

STATE OF MINNESOTA
IN COURT OF APPEALS
A05-2041

William J. Bearman and Claudia A. Bearman

Appellants

v.

City of Eden Prairie,

Respondent

APPELLANTS' BRIEF AND APPENDIX

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LEGAL ISSUES

1. Is the Agreement Regarding Special Assessments *Ultra Vires* and Therefore Void Because It Impairs Respondent's Taxing Power in Violation of Article X, Section 1 of Minnesota's Constitution?

Trial Court Held (by implication)¹The subject Agreement does not violate Minnesota's Constitution.

Apposite Constitutional Provision:

Minn. Const. Article X, Section 1 - Power of taxation; exemptions; legislative powers.

Apposite Cases:

In Re: Minnehaha Parkway, 209 N.W. 939 (Minn. 1926)
Anderson v. State, 435 N.W. 2d 74 (Minn.App. 1989)
Bell v. Kirkland, 113 N.W. 271 (Minn. 1907).

2. Was the Agreement Regarding Special Assessments Properly Terminated By Appellants' Notice to Respondent, Because It Was a Contract Without a Definite Term?

Trial Court Held (by implication): Either the Agreement wasn't properly terminated by Appellants' notice or that it was not a contract without a definite term

Apposite Cases:

Benson Co-op Creamery Ass'n v. First Dist. Ass'n, 151 N.W. 2d 422, (Minn. 1967);
Hayes v. Northwood Panelboard Co., 415 N.W. 2d 687 (Minn.App.1987), review denied (Minn. Jan. 28, 1988).

¹ The Appealed Order and Judgment did not directly address any of the issues raised herein. However, implicit in them are holdings adverse to Appellants, as noted.

3. Is the Special Assessments Agreement a Valid Lien Against Appellants' Property?

Trial Court Held (by Implication): The Special Assessments Agreement was a valid lien against Appellants' Property.

Apposite Statute:

Minn. Stat. § 429.061 Subd.2

4. Did Appellants Waive their Right to Terminate or to Challenge the Constitutionality of The Special Assessments Agreement by Waiving their Right to Contest the Validity and Amount of the Agreed Upon "Assessment" therein?

Trial Court Held (by Implication): Appellants Waived their Right to Terminate said Agreement.

Apposite Statute:

Minn. Stat. § 429.081

Apposite Case:

Ruzic v. City of Eden Prairie, 479 N.W.2d 417 (Minn. App. 1991)

STATEMENT OF THE FACTS AND OF THE CASE

Introduction

Until December 18, 2001, Appellants owned approximately 16 acres of land within the corporate limits of Respondent City of Eden Prairie (the "Property"). On that date, the Metropolitan Airports Commission (the "MAC"), Petitioner/Plaintiff in the lower court, purchased the Property, pursuant to eminent domain proceedings it commenced earlier in 2001. The Property is located near Flying Cloud Airport in Eden Prairie, which is owned and administered by the Metropolitan Airports Commission. [A-24, ¶3]²

Both Appellants and Respondent were parties in that eminent domain proceeding from the time of its commencement, having been named as defendants/respondents therein.

In 1999, approximately two years before the MAC began these eminent domain proceedings, its agent W.D. Schock Co., Inc., ("Schock") advised Appellants their entire property would be taken by the MAC for expansion of Flying Cloud Airport's "Safety Zone", pursuant to requirements of the Federal Aviation Administration. [*Ibid.*]

A small part of the Property was Appellant's residence. Most of the Property was used in their equine stabling business, serving a number of horse-owning customers living within Respondent's city limits or in adjacent communities for many years. It was

² References to the Appendix throughout this brief, "A-___".

one of the few facilities in the Twin Cities where owners could both stable and ride their horses. [A-24, ¶3]

Shortly following receipt of Schock's notice in 1999 that their Property would be condemned, Appellants decided to phase out of the equine business, giving their customers, many of whom had been with them for years, the time to find suitable replacement stabling for their horses. *Ibid.*

Woodbear Highlands Subdivision

Intermittently thereafter, Appellants were advised by Schock that the MAC may not take their Property through eminent domain proceedings, despite previous notification of the intended taking. [*Id.* ¶4].

Because they had overhead and other fixed costs with respect to the Property, which continued after terminating the horse stabling business and the income therefrom, and being concerned the MAC would eventually decide not take their Property, Appellants made alternative plans to develop it as a residential subdivision. (*Ibid*)

Even after the MAC commenced eminent domain proceedings in early 2001, Schock personnel continued to report to Appellants the MAC may still abandon and not complete condemnation of the Property. [*Id.* ¶ 6] Appellants therefore pursued their alternate plan. They retained appropriate professionals, conferred with Respondent's personnel in rezoning, platting and other activities, and paid Respondent's requisite fees for rezoning and development of their Property as "Woodbear Highlands" subdivision. [A-24 & 25, ¶¶7 & 8]. During this development of their Property as a residential subdivision, the MAC's ambivalence of condemning or not condemning Appellants'

property was well known to Respondent. During their subdivision development process, Appellants reported to Respondent the MAC might yet complete its eminent domain proceedings, which would terminate both their ownership in that land and the completion of Woodbear Highlands subdivision. [A-25, ¶10]

Special Assessments Agreement

As part of developing Woodbear Highlands subdivision, Appellants entered into the Agreement Regarding Special Assessments with Respondent on August 21, 2001 (the "Special Assessments Agreement"). [A-25, ¶9 & Ex.1; A-30 to 33]. In that Agreement, Respondent agreed to levy an assessment and construct certain improvements to serve the Woodbear Highlands Subdivision, including extension of Eden Prairie Road and installation of water mains, sewers and storm sewers, commencing on or after November 1, 2001 (the "intended improvements").[*Id.* ¶3] In return, Appellants agreed to Respondent's adoption of a special assessment in the amount of \$114,897.25 for construction of the intended improvements, to be levied against the Property and repaid in annual installments beginning with the *ad valorem* taxes due following the year the assessment was levied or when the improvements were constructed, [*Id.* ¶4] The special assessments to be levied against the Property were fixed at the sum of \$114,897.25 regardless of when they were levied [*Id.* ¶¶2 & 4], and Appellants waived any right they had to appeal the amount or validity of the assessment to the District Court, otherwise permitted by Minn.Stat. § 429.081 [A-31, ¶8].

