

STATE OF MINNESOTA
IN COURT OF APPEALS
A05-2041

William J. Bearman and Claudia A. Bearman

Appellants

v.

City of Eden Prairie,

Respondent

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

There are several areas of dispute between the parties concerning their respective rights and duties under Minnesota Law and the Special Assessments Agreement. To the extent rebuttal is necessary, these are addressed in Sections III through V of this Reply Brief, which correspond with Respondent's arguments in its Brief. Before addressing those arguments, however, Appellants will identify, in Section II of this Reply Brief, their most fundamental differences with Respondent's view of the Special Assessments Agreement and the Parties rights thereunder.

II. Does the Special Assessment Agreement Apply Only to Improvements That Would Benefit the Property Then Owned by Appellants (the "Property") or Does It Apply to Construction Of Any Improvements Within Respondent's City limits, Even Though They Will Not Benefit the Property Which Was Condemned By the MAC and Is Now Limited to "Aeronautical" Use?

Appellants believe the Agreement is limited to the benefits described therein, for development of the 31 lots contemplated by the Wood Bear Highlands subdivision then under development, as the Agreement states.

Respondent disagrees, maintaining the Agreement is not so limited and applies "to complete the urbanization of the neighborhoods adjacent to Eden Prairie Road in the vicinity of the Property" (A-98). In other words, even though the improvements will not and cannot benefit the Property, it doesn't matter. Respondent is nevertheless entitled to the \$114,897.25 in escrowed funds - part of the amount due Appellants for the fair value of the Property taken by eminent domain - because the Agreement is no longer "executory" and "is a lien on the land." Both these legal propositions are dubious and Appellants dispute them.

After the taking by eminent domain, the Property cannot be developed as the 31-lot Wood Bear Highlands subdivision contemplated in the Agreement. As explained in an Affidavit by Robert B. Swenson, Vice President of W.D. Schock Company, Inc., MAC's agent for acquiring the Property and other land around Flying Cloud Airport, executed and filed with the Court Administrator May 16 and 17, 2001, development of the Property is "strictly regulated" by Minn. Rules Chap. 8800. [Paragraph 5 of said Affidavit and Exhibit. A, p.3, attached thereto]. Those State Regulations would not allow more than 1/10th the number of lots contemplated for the Property by Wood Bear Highlands

subdivision. *Ibid.* More especially, it is the MAC's intention to prohibit even that "strictly regulated" development, allowing it only "as a last resort." *Id.*, p.6. The MAC's Airport Planner, Mark Ryan was even more explicit in paragraph 6 of his affidavit executed April 17, 2001 and filed with the Court Administrator in this proceeding on April 26, 2001. He stated:

[Appellants'] Parcel is included in the area of real property being acquired in furtherance of the MAC objective to limit future non-aeronautical development near the Airport.

Thus, after the MAC's taking of the Property by eminent domain the improvements described in the Special Assessments Agreement will not benefit the Property, since the MAC's expressed intention is to keep the Property as undeveloped, vacant land, within Safety Zone B, adjacent to the airport's runways. Yes, certain of the intended improvements, such as the Extension of Eden Prairie Road and sewer and water mains, if constructed, may benefit owners of other real estate not condemned, but they will be of no benefit to the Property, which the MAC intends to restrict exclusively to "aeronautical" rather than "non-aeronautical" use.

Both in its submissions to the Trial Court (A-169) and in its Brief, Respondent redundantly refers to a "complex project, involving a complex design and financing from several parcels." That is not the project contemplated nor intended by the terms of the Agreement, which is limited to a defined parcel of land, to be divided into 31 lots and named "Wood Bear Highlands".

These obviously do not refer to the Property now owned by the MAC. It is and was Appellant's contention that under no circumstances is Respondent entitled to the

presently escrowed funds of \$114,897.25. Respondent has done nothing, and will do nothing in performing under the Agreement, since the improvements cannot benefit the Property or the MAC as the owner thereof.

III. Appellants Have Standing To Pursue Their Rights Under Both the Special Assessments Agreement and the Escrow Agreement.

Relying primarily on Vern Reynolds Const. v. City Of Champlin, 539 N.W.2d 614 (Minn.App. 1995), *rev. den.* 12-20-1995, Respondent argues Appellants do not have standing to assert claims they have arising out of or pursuant to the subject Escrow Agreement and the Special Assessments Agreement.

