

A11-0138

STATE OF MINNESOTA

IN SUPREME COURT

MARLOW TIMBERLAND, LLC,

Relator,

vs.

COUNTY OF LAKE,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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LEGAL ISSUES

- I. Whether failure to file separate tax petitions for parcels located in several taxing jurisdictions requires dismissal of the petition under Minnesota Statute § 278.02.

The Tax Court held: Marlow Timberland's tax petition violated Minnesota Statute § 278.02 and was invalid and subject to dismissal.

Apposite Authorities: Minnesota Statute § 278.02

- II. Whether Marlow Timberland's inexcusable failure to pay taxes due in payable years 2009 and 2010 deprives it of the ability to prosecute its 2009 and 2010 petitions.

The Tax Court held: Marlow Timberland's failure to pay taxes due in payable years 2009 and 2010 resulted in automatic dismissal of the petitions.

Apposite Authorities: Minnesota Statute § 278.01
Minnesota Statute § 278.03

- III. Are equitable remedies, pursuant to Minn.R.Civ.Proc. 60.02 or at Common Law available to Marlow Timberland to reinstate the dismissed 2009 and 2010 petitions.

The Tax Court held: Equitable remedies are not available to reinstate the 2009 and 2010 petition because the statutory remedies are adequate and Marlow Timberland's actions are not excusable.

Apposite Authorities: Minnesota Statute §278.01, et seq.
Minn.R.Civ.Proc. 60.02

STATEMENT OF THE CASE

Respondent accepts Relator's statement of the case except as modified or supplemented herein.

STATEMENT OF FACTS

In early 2008, Roy Marlow, doing business as Marlow Timberland, LLC, referred to as "Marlow Timberland", purchased over 39,000 acres of real estate situated in Lake County, Minnesota, from the Potlach Corporation. (A109)¹ The purchase price averaged \$385 per acre, well below the assessed value of an averaged \$1,000 per acre as of January 1, 2007 for taxes payable in 2008. (A097, A099) Marlow Timberland negotiated with Potlach for almost two years before purchasing the property. (A096) The property included 744 separate tax parcels located throughout Lake County. (A077) Potlach paid the first-half taxes on the assessed values of the individual parcels for payable year 2008. (A143) After the purchase, Marlow Timberland sold some of the property for \$2,500 per acre. (A096)

On April 24, 2008, Marlow Timberland filed one real property tax petition alleging that the estimated market value is greater than the actual market value

¹ "A" refers to Marlow Timberland's Appendix followed by the appropriate page number.

and the subject property is unequally assessed. (A004) The petition included the 744 separate tax parcels located in four townships and two unorganized territories. (A004-A023) The following year, on April 29, 2009, Marlow Timberland filed four tax petitions for taxes payable in 2009. The petitions were separated by parcels located in three townships and one unorganized territory. (A025, A033, A043, A047) Marlow Timberland paid the first-half installment of the payable 2009 taxes on the parcels. (A086) The remainder of the payable 2009 taxes have not been paid. (A086)

In April 2010, Marlow Timberland again filed four tax petitions, each related to parcels located in one of three townships and an unorganized territory. (A051, A059, A063, A073) No taxes have been paid for the payable year 2010. (A086, A097)

The 2009 and 2010 petitions were automatically dismissed for failure to pay the taxes due for those years. (A143) On March 29, 2010, Lake County filed a motion to dismiss the 2008 petition, which included multiple parcels located in multiple townships, thereby violating the statutory requirement that multiple parcels may be contained in the same petition only if the parcels are in the same town. (A077)

Marlow Timberland filed a Motion for Reinstatement of the 2009 and 2010 petitions on September 23, 2010. (A080-A081) The 2008 petition was not addressed in that motion nor was it discussed in the memorandum in support of the motion to reinstate. (A080, A083-A094) Rather, Marlow Timberland focused

on its failed business plan and financial difficulties to justify reinstatement of the 2009 and 2010 petitions without payment of taxes due in 2009 and 2010. (A084-A085) On October 1, 2010, Marlow Timberland proposed to Lake County that the 2008 petition "continue" for only those parcels located in Stony River Township. (A159)

