

NO. A05-0121

State of Minnesota  
**In Supreme Court**

McNeilus Truck & Manufacturing, Inc.,

*Relator,*

v.

County of Dodge,

*Respondent.*

**RELATOR'S BRIEF AND APPENDIX**

James H. Gilbert (#34708)  
Steven R. Hedges (#43119)  
JAMES H. GILBERT LAW GROUP PLLC  
10159 Wayzata Boulevard, Suite 250  
Minnetonka, Minnesota 55305  
(952) 960-4200

and

Robert Hill (#217165)  
ROBERT HILL & ASSOCIATES, LTD.  
Suite 825, IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402  
(612) 376-0999

*Attorneys for Relator McNeilus Truck &  
Manufacturing, Inc.*

Kenneth R. Moen (#156310)  
MOEN LAW FIRM  
400 South Broadway, #202  
Rochester, Minnesota 55904  
(507) 281-2437

*Attorneys for Respondent County of Dodge*

Myron L. Frans (#172558)  
Mark D. Savin (#178007)  
John F. Beukema (#8023)  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 766-7000

OF COUNSEL:

Jan S. Amundson,  
Senior Vice President and  
General Counsel  
Quentin Riegel, Vice President,  
Litigation and Deputy General Counsel  
National Association of Manufacturers  
1331 Pennsylvania Avenue N.W.  
Washington, D.C. 20004  
(202) 637-3000

*Attorneys for Amici Curiae*

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES .....	v
I.    WAS IT ERROR FOR THE TAX COURT TO REJECT THE USE BY APPRAISERS OF COMPARABLE SALES DATA FROM OTHER JURISDICTIONS, BASED ON AN UNPROMULGATED RULE OF EVIDENCE?.....	v
II.   WERE THE DETERMINATIONS OF VALUE BY THE TAX COURT IN THIS CASE CLEARLY ERRONEOUS?.....	v
STATEMENT OF THE CASE AND FACTS.....	1
A.    STATEMENT OF THE CASE.....	1
B.    STATEMENT OF FACTS .....	2
1.    General Background .....	2
2.    Primary Manufacturing Area .....	3
3.    Dodge County’s Industrial Manufacturing Market.....	4
4.    Relator’s Expert’s Opinion of Value .....	5
5.    Dodge County’s Expert’s Opinion of Value.....	6
6.    Highest and Best Use.....	9
7.    Dodge County’s Hypothetical Subdivision of the Subject Property .....	10
8.    Cost Approach to Value.....	11
9.    The Tax Court Opinion.....	13
ARGUMENT .....	16
I.    IT WAS ERROR FOR THE TAX COURT TO REJECT THE USE BY APPRAISERS OF COMPARABLE SALES DATA FROM OTHER JURISDICTIONS, BASED ON AN UNPROMULGATED RULE OF EVIDENCE.....	16
A.    Standard of Review.....	16

**TABLE OF CONTENTS (Cont'd)**

	<u>Page</u>
B. The Tax Court “Rule of Evidence”.....	18
C. The Unpromulgated Exclusionary Rule Undermines the Statutory Mandate to Determine the Fair Market Value of Property .....	20
D. Tax Court Decisions Do Not Have Precedential Value.....	22
E. The Unpromulgated Exclusionary Rule Violates the Principle of Substitution in Setting the Subject Property’s Value Based upon Sales of Dissimilar Properties that do not Compare with the Subject Property.....	23
F. The Arbitrary Exclusion of Out-of-State Comparable Sales is an Abuse of Discretion .....	28
II. THE DETERMINATIONS OF VALUE BY THE TAX COURT IN THIS CASE WERE CLEARLY ERRONEOUS.....	30
A. Errors Relating to Cost.....	30
B. The Exclusion of the Alliant Techsystems Property as a Comparable.....	32
C. Other Errors .....	34
CONCLUSION.....	37

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>American Express Financial Advisors, Inc. v. County of Carver</i> , 573 N.W. 2d 651 (Minn. 1998) .....	v, 21, 23, 28
<i>Appeal of Crow Wing County</i> , 552 N.W.2d 278, 280 n.2 (Minn. App. 1996) .....	23
<i>Desnick v. Mast</i> , 311 Minn. 356, 249 N.W.2d 878, 884 (1976).....	17
<i>DeZurik v. County of Stearns</i> , 518, N.W.2d 14 (Minn. 1994).....	v, 12, 19, 23
<i>Hanson v. County of Hennepin</i> , 527 N.W.2d 89, 92 (Minn. 1995) .....	16
<i>Harold Chevrolet, Inc. v. County of Hennepin</i> , 526 N.W.2d 54, 58 (Minn. 1995).....	16
<i>Hirman v. Rogers</i> , 257 N.W.2d 563 (Minn. 1977) .....	16
<i>In re Northerly Centre Corp. v. County of Ramsey</i> , 311 Minn. 335, 248 N.W.2d 923, 927 (1976).....	17
<i>In Re Trust Known As Great Northern Iron Ore Properties</i> , 342 N.W.2d 302, 305 (Minn. 1976).....	18
<i>Kroll v. Independent School District No. 593</i> , 304 N.W.2d 338 (Minn. 1981).....	17
<i>Limited Flying Club, Inc. v. Wood</i> , 632 F.2d 51, 54 (8 <sup>th</sup> Cir. 1980).....	17
<i>Miles v. City of Oakdale</i> , 323 N.W.2d 51, 54 (Minn. 1982).....	17
<i>Montgomery Ward &amp; Co., Inc. v. County of Hennepin</i> , 450 N.W.2d 299 (Minn. 1990).....	v, 3
<i>Nagaraja v. Commissioner of Revenue</i> , 352 N.W.2d 373 (Minn. 1984).....	16, 17
<i>Nash v. Wollan</i> , 656 N.W.2d 585, 590-91 (Minn. App. 2003).....	23
<i>Northwest Airlines, Inc. v. Commissioner of Revenue</i> , 265 N.W.2d 825 (Minn. 1978).....	17

**TABLE OF AUTHORITIES (Cont'd)**

<b><u>Cases (Cont'd)</u></b>	<b><u>Pages</u></b>
<i>Prince v. Torgersons of Austin, Mn, Inc.</i> , 1992 WL 231667 (Minn. App. 1992).....	23
<i>Red Owl Stores, Inc. v. Commissioner of Taxation</i> , 261 Minn. 1, 10, 117 N.W.2d 401, 407 (1962).....	28
<i>Terault v. Palmer</i> , 413 N.W.2d 283 (Minn. App. 1987) .....	22
<i>Westling v. County of Mille Lacs</i> , 512 N.W.2d 863, 866 (Minn. 1994) .....	16

**Statutes**

Minnesota Statute Section 271.10.....	2
Minnesota Statute Section 272.03, subd. 8 .....	21
Minnesota Statute Section 480A.08, subd. 3(c).....	22

**Other Authorities**

Black's Law Dictionary .....	22
Minnesota Rules of Evidence Section 702 .....	29
Minnesota Rules of Evidence Section 703 .....	29
Minnesota Statutes Section 271.06, subd. 7.....	23
<u>The Appraisal of Real Estate</u> , 26 (12 <sup>th</sup> Ed. 2001) .....	26, 27, 29
<u>The Appraisal of Real Estate</u> , 315 (12 <sup>th</sup> Ed. 2001) .....	v

## STATEMENT OF ISSUES

### I. WAS IT ERROR FOR THE TAX COURT TO REJECT THE USE BY APPRAISERS OF COMPARABLE SALES DATA FROM OTHER JURISDICTIONS, BASED ON AN UNPROMULGATED RULE OF EVIDENCE?

- A. The Tax Court ignored two sales of light manufacturing facilities in Minnesota, and rejected five sales of similar plants from other states, to hold that dissimilar types of industrial properties are “interchangeable” in the marketplace. The Tax Court did this, even though both experts agreed that the highest and best use of the Subject Property was “continued use as a manufacturing facility” and that the Subject Property could not be profitably converted to the alternative use the Tax Court relied upon to reach its conclusion.
- B. Apposite Cases: *American Express Financial Advisors, Inc. v. County of Carver*, 573 N.W. 2d 651 (Minn. 1998), *Montgomery Ward & Co., Inc. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990), *DeZurik Corporation v. County of Stearns*, 518 N.W.2d 14 (Minn. 1994).
- C. Apposite Secondary Authority: The Appraisal of Real Estate, 315 (12<sup>th</sup> Ed. 2001).

