

No. A11-399

**STATE OF MINNESOTA
IN SUPREME COURT**

Berry & Co., Inc.,

Relator,

v.

County of Hennepin,

Respondent.

RESPONDENT'S BRIEF

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

MICHAEL O. FREEMAN
Hennepin County Attorney
By: Michael Bernard (#253054)
Assistant County Attorney
A-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487
Telephone: (612) 348-5586

ATTORNEYS FOR RELATOR

ATTORNEYS FOR RESPONDENT

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ISSUES RAISED

- (1) **Did the Tax Court err in finding that the City of Wayzata allowed a Planned Unit Development that allowed deviation from the standard C-4A zoning?**

RESULT BELOW: The Tax Court correctly determined Respondent's expert was credible and accorded significant weight to Respondent's expert's facts supporting consideration and reliance on a Planned Unit Development for the subject property.

Most Apposite Authority: Southern Minnesota Beet Sugar Coop v. County of Renville ("SMBSC"), 737 N.W.2d 545, 551 (Minn. 2007); Wybierala v. Commissioner of Revenue, 587 N.W.2d 832, 837 (Minn. 1998); Hedberg & Sons Co. v. Hennepin County, 232 N.W.2d 743, 91-92 (Minn. 1975).

- (2) **Did the Tax Court err by reaching a decision on the market value of the subject property that was based upon facts presented by the experts and using the Court's own expertise and judgment?**

RESULT BELOW: The Tax Court correctly determined Respondent's expert was credible and accorded significant weight to Respondent's expert's sales comparison approaches to value and minimal weight to the Relator's expert's approach to value.

Most Apposite Authority: Southern Minnesota Beet Sugar Coop v. County of Renville ("SMBSC"), 737 N.W.2d 545, 551 (Minn. 2007); Wybierala v. Commissioner of Revenue, 587 N.W.2d 832, 837 (Minn. 1998); Hedberg & Sons Co. v. Hennepin County, 232 N.W.2d 743, 91-92 (Minn. 1975).

STATEMENT OF THE CASE

This case involves two Chapter 278 petitions filed by Berry & Co., Inc., challenging the assessor's Estimated Market Value ("EMV") for the subject property located at 253 Lake Street East, Wayzata, Minnesota, for the assessment dates of January 2, 2007 and January 2, 2008. The subject property is located in Wayzata's

Lake Street Market Area and is owned by Relator and improved with three structures – a one-story office/garage building with no basement and two pole buildings.

The trial was held on September 27 and 28, 2010 before the Honorable Sheryl A. Ramstad, Judge of the Minnesota Tax Court. Relator's evidence consisted of the appraisal report and testimony of James Kramer, MAI, and the lay testimony of Bradley Hoyt, the property owner. Respondent's evidence consisted of the appraisal report and testimony of Christopher Bennett, a Senior Accredited Minnesota Assessor with the Hennepin County Assessor's Office.

The Tax Court issued its decision on December 28, 2010. Relator appealed the Tax Court decision by Petition for Writ of Certiorari on February 28, 2011.

STATEMENT OF FACTS

1. The Subject Property

The subject property is located at 253 Lake Street East, Wayzata, Minnesota. See Relator's Appendix APP ("APP") at p. 0236. The site area includes a total of 53,227 square feet, including 44,107 usable square feet. *Id* and *See* Tax Court Order at p. 4. The subject property is improved with three structures -- a one-story office/garage building with no basement, and two pole buildings. See APP at pp. 0256-0258. The office area measures approximately 4,358 square feet, with carpeted flooring, painted gypsum walls, solid 7-foot doors, fluorescent lighting and a suspended ceiling. *Id.* at p. 0257-0258. The parking lot is bituminous with 40 exterior parking stalls and 20 interior parking stalls. *Id.* at pp. 0255 and 0258.

The subject property is located in the Lake Street Market Area (“LSMA”) in the City of Wayzata. *See* APP at p. 0251. The City of Wayzata is the financial center of the Lake Minnetonka area. *Id.* at p. 0250. Major banks, financial business and real estate companies desire a presence in the Wayzata. *Id.* Demand for commercial property in the City of Wayzata has been strong. *Id.* The limited number of properties in the LSMA drives sale prices higher than sales of properties outside of the LSMA. *Id.* at p. 2051. The subject property has frontage on Lake Street and is across the street from Lake Minnetonka’s Wayzata Bay. *Id.*

2. The Tax Court Decision

Both experts considered the cost and income approaches to value without relying on either approach in their valuation analysis. *See* APP at p. 0046, 0263, 0275. Both experts relied solely upon the sales comparison approach to value by selecting sales of similar real property, then adjusting each sale price to reflect the circumstances at the subject property. *See* APP at p. 0040, 0043, 0266 and 0282.