The Tax Court hearing on Lake County's motion to dismiss the 2008 petition and Marlow Timberland's motion to reinstate the 2009 and 2010 petitions was heard on October 12, 2010. (A160) Lake County argued that the 2008 petition was invalid in light of Marlow Timberland's insistence that the purchase of the Potlach property was in bulk, which must be considered as a whole for tax purposes. (A168-A169) This bulk purchasing theory tied in with Marlow Timberland's valuation scheme, as well, which drastically lowered the average per acre value. (A163-A165) There were no other motions addressed by the Tax Court. (A162)

In an order filed November 23, 2010, the Tax Court granted Lake County's motion to dismiss the 2008 petition and denied Marlow Timberland's motion to reinstate the 2009 and 2010 petitions. (Addendum to Realtor's brief, AD01-AD10) This appeal follows.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of decisions of the Tax Court is limited to whether the Tax Court had jurisdiction, whether its decision was justified by the evidence and in conformity with the law or whether it committed an error of law. Minn. Stat. § 271.10, subd. 1, *Southern Minnesota Sugar Beet Coop v. County of Renville*, 737 N.W.2d 545, 551 (Minn. 2007). This Court reviews the Tax Court's interpretation of statutes de novo. *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 830 (Minn. 2002).

II. The 2008 Petition Failed to Comply with Minnesota Statute §278.02 and was Properly Dismissed by the Tax Court.

A. Marlow Timberland Failed to Motion the Tax Court to Amend the 2008 Petition.

The form and content of Tax Court petitions are governed by Minn. Stat. §278.02 and Tax Court Rule 8610.0050. The petition must include an official description of the property and its location. *Id.* The petition may include "several parcels of land in or upon which the petitioner has an estate, right, title, interest, or lien may be included in the same petition, but only if they are in the same city or town..." Minn. Stat. §278.02.

Marlow Timberland urges this court to find that the 2008 petition, which did not comply with statutory requirements, may be amended without the required motion pursuant to Tax Court Rule 8610.0070. In support of its position, Marlow

Timberland asserts that it “requested leave of the court to modify the petition”. (Relator Brief, p. 9) At no time did Marlow Timberland motion the court to amend the 2008 petition. Rather, in response to Lake County’s motion to dismiss the petition for failure to comply with statutory requirements, Marlow Timberland conceded that the petition was improper and suggested a compromise that the petition be limited in scope to 89 parcels in Stony River Township (A155).

The first hint of this compromise came in an October 1, 2010 letter to Lake County which was not filed with the Tax Court until after the October 12, 2010 hearing. (A155) It came 18 months after Marlow Timberland filed four 2009 petitions which did comply with the “one township” requirement. It came six months after Lake County filed its motion to dismiss the petition. Marlow Timberland argued to the Tax Court that the 2008 petition should not be dismissed as motioned by Lake County because Marlow should be allowed to “proceed to hearing with respect to one of the townships included in the petition” (A155).

A careful review of the record contradicts Relator’s recitation of the procedural history. Marlow Timberland failed to affirmatively “request” amendment, modification or any other change to the 2008 petition. Rather, Relator responded to a motion to dismiss the petition by claiming that “it seems appropriate to allow maintenance of the Stony River Township parcels” (A155).

Chapter 278 is generally excepted from the Rules of Civil Procedure under Rule 81.01. Motions to the Tax Court are subject to Tax Court Rule 8610.0700.

Lake County filed its dispositive motion to dismiss the 2008 petition on March 26, 2010. Marlow Timberland filed its Motion to Reinstate the 2009 and 2010 petitions on September 3, 2010. Marlow filed a Response to Lake County's Response to Motion to Reinstate on October 25, 2010. Two paragraphs of the five page response are devoted to the motion to dismiss 2008 Petition. Marlow did not file a non-dispositive motion to amend the 2008 petition pursuant to Tax Court Rule 8610.0700 subp. 6.

The only motion before the Tax Court was Lake County's motion to dismiss the 2008 petition. The petition listed 744 parcels. The parcels are scattered throughout Lake County in four townships and two unorganized territories. The meaning of Minn. Stat. § 278.02 is clear and unambiguous. The tax petition may not relate to parcels in more than one town. The 2008 petition specifically lists the multiple townships. By 2009, however, Marlow Timberland correctly filed separate petitions for each town or unorganized territory. There is no excuse for Relator's failure to comply with the statute in filing the 2008 petition and the petition must be dismissed.

