STATE OF MINNESOTA | TAX COURT

COUNTY OF WASECA | REGULAR DIVISION

Guardian Energy, LLC,

Petitioner,

vs.

County of Waseca,

Respondent.

ORDER DENYING COUNTY'S MOTION FOR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Court File Nos.: 81-CV-10-365
81-CV-11-348
81-CV-11-741

Filed: February 2, 2018

These consolidated matters came before The Honorable Joanne H. Turner, Judge of the Minnesota Tax Court, on the motion of respondent Waseca County to amend the court's May 16, 2017 findings of fact and conclusions of law on economic obsolescence.

Thomas R. Wilhelmy and Masha M. Yevzelman, Fredrikson & Byron, P.A., Minneapolis, Minnesota, represent petitioner Guardian Energy, LLC.

Marc J Manderscheid and Michael M. Sawers, Briggs and Morgan, P.A., Minneapolis, Minnesota, and Brenda Miller, Waseca County Attorney, represent respondent Waseca County.

At issue in these cases is the value as of January 2, 2009, January 2, 2010, and January 2, 2011, of Guardian's ethanol production facility in rural Waseca County. In 2014, we filed findings of fact and conclusions of law determining the market value of the facility. *Guardian Energy, LLC v. Cty. of Waseca*, No. 81-CV-10-365 et al., 2014 WL 7476215 (Minn. T.C. Dec. 9, 2014). Guardian appealed our decision to the Minnesota Supreme Court, which reversed solely on the issue of economic obsolescence. *Guardian Energy, LLC v. Cty. of Waseca*, 868 N.W.2d 253 (Minn. 2015). On remand, we concluded that our initial measure of economic obsolescence—excess production capacity—was not supported by the record. *Guardian*

Energy, LLC v. Cty. of Waseca, No. 81-CV-10-365 et al., 2016 WL 5874449 (Minn. T.C. Sept. 28, 2016). Applying a different approach, we found economic obsolescence present only in 2010, because the subject property had not generated the market-required rate of return during that year.

Waseca County moved to amend the September 2016 findings of fact and conclusions of law. While the County's motion was pending, Guardian appealed our 2016 decision. The supreme court stayed its proceedings to allow us to address the County's motion. *Guardian Energy, LLC v. Cty. of Waseca*, A16-1850, Order (Dec. 28, 2016). In May 2017, we filed amended findings of fact and conclusions of law addressing economic obsolescence and superseding in its entirety our September 2016 decision. *Guardian Energy, LLC v. Cty. of Waseca*, No. 81-CV-10-365 et al., 2017 WL 2193526 (Minn. T.C. May 16, 2017).

The County has moved to amend our May 2017 findings of fact and conclusions of law on three points. First, the County argues that our decision "relies on an incorrect reading of the Minnesota Supreme Court's instructions on remand." Second, the County argues that we erred in rejecting its suggestion that we calculate external obsolescence based on "inutility" and operating capacity. Finally, the County argues again that we erred in not correcting errors in our previous findings concerning the calculation of indirect costs and entrepreneurial profits. We deny the County's motion in its entirety.

Based upon all the files, records, and proceedings herein, the court now makes the following:

ORDER

The motion of Waseca County for amended findings of fact and conclusions of law is denied.

IT IS SO ORDERED.

BY THE COURT:

Joanne H. Turner, Judge
MINNESOTA TAX COURT

DATED: February 2, 2018

MEMORANDUM

A. PROCEDURAL HISTORY

Our orders on the County's previous motions for amended findings recite in detail the long procedural history of this dispute. *See Guardian*, 2016 WL 5874449, at *2-5; *Guardian*, 2017 WL 2193526, at *2-8. Accordingly, we summarize here only the most recent proceedings.

After the May 2017 decision, the County timely filed a motion for amended findings of fact and conclusions of law,[1] which Guardian opposed in its entirety.[2] We heard argument on the County's motion in June 2017. After that hearing, the parties agreed to mediation before Chief

[1] Waseca Cty.'s Mot. Am. Findings Fact Conclusions Law (filed May 31, 2017).

[2] Guardian's Mem. Opposing Waseca Cty.'s May 2017 Mot. Am. Findings Fact Conclusions Law (filed June 9, 2017).

Judge Delapena.[3] Mediation was held in October 2017. On November 2, 2017, the County notified the court that mediation was unsuccessful.[4]

B. LEGAL STANDARD FOR MOTIONS FOR AMENDED FINDINGS

On a proper motion, this court may "amend its findings or make additional findings." Minn. R. Civ. P. 52.02; Minn. Stat. § 271.08, subd. 1 (2016) (authorizing motions for amended findings of fact and conclusions of law in the tax court). A motion for amended findings authorizes a court "to review all of the evidence and all of [its] findings" and to amend its findings in a manner either favorable or unfavorable to the moving party. *McCauley v. Michael*, 256 N.W.2d 491, 500 (Minn. 1977). Ultimately, the court is "free to examine all of the evidence . . . , and then to enter amended findings as appear . . . warranted by [its] review of the record as a whole." *Id.*

A party moving for amended findings must address the evidence in the record, explain why that evidence does not support the court's findings, and explain why its proposed findings are appropriate. *State by Fort Snelling State Park Ass'n. v. Minneapolis Park Bd.*, 673 N.W.2d 169, 178 (Minn. App. 2003); *see* David J. Herr & Roger S. Haydock, 2 Civil Rules Annotated § 52.19 (4th ed. 2004) ("The motion to amend should specify the objections to the findings and conclusions and include proposed amended findings and conclusions of law.").