### II. WERE THE DETERMINATIONS OF VALUE BY THE TAX COURT IN THIS CASE CLEARLY ERRONEOUS?

- A. The Tax Court held that the County’s “alternative analysis of the Subject Property being sold off in smaller sizes adds support to [the County’s] opinion of value,” even though the undisputed evidence at trial was that no market for leased industrial property exists in Dodge County. The Tax Court also accepted a cost approach that deliberately inflated the replacement cost for the Subject Property by 200 to 300 percent over the Subject Property’s actual replacement cost.
- B. Apposite Cases: *American Express Financial Advisors, Inc. v. County of Carver*, 573 N.W. 2d 651 (Minn. 1998), *Montgomery Ward & Co., Inc. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990); *DeZurik Corporation v. County of Stearns*, 518 N.W.2d 14 (Minn. 1994).

## STATEMENT OF THE CASE AND FACTS

### A. STATEMENT OF THE CASE

Relator McNeilus Truck & Manufacturing, Inc., filed a real estate tax protest involving the assessment of its large manufacturing plant located in Dodge Center, Dodge County, Minnesota for the tax years January 2, 2001 and 2002. The Dodge County Assessor had set the estimated market value of the Subject Property at \$6,739,900 as of January 2, 2001, and \$6,743,900 as of January 2, 2002.

A trial in the Tax Court, Third Judicial District, Dodge County, Regular Division, before the Honorable Sheryl A. Ramstad was held in February 2004. Findings of Fact, Conclusions of Law and Order for Judgment were entered on August 6, 2004, and stayed by the Tax Court for 15 days. *McNeilus Truck & Mfg., Inc. v. County of Dodge*, 2004 WL 1843041 (Minn. T.C. Aug. 6, 2004) (hereinafter cited as "A.1-8"). The Tax Court held in favor of the Respondent, Dodge County, concluding that the valuation of the real estate for the years in question was \$8,800,000 as of January 2, 2001, and \$9,000,000 as of January 2, 2002, representing an increased valuation for each year of more than \$2,000,000 and approximately a 33% increase over the valuations proposed by the Dodge County Assessor.

Relator brought a Motion for Amended Findings of Fact and Conclusions of Law, which was heard on October 22, 2004. By Order dated January 3, 2005 the Tax Court denied the motion. The Judgment of the Tax Court was entered and docketed on January 4, 2005.

A Petition for Writ of Certiorari was filed on January 19, 2005 pursuant to Minn. Stat. § 271.10. The Writ issued and this appeal follows.

## **B. STATEMENT OF FACTS**

### **1. General Background**

The property at-issue is a very large light manufacturing facility located in Dodge Center, Minnesota (“Subject Property”), owned by McNeilus Truck & Manufacturing, Inc. (“McNeilus”), a wholly-owned subsidiary of Wisconsin-based Oshkosh Truck Corporation. The McNeilus Plant improvements are located on a 90 plus acre parcel located in the northeast portion of Dodge Center, approximately 70 miles southeast of the Twin Cities and approximately 25 miles east of Interstate 35 and 25 miles north of Interstate 90. The facility is used for light manufacturing and assembly for cement and refuse vehicles. McNeilus employs approximately 650 people in Dodge Center. The Dodge Center Plant Parcel is zoned I-2 Industrial. This zoning classification includes heavy and light manufacturing industrial uses. (A.1-2). The plant is also designated by the EPA and the Minnesota Pollution Control Agency (“MPCA”) as a high volume generator of hazardous wastes because of its significant use of paints, solvents and oils. Transcript at page 115, February 25, 2004 (hereinafter cited as “Tr. at \_\_\_\_, mo./dd/yr”).<sup>1</sup> See also Ex. 8, DeCaster Appraisal, pages 9-10, Supplemental Record at 27-28 (hereinafter “SR. \_\_\_\_”).

---

<sup>1</sup> The Transcript consists of five volumes but they do not have designations as such. Also, each volume has separate pagination. Accordingly, each citation will designate the date of the hearing after the page reference, as was done in the Tax Court Opinion.

The McNeilus Plant improvements total 645,734 square feet, consisting of 26 additions built in 21 stages over a period of years from 1972 through 1999. The overall structure of the Dodge Center Plant is average class S construction of steel frame with steel sheet siding. Large areas of the plant lack insulated walls or roofs and are not heated. The plant also has large industrial cranes that are integrated into the physical structure and that would be difficult, at best, to remove, as well as extensive in-line blast, prime and finish paint equipment and booths. The manufacturing area of the plant has no sprinkler system. Ex. 8, DeCaster Appraisal, pages 9-10, 24-30 (SR.27-28 and A.1-2). Additionally, the plant has several areas for assembling and painting trucks containing imbedded chain drive equipment, as well as pitted floors dug in the ground at depths of four feet, four feet in width, and running the length of the paint booths. Tr. at 109, 2/17/04. The average effective age of the McNeilus Plant improvements is 15-16 years. Ex. 8, DeCaster Appraisal, page 43.<sup>2</sup>

## **2. Primary Manufacturing Area**

The primary light manufacturing and truck assembly area of the Dodge Center Plant consists of a “saw-tooth” one story facility comprised primarily of two unsprinkled, unheated main manufacturing structures totaling 504,562 square feet. In addition, two separate structures stand in close proximity to the main plant. These buildings are utilized

---

<sup>2</sup> The Tax Court Opinion (at p. 1) states, without reference to the record, that the “weighted average” age is 12-13. County’s expert’s opinion contained the “estimate” that the average age was 13 years. Ex. 6, Jabs Appraisal, at A-3 and C-9. Because the outcome of this proceeding governs the market valuation of the Dodge Center Plant as of January 2, 2001 and January 2, 2002, the effective age of the plant increased by one year between the two valuation dates under consideration.

for product painting and total 96,995 square feet. The remaining manufacturing facility square footage totals 17,635 square feet and consists of a total of seven smaller, class S steel-sided support structures used for storage, research, and development. The remainder of the square footage for the facility totals 26,542 square feet, and is primarily devoted to office and storage facility use. Ex. 8, DeCaster Appraisal, page 24.

As noted, the primary manufacturing area is divided into approximately 26 separate rooms or areas, most of which are separated by retaining walls and concrete aprons because the buildings are at four different grades. Steel columns and beams, typically found in distribution facilities, are not present in the manufacturing assembly area of the plant. The ceiling heights in the plant vary, but are too low to become a distribution warehouse. There are no dock-height dock doors or dock-height floors in the facility. Tr. at 106-13, 2/17/04; Ex. 1.

### **3. Dodge County's Industrial Manufacturing Market**

As acknowledged by David Meek, the Dodge County Assessor, the McNeilus plant is the only manufacturing plant of its size and type in Dodge County, and one of only a handful of industrial properties in the county. Meek did not attempt to assess the Subject Property in either 2001 or 2002 by performing any type of direct sales comparison approach to value. There is no lease market for this type of facility in Dodge Center, such that the Dodge County Assessor was unable to perform an income approach to value for the Subject Property in either 2001 or 2002. Meek did not perform a cost approach to value in either 2001 or 2002. Rather, the assessments for the Subject Property resulted from "a mass appraisal process" that compared "square foot costs [of the McNeilus plant] with similar

types of buildings.” Tr. at 137-40 2/17/04. Significantly, however, it is undisputed that there are no “similar types of buildings” in Dodge County.

#### **4. Relator’s Expert’s Opinion of Value**

Relator’s primary expert was Steven M. DeCaster, MAI (“DeCaster”) of the Nicollet Partners appraisal firm. His opinion of value of the McNeilus plant is based on an appraisal dated November 7, 2003. DeCaster Appraisal, Ex. 8. Based on the comparison of the sales of seven light manufacturing properties, and using a cost approach, DeCaster concluded that the value of the McNeilus plant was \$2,600,000 as of both January 2, 2001 and January 2, 2002. Ex. 8, DeCaster Appraisal, page 24; *see also*, (SR.27-28); (A.26).