The Tax Court found Respondent’s expert, Mr. Christopher Bennett, to be a credible witness who responded with appropriate answers, and the Tax Court accepted his testimony as persuasive and internally consistent with the other evidence produced at trial. *See* Tax Court Order at p. 15. By contrast, the Tax Court found Relator’s expert, Mr. James Kramer, to be inconsistent and less reliable. *See* Tax Court Order at p. 10 (indicating that the inconsistency in Mr. Kramer’s size calculation “resulted in unwarranted reduction in the values of his comparables” and “[i]n view of this, we find Mr. Kramer’s adjustments for size, shape and terrain to be inconsistent and less reliable

than those made by Mr. Bennett.”), p. 12 (indicating that Mr. Kramer’s soil correction estimates “are unreliable and unsupported in the record”), and p. 13 (finding “Mr. Kramer’s time adjustments to be largely subjective and inconsistent while Mr. Bennett’s were based upon empirical market data.”).

The EMVs and each expert’s final conclusions of value are summarized as follows:

Assessment Date	January 2, 2007	January 2, 2008
AEMV ¹	\$2,540,000	\$2,650,000
Relator’s Expert ²	\$1,620,000	\$1,550,000
Respondent’s Expert ³	\$3,881,000	\$4,153,000

Based upon the analysis and testimony of Mr. Bennett, the Tax Court found Respondent’s expert’s value conclusions for the subject property correctly reflected the fee simple market value at \$3,881,000 for January 2, 2007 and \$4,153,000 for January 2, 2008. Tax Court Order at p. 15.

ARGUMENT

I. Standard of Review.

This Court reviews a final order of the Tax Court to determine whether the Tax Court lacked jurisdiction, whether the order is supported by the evidence and is in conformity with the law, and whether the Tax Court committed any other error of law.

¹ APP at p. 0008, 0230, 0284.

² APP at p. 0009.

³ APP at p. 0230, 0284.

See Southern Minnesota Beet Sugar Coop v. County of Renville (“SMBSC”), 737 N.W.2d 545, 551 (Minn. 2007), *citing* Hutchinson Tech., Inc. v. Comm’r of Revenue, 698 N.W.2d 1, 6 (Minn. 2005); Jefferson v. Comm’r of Revenue, 631 N.W.2d 391, 394 (Minn. 2001). Legal determinations are subject to de novo review while factual findings are subject to a “clearly erroneous” standard. See SMBSC, 737 N.W.2d at 551, *citing* Hutchinson Tech., 698 N.W.2d at 6; 200 Levee Drive Ass’n v. County of Scott, 532 N.W.2d 574, 576 (Minn. 1995). In Equitable Life Assurance Society of the United States v. County of Ramsey, 530 N.W.2d 544, 552 (Minn. 1995), this Court set forth the clearly erroneous standard as: when the Tax Court’s decision is “**not reasonably supported by the evidence as a whole.**” (Emphasis added.)

In State v. Evans, 756 N.W.2d 854 (Minn. 2008) *citing* Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999), this Court held that “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 finding of fact, a reviewing court should not disturb those findings” and that “if we find ‘reasonable evidence to support the [district] court’s findings of fact,’ we will not disturb those findings.” Additionally, this Court has held that it defers to the decision of the Tax Court, due to the “inexact nature of property assessment,” unless the Tax Court either clearly overvalued or undervalued the subject property, or completely failed to explain its reasoning. Equitable Life, 530 N.W.2d at 552, *citing* Harold Chevrolet v. County of Hennepin, 526 N.W.2d 54, 58 (Minn. 1995).

II. The Tax Court did not err in finding that the City of Wayzata allowed a Planned Unit Development that allowed deviation from the standard C-4A zoning.

Relator first claims that the Tax Court erred in its finding that the subject property had been approved for a Planned Unit Development (“PUD”). *See* Relator’s Brief at p. 11. Relator correctly claims that deviation from the C-4A zoning requires permission from the City. *Id* at p. 10. Relator then, incorrectly (*see* discussion *infra*), claims that said permission from the City of Wayzata has never been obtained. *Id.* Finally, Relator reverses direction to argue that the PUD had been approved – however said approval included an adjacent property and conditions imposed by the City of Wayzata. *Id* at p. 11.