The Special Assessments Agreement was of indefinite duration, having neither a time nor a deadline for performance by either party, nor a termination date. [A-30-33].

MAC's Taking Property

After the Commissioners issued their Award on October 10, 2001, (the "Award"), the MAC decided to complete its taking of Appellants' Property. Both it and Appellants accepted the Commissioners' Award and the valuation of the Property therein.

Thereafter, at a closing on December 18, 2001 (the "Closing"), the MAC purchased the Property and Appellants conveyed fee title therein to that Agency. [A-26, ¶11]

Immediately thereafter, Appellants' Counsel notified Respondent of the MAC's purchase of Appellants' Property pursuant to the Eminent Domain proceeding, resulting in the termination of further development of the Woodbear Highlands subdivision on Appellant's land. [A-26. ¶13]

At no time prior to the Closing nor at any other time, did Respondent's City Council pass any resolution adopting any special assessment for the intended improvements on the Property nor otherwise comply with Minn.Stat. § 429.061, to establish any lien for special assessments against the Property. Furthermore, there has never been any construction of the intended improvements on or for the benefit of the Property at any time.

Escrow

The MAC required, as a condition to closing its purchase of the Property, the establishment of two escrow accounts, retaining, from the amount due Appellants pursuant to the Award, the aggregate sum of \$125,897.25. The separate escrows were established pursuant to two separate agreements having the identical parties thereto:

Appellants, the MAC and General American Corporation/North Star Title serving as Escrow Agent.

Only one of those escrows, in the amount of \$114,897.25 and included at A-34 – 35 (the "Escrow" or the "Escrow Agreement") is relevant herein. The other escrow, in the amount of \$11,000, for Green Acres Recapture on Appellants' Property, is not.

As above noted, no special assessments were ever levied against the Property. If such assessments had been levied, Minn.Stat. § 117.135, subd. 1 and Minn.Stat. § 272.68, subd. 1, would have required collection of the entire amount of that assessment at the Closing, and remittance thereof.

However, the Special Assessments Agreement had been filed in the office of the Hennepin County Registrar of Titles [A-30]. Although that Special Assessment Agreement and its filing did not require the MAC to deduct said sum of \$114,897.25 from the Award to be paid to Appellants at the Closing for remittance to the county treasurer because it was not a levied special assessment, it created an issue to complete the closing. That issue was resolved by depositing those funds in escrow, pursuant to the Escrow Agreement, to be distributed later by motion or agreement subsequent to the Closing. [A-26, ¶11; A-34]

Notice of Termination

In addition to Appellants' attorney's notifying Respondent at the time of the MAC's purchase of their Property in December 2001 that further development of Woodbear Highlands was terminated [A-26, ¶13], Appellants later formally notified

Respondent by letter on or about August 19, 2005 that, effective October 1, 2004, the Special Assessments Agreement was terminated [A-26, ¶14 & Ex. 4 at A-39].

Shortly thereafter, Respondent's counsel sent two letters to Appellants' counsel rejecting Appellants' termination, stating (1) the Special Assessments Agreement is a valid encumbrance on the Property, (2) Appellants "waived their rights to otherwise challenge the validity of the assessments," (3) Respondent had commenced a feasibility study for "construction of the improvements next spring" and (4) Appellants had no right to "unilaterally terminate" that Agreement. [A-26 & 27, ¶15, and A-40 & 41].

Motions

When the MAC brought its Motion for Final Certificate in Condemnation Proceeding in the spring of 2005, Appellants and Respondent brought cross motions for payment of the escrowed funds to each of them. [A- 3 to A-6] In their submissions, Appellants argued they were entitled to the escrowed funds of \$114,897.25 because: (1) the Special Assessments Agreement is ultra vires and, therefore, void because it violates Article X, Section 1 of Minnesota's Constitution, which prohibits Respondent from entering into a Special Assessment Agreement of indefinite duration and limiting the amount it can assess for such improvements to a fixed sum; (2) Appellants properly terminated the Special Assessments Agreement by reasonable notice, since it was of indefinite duration and could be terminated upon such reasonable notice; and (3) the same improvements, identified in the Special Assessments Agreement, were going to be completed by another development near the Property, to be paid for by that developer.

In addition to contradicting each of Appellants' arguments, Respondent further argued (1) Appellants lacked standing to bring their motion; (2) Appellants waived their right to challenge the validity, enforceability and constitutionality of the Special Assessments Agreement; and (3) the Special Assessments Agreement is a "lien on the property" and, therefore, cannot be terminated by Appellants.

The motions were heard before the Honorable LeJeune Lange of the Hennepin County District Court on April 7, 2005. Because of the unexpected assignment to it of the arraignment calendar, to be heard at the same time as the subject motions, the Court curtailed the parties' arguments and therefore invited each of them to make subsequent submissions for the Court to consider.

Both Appellants and Respondent made such subsequent submissions to the Court.

[A-122 to 176]

Order and Judgment

On August 17, 2005 the Court issued an Order directing the Escrow Agent to disburse the Escrowed funds in the amount of \$114,897.25 to Respondent and Ordered Judgment be entered Accordingly. [A-1, 2].

On August 22, 2005, Judgment was entered by the Hennepin County Court Administrator in favor of Respondent. *Ibid*

Appellants filed their Notice of Appeal on October 14, 2005.

ARGUMENTS

I. Standard Of Review

The issues under appeal are reviewed *de novo*, because they involve application of the State Constitution and the construction and effect of an unambiguous contract.

Hamilton v. Comm'r of Pub. Safety, 600 N.W. 2d 720, 722 (Minn. 1999) Empire State

Bank v. Devereaux, 402 N.W.2d 584, 587 (Minn. App. 1987)), review denied (Minn.

Sept. 28, 1995)

II. The Agreement Regarding Special Assessments, Being of Indefinite Duration, Is Ultra Vires and Therefore Void because it Does not Accomodate for Inflation, thus Impairing Respondent's taxing Power, in violation of Article X, Section 1 of Minnesota's Constitution.