DeCaster’s comparable sales are as follows:

- a. The January 2003 sale of an 868,000 square-foot manufacturing assembly plant in Edgerton, Wisconsin;
- b. The August 1997 sale of a 702,463 square-foot light manufacturing plant located in Tilton, Illinois;
- c. The February 1997 sale of a 751,658 square-foot light manufacturing facility in Silvis, Illinois;
- d. The December 2001 sale of a 547,679 square-foot manufacturing facility in Chicago Heights, Illinois;
- e. The August 2001 sale of a 658,696 square-foot manufacturing facility in Clinton, Illinois;
- f. The August 20, 2002 sale of a 537,078 square-foot light manufacturing facility in Hopkins, Minnesota; and
- g. The September 1999 sale of a 284,520 square-foot light manufacturing facility in Glencoe, Minnesota (A.26).

The August 20, 2002 sale of the Hopkins light manufacturing facility – DeCaster’s comparable number 6 – was also included in the Appraisal of Dennis Jabs, Dodge County’s appraiser, in his list of “Other Sales of Industrial Property Considered for Analysis,” found at the end of Exhibit C of his Appraisal. Ex. 7, Exhibit C (“Jabs’ Appraisal”). However, it was not one of the comparable sales he used in arriving at his opinion of value. The Alliant Techsystems sale, which DeCaster included at \$5.20 per square foot before adjustment for building age and location, Tr. at 201-206, 2/17/04, was the only sale of a manufacturing facility in Minnesota over 500,000 square feet since January 1, 1997. See testimony of Robert Strachota, Tr. at 18, 20, 2/25/04.

Additionally, the September 1999 sale of the Glencoe light manufacturing facility previously has been relied upon by both Jabs and the County’s review appraiser, Alan Leirness, MAI, to evaluate the fair market value of other large industrial manufacturing properties in rural Minnesota. Tr. at 58-60, 2/24/04, and Tr. at 29-45, 2/27/04 (portion of transcript sealed). Yet, in this case, Jabs and Leirness both excluded those sales from their consideration of comparable sales, as did the Tax Court.

##### **5. Dodge County’s Expert’s Opinion of Value**

The County’s opinion of value of the McNeilus Plant is based on an appraisal dated November 14, 2003 by Dennis W. Jabs, MAI. The Jabs Appraisal, also employing the sale comparison and cost approaches, concluded that the value of the McNeilus Plant was \$9,100,000 as of January 2, 2001 and \$9,300,000 as of January 2, 2002. Ex. 7, Jabs Appraisal, at A-1 through A-3.

The sales comparisons used by Jabs involved ten dissimilar properties, nine from Minnesota and one from South Dakota. *See generally*, Ex. 7, Jabs Appraisal, at C-13 through C-21, especially the summary found at C-18 through C-20; *see also*, the materials contained in his Exhibit C. Four of the comparable sales were pure warehouse distribution centers (Nos. 1-4), five comparables were combination distribution warehouse facilities (Nos. 5-9) and one – 5% the size of the Subject Property - was a pure manufacturing facility (No. 10). Six of these comparables were located in Owatonna, Minnesota, the largest of which was 205,800 square feet (No. 5) and all within a few blocks of Interstate 35 (Nos. 5-10). One facility was located in Brookings, South Dakota, located on Interstate 29 (No. 2); comparable No. 3 was located in Albert Lea, directly on Interstate 35 near the intersection with Interstate 90; comparable No. 4 was located in Eagan, a suburb of the Twin Cities; and comparable No. 1 was in Northfield, Minnesota, located 7 miles from Interstate 35. All but comparable No. 7 were constructed with either pre-stressed tilt up concrete walls (Nos. 1, 2 and 5); or were constructed out of concrete blocks (Nos. 3, 4, 6, 9 and 10); or concrete block and tilt up panels (No. 8). Comparable No. 7 was the only metal clad building similar in construction to the Subject Property. *Id.*

Eight of the ten properties were under 500,000 square feet gross building area. Only four of the County's comparables were greater in size than 300,000 square feet (Nos. 1-4), No. 5 was 205,800 square feet, and five comparables from Owatonna were less than 72,261 square feet. See comparables No. 6 – 72,261 square feet; No. 7 - 67,720 square feet, No. 8 - 66,849 square feet, No. 9 - 33,640 square feet and No. 10 - 31,968

square feet. The average size of the ten comparables used by Jabs equaled approximately 241,000 square feet, or only 37% of the Subject Property.

In his testimony, Jabs rejected the comparable sale of the Alliant Techsystems manufacturing property in Hopkins. He testified that he did not use it because he came up with “different facts than DeCaster.” Tr. at 191, 2/24/04. Jabs was of the opinion that of that sale, 6.53 acres was considered “excess land” associated with the manufacturing property that was immediately resold by the new buyer for \$2,805,000. Tr. at 191, 2/24/04. Therefore, Jabs adjusted the \$4,195,000 purchase price for this 537,000 square foot factory facility by that amount (plus some other reductions) leaving an adjusted purchase price of only \$1,190,000, or 28% of the entire sale price. Tr. at 192, 2/24/04.

In rebuttal, William Beard, of the Beard Group, the buyer of the project, testified that the excess land actually sold for \$1,386,000. Tr. at 60, 2/25/04. Jabs’ figure of \$2,805,000 effectively doubled the price. As further validation of DeCaster’s valuation, Beard testified that the Alliant property was assessed for 2003 property tax valuation purposes at \$2,690,000, or \$5.00 a square foot. Tr. at 59, 2/25/04; *see also*, (A.27-28) (Wentzel Affidavit detailing the 2001 and 2002 assessed values of five large manufacturing facilities located in greater Minnesota with assessed values ranging from \$4.00 to \$5.50 a square foot).

Jabs' "other apprehension" about using the Alliant sale as a comparable was its location, since there was no "immediate access or close immediate access to interstate."<sup>3</sup> See Tr. at 193, 2/24/04. Ironically, the Subject Property is much further from any interstate transportation system than Alliant (the closest access being 25 miles). Thus, Jabs in his further analysis ends up using 10 comparables that were not only different in use and size, but nine were directly located on or adjacent to the freeway or had immediate access to the interstate freeway system.

#### **6. Highest and Best Use**

Both of the parties' experts testified that the highest and best use or the maximally productive use of this property was for continued use as a manufacturing facility. See Ex. 7, Jabs Appraisal, pages C-2 and C-3 (SR.1-10); DeCaster testimony Tr. at 182, 2/17/04. Alan Leirness, the County's review appraiser, had no opinion. Tr. at 7, 2/24/04.

Specifically, Jabs appraisal employs the following definition of "highest and best use", Ex. 7, Jabs Appraisal, at C-1, (SR.2-4, 6):

[T]hat reasonable and probable use which, at the time of the appraisal, is the most profitable use to which the property is adapted or capable of being used. It may also be defined as that legal use which will produce the highest present value to the property as a whole. The opinion of such use is based on the highest and most profitable continuous use to which the property is adapted and needed, or likely to be in demand for the reasonably near future.

Jabs defines "Most Profitable Use" as the "use, among the feasible uses, [which] is the most profitable use of the subject." *Id.* Jabs concluded the highest and best use of the

---

<sup>3</sup> Even cursory examination of a map demonstrates that the Alliant property is within a few miles of an interstate, and just blocks from U.S. Highway 169, which, at that location, has virtually all of the attributes of an interstate highway.

McNeilus Plant as follows: “The property is in about average physical condition for its age. Based on these factors, the continued use of the property as a manufacturing facility *represents the only financially feasible use*, and therefore represents the maximally productive use of the property as improved.” *Id.* at C-3 (SR.8). At trial, Jabs conceded that the highest and best use of the McNeilus Plant was “for continued use as a manufacturing facility.” Tr. at 158, 2/24/04.

Jabs’ Appraisal goes on to state:

It is our opinion that a heavy manufacturing use represents the most financially feasible use. Alternatively to a manufacturing use maybe (*sic*) warehousing; however we believe that a warehousing use would not take full advantage of the significant investment in improvements for manufacturing. . . . In summary, although warehousing may be an alternative use, the highest and best use is for manufacturing. Ex. 7, Jabs Appraisal, at C-2, (SR.7).