B. Minnesota Rules of Civil Procedure 15.01 Does Not Excuse Marlow Timberland's Failure to Comply with Minn. Stat § 278.02 as Nearly as Practicable.

Relator's argument to this court is that justice requires the amendment of the 2008 petition, irrespective of Marlow Timberland's failure to motion the court

for leave to amend the petition. Now, after the Tax Court hearing on the motion to dismiss the 2008 petition, Marlow Timberland relies upon Minnesota Rule of Civil Procedure 15.01 which provides in part “a party may amend a pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”

The Rules of Civil Procedure govern Chapter 278 proceedings “as long as the provisions of the statutes and the rules are consistent and not in conflict.” *Kmart et al v. County of Clay*, 711 N.W.2d 485, 488 (Minn. 2006). Moreover, Tax Court Rules govern procedures in Tax Court unless those rules indicate that the Rules of Civil Procedure apply. *Raisanen v. County of Hennepin*, 678 N.W.2d 669, 671 (Minn. 2004) The Rules of Civil Procedure apply to Tax Court “where applicable”. Minn. Stat. §271 .06 subd. 7. This Court has held that when there are no Tax Court rules which conflict with the Rules of Civil Procedure, Rules of Civil Procedure apply. *Kmart et al.*, at 488.

Rule 15.01 of the Rules of Civil Procedure has been applied to motions to amend Tax Court petitions. Generally, amendments have been freely granted when the petitioner files a motion to amend the petition. *American Crystal Sugar Co. v. County of Polk*, C1-05-574 et al (Minn.Tax Ct., November 28, 2007) (App. 1)²; *American Crystal Sugar Co. v. County of Polk*, C1-05-574 et al (Minn.Tax Ct., January 25, 2007) (App.5); *Nutrico, Inc. v. County of Otter Tail*, C6-95-541 (Minn.Tax Ct., May 13, 1996) (App.9). Rule 15.01 has not been interpreted to

² “App” refers to Respondent Lake County’s Appendix.

abrogate the motion requirements under Tax Court Rule 8610.0700.

In *American Crystal Sugar Co. v. County of Polk*, C5-03-1769 et al (Minn. Tax Ct. December 2, 2004) (App. 11), however, the County's motion to dismiss petitions which did not conform to Minn. Stat. §278.02 was granted and American Crystal Sugar's motion to amend the petitions was denied. The parcels listed in the original petitions were in several cities and townships spread throughout Polk County. In response to the county's motion to dismiss the invalid petitions, American Crystal Sugar filed its motion to amend the petitions to comply with the statute. In granting the dismissal motion and denying the amendment motion, the Tax Court determined that American Crystal Sugar was not confused about the location of the parcels in the petitions and admittedly did not comply with the statute.

Additionally, the Tax Court found that American Crystal Sugar's technical noncompliance with the statute was not excusable. Minn. Stat. §278.02 does not specify a consequence for failure to comply. A court may excuse technical noncompliance of such a statute if there is no prejudice to the other party and if the nonconforming party complied with the statute as nearly as practicable. *State v. Frisby*, 260 Minn. 70, 108 N.W.2d 769 (1961). In *American Crystal Sugar (2004)* the Tax Court determined that the inclusion in the petition of so many different parcels scattered throughout Polk County was not compliance with the statute "as nearly as practicable".

Here, as in *American Crystal Sugar (2004)*, Marlow Timberland filed a nonconforming petition which contained 744 parcels in several townships scattered throughout Lake County. There was no confusion about the location of the parcels as the face of the petition listed all the townships. The next year, Marlow Timberland corrected that nonconformity by filing separate petitions for payable year 2009. There was no attempt to amend the 2008 petition in 2009 when Marlow Timberland was aware of the petition requirements. The statute was not complied with “as nearly as practicable”.