The trial record includes the following evidence related to the PUD: (i) City of Wayzata Resolution No. 2894, adopted by the Wayzata City Council on September 20, 2005, which approves the PUD that deviates from C-4A zoning to allow development of a three-story building (*see* APP 0290 (Trial Exhibit 104)); (ii) Ordinance No. 663, signed by Mayor Andrew Humphrey on September 20, 2005 which amends the Wayzata City zoning ordinance to re-zone the subject property from C-4A to a Planned Unit Development District (*see* APP 0285 (Trial Exhibit 103)); (iii) 253 & 259 Lake Street PUD General Development Plan which set forth the specifics of Relator’s development plans (Trial Exhibit 10 and 105); (iv) testimony by the owner of the subject property, Mr. Hoyt, acknowledging the existence of the PUD (“It’s a Planned Unit Development, and it allows you to basically ignore all of the setbacks and other restrictions by using that device.... [T]he PUD in this case was necessitated by the

parking ramp, which would be shared and straddling both of the properties.”) (T. at p. 48); (v) testimony by Relator’s expert that the PUD had been issued for the subject property (T. at pp. 125-126); (vi) testimony by Respondent’s expert that “It [the PUD] allows the Petitioner to vary from the C-4A zoning and increase the – he was able to increase the height of the building to 38 feet *** do the retail, office and then residential on the third floor ***” (T. at p. 205) and that “***most properties on Lake Street are developed with PUDs.... This zoning, this C-4A encouraged PUD construction, it’s right in the zoning code.” (T. at p. 207); and (vii) extensive cross-examination of Respondent’s expert regarding the PUD (T. at p. 310-322). As Relator contends, the PUD does include conditions on development – in fact, that argument simply describes the de facto nature of Planned Unit Developments, which is to allow deviation from standard zoning within certain limits. Tax Court Order at p. 5. Even if the conditions attached to the PUD do not precisely reflect the developer’s vision, that difference is not critical to the valuation of property. Instead, the existence of the PUD as allowing deviation from the C-4A zoning is critical to the opinion of value.

As of the January 2, 2007 assessment date, the PUD had been approved, thus Relator’s reliance on Hedberg is misplaced. The Court’s ruling in Hedberg applies to the situation where an appraiser, in formulating an opinion of value, relies upon zoning restrictions that do **not** exist at the time in question. See Hedberg & Sons Co. v. Hennepin County, 232 N.W.2d 743, 91-92 (Minn. 1975) (citing State by Lord v. Pahl, 95 N.W.2d 85 (Minn. 1959)). In such a circumstance, the appraiser could instead rely on alternative zoning upon showing a reasonable probability that the ordinance would

change to match his alternative. *Id.* Here, however, as indicated by the record, the PUD was in existence as of the January 2, 2007 assessment date. *See* Exhs. 103 and 104, T. at p. 320 and Tax Court Order at p. 5.

The PUD expired in late 2007, prior to the second assessment date of January 2, 2008. *See* T. at p. 320. However, Relator's expert testified that Relator had once requested an extension of the PUD and, in response, the City of Wayzata had so extended the PUD for one year (*see* T. at p. 320), that the City of Wayzata encouraged PUD development (*see* T. at p. 207), that most recent development in Wayzata was conducted via Planned Unit Developments (*Id.*), that the City of Wayzata had historically approved PUDs over-and-over again (*see* T. at p. 335) and that, based on Respondent's expert's experience as the commercial appraiser for the City of Wayzata, that "I have no doubt that if he [Relator] went in and asked for a three-story approval that they would give it to him." *See* T. at p. 334. As a result, the evidence supported the conclusion of Respondent's expert that there was a reasonable probability that a PUD allowing development in deviation from C-4A zoning could have been in effect for the January 2, 2008 assessment date and the Tax Court did not err in adopting that conclusion.

Given the undisputed evidence about the existence of the PUD, the Tax Court did not err in concluding that the City of Wayzata allowed a Planned Unit Development deviation from the C-4A zoning on the assessment dates. *See* Tax Court Order at p. 5. The Tax Court correctly found the record and evidence supported Respondent's expert's reliance on the PUD in his opinion of value.

III. The Tax Court correctly reached a decision of market value based upon facts presented by the experts and using the Court's own expertise and judgment.

A. The evidence supported the Tax Court's finding that the highest and best use of the subject property is for redevelopment.

Relator claims that the Tax Court committed error by adopting the highest and best use identified by Respondent's expert, which it contends was unsupported by the record. That claim is without merit. The Minnesota Supreme Court has consistently held that "[t]he 'tax court is in the best position to assess the credibility and sincerity of witnesses.'" Wybierala v. Commissioner of Revenue, 587 N.W.2d 832, 837 (Minn. 1998), *citing* F-D Oil Co. v. Commissioner of Revenue 560 N.W.2d 701, 706 (Minn. 1997), *citing* Manthey v. Commissioner of Revenue, 468 N.W.2d 548, 550 (Minn. 1991).

