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Berry & Co., Inc. v. County of Hennepin

Minnesota Tax Court

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STATE OF MINNESOTA
COUNTY OF HENNEPIN

TAX COURT
REGULAR DIVISION

Berry & Co., Inc.,

Petitioner,

v.

County of Hennepin,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT**

File Nos. 27-CV-13-07304
27-CV-14-05896
27-CV-15-07009

Filed: March 20, 2017

This matter came on for trial before the Honorable Thomas G. Haluska, Judge of the Minnesota Tax Court.

William R. Skolnick, Skolnick & Joyce, P.A., and Michael J. Mergens, Entrepartner Law Firm, PLLC, represented petitioner Berry & Co., Inc.

Thomas F. Pursell and John J. March, Assistant Hennepin County Attorneys, represented respondent Hennepin County.

These property tax cases concern the market value as of January 2, 2012, January 2, 2013, and January 2, 2014, of real property located in downtown Wayzata. We find that the assessed value of the subject property overstates its market value as of January 2, 2012, and January 2, 2013, and understates its value as of January 2, 2014.

The court, having heard and considered the evidence adduced at the hearings and the arguments of counsel, and upon all of the files, records, and proceedings herein, now makes the following:

FINDINGS OF FACT

1. Petitioner Berry & Co., Inc., has sufficient interest in the property to maintain this petition; all statutory and jurisdictional requirements have been fulfilled; and the court has jurisdiction over the subject matter of the action and the parties thereto.

2. The subject property is a single 54,632 square-foot parcel, located at 253 East Lake Street in Wayzata, Minnesota.

3. The property is rectangular, with narrow northern and southern edges. Its southern edge borders Lake Street by 107 lineal feet.

4. A 16,498 square-foot wetland covers the northwestern portion of the property. The City of Wayzata imposes an additional 20-foot-wide, 4,854 square-foot wetland buffer on the property.

5. The property has 38,134 square feet of useable land and 33,280 square feet of developable land.

6. There are three vacant structures on the property; an office building and two pole barns, none of which contribute to the property's value.

7. The property is accessible from a single curb-cut from Lake Street. The rear is accessible by a driveway that encroaches 14 feet upon the adjacent property to the east.

8. Any new construction will require soil stabilization.

9. The property is impacted by petroleum-related compounds, polycyclic aromatic hydrocarbons, and Resource Recovery and Conservation Act metals.

10. The property is located in the Lake Street Market Area (LSMA), a 1.2 mile corridor of Lake Street abutting the north shore of Wayzata Bay of Lake Minnetonka. The LSMA includes properties fronting Lake Street and those nearby influenced by Lake Street.

11. Properties located in the LSMA include office, retail, and residential. Sale prices and market rents in the area are significantly above others in the Twin Cities.

12. In 2012, the LSMA saw a revival of upper-bracket residential condominium development.

13. During the years at issue, the property was zoned C-4A, Limited Central Business District.

14. C-4A zoning limits building height to two (2) stories and thirty (30) feet. Residential use is permitted under C-4A zoning in properties fronting Lake Street so long as residential is not a "principal use."

15. Planned Unit Development (PUD) zoning may accommodate developments that do not conform to C-4A zoning requirements. PUD zoning limits building height to three (3) stories and thirty-five (35) feet.

16. In addition to C-4A zoning, the property is governed by three overlapping zoning districts: the Lake Street Design Standards; the Shoreland Overlay District; and the Wetlands Overlay District.

17. The highest and best use of the property is for redevelopment to a three-story/four-level mixed-use building that includes residential units on the upper levels.

18. The Hennepin County Assessor estimated the market value of the subject property at \$2,257,000 for assessment dates January 2, 2012, and January 2, 2013; and at \$2,206,000 for assessment date January 2, 2014.

19. Petitioner's appraiser, Darren L. Browen, MAI, valued the subject property at \$380,000 (with cleanup) or \$980,000 (without cleanup) as of January 2, 2012; at \$430,000 (with cleanup) or \$1,030,000 (without cleanup) as of January 2, 2013; and at \$490,000 (with cleanup) or \$1,090,000 (without cleanup) as of January 2, 2014.

20. The County's expert, Christopher Bennett, SAMA, valued the subject property at \$2,402,000 as of January 2, 2012; \$2,517,000 as of January 2, 2013; and \$2,936,000 as of January 2, 2014.

21. The fee-simple market value of the subject property as of January 2, 2012, was \$1,967,900.

22. The fee-simple market value of the subject property as of January 2, 2013, was \$2,080,600.

23. The fee-simple market value of the subject property as of January 2, 2014, was \$2,418,800.

CONCLUSIONS OF LAW

1. Petitioner submitted sufficient credible evidence to rebut the prima facie validity of the assessed value as of each valuation date.

2. The Hennepin County Assessor's estimated market value for the subject property as of January 2, 2012, and January 2, 2013, overstates its market value as of those dates.

3. The Hennepin County Assessor's estimated market value for the subject property as of January 2, 2014, understates its market value as of that date.

ORDER FOR JUDGMENT

1. The assessed value of the subject property as of January 2, 2012, shall be decreased from \$2,257,000 to \$1,967,900.

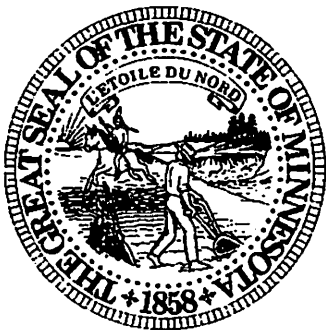
2. The assessed value of the subject property as of January 2, 2013, shall be decreased from \$2,257,000 to \$2,080,600.

3. The assessed value of the subject property as of January 2, 2014, shall be increased from \$2,206,000 to \$2,418,800.

4. Real estate taxes due and payable in 2013, 2014, and 2015 shall be recomputed accordingly and refunds, if any, paid to petitioner as required by such computations, together with interest from the original date of payment.

IT IS SO ORDERED. THIS IS A FINAL ORDER. ENTRY OF JUDGMENT IS STAYED FOR 15 DAYS. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT,



A handwritten signature in black ink, appearing to read "Thomas G. Haluska", written over a horizontal line.

Thomas G. Haluska, Judge
MINNESOTA TAX COURT

Dated: March 20, 2017

MEMORANDUM

I. PROCEDURAL HISTORY

On the parties' stipulation, we consolidated Berry's property tax petitions for taxes payable years 2013, 2014, and 2015.¹ We held a trial on the matter from July 19 through

¹ Stip. Order to Consolidate & Order (filed Jan. 26, 2016).

July 21, 2016.² At Berry's request, we reopened the record to receive additional evidence Berry submitted with its post-trial briefing.³ We then allowed the County to supplement its evidence, and held a hearing on December 2, 2016.⁴ We heard final arguments on December 20, 2016.

II. FACTS

The subject property is a single 54,632 square-foot parcel located at 253 East Lake Street in Wayzata, Minnesota.⁵ The property is rectangular, with narrow northern and southern edges.⁶ Its southern edge borders Lake Street by approximately 107 lineal feet at a slight angle.⁷ The

² Immediately before trial, Berry moved to exclude Christopher Bennett's opinions of value, arguing that Bennett is not qualified, has no practical experience, and is biased. Tr. 7; *see* Mem. Law Supp. Pet'r's Obj. Resp't's Expert Opinion & Report (filed May 2, 2016). We denied the motion. Tr. 21. Although Bennett is not a licensed appraiser, he is an assessor for Hennepin County and maintains his assessor's license. Tr. 40. As an assessor, Bennett has the power "[t]o perform appraisals of property." Minn. Stat. § 273.061, subd. 8(16) (2016). Additionally, Bennett has worked for the Hennepin County Assessor's Office since 1985, conducting both residential and commercial appraisals. Ex. A, at 91. Further, he has been the commercial appraiser for the City of Wayzata since late 2013. Tr. 42, 155. Therefore, Bennett is both legally and practically qualified to testify. *See Beck v. Cty. of Todd*, 824 N.W.2d 636, 640 (Minn. 2013) (explaining that the supreme court has "repeatedly emphasized that the most important factor for determining an expert witness's qualifications . . . is practical experience."). Finally, the issue of bias goes to the weight given to the testimony, not its admissibility. *See* Minn. R. Evid. 616 ("For the purpose of attacking the credibility of a witness, evidence of bias . . . for or against any party to the case is admissible."); *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995) ("The partiality or bias of a witness is 'always relevant as discrediting the witness and affecting the weight of his testimony.'") (citations omitted).

³ Berry submitted an affidavit of its counsel, Michael J. Mergens, in which he appended two exhibits not offered at trial. *See* Affidavit of Michael J. Mergens ¶¶ 3, 4 (filed Sept. 1, 2016), Exs. B (July 19, 2016 Wayzata City Council Meeting Minutes) & C (portion of packet referenced during July 18, 2016 Wayzata Planning Commission meeting).

⁴ *See* Suppl. Exs. A (Nov. 7, 2016 Wayzata Planning Commission's Meeting Minutes) & B (Nov. 18, 2016 Wayzata Planning Commission Report recommending approval of Meyer Place project).

⁵ Stipulation of Facts ¶ 1 (filed May 2, 2016).

⁶ Ex. 4 (Berry's Appraisal), at 9; Ex. A (County's Appraisal), at 6, 8.

⁷ Ex. 4, at 8-9.

topography declines slightly from the southern boundary to the northern boundary.⁸ A 16,498 square-foot wetland covers the northwestern portion of the property; the City of Wayzata imposes an additional 20-foot-wide, 4,854 square-foot wetland buffer on the property.⁹ In total, the property has 38,134 square feet of usable land and 33,280 square feet of developable land.¹⁰

Located on the property are three structures, all in poor condition.¹¹ Each structure is a single-story building with no basement.¹² The first is a vacant 7,811 square-foot office building constructed in 1940.¹³ The second and third structures are vacant pole buildings with a combined square footage of 3,913.¹⁴ The parties agree that the structures do not contribute to the property's value.¹⁵

The property is accessible from a single curb-cut off Lake Street. The rear is accessible by a driveway that encroaches 14 feet upon the adjacent property to the east.¹⁶ No adverse easements burden the property,¹⁷ which is serviced by all municipal utilities.¹⁸ Geotechnical studies conducted on the property in 2005 and 2014 indicate that its soils are soft and its water

⁸ Ex. 4, at 9; Ex. A, at 29.

⁹ Stip. Facts ¶ 1; Ex. A, at 6, 29.

¹⁰ Ex. A, at 6, 28-29; Ex. 4, at 9.

¹¹ Ex. 4, at 10; *see* Ex. A, at 31 (providing diagram of buildings).

¹² Ex. A, at 32.

¹³ Ex. 4, at 10.

¹⁴ Ex. 4, at 10. Although the parties disagree on both the size and age of all buildings located on the property (*compare id.*, with Ex. A, at 7), because they are not material to value, we use Berry's numbers.

¹⁵ Ex. 4, at 79; Ex. A, at 44; *see* Tr. 232.

¹⁶ Ex. 4, at 10; Ex. A, at 30.

¹⁷ Ex. 4, at 9; Ex. A, at 30.