Article X, Section 1 of Minnesota's State Constitution states, in part:

Section 1. POWER OF TAXATION; EXEMPTIONS; LEGISLATIVE POWERS. The power of taxation shall never be surrendered, suspended or contracted away. ...

This rule applies not only to a municipality's taxing powers, but to special assessments as well. In Re: Minnehaha Parkway, 209 N.W. 939, 940 (1926). In that seminal case, our Supreme Court also made it clear this constitutional prohibition applied to "any impairment of the taxing power," stating:

Although general taxes and special assessments differ in important particulars, both rest upon and are imposed under the taxing power; and, although laws relating to taxation frequently apply only to general taxes, the broad, all-comprehensive language of the above inhibition leaves no doubt that it was intended to prevent any impairment of the taxing power in any manner whatever.

Ibid.

In addition to applying the aforementioned prohibition of the State Constitution to special assessments, our Supreme Court also made it clear in Minnehaha Parkway just how pervasive that prohibition is against a municipality's contracting away of its power to impose special assessments. In that case, a landowner received a credit against special assessments for the fair market value of a parcel of land he conveyed to the City of Minneapolis for park purposes. Per agreement, the landowner did not receive payment for that conveyed parcel, but was provided a credit against special assessments assessed upon his adjoining land which he retained and which benefited from the parkway. The

Supreme Court approved of this transaction, but specifically limited the amount of the credit to the fair market value of the parcel the landowner conveyed to the city and required any special assessments exceeding that sum to be assessed against the landowner's retained parcel, noting that not doing so would violate the aforementioned constitutional prohibition against impairment of the City's taxing power. *Ibid*

The language in Minnehaha Parkway interpreting this Constitutional prohibition was restated in Anderson v State, 435 N.W.2d 74, 77 (Minn. App. 1989) where the Court of Appeals further noted any such contracting away was "*invalid ab initio*" and "*ultra vires*."

The effect upon any contract between a municipality and anyone which is "*invalid ab initio*" and "*ultra vires*" is that it is void. It's not simply voidable. It's void and cannot be enforced for any reason or purpose. This is the general rule throughout the United States, McQuillin Mun. Corp. § 29.104.30 (3rd Ed.), as it has been in Minnesota for almost a century. Bell v Kirkland, 113 N.W. 271, 273 (Minn. 1907).

Appellants acknowledge there are few appellate court cases interpreting the impairment of the above-referenced taxing powers provision of our State Constitution other than Minnehaha Parkway and State v. Anderson. However, it appears from the language in both cases that the prohibition is uniformly pervasive and limits a municipality's contractual powers with respect to special assessments to such an extent that it obviously applies to a contract for an indefinite term which includes a sum certain for contractual liability for special assessments. Such a sum certain in a contract of indefinite duration, results in just as much an impairment of a city's taxing power, in

violation of our State Constitution, as the contract with the landowner in Minnehaha Parkway would have been if he received a waiver of liability for special assessments on his retained parcel that exceeded the value of the land he contributed to the City.

The Special Assessments Agreement in this proceeding completely ignores inflation. Although Appellants are not aware of any cases decided by our Appellate Courts considering the impact of inflation on the constitutionality of fixed price contracts of indefinite duration for special assessments, there is nonetheless an obvious impairment of taxing power.

Inflation exists in our society, as explicitly recognized by our Supreme Court. In holding that a court's instructions to jurors to consider the impact of inflation on their award is permissible, our Supreme Court stated:

... We have taken the position that inflation is a fact of life which cannot fairly and realistically be ignored.”

Ossenfort v. Associated Milk Producers, Inc. 254 N.W.2d 672, 684 (Minn. 1977)

In addition, in almost every conceivable area in which the cost of goods or services may have an impact on particular individuals or businesses or the general public, our state legislature has consistently mandated cost of living adjustments be determined by agencies, commissions and administrators of every level of government in this state. The Minnesota Statutes are replete with well over 80 separate laws requiring periodic inflation/cost of living adjustments for such disparate subjects as campaign spending limits,³ agricultural loan programs of the Rural Finance Authority,⁴ salary limits of state

³ Minn.Stat. § 10A.255, subd. 1

employees,⁵ medical cost containment goals,⁶ permit fees by government agencies,⁷ education aid and funding policies,⁸ public welfare eligibility,⁹ medical assistance for needy persons,¹⁰ inflation adjustment of tax brackets for state income and franchise taxes,¹¹ public safety officers' survivor benefits,¹² post retirement adjustments to teachers retirement benefits,¹³ job credits and economic development zones¹⁴ and metropolitan government transit tax levies.¹⁵

Our state legislature has even imposed the duty on Minnesota's Supreme Court to make bi-annual adjustments, based upon widely recognized inflation indices, of the ceiling for the maximum amount of income by an obligor for child support under state guidelines in Minn.Stat. § 518.551. This is not simply an example of the pervasiveness of our public policy in this state to recognize inflation as "a fact of life which cannot fairly and realistically be ignored." It also includes specific determinations of what that

⁴ Minn.Stat. § 41B.043, subd. 5 (total net worth limit)

⁵ Minn.Stat. § 43A.17, subd. 1 & 9(a) (State Employment Department of Employee Relations)

⁶ Minn.Stat. § 62J.04, subd. 1(b) & (c) & subd. 1a (implemented by Commissioner of Health)

⁷ Minn.Stat. § 116.07, subd. 4d(d) (Minnesota Pollution Control Administration Powers and Duties – Permit Fees)

⁸ Minn.Stat. § 123B.42, subd. 3(b) (education aid to non-public students for text books); Minn.Stat. § 135A.01 (public post-secondary education funding policy)

⁹ Minn.Stat. § 252.32, subd. 1a (public welfare – eligibility for services to people with mental retardation)

¹⁰ Minn.Stat. § 256B.057, subd. 9 (medical assistance for needy persons' eligibility; income and asset limitations for special categories)