In Vern Reynolds, the Court of Appeals held that a landowner, acquiring ownership to the real estate subsequent to its “inverse taking”, but without notice thereof, had standing to pursue an inverse condemnation claim for the loss in value to his property as the result thereof.

Vern Reynolds is not in any way relevant to Respondent’s assertion that Appellants lack standing to pursue their rights under each of the aforementioned Agreements.

What is most surprising about Respondent’s standing argument is the extent to which it contrasts with its argument to the Trial Court where it stated the Special Assessments Agreement “... is binding on [Respondent], [Appellants] and the Property.” (A-75) If Appellants are “bound” by the Special Assessments Agreement, they obviously having standing to have their rights and duties under that agreement resolved in court.

It is well established that a party to a contract always has standing with respect to issues arising under it. *E.g.* Northern Nat. Bank of Bank of Bemidji v. Northern Minnesota Nat. Bank of Duluth, 70 N.W.2d 118, 123 (Minn. 1955); Herr & Haydock, 2 Minn.Prac. § 57.6 (4th Ed.).

There does not appear to have been any appellate court decision ever holding a party to an agreement does not have privity to assert rights thereunder by judicial means. Furthermore, as stated in Vern Reynolds, “An individual has standing to maintain a suit by showing an ‘injury to some interest, economic or otherwise, which differs from an injury to the interests of other citizens generally.’” Vern Reynolds at 617. Obviously, a party to a contract always has such a unique interest.

It is apparently Respondent’s assertion, citing Vern Reynolds, that because Appellants were no longer owners of the Property after it was taken by the MAC, they also were “purged” of all rights they had under basic principles of contract law with respect to their rights under either the Escrow Agreement or the Special Assessments Agreement. Appellants do not believe they have lost either privity or standing to assert their rights under these contracts and their right to the escrowed funds of \$114,897.25, whether they own or do not own the Property and, neither Vern Reynolds nor Brooks Investment Co. v City of Bloomington, 232 N.W.2d 911 (1975) cited and distinguished therein, have any import or relevance to support Respondent’s contention that Appellants do not have standing with respect to either of the subject agreements.

IV. For Four Separate And Distinct Reasons, *Res Judicata* Does Not Bar Appellants From Asserting Their Rights To The \$114,897.25 In Escrow.

The four separate reasons, each of which dictate Appellants are not barred from asserting their claim to the escrowed funds either before the Trial Court or this Appellate Court, because of *res judicata* or any form of issue preclusion, are:

A. Two of the three essential elements for *res judicata* are missing.

As recently confirmed in SMA Services, Inc. v. Weaver, 632 N.W.2d 770, 773 (Minn.App. 2001), there are three essential elements that must exist for a claim to be barred by *res judicata*, these are:

1. There was a final judgment on the merits;
2. A second suit involves the same cause of action; and
3. The parties to both are identical or were in privity with identical parties.

SMA Services continues, “If any of the three elements is not satisfied, *res judicata* will not apply.” *Ibid.*

In this proceeding, there is obviously not a “final judgment on the merits,” nor is there a “second suit [which] involves the same cause of action.” Although Respondent appears to argue that this proceeding is a “second suit,” it is in error. The condemnation proceeding was in existence at the time the underlying motions were made to the Trial Court. Those motions were made and argued before the Final Certificate was issued. Further, there has not ever been a second proceeding commenced.

Thus, the prior action “to final judgment” and the second suit elements do

not exist in this proceeding and, therefore, *res judicata* does not preclude Appellants from bringing their motion.

B. As an affirmative defense, *res judicata* must be raised before the Trial Court or it is waived. MRCP 8.03

Respondent's failure to timely and affirmatively plead this defense to the Trial Court results in a waiver of it. Bueutz v. A.O. Smith Harvistore Prods., Inc. 431 N.W.2d 528, 532, N.3 (Minn. 1988). At page 1 of its brief, Respondent states that it raised the issue of *res judicata* before the Trial Court. Appellants disagree. Neither *res judicata* nor any contention of issue preclusion was raised by Respondent in any of its four memoranda to the Trial Court. These memoranda are located, in full, in the Appendix beginning, respectively, at pages A-74, A-94, A-113 and A-167. Nor did Respondent include *res judicata* in its Notice of Motion and Motion for Dispersion of Escrowed Funds to the Trial Court, beginning at page A-5. Nor did Respondent include any defense of *res judicata* nor other form of issue preclusion in various affidavits and attached exhibits, also submitted to the Trial Court and included in both Appendices beginning at A-77, A-103, A-119 and RA-055. Because of this failure to raise the affirmative defense of *res judicata* or other form of issue preclusion, Respondent has forever waived its right to do so.