¹⁸ Ex. A, at 30; *see also* Ex. 4, at 24 (noting property has access to utilities including municipal water, sewer, natural gas, electricity, and telephone).

table high.¹⁹ As a result, “[n]ew construction [on the subject property] will require soil stabilization.”²⁰ Moreover, the adjacent property to the east, 259 East Lake Street, once held a gas station with underground tanks.²¹ Although the tanks were removed, the subject property is “impacted by petroleum[-]related compounds,”²² polycyclic aromatic hydrocarbons (PAHs), and Resource Conservation and Recovery Act (RCRA) metals.²³

The property is located in the Lake Street Market Area (LSMA), a 1.2 mile corridor of Lake Street that abuts the north shore of Wayzata Bay of Lake Minnetonka.²⁴ The LSMA includes “properties that front on Lake Street and those nearby that are influenced by Lake Street.”²⁵ Properties located in the LSMA are a mixture of office, retail, and residential.²⁶ The sale prices and market rents of such properties are “significantly above” those in other areas of the Twin Cities,²⁷ in part due to Wayzata’s high-wealth population and its desirable location for businesses selling financial products.²⁸ In 2012, the area saw a “revival of upper[-]bracket

¹⁹ Ex. A, at 30; *id.* at 72 (citing a 2005 GME Consultants, Inc’s geotechnical report showing groundwater at less than four feet deep in five of seven borings drilled on the subject property); *id.* at 74 (citing a 2014 Northern Technologies, Inc.’s geotechnical report showing groundwater at four feet deep in a boring drilled in the center of the subject property).

²⁰ Ex. A, at 30.

²¹ Tr. 511.

²² Ex. A, at 30.

²³ Ex. A, at 62; *see* Ex. B (Liesch Report, dated July 19, 2005), at 1.

²⁴ Ex. A, at 24.

²⁵ Ex. A, at 24.

²⁶ Ex. A, at 24.

²⁷ Ex. A, at 24.

²⁸ Ex. A, at 23.

residential condominium development,” in part due to “its proximity to Lake Minnetonka and pedestrian amenities.”²⁹

During the years at issue, the property was zoned C-4A, Limited Central Business District.³⁰ Under Wayzata City Code, C-4A zoning accommodates “those retail, service, office and residential functions which are characteristic to a ‘downtown’ area . . . with emphasis on specialty shops and office uses with continuous linear low level building designs.”³¹ C-4A zoning has certain requirements for real estate located in the zone, including height and use restrictions;³² however, Planned Unit Development (PUD) zoning may be available for nonconforming developments.³³ The property is governed by three additional overlapping zoning districts: (1) the Lake Street Design Standards; (2) the Shoreland Overlay District; and (3) the Wetlands Overlay District.³⁴ Each district has additional regulations and restrictions.³⁵

The Hennepin County Assessor estimated the market value of the subject property at \$2,257,000 for assessment dates January 2, 2012 and January 2, 2013; and \$2,206,000 for assessment date January 2, 2014.³⁶ Berry’s expert appraiser, Darren L. Browen, MAI, offered two opinions of value. If the property does not require cleanup, Browen valued the subject property at \$980,000 for the 2012 valuation date; \$1,030,000 for the 2013 date; and \$1,090,000

²⁹ Ex. A, at 23; *see id.* at 26 (providing chart of six “Residential Condominium Developments” in the LSMA since 2012).

³⁰ Ex. 4, at 9; Ex. A, at 6.

³¹ Ex. Z (Wayzata, Minn., Zoning Ordinance, ch. 801 (2013)) [hereinafter Code § 801], at 79-1 (citing Code § 801.79.1); *see* Ex. A, at 34.

³² *See generally* Ex. Z, at 79-1 through 79-8 (citing Code § 801.79).

³³ Ex. A, at 35.

³⁴ Ex. A, at 35.

³⁵ *See* Ex. Z, at 9-1, 91-1, 92-1 (citing Code §§ 801.09, 801.91, 801.92); *see* Ex. A, at 35.

³⁶ Stip. Facts ¶ 2.

for the 2014 date.³⁷ If, on the other hand, the property contains hazardous conditions requiring cleanup, Brown valued the subject property at \$380,000 for the 2012 valuation date; \$430,000 for the 2013 valuation date; and \$490,000 for the 2014 valuation date.³⁸ The County's expert, Christopher Bennett, SAMA,³⁹ valued the subject property at \$2,402,000 as the 2012 valuation date; \$2,517,000 as of the 2013 valuation date; and \$2,936,000 as of the 2014 valuation date.⁴⁰

III. BURDEN OF PROOF

An assessor's estimated market value is prima facie valid.⁴¹ A petitioner may overcome the presumption of validity by introducing evidence that the assessor's estimated market value is excessive.⁴² We conclude that Berry presented sufficient evidence to rebut the presumption, and the County agrees.⁴³ When the prima facie validity is overcome, we determine market value based upon a preponderance of the evidence.⁴⁴

³⁷ Ex. 4, at 3.

³⁸ Ex. 4, at 3. Brown refers to the contamination as "hazardous," however, he clarified at trial that he is not referring to a statutory definition of "hazardous waste." Tr. 269-70; see Minn. Stat. § 116.06, subd. 11 (2016) (defining hazardous waste). Rather, he refers to "something that someone that owns the property is going to eventually have to deal with, meaning, it's going to cost you something to correct it at some point in time." Tr. 269.

³⁹ Bennett is a licensed assessor, but not a licensed appraiser. Tr. 40.

⁴⁰ Ex. A, at 2.

⁴¹ *S. Minn. Beet Sugar Coop v. Cty. of Renville*, 737 N.W.2d 545, 557 (Minn. 2007) (citing Minn. Stat. §§ 271.06, subd. 6, 272.06 (2016)).

⁴² *SMBSC*, 737 N.W.2d at 558.

⁴³ Resp't's Proposed Findings of Fact ¶ 14 (filed May 9, 2016) (proposing that "[p]etitioner overcame (and Respondent did not defend) the presumption of correctness of the assessments for the relevant years").

⁴⁴ See *Red Owl Stores, Inc. v. Comm'r of Taxation*, 264 Minn. 1, 8, 117 N.W.2d 401, 406-07 (1962).

IV. HIGHEST AND BEST USE

A property's highest and best use is "[t]he reasonably probable use of property that results in the highest value."⁴⁵ To be reasonably probable, a use must be physically possible, legally permissible, and financially feasible.⁴⁶ Uses that satisfy these three criteria are then tested "for economic *productivity*, and the reasonably probable use with the highest value is the highest and best use."⁴⁷

Highest and best use analysis is undertaken "from two perspectives: [(1)] the use of a property based on the assumption that the parcel of land is vacant or can be made vacant by demolishing any improvements[; and (2)] the use that should be made of a property as it exists (i.e., considering the current improvements)."⁴⁸ Here, the parties agree the current improvements provide no additional value;⁴⁹ but disagree how the property would most likely be developed.

The County's expert, Christopher Bennett, concludes that "[t]he highest and best use of the subject property is redevelopment with the existing improvements completely razed and replaced with a new mixed[-]use development that is primarily residential condominium units."⁵⁰ He proposes a three-story/four-level building, with 50 percent retail and 50 percent

⁴⁵ Appraisal Institute, *Appraisal of Real Estate* 332 (14th ed. 2013).

⁴⁶ *Id.* at 332.

⁴⁷ *Id.* at 332.

⁴⁸ *Id.* at 336.

⁴⁹ Ex. A, at 44; Ex. 4, at 79.

⁵⁰ Ex. A, at 45; Tr. 67-68. Before concluding that the primary use of the property would be residential, Bennett suggested that "[t]he highest and best use for the subject property for all three appraisal dates is a [three-]story/[four-]level mixed use development that combines either office or residential condominiums with the required ground level retail/service commercial square footage." Ex. A, at 40.

enclosed parking on the ground level.⁵¹ The project's ground floor would be 3.5 feet below grade, meaning both the retail portion and enclosed parking would be partially below grade.⁵² To comply with Wayzata City Code, Bennett's proposed project requires, at a minimum,⁵³ PUD rezoning or a PUD variance for height above two stories and 30 feet.⁵⁴ In other words, Bennett's project assumes there is a reasonable probability that the City would grant the necessary rezoning or variance for his proposal.⁵⁵

Berry's expert appraiser, Darren Browen, concludes that the "maximally productive use of the subject land would be to hold it until an office use is financially feasible (i.e. it is either 50 [percent] pre-leased or an owner-user is identified)." ⁵⁶ Significantly, Browen agrees that a residential condominium development would result in the highest return; however, he opines that residential use should not be considered because it does not comply with current zoning and is therefore not legally permissible.⁵⁷

⁵¹ Ex. A, at 38, 40; Tr. 70, 74; *see* Ex. 22 (rendering of Bennett's proposed development). Bennett refers to the 50 percent retail component as "retail/service commercial." Ex. A, at 38. We shorten the reference to "retail" for our purposes, but note that either option is permissible under Wayzata City Code. *See* Ex. Z, at 79-7, 79-8 (citing Code § 801.79.6.C).

⁵² Tr. 79; *see* Ex. A, at 30 (noting that the "water table is high which limits the construction of below grade improvements to a partial story").

⁵³ Even if rezoning were granted, Berry asserts that Bennett's project would nevertheless exceed the PUD height limitations, requiring an additional height variance. Pet'r's Final Arg. 12 (filed Sept. 1, 2016).

⁵⁴ Ex. A, at 38; Tr. 240.

⁵⁵ *See Berry & Co., Inc. v. Cty. of Hennepin*, 806 N.W.2d 31, 35 (Minn. 2011) ("[T]he tax court may consider '[e]vidence of value for uses prohibited by an ordinance when there is 'evidence showing a reasonable probability' that a [PUD] allowing for deviation from existing zoning requirements would be granted in the 'near future.' " (quoting *Hedberg & Sons Co. v. Cty. of Hennepin*, 305 Minn. 80, 92, 232 N.W.2d 743, 750 (1975))).

⁵⁶ Ex. 4, at 79.

⁵⁷ Tr. 303.

A. Legally Permissible

Generally, “legally permissible uses would conform to the land’s current zoning classification.”⁵⁸ When valuing property, however, “[the court] may also consider uses that would be permitted if the property’s zoning were changed[;] if there was a reasonable probability on the assessment date that the existing zoning ordinance would be changed in the near future.”⁵⁹ The question of whether a prospective buyer would pay more for the subject property than justified by its current zoning, “in the belief that its zoning could be changed to permit a more valuable use,” is a question of fact.⁶⁰ “Evidence relevant to the probability of rezoning includes zoning trends, the history of rezoning in the area, documents such as the community’s comprehensive plan, and interviews with planning and zoning officials.”⁶¹ We consider the Wayzata City Code, PUD application histories on the subject property and in the LSMA, and testimony from the Wayzata City Planner to determine whether “there was a reasonable probability” of PUD rezoning as of the assessment dates.

⁵⁸ *Westridge Mall Ltd. P’ship v. Cty. of Otter Tail*, Nos. 56-CV-10-1119 et al., 2014 WL 1224971, at *3 (Minn. T.C. Mar. 20, 2014) (quoting *Appraisal of Real Estate* 334) (emphasis omitted).

⁵⁹ *Duke Realty Corp. v. Cty. of Hennepin*, Nos. 27-CV-09-12170 et al., 2013 WL 5629584, at *4 (Minn. T.C. Oct. 13, 2013). When a potential purchaser is “willing to pay more than an amount justified by the uses permitted under existing zoning because of a general belief that there is a *probability* of a change in zoning, to permit a more valuable use within the reasonably foreseeable future,” evidence reflecting that possibility is admissible “because it does reflect a factor in the present fair market value under existing zoning.” *Hedberg*, 305 Minn. at 92, 232 N.W.2d at 751 (quoting *Masheter v. Ohio Holding Co.*, 38 Ohio App. 2d 49, 55, 313 N.E.2d 413, 418 (1973)) (emphasis added).

⁶⁰ *Duke Realty*, 2013 WL 5629584, at *5.