Respondent's expert determined that the highest and best use of the subject property is for re-development with the existing structures completely razed. *See* Ex. 101 at p. 34 (RA APP at p. 0261) and T. at p. 206 and 257. In fact, Relator's expert reached the very same conclusion - Relator's expert wrote that "[t]he highest and best use of the subject land as if vacant, is estimated to be commercial development, subject to required stabilization of soils and sub-soils." *See* Ex. 1 at p. 29 (RA APP 0033). Relator's expert determined that "the highest and best use for the subject property, as currently improved is estimated to be interim occupancy of the existing buildings, as-is, for the near-term future. *Thereafter, the subject improvements would be razed to construct new improvements, similar to the highest and best use, as-if-vacant.*" Ex. 1 at p. 29 (RA APP at p. 0033) (emphasis added). In response to questioning by the Tax

Court, Relator's expert confirmed that a buyer would purchase the subject property for the land, "and they would probably tear the buildings down the next day...." T. at p. 182 and *see generally* T. at pp. 80-81 and 181-185. Relator confirmed the same in its brief by writing that "[n]either party attributed any value to the buildings currently occupying the Subject Property." Relator's Brief at p. 25. In other words, the parties agree that the existing buildings have no value and, accordingly, the highest and best use remains re-development. Any contention by Relator to the contrary contradicts Relator's own expert and Relator's very own admission.

Based on the evidence of record, the Tax Court found that the highest and best use of the subject property is for re-development after the buildings are razed. In reaching that conclusion, the Tax Court specifically recognized that Relator's very own expert performed his sales approach to value in a manner consistent with his determination that the subject property would be re-developed. *See* Tax Court Order at p. 5. Relator's claim of error must be rejected.

B. The evidence supported the Tax Court's finding that Respondent's expert's adjustments were credible and consistent.

Relator next claims that Respondent's expert's appraisal must be rejected, based on its contention that Respondent's expert refused to make appropriate adjustments in his sales comparison approach to value. Here, Relator specifically claims that Respondent's expert failed to make necessary adjustments for size, shape and slope, soil correction, razing costs, time, and motivated sale. The record before the Tax Court

demonstrates that Respondent's expert made appropriate, credible, market-based adjustments and the Tax Court did not err in adopting that analysis.

1. Size adjustment.

Relator first contends that Respondent's expert failed to make a necessary size adjustment. However, on this point, Relator misquotes the record by failing to include a critical statement from Respondent's expert's testimony. Relator's counsel asked Respondent's expert, "And wouldn't you agree with me that a smaller property is more valuable?" T. at p. 357. The complete response of Respondent's expert is as follows:

A: Normally you would assume that, but I don't think that is the case on Lake Street.

Q: And you base that on what?

A: Well, I looked at all the properties on Lake Street – first of all, there is no evidence out there that you can really find out if an adjustment should or shouldn't be made on this.

T. at p. 357.

Respondent's expert then explained that he "****put every property on Lake Street from one end to the other on a spreadsheet, and I sorted them by size, and you have a majority of the properties are small out there". See T. at p. 358. Further, Respondent's expert testified that he calculated the contract price divided by the square feet for every property sold in the Lake Street Market Area between October 2004 and January 2010. See T. at p. 374 and Ex. 101 at p. 54 (APP at p. 0280).

By contrast, Relator's expert made dramatic adjustments to his comparable properties. First, Relator's expert wrote that "Given the relatively small size of the

subject land***this is a negative value consideration for the subject land.” *See* Ex. 1 at p. 4 (APP at p. 0008). On the contrary, the subject property was the second largest property among all properties sold in the Lake Street Market Area between October of 2004 and January of 2010. *See* Ex. 101 at 54 (APP at p. 0280). However, in testimony, Relator’s expert admitted that most of the properties on Lake Street are smaller. *See* T. at p. 127. Then, to support his size adjustments rationale, Relator’s expert admitted that “Well, compared to the development that is approved and going to be constructed on Lake Street and Superior where it’s at, what, a couple hundred thousand square feet, it’s Land Sale Number 5***. *Id.* The first four comparables selected by Relator’s expert ranged from half the size of the subject all the way to three times smaller than the subject property. *See* Ex. 1 at pp. 34, 36. Nonetheless, Relator’s expert made the same 20% adjustment to three of those comparables. *Id.* at p. 36. As calculated by Relator’s expert, the subject site has 34,598 usable square feet, yet he applied -20% adjustments to Sale #1 (13,323 usable sq.ft. at 239 E. Lake St.), Sale #2 (17,020 usable sq.ft. at 235 E. Lake St), Sale #3 (8,957 usable sq.ft at 328 Barry Ave) and Sale #4 (11,176 usable sq.ft at 230 Manitoba). *Id.* His inconsistent size adjustments continued to Sale #5 (628,747 usable sq.ft. at 801 E. Lake St), which is 18 times larger than the subject but received only a 30% adjustment. *Id.* Incredibly, Relator’s expert gave more weight to Sale #5, despite the enormous size discrepancy between Sale #5 and the subject. *See* T. at 173.