C. The subject of *res judicata* is not within the Court of Appeals Scope of Review.

As often stated, in citing Thiele v. Stitch, 425 N.W.2d 580, 582 (Minn. 1988), if an issue is not raised before the Trial Court, it will not be addressed on appeal. The waiver of the affirmative defense stated in Argument B above and the

reasons thereto are fully applicable in this third reason, as well.

D. Respondent has waived any claim for res judicata or issue preclusion.

Respondent fails to note that, simultaneously before the Trial Court, both Appellants and Respondent brought identical motions seeking identical relief. In doing so, the same principles of *res judicata*, if all essential elements existed, would have barred both Appellants and Respondent from bringing their motions. Therefore, in Respondent's bringing this identical motion, knowing – apparently – that such a motion was barred by *res judicata*, it has now waived such a defense against Appellants.

V. The Special Assessments Agreement, Wholly Executory, Does Not Entitle Respondent to the Escrowed Funds.

Respondent's four subarguments under its Argument V asserting the validity and enforceability of the Special Assessments Agreement, do not rebut Appellants' arguments that they, not Respondent, are entitled to the escrowed funds. In order to accommodate its inconsistent arguments, Respondent sometimes asserts, as it did in its first memorandum to the Trial Court, that the Special Assessments Agreement "is binding on [Respondent], [Appellants] and the Property" (A-75) and in other instances argues Respondent is not bound by the Agreement, as noted in subargument A below. These inconsistent arguments demonstrate, as much as any argument propounded by Appellants, that a proper reading of the Special Assessments Agreement, together with the circumstances of the taking of the Property by eminent domain, dictate reversal of the Trial Court's decision and awarding Appellants the funds held in escrow.

A. Special Assessments Agreement, a contract which Respondent argues is "binding" on both parties, is unconstitutional.

Respondent's principal argument that Article X, Section 1 of Minnesota's Constitution is not violated by the Special Assessments Agreement is that Respondent can simply reassess for the same improvements so inflation does not cause an impairment of its taxing power. Thus, the Special Assessments Agreement is apparently binding on Appellants, but not on Respondent. Obviously, if Respondent can reassess for the same improvements, identified in the Special Assessments Agreement, it is not bound by that agreement. If so, the Special Assessments Agreement is not an enforceable contract and Appellants are

entitled to receipt of the \$114,897.25 in escrow, since the only basis for Respondent's right to said escrowed funds derives from an Agreement that is not enforceable.

Appellants do not agree that Respondent can reassess for the same improvements identified in the Special Assessments Agreement, and establish an assessment levy greater than the amount stated in the Special Assessments Agreement. Furthermore, Minn.Stat. § 462.3531 does not authorize such a reassessment, as Respondent contends. It only provides that a waiver of a landowner's right to challenge the validity of the assessment procedure and the assessment amount is limited to the amount stated in an assessment agreement with the municipality. It does not abrogate or alleviate Respondent's duties under the Special Assessments Agreement.

As noted by Appellants at page 16 of their principal brief, Respondent also uses a form for its Special Assessments Agreement with developers, labeled "SSA No. 01-00", which specifically provides for the adjustment of the assessment amount upon "actual costs". (A-161, paragraph 4) This form, which was to be used in a draft of the developer's agreement proposed by Respondent to Appellants, does not violate Article X, Section 1 of Minnesota's Constitution. The Special Assessments Agreement, however, which does not include that variable provision for costs, does violate that constitutional prohibition. As earlier noted by Appellants in their principal brief, the difference in terms between these two agreements is obvious and, presumably, if there is any reason to include variable

costs in SSA No. 01-00, it is to recognize and accommodate the constitutional prohibition against impairment of the taxing power as well as to create a contract which is binding on both parties.

B. The Special Assessments Agreement is completely executory and for this and other reasons can be terminated by Appellants.

Appellants submit Respondent has misstated many of the facts and law in its Argument V(B) at pages 16 through 21 of its brief. Each will be addressed herein.

1. The Special Assessments Agreement, is an obvious example of an executory contract in Minnesota. An executory contract is a “contract that has not yet been fully completed or performed.” Brooksbank v. Anderson, 586 N.W.2d 789, 793 (Minn.App. 1998) *rev. den.* January 27, 1999. Citing Black’s Law Dictionary, p. 570 (6th Ed. 1990).