Finally, amendments to the pleadings are not mandatory under Rule 15.01. A motion to amend the pleadings is required under Tax Court rules before the Tax Court may consider the amendment. Amendments are to be considered within the context of the stage of the action. “While pleadings may be freely amended when justice so requires under Rules 15.01 and 15.02, the liberality in the allowance of the amendments depends in part upon the stage of the actions.” *Tomlinson Lumber Sales Inc. v. J.D. Harrold Co.*, 263 Minn. 470, 474-475, 117 N.W.2d 203, 207 (1962). In *Tomlinson*, the motion to amend the pleadings was made at the close of a lengthy trial. The motion was denied. In the present case, there is no motion to amend the petition. Rule 15.01 does not apply. The Tax Court’s decision to dismiss the 2008 petition is in conformity with the law and no other error of law was made. The decision should be upheld by this Court.

III. The Tax Court Properly Determined that Marlow Timberland is Not Entitled to Reinstatement of the 2009 and 2010 Petitions.

Minnesota Statute §278.01, Subd. 1, provides in relevant part:

(a) Any person having personal property, or any real estate, right, title or interest in or lien upon any parcel of land, who claims that such property has been partially, unfairly or unequally assessed in comparison with other property ... may have the validity of the claim, defense, or objection determined by the district court of the county in which the tax is levied or by the Tax Court

The petition must be filed on or before April 30 of the year in which the tax is payable. Minn. Stat. §278.01 Subd. 1(c). If the proceedings initiated by the petition are not completed by May 16 following the filing of the petition, fifty percent (50%) of the tax levied on the property shall be paid to the county treasurer. Minn. Stat. §278.03 Subd. 1. If the proceedings have not been completed by October 16 following the filing of the petition, eighty percent (80%) of the unpaid balance of the tax levied against the property must be paid if the balance exceeds \$2,000. *Id.* Failure to pay the second installment when due results in automatic dismissal of the petition.

Marlow Timberland filed four Tax Court petitions on April 29, 2009 and four Tax Court petitions on April 16, 2010. The 2009 first-half property taxes on the assessed value of the properties were paid. No property taxes have been paid since that time for either taxable year 2009 or 2010. Marlow Timberland failed to seek permission from the Tax Court to proceed without payment of the taxes or,

in the alternative, to pay a lesser amount under Minn. Stat. §278.03, Subd. 1. The petitions were automatically dismissed pursuant to that statute.

In a 1989 amendment to Minn. Stat. §278.03, Subd. 1, the legislature provided relief to taxpayers from the payment requirement by creating automatic reinstatement of the petition upon payment of the entire tax due, plus interest and penalty if made within one year of the dismissal. Marlow Timberland did not avail itself of that remedy either. Rather, Marlow Timberland urges this Court to ignore the statutory requirements due to its unique situation and rely solely on Minn. R. Civ. Proc. 60.02. This argument is contrary to established Minnesota law and disregards Marlow Timberland's responsibility in failing to comply with Chapter 278.

A. Chapter 278 is the exclusive remedy to challenge a real property assessment.

Chapter 278 was enacted to benefit the taxpayer and the state. *State v. Elam*, 250 Minn. 274, 277-78, 84 N.W.2d 227, 230 (1957). The statutory scheme provides the taxpayer a mechanism to object to property taxes without having to default and respond in a delinquency tax proceeding. *Programmed Land, Inc. v. O'Connor*, 633 N.W.2d 517, 522 (Minn, 2001). The state benefits by the established cause of action in Chapter 278, which limits tax delinquencies and promotes the prompt collection of taxes "ensuring a reliable stream of revenue at a time when local governments were threatened by financial instability." *Id.*, at

525, citing *Elam* at 278, 230. The *Programmed* court further noted “[H]aving provided a means to challenge property taxes for the purpose of ensuring prompt payment, the legislature would not then undermine that purpose by allowing a significant number of tax grievances to be free of Chapter 278 filing limitations...” *Id.* This Court held that Chapter 278 provides the exclusive remedy to challenge an assessment, including valuation and classification of the property. *Id.*, at 523. The adequate statutory remedies preclude actions in common law or equity. *Id.*, at 530.

Marlow Timberland challenged the valuation, unequal assessment and classification of the properties in the 2009 and 2010 petitions pursuant to Chapter 278. To insure Marlow Timberland’s good faith in filing the petitions and to promote the prompt collection of taxes during a period of financial instability for the county, it was required to pay the taxes to avoid automatic dismissal. In *Elam*, this Court viewed the entire statutory scheme including the provisions of Minn. Stat. §278.03 when holding that “the legislature intended that it should provide the exclusive means by which a taxpayer may assert the defense of an unfair or unequal assessment.” *Elam*, at 281, 231.