More specifically, a motion seeking amended findings must identify the defect in the court's existing findings *and* explain why those findings are defective. *City of E. Bethel v. Anoka Cty. Hous. & Redev. Auth.*, 798 N.W.2d 375, 379 (Minn. App. 2011). "An explanation of why

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[3] E-mail from Thomas R. Wilhelmy to Lisa Pister (June 26, 2017) (on file with the Minnesota Tax Court); e-mail from Marc J Manderscheid to Lisa Pister (July 19, 2017) (on file with the Minnesota Tax Court).

[4] Letter from Marc J Manderscheid to Judge Turner (Nov. 2, 2017) (on file with the Minnesota Tax Court).

findings are allegedly defective should address the relevant standard for amending findings." *Lewis v. Lewis*, 572 N.W.2d 313, 315 (Minn. App. 1997), *abrogated on other grounds by Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168, 171-72 (Minn. 2000). A party proposing additional findings must do more than simply point to record evidence that might support those findings. *Nielsen v. City of Saint Paul*, 252 Minn. 12, 29, 88 N.W.2d 853, 864 (1958). Rather, "the moving party must show that the . . . court was compelled to make the requested findings and failed to do so." *Zander v. State*, 703 N.W.2d 845, 857 (Minn. App. 2005); *Chamberlin v. Twin Ports Dev. Co.*, 195 Minn. 58, 60, 261 N.W. 577, 578 (1935) (where the evidence conflicts, a party moving for amended findings must show the court "was compelled to make [the requested findings]"). Similarly, a party requesting that existing findings be deleted must show that they have insufficient evidentiary support. *See Kehrer v. Seeman*, 182 Minn. 596, 602, 235 N.W.2d 386, 389 (1931) (noting that a court "is required to strike out a finding of fact only when the finding has no sufficient support in the evidence"). A motion for amended findings must be based on the files and exhibits in the case, not on evidence that is not part of the record. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006).

C. THE COUNTY'S MOTION IS ONE FOR RECONSIDERATION, NOT FOR AMENDED FINDINGS

The County contends that our May 2017 decision reflects "three errors that must be corrected." [5] First, the County contends, our May 2017 decision "relies on an incorrect reading of the Minnesota Supreme Court's instructions on remand." [6] Second, the County contends, we erred in rejecting for lack of record evidence "an approach calculating the amount of external

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[5] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 3 (filed May 31, 2017).

[6] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 3.

obsolescence based on inutility and operating capacity." [7] Finally, the County contends, we erred in not correcting "errors [in our September 2016 findings] concerning the calculation of indirect costs and entrepreneurial profits." [8]

Guardian urges denial of the County's motion in its entirety, calling it "an improper motion for reconsideration of issues that this Court has thoroughly addressed." [9] For example, Guardian points out that the County "has previously twice argued" for the adoption of an "inutility" approach to external obsolescence.[10] Guardian also notes that the County "has now argued at least thrice that the computational error"—that is, our failure to include indirect costs and entrepreneurial profit in our 2014 calculation of replacement cost new as of January 2, 2010, and January 2, 2011—"should be corrected." [11]

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[7] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 3.

[8] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 3.

[9] Guardian's Mem. Opposing Waseca Cty.'s May 2017 Mot. Am. Findings Fact Conclusions Law 1.

[10] Guardian's Mem. Opposing Waseca Cty.'s May 2017 Mot. Am. Findings Fact Conclusions Law 4.

[11] Guardian's Mem. Opposing Waseca Cty.'s May 2017 Mot. Am. Findings Fact Conclusions Law 4.

Although Guardian argues that the County's motion should be denied, Guardian nevertheless urges us to "*modestly refine* [our] review of historical industry-wide profit margins" and thereby decrease our determinations of market value of the subject property *by nearly 50 percent for each year at issue*. Guardian's Mem. Opposing Waseca Cty.'s May 2017 Mot. Am. Findings Fact Conclusions Law 2, 14. More particularly, Guardian urges us to base our calculation of average profit margin on data between *August 2005* and early 2007, rather than between *2000* and 2007, as Guardian's expert appraisers did. *Id.* at 12-13. Doing so increases the calculated average, from our figure of $0.857 per gallon to $1.58 per gallon, dramatically increasing the amount of economic obsolescence and thereby decreasing market values. For example, for the 2009 valuation date, Guardian's suggested approach would reduce market value by more than $15 million, a decrease of 45%.

Although labeled a motion for amended findings, the County's motion is really a motion for reconsideration. The County points to no specific finding as defective (although, given the limited findings in our May 2017 order, it takes little imagination to conclude that the County seeks to amend our findings with respect to value). *See City of E. Bethel*, 798 N.W.2d at 379 (requiring a motion for amended findings to identify the defects in the findings and to explain why the findings are defective). Nor does the County show that our findings with respect to obsolescence lack any support in the factual record.

As significantly, the County does not demonstrate that the record evidence *compels* use of either its inutility or operational capacity approach. Rather, the County offers its inutility and operational capacity approaches as preferred alternatives to our findings, that is, as "the best measures of external obsolescence." [12]

Finally, the County itself proposes no findings at all. *See Lewis*, 572 N.W.2d at 316 (requiring a motion for amended findings to "explain why [the moving party's] proposed findings are appropriate"); *see also* Herr & Haydock § 52.19 ("The motion to amend should . . . include proposed amended findings of fact and conclusions of law."). Indeed, the County specifically

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Guardian made no motion for amended findings with respect to our May 2017 decision, and we cannot consider Guardian's memorandum opposing the County's motion as a motion of Guardian's own. *See* Minn. Stat. § 271.08, subd. 1 (2016) (requiring a motion for rehearing, including a motion for amended findings of fact, be filed within 15 days of mailing of the notice of the decision). Nor does Guardian's request satisfy the requirements of a motion for amended findings: Guardian has not shown that our approach lacks any support in the record, or that the record compels computation over Guardian's suggested time period. Rather, Guardian offers its higher average profit margins as the approach it prefers. Guardian's Mem. Opposing Waseca Cty.'s May 2017 Mot. Am. Findings Fact Conclusions Law 13-14 (describing the August 2005-2007 time period as "the more relevant period."). This is not enough to require amending our findings.