¹¹ Minn.Stat. § 290.06, subd. 2d

¹² Minn.Stat. § 299A.44, subd. 2

¹³ Minn.Stat. § 354A.29, subd. 6

¹⁴ Minn.Stat. § 469.338, subd. 3

¹⁵ Minn.Stat. § 473.46, subd. 1(a)(2) & (b)

inflation is and has been for the past decade and its consistent increases. Minn.Stat. § 518.551, subd. 5(k) requires our Supreme Court to use an index for the adjustment in the aforementioned child support ceiling. By bi-annual Orders it has issued since 1994, the Supreme Court has made that adjustment, based upon the Minneapolis-Saint Paul (CPI-U). These Supreme Court Orders, identified by Order number, are summarized in the “Historical and Statutory Notes” accompanying Section 518.551 of the Minnesota Statutes Annotated, 31 M.S.A. 2005 Suppl. pp. 135-36. In each of the even years, since 1994 and continuing inclusively through 2004, our Supreme Court has increased the child support obligation ceiling, thus recognizing the effect of inflation in each of those even years when the adjustment has been made. There has never been a downward adjustment during that decade and there has always been an adjustment. In fact, the increase over ten years has been 31%, having an annual average percent increase of slightly more than 3% simple interest.

The impact of such a steady and continuing “fact of life” of inflation upon a fixed price, indefinite duration contract for special assessments is obvious, in view of the rule in Minnehaha Parkway decided almost 80 years ago. It is unconstitutional as a violation of Article X, Section 1 of Minnesota’s Constitution. Any other determination runs directly contrary to the ruling in Minnehaha Parkway and, consequently, that prohibition in our State Constitution.

Frankly, it is hard to understand why Respondent even uses the form of Special Assessment Agreement it used with Appellants. It appears to be a form in regular use since it bears the designation, “SSA No. 01-06” at the top of its first page [A-30].

Respondent uses other forms of special assessment agreements with its developers, which are automatically adjusted for inflation by the terms of the agreement. For example, in the form of agreement it included as an exhibit to the Developer's Agreement with Appellants for the Woodbear Highland Subdivision, it included another form, "SSA No. 01-00" [A-160]. This form specifically provides, at paragraph 3, for the adjustment of the assessment based upon "actual costs". [*Ibid*] The difference between these two forms is obvious. One impairs Respondent's taxing power and the other does not. The unconstitutional form is the one that is the subject of this litigation.

Therefore, under long-standing doctrines with respect to contracts that are *ultra vires*, there should have been a determination by the Trial Court that the Special Assessment Agreement used is void and, accordingly, Appellants, not Respondent, are entitled to the escrowed funds in the amount of \$114,897.25. After all, pursuant to law, Appellants were to receive the fair market value of their property, from the MAC, for its taking by eminent domain. Unless and until they receive the sum of \$114,897.25 in escrow, Appellants have not received the fair market value of their property in accord with Chap. 117 of the Minnesota Statutes. Ordering the distribution of these funds to Respondent effectively deprives Appellants of the amount they are entitled to receive for the taking of their property and lacks all legal bases because the subject Special Assessments Agreement is void.

III. The Agreement Regarding Special Assessments Is Of Indefinite Duration and Therefore Can Be Terminated By Either Party Upon Reasonable Notice.

As earlier stated in the Statement of Facts and the Case, in August 2004 Appellants served Notices of Termination of the Special Assessments Agreement upon Respondent [A-39], as acknowledged by Respondent's counsel [A-40 and 41].

In Minnesota, a contract of indefinite duration, express or implied, may be terminated at will by either party upon reasonable notice. Benson Co-op Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 526, 151 N.W.2d 422, 426 (1967); Hayes v. Northwood Panelboard Co., 415 N.W.2d 687, 691 (Minn.App.1987), review denied (Minn. Jan. 28, 1988).

The Special Assessments Agreement [A-30 to 35] has no stated duration or termination date. Accordingly, this Agreement is of indefinite duration and is terminable upon reasonable notice by either party to the other.

Although Minnesota law does not require a contract of indefinite duration to have been in force for a reasonable time prior to a party's termination of it by notice, this additional condition may exist in some jurisdictions. 17A Am. Jur. 2d Contracts, § 531 Contracts Of Indefinite Duration. Even if this additional criteria were included in Minnesota law, Appellants submit the Special Assessments Agreement continued well beyond any appropriate reasonable period of time, as evidenced by both the Agreement itself and the parties' conduct thereunder.

An examination of the terms of that four-page Agreement shows its purpose, and the construction of the "Improvements" described therein, was to provide municipal

utilities, primarily sewer and water, to the owners of homes to be developed on lots of Woodbear Highlands, the residential subdivision being developed by Appellants.

Because Appellants' property was taken by the MAC's eminent domain proceeding, the purpose for this Agreement obviously failed. In particular, Recitals B and C to the Special Assessments Agreement provide:

B. [Appellants]¹⁶ desire to develop the property in such a manner that will require construction of Eden Prairie Road, street and gutter, storm sewer, water mains and sanitary sewer (the "Improvements") by [Respondent].

C. [Appellants and Respondent] hereto desire to enter into an Agreement concerning the financing of the construction of the Improvements, all of which will enure to the benefit of the [Property] and the levying of assessments for said Improvements.

In addition, paragraph 3 of that Agreement provides:

3. [Respondent] may proceed with the construction of the Improvements on or after the first day of November 2001 in accordance with this Agreement. The Owners agree to provide temporary and permanent easements for road improvements consistent with the preliminary plat for Woodbear Highlands as required for the Improvements on demand by [Respondent] without compensation; provided, however, the temporary and permanent easement areas for roadway purposes shall not be included as assessed or assessable acreage of the property.

Clearly, the above preambles contemplate final approval of the Woodbear Highlands plat and subdivision by Respondent's City Council. That never happened because of the issuance of the Commissioners' Award in October 2001, the acceptance of that Award by both the MAC and Appellants and the MAC's decision to complete the taking at the Closing in December 2001 before the final plat approval of Woodbear

¹⁶ The bracketed language in the quoted portions of the Special Assessments Agreement are modified to state the parties' named designations on appeal, both here and elsewhere in this Brief.

Highlands subdivision by Respondent [A-26, paragraph 11]. Consequently, there never was a Woodbear Highlands subdivision and there was no need for “improvements” that were the subject of the Agreement between Appellants and Respondent.