2. Shape and slope adjustment.

Relator also claims that Respondent's expert "provided no explanation for his failure to make adjustments to those properties with more frontage and less depth, merely opining that the subject property was developable in its current state." Relator's Brief at p. 21, *citing* T. at p. 241. Contrary to Relator's claims, Respondent's expert acknowledged that the subject site is deeply rectangular in shape with approximately 108 feet of frontage on Lake Street, and he further acknowledged that its topography is level and low. *See* Ex. 101 at p. 28. Although he concluded that the subject property has sufficient size, shape and terrain to accommodate a variety of mixed use developments (*see* Ex. 101 at p. 33 and T. at 241), Respondent's expert accounted for the subject's shape, wetlands and need for vehicular access by adjusting his Sale Comparables #1, #3 and #4 downward by 10%. *See* Ex. 101 at p. 39. The Tax Court did not err in its conclusion that Respondent's expert's adjustments were reasonable. *See* Tax Court Order at p. 10.

By contrast, Relator's expert opined that the excessive depth of the subject site resulted in 10% diminished use. *See* Ex. 1 at p. 33. Accordingly, he adjusted his Sale Comparables #3, #4, and #5 down by 5%. *Id.* at p. 36. Notably, Relator's expert made that adjustment even though Sale #3 has a deeply rectangular shape, with only 8,957 usable square feet. *Id.* at p. 64. Relator's expert also made that adjustment even though Sale #5, at 628,747 usable square feet, is anything but regular in shape and may be best described as a rounded, misshaped triangle. *Id.* at p. 66. As further evidence of his unreasonable adjustments, Relator's expert's -5% adjustment to Sale #5 amounts to

\$1,200,000 of its sale price of \$24,000,000 – nearly three-fourths of Relator’s entire conclusion of value for the subject property. *Id.*

The Tax Court found Relator’s expert’s adjustments for “size, shape and terrain to be inconsistent and less reliable than those made by Mr. Bennett [Respondent’s expert].” That finding is supported by the evidence of record, and the Tax Court’s credibility determination should not be disturbed.

3. Soil correction adjustment.

Relator next claims that Respondent’s expert failed to account for additional soil correction costs that make development of the subject property cost prohibitive. Relator’s Brief at p. 24. That claim is flatly contradicted by ample evidence in the record.

The parties agree that new construction will require ground improvements. *See* Ex. 101 at p. 28; Ex. 1 at p. 18. In 2005, engineers for GME Consultants were commissioned by Mr. Bradley Hoyt (Petitioner/Relator) to conduct geotechnical explorations for a proposed development at 253 East Lake Street. *See generally* Ex. 107 (the “GeoTechnical Report”). As indicated in the GeoTechnical Report, engineers recommend supporting buildings, parking ramps and foundations on 16-inch diameter, auger-cast piles. *See* Ex. 107 at p. 14. GME Consultants recommended a pile depth of 65 to 70 feet. *Id.* Respondent’s expert discussed the piles, pile depth and the cost of pilings necessary for development on the subject property with one of the engineers that authored the GeoTechnical Report. *See* T. at 249-253, 344-347. He also had conversations with Veit construction to approximate the cost of the necessary pilings.

See T. at 253-254. Based on those discussions, Respondent's expert calculated that approximately 80 pilings would be needed to support a 16,107 square foot building with an 11,700 square foot parking ramp. *See* T. at 249-251. Based on his conversations with the GME engineer, Respondent's expert estimated that the cost for the required pilings would be approximately \$179,000. *See* T. at 252-253. Respondent's expert used that estimate in his sales comparison approach to value when adjusting for soil issues at the subject property. *See* T. at 250-251, 254. Accordingly, Respondent's expert adjusted his Sale Comparables #1 and #3 down 25% because both sites are suitable for below grade square footage, unlike the subject. *See* Ex. 101 at p. 39, 46.