[12] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 9.

disavows the need to propose *any* particular amount of external obsolescence.[13] Rather, the County contends it is sufficient that we "conclude that the amount of external obsolescence affecting the subject's taxable real property was most likely no more than single digit percentages, if that." [14]

Motions for reconsideration are not specifically authorized in this court. *See* Minn. Stat. § 271.08, subd. 1 (2016) (authorizing motions for "rehearing," including motions for amended findings and motions for new trial). In district court, motions for reconsideration are permitted only under Rule 115.11 of the Minnesota General Rules of Practice, to which this court is not specifically subject. *See* Minn. Stat. § 271.06, subd. 7 (2016) (making the tax court subject to the Minnesota Rules of Civil Procedure and the Minnesota Rules of Evidence "where practicable," but including no mention of the Minnesota Rules of General Practice). Even if motions for reconsideration are permitted in the tax court, the County has not complied with Minn. R. Gen. P. 115.11 in making one. Rule 115 requires a party contemplating a motion for reconsideration to first obtain permission from the court. *Id.* The County neither sought nor received such permission for the instant motion. We therefore deny the County's motion on procedural grounds.

D. THE COUNTY'S MOTION LACKS MERIT

Although we deny the County's motion on procedural grounds, we deny the motion on its merits as well.

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[13] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 8 (noting that in its post-remand memorandum "Waseca County did not advocate 'for a specific percentage of external obsolescence.' ").

[14] Waseca Cty.'s Mem. Concerning Effect *MERC* 15 (filed Feb. 6, 2017).

1. Instructions on remand

The County first contends that we "relied on an incorrect assumption regarding the supreme court's instructions on remand[]," namely, "that the supreme court's instructions to us on remand restrict our approach to economic obsolescence to one of the two taken by the parties' respective appraisers." [15] According to the County, our "assumption is surprising because it is directly contrary to the Supreme Court's guidance" and to our "own explanation of the Supreme Court's decision." [16] The County complains that, having rejected the approach to external obsolescence taken by Guardian's appraisers, we then adopted the very same approach.[17]

In response, Guardian calls the County's description of the supreme court's guidance on remand "woefully incomplete and, therefore, inaccurate." [18] According to Guardian, our discretion to adopt an approach to economic obsolescence "different from what was advanced by either party" is "plainly contingent on two things: (1) the Tax Court would have to 'adequately explain its reasoning' and (2) 'the evidence as a whole supports the alternative methodology.' " [19] But, according to Guardian, the supreme court's instructions on remand go beyond these two

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[15] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 4 (quoting *Guardian*, 2017 WL 2193526, at *31).

[16] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 5.

[17] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 6.

[18] Guardian's Mem. Opposing Waseca Cty's May 2017 Mot. Am. Findings Fact Conclusions Law 5.

[19] Guardian's Mem. Opposing Waseca Cty's May 2017 Mot. Am. Findings Fact Conclusions Law 6 (quoting *Guardian*, 868 N.W.2d at 267).

requirements, and limit any approach we may take to external obsolescence to one supported by "expert appraisal testimony." [20]

Our understanding of the supreme court's instructions on remand was expressly stated in our May 2017 decision. We noted that the supreme court's instructions on remand were "not entirely clear." *Guardian*, 2017 WL 2193526, at *9. For example, although the supreme court declined to "mandate a particular methodology to apply on remand," it also characterized the record before us as "devoid of expert-appraisal support" for our approach to obsolescence. *Guardian*, 868 N.W.2d at 267. Similarly, the court expressly authorized us to "adopt a methodology that is different from those advanced by either party," *id.*, but elsewhere complained that we had "rejected entirely" a decline in ethanol profit margins it said had been cited by both experts, *id.* at 266. Ultimately we concluded: "All the supreme court requires of us on remand is that we 'adequately explain [our] reasoning,' and if we 'adopt a methodology that is different from those advanced by either party,' that 'the evidence as a whole supports the alternative methodology.' " *Guardian*, 2017 WL 2193526, at *10 (quoting *Guardian*, 868 N.W.2d at 259).

We reject the County's contention that we misunderstood the supreme court's instructions on remand, and we reject Guardian's contention that our approach to economic obsolescence is limited to one used by one of the parties' experts. Our May 2017 decision on economic obsolescence adapted the methodology used by Guardian's appraisers, not because we were required to do so, but because we chose to do so. Although the supreme court's remand instructions are not entirely clear, they undoubtedly furnish us with latitude to decide the issue as we have.

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[20] Guardian's Mem. Opposing Waseca Cty's May 2017 Mot. Am. Findings Fact Conclusions Law 6.

2. Calculation of external obsolescence

Rejecting our approach to economic obsolescence, the County urges us to adopt instead the approach to economic obsolescence for which it first advocated in June 2016, namely, "inutility and operational capacity." [21]

As a threshold matter, the County's motion omits an essential element of any motion for amended findings. As we have explained, a party requesting that existing findings be deleted must show that they have insufficient evidentiary support. *See Kehrer*, 182 Minn. at 602, 235 N.W.2d at 389 (noting that a court "is required to strike out a finding of fact only when the finding has no sufficient support in the evidence"). A party proposing *additional* findings must do more than simply point to record evidence that might support those findings. *Nielsen*, 252 Minn. at 29, 88 N.W.2d at 865. Rather, "the moving party must show that the . . . court was compelled to make the requested findings and failed to do so." *Zander*, 703 N.W.2d at 857.

