondent's brief).

[16] *See* Minn. R. Evid. 702 (proponent of opinion based upon a novel theory must established that the underlying method is generally accepted in the relevant professional community).

927 ("Assuming there is conflicting opinion testimony, it is not mandatory upon the trier of fact to accept any particular valuation approach as the sole basis for determining market value"); *Harold Chevrolet, Inc.*, 526 N.W.2d at 59 (tax court's decision to place more reliance on one approach verses the other is not clearly erroneous); *Hansen*, 527 N.W.2d at 95 (Court rejected taxpayer's argument that the tax court's partial reliance on the market approach was clearly erroneous and not supported by the evidence when the record revealed that both experts presented values based on the market approach); *Montgomery Ward & Co. Inc.*, 482 N.W.2d at 791 (tax court simply adopting party's expert witness's methodology is not an error).

C. The Tax Court did not err as matter of law in using comparable leases to determine the market rent for the subject property.

Relator cites unpublished Tax Court cases that it knows are not binding on this Court, *see Kmart Corp v. Co. of Stearns*, 710 N.W.2d 761, 769 (Minn. 2006),[17] and yet persists to rely on them to suggest that the Tax Court in this matter somehow committed an error of law by not utilizing the percentage of retail sales methodology to determine the market rent. Neither this Court nor the Tax Court has ever held as matter of law that the percentage of retail sales methodology must be used or considered to determine the market rent when performing the income approach to value property. *See Northerly Centre Corporation*, 311 Minn. at 341, 248 N.W.2d at 927 ("it is not mandatory upon the trier of fact to accept any particular valuation approach"); *see also Montgomery Ward &*

[17] "Although the tax court is described as a 'court,' it is an administrative agency within the executive branch." "As such, its decisions have little, if any, precedential effect." *Kmart Corp v. Co. of Stearns*, 710 N.W.2d 761, 769 (Minn. 2006).

Co. Inc., 482 N.W.2d at 791 (Minn. 1992) (upon remand, the Tax Court was not required to consider one approach to the exclusion of others in determining market value). Nor has either Court held that this methodology is more reliable or a better indicator of the market rent.

Upon review of the cases cited by the Relator, the Court will observe that the percentage of retail sales methodology is only utilized, if utilized at all, in two unique situations: one, when there clearly were no similar market comparable rents to the subject property to determine the market rent, or, two, when the type of business on the subject property typically enters into a leases basing rent on a percentage of that property's sales.[18] *See Macy's Retail Holdings, Inc. v. Co. of Hennepin*, 27-CV-07-07774, *et al.*at *29-30 (Minn. Tax. Ct., Nov. 28, 2011) (percentage of retail sales utilized when the comparable leases offered into the record required substantial adjustments and were not adequately similar to the subject property); *JC Penney Properties, Inc. v. County of Hennepin*, TC-26456 at *6-7 (Minn. Tax Ct., Dec. 18, 2000) (neither of the parties' witnesses offered comparable leases and used a percentage of retail sales to estimate market rent); *Eden Prairie Mall, LLC v. County of Hennepin*, 27-CV-06-04210, *et al.* at *36-38 (Minn. Tax Ct., Oct. 13, 2009) (Von Maur) (percentage of sales utilized to reconcile market rents derived from comparable market rents appropriate when subject property was subject to ground lease providing for percentage of rent payment of 2% of net sales in excess of $20 million); *Montgomery Ward & Co.*, 482 N.W.2d at 789

[18] The Court should further observe that Relator's counsel represented the taxpayer in all of the cited cases attempting to advance this methodology of estimating market rent.

(comparable leases offered into the record indicated that the type of retail store on the subject property typically entered into a percentage of retail sales rental lease).

In the remainder of the cases Relator cites, the Tax Court did not actually utilize the percentage of retails sales methodology to arrive at its determination of the market rent, notwithstanding that the taxpayer's appraiser may have employed this method. *See Bon Stores Realty Two LLC v. County of Ramsey*, 62-CV-08-3921, *et al.* at *25 (Minn. Tax Ct., Aug. 8, 2011) (Tax Court utilized the rent comparable method to estimate market rent); *Federated Retail Holdings, Inc. v. County of Ramsey*, 62-CV-08-5061, *et al.* at *33 (Minn. Tax Ct., Aug. 23, 2011) (Tax Court found market rent based on the comparables and adjustments made); *Kmart Corp. v. Co. of Becker*, CX-02-410, *et al.* at *14 (Minn. Tax. Ct., Dec. 1, 2004) (percentage of retail sales methodology used as a check on the lease comparable analysis used be both parties' expert witnesses); *see also Kohl's Department Stores v. County of Ramsey*, C1-05-656, *et al.* at *6 (Minn. Tax Crt., Oct. 31, 2008) (the Tax Court rejected Petitioner's appraiser's percentage of retail sales analysis in favor of Respondent's market comparable analysis due to the subject property typically not being subject to percentage of sales leases).