⁶¹ *Ford Motor Co. v. Cty. of Ramsey*, Nos. C5-07-4696 et al., 2014 WL 3888226, at *18 (Minn. T.C. Aug. 5, 2014) (citing *Appraisal of Real Estate* 339; *SPX Corp. v. Cty. of Steele*, No. C1-00-350, 2003 WL 21729580, at *4 (Minn. T.C. July 23, 2003)).

a. Wayzata City Code

Under Wayzata City Code § 801.79, the C-4A Limited Central Business District, “is intended to provide a district accommodating those retail, service, office and residential functions which are characteristic to a ‘downtown’ area and to allow the present downtown area to expand, develop and redevelop, with emphasis on specialty shops and office uses.”⁶² “No building [in the Limited Central Business District] shall . . . exceed two (2) stories and thirty (30) feet in height, whichever is lesser,”⁶³ and the “maximum floor area ratio (F.A.R.) shall be 2.0.”⁶⁴ “All new buildings along Lake Street with a building footprint of 4,000 square feet or more must be developed with more than one of the following uses: retail, service, residential and office. Upper floors may be used for any permitted use *including* residential.”⁶⁵ However, should the development “front or border Lake Street,” residential use “as a principal use” is not permitted.⁶⁶

Should a proposed development deviate from these standards, the City of Wayzata allows a property owner to apply for a PUD, which functions as a conditional use permit or actual zoning district.⁶⁷ Wayzata City Code § 801.33, Planned Unit Development, allows “greater flexibility in the development of neighborhoods and/or non-residential areas by incorporating

⁶² Ex. Z, at 79-1 (citing Code § 801.79.1).

⁶³ Ex. Z, at 79-8 (citing Code § 801.79.7.A).

⁶⁴ Ex. Z, at 79-8 (citing Code § 801.79.7.C).

⁶⁵ Ex. Z, at 79-8 (citing Code § 801.79.6.D) (emphasis added); *see* Tr: 569.

⁶⁶ Ex. Z, at 79-4 (citing Code § 801.79.5.E.1). Residential properties in the C-4A District are subject to R-5 District density requirements, Ex. Z, at 79-4 (citing Code § 801.79.5.E.3), which provide “[l]ot coverage shall not exceed thirty (30) percent of the lot area,” and “[t]he maximum floor area ratio (F.A.R.) shall be 0.7,” *id.* at 59-4 (citing Code §§ 801.59.8.A & B).

⁶⁷ Ex. Z, at 33-1 (citing Code § 801.33); Tr. 568 (Thomson testifying that a PUD zoning district “is a separate zoning to which a property could be zoned.”).

design modifications as part of a PUD conditional use permit”⁶⁸ Essentially, PUD zoning allows design and use deviation from strict zoning provisions.⁶⁹ The PUD process is meant to encourage “innovations in development [so] that the growing demands for all styles of economic expansion may be met by greater variety in type, design, and placement of structures.”⁷⁰ As part of its review process, the City Council “shall evaluate the effects of the proposed project upon the health, safety and welfare of residents of the community.”⁷¹

Wayzata City Code § 801.33, provides, in pertinent part, “[t]he maximum building height within a PUD District shall be thirty five (35) feet and three (3) stories, whichever is lesser.”⁷² “There shall be no deviation from the height standards applied within the applicable zoning districts for PUD conditional use permits.”⁷³ If the site “were zoned commercial prior to PUD and exceed[s] 13 acres, the maximum allowable height shall be as negotiated and agreed upon between the applicant and the City.”⁷⁴ Last, a “maximum allowable density in a PUD District

⁶⁸ Ex. Z, at 33-1 (citing Code § 801.33.1).

⁶⁹ Ex. A, at 35; *see, e.g., Berry & Co., Inc. v. Cty. of Hennepin*, Nos. 27-CV-08-09471 & 27-CV-09-11172, 2010 WL 5463852, at *2 (Minn. T.C. Dec. 28, 2010), *aff’d*, 806 N.W.2d 31 (Minn. 2011) (noting that the city approved a PUD allowing the subject property to deviate from height zoning requirements); *see also Variance*, Appraisal Institute, *Dictionary of Real Estate Appraisal* (5th ed. 2010) (“In zoning, permission from the responsible agency for a specified violation of a code or ordinance.”); *Zoning Variance*, *Dictionary of Real Estate Appraisal* (“A legally authorized modification in the use of property at a particular location that does not conform to the regulated use set forth in the zoning ordinance for the surrounding area.”).

⁷⁰ Ex. Z, at 33-1 (citing Code § 801.33.1.A.).

⁷¹ Ex. Z, at 33-2 (citing Code § 801.33.2.A.1).

⁷² Ex. Z, at 33-5 (citing Code § 801.33.2.A.14.a).

⁷³ Ex. Z, at 33-5 (citing Code § 801.33.2.A.14.b).

⁷⁴ Ex. Z, at 33-5 (citing Code § 801.33.2.A.14.c).

shall be determined by standards negotiated and agreed upon between the applicant and the City.”⁷⁵

b. PUD Application History

When “investigating the reasonable probability of a zoning change, an appraiser considers zoning trends and the history of rezoning requests in the market area.”⁷⁶ We review a summary of recent PUD applications for development of the subject property and in the LSMA, and the City’s reasons for approval or denial.

i. Subject Property

In September 2005, the City approved PUD zoning and a conditional use permit for a combined project of both the subject property and the neighboring site, 259 East Lake Street.⁷⁷ The PUD zoning allowed three structures on the two properties: two three-level mixed-use buildings (one on 253 and one on 259) and a four-level parking structure.⁷⁸ Both mixed-use buildings would contain 100 percent retail space on the first floor, 100 percent office space on the second floor, and a mix of office and residential use on the third floor.⁷⁹ The conditional-use permit for building height required an additional one foot building setback for every one foot of

⁷⁵ Ex. Z, at 33-4 (citing Code § 801.33.2.A.8.a).

⁷⁶ *Appraisal of Real Estate* 339.

⁷⁷ Ex. 14 (Resolution No. 2894: Resolution Approving a General Plan for a Planned Unit Development, Conditional Use Permit, and Project Design at 253 and 259 East Lake Street).

Berry has owned the subject property since the late 1990’s. Ex. 4, at 23. In turn, real estate developer Brad Hoyt owns Berry. *Id*; see Tr. 530. Although Berry owns the subject property, Continental Development Corporation and Boatworks Development Company submitted the 2005 PUD application. Ex. 14, at § 1.1. Flagship Bank, in conjunction with Cambridge Bank, owns 259 East Lake Street. Tr. 500.

⁷⁸ Ex. 14, at § 1.1.

⁷⁹ Ex. 14, at § 1.1.

building height above 35 feet.⁸⁰ Moreover, the PUD limited building height to 38 feet, excepting an additional five feet for elevator penthouses.⁸¹ Despite the City's approval, the property owners never developed the project and the PUD expired.⁸²

In 2014, Continental Property Group (CPG), the management company for the subject property, presented the City with a second proposal encompassing both 253 and 259 East Lake Street.⁸³ This time, the City did not approve the proposed project.⁸⁴ The proposal entailed a five-story mixed-use building, 61 feet in height, ground floor retail space, 148 luxury rental housing units on the upper levels, and 300 parking spaces.⁸⁵ Despite the properties' high water tables, the proposal also included below grade or "subterranean" parking.⁸⁶ The project required both PUD zoning and a variance from PUD zoning height limits.⁸⁷ The City denied CPG's application because "the proposed PUD would have a negative effect on the health, safety and welfare of residents of the community and the surrounding area in that [the project] would

⁸⁰ Ex. 14, at § 3.4.B. The design standards for the 253 building also required the third story to be setback 12.5 feet from Lake Street. *Id.* at § 3.6E.

⁸¹ Ex. 14, at § 4.1.1; Tr. 181.

⁸² During a December 2014 Wayzata Planning Commission hearing, Michael Mergens, counsel for Berry and Continental Property Group, indicated that the 2005 project proposal was, "at the end, a project that turned out to be not feasible." Ex. 27 (transcript from Dec. 1, 2014 Wayzata Planning Commission hearing), at 27-28.

⁸³ Ex. F (Wayzata City Council Planning Report, dated Dec. 16, 2014), at § 1.1; *id.* Attach. A-1 (2014 PUD Application and Written Statement in Support of PUD Application). Berry's owner, Brad Hoyt, owns part of CPG. Tr. 530; Ex. 4, at 23.

⁸⁴ *See* Ex. 27, at 96-97; Tr. 522; *see also* Ex. 24 (*Cont'l Prop. Grp. LLC v. City of Wayzata*, No. A15-1550, 2016 WL 1551693, at *3, 6 (Minn. App. Apr. 18, 2016)) (affirming City's denial of PUD application and height variance request).

⁸⁵ Ex. F, at § 1.

⁸⁶ Ex. F, Attach. A-1, at 15; *id.* Attach. A-2 (rendering of proposed project showing underground parking), at 12.

⁸⁷ *See* Ex. F.

negatively impact the views, noise levels, traffic flows and parking.”⁸⁸ The City further found, “the height, scale, design and aesthetics of the [project] do not reflect the ‘small town’ character and aesthetics of Wayzata.”⁸⁹ Additionally, the proposed density and height requirements were well above the applicable limits.⁹⁰ For example, the project required a variance from Wayzata City Code § 801.33.2.A.14 (building height limits), from 35 feet and three stories to 61 feet and five stories.⁹¹

On appeal, the court of appeals affirmed the City’s denial of the PUD application’s concept plan and height variance.⁹² Specifically, the court concluded that the City’s decision to deny the concept plan was neither arbitrary nor capricious because the City had a rational basis for its denial.⁹³ Likewise, the City’s denial of the height variance was neither arbitrary nor capricious because the city had a factual basis for denying the variance and CPG did not establish practical difficulties in complying with the City Code.⁹⁴

⁸⁸ Ex. F, Attach. D (Wayzata Planning Commission Report, dated Dec. 15, 2014), at § 3.1.B.1.

⁸⁹ Ex. F, Attach. D, at § 3.1.B.1.

⁹⁰ Ex. F, Attach. D, at § 3.1.B.3 & .4.

⁹¹ Ex. F, at § 2.1.B; Ex. Z, at 33-5.

⁹² Ex. 24 (*Cont’l Prop. Grp.*, 2016 WL 1551693, at *3, 6).

⁹³ Ex. 24 (*Cont’l Prop. Grp.*, 2016 WL 1551693, at *1, 3) (“A city’s denial of a zoning request ‘is not arbitrary when at least one of the reasons given for the denial satisfies the rational basis test.’”) (quoting *St. Croix Dev. Inc. v. City of Apple Valley*, 446 N.W.2d 392, 398 (Minn. App. 1989)); see also *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1998) (noting that a rational basis review focuses “on the legal sufficiency of and factual basis for the reasons given”).

⁹⁴ Ex. 24 (*Cont’l Prop. Grp.*, 2016 WL 1551693, at *4-6) (citing *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983) (noting that the court “examine[s] the municipality’s action to ascertain whether it was arbitrary and capricious . . . or whether the reasons given by the governing body were legally sufficient and had a factual basis.”)); *id.* at *4 (“To receive a grant of a variance, an applicant must establish practical difficulties in complying with the zoning ordinance.”) (citing Minn. Stat. § 462.357, subd. 6(2) (2016)).

ii. **Lake Street Market Area (LSMA)**

We turn to PUDs recently granted in the LSMA. Attached to the County's appraisal in this case was a summary of recent PUDs granted in the LSMA approving deviation from the City Code's height restrictions. Bennett's summary lists nine approved projects between 2004 and 2015, including their maximum height limits before and after approval.⁹⁵ In five of the nine projects, the City approved building heights above 35 feet; in four of the nine, the City approved an increase in the number of stories.⁹⁶ Although PUD zoning provides that "[t]here shall be no deviation from the height standards" unless the property seeking rezoning exceeds 13 acres,⁹⁷ two of the nine were granted height maximums above 35 feet, even though the properties did not exceed 13 acres.⁹⁸ Based on his research, Bennett concluded that "approval of a [three-story/four-level] project is a reasonably probable use for the subject property."⁹⁹

In addition to height deviations, the County provided a brief analysis of the increase in residential real estate in the LSMA. Bennett testified that the market has, since mid- to late 2012, experienced a boom in "upper bracket residential condominium[s]."¹⁰⁰ To demonstrate this, Bennett appended a timeline of residential condominium proposals in the LSMA between

⁹⁵ Ex. A, at 71 (Addenda – Exhibit D). One project proposed, the 2005 PUD application on the subject property, was located in the C-4A District. Ex. A, at 71.