Paragraph 3 of the Special Assessments Agreement quoted above also contemplates the construction of the improvements was to begin on or after November 2001. Again, if a reasonable period of time must pass before a contract of indefinite duration may be terminated, the Notice of Termination by Appellants in August 2004, almost three years after construction of the improvements was to begin pursuant to paragraph 3, certainly was after a reasonable period of time for the duration of the Agreement.

Assuming the Special Assessments Agreement is unambiguous, as Respondent contended before the Trial Court [A-171], the aforementioned provisions of the Agreement and the absence of any duration for the existence of the Agreement allow Appellants to terminate it upon reasonable notice. Certainly, there is no ambiguity with respect to the Special Assessments Agreement’s not having a term or duration. There is absolutely no language in the Agreement providing such directly or by implication.

On the other hand, if the Agreement is considered to be ambiguous in when it was to be performed, from the record, presented to the Trial Court by Respondent’s affidavits and exhibits accompanying them, there is no doubt the contemplated undertakings by Respondent under this Agreement were to occur almost immediately after its execution on August 2001. In particular, Respondent’s Director of Public Works, Eugene Dietz, submitted an agenda to Respondent’s City Council on the same day the Agreement was

executed by Respondent, stating:

[Appellants]¹⁷ have progressed their 15 plus acre property through the preliminary approvals for subdivision and rezoning. However, a hearing will occur later this month to begin the process of condemnation of the property by the MAC. [Appellants] are inspired to accept these assessments as a legacy towards doing the right thing for their community and their neighbors.

Staff recommends that the Special Assessment[s] Agreement be approved. The next step of the process would be to hold a special assessment hearing regarding this property so that it may be levied prior to the anticipated change in ownership.

[A-106]

Certainly the above statement, submitted as part of Respondent's City Council agenda, assumes an almost immediate proceeding by that City Council "to hold a special assessment hearing" for the property in order to levy prior to the anticipated change of ownership. Obviously, Respondent's Director of Public Works, as of August 21, 2001, expected an almost immediate performance by Respondent under the Special Assessments Agreement. Certainly, his reference to the special assessment hearing and the levy is pursuant to Minn.Stat. § 429.061, which provides for the public hearing he referred to in the agenda and for the assessment to be levied and a lien upon the property "from the date of the resolution adopting the assessment,..." *Ibid.*, subd. 2.

No such resolution was ever adopted by Respondent's City Council, at any time.

Furthermore, the process of assessment and construction of the assessed improvements is relatively expedient in Minnesota. It is the general rule that within one year after the adoption of the resolution ordering the improvement and assessment, the

¹⁷ The bracketed language in the quoted portions of Mr. Dietz' agenda to Respondent's City Council are modified to state the parties' named designations on appeal.

contract for that improvement must be let for construction. Minn.Stat. § 435.191 (“Time limit on improvements”).

Thus, should there be any ambiguity in this Agreement allowing an examination of parol evidence to resolve that ambiguity, these statements by Respondent’s Director of Public Works to the City Council in the agenda above quoted on the same day as Respondent’s Mayor executed the Special Assessments Agreement, resolves that ambiguity in favor of a duration of the Special Assessments Agreement well short of three years when Appellants gave notice to Respondent of termination. That is corroborated by Minnesota law requiring expedient construction of improvements after a municipality adopts the assessment. *Ibid.*

In addition, interpreting the Special Assessments Agreement to be of a duration beyond even a year, is contrary to Article X, Section 1 of Minnesota’s Constitution, discussed in the preceding Argument herein. That is, by having a fixed price for improvements of a contract of indefinite duration, there is an impairment of Respondent’s taxing power due to inflation. If this Agreement is to comport with that constitutional mandate, its duration would have to expire long before the present time.

Finally, Appellants note the Special Assessments Agreement is entirely executory. That is, aside from submitting this matter to Respondent’s City Council for resolution and that council’s passing a resolution for a preliminary feasibility study “with all convenient speed for the scope, cost assessment and feasibility of the proposed improvements,” on October 16, 2001 [A-108], Respondent did absolutely nothing in performing under the Special Assessments Agreement. Respondent did not conduct a public hearing or even

issue notice thereof, as required by Minn.Stat. § 429.061, subd. 1 and did not adopt any resolution for the assessment, or otherwise comply with subdivision 2 of that section of the Minnesota Statutes. Of course, there was neither construction nor any other similar activity towards development of the improvements. Appellants acknowledge that, in response to their Notice of Termination in August 2004, Respondent's attorney said that a consultant had been retained to determine project feasibility, but the resolution referred to was the one adopted in October 2001, three years earlier, to be completed with "all convenient speed". Appellants submit these aforementioned acts in no way effected the completely executory status of the Special Assessments Agreement. It was never performed, even partially, by either party.

IV. The Special Assessments Agreement is not a Valid Lien Against the Property because Respondent's City Council Never Adopted any Assessment, as Minn. Stat. § 429.061 Subd.2 and the Agreement Required.

One of Respondent's principal contentions is based upon Paragraph 9 of the Special Assessments Agreement, which states:

The parties agree that this Agreement and the assessments against the Property for the Improvements shall be a lien on the Property and that [Appellants] shall have no individual liability or obligations with regard thereto at any time.

Respondent contends this provision creates an indefinite and valid lien against the Property, even though it's City Council never adopted any special assessments, nor otherwise complied with Minn. Stat. § 429.061, subd. 1 & 2 and did not construct the intended improvements.

Respondent also filed the Special Assessments Agreement with the Hennepin County Registrar of Titles on August 27, 2001, 6 days after its execution. Respondent's counsel contends this filing against the Property created "... a valid encumbrance upon the Property..." which prohibits Appellants from "unilaterally" terminating it. [A-41].

There are three separate reasons the Special Assessments Agreement, although filed with the Hennepin County Registrar of Titles, is not such a valid lien against the Property:

(1) Respondent never complied with the statutory mandate for creating a valid lien for any special assessment against the property, as Minn. Stat. § 429.061, subd.2 requires;

(2) Paragraph 9 of the Agreement, earlier quoted, requires both the execution of the Agreement and an assessment for a valid lien or encumbrance to exist; and

(3) Such an indefinite lien denies the rights Appellants would otherwise have to these escrowed funds under Minn. Stat. § 435.202. subd. 2 if Respondent had actually complied with Minn. Stat. § 429.061, adopting a valid assessment and thereafter failed to construct the improvements.