Here, Marlow Timberland was aware of the assessed taxes effective January 1, 2007 at the time of the 2008 purchase of the Potlach properties because Potlach paid the first-half taxes in 2008 under the purchase agreement. Thereafter, Marlow Timberland failed to pay the taxes as required after filing the petitions. The petitions were automatically dismissed. Marlow Timberland

asserts that it is entitled to equitable relief outside Chapter 278 because it is in a “unique situation”. (Relator’s brief at 25). That situation is one of its own making due to a flawed business plan and heavy debt load which resulted in the lack of capital. There is little unique about this situation. Marlow Timberland cannot avail itself of the benefits of challenging the assessed taxes under Chapter 278 and now decide that the remainder of the provisions do not apply. The remedies under the statute are adequate and Marlow Timberland is not entitled to common law or equitable remedies.

B. The Tax Court did not err in refusing to reinstate the dismissed petitions under Chapter 278.

Marlow Timberland argues that it is entitled to reinstatement of the 2009 and 2010 petitions, notwithstanding its failure to comply with Chapter 278. It insists that the remedies set forth in Minn.R.Civ.Proc. 60.02 are available and mandate reinstatement. The argument under these facts, however, also has the effect of making the Chapter 278 statutory scheme irrelevant.

Minn. R.Civ.Proc. 60.02 allows a court to set aside a final order as a result of “mistake, inadvertence, surprise or excusable neglect”. Prior to the 1989 amendment to Minn. Stat. 278.03 providing for a one-year grace period after an automatic dismissal of a Tax Court petitions for failure to pay the property taxes, Rule 60.02 governed dismissals under section 278.03. *Husby-Thompson v.*

County of Freeborn, 435 N.W.2d 814, 815-816 (Minn. 1989)³ In this pre-1989 amendment case, Husby-Thompson Company timely filed a petition challenging the assessed value of real property. *Id.*, at 815. The company paid the second-half taxes with penalty 11 days late. The petition had been dismissed. *Id.* The evidence demonstrated mistake as to who was to pay the taxes after a transfer of ownership occurred. *Id.* This Court permitted the reinstatement of the petition under Rule 60.02 as a result of the mistake. “While the statute is explicit that missing the due date for payment of taxes results in an automatic dismissal of the petition, it is also clear that the legislature, by providing for a waiver, has recognized there may be situations where relief from a dismissal is appropriate”. *Id.*, at 815. The legislature, in adopting the 1989 amendment a few months after *Husby-Thompson* was decided, recognized there were situations where automatic reinstatement was appropriate and incorporated that remedy into Chapter 278.

Since 1989, there have been few cases regarding motions to reinstate following an automatic dismissal of the petition for failure to pay property taxes. In the most recent case, *Compass Management and Leasing Inc. v. County of Ramsey*, C8-91-542 at al (Minn.Tax Ct. 1993)(App. 17), Compass Management filed a tax petition in 1991. It failed to pay the second-half 1991 taxes and the petition was automatically dismissed. Due to a mistake, the county was unaware

³ *Husby-Thompson* was decided on February 17, 1989. The effective date of the 1989 amendment to Minn.Stat. § 278.03 was May 31, 1989.

of the dismissal and continued to negotiate a settlement. The company filed an amended petition, at which time the county learned of the automatic dismissal of the prior petition and refused to reinstate because the taxes remained unpaid. The taxes were paid in May 1993 and the company moved for reinstatement of the petition. The Tax Court denied the motion noting Minnesota's "old and detailed" statutory mechanism for challenging taxes, including the remedy to seek a temporary reduction of the amount to be paid in hardship cases. *Id.*, at 2. Because Compass Management failed to seek such a waiver or reduction in the amount to be paid and failed to pay the taxes within the one-year grace period, the motion to reinstate was denied.