⁹⁶ Ex. A, at 71; Tr. 306.

⁹⁷ Ex. Z, at 33-5 (citing Code § 801.33.2.A.14.b); see Tr. 96.

⁹⁸ See, e.g., Ex. A, at 71 (citing Garrison Landing project and 2005 PUD approval on the subject property).

⁹⁹ Ex. A, at 38.

¹⁰⁰ Ex. A, at 58, 89.

2008 and 2015.¹⁰¹ The timeline shows at least six proposals for residential condominiums, four already approved by the City and two currently seeking approval.¹⁰²

We also heard the testimony of James Waldo, CFO and “operations person” at Ron Clark Construction.¹⁰³ Ron Clark developed the WayPoint I project, one of the aforementioned projects approved by the City, and has proposed the WayPoint II project.¹⁰⁴ Waldo indicated that the construction company had “received concept approval from the City” for WayPoint II and was “submitting for PUD.”¹⁰⁵ The proposed project is mixed-use, with office space on the first level as required by zoning ordinance and residential units above.¹⁰⁶ He also testified that, although Ron Clark initially sought a 38-foot height allowance for WayPoint II; the concept approval from the City instructed Clark to reduce the height by two feet, to 36 feet.¹⁰⁷

c. Thomson Testimony

In addition to historical PUD applications for the subject property and elsewhere in the LSMA, our record includes testimony from Jeff Thomson regarding the reasonable probability that Bennett’s highest and best use proposal would obtain PUD rezoning and/or a variance. Thomson has been the Director of Planning and Building for the City of Wayzata since October 2015.¹⁰⁸ Prior to that, he worked in city planning for the City of Minnetonka for nine-and-a-half

¹⁰¹ Ex. A, at 89 (Addenda – Exhibit M).

¹⁰² Ex. A, at 89 (showing that the Regatta, WayPoint I, Garrison Landing, and The Landings projects were approved); *see id.* at 26.

¹⁰³ Tr. 325.

¹⁰⁴ Ex. A, at 89 & 90 (Addenda – Exhibit N).

¹⁰⁵ Tr. 328.

¹⁰⁶ Tr. 328-29.

¹⁰⁷ Tr. 328. The WayPoint II project will be developed on land currently zoned C-1 Office and Limited Commercial. *See* Ex. A, at 36 (providing Wayzata Zoning Map).

¹⁰⁸ Tr. 565.

years.¹⁰⁹ Thomson testified that he is familiar with the subject property, the adjoining areas and development, as well as the respective zoning.¹¹⁰ He notes that although the property is currently zoned C-4A, “PUD is a potential zoning district for the property.”¹¹¹

Corroborated by Wayzata City Code § 801.79, Thomson testified that residential use is a permitted use under C-4A zoning.¹¹² Properties that front Lake Street may have residential uses, but only on the upper floors.¹¹³ According to Thomson, the City has allowed “primarily residential” buildings on Lake Street, including The Regatta (County’s Comparable 4),¹¹⁴ and height variances in the LSMA, including the Garrison Landing project (County’s Comparable 1).¹¹⁵ Additionally, Thomson testified PUD zoning allows for an exposed basement up to 6 feet without considering it a story.¹¹⁶ Thus, Thomson testified, Bennett’s proposal for a three-story/four-level structure is entirely possible:¹¹⁷ “[B]ased on other projects that have been approved in the area, and based on what’s been approved previously on this property, I do believe it’s reasonable that a PUD with a three-story building could be approved on this property.”¹¹⁸

¹⁰⁹ Tr. 565.

¹¹⁰ Tr. 566.

¹¹¹ Tr. 568.

¹¹² Tr. 568; *see* Ex. Z, at 79-4 (citing Code § 801.79.5.E).

¹¹³ Tr. 569; *see* Ex. Z, at 79-8 (citing Code § 801.79.6.D). Notably, Thomson cited Code § 801.79.6.D, which references “floors,” indicating multiple upper floors may be residential. Tr. 569.

¹¹⁴ Tr. 574; Ex. A, at 53. Thomson defines “primarily residential” in this context as “more than half” residential. Tr. 574.

¹¹⁵ Tr. 575; Ex. A, at 71.

¹¹⁶ Tr. 574.

¹¹⁷ Tr. 574.

¹¹⁸ Tr. 576.

Berry sought to undermine Thomson's credibility by introducing evidence that two days prior to Thomson's testimony at trial, the City Council and Planning Commission denied a PUD application for the Meyer Place project, a mere .4 feet above the PUD height limit.¹¹⁹ With its post-trial briefing, Berry submitted the meeting minutes from the Wayzata City Council's July 19, 2016 meeting and a portion of the packet referenced during the July 18, 2016 Wayzata Planning Commission meeting.¹²⁰ The exhibits reference the proposed Meyer Place project in C-4A District, which sought both PUD zoning and a variance from PUD height requirements.¹²¹ The exhibits show both the City Council and Planning Commission denied the Meyer Place application at their respective meetings, at which Thomson was present.¹²² Despite the County's objections,¹²³ we admitted Berry's additional evidence as it related to Thomson's credibility, specifically his testimony on the subject property's highest and best use.¹²⁴

At the County's request we held a hearing on December 2, 2016, during which we heard additional testimony from Thomson regarding a revised proposal for the Meyer Place project. According to Thomson, during a November 7, 2016 meeting, the Wayzata Planning Commission

¹¹⁹ Mergens Aff. Exs. B (July 19, 2016 Wayzata City Council Meeting Minutes), C (portion of packet referenced during July 18, 2016 Wayzata Planning Commission meeting). The Meyer Place project site is 105 East Lake Street in the LSMA. *Id.* at 2. Although we accepted testimony and documentation regarding the Meyer Place project, our immediate task is to determine the market value of the subject property as of the 2012, 2013, and 2014 assessment dates, not 2016. We accept evidence on the Meyer Place project as it relates only to the credibility of Thomson, not as it relates to the reasonable probability of the County's proposed highest and best use.

¹²⁰ Mergens Aff. ¶¶ 3, 4, Exs. B, C.

¹²¹ Mergens Aff. Ex. B, at 4; *id.* Ex. C, at 2.

¹²² Mergens Aff. Ex. B, at 5; *id.* Ex. C, at 2-3.

¹²³ *See* Resp't's Obj. Post-Trial Evid. & Untimely Filing 1 (filed Sept. 22, 2016).

¹²⁴ Tr. 565, 576; Tr. 14 (Oct. 25, 2016) (noting "that the highest and best use is the central part of this case," and "that the probability of a variance is a central issue to the determination of highest and best use").

asked City staff to draft a report recommending approval for PUD rezoning, including a 35-foot height.¹²⁵ We also accepted two supplemental exhibits from the County; the November 7 meeting minutes and the written report recommending approval.¹²⁶ Thomson testified that during a November 21 meeting, the Commission agreed to table the proposal until all Commission members were present to vote.¹²⁷

We find Thomson's testimony credible. Though the City initially denied the Meyer Place proposal, it denied the application for many reasons, as noted in the July 19 City Council meeting minutes, including density, height, additional setbacks, building recession from second to third floor, and ground level expression.¹²⁸ Moreover, the City eventually accepted a revised proposal approving PUD zoning.

d. Conclusion

Based on the subject property's PUD history, activity in the LSMA during the assessment years, and Thomson's testimony, we find there is a "reasonable probability" the City would approve PUD rezoning and, if necessary, a height variance in the near future for the County's proposed highest and best use.¹²⁹ Although the City Code restricts height limitation to two stories and 30 feet in C-4A zoning,¹³⁰ PUD zoning specifically allows for deviation from strict

¹²⁵ Tr. 8, 15 (Dec. 2, 2016).

¹²⁶ Suppl. Ex. A (Nov. 7, 2016 Wayzata Planning Commission Meeting Minutes), at 8; Suppl. Ex. B (Nov. 18; 2016 Planning Commission report recommending approval of Meyer Place project), at 9.

¹²⁷ Tr. 8 (Dec. 2, 2016).

¹²⁸ Mergens Aff. Ex. B, at 4-5.

¹²⁹ See *Duke Realty*, 2013 WL 5629584, at *4.

¹³⁰ Ex. Z, at 79-8 (citing Code § 801.79.7.A).

zoning provisions, including limitations on height and density.¹³¹ In particular, PUD zoning allows building height up to three stories and 35 feet, and allows the applicant and the City to negotiate density levels.¹³²

Between 2004 and 2015, the City granted nine height variances, whether in total feet or stories.¹³³ Recently, the City Planning Commission recommended approval on the WayPoint II project, which changes zoning to PUD and approves an additional one foot above the 35-foot height-limit.¹³⁴ Further, the City previously granted PUD zoning and a conditional use permit on the subject property for a project in conjunction with 259 East Lake Street.¹³⁵ That PUD allowed a 38-foot height-limit, including five additional feet to accommodate elevator penthouses.¹³⁶

Berry asserts the Minnesota Court of Appeals has already ruled “that the Subject Property did not qualify for a variance.”¹³⁷ However, that decision merely affirms the City’s denial as neither arbitrary nor capricious; it does not decide *per se* that the property is ineligible for a variance.¹³⁸ Moreover, the project at issue in that case was a five-story/six-level building, 61 feet high, with 148 luxury rental housing units.¹³⁹ In contrast, Bennett proposes a three-story/four-level building with approximately 14 condominium units.¹⁴⁰ Indeed, Berry’s

¹³¹ See generally Ex. Z, at 33-1 (citing Code § 801.33); compare Ex. Z, at 33-4, 33-5, with *id.* at 79-3, 79-8.

¹³² Ex. Z, at 33-5; *id.* at 33-4.

¹³³ Ex. A, at 71.

¹³⁴ Tr. 328.

¹³⁵ Ex. 14.

¹³⁶ Ex. 14, at § 4.1.1.

¹³⁷ Pet’r’s Final Arg. 20-21 (citing Ex. 24 (*Cont’l Prop. Grp.*, 2016 WL 1551693)).

¹³⁸ See Ex. 24 (*Cont’l Prop. Grp.*, 2016 WL 1551693, at *6).

¹³⁹ Ex. F, at § 1.

¹⁴⁰ Ex. A, at 41, 45; Ex. 22; Tr. 112.

own expert believes it is “reasonably likely [Bennett’s proposal would] get the building height approval.”¹⁴¹

Regarding residential use, Wayzata City Code allows residential use on the upper levels of properties fronting Lake Street.¹⁴² Between 2008 and 2015, the City approved at least six development proposals incorporating residential use in the LSMA, four of which were already approved or complete as of the trial date.¹⁴³ This “revival of upper bracket residential condominium development”¹⁴⁴ further supports the probability of PUD rezoning on the subject property.