#### **7. Dodge County’s Hypothetical Subdivision of the Subject Property**

Despite the agreement about highest and best use, Jabs developed an abbreviated discounted cash flow model for a hypothetical subdivision of the property as an alternative to his sales comparison approach. *See* Ex. 7, Jabs Appraisal, at C-16 through C-26. This would involve dividing the Subject Property into separate parcels and leasing or selling the buildings separately, after necessary alterations, for use as commercial distribution facilities or warehouse/manufacturing.

Yet, at trial, Jabs conceded that, to his knowledge, no leases exist for industrial properties like the McNeilus plant, and that “in general the market for the subject, if you’re going to lease it, would be speculative on whether it would be leased out.” Tr. 113, 2/27/04.

In fact, Jabs testified candidly that, "I didn't do an income approach. Again, I don't think that's what a buyer would use to value the property. So I didn't really do an extensive analysis of what properties lease for in the area." Tr. at 114, 2/27/04. Nevertheless, the Tax Court relied on this hypothetical subdivision and conversion in determining that Jab's sales comparison approach to value "was corroborated by the alternative sales approach," but offered no reasoning to explain why this was true (A.1-8).

#### **8. Cost Approach to Value**

The parties' experts differed in their appraisals in performing their cost approach analyses. DeCaster examined the factors typically used by appraisers and concluded that the valuation using this approach was \$2,800,000. Ex. 8, DeCaster Appraisal, pages 42-45.

The approach used by Jabs is found at pages C-5 through C-12 of his Appraisal. Jabs' cost approach purports to be based on replacement cost new ("RCN"), but is unsupported in the record. Jabs' appraisal indicates that the *Marshall Valuation Service* is the source for his RCN data. Yet, precise descriptions for each building section are not presented for the "cost new numbers" presented at page C-8 of his report. *See also*, (SR.13-14); Tr. 126-200, 2/25/04. Instead, the reader of his report is left to guess as to where Jabs' numbers are coming from because the appraisal offers no "back-up" to support them. Perhaps more importantly, Jabs' hypothetical numbers grossly inflate the *actual* RCN data for the most recent additions to the facility, in order to arrive at a distorted and grossly inflated result. Actual cost figures were ignored by both Jabs and the Tax Court.

For example, Richard Jech, McNeilus' controller, testified that the actual cost figures for a 67,861 square foot manufacturing addition completed in 1999 were \$23.73/sq. ft., and

\$30.39/sq. ft. for a 30,000 square foot paint facility structure also completed in 1999 (\$911,803 cost for 30,000 square foot facility works out to \$30.39). Tr. at 135-41, 2/17/04. Yet, Jabs' hypothetical figures for these same structures are: (a) \$63.23/sq. ft. for the manufacturing addition; and (b) \$37.40/sq. ft. for the paint facility. Ex. 7, Jabs Appraisal, at C-9. To justify this discrepancy, Jabs claimed that although Jech had provided him with the actual cost information months before trial, "I didn't have sufficient information to do the analysis based on the actual cost." Tr. at 125, 2/27/04. The Tax Court nonetheless adopted the cost approach presented by Jabs and rejected that of DeCaster, without explanation or comment.

It seems that part of the basis for Jabs' conclusions about costs has to do with his description of the improvements of the Subject Property as a "heavy manufacturing facility." Ex. 8, Jabs Appraisal, at A-3, B-1, and B-10; *see also* Jabs' testimony, Tr. at 134 and 143, line 22, 2/24/04. In fact, it is undisputed that this facility was used for light manufacturing. The plant manufactures cement drums and refuse containers and has them painted and then installed on trucks that are already manufactured. Under principles set forth by Jabs himself, the importance of the cost approach for this older property is diminished because of its age and because manufacturing was determined to be its highest and best use. *See, DeZurik Corporation v. County of Stearns*, 518 N.W.2d 14 (Minn. 1994); *see also*, Ex. 7, Jabs Appraisal, at C-5; *see generally*, (SR.11-25) (Review Appraisal of McNeilus' Expert Review Appraiser, Gary Battuello, MAI).

## 9. The Tax Court Opinion

Disregarding the comprehensive review appraisal and uncontradicted trial testimony of Battuello, (SR.11-25), Tr. 126-200, 2/25/04, as well as Relator's unopposed Findings of Fact and Conclusions of Law, (A.59-83), the Tax Court found instead that the opinion of the County's appraisal expert was more persuasive and granted the "greatest weight to the sales comparison approach" used by Jabs. (A.7-8). Jabs also performed the cost analysis on a building-by-building basis and the Tax Court found that "we have given it some weight where 'the income approach is not available and the sales . . . are of questionable comparability.'" (A.7.)

Part of its holding was based on its rejection of the out-of-state comparable sales relied upon by DeCaster in his appraisal. (A.6-7)

The Tax Court further accepted Jabs' hypothetical notion, submitted under the guise of an "alternative analysis of the Subject Property being sold off in smaller sizes", by concluding that such an analysis "adds support to his opinion of value." (A.7). The use of the six smaller distribution warehouse comparables from Owatonna in Jabs' appraisal was justified according to the Tax Court because "the Dodge Center zoning authorities [were] receptive to the idea of dividing the Subject Property into smaller pieces for lease or resale . . . ." *Id.* This concept was approved by the Tax Court even though Jabs himself on cross-examination acknowledged that none of his comparables

involved parcels that had been re-platted.<sup>4</sup> DeCaster testified that such subdivision was not feasible. Tr. at 23-24, 2/18/04.

The Tax Court Opinion stated that Leirness, the County's Review Appraiser, testified as to various inquiries he had made regarding environmental issues regarding the DeCaster comparables. (A.5-6). In response to the testimony of Leirness, DeCaster testified that he had made special visits to the sites (during the trial) and made further investigation regarding the potential issues identified by Leirness. Tr. at 103 and 119, 2/25/04. As to each of the matters referenced in the Tax Court Opinion, DeCaster testified that he was satisfied there was nothing additional that would change his use of the comparable sales and that the "issues" raised by Leirness were not even considered by the comparables' buyers and sellers. *See generally* Tr. at 113-15, and at 120-21, 2/25/04.

DeCaster (and several fact witnesses) testified as to the reality of commercial sales transactions in the present times that the parties always obtain environmental reports and do the necessary investigations and, where necessary, either obtain indemnities, provide for any required remediation, and/or make adjustments in the sale prices. *Id.* As stated above, he specifically addressed the issues identified by Leirness in each case and testified that his opinions as to value or as to the appropriate use of the sales as comparables had not changed.<sup>5</sup>

---

<sup>4</sup> "[D]o any of these comparables represent a situation where a property this large is platted and sold in pieces? Yes or No? Answer: None of the comparables I had were re-platted" Tr. at 69, lines 6-14, 2/17/04.

<sup>5</sup> Interestingly, as to the issue of being identified as a "high-volume hazardous waste generator," DeCaster testified that the Subject Property was on the same list, a natural consequence of being in that kind of business. Tr. at 115, 2/25/04. This is one of the

The Tax Court Opinion also took issue with DeCaster comparable number 1, asserting that Exhibit 12 (a document prepared by the Wisconsin Department of Revenue, for which no foundational testimony was produced) made reference to roof, mechanical, insulation, and paving problems, and other points relating to age and access. (A.6-7). Again, DeCaster addressed these in his testimony. *See generally* Tr. at 118-30, 2/25/04. Suffice it to say that DeCaster spoke with the broker who handled the transaction and to a representative of the buyer. In short, the alleged concerns regarding the physical condition of the roof and other parts of the facility seem to have been overstated, both as to severity and as to cost to remedy.

For example, the buyer did not see a need to replace the roof, and estimated that, even if it did, the total cost would be dramatically under the figure mentioned in Exhibit 12. Tr. at 118-119, 2/18/04. Furthermore, DeCaster worked through the replacement cost analysis, concluding that the analysis in Exhibit 12 was very close to his own analysis. Tr. at 123-128, 2/18/04. Finally, he analyzed several components of the report and concluded that it was consistent with his own analysis in these respects and comparable to the Subject Property. Tr. at 128-131, 2/18/04. In short, Exhibit 12, introduced without foundational testimony, does not discredit or otherwise undermine DeCaster's use of comparable number 1 as the Tax Court suggests; rather, it actually supports DeCaster's analysis.<sup>6</sup>

---

reasons DeCaster limited his choice of comparables to sales of "high volume hazardous waste generators" like the Subject Property. Jabs, on the other hand, chose comparables that are *not* on the EPA's list, again demonstrating why they are not "comparable" to the Subject Property in any respect.