In this case, the County has previously argued for an "inutility" approach. To prevail, the County must therefore show both that the record evidence utterly fails to support our manner of

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[21] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 8-9 (citing Waseca Cty.'s Post-Remand Br. Re: Quantification of External Obsolescence (filed June 21, 2016)).

The County argues that our May 2017 decision is in error because "the 'property's actual margin' is largely derived from the operation and management of the plant's non-taxable personal property." Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 7. The County thus renews its argument that reliance on the price per gallon of ethanol is not an appropriate indicator of any external obsolescence for the subject property because it is a function of the machinery and equipment installed at the subject property, rather than the taxable real property. Resp't's Objections Guardian Energy, LLC's Proposed Findings 13. Our 2014 findings of fact and conclusions of law agreed with the County. *Guardian*, 2014 WL 7476215, at *43. But the supreme court disagreed with us on this specific point. *Guardian*, 868 N.W.2d at 266-67 ("For a special-purpose property, it is impossible to divorce the property value from the operations of the property itself for purposes of valuation because, by their nature, special-purpose properties typically have one practical use and no alternative practical uses. In other words, only one type of business can operate within the special-purpose property.") (citation omitted) (internal quotation omitted).

calculating external obsolescence and that the record evidence compels use of either the inutility or operational capacity approach. The question is not, therefore, whether obsolescence is better calculated in some other way, but whether obsolescence *cannot* be calculated using our approach and *must* be calculated using the County's approach. The County has not met its burden on either of these points. The County has not shown that our approach is without support in the factual record. Nor has the County demonstrated that the record evidence compels the use of either the inutility or operational capacity approach.

Instead, the County complains that our May 2017 decision reduced its proposed approach to obsolescence to an "absurdity."[22] We disagree. Our May 2017 decision rejected the County's "inutility" approach specifically because the record did not establish that it was an appropriate measure of economic obsolescence in this case. As we explained:

> In post-trial briefing, the County suggested that economic obsolescence could alternatively be measured by the proportion of ethanol plants operating as of each valuation date. According to the County, 89% of U.S. ethanol plants (171 out of 191) were operating as of January 1, 2009; 94.5% (189 out of 200) were operating as of January 1, 2010, and 99.5% (204 out of 205) were operating as of January 1, 2011. The County urged us to find "[i]t would be reasonable to conclude that the ratio of closed to operational plants is a strong indicator of the external obsolescence of the Subject Property."
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> We reject the County's alternate approach as well, first because a computation of excess capacity based on the sheer number of ethanol plants in operation fails to consider differences in the capacities of those plants. Ethanol plants in Minnesota alone range in size from 22 Mgy to 110 Mgy. As a simple illustration of the problems created by relying on sheer numbers of facilities open and operating, suppose the ethanol industry comprised just two facilities: a 50 Mgy facility and a 100 Mgy facility. If only one of those facilities was operating, the County would have us estimate economic obsolescence at 50%. In reality, however, the industry could be operating at 2/3 capacity if the 100 Mgy facility was operating and the 50 Mgy facility was closed, or at 1/3 capacity if the 100 Mgy facility was closed. Any measure of excess capacity in the industry should take facility size into account.

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22 Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 9.

> Moreover, a measure of economic obsolescence based on the proportion of ethanol plants not operating on each valuation date does not take into consideration *why* a particular plant was not operating—a reason that may reflect only on the operation of that particular plant and not on the state of the industry as a whole.
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> To summarize, even if we accept that excess production capacity is typically an appropriate measure of economic obsolescence in an industry, we would reject its use here. As we have explained, a particular ethanol plant may not have been open and operating as of a particular valuation date not because of lack of demand for ethanol, but because management of the facility entered into corn futures contracts that became unfavorable. At the same time, as we have explained, the demand for ethanol during the years in question was fixed by statute. Under the unique circumstances of the industry and the record before us, we cannot say that the proportion of ethanol plants closed or not operating as of any valuation date at issue here is an appropriate or accurate measure of economic obsolescence applicable to the subject property.

Guardian, 2017 WL 2193526, at *25-27. Our critique of the County's 2014 proposed findings of fact and conclusions of law remains valid.[23]

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[23] Immediately after trial, Waseca County proposed that the court adopt the opinions of its expert, Mr. Dodd, as to the value of the subject property, including his approach to economic obsolescence based on a comparison of the hypothetical cost to construct an ethanol plant and the prices at which other ethanol production plants had been purchased from bankruptcy. Waseca Cty.'s Proposed Findings Fact Conclusions Law ¶¶ 181-85 (filed Apr. 30, 2014). To bolster those opinions, the County proposed the court find that external obsolescence was declining over the years at issue, as demonstrated by the increasing number of ethanol plants open and operating at each valuation date. Waseca Cty.'s Post-Trial Mem. 9 (filed Apr. 30, 2014) ("Mr. Dodd's conclusion that market conditions improved over time is supported by industry utilization rates."); Waseca Cty.'s Proposed Findings Fact Conclusions Law ¶ 183-84. The County offered "industry utilization rates" as an alternative measure of economic obsolescence as well:

> The Court should either conclude to Mr. Dodd's declining estimates of external obsolescence, or conclude to an even lower and more significant improvement in the ethanol processing industry from 2009 to January 2, 2011. Based on plant utilization rates, the Court could find that the rates of external obsolescence as of the three dates of value were 11% as of January 2, 2009; 5.5% as of January 2, 2010; and 0.5% as of January 2, 2011.