Berry argues that under Wayzata City Code § 801.79.5.E, buildings that front Lake Street cannot have residential use as a “principal use.”¹⁴⁵ According to Bennett, “principal use” means 100 percent residential use, as opposed to a majority.¹⁴⁶ Under his interpretation, properties fronting Lake Street in the C-4A District may have residential use so long as it is not 100 percent of the property. Although we disagree with Bennett’s interpretation,¹⁴⁷ PUD approval negates this “principal use” problem because PUD zoning, Code § 801.33, is not limited by the same use restriction.¹⁴⁸

¹⁴¹ Tr. 316.

¹⁴² Ex. Z, at 79-8 (citing Code § 801.79.6.D); Tr. 569.

¹⁴³ Ex. A, at 89.

¹⁴⁴ Ex. A, at 23; *see also id.* at 26 (providing chart of six “Residential Condominium Developments” in the LSMA since 2012).

¹⁴⁵ Pet’r’s Final Arg. 9; *see* Ex. Z, at 79-4.

¹⁴⁶ Tr. 65.

¹⁴⁷ “Principal” means chief, primary, or most important. *Black’s Law Dictionary* 1384 (10th ed. 2014).

¹⁴⁸ *See generally* Ex. Z, at 33-1 (citing Code § 801.33).

Because we find there is a “reasonable probability”¹⁴⁹ the City would approve PUD rezoning, we find the County’s proposed highest and best use, a three-story/four-level mixed-use building with residential units on the upper levels, legally permissible. Berry’s proposed redevelopment, a two-story office building with 50 percent retail space on the ground floor, is likewise legally permissible.¹⁵⁰

B. Physically Possible

Having concluded that both proposals are legally permissible, we examine whether each proposal is physically possible.¹⁵¹ Berry criticizes Bennett’s proposal as physically impossible given the property’s high water line. The record shows that groundwater on the subject property reaches as high as four feet below-grade at some points.¹⁵² However, Bennett’s proposal is only 3.5 feet below grade.¹⁵³ Further, CPG, sharing common ownership with Berry, proposed below-grade parking in its 2014 PUD application on the subject property,¹⁵⁴ discrediting Berry’s argument that any below-grade parking is impossible. On the evidence presented, we find the County’s proposal physically possible.¹⁵⁵ We also find Berry’s proposed project physically possible.¹⁵⁶

¹⁴⁹ See *Appraisal of Real Estate* 332.

¹⁵⁰ Ex. 4, at 79, 98; see Ex. Z, at 79-8 (citing Code § 801.79.7.A). The County did not contest whether Berry’s proposed project was legally permissible.

¹⁵¹ *Appraisal of Real Estate* 332.

¹⁵² Ex. A, at 74.

¹⁵³ Tr. 79; Ex. A at 38.

¹⁵⁴ Ex. F, Attach. A-1, at 15; *id.* Attach. A-2, at 12. Berry’s owner, Brad Hoyt, also owns part of CPG. Ex. 4, at 23; Tr. 530.

¹⁵⁵ We base our conclusion on the County’s project on the general proposal that a three-story/four-level building with a partially below-grade level is physically possible. As discussed in Section V.A.d., we take issue with certain measurements proposed by Bennett.

¹⁵⁶ The County did not contest whether Berry’s proposed project was physically possible.

C. Conclusion

Although we find both parties' highest and best use legally permissible and physically possible, Berry's own expert testified at trial that developing a residential property would make the property more valuable.¹⁵⁷ Based on this testimony, the reasonable probability that the City would approve PUD rezoning in the near future, and because the County's proposal is physically possible, we adopt the County's highest and best use of the subject property; for redevelopment to a three-story/four-level mixed-use building that includes residential units on the upper levels.¹⁵⁸

V. VALUATION

Minnesota law requires that all real property be valued at its market value.¹⁵⁹ Market value means "the price for which property would sell upon the market at private sale."¹⁶⁰ In determining market value, the court recognizes three basic approaches:

(1) the market comparison approach, which is based on prices paid in actual market transactions involving comparable properties; (2) the cost approach, which is founded on the proposition that an informed buyer would pay no more for the property than the cost of constructing new property having the same utility as the subject property; and (3) the income approach, which is predicated on the capitalization of the income the property is expected to generate.¹⁶¹

The three valuation approaches "are suggested but are neither exclusive nor mandatory upon either the assessor or the factfinding court."¹⁶² Additionally:

¹⁵⁷ Tr. 303.

¹⁵⁸ Ex. A, at 40, 45.

¹⁵⁹ Minn. Stat. § 273.11, subd. 1 (2016).

¹⁶⁰ *Equitable Life Assur. Soc'y of U.S. v. Cty. of Ramsey*, 530 N.W.2d 544, 555 (Minn. 1995) (citations omitted).

¹⁶¹ *Id.* at 552 (citations omitted).

¹⁶² *Id.* at 554 (citations omitted).

Whenever possible, appraisers should apply at least two approaches to market value because the alternative value indications derived can serve as useful checks on each other. In a given valuation assignment, more than one approach to value is usually appropriate and necessary. A final determination of value, however, may require that one approach be given greater emphasis in making a final value estimate. The appraiser's judgment and experience, and the quantity and quality of data available, may determine which approach or approaches are used and what weight each deserves.¹⁶³

The priority and extent of reliance on the various approaches depends on the facts of each case.¹⁶⁴ Minnesota law requires each assessor "to consider and give due weight to every element and factor affecting the market value" of real property for the purpose of taxation;¹⁶⁵ however, "the term 'due weight' implies that every element and factor deserves only so much weight as is appropriate to the valuation problem at issue."¹⁶⁶ "[A]lthough the circumstances will rarely warrant giving weight to only one approach to value . . . under appropriate circumstances, a single approach may be used to determine the market value" ¹⁶⁷ Here, the County's appraiser conducted only the sales comparison approach.¹⁶⁸

The sales comparison approach assumes, among other things, "that the value of property tends to be set by the cost of acquiring a substitute or alternative property of similar utility and desirability within a reasonable amount of time."¹⁶⁹ Application of the sales comparison approach requires the analysis of recent sales of other properties to determine the comparability of those properties to the subject property, and the adjustment of their sale prices as necessary for

¹⁶³ *Id.* at 553 (citations omitted).

¹⁶⁴ *Lewis & Harris v. Cty. of Hennepin*, 516 N.W.2d 177, 180 (Minn. 1994).

¹⁶⁵ Minn. Stat. § 273.12 (2016).

¹⁶⁶ *Equitable Life Assur. Soc'y*, 530 N.W.2d at 554.

¹⁶⁷ *Id.*

¹⁶⁸ Ex. A, at 43-45.

¹⁶⁹ *Appraisal of Real Estate* 379; see also *Equitable Life Assur. Soc'y*, 530 N.W.2d at 552 (observing that the sales comparison approach "is based on prices paid in actual market transactions involving comparable properties").

such features as size, location, and condition to make those properties comparable to the subject property.¹⁷⁰ The reliability of this approach depends on the availability of sales information for other properties, and on the comparability of those properties to the subject.¹⁷¹

A. County's Approach

a. Proposed Project

We first address Bennett's proposed project, a primarily residential three-story/four-level mixed-use development. He estimated a building footprint of 16,800 square feet, split evenly on the ground floor between retail space and enclosed parking, and 16,800 square feet in each upper level.¹⁷² Bennett proposed the project could hold up to 14 residential condominium units on the upper levels.¹⁷³ According to Bennett, the project requires two parking stalls per residential unit, and one spot per 250 square feet of retail space for a total of 58 parking spots (after reducing retail square footage by ten percent).¹⁷⁴ At 300 square feet per stall, Bennett puts 28 of the parking spots in the enclosed area and the remainder (up to 35) as surface stalls.¹⁷⁵

We note several issues with Bennett's proposal. First, his project rendering indicates 200 feet in building length and 80 feet in building width: a 16,000 square-foot building footprint, not 16,800 square feet as Bennett testified.¹⁷⁶ The additional 800 square feet encroaches upon

¹⁷⁰ *Appraisal of Real Estate* 381-82.

¹⁷¹ *Id.* at 380-81.

¹⁷² Tr. 114-15; *see* Ex. 22 (rendering of Bennett's proposed project). At 16,800 square foot per level, the building's upper level total square footage would be 50,400. Tr. 115.

¹⁷³ Tr. 111-12; Ex. 22.

¹⁷⁴ Tr. 73, 117; Ex. 23 (Wayzata City Code § 801.20, Off-Street Parking and Loading), at 20-4 (citing Code § 801.20.9.D.1); *see* Ex. 22 (8,400 x .90 = 7,560; 7,560/250 = 30; 30 + 28 = 58 stalls).

¹⁷⁵ Ex. 22; Tr. 111-12. According to Bennett, the proposed 300 square-foot per stall includes everything, including access lanes between stalls. Tr. 251.

¹⁷⁶ Ex. 22; Tr. 114-15.

Bennett's proposed surface parking area of 10,428 square feet.¹⁷⁷ Second, Bennett did not account for a 24-foot-wide driveway¹⁷⁸ or landscaping¹⁷⁹ required by the City Code. Last, Bennett's proposed parking assumes that 100 percent of the northern triangular portion of the property can be used for surface parking.¹⁸⁰ Given the irregular shape of the proposed surface parking lot, the 800 square-foot building encroachment, and the failure to account for a 24-foot-wide driveway and landscaping, we find certain aspects of the footprint implausible.¹⁸¹ We adjust accordingly in our reconciliation of the County's valuation.

b. Comparables

We next examine Bennett's comparable sales. Bennett used four comparables in his sales comparison approach, all located in the LSMA. Three of the four were developed or redeveloped with residential units on the upper floors; one has only office space on the upper levels. Comparables 1, 2, and 4 all required rezoning. Comparable 1 (Garrison Landing),

¹⁷⁷ See Ex. 22.

¹⁷⁸ Bennett's project provides a 20-foot-wide driveway. Tr. 121; Ex. 22. City Code requires a minimum of 24 feet in width for a two-way driveway. Ex. 23, at 20-5 (citing Code § 801.20.9.E.3). Although Bennett testified that he believes this applies only to driveways within parking lots and not "access" driveways, Tr. 222, the City Code as written does not support this distinction.

The City also requires five-foot setbacks in C-4A zoning for parking areas adjacent to residentially zoned or residentially used property. Ex. 23, at 20-3 (citing Code § 801.20.9.C.1). Because only the northern portion of the property is adjacent to a residentially used property, where the non-developable wetland is, this portion of the City Code is immaterial. Tr. 219-20.

Berry also questioned Bennett on whether he accounted for required snow storage space. Tr. 220-21. Bennett suggested that the wetland buffer zone may be used for snow storage. *Id.*

¹⁷⁹ Tr. 214-15; see Ex. 23, at 20-2 (citing Code § 801.20.6) ("All exposed parking areas of four (4) or more required spaces shall be landscaped on all sides. Such screening shall be in conformance with Section 801.18 of this Ordinance and be approved in advance by the City.")

¹⁸⁰ See Ex. 22, Ex. 4, at 77.

¹⁸¹ Although Wayzata City Code allows for parking nonconformity in the C-4A District through a conditional use permit, Bennett does not mention this as part of his analysis. See Ex. 23, at 20-17 (citing Code § 801.20.17).

located at 236/240 Minnetonka Avenue South and 519 Indian Mound East, sold for \$1.9 million in July 2014.¹⁸² The property has 25,410 square feet of useable land, making the sale price \$74.77 per square foot.¹⁸³ Comparable 1 is located in the C-1 District, Office and Limited Commercial District, but obtained PUD rezoning.¹⁸⁴ The property has a high water table and poor soil quality.¹⁸⁵ The property's buyer is constructing a four-level mixed-use development with nine residential condominiums, 3,000 square feet of retail space, and enclosed parking for residential units.¹⁸⁶ The project has a height variance to 38 feet and a ground-floor area of 12,025 square feet.¹⁸⁷ Comparable 1's parking is only partially below grade due to the high water table, and any below-grade construction will require concrete storm sewer infrastructure.¹⁸⁸ Last, the development required \$190,000 in soil correction.¹⁸⁹

Comparable 2 (WayPoint I), located at 415 Indian Mound East, sold for \$660,000 in September 2012.¹⁹⁰ The property has 16,133 square feet of useable land area, making the sale price \$40.91 per square foot.¹⁹¹ Comparable 2 is zoned C-1 but required height and design conditional use permits.¹⁹² The property does not have a high water table or poor soil quality.¹⁹³

¹⁸² Ex. A, at 47.