<sup>6</sup> This Court also should note that the author of Exhibit 12, James Samsal, a Wisconsin Department of Revenue employee, was found by the Wisconsin Tax Appeals

## ARGUMENT

### I. IT WAS ERROR FOR THE TAX COURT TO REJECT THE USE BY APPRAISERS OF COMPARABLE SALES DATA FROM OTHER JURISDICTIONS, BASED ON AN UNPROMULGATED RULE OF EVIDENCE.

#### A. Standard of Review

As to questions of law, this Court always has plenary power. *Nagaraja v. Commissioner of Revenue*, 352 N.W.2d 373, 376 (Minn. 1984). The question whether evidence is sufficient or insufficient to sustain a finding is a question of law. *See, e.g., Hirman v. Rogers*, 257 N.W.2d 563 (Minn. 1977). And, perhaps most importantly, this Court will not defer to the Tax Court's decision when the court has "*completely failed to explain its reasoning.*" *Harold Chevrolet, Inc. v. County of Hennepin*, 526 N.W.2d 54, 58 (Minn. 1995) (emphasis added).

The issue considered under this section is certainly a question of law, and no deference to the Tax Court holding is required.

Regarding factual determinations (which are at issue in the next section of this brief), a Tax Court decision may be set aside if it is clearly erroneous. *Westling v. County of Mille Lacs*, 512 N.W.2d 863, 866 (Minn. 1994). A Tax Court decision is considered to be clearly erroneous when the Court is left with a firm conviction that a mistake has been made, and that the Subject Property has been overvalued. *Hanson v. County of Hennepin*, 527 N.W.2d 89, 92 (Minn. 1995). The standard for review in any case depends in part on the nature of the alleged error. As to findings of fact, the standard

---

Commission to be a biased witness in a recent case with facts remarkably similar to this case. *See* (A.84-125).

generally is whether there was sufficient evidence to support the Tax Court's decision. *Nagaraja v. Commissioner of Revenue*, 352 N.W.2d 373 (Minn. 1984).

In determining the sufficiency of the evidence, this Court cannot stop and never has stopped with simply seeing whether some witness made a statement; the test of sufficiency requires the analysis to go further, to see whether it would be improper for the Tax Court to have relied on such testimony. Reliance on testimony to support findings may be erroneous for any of several reasons. The witness may have been so thoroughly impeached or incredible that the testimony even of multiple witnesses must be disregarded and cannot be deemed "sufficient" on appeal to support a finding. *See, e.g., Kroll v. Independent School District No. 593*, 304 N.W.2d 338 (Minn. 1981). Or the testimony or a finding based on it might be premised on an incorrect theory of the law. *Nagaraja, supra*.

This standard of review "is the same as for any other trial without a jury." *Northwest Airlines, Inc. v. Commissioner of Revenue*, 265 N.W.2d 825 (Minn. 1978). Thus, this Court properly insists upon *substantial* evidence, not merely some evidence or a scintilla of evidence. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 54 (8<sup>th</sup> Cir. 1980)(emphasis added); *accord, In re Northerly Centre Corp. v. County of Ramsey*, 311 Minn. 335, 248 N.W.2d 923, 927 (1976); *Miles v. City of Oakdale*, 323 N.W.2d 51, 54 (Minn. 1982); *Desnick v. Mast*, 311 Minn. 356, 249 N.W.2d 878, 884 (1976)("findings may be held clearly erroneous notwithstanding evidence to

support [them] if the reviewing court is left with the definite and firm conviction that a mistake has been made” after examining the whole evidence); *In Re Trust Known As Great Northern Iron Ore Properties*, 342 N.W.2d 302, 305 (Minn. 1976).

#### **B. The Tax Court “Rule of Evidence”**

The Subject Property is a large, specially designed and constructed industrial property owned by a single user in a small town in greater Minnesota remote from any interstate access. Appraisal experts for both parties testified as to the difficulty in finding comparable sales of larger industrial facilities near the Subject Property. (A.1-8). Accordingly, based on the lack of comparables in Minnesota, McNeilus’s appraisal expert selected five out-of-state sales of similar light manufacturing facilities among seven comparables to consider in evaluation. One was from Wisconsin, four from Illinois and two from Minnesota. The Tax Court rejected the use of out-of-state comparable sales of similar properties in its decision, which increased the tax valuation of the Subject Property by an amount that is approximately 33 percent higher than the amount that the Dodge County Assessor had previously determined to be the “market value”, and 300 percent higher than similar facilities state-wide. (A.27-28.)

The Tax Court followed this line of reasoning in *SPX Corp. v. County of Steele*, 2003 WL 21729580 (Minn. Tax), File No. C1-00-350 (Minn. T.C. July 23, 2003), and held “we will not accept comparables from outside Minnesota . . . .” *Id.* at 5. This “Tax Court precedent,” which was created by the Tax Court approximately six years ago, is now treated as black letter law invoked by the Tax Court Judges and has been given the force of a rule of evidence as if it was in the Minnesota Rules of Evidence. It has been

adhered to by at least two additional Tax Court Judges, plus the original author of this precedent in one other Tax Court case.

It first arose in *Huisken Meat v. County of Murray*, 1998 WL 15131 (Minn. Tax), File Nos. C2-97-27 and C8-95-271 (Minn. T.C. Jan. 14, 1998). The *Huisken* case involved a tax protest of valuation of a meat processing plant in Chandler, Minnesota, where the Tax Court summarily disregarded four comparable sales of meat processing plants in Iowa that were offered by the County. Without any citation to authority or to the Minnesota Rules of Evidence of the District Courts or precedent from the Minnesota Supreme Court, the Tax Court summarily held (*id.* at 2):

“We are reluctant to place any weight on sales in another state. We do not know the market or the effect of different tax rates to determine what adjustments, if any, should be made. Without this information, we are unable to say that the sales are comparable to the subject.”

This holding has now become “precedent” for the Tax Court judges even though the Tax Court is not an Article VI, Section I court of law under the Minnesota Constitution or a court of final jurisdiction. Judge Diane Kroupa, the original author of this precedent in *Huisken*, carried this precedent forward in a 1999 holding by stating, “We have consistently been reluctant to place any weight on sales in another state.” See *DeZurik v. County of Stearns*, 1999 WL 286300 at 3 (Minn. Tax), File No. C1-97-1235, *et al.* (Minn. T.C. May 5, 1999). The Tax Court has cited *Huisken*, but also referred to the Tax Court case of *Multifoods Specialty Distribution, Inc. v. County of Benton*, 1996 WL 685572 (Minn. Tax), File No. C7-96-307 (Minn. T.C. Nov. 25, 1996). In the *Multifoods* case, the Tax Court, the Honorable Dorothy A. McClung, held, “We are not

convinced that these [two comparisons from Iowa and North Dakota] are comparable because we were not given enough information about the business conditions in those areas.” *Id.* at 4. The concept of “business conditions in those areas” now has been transformed by another Tax Court Judge in *Huisken* into personal knowledge about the market or the effect of different tax rates to determine what adjustments, if any, should be made.

Similarly, Judge Sanberg used the “precedent” from *Huisken* in *Jennie-O Foods, Inc. v. County of Lyon*, 2001 WL 1007885 at 3 (Minn. Tax), File Nos. C0-99-265 and C0-00-287 (Minn. T.C. Aug. 21, 2001), and concluded in the *SPX Corporation* case, “We have often stated that we will not accept comparables from outside Minnesota” except under the circumstances described above, 2003 WL 21729580 at 5.