At all relevant times herein, the Special Assessments Agreement was wholly executory and Respondent did nothing, of any material consequence, toward even partially performing and executing its duties and obligations under this Agreement before it was terminated by Appellants. Obviously, improvements were not constructed. Respondent’s City Council never even adopted an assessment, which is a precondition to levying and creating a lien on the Property, although its Director of Public Works, Eugene Dietz, at the time of execution of

the subject Agreement, strongly suggested this course be undertaken as soon as possible. (A-106)

Furthermore, Although Respondent states in conclusory fashion that the Special Assessments Agreement is “not an executory contract”, it provides no primary or secondary authority, of any kind, to support its contention that an agreement of indefinite duration cannot be terminated if it is “not an executory contract”. Minnesota’s seminal case on the rule of termination at will for agreements of indefinite duration, Benson Co-op Creamery Ass’n. v. First Dist. Ass’n., 151 N.W.2d 422 (Minn. 1967), was an agreement which was, at least partially, executed. However, whether or not it is a rule that an executed contract of indefinite duration cannot be terminated at will, the facts in this case clearly show the Special Assessments Agreement to be an executory contract, according to Minnesota law.

2. In this section of its argument, Respondent again argues, without any authority, that Appellants lack standing “because they have absolved themselves of all personal liability and only agreed to encumber the Property,…” For the same reasons discussed earlier, at Section III herein, Appellants disagree and submit that, as parties to both the Escrow Agreement and the Special Assessments Agreement, they have both standing and privity as parties in this proceeding to assert their rights under those agreements.

3. In discussing Benson Co-op Creamery Ass'n., and Hayes v. Northwood Panel Board Co., 415 N.W.2d 687 (Minn.App. 1987) at page 17 of its brief, Respondent apparently argues there is some limitation to the application of the rule that contracts of indefinite duration are terminable at will by either party.

However, that is not the holding in Benson Co-op Creamery Ass'n. At page 426, in one short sentence, said without any conditions or qualifications, our Supreme Court stated:

The general rule is that a contract having no definite duration, expressed or which may be implied, is terminable by either party at will upon reasonable notice to the other.

This statement by our Supreme Court was not in any way limited to sales of goods contracts, as Respondent implies. Nor has Benson Co-op Creamery Ass'n been so limited in subsequent cases referring to it. *E.g.* Ag-Cam Equipment Co., Inc. v. Hahn, 480 F.2d 482, 487 (8th Cir. Minn. 1973).

In jurisdictions having the same rule as stated in Benson Co-op Creamery, Ass'n. providing for at-will termination of contracts with an indefinite term, there is no such limitation as Respondent imposes. For example, in Jespersen v. Minn. Mining and Mfg. Co. 700 N.E.2d 1014, 1017 (Ill. 1998), the Illinois Supreme Court stated:

As we have already acknowledged, the rule that contracts of indefinite duration are terminable at will has long been followed in Illinois and our courts have applied the rule in a variety of contexts including employment

contracts, credit card agreements, money market fund accounts, and even sales contracts. (internal citations omitted).

In addition, well-known treatises on contract law discussing this rule in various circumstances do not identify any limitations or exclusions to its application in particular factual circumstances. *E.g.* Perillo, Calimari & Perillo on Contracts, 5th Ed. (2003) Sec. 2.9(d) pp. 57-61; 1 Williston 4th Ed. (Lord) Sec. 4:19, pp. 429-248; 1 Corbin on Contracts, Sec 4.2 pp. 548-567 (Rev'd 1993). Although it is true that Appellate Court cases primarily consider such contracts of indefinite duration involving employment, distributorships, product supplies and sales, since appeals of those agreements predominate, there do not appear to be any cases or treatises which have excluded any particular type of contract with indefinite duration from this rule, as Respondent contends.

4. Lake Superior Paper Industries v. State of Minnesota and County of St. Louis, 624 N.W.2d 254 (Minn. 2001), cited by Respondent at pages 17-18 of its brief for the proposition that the Special Assessments Agreement “was effective when it was executed and immediately became a lien on the Property” does not state such a rule. Lake Superior did not involve special assessment agreements nor special assessments. Specifically, this case involved *ad valorem* property taxation related to tax increment financing (“TIF”). Lake Superior considered agreements establishing “minimum market values” to be used for *ad valorem* tax assessments – not special assessments – for purchase of real estate and construction of buildings and facilities thereon to be financed through TIF.