¹⁸³ Ex. A, at 47.

¹⁸⁴ Ex. A, at 47, 48.

¹⁸⁵ Ex. A, at 47.

¹⁸⁶ Ex. A, at 48.

¹⁸⁷ Ex. A, at 48.

¹⁸⁸ Ex. A, at 48.

¹⁸⁹ Ex. A, at 48.

¹⁹⁰ Ex. A, at 49.

¹⁹¹ Ex. A, at 49.

¹⁹² Ex. A, at 49, 50.

¹⁹³ Ex. A, at 49.

The property was redeveloped into a four-level mixed-use building with eight residential condominiums and a 600 square-foot first-floor office unit.¹⁹⁴ The project's ground floor area is 6,868 square feet.¹⁹⁵ The lowest level is 100 percent below-grade parking.¹⁹⁶ Due to its hillside elevation, the building required a substantial boulder retaining wall.¹⁹⁷

Comparable 3, located at 153 East Lake Street, sold for \$610,000 in April 2013.¹⁹⁸ The property has 8,424 square feet of usable land area, making the sale price \$72.41 per square foot.¹⁹⁹ Comparable 3 is zoned C-4A and does not have a high water table or poor soil quality.²⁰⁰ After purchasing the property in June 2013, the buyer partially razed a then-existing building and constructed a two-story, no-basement building using the same footprint as the prior structure.²⁰¹ That building has a ground floor area of 1,966 square feet and no residential units.²⁰²

Comparable 4 (The Regatta), located at 875 Lake Street North, sold for \$6,846,000 in October 2012.²⁰³ The property has 71,030 square feet of useable land, making the sale price \$96.38 per square foot.²⁰⁴ Comparable 4 is located in PUD zoning,²⁰⁵ has a high water table,

¹⁹⁴ Ex. A, at 50.

¹⁹⁵ Ex. A, at 50.

¹⁹⁶ Ex. A, at 50.

¹⁹⁷ Ex. A, at 50.

¹⁹⁸ Ex. A, at 51. The bank selling the property foreclosed on the prior owner. *Id.* at 52.

¹⁹⁹ Ex. A, at 51.

²⁰⁰ Ex. A, at 51.

²⁰¹ Ex. A, at 52.

²⁰² Ex. A, at 52.

²⁰³ Ex. A, at 53.

²⁰⁴ Ex. A, at 53.

²⁰⁵ Ex. A, at 54.

poor soil quality, and contaminated soil.²⁰⁶ The property was redeveloped into a four-level building with 59 condominium units on floors two through four, a completely retail street level, and full basement level for parking.²⁰⁷ Its ground floor area is 39,550 square feet.²⁰⁸ The building is part of the larger Promenade Development in Wayzata, and the land between Comparable 4 and Lake Street is open space.²⁰⁹ Because of the poor soil quality, the property required pilings for soil correction in preparation for redevelopment.²¹⁰

Bennett made the following adjustments to his comparables: market condition (time adjustment),²¹¹ location/view, topography/shape, soil quality, soil contamination, zoning, and parcel/project size.²¹² Berry criticizes Bennett's view adjustments, arguing that he provided no support for them, other than the opinions of his in-laws.²¹³ We disagree. Bennett calculated his view adjustment using three paired sales analyses.²¹⁴ He describes each property's view quality, the sale dates, and adjustments.²¹⁵ We find his analyses credible.

²⁰⁶ Ex. A, at 53, 54.

²⁰⁷ Ex. A, at 54.

²⁰⁸ Ex. A, at 54.

²⁰⁹ Ex. A, at 54.

²¹⁰ Ex. A, at 54.

²¹¹ Ex. A, at 58. To be consistent, Bennett adjusted the sale dates to the date each purchase agreement was signed. *Id.* Because of the uniqueness of the subject property's market, Brown focused his analysis on the LSMA, rather than on the City of Wayzata. *Id.*

²¹² Ex. A, at 58-64. Berry's arguments regarding soil contamination are discussed in Section VI.

²¹³ Pet'r's Final Arg. 14.

²¹⁴ Ex. A, at 59-60.

²¹⁵ Ex. A, at 59-60.

Berry also argues that Bennett “failed to account for any density adjustments” in his analysis.²¹⁶ This argument is based on the notion that the property is subject to different zoning density requirements than three of Bennett’s four comparables. As we have already found, there is a reasonable probability that the City would grant PUD rezoning for the County’s proposed project. Because PUD zoning provides negotiable density maximums between the City and the applicant,²¹⁷ specific density adjustments to Bennett’s comparables are unnecessary. Berry does not attack the remainder of Bennett’s adjustments, and we adopt them all, save the adjustment to parcel/project size.

c. Financial Feasibility of the Bennett Project

Berry argues Bennett’s project, as proposed, is financially infeasible. Contrary to Berry’s assertions,²¹⁸ we find Bennett demonstrated a strong market demand for residential properties in the LSMA, even more than for office space. According to Bennett, the market has, since mid- to late 2012, experienced a boom in “upper bracket residential condominium[s].”²¹⁹ For example, the timeline appended to Bennett’s appraisal shows at least six proposed projects with residential condominiums, four already approved by the City of Wayzata and two currently seeking approval.²²⁰ Just as a lack of new construction throughout the market may demonstrate a lack of demand,²²¹ we find the presence of new construction indicative of demand for residential properties.

²¹⁶ Pet’r’s Final Arg. 17.

²¹⁷ Ex. Z, at 33-4 (citing Code § 801.33.2.A.8.a).

²¹⁸ See Pet’r’s Final Arg. 3-4.

²¹⁹ Ex. A, at 58, 89.

²²⁰ Ex. A, at 26, 89.

²²¹ *Appraisal of Real Estate* 341.

Bennett admits “[t]here has been demand for office product in [the LSMA],”²²² “however, the majority of office buyers have opted to remodel previously developed property or have chosen the lower valued non-prime locations within Wayzata.”²²³ Bennett concludes, and we agree, that “[t]here has been more market activity for the residential condominium land product than for office.”²²⁴ That Brown was forced outside the City of Wayzata, well beyond the LSMA, in search of office comparables for his capitalization rate study, bolsters this conclusion.²²⁵

Berry also presented the testimony of Traci Tomas, president of Hoyt Management, a real estate management company sharing common ownership with petitioner Berry.²²⁶ In her capacity as president, Tomas has “tried to develop a project” for construction on the subject property.²²⁷ During her testimony, Tomas discussed a pro forma²²⁸ for a three-story building on 253 and 259 East Lake Street, estimating \$14 million in value but \$23 million in required costs.²²⁹ A revised pro forma yielded \$17 million in value but \$20 million in construction costs.²³⁰ According to Tomas, Hoyt Management proposed an assemblage of 253 and 259 East

²²² Ex. A, at 39; *see id.* at 26, 89.

²²³ Ex. A, at 39.

²²⁴ Ex. A, at 40.

²²⁵ Ex. 4, at 65, 69, 92.

²²⁶ Tr. 530; Ex. 4, at 23; *see supra* note 77.

²²⁷ Tr. 429.

²²⁸ *See Pro Forma, Black's Law Dictionary* ((Of an invoice or financial statement) provided in advance to describe items, predict results, or secure approval); *see also* Tr. 534 (Tomas testifying that “pro forma” is “[j]ust a projection of a particular project”).

²²⁹ Ex. M (Three-Story Pro Forma); Tr. 433 (Tomas testifying that the pro forma is for a project that would encompass both 253 and 259 East Lake Street).

²³⁰ Ex. O (Revised Three-Story Pro Forma).

Lake Street because Berry “can’t build something that’s financially feasible on [253] and then have to do a lot with access, parking, wetland, [and] soils.”²³¹

We find neither pro forma indicative of financial infeasibility. First, the pro formas encompass both the subject property and 259 East Lake Street. Second, Tomas testified that the construction costs came “primarily” from The Vue project, a 119-unit apartment development in Minneapolis with five above-ground stories and two underground parking levels.²³² Because the pro forma was prepared to project costs associated with a proposal much larger than that offered by the County, we do not find it demonstrates Bennett’s proposed project was financial infeasible.

For these reasons, and Browen’s admission that residential use would create more value,²³³ we do not find Bennett’s project financially infeasible.

d. Reconciliation

Because Bennett concludes the highest and best of the subject property is for residential use on the upper floors, we disregard Comparable 3, as it is purely for office use. We next adjust Bennett’s specific project proposal. Bennett proposes a 16,800 square-foot building footprint. Because, however, 800 square feet of that footprint encroaches upon his proposed surface parking, we first reduce the building footprint to 16,000 square feet.²³⁴ Next, Bennett failed to account for a 24-foot-wide driveway. Based upon his rendering, his proposed driveway is four feet too narrow. Moreover, his proposed parking area does not account for required landscaping

²³¹ Tr. 501.

²³² Tr. 502; 554.

²³³ Tr. 303.

²³⁴ Ex. 22.

or the irregular shape of the parking lot.²³⁵ We decrease the width of the project by four feet to allow for the proper driveway width; and we decrease the length of the property by ten feet to account for the necessary landscaping and the surface parking area's irregular shape. We arrive at a proposed building 76 feet wide and 190 feet long, or a 14,440-square-foot footprint. Based on the above, we make a discretionary adjustment of 14 percent to each remaining comparable:

<u>January 2, 2012</u>	Comparable 1	Comparable 2	Comparable 4
Transaction Adjusted Price per Square Foot of Useable Land	\$53.83	\$40.09	\$93.49
Bennett's Net Adjustments	9%	42%	(30%)
Total Net Adjustments after (14%) Project Size Adjustment	(5%)	28%	(44%)
Final Adjusted Price per Square Foot of Useable Land	\$51.14	\$51.32	\$52.35

Giving equal weight to each comparable, we arrive at a value of \$51.60 per square foot of usable land, or \$1,967,890 for January 2, 2012.

<u>January 2, 2013</u>	Comparable 1	Comparable 2	Comparable 4
Transaction Adjusted Price per Square Foot of Useable Land	\$57.57	\$42.14	\$98.31
Bennett's Net Adjustments	9%	42%	(30%)
Total Net Adjustments after (14%) Project Size Adjustment	(5%)	28%	(44%)
Final Adjusted Price per Square Foot of Useable Land	\$54.69	\$53.94	\$55.05

Giving equal weight to each comparable, we arrive at a value of \$54.56 per square foot of useable land or \$2,080,620 as of January 2, 2013.

²³⁵ Ex. 22; *see* Ex. 23, at 20-2 (citing Code § 801.20.6).

<u>January 2, 2014</u> Transaction Adjusted Price per Square Foot of Useable Land	Comparable 1 \$68.79	Comparable 2 \$48.27	Comparable 4 \$112.76
Bennett's Net Adjustments	9%	42%	(30%)
Total Net Adjustments after (14%) Project Size Adjustment	(5%)	28%	(44%)
Final Adjusted Price per Square Foot of Useable Land	\$65.35	\$61.79	\$63.15

Giving equal weight to each comparable, we arrive at a value of \$63.43 per square foot of useable land, or \$2,418,809 as of January 2, 2014.