### **C. The Unpromulgated Exclusionary Rule Undermines the Statutory Mandate to Determine the Fair Market Value of Property**

The use of these inappropriate in-state “comparables”<sup>7</sup> skews the results for the actual market value of such properties in an unjust manner. That occurred in this case. The consequence – here and in all similar cases – is to misdirect the entire trial into a false market scenario. The Tax Court first excluded what buyers of similar properties would have paid in neighboring states. It then utilized dissimilar sales and costs in valuing the Subject Property. This resulted in a market value finding by the Tax Court grossly in excess of actual market value: “[T]he price which could be obtained at a private sale or an auction sale . . . . The price obtained at a forced sale shall not be

---

<sup>7</sup> That is, properties that are so different in use, size, location and construction that they do not compete for buyers. *See generally*, (SR at 11-25); Tr. 126-200, 2/25/04.

considered.” Minn. Stat. § 272.03, subd. 8. The evidence overwhelmingly indicates that the most probable price for the Subject Property is not determined by using sale or cost comparables of smaller, dissimilar Minnesota properties in larger population areas adjacent to interstate freeways, but by comparing what buyers of similar size, type and located properties pay for such comparable property on a regional or national basis.

Fair market value in Minnesota has been defined as what a willing buyer will pay to a willing seller for the Subject Property. *American Exp. Financial Advisors, Inc. v. County of Carver*, 573 N.W.2d 651, 659 (1998). Uncontradicted testimony in this case indicated that markets for properties such as the one involved in this case were not only weak and thin, but also that a very limited number of buyers would actually acquire such a property. The main reason for this is that there are only a few potential buyers who have a use for such property and the risk is high in relation to the return. Therefore very large properties like this are marketed on a regional or national basis to regional or national buyers.

The Tax Court “rule of evidence”, however, has created a rule of law that displaces and distorts the true market conditions by precluding consideration of an out-of-state sale of a comparable property that a willing regional or national buyer has purchased. After removing the willing buyer from the appraisal process, the Tax Court has then substituted smaller and different type buildings for use as comparables. In routine cases, where there are many comparable properties, the Tax Court exclusionary rule of evidence may have some utility and wisdom. But this is simply not so in regard to these larger properties. What the out-of-state willing buyer has paid for a similar size and

use property outside the borders of Minnesota must be reinstated into the valuation equation or model.

The Tax Court “rule of evidence” developed around these large, unique properties therefore must be re-examined and altered to conform to the Minnesota Rules of Evidence that reflect the true, probable market value considerations that extend beyond the borders of Minnesota.

#### **D. Tax Court Decisions Do Not Have Precedential Value**

By enforcing its unpromulgated exclusionary rule (here and in prior cases), the Tax Court has applied the principle of *stare decisis* to its own cases. *Stare decisis* is defined in Black’s Law Dictionary as “the doctrine of precedent, under which it is necessary for courts to follow earlier judicial decisions when the same points arise again in litigation.” Similarly, Black’s defines “precedent” as a “decided case that furnishes a basis for determining later cases involving similar facts or issues.”

It is clear that reported decisions of the Minnesota Supreme Court and the Minnesota Court of Appeals have precedential value in Minnesota. However, not all decisions of those courts have precedential value. For example, summary affirmances by the Minnesota Supreme Court do not. *Terault v. Palmer*, 413 N.W.2d 283 (Minn. App. 1987). Similarly, unpublished decisions of the Minnesota Court of Appeals are not precedential. Minn. Stat. § 480A.08, subd. 3(c), and numerous cases decided thereunder.

Perhaps most importantly, decisions of district courts in Minnesota have been held to have no precedential value. *Nash v. Wollan*, 656 N.W.2d 585, 590-91 (Minn. App.

2003); *Appeal of Crow Wing County*, 552 N.W.2d 278, 280 n.2 (Minn. App. 1996); and *Prince v. Torgersons of Austin, Mn, Inc.*, 1992 WL 231667 (Minn. App. 1992).

The rules of precedent and *stare decisis* have evolved over a great deal of time, and are well defined, at least in terms of what kinds of court decisions have precedential value. In Minnesota, the Minnesota Supreme Court and the Legislature have made pronouncements from time to time on these issues. The Tax Court decisions do not have precedential value for subsequent cases until the Minnesota Supreme Court affirms them, and they certainly do not establish a rule of evidence that the Tax Court would not otherwise have authority to promulgate.<sup>8</sup>

**E. The Unpromulgated Exclusionary Rule Violates the Principle of Substitution in Setting the Subject Property's Value Based upon Sales of Dissimilar Properties that do not Compare with the Subject Property**

A fundamental issue to be decided by this Court is whether an owner of a large manufacturing facility is (or is not) entitled to have its real estate assessment based upon sales of comparable properties. This Court has made clear that "comparable sales" are limited to those that are similar in "size and utility" to the Subject Property. *American Express Financial Advisors, Inc. v. County of Carver*, 573 N.W. 2d 651 (Minn. 1998); *Montgomery Ward & Co., Inc. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990); *DeZurik Corporation v. County of Stearns*, 518 N.W.2d 14 (Minn. 1994).

---

<sup>8</sup> Minn. Stat. §271.06, subd. 7, directs that Minnesota Rules of Evidence and Minnesota Rules of Civil Procedure "govern the procedures" in the Tax Court. It also authorizes the Tax Court to promulgate rules, obviously not contrary to the Rules of Evidence and Rules of Civil Procedure. The Tax Court certainly cannot do by "precedent" what it could not do by rule promulgation.

One of the first steps any appraiser takes in deciding which types of sales to include in a list of “comparables,” is to determine a property’s highest and best use. A highest and best use analysis is a way of looking at the evaluation of alternative uses. The highest and best use of a property is the reasonable and probable use that supports the highest present value. In this case, both of the parties’ experts testified that the highest and best use (or the maximally productive use) of this property was for continued use as a manufacturing facility. Ex. 7, Jabs Appraisal, pages C-2 and C-3; DeCaster testimony, Tr. at 182, 2/17/04. Perhaps more importantly, both experts agreed that the property could *not* be profitably converted to a commercial distribution facility, and that, in any event, *no* market currently exists for such a use in Dodge Center. See Statement of Facts.

Given the parties’ agreed highest and best use conclusion, DeCaster confined his sales comparison approach to sales of light manufacturing facilities of similar size, age, and utility to the McNeilus facility, which included (in addition to the out-of-state sales comparables), the August 2002 Alliant Techsystems property sale in Hopkins, Minnesota. As noted, this sale represents the only sale of a manufacturing facility in Minnesota of over 500,000 square feet in value since January 1, 1997 (testimony of Robert Strachota, Tr. at 18, 20, 2/25/04), but, while mentioned in passing, is not discussed in the Tax Court Opinion.

So, while Jabs agreed with DeCaster – both in his appraisal and during his trial testimony – that “the continued use of the property as a manufacturing facility *represents the only financially feasible use*, and therefore represents the maximally productive use

of the property as improved” (Ex. 7, Jabs Appraisal at C-3, emphasis added), he nonetheless switched to using “comparable” improved property sales of pure distribution warehouse facilities to justify his value conclusion. The Tax Court erred in the same manner.

The Statement of Facts points out the numerous ways in which the comparable sales used by Jabs differ dramatically from the Subject Property (size, use, proximity to interstate highways, type of construction, and cost of conversion). While it never explained why it switched to a different use, the Tax Court nevertheless adopted the use of the distribution facility comparables for valuing this light manufacturing facility and held that they were suitable comparables (yet somehow still “questionable” in the Tax Court’s mind) (A.7), to a manufacturing plant like the Subject Property. The Tax Court also reasoned “that although in the marketplace the properties may be interchangeable, the value adjustment is appropriate.” (A.7.) This reasoning was erroneous because, for all the reasons set forth above, these properties simply are not interchangeable in the marketplace. (SR.11-25); Tr. 126-200, 2/25/05. In fact, the undisputed testimony at trial demonstrated that the market for such distribution facility space in Dodge Center is nonexistent.

Furthermore, in formulating and implementing its unpromulgated rule of evidence, the Tax Court has created artificial barriers and additional foundation requirements that have no basis in fact or applicable evidentiary rules. This exclusionary rule was used by the Tax Court in this case as precedent, even though both appraisal experts determined that it was appropriate to use out-of-state sale comparables from neighboring states

pursuant to national and Minnesota appraisal standards. The Appraisal Institute's guidelines provide that "if a market exists for a limited-market property, the appraiser must search diligently for whatever evidence of market value is available". The Appraisal of Real Estate, 26 (12<sup>th</sup> ed. 2001).