Waseca Cty.'s Post-Trial Mem. 10. Although our December 2014 amended findings of fact and conclusions of law did not adopt the County's alternate measure of economic obsolescence—"plant utilization rates"—the County did not move for amended findings of fact. Nor did the

But the County's suggested approach to economic obsolescence has changed over the course of the post-trial proceedings, from an objective approach based on a simple formula to a subjective approach that takes into account a multitude of factors. We therefore attempt to summarize the changes and address the County's most recent approach.

a. The County's approach in 2016

On remand, the County advocated for an "inutility" approach to economic obsolescence, specifically citing John Corum, *Inutility—An Approach to Calculating Economic Obsolescence*, J. Multistate Tax'n & Incentives, July 2009.[24] Mr. Corum suggests calculating "inutility" as a percentage of cost using the following formula:

$$(1 - (\text{Capacity B} / \text{Capacity A})^x) - 100$$

where Capacity A is the "normal capacity" for the industry, Capacity B is actual production, and x is an "exponent or scale factor." *Inutility*, at *22.[25] Application of the Corum formula thus requires

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County appeal any aspect of our decision to the supreme court. Indeed, the County defended our chosen measure of economic obsolescence.

[24] Waseca Cty.'s Post-Remand Br. Re: Quantification of External Obsolescence 5-7 (filed June 21, 2016) (describing the Corum article as "[a]n exposition of how appraisers can calculate economic obsolescence caused by an excess of supply over demand for industrial properties").

[25] Mr. Corum's approach is adapted from one described by the American Society of Appraisers in its text, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets* (2d ed. 2005). Unlike Mr. Corum, the ASA's formula relies on the "rated or design capacity" of the asset being valued. *Id.* at 98. According to Mr. Corum, government assessors "generally will not accept" obsolescence calculated on the basis of rated or design capacity, "as it is rarely achieved in actual practice, and typically, investment in new facilities is predicated on a lower stabilized level of output." *Inutility*, at *22. Presumably, assessors reject the use of rated or design capacity because facilities generally operate at something less than rated capacity and, as a result, economic obsolescence calculations that rely on rated capacity will generally result in a higher estimate of economic obsolescence and a lower market value.

knowledge of three variables: "normal capacity," "actual production," and the "scale factor" to apply.

The County directs us to its first post-remand memorandum, in which the County suggested two ways to calculate external obsolescence "based on an analysis of inutility": (1) by focusing on "the demand for the products of the entire industry;" or (2) by focusing on "the utilization of production plants which make the product." [26] According to the County, our initial approach to economic obsolescence applied the first option: "comparing the reported demand for ethanol in the United States with the reported ethanol production capacity in the United States for each year." [27] The County argued that the approach it had suggested in its post-trial brief—"comparing the number of operating plants to the number of closed plants"—was a valid application of the second option, "analyzing capacity utilization at the facility level." [28] Using this approach, the County argued, produced operating levels or plant utilization rates of 89% as of January 2, 2009; 94.5% as of January 2, 2010; and 99.5% as of January 2, 2011.[29]

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[26] Waseca Cty.'s Post-Remand Br. 7. The County suggested a third approach—using "production levels for the Subject Property compared to industry averages or the plant's rated capacity"—but discarded that approach for lack of record evidence. Waseca Cty.'s Post-Remand Br. 7, 9.

[27] Waseca Cty.'s Post-Remand Br. 7 (quoting *Guardian*, 868 N.W.2d at 266).

[28] Waseca Cty.'s Post-Remand Br. 8. We disagree with the County that its proffered approach accurately measures "capacity utilization at the facility level." Capacity utilization at the *facility* level must necessarily measure the difference between production and capacity *facility-by-facility*. Consider an industry in which every facility is open and operating but at only 80% of capacity due to, say, a shortage of raw materials. The County's formula would presumably produce zero economic obsolescence when, in reality, there is significant economic obsolescence *at the facility level*. Consider also an industry in which all facilities are open and operating, but only the subject facility is operating at 80% of capacity because of a localized shortage of raw materials. The County's formula would again produce zero economic obsolescence, even though there is economic obsolescence *at the level of the subject facility*.

[29] Waseca Cty.'s Post-Remand Br. 8-9.

The County then returned to the Corum formula, observing that "convert[ing] the available industry data concerning capacity and utilization into a quantifiable measure of demand for ethanol requires a determination of 'normal capacity.' " [30] Here, the County suggested using as "normal capacity" the utilization rates (between 75% and 80%) applicable to all manufacturing as cited in the Corum article.[31] According to the County, at those levels of "normal capacity" as compared to its calculated plant utilization rates (89% in 2009, 94.5% in 2010, and 99.5% in 2011), "there was no industry-wide external obsolescence in the ethanol industry for any of the three years at issue." [32] The County concluded with these observations:

> Capacity measurements are an accepted and widely used means to quantify inutility and to calculate the degree of external obsolescence. In these cases, there is independent and trustworthy data in the record which can be used to measure the level of external obsolescence affecting the taxable real property. Whether the court uses industry production data or plant-level capacity utilization, or a synthesis of the two, the facts in the record establish that external obsolescence was declining from 2009 to 2011 and that, at most, external obsolescence caused only a single digit percentage decline in market value per year.[33]

We disagree, on several counts. First, there is no evidence in the record as to the "normal capacity" of the ethanol industry, or any other. Mr. Corum did not testify at trial, nor was his article offered as an exhibit. At best, the County relies on testimony of its expert, Mr. Dodd, but Mr. Dodd did not use the Corum approach to estimating obsolescence.[34] Whether Mr. Dodd would

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30 Waseca Cty.'s Post-Remand Br. 10.