B. Berry's Approach

Brown based his highest and best use, and therefore his entire valuation, on the assumption that "any residential use as a principal use would not be allowed" on the subject property.²³⁶ Because we find this assumption incorrect, and because Brown admits residential use creates more value,²³⁷ we place no weight on Brown's valuation. However, we briefly examine his report to show that even if his proposed use were correct, his appraisal is nonetheless unreliable.

Brown applied a land residual approach (a blend of the cost and income approaches),²³⁸ and a land (or market) extraction approach (a method alternative to the three traditional approaches).²³⁹ The land residual approach, also known as the development cost approach,

²³⁶ Tr. 304.

²³⁷ Tr. 303.

²³⁸ See generally *Appraisal of Real Estate* 503 (discussing the land residual approach); Tr. 356.

²³⁹ *Appraisal of Real Estate* 368.

separately estimates land and building.²⁴⁰ The approach is “a method of appraising property in which an appraiser attempts to determine the current price a developer would pay for land, given the cost of development and the probable proceeds from the sale of the developed property.”²⁴¹

We have several concerns regarding Browen’s land residual analysis. First, the land residual approach is conceptually speculative. It relies on multiple estimates,²⁴² consequently, a slight alteration of any variable can dramatically change a valuation.²⁴³ Second, the approach should be used only when comparable sales are not available;²⁴⁴ that is, “when the other traditional methods for valuing property are not wholly reliable.”²⁴⁵ Although Browen’s capitalization rate study, conducted as part of his land residual approach, expands well outside Wayzata, his land extraction approach offers five comparables, all located in the City of Wayzata.²⁴⁶ Moreover, both Browen and Bennett offer 153 East Lake Street as a comparable with their respective approaches.²⁴⁷

²⁴⁰ *Id.* at 503; see *Buzick v. City of Blaine*, 505 N.W.2d 51, 52 n.2 (Minn. 1993) (explaining that “[t]he development cost approach is also referred to as” a “land residual analysis”) (citations omitted).

²⁴¹ *Hansen v. Cty. of Hennepin*, 527 N.W.2d 89, 93 (Minn. 1995).

²⁴² *Appraisal of Real Estate* 503.

²⁴³ *Ford Motor Co.*, 2014 WL 3888226, at *24 (cautioning that the approach is “susceptible to manipulation,” and “inherently speculative” because it “relies on numerous estimates”) (citing *Hansen*, 527 N.W.2d at 94) (emphasis in original).

²⁴⁴ *Appraisal of Real Estate* 370.

²⁴⁵ *Hansen*, 527 N.W.2d. at 94; see also Ex. 4, at 80 (noting that the method “is sensitive to a number of inputs”).

²⁴⁶ Compare Ex. 4, at 92, with *id.* at 112.

²⁴⁷ See *id.* at 108; Ex. A, at 51.

Third, Bowen's appraisal did not meet the foundational requirements for this approach.²⁴⁸ Berry did not demonstrate the land was ripe for development.²⁴⁹ Additionally, Berry did not prove that development of the proposed project would "not take place at too remote a time."²⁵⁰ Rather, Brown recommends the property be held until at least 50 percent of the proposed building is preleased.²⁵¹ His appraisal does not specify when this might occur.²⁵²

Fourth, the variables used in Brown's land residual approach lack foundation. One, in his cost (new) analysis, Brown provides no support for his 20 percent indirect cost amount nor does he explain his time adjustment.²⁵³ Two, Brown uses a \$30 per square foot market rent for all three years, applying no time adjustment.²⁵⁴ He inappropriately relies on asking rents rather than market rents,²⁵⁵ and a large portion of his analysis is based on a rental study from 2005,

²⁴⁸ See *Hansen*, 527 N.W.2d at 94 (concluding that before a court will receive evidence on the land residual approach, an offering party must show: "(1) the land is ripe for development; (2) the owner can reasonably expect to secure the necessary zoning and other permits required for the development to take place; and (3) the development will not take place at too remote a time").

²⁴⁹ Ex. 4, at 2, 16. "Property is ripe for development when the improvements are completed making possible the development of the property at its highest and best use." *Buzick*, 505 N.W.2d at 53.

²⁵⁰ *Hansen*, 527 N.W.2d at 94.

²⁵¹ Ex. 4, at 79.

²⁵² Contrary to his appraisal, Brown testified the property would be 50 percent preleased or an owner/user identified as of the valuation dates. Tr. 323. We find that testimony not credible.

²⁵³ Tr. 352-53.

²⁵⁴ Ex. 4, at 85-86.

²⁵⁵ Tr. 359-60; see *Lone Oak Rogers, L.L.C. v. Cty. of Hennepin*, Nos. 27-CV-11-06077 et al., 2015 WL 2329356, at *4 (Minn. T.C. Apr. 9, 2015) (finding that respondent's appraiser inappropriately relied on asking rents rather than actual rents to form his opinion of market rent); cf. *KCP Hastings LLC v. Cty. of Dakota*, Nos. 19HA-CV-11-2713 et al., 2016 WL 7638310, at *13 (Minn. T.C. Dec. 29, 2016) (finding that reliance on contract rents instead of market rents "is consistent with a lease-fee valuation but inconsistent with a fee-simple valuation") (citing *Appraisal of Real Estate* 447).

seven years before the first assessment date.²⁵⁶ Three, Brown's capitalization rate relies on a RERC survey²⁵⁷ measured against an unreliable capitalization rate study. "[S]urveys are generally used as support rather than as primary evidence," and often represent the opinions of institutional investors, such as insurance companies, pension funds, and other big money equity investors whose investment criteria differ from typical investors in small commercial or residential real estate like the subject property.²⁵⁸

Moreover, Brown's own capitalization rate study, utilized in addition to the RERC study, incorporates buildings not comparable in age or size, including buildings as old as 1916 and as great as 99 times larger than Brown's proposed project.²⁵⁹ A capitalization rate "provides compelling evidence of value when," *inter alia*, data is drawn from physically similar properties, similar markets, and the comparables' sale prices reflect market terms.²⁶⁰ "If there are wide differences between a comparable property and the subject property that could affect the overall capitalization rate, the appraiser must explain the market behavior or property characteristics that account for these differences."²⁶¹ We find the majority of Brown's comparables for his capitalization rate are not physically similar in size or age, are not located in the same or similar market (not LSMA or Wayzata), and Brown did not appropriately adjust the sales for income attributable to existing leases.²⁶²

²⁵⁶ Brown provides no evidence verifying the asking rent amounts beyond his testimony. Tr. 358-59.

²⁵⁷ Tr. 364, 367.

²⁵⁸ *Appraisal of Real Estate* 499.

²⁵⁹ Ex. 4, at 92-93.

²⁶⁰ *Appraisal of Real Estate* 495.

²⁶¹ *Id.* at 494. "When a comparable property has significant differences, it may be afforded less weight or may be discarded entirely." *Id.* at 495.

²⁶² Tr. 366-67; Ex. 4, at 92-93.

Furthermore, we find Browen's land extraction approach not credible. Three of his five comparables were leased-fee sales for which he made no adjustments.²⁶³ The remaining two comparables include structures built in 1950 and 1954.²⁶⁴ Their significant age is difficult to reconcile, considering the land extraction approach is most applicable when the improvements to land "are new, their cost is known, and there is little or no depreciation."²⁶⁵

VI. CLEANUP COSTS

Berry argues that Bennett's analysis failed to account for environmental cleanup costs needed on the property. After completing his land residual and land extraction approaches, Browen estimated an additional \$600,000 decrease in value due to the necessary cleanup cost of hazardous conditions on the subject property.²⁶⁶ Because Berry failed to demonstrate the presence of contaminants beyond safe levels, failed to prove costs associated with any cleanup, and because Bennett adjusted his sales comparables for contamination, we disregard the additional decrease in value proffered by Berry.

A. Evidence

Browen based his cleanup cost estimate on two reports furnished by Berry and a two-page estimate letter attached to Browen's appraisal.²⁶⁷ The first report is a limited subsurface investigation performed by Nova Environmental Services, Inc., in October 1997. The

²⁶³ Ex. 4, at 103, 107, 111; Tr. 374; *see also Cont'l Retail, LLC v. Cty. of Hennepin*, 801 N.W.2d 395, 401 (Minn. 2011) ("Because the leased[-]fee interest is limited to the current landlord's interest in the property, the leased[-]fee interest is not the entire, unencumbered interest in the real property.").

²⁶⁴ Ex. 4, at 104,108. Browen adjusted their effective ages downward because the buildings had been renovated. Tr. 381.

²⁶⁵ *Appraisal of Real Estate* 365.

²⁶⁶ Ex. 4, at 2, 9.

²⁶⁷ Ex. 4, at 9.

purpose of the report “was to assess whether past site uses and/or adjacent properties have impacted subsurface soil and/or groundwater at the site.”²⁶⁸ As part of its investigation, Nova drilled five borings at depths ranging from nine to 14 feet, monitored soil samples for organic vapors, measured pH levels of shallow soil samples, and collected groundwater samples to analyze volatile organic compounds (VOCs) and gasoline range organics (GROs).²⁶⁹

Although Nova’s report concluded that the soil and groundwater were impacted, it specifically noted that, “[n]one of the compounds detected in the groundwater collected . . . are present in concentrations that exceed Minnesota Department of Health (MDH) health risk limits for drinking water.”²⁷⁰ Further, the report opined that detected petroleum-related compounds “are probably the result of contaminant plume migration from the property to the east,”²⁷¹ where a gas station formerly operated.²⁷² “Based on the results of this limited subsurface investigation,” the report recommended “no additional investigative or corrective actions” at the site.²⁷³

The second report Brown relied upon was conducted by Liesch Associates Inc. in July 2005.²⁷⁴ Notably, this report covers both the subject property, 253 East Lake Street, and the

²⁶⁸ Ex. C (Nova Environmental Services, Inc. Report, dated Oct. 28, 1997) (listing the prior uses of the subject property including an auto repair and sales shop, a non-dry cleaning laundry facility, a blacksmith, and a battery service), at § 1.1.

²⁶⁹ Ex. C, at § 1.2. Because both the Nova and Liesch reports use “borings,” as opposed to “boreholes,” we also use “borings.”

²⁷⁰ Ex. C, at § 4.0.

²⁷¹ Ex. C, at § 4.0.

²⁷² Tr. 511.

²⁷³ Ex. C, at § 4.0. Additionally, “Nova did not encounter any evidence that battery service operations have impacted the site.” *Id.*

²⁷⁴ Ex. B (Liesch Report).

eastern neighboring property, 259 East Lake Street.²⁷⁵ Liesch completed 13 soil borings between the two properties; seven on 253 and six on 259.²⁷⁶ Using a photoionization detector (PID), Liesch measured soil samples for petroleum-related compounds,²⁷⁷ including GROs; diesel range organics (DROs); benzene, toluene, ethyl benzene, xylenes (BTEXs); and lead.²⁷⁸ Liesch also measured boring B-3 (drilled on 253) for the presence of PAHs and RCRA metals.²⁷⁹ Additionally, Liesch measured groundwater samples for GROs, DROs, BTEXs, lead, pH, and chemical oxygen demand (COD).²⁸⁰

Six of the seven borings on 253 yielded petroleum-related compounds.²⁸¹ Further, boring B-3 detected PAHs and RCRA metals.²⁸² However, the concentration levels detected in the 253 soil samples were “below their respective Minnesota Pollution Control Agency (MPCA) Tier 1 Soil Reference Values (SRVs).”²⁸³ According to the Liesch report, “MPCA SRVs are concentrations of contaminants in soils that, if exceeded, are deemed to pose an unacceptable risk to human health based on the assumption of long-term (chronic) exposure in a residential

²⁷⁵ Ex. B, at 1. The 2005 PUD approval covered both the subject property and the adjacent 259 East Lake Street. Ex. A, at 35; Ex. 14; Tr. 465-66.