All the experts who testified stated that large buildings such as this located in remote areas and designed for a limited use have a very limited number of potential buyers. Alan Leirness (the County's Review Appraiser) "fairly limited market" (Tr. at 222, line 9, 2/18/04); Robert Strachota (Appraiser, Shenhon Company – performed marketing work on the Alliant property) "very, very limited" market (Tr. at 28, lines 20-22, 2/25/04), and "these kinds of properties are not in very high demand" (Tr. at 29, lines 1-3, 2/25/04); William Beard (buyer of large industrial properties - Tr. at 32, lines 1-25, 2/25/04) "We would be much more concerned about the absorption into the marketplace of the space with an out-state facility than we would, you know, something that's located in Hopkins on the corner of Excelsior and 169" (Tr. at 54, lines 11-25 and at 55, lines 1-2, 2/25/04); Beard also testified that "we would definitely be more aggressive in offering a lower dollar value per square foot in out-state versus the metropolitan area" (Tr. at 55, lines 21-24, 2/25/04); David Stokes (Welch Companies broker) "problem marketing it" (Tr. at 76, line 25, 2/25/04), "very soft market" (Tr. at 88, lines 12, 2/25/04), and "market has really gone down . . . deeply discounted prices, extended marketing periods, extended holding costs" (Tr. at 88, line 12 through 89, line 3, 2/25/04). When such a property is marketed, the search for potential buyers is conducted on a regional and national basis.

Similarly, for appraisers it is not only necessary but also generally accepted practice to expand the search for recent sales of reasonably comparable properties beyond the borders of Minnesota. Ex. 8, DeCaster Appraisal, page 33, citing The Appraisal of Real Estate, 26 (12<sup>th</sup> ed. 2001).

Furthermore, none of these Tax Court decisions explain why knowledge of the market by the individual tax judge or different tax rates affect market value. There is no evidence in this record or the respective records in the other Tax Court cases supporting this broad prohibition on the use of evidence of market value comparables in neighboring states offered by fully qualified appraisal experts.

The proposition put forth by the Tax Court in support of this exclusionary rule that “we do not know the market” is suspect in itself. The appraisal experts are the ones who know the market and therefore selected sale comparables outside of Minnesota for these unique industrial properties. The Tax Court should not be bringing into valuation hearings some preconceived expertise, notion or “knowledge” of the market.

The Tax Court’s concern for the effect of different tax rates on out-of-state property adjustments on account of taxes also has no support in the record and contains no analysis of why that should be a consideration in any event. In fact, in this case none of the experts even considered “tax rates” having *any* impact on the market value of the Subject Property, even though the property is in a Tax Increment Financing District (TIF), where tax rates (and values) sometimes are severely skewed for reasons completely unrelated to normal market value considerations.

Moreover, Jabs testified in regard to his Brookings, South Dakota, comparable, that “South Dakota . . . had a more favorable tax environment, but that it wasn’t the motivating factor and didn’t affect what [the Buyer] offered for the property.” Tr. at 177-78, 2/24/04. Jabs only relied on input from an undisclosed second appraiser and his own familiarity with the “costs and values in the Brookings market” in reaching a value conclusion. Ex. 7, Jabs Appraisal, Exhibit C, Comparable No. 2 and footnote.

**F. The Arbitrary Exclusion of Out-of-State Comparable Sales is an Abuse of Discretion**

The Tax Court is “required on hearing de novo to apply and use its independent judgment in its evaluation of all the testimony determinative of the issues before it.” *Red Owl Stores, Inc. v. Commissioner of Taxation*, 261 Minn. 1, 10, 117 N.W.2d 401, 407 (1962). The decision of the Minnesota Supreme Court in *American Express Financial Advisors, Inc. v. County of Carver*, 573 N.W.2d 651 (Minn. 1998) is instructive on this point. There, in a case involving real estate taxes on a corporate conference center, the Tax Court had excluded data offered by the taxpayer involving national averages of income and expenses for conference centers and disapproved of the taxpayer’s appraisers relying on such data.

In reversing the decision, the Supreme Court stated:

We also disagree with the tax court's determination that the data concerning national averages of income and expenses for conference centers was insufficiently specific to make adjustments to Oak Ridge's income and expenses. In performing her income approach, Rubin utilized a detailed composite operating statement based on industry averages. She also testified at length as to her consideration of industry averages in adjusting Oak Ridge's income and expense ratios under the income capitalization approach. In addition, *the national average data* contained in Buchalski's

valuation report is broken down into income and expense categories which are almost identical to those used on Oak Ridge's spreadsheets. In light of this wealth of local and *national income data*, the tax court's determination that there was insufficient evidence to perform an income approach was clearly against the weight of the evidence. Moreover, considering that there was ample income data available and the fact that Oak Ridge is not a special purpose property, the tax court's decision to rely solely on the cost approach was an abuse of discretion. 573 N.W.2d at 659, footnote omitted, emphasis added.

Similarly here, Relator submits that the refusal of the Tax Court to accept comparable sales of light manufacturing facilities from outside of Minnesota, except under pre-ordained restrictive circumstances, is an abuse of discretion, and requires, in this case, a new trial. This exclusionary rule has worked to elevate the Tax Court as experts that pre-judge the market rather than fulfilling the traditional, fact finding role of an impartial tribunal.

The Minnesota Rules of Evidence have been ignored by the Tax Court in establishing this exclusionary rule for use of out-of-state sales of large industrial properties. Minn. R. Evid. 702 and 703, relating to testimony of experts, should control the Tax Court decision on the use of expert testimony. If out-of-state comparables from five large, similar "size and utility" industrial properties are of the "type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data," they may not only be used, but need not even be admissible in evidence. Minn. R. Evid. 703. In fact, national appraisal standards were used by the McNeilus expert in resorting to out-of-state comparables. See Ex. 8, DeCaster Appraisal, p. 33, citing The Appraisal of Real Estate, 26 (12<sup>th</sup> Ed. 2001).

The Tax Court has created its own “rule of evidence” that is contrary to the Minnesota Rules on Evidence and is not based on Minnesota Supreme Court precedent. It is also contrary to national, regional and state appraisal uniform standards developed by The Appraisal Institute. Importantly, this rule must now be followed out of necessity by appraisers in performing the fair market valuations on every large industrial manufacturing property.

The Tax Court effectively has forced appraisers to systematically exclude comparable sales of properties outside of Minnesota for these unique, large industrial properties, even though there are few, if any, similar sales in Minnesota and even though in the experts’ opinion(s) the out-of-state comparables should be used. This exclusionary rule thus forces appraisers to abandon their own professional appraisal standards and resort to using alternative Minnesota sales that are dissimilar to the type of property under consideration. This substitution of inappropriate properties further distorts the market analysis when the Tax Court accepts widely divergent sales in Minnesota for valuation purposes, which is what occurred in this case.

## **II. THE DETERMINATIONS OF VALUE BY THE TAX COURT IN THIS CASE WERE CLEARLY ERRONEOUS**

### **A. Errors Relating to Cost**

The Tax Court based its decision at least in part on the replacement cost and the cost of changing use of the Subject Property as presented by Jabs. (A.7.) The cost approach used by Jabs erroneously described the improvements of the Subject Property as a “heavy manufacturing facility.” Ex. 8, Jabs Appraisal, pages A-3, B-1, and B-10;

*see also* Jabs' testimony, Tr. at 134 and 143, 2/24/04. In fact, it is undisputed that this facility is constructed of light manufacturing type materials. The plant manufactures only cement drums and refuse containers, has them painted and then installed on trucks that are already manufactured. The buildings simply house McNeilus' manufacturing equipment, which is why they are, for the most part, unheated and unsprinkled.

Under principles set forth by Jabs himself, the importance of the cost approach for this older property is diminished because of its age and because manufacturing was determined to be its highest and best use. Ex. 7, Jabs Appraisal, page C-5. In fact, Jabs based his cost comparisons on higher quality heavy manufacturing facility construction and never bothered to reconcile this with his views of the light manufacturing nature of the Subject Property.