At trial, the property owner, Mr. Hoyt, confirmed Respondent's expert's conclusion, through his testimony that pilings drilled to the depth of 65 to 70 feet would be necessary for development at the subject property. *See* T. at 39. Mr. Hoyt testified that the estimated cost for the pilings would be \$190,000, very close to the cost estimated by Respondent's expert. *Id.*

By contrast, Relator's expert claimed that "the landowner reports that as much as 200 feet of piling may be required." Ex. 1 at p. 18. That assertion is directly contradicted by Mr. Hoyt's testimony. Moreover, instead of calculating the cost of necessary pilings, like Respondent's expert and Mr. Hoyt, Relator's expert applied an adjustment of \$15 per square foot to the total land area, based on an unsupported conclusion that the property had diminished use. *See* Ex. 1 at pp. 18, 34, 39. Relator's expert based his subsoils correction adjustment on his understanding of correction costs at the commercial development of the Lexus Dealership along I-394, instead of

considering the actual correction costs estimated for the subject property. *Id.* at p. 18; T. at 136-139. On cross-examination, Relator's expert conceded that the Lexus Dealership is more than two miles away from the subject. *See* T. at 136-139. Moreover, unlike the subject, the Lexus Dealership is bordered by a large swamp and included fill from the I-394 freeway development. *Id.*

The Tax Court found that the evidence supported Respondent's expert's adjustments and it further found that Relator's expert's estimates, based on the distant Lexus dealership, were "unreliable and unsupported in the record." *See* Tax Court Order at p. 10, 12. That finding should be affirmed.

4. Razing costs adjustment.

Relator wrongly claims that Respondent's expert erroneously failed to adjust his comparables for the cost of razing the existing buildings at the subject. In fact, Respondent's expert testified that no such adjustment was required, because the cost to raze the buildings at the subject property was essentially the same as the cost to raze the buildings at the comparable properties.

"Ideally, if all comparable properties are identical to the subject property, no adjustments will be required.... After researching and verifying transactional data and selecting the appropriate units of comparison, the appraiser adjusts for any differences." The Appraisal of Real Estate (13th Ed.) at p. 307. Respondent's expert properly applied that principle to his comparables. *See* T. at p. 262 (regarding Sale Comparable #1, Respondent's expert testified "that both the subject and all the comparables have modest buildings that needed to be tore down, so they are essentially the same in that respect, so

there is no adjustment needed.”), p. 268 (regarding Sale Comparable #2, “It had a modest two-story building on it that was removed.... Right, they’re all going to come down. They are all similar.”), and p. 277 (regarding Sale Comparable # 4, “It still has the building, but it’s a modest building like all the others are, and there is really nothing to adjust for.”). Respondent’s expert further confirmed that he considered adjustments for razing costs, thus his decision not to apply such an adjustment was not an oversight or a mistake. *See* T. at pp. 366-367 (“I know ballpark what [the razing costs] are and what they would be, but there is no – there is no reason to do it because they all have the buildings. They all have old, obsolete, modest buildings that are going to be scraped.”).

For his part, Relator’s expert made multiple adjustments for razing costs. In his sales comparison approach, Relator’s expert indicated a cash equivalent effective sale price (“CEESP”). *See* Ex. 1 at p. 32, 36, 62-66. The CEESP is an adjusted sale price for Relator’s comparables, which accounts for razing costs, non-market terms and conditions of sale, atypical subsoil correction costs, and buyer paid assessments. *Id.* at p. 32. Relator’s expert adjusted the sale price for razing costs on four of five sale comparables as follows: Sale #1: \$25,000; Sale #3: \$10,000; Sale #4: \$15,000; Sale #5: \$1,000,000.⁴ *Id.* at pp. 62-66. Nonetheless, in addition to adjusting for the improvement status of the land sales through his CEESP, Relator’s expert **also** adjusted each comparable to reflect the cost of razing the improvements on the subject property. *See* Ex. 1 at p. 39 (emphasis added). Further, Relator’s expert admitted that the razing

⁴ Relator’s expert acknowledged that the \$1,000,000 adjustment for razing costs at Sale #5 is only his *estimate*. *See* T. at 175.

costs he included were merely his subjective estimates. *See* T. at p. 157 (for Sale Comparable # 2, Relator's expert testified, "Well, we just figured that that was kind of the depreciable value of the improvements. It was an estimate based on our time, based on our opinion it's just an estimate. We haven't had any engineering numbers for that.") and p. 175.

The Tax Court rejected the analysis of Relator's expert as double deducting for razing costs, through his CEESP calculation and his adjustments, thereby artificially reducing the sale price of each comparable. *See* Tax Court Order at p. 14. Instead, the Tax Court correctly adopted the adjustment applied by Respondent's expert.

5. Time adjustment.

Relator claims that its expert applied the only appropriate time adjustments. Relator's Brief at p. 27. Here, Relator wrongly claims that Respondent's expert included data from "the entire metropolitan area" in applying a time adjustment. *Id.* Relator's argument must be rejected.

Respondent's expert tracked and studied all 12 sales occurring in the LSMA between October 27, 2004 and January 19, 2010. *See* Ex. 101 at p. 54 (APP 0280). Respondent's expert verified those transactions by contacting each buyer. *See Id.* at p. 54; T. at 207-208, 299. Relying on seven actual sales of property in the LSMA between 2006 and 2008, Respondent's expert testified that the LSMA was "hot" during that timeframe. *See* T. at 196, 198, 199 and 207-208.