²⁷⁶ Ex. B, at 2. Although the borings on 259 indicated much higher PID measurements (organic vapors), one boring on 253 yielded a PID measurement up to 334 ppm (parts per million). Ex. B, at 2; *see id.* at Table 1 (showing much higher PID measurements in 259 borings than 253 borings).

²⁷⁷ Ex. A, at 62.

²⁷⁸ Ex. B, at 1.

²⁷⁹ Ex. B, at 1-2. PAHs are polycyclic aromatic hydrocarbons and RCRA metals refer to Resource Conservation and Recovery Act metals. *Id.* at 1.

²⁸⁰ Ex. B, at 1.

²⁸¹ Ex. B, at 2.

²⁸² Ex. B, at 2.

²⁸³ Ex. B, at 2.

environment.”²⁸⁴ Therefore, “[t]he presence of petroleum contaminants and elevated PID measurements exhibited in [the 253 soil borings] may necessitate special handling considerations should soil need to be exported during property development.”²⁸⁵

Like the Nova report, Liesch found that petroleum-related compounds impacted the groundwater sample collected from 253 (from boring B-2).²⁸⁶ However, also like the Nova report, Liesch concluded that the concentration of such compounds on 253 East Lake Street were “below their respective [MDH] Health Risk Limits (HRLs).”²⁸⁷ The report did find concentrations of compounds *above* the MDH HRLs on 259.²⁸⁸

Last, Brown relied upon an April 18, 2016 estimate letter for the cost of remediation prepared by Therese Hovanec, a senior project manager with The LJM Group, an environmental consulting firm.²⁸⁹ The purpose of the letter was to opine as to additional testing, remediation work, and associated costs. The heading to Hovanec’s letter indicates that it applies to properties 253–259 Lake Street and the letter internally references the 2005 Liesch report.²⁹⁰ Brown testified he was informed the reference to 259 is a typographical error.²⁹¹ Hovanec’s letter indicates, however, that the “groundwater impact was documented at concentration exceeding the[] respective Minnesota Department of Health[] Health Risk Limits.”²⁹² The Liesch report,

²⁸⁴ Ex. B, at 2.

²⁸⁵ Ex. B, at 2-3.

²⁸⁶ Ex. B, at 3 (noting specifically benzene and ethyl benzene).

²⁸⁷ Ex. B, at 3.

²⁸⁸ Ex. B, at 3.

²⁸⁹ Ex. 4, Addenda (LJM Group Remediation Costs); Tr. 526.

²⁹⁰ Ex. 4, Addenda (LJM Group Remediation Costs).

²⁹¹ Tr. 265. Brown testified that he believes either Mike Mergens, counsel for Berry, or Traci Tomas informed him of the typo. Tr. 284.

²⁹² Ex. 4, Addenda (LJM Group Remediation Costs).

as discussed above, found groundwater impact above HRLs on 259, *not* 253 (the subject property).²⁹³

Hovanec makes several conclusions in her letter. First, although “the documented impacts to soil were below . . . MPCA Tier 1 [SRVs], the impacted soils consisted of soils unsuitable for foundation support (i.e. organic silts, peat) and will likely require special handling and off-site disposal as part of any future site redevelopment.”²⁹⁴ Second, because she found the groundwater impact above HRLs, she concluded “[b]ased on the proximity of groundwater to the surface, special handling will be necessary as part of any construction de-watering during site redevelopment.”²⁹⁵ Third, she concluded the MPCA will require additional testing and analysis before any redevelopment can begin and “to adequately estimate the type/extent of remediation” and the associated cost.²⁹⁶ Hovanec believes the MPCA will likely require designing and installing a sub-surface depressurization system, the estimated cost of which ranges from \$100,000 to \$125,000.²⁹⁷ Her letter concludes that given the soil (“unsuitable for foundation support”) and the impact, “removal and off-site disposal of impacted soils should be anticipated.”²⁹⁸ Without providing further detail, she estimates the cost of removal and disposal will range anywhere from \$300,000 to \$700,000.²⁹⁹

²⁹³ Ex. B, at 3. Additionally, Hovanec’s letter notes Leisch advanced 13 borings, but Leisch advanced only seven borings on the subject property. Ex. 4, Addenda (LJM Group Remediation Costs).

²⁹⁴ Ex. 4, Addenda (LJM Group Remediation Costs).

²⁹⁵ Ex. 4, Addenda (LJM Group Remediation Costs).

²⁹⁶ Ex. 4, Addenda (LJM Group Remediation Costs).

²⁹⁷ Ex. 4, Addenda (LJM Group Remediation Costs).

²⁹⁸ Ex. 4, Addenda (LJM Group Remediation Costs).

²⁹⁹ Ex. 4, Addenda (LJM Group Remediation Costs). Berry “made no mention of environmental contamination or extraordinary cleanup costs in its 2014 PUD application.” Resp’t’s Post-Trial Br. 5 (citing Ex. F).

B. Analysis

We conclude that the cleanup costs assumed by Berry are unsupported. First, neither the Nova report nor the Liesch report indicate the subject property suffers from contamination above a legal limit. Despite this, Berry asserts that “[i]t is uncontested that the Subject Property is burdened by a number of contaminants The undisputed fact is that testing showed [petroleum-related compounds] were present – at levels above each chemicals['] respective Health Risk Limit.”³⁰⁰ This statement is directly contrary to both the Nova and Liesch reports, which found that on 253 Lake Street, neither the groundwater samples nor the soil samples yielded concentrations above MDH HRLs or Tier 1 SRVs.³⁰¹

Second, Hovanec’s letter is unreliable. It is clear that Hovanec based her opinions on the entirety of the Liesch report, utilizing data on both 253 and 259 Lake Street. The letter does not distribute costs between the two properties, and Berry did not attempt to do so. Further, as the County suggests, Hovanec’s “letter conflate[s] environmental and geotechnical issues”³⁰² by estimating a single amount for the cost to remove and dispose of impacted soils (an environmental issue) and the cost to correct soil “unsuitable for foundation support” (a geotechnical issue).³⁰³ Last, apart from the cost of a depressurization system, Hovanec does not itemize her estimated costs or provide a resource for estimating them.³⁰⁴

³⁰⁰ Pet’r’s Final Arg. 23.

³⁰¹ See Ex. C, at § 4.0; Ex. B, at 2-3.

³⁰² Resp’t Post-Trial Br. 5.

³⁰³ See, e.g., Ex. A, at 15-16 (distinguishing between geotechnical reports, assumption (6), and environmental reports, assumption (14)).

³⁰⁴ We note that Berry did not introduce evidence regarding Hovanec’s qualifications nor did Brown verify her statements despite attaching the letter to his appraisal. Tr. 264. Interestingly, Hovanec’s letter is dated April 18, 2016, the same date appraisals in this case were exchanged. Compare Ex. 4, Addenda (LJM Group Remediation Costs), with Scheduling Order ¶ 5 (filed Mar. 16, 2015).

Although we find no support for the \$600,000 in cleanup costs asserted by Berry, the property *is* burdened by some level of petroleum-related compounds, PAHs, and RCRA metals. For example, the Nova report from 1997 suggests that though the concentrations of contaminants in the subject property’s groundwater are below HRLs, “the ground water has been impacted and the Minnesota Pollution Control Agency should be notified.”³⁰⁵ Likewise, the Leisch report from 2005 concludes that “[t]he presence of petroleum contaminants and elevated PID measurements . . . at the 253 East Lake Street Property may necessitate special handling considerations should soil need to be exported during property development.”³⁰⁶

The County does not dispute the accuracy of the Nova or Leisch reports. Indeed, Bennett incorporated the reports into his appraisal as addenda and “consider[s] the environmental reports furnished by the petitioner to be accurate and reliable.”³⁰⁷ Further, Bennett does not deny that there is some level of contamination on the property.³⁰⁸ Contrary to Berry’s assertion,³⁰⁹

We also note that Berry’s request for a “contamination value” under Minn. Stat. § 270.91, subd. 1 (2016), and a reduction in value due to “stigma” are untimely. *See* Pet’r’s Final Arg. 23-24. Berry’s post-trial brief is the first instance in which both issues are raised and neither issued has been litigated. Moreover, the “contamination value for a property may be no greater than the estimated cost of implementing a reasonable response action plan.” Minn. Stat. § 270.93 (2016). Berry did not present a “response plan” as defined under Minn. Stat. § 270.92, subd. 6 (2016), and we cannot apply a contamination value without a qualified “response plan.” *See, e.g., Ford Motor Co. v. Cty. of Ramsey*, Nos. C5-07-4696 et al., 2013 WL 3242880, at *5-6 (Minn. T.C. Jun. 19, 2013) (finding that no contamination value can be assigned without first producing a “response action plan”). Additionally, Berry simply asserts, without support, that the property is subject to a negative stigma. Pet’r’s Final Arg. 24. “Measuring the effect of stigma on value can be difficult because the damage caused by stigma is not simply the cost to repair a defect. Focus groups, surveys, statistical analyses, case study comparisons, and other tools have been used in this analysis.” *Appraisal of Real Estate* 212. Berry offers none of these.

³⁰⁵ Ex. C, at § 4.0.

³⁰⁶ Ex. B, at 2-3.

³⁰⁷ Ex. A, at 16.

³⁰⁸ Ex. A, at 16; *see* Tr. 82.

Bennett's appraisal does consider the property's contamination. Rather than decrease the property's value by the cost of cleanup, as Berry did, Bennett adjusts for contamination on his sales comparables by decreasing three of the four by negative one percent.³¹⁰ Because Berry did not attack or argue the incorrectness of the negative one percent adjustment, we adopt Bennett's adjustment as sufficient consideration of soil and groundwater contamination.³¹¹

VII. FINAL RECONCILIATION

We disagree with Berry's highest and best use and find that, as a whole, Berry's analysis is overly speculative and substantially unsupported. Therefore, we largely disregard Brown's appraisal and appraisal testimony. Although we "rarely . . . giv[e] weight to only one approach to value," under these circumstances, we find it appropriate to rely on the County's single approach to determined market value.³¹² Bennett's sales comparison approach is well-supported, and the County offers reliable evidence of value. We arrive at the following values for each assessment date: \$1,967,900 as of January 2, 2012; \$2,080,600 as of January 2, 2013; and \$2,418,800 as of January 2, 2014.

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³⁰⁹ Pet'r's Post-Trial Resp. Br. 23 (arguing that Bennett "did nothing to determine the value impacts of contaminants").

³¹⁰ Ex. A, at 55-57, 62.

³¹¹ Berry notes that Bennett misstates a comment from Gary Krueger, an MPCA supervisor, regarding the subject property. See Pet'r's Final Arg. 9. In an affidavit, Krueger admits that during a phone call with "real estate appraisers and Tom Pursell," he "relayed only general information that if soil contamination levels at a site within the state were determined to fall below MPRC's Tier I soil reference values, MPCA generally would not require further investigation or cleanup of that property." Ex. 19 (Affidavit of Gary L. Krueger ¶¶ 6, 7 (dated July 15, 2016)). Bennett then applied this statement to the subject property. Although Bennett should not have extrapolated Krueger's statements to the subject property without explanation, his application does not discredit Krueger's statement regarding contamination levels below Tier I SRVs in general.

³¹² *Equitable Life. Assur. Soc'y*, 530 N.W.2d at 554.