Furthermore, the eight cost comparisons used by Jabs were all built of higher quality construction than the Subject Property. The Subject Property is a Class S building constructed of steel, and Jabs' comparables were generally built of far more expensive concrete block or pre-stressed tilt-ups. See Ex. 7, Jabs Appraisal, page C-11. This resulted in a replacement cost per square foot value of approximately \$56 per square foot. See Ex. 7, Jabs Appraisal, page C-8. This square foot amount represents a cost equal to more than twice the actual square foot cost that the Relator testified it cost to build the most recently added manufacturing addition. Tr. at 135-40, 2/17/04.

The actual cost to convert the Subject Property to the distribution facility type comparables used by the Tax Court was totally ignored by the Tax Court. The Subject Property has heavy cranes, tracks in the floor, welding equipment, painting booths with

pits built into the floor, large, expensive in-line painting equipment,<sup>9</sup> low ceiling heights in a number of the buildings, no dock-height dock doors or floors, doors in place that could not be used as loading docks because of inappropriate heights, and slab-on-grade construction that would have to be altered dramatically to install dock-height doors. *See* Ex. 1. Furthermore, it was estimated that 65 new dock doors would be needed to convert the Subject Property to warehouse use, and the Subject Property still would lack the requisite warehouse design parameters even then. Ex. 2; *see also* testimony of James E. Diehl, Tr. at 106, 109, 112, and 116-17, 2/17/04; and testimony of DeCaster, Tr. at 183, 2/17/04.

Importantly, Jabs' cost approach to arrive at a valuation of \$9,200,000, Ex. 7, Jabs Appraisal, page C-12, makes no mention of conversion costs even though the Tax Court in effect converted the property to a distribution warehouse in its final analysis of value. If the property were in fact to be converted, the conversion costs would more than likely exceed its value and the property still would be located in a market with no demand for commercial distribution warehouse space of this (or any) size. This clearly is erroneous.

**B. The Exclusion of the Alliant Techsystems Property as a Comparable**

The Findings of Fact and Conclusions of Law of the Tax Court are clearly erroneous and are not supported by the evidence. The bias in this process was evident not only by the Tax Court's use of an improper evidentiary standard with improper

---

<sup>9</sup> Regarding conversion expense, Beard described such equipment succinctly: "Expensive, expensive things, but really just junk to throw in the dumpster and problems to [cure]." Tr. at 42, l. 16-18, 2/25/04. In other words, they do not add value, but would add to the cost of conversion.

foundation requirements, but also by excluding the Alliant Techsystems comparable. The Tax Court made no use of DeCaster's comparable no. 6, which was the only one of the Minnesota comparables submitted in this case that truly was comparable in terms of size and manufacturing use. As is set forth in detail in the factual analysis, the August 20, 2002 sale of the Hopkins light manufacturing facility was the only sale of a manufacturing facility in Minnesota of over 500,000 square feet in value since January 1, 1997.

The record is clear that Jabs erroneously based his exclusion on the inaccurate assumption that the sale price of "excess land" in the Alliant Techsystems transaction was more than double its actual sales price, which was verified by William Beard, the buyer of the property. Unfortunately, the uncontradicted testimony of Beard that the excess land was sold for \$1,386,000 - less than half of the figure used by Jabs - was not mentioned in the Tax Court's opinion. Neither is his testimony regarding the 2003 assessed valuation of that property or the assessed values of other large manufacturing facilities in Minnesota (A.27-28).

Similarly, it was shown that Jabs' "other apprehension" about using the Alliant sale as a comparable, the (erroneously) perceived lack of access to interstate highways, was groundless, especially considering how remote the Subject Property is from the interstate system. Yet the Hopkins comparable is never discussed by the Tax Court in reaching its value conclusions. This, too, is in error.

### **C. Other Errors**

The Tax Court was also inconsistent and unjustified in its analysis of the evidence, as the following examples demonstrate:

- The Tax Court criticized and critiqued DeCaster's use of out-of-state comparables, yet then apparently accepted Jabs' use of the Brookings, South Dakota, out-of-state comparable without so much as a comment.
- The Tax Court criticized DeCaster's alleged use of Chicago, Milwaukee and Quad City area comparables because of differences in market from "a mere rural or smaller community", but then accepted Jabs' comparables from much larger communities than Dodge Center and made no distinction in their use. The cities Jabs used for comparables were Egan, Brookings, South Dakota, Owatonna, Albert Lea, and Northfield.
- The Tax Court utilized all of Jabs' cost comparables even though comparable no. 7 (10% the size of the Subject Property) was the only one constructed of similar materials and quality of construction (metal clad – Class S). All of the other properties selected by Jabs were more expensive in terms of construction and consisted of either block, tilt up or pre-stressed walls, and many of them were insulated, heated and air-conditioned, unlike the Subject Property.
- The Tax Court erroneously used one sale comparison put forth by the County that was immediately converted from a warehouse to a high volume retail establishment in Owatonna. This was comparable no. 5, which was converted to a Mills Fleet Farm and had a sale price of \$29.21 per square foot. This property was

not only located directly on Interstate 35, but was rezoned for business purposes and had a much higher replacement cost on a square foot basis. The replacement cost was \$16,305,226 or \$81.12 per square foot before adjustments for physical, functional and economic obsolescence: four times the actual RCN for the Subject Property's latest manufacturing additions.

- The Tax Court improperly gave validity to the alleged difference in the effect that labor unions had on the values between the Chicago area properties and the Subject Property in Dodge Center. (A.6-7.) However, the only evidence in the record as to unions and why Jabs and the review appraiser discounted the Chicago comparables was based on Jabs' testimony: "And a big part of it was because of the unions. The unions will destroy the value of a manufacturing plant . . . [a]nd that was just a huge, huge issue. That was the primary issue I was given." Tr. at 166, 2/24/04. There is simply no support for this view.
- The Tax Court improperly compared the Subject Property's "average age" to the original date of construction for DeCaster's comparables, thus distorting the validity of his adjustments for differences in the age/condition of the respective properties.
- The Tax Court improperly compared "market and vacancy conditions" between "Chicago's south side" and Dodge Center, even though all but one of DeCaster's comparables are at least 100 to 150 miles away from Chicago and, perhaps more importantly, even though each is located in rural areas where, like Dodge Center, there is "no unoccupied manufacturing space".

- The Tax Court criticized “Mr. DeCaster’s attempt to categorically dismiss [alleged] environmental issues”, but never mentioned the fact that the Subject Property has the same environmental issues and is on the same EPA watch list as are DeCaster’s comparables.

In short, there are numerous examples of factual errors, as set forth in this section, and as discussed in the Statement of Facts. Individually and in the aggregate they necessitate a new trial.

## CONCLUSION

The treatment by the Tax Court of the issues in this case compels reversal of its decision and the granting of a new trial. Its use of its unpromulgated rule of evidence denying consideration of out-of-state comparable sales data is contrary to the law and is fundamentally unfair. Its resultant use of sales data from sales of fundamentally dissimilar properties creates unreal and artificially inflated valuations. Its refusal to consider the impact of costs of conversion to the uses that it arbitrarily imposes on taxpayers is fundamentally unfair.

Relator submits that the ratification of the Tax Court's unpromulgated rule of evidence by this Court would have a distinctly negative impact on taxpayers. First, the perception and recognition of institutional unfairness in the tax valuation system undermines respect for the law and for governing authorities. Second, a system that systematically and artificially overvalues and overtaxes large industrial manufacturing property tax owners has the potential to further impact what is widely perceived as a repressive tax environment.

That would be a clear loss for all.

For the reasons stated in this Brief, and based on the arguments contained herein, and on the entire record in the matter, Relator respectfully requests that the Judgment of the Tax Court be reversed and a new trial ordered.

Respectfully submitted,

Dated: March 4, 2005.



James H. Gilbert (#34708)  
Steven R. Hedges (#43199)  
JAMES H. GILBERT LAW GROUP, P.L.L.C.,  
10159 Wayzata Boulevard, Suite 250  
Minnetonka, Minnesota 55305  
(952) 960-4201

Robert A. Hill (#217165)  
ROBERT HILL & ASSOCIATES, Ltd.  
80 S. 8<sup>th</sup> St., Suite 825  
Minneapolis, Minnesota 55402  
(612) 376-0999

Attorneys for Relator

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).