To adjust his comparables for time to the January 2, 2007 assessment date, Respondent's expert applied a 7% annual time adjustment. *See* Ex. 101 at pp. 39, 45.

His 7% adjustment is partly founded on the sale and subsequent re-sale of the Village Shopping Center, located in the LSMA. *Id.* at p. 45; T. at 359. The Village Shopping Center sold on July 2, 2003, then re-sold on October 2, 2007, and that paired sale demonstrated an annualized appreciation of 5.67%. *Id.* Respondent's expert also considered the sale and re-sale of the Wayzata Bay Center. *See* T. at 359. That property sold on December 22, 2004, then re-sold on October 31, 2008, and that paired sale demonstrated an annualized appreciation of 14.96%. *See* Ex. 101 at p. 54; T. at 359-360. Last, Respondent's expert considered actual commercial growth statistics compiled by the Hennepin County Assessor's Office. *See* Ex. 101 at pp. 39, 45; T. at 359-360. Respondent's expert only considered data in **suburban Hennepin County** -- not in "the entire metropolitan area" as Relator imprecisely contends. *See* Ex. 101 at p. 54; T. at 359-360. Between January of 2005 and January of 2008, the market values of commercial property in suburban Hennepin County increased 26.6%. *Id.* The average annual increase was +8.86%. *Id.*

In turn, Relator's expert generically referred to the "collapse" of the market. *See* Ex. 1 at p. 13 ("But this explosive growth in land values collapsed in mid-2000s"), p. 22 ("In late 2006, the commercial retail markets hit their peak.... In 2008, turmoil in residential markets, rising fuel costs, sagging consumer confidence began to collapse the retail markets.") and p. 23 ("These discussions [in 2005] occurred at a time when the commercial market was peaking, with the general collapse of market demand starting in 2006, accelerating in 2007, and becoming transparently obvious in 2008"). Those subjective opinions about the markets influenced Relator's expert's valuation. As an

example, with respect to his Sale Comparable #3, Relator's expert testified, "No, I believe that it was my personal experience, you know, appraising that things were really going down. They plateaued at that time. There was like no time adjustment 2000 to 2006, and even less so thereafter in 2007, and negative in 2008." T. at 152.

For the January 2, 2007 assessment date, Relator's expert inconsistently adjusted four of his five sales for time. See Ex. 1 at p. 36. Relator's expert made a 5% (compounded) adjustment to his comparable Sale #1 (sale date 10/27/04) and Sale #2 (sale date 5/1/03). *Id.* That adjustment was applied to October, November and December of 2006. However, during those same three months of 2006, Relator's expert claims that Sale #3, just down the street, was only appreciating at the rate of 2%. *Id.* Moving into 2007, Relator's expert made no time adjustment to Sale #4, which had a sale date of April 11, 2007, or approximately three full months after the assessment date of January 2, 2007. *Id.* Although he recognized no time adjustment in the first quarter of 2007 for Sale #4, Relator's expert applied a 5% adjustment to Sale #5, which had a sale date of October 31, 2008 – just six months later. *Id.* The time period for Sale #5, which apparently warranted a time adjustment, included the unadjusted time from Sale #4. *Id.*

For the January 2, 2008 assessment date, Relator's expert again adjusted four of his five sales for time. See Ex. 1 at p. 39. This time, the adjustment to Sale #1 fell to 4%, Sale #2 fell farther to 3%, Sale #3 changed to 0%, Sale #4 suddenly required a -5% adjustment (up from 0% for the January 2, 2007 assessment date) and Sale #5 remained the same at -5%. *Id.*

The Tax Court found Relator's time adjustments to be "largely subjective and inconsistent while Mr. Bennett's [Respondent's expert] were based upon empirical market data. We, therefore, find Mr. Bennett's time adjustments to the comparables more persuasive." *See* Tax Court Order at p. 13. That finding is amply supported by the record.

6. Motivated sale adjustment.

Finally, Relator claims that Respondent's expert failed to adjust his comparables for motivated sales. Relator's Brief at p. 27. In order to make that claim, Relator makes two unsupported assumptions: first, that a contract for deed also provides more favorable terms for the buyer than those available through a bank, and second, that whenever a buyer purchases property from an adjacent landowner, "it is assumed that the land has more value for that individual." *Id.*

Conditions of sale, or motivation, are a basic element of comparison to be considered by appraisers. *See* The Appraisal of Real Estate (13th Ed.) at p. 309. However, "[t]he appraiser determines the elements of comparison for a given appraisal through market research and supports the conclusions with market evidence." *Id.*