Marlow Timberland relies on *Bloomington Hotel Investors v. County of Hennepin*, TC-8428 (Minn. Tax Ct. October 25, 1990)(App. 20) and *T.S. Montgomery v. County of Hennepin*, TC-15110 (Minn. Tax Ct. May 28, 1993)(App. 23) in arguing that Rule 60.02 relieves it from complying with the Chapter 278 mechanism for challenging assessments. In *Bloomington Hotel*, petitioner failed to pay the first-half 1989 property taxes and the petition was automatically dismissed.⁴ The county agreed that the property was overvalued. Petitioner did pay the taxes and penalty before moving the court for reinstatement of the petition. The motion for reinstatement was granted. In *T.S. Montgomery*, petitioner moved the court for permission to proceed on the petition upon payment of reduced taxes. The motion was filed before the 1992 taxes

⁴ The 1989 first-half taxes were due prior to the effective date of the 1989 amendment to Minn. Stat. §278.03.

were due. The motion was granted. Petitioner paid the second-half ordered amount but due to a misunderstanding, payment was stopped. The taxes with interest and penalty were repaid within 5 months. Petitioner's motion to reinstatement the petition was granted. In both cases, the taxes were paid prior to the filing of the motion to reinstate.

Here, Marlow Timberland has not paid any taxes on the 39,000 acres at issue since May 2009. Marlow Timberland has not sought a waiver or reduction for the taxes to be paid. Instead, it blames the County's valuation of the property and a difficult market as the reasons for its failure to pursue any remedy under the statute. (A097) Marlow Timberland purchased the property in early 2008 knowing the assessed value of the property and that the first-half taxes were paid by Potlach in 2008. After paying the first-half 2009 taxes, it has done nothing until it filed the motion to reinstate the 2009 and 2010 petitions on September 23, 2010. The taxes remain unpaid and there is no evidence that Marlow Timberland intends to pay the taxes due.

Minn. Stat. 278.03 now provides a one-year grace period, no questions asked, to petitioners who have failed to comply with the payment requirement under the statute. That remedy governs reinstatement of an automatically dismissed petition. The Rules of Civil Procedure govern Tax Court proceedings "where practicable". *Gale v. County of Hennepin*, 609 N.W.2d 887, 890 (Minn. 2000). Where there is a specific remedy created by the legislature, as in Minn. Stat, §278.03, the Rules are not consistent with the intended statutory scheme.

Rule 60.02 is not available to Marlow Timberland to avoid his statutory obligations. The Tax Court's determination is in conformity with Minnesota law.

C. Marlow Timberland failed to establish that it is entitled to Rule 60.02 relief.

Assuming that Rule 60.02 is available to Marlow Timberland under the facts of this case, it cannot demonstrate that it meets the spirit of the rule. The Rule is applied to further the interests of justice and pursuant to a liberal policy favorable to trials on the merits. *Kosloski v. Jones*, 295 Minn. 177, 179, 203 N.W.2d 401, 403 (Minn. 1973). Under Rule 60.02 (a) a party may be relieved from a final order as a result of mistake, inadvertence, surprise or excusable neglect. Marlow Timberland seeks relief pursuant to this clause. To prevail, it must show 1) that it has a reasonable claim on the merits; 2) a reasonable excuse for its neglect to act; 3) that it has acted with due diligence after entry of the judgment; and 4) that no substantial prejudice will result to the opposing party. *Kosloski v. Jones* at 179, 402. The party seeking relief bears the burden of proof under the rule. *City of Barnum v. Sabri*, 657 N.W. 2d 201, 205 (Minn. App. 2003). The right to be relieved of a final order is not absolute. *Kosloski*, at 18, 403.

1. Marlow Timberland has not demonstrated a reasonable claim on the merits.

Marlow Timberland's attempt to show that it has a reasonable claim on the merits is based on valuation estimates based on novel methods and a variety of figures. The "bulk discount" method of valuation, not recognized in Minn. Stat. §273.03, is the core of Marlow Timberland's claim. The argument is that because Marlow Timberland purchased such a large amount of property in one transaction from one seller, it is entitled to an averaged assessed value based upon the total purchase price.

This novel argument disregards individual parcels and their location in relation to neighboring parcels as well as the statutory criteria for valuation. Minn. Stat. § 273.03 Subd.1 provides:

The auditor shall make out, in the real property assessment book, complete lists of all lands subject to taxation, showing the names of owners, if known; and if unknown, so stated opposite each tract or lot, the number of acres, and the lots or parts of lots or blocks, included in the description of each description of property.