In the case at bar, both expert witnesses determined that there were adequate leases in the subject property's market to estimate the market rent and the record shows that the business on the subject property does not typically enter into percentage of rent leases. The Tax Court reliance on the market analysis method to extract market rent is consistent with the above-cited cases and is reasonable supported by the record. The Tax

Court's determination of the market rent is neither clearly erroneous nor an error as matter of law. Therefore, the Tax Court's determination should be affirmed.

D. The Tax Court, as the trier of fact, has the discretion to rely on the comparable leases offered into the record to determine the market rent.

The Tax Court's decision to place greater weight on three of the four of Ms. Swanson's comparable leases is reasoned and is supported by the record.[19] Ms. Swanson's comparable leases and her analysis were logical, straightforward, and her adjustments were quantified and explained in detailed. Ms. Swanson looked to four comparable leases of Kohl's Department Stores, all located within the Twin Cities' metropolitan area. Ms. Swanson is very familiar with the market area based upon her experience with the Washington County Assessor's Office for the last 9 years and she was of the opinion that the rent in these leases reflected the market rate for this type of property, which was also confirmed by other assessors located in the counties of those comparable properties. T. 285-86; T. 518. The unadjusted rent range of these leases ranged from $6.81 to $8.93 per square foot. Exh. 101 at 87. Ms. Swanson performed a quantitative adjustment analysis of all the comparable leases and provided a detailed narrative of the adjustments she made and the reason for such adjustments, in accordance with the best practices as recommended by *The Appraisal of Real Estate. Id.* at 93-95; T. 330; *see also* Exh. 35, p.307 (The Appraisal Institute recommends appraisers quantify

[19] Relator confusingly argues that the Tax Court erred in relying on the Kohl's Shakopee lease (Ms. Swanson's fourth comp) when, in fact, the Court clearly held in its order that it only gave minimal weight to this comparable in its market rent determination. Rel. Brief, Add-11.

their adjustments in either dollar or percentage amounts when data is available). After making the appropriate adjustments, the comparable rents ranged from $6.96 to $7.24 per square foot. Exh. 101 at 93. Ms. Swanson arrived at a reconciled market value of $7.10 per square foot. *Id.* at 95.

When reviewing Ms. Swanson's comparables and adjustments, the Tax Court was able form its own conclusion and determination of the market rent. Mr. Amundson completely failed to even cite, much less explain, any of the adjustments that he made to his offered leases. Exh. 1 at 66. It is therefore reasonable for the Tax Court not to place significant weight on Mr. Amundson's comparable leases when most of those leases involved buildings 21 to almost 40 years older than the subject property and there was no indication whether he adjusted for this fact when determining his estimated market rent. *See* Rel. Brief, Add-11, Add-12.

Relator misrepresents the record and attempts to introduce exhibits not received into evidence[20] in attempting to argue that the Tax Court erred in relying on Ms. Swanson's lease comparables to determine market rent. Relator erroneously insists that the leases Ms. Swanson utilizes were not verified and that Ms. Swanson was somehow untruthful in her testimony when in reality, it is Relator who is misrepresenting the record and the facts.[21] First, Relator cites *The Appraisal of Real Estate*, *see* Exh. 5, for the

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[20] Relator cites Exhibit 33 in its brief and includes it in its Appendix. App. 92. This exhibit should be stricken. It was not admitted into evidence and is clearly outside the record of this appeal. T.208; T. 249.

[21] Relator also misrepresents the record when it states that Ms. Swanson was unable to produce a copy of the Woodbury Kohl's "rent roll." Rel. Brief at 31 & 32. The rent roll

proposition that Ms. Swanson was professionally obligated to personally contact the actual parties to the lease transactions of her comparable leases. Exhibit Five clearly does not support this assertion. In this excerpt, the Appraisal Institute is simply advising that the appraiser should verify "*sales* transaction[s]" when performing the sales comparison approach to value property. *Id.* at 305. There is no reference in this exhibit that the appraiser must personally contact the party's privy to the comparable property's lease for the purposes of performing the income analysis to value property.[22]

Notwithstanding Relator's misapplication of the *The Appraisal of Real Estate*, the record shows that Ms. Swanson personally inspected all the properties she used as her lease comparables, *see e.g.* T. 357-58, 396, 400, and verified that the terms of these leases were at market rate. T. 335. One of the leases she verified personally with the manager of that property and all of the others were verified by the properties' local county assessor's office. T. 389, 518. Ms. Swanson testified that it is standard customary practices for county assessors to verify leases and sales of properties within their respective counties. T. 518. There is no prohibition articulated by the Appraisal Institute

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was produced on the third day of trial at the request of Relator's counsel and admitted into evidence as Exhibit 105.