An elaboration of each of these three reasons follows in this Argument.

1. Respondent Never Complied with the statutory Mandate For Creating a Valid Lien For Any Special Assessments Against the Property Required by Minn.Stat. § 429.061, subd. 2.

A valid lien for special assessments against any property only arises after a municipality complies with Minn.Stat. § 429.061, which requires, following notice of public hearing and the hearing, the adoption of a resolution by the municipality adopting the assessment. Minn.Stat. § 429.061 subd. 2 is quite specific identifying when a special assessment becomes a lien. It states, in part:

... The assessment, with accruing interest, shall be a lien upon all private and public property included therein, from the date of the resolution adopting the assessment, concurrent with general taxes; ...

Thus, Minnesota's statutory procedure for creating a valid lien of special assessments requires municipalities to comply with the procedure outlined in Minn.Stat. § 429.061, subd. 2 before the special assessments are a valid lien on the subject property.

By failing to comply with this statute, Respondent has not established a lien or encumbrance against the property. There cannot be a valid lien or encumbrance on the Property for such intended special assessments that were never adopted.

It is long settled law in Minnesota that a lien or encumbrance must have an underlying debt or charge upon the property for payment of a debt. . E.g. In Re: Objections and Defenses to Real Property Taxes for the 1985 ..., 410 N.W.2d 321, 323 (Minn. 1987)

“... ‘lien’ is a clearly defined term. A lien is a hold or claim which one person has on the property of another as security for a debt or charge; it is a charge upon property for the payment of a debt.[citing Gau v. Hyland. 41 N.W.2d 444, 448 (Minn. 1950)]”. This rule is consistent throughout the United States. For example, 51 Am.Jur.2d Liens § 13, “Underlying Debtor Obligation”, states:

... A lien is a right to encumber property until a debt is paid. It presupposes the existence of a debt. If there is no debt in the first instance, there is no need for a lien, so a lien cannot legally exist or attach. In other words, without a debt there can be no lien.

2. Paragraph 9 of the Agreement Requires Both the Execution of the Agreement and Adoption of the Assessment by Respondent’s City Council for a Valid Lien or Encumbrance to Exist.

Paragraph 9 of the Special Assessments Agreement provides in part, “The parties agree that this Agreement and the assessments against the property for the improvements shall be a lien on the Property ...” [Emphasis added] This is in the conjunctive and means for the Agreement to be a lien on the Property there must also be a valid assessment adopted by Respondent’s City Council. As above noted, an assessment does not arise unless the procedure in Minn.Stat. § 429.061, subd. 2 is followed, culminating in the resolution by Respondent’s City Council adopting the assessment. Because that never occurred and this particular provision is in the conjunctive with “and”, those two conditions are required before the Special Assessments Agreement is a lien on the property did not occur. If the parties intended for the Special Assessments Agreement alone, without adoption of any assessment, to be a lien on the property, a disjunctive word such as “or” would have been used rather than “and”.

Although Minnesota's Appellate Courts have not directly held the use of "and" is conjunctive in ordinary contracts such as the Special Assessments Agreement, our Supreme Court recently held that the language in our State Constitution using "and" is conjunctive, not disjunctive. State v. Hartmann, 700 N.W.2d 449, 453 (Minn. 2005) ("Occupied and Cultivated" in Article XIII, Section 7 of Minnesota's Constitution in conjunctive). A well-know encyclopedia of law provides that when used "in its ordinary sense", the word "and" is strictly of a conjunctive nature, while the word "or" is of a disjunctive nature. 17A C.J.S. Contracts § 323, p. 347. This section of that encyclopedia goes on to note that although these words are not ordinarily "interchangeable terms" they can be interchanged "... if the remainder of the agreement shows that a reasonable person in the position of the parties would so understand it...." Under this test, Appellants submit the only reasonable interpretation is to use "and" in the conjunctive the way it is ordinarily used.

Of course, the forgoing assumes paragraph 9 of the Special Assessments Agreement and, in particular, the subject language therein, is unambiguous in that it is reasonably subject only to one interpretation. *E.g.* Columbia Heights Motors v. All State Insurance Co., 275 N.W.2d 32, 34 (Minn. 1979). If so, the contract language is clear and unambiguous, Starr v. Starr, 251 N.W.2d 341, 342 (Minn. 1977) and the meaning of the contract is determined in accordance with its plainly expressed intent. Carl Bolander and Sons, Inc. v. United Stock Yards Corp., 215 N.W. 2d 473, 476 (Minn. 1974). Other evidence, not in the four corners of the Agreement, must be excluded under the parol evidence rule prohibiting the admissibility of prior oral or written agreements to

contradict or vary the explicit terms of a written contract which the parties intended to represent their final and complete agreement.

However, even if it were argued an ambiguity existed as to whether “and” was used in the disjunctive or conjunctive, use of extrinsic evidence prepared on the same day shortly before Respondent’s Mayor executed the Special Assessments Agreement on Baker v. Citizens State Bank of St. Louis Park, 349 N.W.2d 552, 558 (Minn.1984). August 21, 2001, shows that “and” in this Agreement was used in the conjunctive. Specifically, as earlier noted herein, on that same date, Mr. Eugene Dietz, Respondent’s Director of Public Works prepared an Agenda for the City Council to approve the subject Agreement. In that Agenda, Mr. Dietz stated to the City Council, “The next step” after it approves the Special Assessments Agreement, “would be to hold a special assessment hearing regarding this property so that it may be levied...” [A-106].

Thus, whether paragraph 9 of the Special Assessments Agreement is considered unambiguous or ambiguous, the result is the same. It was the intent of the parties, as expressed by Respondent’s Director of Public Works, that “and” is in the conjunctive in that Special Assessments Agreement, in that it is the Agreement and the assessment which was to be “levied” as soon as possible against the Property constituting a lien immediately thereafter.