31 Waseca Cty.'s Post-Remand Br. 10.

32 Waseca Cty.'s Post-Remand Br. 10.

33 Waseca Cty.'s Post-Remand Br. 12.

34 Waseca Cty.'s Post-Remand Br. 4-5 (citing Mr. Dodd's testimony that supply of and demand for ethanol were "in pretty good sync" and that 90% utilization was "in balance").

endorse the Corum formula or agree that "normal capacity" in the ethanol industry, *within the meaning of the Corum formula*, is 75% to 80% is unanswered on our record.

Second, the County's application of the Corum formula simply ignores variable x, the "scale factor."[35] According to Mr. Corum, the scale factor is "the variable in the inutility formula that raises the most questions." *Inutility*, at *23. Mr. Corum describes the scale factor as "the marginal cost factor inherent in achieving a given level of additional capacity." *Id.* In other words, the scale factor is the marginal cost (or the marginal savings) of increasing (or decreasing) capacity. As to how a scale factor is calculated, the American Society of Appraisers (ASA), on whose writing Mr. Corum's approach is based, instructs:

> The exponent X can be determined by plotting actual historical costs for the equipment or plant as the ordinate on log-log paper and the equipment or plant size as the abscissa. The slope of the resulting line through the data will be the cost-capacity factor.

American Society of Appraisers, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets* 61 (2d ed. 2005). In other words, again according to the ASA, "not all [marginal] costs vary with size in a straight line." *Id.* at 62.[36]

Third, the "inutility" approach to calculating economic obsolescence is appropriate only where there are *no fixed costs or expenses* associated with the operation of the item being valued—

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[35] The County asserts that "a property with economies of scale will have less external obsolescence because 'the incremental cost of additional capacity (on a unit basis) becomes less as size increases.' " Waseca Cty.'s Post-Remand Br. 11 (quoting *Inutility*, at *23). But that assertion falls short of a scale factor itself, and shorter still of the information needed to calculate one. *Inutility*, at *23 (observing that incremental cost differences "var[y] significantly from industry to industry").

[36] The ASA provides an example of the calculation of scale factor x for a particular size facility where the replacement cost of plants with both larger and smaller capacities is known. *Valuing Machinery & Equipment* 63. In that example, the cost of a 5,000-unit facility is known to be $171,000 and the cost of a 3,000-unit facility is known to be $119,000. With C_1, C_2, Q_1, and Q_2 known, the scale factor x is the variable to be solved for: $1.43697 = 1.66667^x$. *Id.*

something the ASA acknowledges is "an unrealistic assumption in most situations." *Valuing Machinery and Equipment* 97 (noting that if there are fixed expenses associated with the item, this approach "may significantly underestimate the inutility penalty").[37] The record in this case demonstrates that there are fixed costs associated with the subject property.

Fourth, nowhere does the Corum article discuss whether its approach is appropriate, much less how it would be applied, when Capacity B (actual production) exceeds Capacity A (normal capacity), even in the short-term. Finally, the County's post-remand approach essentially assumes its own conclusion, namely, that an industry (or facility) operating at more than "normal capacity" can never experience economic obsolescence.

Our September 2016 amended findings of fact and conclusions of law did not adopt the County's "inutility" approach. Although the County moved for amended findings of fact and conclusions of law with respect to other findings, the County did not move for amended findings of fact or conclusions of law with respect to economic obsolescence. Nor did the County seek supreme court review of our September 2016 findings with respect to economic obsolescence.

b. The County's approach in February 2017

In January 2017, after the Minnesota Supreme Court's decision on economic obsolescence in *Minnesota Energy Resources Corp. v. Commissioner of Revenue*, 886 N.W.2d 786 (Minn. 2016) (*MERC*), we invited further briefing from the parties. The County took the opportunity to address not only the effect of the *MERC* decision on these cases, but to advocate for at least three different approaches to economic obsolescence.

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[37] When there are fixed expenses to consider, the ASA (but not Mr. Corum) suggests the approach taken in Robert G. Crawford and Gary C. Cornia, *The Problem of Appraising Specialized Assets*, The Appraisal Journal 75-85 (Jan. 1994). *Valuing Machinery and Equipment* 97 & 97 n.28.

First, the County argued that the court could base its estimate of economic obsolescence on the rebuttal testimony of Dean Reder, Guardian's then-chief financial officer.[38] Mr. Reder testified that ethanol margins are "correlated to the amount of ethanol in the marketplace. . . . [W]hen [ethanol supplies] are low, for whatever reason . . . margins can be good. But generally when there's a fair amount of supply in the pipelines, in the terminals, margins are quite low."[39] Because we found "no significant oversupply of ethanol in the market" as of any of the valuation dates at issue, the County urged us to "conclude that there was no excess of supply over demand in the ethanol market."[40]

Second, the County renewed its argument for the "inutility" approach, but with a variation: "Waseca County suggests the Tax Court can use Mr. Reder's testimony and his 'theory of economic obsolescence' . . . to apply the [Corum] inutility analysis suggested by the Supreme Court."[41] The County reiterated that it had "described how in theory there were three ways in which external obsolescence could be calculated for the ethanol industry based on an inutility analysis," using demand for products, utilization of plants, or production levels of the subject property itself.[42] The County asserted that the court had already "made many factual findings which can be used in applying the inutility approach."[43] Indeed, the County claimed that the court's findings to date "supply the component facts needed to prepare an inutility analysis as

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38 Waseca Cty's Mem. Concerning Effect *MERC* 10-11 (filed Feb. 6, 2017).