Relator's expert reduced the sale price for sale terms/conditions on four of five comparables as follows: Sale #1: \$105,000; Sale #2: \$122,500; Sale #3: \$90,000; Sale #4: \$59,000. *See* Ex. 1 at pp. 32, 62-66. However, on direct examination, Relator's expert admitted that this adjustment was speculative: "It's because it was regarded to be a contract for deed sale *probably* with – *probably* with terms more favorable than a first mortgage and so forth...." T. at 96 (emphasis added). When asked on cross-

examination about the contract for deed in Sale Comparable #1, Relator's expert testified that he "didn't see the contract for deed, and I just assumed it was favorable." *Id.* at 154. Relator's expert further admitted that he had not seen the contract for deed for Sale Comparable #4. *Id.* at 177.

By contrast, Respondent's expert contacted the buyer for all 12 sales transactions that occurred in the LSMA during the time in question. *See T.* at p. 265-266, 299. Based on that investigation, Respondent's expert concluded that his comparable sales did not require any adjustment for favorable contract terms because the cash equivalent sale price was the same as the actual sale price for all four comparables. *See Ex. 101* at p. 39. Respondent's expert further testified that it's "quite common that a contract for deed is arm's length", *T.* at p. 296, and that he did, in fact, look at the contract for deed at for Relator's Sale Comparable #2. *See T.* at p. 374.

Given the evidence of record, the Tax Court properly found that Relator's expert's adjustments for motivated sales were not supported by the evidence. *See Tax Court Order* at p. 15. The evidence supports the Tax Court's adoption of Respondent's expert's analysis.

C. The evidence supported the Tax Court's finding that Respondent's expert correctly analyzed the usable land at the subject property.

Relator wrongly claims that Respondent's expert admitted to miscalculating the usable land area at the subject property and, as such, "the Tax Court's adoption of his valuation was clearly erroneous." Relator's Brief at p. 30. Respondent's expert did not admit miscalculating the usable land area. *See T.* at p. 328-329. Instead, Relator has

misunderstood or misstated Respondent's expert's methodology for adjusting his comparable properties to the subject properties.

Here, the Tax Court found that "Mr. Bennett's [Respondent's expert] analysis of the comparables was consistent with his determination as to the subject property's usable land." *See* Tax Court Order at p. 9. In calculating usable square footage involving wetlands, Respondent's expert testified that "[y]ou don't subtract out setbacks when you calculate usable. Usable is the gross square footage minus the wetlands." T. at 328. When asked to explain, Respondent's expert testified as follows: "Well, in the first place we don't know what they are on all the properties, we don't know what is going to happen with the property.... I'm just trying to say I'm trying to treat these all of the – I am trying to treat everything the same so we're comparing apples to apples." *Id.* at 328-329. Without including any wetland "buffer zone" or setback in his calculation, Respondent's expert explained his process for calculation of the wetland area on the subject property. *See* T. at pp. 220-240. In essence, he used the "Wetland Delineation Report" prepared by Peterson Environmental Consulting for Relator (Ex. 106), the Hennepin County Surveyor's map (Ex. 109), and his own Pictometry calculations (Ex. 110), to calculate and confirm the usable land area at 44,107 square feet. The Tax Court agreed with Respondent's expert's calculations. *See* Tax Court Order at p. 9.

Further, Respondent's expert calculated the gross square footage for the balance of land sales in the LSMA, including three properties that Relator's expert used for sale comparables, i.e., Relator's Sale #1, Sale #4 and Sale #5. *See* Ex. 101 at p. 54; Exhibit

1 at p. 36. Respondent's expert calculated the usable square feet at Relator's Sale #1 (239 E. Lake St.) equal to 13,323, the usable square feet at Relator's Sale #4 (230 Manitoba) equal to 11,176 and the usable square feet at Relator's Sale #5 (801 E. Lake St.) equal to 628,757. See Ex. 101 at p. 54. So, despite Relator's expert's claimed setback (buffer zone), he used the *exact same square footage* calculated by Respondent's expert without a setback (buffer zone). See Ex. 1 at p. 36. In this respect, Relator's expert failed to compare apples to apples; he included a buffer zone in his wetland calculation at the subject property, but failed to include a buffer zone for the wetland calculation at his sale comparables. His inconsistency resulted in another unwarranted reduction to the value of his sale comparables. As a result, the Tax Court properly rejected the analysis of Relator's expert, instead finding that Respondent's expert had performed the only consistent and credible value analysis.

CONCLUSION

For the above stated reasons, Respondent respectfully requests that the Tax Court's decision be affirmed.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

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By: Michael R. Bernard
Michael R. Bernard (253054)
Assistant County Attorney
Attorneys for County of Hennepin
A2000 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5586
FAX No: (612) 348-8299