[22] It is completely disingenuous of the Relator to argue that Ms. Swanson's analysis was deficient due to allegedly not personally verifying the leases when their own expert testified that he did not personally verify the sales transaction he used in his sales comparison approach, which, according to Relator, would be in direct violation the Appraisal Institute's admonition. T. 68-69.

in the 13th Edition of *The Appraisal of Real Estate* or in USPAP that a third party cannot verify the transaction. *See* Exh. 5.[23]

The Relator further argues that Ms. Swanson's comparable leases should not be relied upon because they either are allegedly a so-called "built to suit" lease or a contract renewal lease. The Relator's argument losses sight of the ultimate issue, which is whether the rents in these comparable leases are reflective of market to reasonably support the Tax Court's market rent determination. The record reasonably supports that they do.

Contrary to the assertions of the Relator, a so-called "built to suit" lease is not *per se* rejected by the Tax Court as evidence of market rent.[24] Generally, built to suit leases may reflect a rental rate directly related to the building's construction costs and may be "rolled back" into the rent, thereby making them higher than market. *See* T. 79; T. 335, 382. However, the lease still may nonetheless be reflective of the market if there are no construction costs built back into the leases contracts. T. 270; T. 335. According to Ms. Swanson's analysis, neither the rents in the Oak Park Heights Kohl's lease nor the Shakopee lease had construction costs built back into them. T. 335-36; 404. Ms.

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[23] Because rental information can be difficult to obtain, the Appraisal Institute recommends that the appraisal make rental databases within the market. *The Appraisal of Real Estate*, p. 473.

[24] *See Federated Retail Holdings, Inc.*, 62-CV-08-5061, at * 31; *Bon Stores Realty Two LLC*, 62-CV-08-3921, at *24-55 (experts agreed in both cases that the "leases of brand new build to suit properties developed for the tenant . . . <u>may not</u> be indicative of market rent as they are intended a return on the construction cost") (emphasis added).

Swanson further testified that the rental amount was reflective of the market. T. 335.[25] In support of Ms. Swanson's testimony, the Tax Court observed that the Kohl's Oak Park Heights' lease completely segregated the landlord's contribution for construction costs from the parties' rental agreement and was not factored into the rental obligation. Rel. Brief, Add-11; *see* Exh. 30 at 10-11. Therefore, the record reasonable supports the Tax Court's decision to give weight to the Oak Park Heights lease in determining the market rent.[26]

With respect to the Relator's other arguments that the Burnsville and Woodbury Kohl's leases relied upon Ms. Swanson were a contract renewal or renegotiated leases, the Relator provides no authority that a renewed or renegotiated lease agreement cannot be reflective of market rent. The Relator's own expert testified against such an assertion. According to Mr. Amundson, a lease renewal can be a good comparable to use to determine market rent. T. 80. Ms. Swanson testified that she examined both of those leases and verified the Woodbury lease with that property's manager and the Burnsville lease with the Dakota County Assessor's Office that the rent in both of those lease were

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[25] It is also apparent that, on its face, the unadjusted rent of the Oak Park Height's lease is reflective of market due to it being was well within the range of Ms. Swanson's other comparable Kohl's leases, ranging from $6.81 to $8.93% per square foot. *See.* Exh. 101 at 93.

[26] Whether the Shakopee lease had construction costs built into the rent is a moot issue since the Court did not give any significant weight to this lease comparable. Rel. Brief, Add-11.

reflective of the market. T. 389; T. 323-26. The Tax Court's decision to give weight to these comparable leases is adequately supported by the record.[27]

The Tax Court acted well within its discretion as the trier of fact to weigh the conflicting evidence and consider the leases offered both expert witnesses when it determined that $6.25 per square foot represented the market rent for the subject property. The Tax Court's finding is reasonably supported by the record and should be affirmed.

[27] Relator additionally argues that the Woodbury lease was renegotiated to include an alleged 5,000 square feet expansion of the property that had yet to be constructed and that the actual rent should be equated to $7.88 per square foot, rather than $8.93. Even assuming this is accurate for argument's sake, a rent of $7.88 per square foot still nonetheless supports Ms. Swanson's reconciled market rent conclusion of $7.10 and clearly does not show that the Tax Court's market rent determination of $6.25 per square foot was unreasonably high.

CONCLUSION

For the above-stated reasons, the Respondent respectfully requests the Minnesota Supreme Court to affirm the Tax Court's decision.

Respectfully submitted,

PETE ORPUT, COUNTY ATTORNEY
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Dated this 14 day of November, 2012.

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

The undersigned certifies that Respondent's Brief submitted herein contains 8,302 words, exclusive of the pages containing the table of contents and table of authorities, and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word, the processing system used to prepare this Brief.

_____
James Zuleger