So read, paragraph 9 of the Special Assessments Agreement is unequivocal. The Agreement was never a lien against the property.

3. Denial of Rights Appellants Otherwise Would Have to These Escrowed Funds under Minn.Stat. § 435.202, subd. 2 if Respondent Had Complied With Minn.Stat. § 429.061, Adopting a Valid Assessment.

If Respondent's City Council had followed the recommendation of its Director of Public Works in the City Council Agenda he prepared discussed immediately above [A-106], the Council would have caused notice to be provided, conducted a public hearing and passed a resolution adopting the special assessments described in the Special Assessments Agreement, pursuant to Minn.Stat. § 429.061, subd. 2. Beginning immediately thereafter, there would have been a valid levy and lien for these special assessments against Appellants' Property.

Assuming all other circumstances identical to what actually happened, including the Closing for the purchase of Appellants' Property by the MAC on December 18, 2001, there would have been a deduction, at that Closing, of the total amount of those special assessments which had been levied. That sum would then have been remitted to the Hennepin County Treasurer for forwarding to Respondent, as specifically required by Minn.Stat. §§ 117.135, subd. 1 and 272.68, subd. 1. That is, at the Closing, the entire sum of \$114,897.25 would have been deducted from what Appellants were to receive, just as Respondent's Director of Public Works intended, as stated in the meeting agenda he sent to the City Council on August 21, 2001 [A-106]

However, assuming that, in the intervening three years there was no construction of the improvements (as there was not), Appellants would have been entitled to a total refund of the \$114,897.25 in levied assessments, pursuant to Minn.Stat. § 438.202, subd. 2, which requires, when a special assessment has been abandoned by a municipality, a refund must be made to any person from whom special assessments were collected.

For some time, Minnesota law has recognized the right of a landowner paying special assessments to recover payments previously made when a project has been abandoned. Valentine v. City of St. Paul, 26 N.W. 457 (1886), as explained at 13 Minn.L.Rev. 631-32 (1929), (“Taxation – Special Assessment – recovery where improvements are abandoned”.) Whether by negligence or otherwise, the failure of Respondent’s City Council to adopt an assessment on Appellant’s property pursuant to Minn.Stat. § 429.061, subd. 1 & 2 and, in accord with paragraph 9 of the Special Assessments Agreement, results in the present situation. The Trial Court awarded Respondent the agreed upon sum of \$114,897.25 for improvements that it never constructed and for which Appellants would be entitled to a refund if they had paid them at Closing when their property was taken by the MAC in December 2001. Minn.Stat. § 435.202, subd. 2 and the aforementioned citation from the Minnesota Law Review and the case decided over 100 years ago, essentially provide that a municipality cannot retain funds it previously assessed for improvements it does not construct. By the convoluted circumstances in this case, however, Appellants’ right to such a refund has been eviscerated by Respondent’s failure to comply with the assessment process under Minnesota law, as its Director of Public Works had recommended. Appellants do not believe it is either public policy or the intent of the legislature in providing for refunds of assessments for improvements that are never constructed for the benefit of the subject property to create such a contradictory result.

V. Appellants Did Not Waive Their Right to Terminate the Special Assessments Agreement by Waiving Their Right to Contest the Validity and Amount of “The Assessment”.

Respondent asserts Appellants waived their right to terminate the Special Assessments Agreement, even though it is of indefinite duration and therefore terminable by either party upon reasonable notice. In so arguing, Respondent relies on Paragraph 8 of the Agreement, which states:

In consideration of [Respondent's] Agreement herein and particularly in consideration of the amount of the assessment against the Property as set forth in Paragraph 2 above, [Appellants] waive all rights they have by virtue of Minnesota Statute 429.081 or otherwise to challenge the amount or validity of such assessments, or the procedures used by [Respondent] in making the Assessments and hereby releases Respondent, its officers, agents and employees from any and all liability relating to or arising out of the imposition or levying of the assessments. [A-31]

Appellants disagree. Paragraph 8 above quoted is not ambiguous. Consequently, as earlier noted, the construction and effect of this provision is a legal question. *E.g.* Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn.1979). The legal effect of Paragraph 8 of the Agreement is obvious. Appellants waived any right to challenge the validity and the amount of an assessment levied by Respondent. However, Respondent never levied and the waiver never became effective.

Under Minnesota law, waiver has always been defined as “the voluntary and intentional relinquishment or abandonment of a known right.” *E.g.* Montgomery Ward & Co., Inc. v. County of Hennepin, 450 N.W.2d 299, 304 (Minn.1990).

Thus, the operative words for waiver in this state require a “voluntary” and

“intentional” relinquishment or abandonment of a known right. In paragraph 8 of the Agreement, the “known right” which Appellants “relinquished” or “abandoned” is limited to the procedure by which Respondent would adopt the assessment contemplated by the Agreement. A simple analysis of this paragraph 8 shows, without any question, these contemplated assessment procedures and the assessment which never occurred, are the “known rights” Appellants voluntarily and intentionally relinquished and thereby waived.

By reference in said Paragraph 8 to Minn.Stat. § 429.081, the specifics of the contracted waiver are obvious. That statute allows for an appeal by “any person aggrieved” “from a special assessment levied pursuant to ... Chapter [429 of the Minnesota Statutes].” With use of the word “assessment” four times in Paragraph 8, there is no question Appellants waiver presupposes an “assessment”. There never was an assessment adopted pursuant to Minn.Stat. § 429.061, subd. 2, which is the only legal means by which an assessment could be levied by Respondent in this situation under the subject Agreement. This waiver clause is therefore completely irrelevant, as a matter of law, and is of no effect whatsoever upon Appellants’ right to terminate the Special Assessments Agreement, of indefinite duration and having no term.

The Court of Appeals has previously acknowledged this difference between waiving the assessment and the procedure thereunder vis-à-vis waiving rights to challenge the underlying agreement. In Ruzic v. City of Eden Prairie, 479 N.W.2d 417, 420 (Minn.App. 1991), the Court of Appeals was quite explicit in limiting the effect of the waiver of the appeal rights and validity of the assessment under Minn.Stat. § 429.081,

stating, “Waiver of appeal rights does not take away the court’s jurisdiction to consider the validity of the waiver.” *Ibid.*

This was the holding in Ruzic, since this Appellate Court specifically remanded Ruzic to the trial court, “... for a determination of the validity of the waiver used by [the City of Eden Prairie] in this case.” *Ibid.*

Quite clearly, therefore, Ruzic holds Appellants, by waiving their right to appeal an assessment under Paragraph 8 of the Special Assessments Agreement, did not waive their right to contest the validity of that Agreement.