The auditor then creates the tax list based on the legal descriptions of the properties, which define the parcels. It is the parcel which defines the scope of the appraisal for the assessor. "The assessor shall actually view, and determine the market value of each tract or lot of real property listed for taxation". Minn. Stat. 273.08.

Marlow Timberland's "claim on the merits" ignores these statutory requirements and instead, proposes several averaged values based upon its

purchase price, an appraisal and even negotiated per acre values in St. Louis County. Ultimately, Marlow Timberland relies upon the averaged per acre purchase price as the value for the 39,000 acres, consistent with its “bulk discount” theory. In its argument, there is no mention of the fact that the 39,000 acres make up 744 separate parcels located in six separate taxing jurisdictions. The property is scattered throughout Lake County. Minn. Stat. 273.03 requires the auditor and assessor to consider the assessment in comparison to adjacent parcels.

Additionally, Minn. Stat. § 273.12 places a mandatory obligation on the assessor to consider the location of the property so that “all lands similarly located and improved will be assessed upon a uniform basis and without discrimination...” Clearly, the statute does not permit the assessor to overlook the location of the individual parcels and do nothing more than average the cost per acre based on a single transaction. Even Marlow Timberland concedes that the property values range from \$100 to \$2,500 per acre depending on its location. (A096) In fact, some of the property was sold for \$2,500 per acre. (A096) Marlow Timberland does not have a reasonable claim that the property assessments calculated by Lake County are invalid and that his new theory of valuation is supported by law.

2. There is no reasonable excuse for Marlow Timberland's failure to comply with Chapter 278.

Marlow Timberland's argument for Rule 60.02 relies heavily on what it perceives to be its unique circumstances. Those circumstances include its failed business plan, a recession and the taxes in existence at the time it purchased the property in 2008. Because of these circumstances, Marlow does not intend to pay the taxes at this time. This is not a situation of mistake, surprise or inadvertence. Marlow Timberland created its business plan to take on \$10 million in debt. (A164) Its plan was designed to immediately sell property and timber to pay the debt and taxes. (A084, A164) It did not have the capital to pay the taxes.

Marlow Timberland is not a naïve party, inexperienced in property transactions. Roy Marlow is the sole owner and CEO of Marlow Timberland. (A096) Roy Marlow is "engaged full time in the land acquisition, management and disposition business." (A096) Within two months after purchasing 39,000 acres of property, Marlow Timberland filed a tax petition. It paid the second-half 2008 taxes and first-half 2009 taxes. It filed 8 tax petitions between 2009 and 2010. Marlow Timberland knew the statutory requirements and did not comply. The intentional failure to pay the taxes is not excusable neglect nor is it forgetfulness. *Husby-Thompson*, at 815.

Excusable neglect has been defined as a mistake. *Husby-Thompson*, at 815. Misunderstanding as to what payments were required is excusable neglect. *T.S. Montgomery*, at 2.(App. 24) There is no authority for Marlow Timberland's position that financial hardship equates to excusable neglect. If this Court were to

accept this new definition of excusable neglect, Rule 60.02 relief would become common place and the statutory provisions of Chapter 278 irrelevant. Yet in Tax Court matters, this Court determined that “[Discretion] exercised to vacate tax dismissals under section 278.03 should be more circumscribed than for other civil actions.” *Husby-Thompson*, at 815. This is even more applicable after the 1989 amendment to section 278.03 giving petitioners broader remedies. The undeniable fact is that Marlow Timberland gambled on a business plan that was unsustainable. This is not excusable neglect – this was taking a chance on the market and losing. Marlow Timberland has not demonstrated neglect, excusable or otherwise.

3. Marlow Timberland has not demonstrated that it has acted with due diligence after entry of the judgment or final order.

The third factor Marlow Timberland is required to establish is that it has acted with due diligence *after* entry of the final order. *Kosloski*, at 402. The facts necessary to establish this prong varies with each case. *Sommers v. Thomas*, 251 Minn. 461, 469, 88 N.W.2d 191, 196-97 (1958). Marlow Timberland fails to establish that it has done anything after entry of the Tax Court order other than perfect this appeal.