39 Trial Tr. 1149-50.

40 Waseca Cty's Mem. Concerning Effect *MERC* 11.

41 Waseca Cty.'s Mem. Concerning Effect *MERC* 12.

42 Waseca Cty.'s Mem. Concerning Effect *MERC* 12.

43 Waseca Cty.'s Mem. Concerning Effect *MERC* 13.

described by Mr. Corum," [44] although as our discussion above makes clear, the record before the court lacks information sufficient to calculate economic obsolescence using Mr. Corum's formula.

Finally, the County urged an entirely subjective approach, "giv[ing] weight to Mr. Reder's testimony, to the ethanol industry level supply and demand data, and to the RFA operating plant level data." [45] The County assured the court that "conclusions as to the quantity of external obsolescence need not be made with mathematical precision," provided that "the Tax Court undertakes a detailed analysis of the entire factual record and explains the reasons for its conclusions." [46] If this court did all of that, the County opined, it "will then have sufficient credible evidence to conclude that the amount of external obsolescence affecting the subject's taxable real property was most likely no more than single digit percentages, if that." [47]

c. The County's approach in May 2017

In its most recent briefing, the County purported to return to its 2016 position, advocating only an "inutility" approach as applied by comparing either "industry level demand for ethanol to its supply" or "comparing the plant level production capacity to its utilization or production." [48]

> The "inutility" approach, which was cited by the Supreme Court and which is advocated by Waseca County, is "a generally accepted method of calculating obsolescence, [which] is estimated by comparing the property's capacity to its use level and adjusting the result for economies of scale." [49]

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44 Waseca Cty.'s Mem. Concerning Effect *MERC* 13.

45 Waseca Cty.'s Mem. Concerning Effects *MERC* 15.

46 Waseca Cty.'s Mem. Concerning Effects *MERC* 15.

47 Waseca Cty.'s Mem. Concerning Effects *MERC* 15.

48 Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 16.

49 Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 16.

But the County's most recent approach diverges from its previous recommendation to apply the Corum formula *verbatim*. First, the County characterizes the Corum formula as equally applicable to a comparison of industry level demand to supply as to a comparison of "plant level production capacity to its utilization or production." [50] Second, the County suggests a host of considerations that, in its view, somehow factor into the Corum formula, including: the statutory mandate for increased ethanol blending with gasoline (RFS-2), the growing market for ethanol exports, expanding sales of co-products generated by the ethanol production process, "[t]he virtual cessation of construction of new ethanol plants," "the significant investments made by both ethanol and oil industry participants in purchasing existing properties," and the "larger size" of the subject property.[51]

We reject the County's most recent approach, for all the reasons we have previously discussed. The approach for which the County advocates is inherently objective but, the County's assertions to the contrary, we lack sufficient facts to calculate "normal capacity" or the scale factor of either the ethanol industry as a whole or the subject facility, both of which are necessary to apply the Corum formula. The County has not explained how the other considerations—the statutory mandate, ethanol exports, and so on—factor into the Corum formula. Nor are we persuaded, in light of the supreme court's remand and the history of the case, that a purely subjective approach to external obsolescence would withstand further review. We therefore deny the County's motion for amended findings with respect to external obsolescence.

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50 Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 16.

51 Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 16-17.

3. Calculation of indirect costs and entrepreneurial profit

Finally, the County contends that we erred in denying its October 2016 motion for "correct[ion] of computational errors." [52] To recount, our December 2014 Amended Findings of Fact and Conclusions of Law corrected one computational error in our calculation of the replacement cost new (RCN) of the four concrete silos on the subject property. *Guardian*, 2014 WL 7051221, at *1-2. During Guardian's appeal of our December 2014 decision to the Minnesota Supreme Court, the County asserted for the first time that we had made a second computational error, namely, failing to add indirect costs and profits to total replacement costs for values as of either January 2, 2010, or January 2, 2011.[53] But, as the County further noted in its supreme court brief, neither party had raised the issue in a motion for amended findings, and the County had not filed a notice of related appeal.[54] Rather, the County specifically asked the supreme court to affirm the market values in our December 2014 amended findings of fact and conclusions of law—errors and all—for all years.[55]

After the supreme court remanded the matter to this court for further proceedings concerning external obsolescence, the parties filed and served letter briefs addressing whether to reopen the record for additional evidence or briefing and, if so, the particular evidence or briefing to be offered. Scheduling Order at 1-2 (filed Sept. 28, 2015). The County's letter brief included the following paragraph:

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52 Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 17.

53 Br. Resp't Cty. Waseca 34 n.10 (filed Feb. 23, 2015). The effect of the error was not insignificant: it understated replacement cost new by more than $2 million as of each valuation date.