This distinction in Ruzic is obviously applicable, since there was no assessment ever levied by Respondent’s City Council. To determine otherwise ignores the predicate to waiver discussed above, being an intentional relinquishment or abandonment of a known right.

Respondent argued that certain of the Minnesota Statutes relating to special assessments support its argument concerning the applicability of the Paragraph 8 waiver. They do not. Each of the statutes cited by Respondent to the Trial Court, Minn.Stat. §§ 429.031, 429.081 and 462.3531 assume that Respondent’s City Council has adopted resolutions either approving the construction of improvements or adopting assessments.

Respondent strongly argued to the Trial Court that Minn.Stat. § 429.031, subd. 3 entitles it to the escrowed funds. That statute provides the means for a municipality and petitioning landowners to avoid a public hearing and other statutorily required processes for construction of utilities and imposition of the assessments therefor. In the present case, that expedited special assessment law is not applicable for several reasons,

including:

a. It requires the petition by all “owners of real property abutting upon any street named as the location of any improvement.” There is a specific street in this proceeding, Eden Prairie Road. Appellants were, at the time they entered into the Special Assessments Agreement, landowners abutting the west side of Eden Prairie Road. There were other landowners abutting the east side of Eden Prairie Road, but no petition was ever filed by them with the City. Thus, “all owners” owning real property abutting the appropriate section of Eden Prairie Road, including those directly opposite (easterly) of the Property, never signed the petition and the statute is therefor unavailable.

b. Respondent’s City Council has never adopted a resolution required by Minn.Stat. § 429.031, subd. 3, determining that all abutting landowners of the street in question have petitioned and ordering “the improvement”. Both of those are necessary in a resolution by Respondent’s City Council. Again, as above stated, no resolutions were ever adopted by the City Council either adopting an special assessments or authorizing improvements, as required by subdivision 3 of Minn.Stat. § 429.031.

Similarly, Respondent’s argument to the Trial Court that Minn.Stat. § 462.3531 is somehow relevant to expanding Appellants’ waiver in Paragraph 8 of the Agreement beyond what Ruzic allows, is misplaced. This relatively new statute, enacted in 2001, reads, in its entirety:

462.3531. Waiver of rights

Any waiver of rights of appeal under section 429.081 is effective only for the amount of assessment estimated or for the assessment amount agreed to in the development agreement. An effective waiver of rights of appeal under section 429.081 may contain additional conditions providing for increases in assessments that will not be subject to appeal if:

- (1) the increases are a result of requests made by the developer or property owner; or
- (2) the increases are otherwise approved by the developer or property owner in a subsequent separate written document.

A reasonable interpretation of this statute shows it does not expand Appellants' waiver beyond the specific procedures and in the amount of the assessment by Respondent's City Council – which never occurred. Of equal importance, Minn.Stat. § 462.3531 only provides that a waiver of appeal rights by a contracting party under Minn.Stat. § 429.081 is limited to the amount of an assessment that has been estimated or agreed to in a development agreement unless there are contractual provisions which provide the waiver applies to increases in assessments resulting from a request by the developer or property owner or otherwise approved by those parties in a separate writing. Appellants do not believe this statute has any applicability or causes any waiver of the rights they have asserted in this proceeding relating to termination of the Special Assessments Agreement.

CONCLUSION

The Trial Court's Order and the subsequent Judgment pursuant to that Order directing the escrowed funds of \$114,897.25 belong to Respondent is error and must be reversed and remanded.

Those escrowed funds, representing a part of the proceeds due Appellants for the fair market value of their Property taken by eminent domain, belong to them and not Respondent.

The Special Assessments Agreement, which is the basis for Respondent's contention it is entitled to Appellants' money, and upon which the Trial Court probably issued its Order, is void as unconstitutional and has been properly terminated by Appellants as argued herein. Respondent's arguments that the Special Assessments Agreement is a valid lien and "runs with the land" and cannot be terminated by Appellants or that the waiver provisions of that Agreement waives more than what it states, do not have merit.

More especially, the Special Assessments Agreement is, for all substantial purposes, completely executory and any of the intended improvements therein are either not going to be constructed since they benefit land taken by the MAC, or will be undertaken by or for the benefit of other developers and landowners at some future date.

Ironically, if Respondent's City Council had actually undertaken what its Director of Public Works recommended in August 2001 and levied an assessment against the Property, which Appellants would have been required to pay at the time the MAC purchased their Property through eminent domain, Appellants would, at present, be

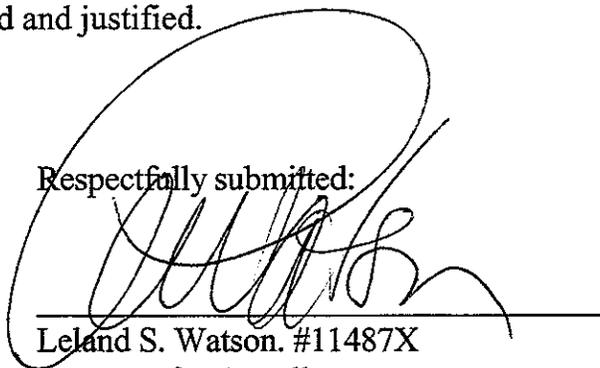
entitled to a refund of those monies paid to Respondent.

In effect, Respondent is receiving the sum of \$114,897.25 for doing nothing. Inasmuch as Appellants would have been entitled to a refund if assessments had been levied as contemplated, this gratuity to Respondent results in Appellants' deprivation of what they were entitled to receive in eminent domain for the fair market value of their property.

Reversal is therefore both warranted and justified.

Dated: November 14, 2005

Respectfully submitted:

A large, stylized handwritten signature in black ink, appearing to read 'L. S. Watson', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

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