In the alternative, Marlow Timberland refers to actions it took after the 2009 petition was automatically dismissed in October 2009 and after the 2010

petition was automatically dismissed in May 2010. On September 23, 2010, it filed the motion to reinstate the petitions. The motion was brought 11 months after the 2009 petition was dismissed and 5 months after the 2010 petition was dismissed. All the while, the taxes have not been paid contrary to the clear policy of Chapter 278. In every case cited by Marlow Timberland to support Rule 60.02 relief, the petitioner paid the taxes due with penalty prior to the appeal. *T.S. Montgomery*, at 1; (App. 23) *Thunderbird Motel Corp. v. County of Hennepin*, 289 Minn. 239, 183 N.W.2d 569, 570 (1971), at 239, 570; *Husby-Thompson*, at 814 and *Bloomington Motel Investors*, at 1. (App. 20) Even in *Compass Management*, where Rule 60.02 relief was denied, petitioner paid the taxes, albeit 18 months late. As this Court stated in *Husby-Thompson*, "It is important, of course, that taxpayer procrastination not hamper tax collections and that tax delinquencies be discouraged." *Id.*, at 815. An award of Rule 60.02 relief in this case is to award delay and procrastination without any attempt to comply with Chapter 278 requirements.

**4. Reinstatement of the 2009 and 2010 petitions
substantially prejudices the County of Lake.**

The County of Lake is a party in the case before this Court, similar to the *T.S. Montgomery*, *Bloomington Hotel*, *Husby-Thompson* and *Thunderbird Motel* cases previously discussed where counties were also responding parties. The similarity ends, however, with the non-payment of the required taxes in this case.

The payable 2009 taxes are nearing 18 months overdue. The payable 2010 taxes are almost 12 months overdue on 744 parcels of real estate. This substantially prejudices the County of Lake. Marlow Timberland argues that if the petitions are reinstated and if its version of fair valuation is adopted, then Marlow Timberland "is in a much better financial situation to pay a reasonable valuation than it has been to pay the levied assessment." (Relator brief at 21) This implies that if the petitions are allowed to proceed, but if the assessments are not drastically altered, the taxes are likely to remain unpaid and the delay will continue to the detriment of Lake County.

Marlow Timberland argues that the County of Lake has the option to forfeit the property if the taxes remain unpaid. This ignores the policy implicit in Chapter 278, which promotes the prompt collection of taxes. There is nothing prompt about the process suggested by Marlow Timberland. The process is long and complex under Chapters 279 – 281. It also ignores that Marlow Timberland seeks an order reinstating the petitions without payment of the past due taxes, contrary to the established law under Chapter 278 and Rule 60.02.

Additionally, there has been no discovery conducted in this matter. Thus, Lake County is also substantially prejudiced by the potentially short time frame to proceed to hearing in Tax Court if the petitions are reinstated. Marlow Timberland has not established that Lake County is not substantially prejudiced by reinstatement of the petitions.

Marlow Timberland has not established each of the four factors required to prevail under Rule 60.02(a). If just one of the factors is not established, relief must be denied under Rule 60.02. Marlow Timberland is not entitled to reinstatement of the petitions under Rule 60.02(a).

Finally, Marlow Timberland argues in the alternative that it is entitled to relief from the Tax Court order pursuant to Rule 60.02 (f) which provides relief from the order for any other reason justifying the relief. "Clause (f) of Rule 60.02 has been designated as a residual clause, designed only to afford relief in those circumstances exclusive of the specific areas addressed by clauses (a) through (e)." *Chapman v. Special District No. 1*, 454 N.W.2d 921, 924 (Minn. 1990) Relief under Clause (F) is proper when the equities weigh heavily in favor of the party seeking relief and relief is required to avoid an unjust result. *Simon's v. Shiek's, Inc.*, 275 Minn. 132, 139, 145 N.W.2d 548, 553 (1966).

The equities do not weigh heavily in the favor of Marlow Timberland. This is an LLC in the business to acquire and dispose of land. Marlow Timberland complied with few of the requirements for Chapter 278 tax petitions. Nor has it sought reinstatement of the petitions in a timely manner. Reinstatement of the petitions is an unjust result because it nullifies the statutory scheme set forth in Chapter 278 and should not be granted.

CONCLUSION

The Tax Court acted in conformity with Minnesota law and did not commit error in dismissing the 2008 petition and denying reinstatement of the 2009 and

2010 petitions. Lake County respectfully requests that this Court affirm the Tax Court's decision.

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