54 Br. Resp't Cty. Waseca 34 n.10.

55 Br. Resp't Cty. Waseca 34 n.10.

> As previously noted by Waseca County, we believe there is a calculation error in the Tax Court's determination of the RCN for January 2, 2010, and 2011. *See* fn.10 of Waseca County's Supreme Court Brief. Correcting this error does not require reopening the record; either the Court did, or did not, add six percent for indirect costs.[56]

In September 2016, we filed findings of fact and conclusions of law concerning economic obsolescence. *Guardian*, 2016 WL 5874449. The court's findings noted that "except with respect to the asphalt paving added [at the subject property] in 2009, our January 2010 and January 2011 calculations do not include indirect costs." *Id.* at *6 n.13. We concluded, however, that "the County waived any claim with respect to the alleged error," both by not moving this court for amended findings with respect to the issue and "by asking the supreme court to affirm the market values in [the court's] December 2014 amended findings of fact and conclusions of law—errors and all—for all years." *Id.* We considered "that part of our decision [] final and correcting it [] not within the scope of our remand." *Id.*

The County then moved for "correction of [two] computational errors" in our September 2016 order.[57] First, the County again sought to add indirect costs and entrepreneurial profit to our calculation of the 2010 and 2011 replacement cost new.[58] Second, the County sought to correct a different clerical error, dealing with the calculation of external obsolescence. In support of its motion, the County cited Minn. R. Civ. P. 60.01 for the proposition that "courts may correct errors in their orders and judgments at any time." [59] The County argued that the court was

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[56] Letter from Marc J Manderscheid to Hon. Joanne H. Turner 3 (dated Dec. 4, 2015) (on file with the Minnesota Tax Court).

[57] Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 1 (filed Oct. 13, 2016).

[58] Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 1.

[59] Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 4, 7 ("Rule 60.01 provides that oversights or omissions 'may be corrected by the court at any time. . . . Rule 60 has

obligated to add "an additional six percent to account for indirect costs and profits" to "all of its RCN calculations," in order "to comply with the Supreme Court's directives to determine the market value of the Subject Property." [60]

The County denied that it had waived any claim for correction of the error, characterizing the footnote in its supreme court brief as nothing more than an "accurate statement of the procedural history in these cases." [61] The County emphasized that Rule 60.01 allows for correction of clerical mistakes, omissions, and oversights "at any time." [62] As for the County's request that the supreme court affirm the tax court's determinations of market value, the County claimed that its "intent in making this statement should be very clear: the County desired that the Supreme Court should bring these lawsuits to an end by affirming the trial court's Orders." [63] Put another way, according to the County its footnote 10 "is not evidence of waiver; instead, it shows that the County did not intend to waive any calculation errors for so long as the litigation continued." [64]

In May 2017, the court granted in part Waseca County's motion for amended findings. *Guardian*, 2017 WL 2193526. The court granted the County's motion to correct a clerical error in the computation of external obsolescence but denied the County's motion to add indirect costs

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often been held to allow post-remand corrections.") (citing *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 950 (8th Cir. 2012)).

60 Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 5 (citing *S. Minn. Beet Sugar Coop v. Cty. of Renville*, 737 N.W.2d 545 (Minn. 2007) & *McNeilus Truck & Mfg., Inc. v. Cty. of Dodge*, 705 N.W.2d 410 (Minn. 2005)).

61 Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 6.

62 Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 6.

63 Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 6.

64 Waseca Cty.'s Mem. Supp. Mot. Correction Computational Errors 7.

and entrepreneurial profit to the calculation of replacement cost new for 2011 or 2012. *Id.* at *10-13. The court reasoned that even under Rule 60.01, the court could not amend anything expressly or implicitly determined by the supreme court. *Id.* at *11-12. Although neither party sought review of the court's determination of replacement cost new, the County had argued to the supreme court that our market value determinations were "supported by substantial evidence in the record," and the supreme court had agreed. *Guardian*, 868 N.W.2d at 261. We therefore concluded that the supreme court had at least implicitly, if not explicitly, affirmed our December 2014 determinations of replacement cost new. *Guardian*, 2017 WL 2193526, at *11-12. We further concluded that because the County had not sought correction of the error in this court, even though Rule 60.01 permitted it to do so while the case was on appeal, the County had waived the issue. *Id.* at *12-13.

In its most recent motion, the County renews the argument it has previously made: that Rule 60.01 permits correction of errors "at any time," even on remand.[65] "[T]he Court's purpose should be to reach the *correct* valuation of the taxable real property," the County argues.[66] In that light, the County maintains, "what the parties may or may not know is irrelevant; the only question should be whether there was an oversight or omission." [67]

We deny the County's motion on this point for two reasons. First, the County has done no more than restate its earlier arguments, which this court has already considered and rejected. *Lewis*, 572 N.W.2d at 316 (finding a motion for amended findings defective where it "essentially

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[65] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 17-18 (filed May 31, 2017).

[66] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 18.

[67] Waseca Cty.'s Mem. Supp. Mot. Am. Findings Fact Conclusions Law 18.

did no more than repeat the arguments [the party] had previously made"). Second, to accept the County's position is to eviscerate the doctrine of waiver in this court by making "what the parties . . . know . . . irrelevant." *Cf. Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2000) (noting that waiver is the intentional relinquishment of a known right). If the doctrine of waiver is to be eliminated in proceedings before this court, it must be the supreme court that does so.

E. CONCLUSION

For all of the foregoing reasons, we deny the County's motion. We offer some additional comments and a word of caution.

As our previous decisions have explained, the subject facility was open for only a portion of the years at issue and, as a result, had no established history of performance that would have allowed application of certain accepted approaches to economic obsolescence. At the same time, the state of the ethanol industry prohibited the use of other accepted approaches. The parties' experts' respective approaches to economic obsolescence therefore were severely limited. The limited record evidence cabined our approach to economic obsolescence as well. As a result, nothing in our decisions in these cases in any way limits the manner in which external obsolescence may be estimated for this property in other years. Indeed, the passage of time should allow the parties' respective experts to take other approaches and to better estimate economic obsolescence, if any, for the subject property in other years.

Finally, and again because of the state of the record here, we caution that nothing in any of our decisions in this case suggests the approach we may take to economic obsolescence in other cases.

J.H.T.