That is, the “assessments agreement” our Supreme Court was discussing in Lake Superior involved a specific statutory provision authorizing TIF, Minn.Stat. § 469.177, subd. 8. It had absolutely nothing to do with the validity, enforceability or effectiveness of any contracts relating to special assessments including the Special Assessments Agreement that is the subject of this case and this appeal.

5. Respondent is essentially arguing the Special Assessments Agreement is an “agreement in perpetuity”. By law, it is not.

In its argument at page 18 and in footnote 2, Respondent argues it had no time limit for the construction of the improvements and never promised to construct them by a certain date. Appellant agrees that there is no date in the Special Assessments Agreement requiring Respondent to complete construction of the improvements. That is why it is a contract of indefinite duration and terminable at will. Respondent’s retort is, apparently, that it can adopt a resolution ordering the improvements and construct them at any time in the future. This, of course, is the very nature of an indefinite term agreement. It is an agreement in perpetuity. It is true that contracts can be perpetual or for an indefinite term, but they must clearly state that is their nature. A well-known legal encyclopedia, citing Benson Co-Op among cases from many other jurisdictions, states this rule of law. 17B C.J.S. Contracts sec. 439 (“If there is nothing in the nature or the language of a contract for an indefinite period to indicate that it is perpetual, the courts will interpret the contract to be terminable at will.”) This legal encyclopedia

then adds, "...a contract which purports to run in perpetuity must be adamantly clear that that is the parties' intent, in order to be enforceable." *Ibid.*)

Respondent's arguments at page 18 of its brief, essentially that it can construct the improvements anticipated by the Special Assessments Agreement at any time, describes an agreement of indefinite duration and terminable at will, because it does not specifically state or make "adamantly clear" that the parties intended the agreement to be perpetual or of indefinite duration.

6. The record is replete with uncontroverted statements that advised Appellants were advised, before and throughout the eminent domain proceeding, that the MAC may abandon the proceeding and not condemn Appellants' Property. At page 19, Respondent contradicts Appellants' brief stating that at the time they entered into the Agreement with Respondent, "There is nothing in the record that supports the allegations that the MAC might abandon the condemnation." Contrary to Respondent's false assertion, the record quite clearly shows MAC's agent, W.D. Schock, Inc. ("Schock") intermittently advised Appellants that the MAC may not take their Property. This admonition continued even following the MAC's commencement of the condemnation proceeding in March 2001. (A-24, paragraphs 4 and 6) This reference is to an affidavit by Appellant William J. Bearman dated March 24, 2005. Appellants and Respondent have differing views of what constitutes "the record" in this proceeding. Appellants submit that the uncontroverted evidence shows they were advised,

before and throughout the eminent domain proceeding, that the MAC could abandon and not take their Property. This is also consistent with MAC's and Respondent's Joint Staff Report to the Metropolitan Airports Commission concerning Flying Cloud Airport. In that report, which is in the record and attached as Exhibit A to the Affidavit of Robert B. Swenson, Vice President of Schock, "availability of funding" is identified as a condition to completion of land acquisition. (Exhibit A to Affidavit of Robert B. Swenson filed May 17, 2001, page 11). Thus, the uncontroverted facts in the record support the "allegation that the MAC might abandon the condemnation" and Appellants were concerned about that. Rightly so, since a condemning authority such the MAC could have abandoned this proceeding and not acquired Appellants' land up to and even during the time of closing when it purchased that Property in December 2001. Minnesota law is clear, that only after a jury returns its verdict after an appeal of a commissioner's award to District Court is the condemning authority precluded from abandoning the eminent domain proceeding. City of Maplewood v. Kavanagh, 333 N.W.2d 857, 862 (Minn. 1983).

7. Respondent intends to use Appellants' funds, presently escrowed, exclusively for the benefit of other property, not what was Appellants' Property taken by the MAC. Commencing at the bottom of page 20, Respondent asserts, as it did elsewhere both before the Trial Court and in its brief, "The improvements are necessary to complete the urbanization of the neighborhoods adjacent to Eden Prairie Road in the vicinity of the Property." As stated in the introduction of this

reply brief, there is only a remote possibility, not presently under consideration, in which any of the improvements being constructed would ever benefit the Property in question. Other land “in the vicinity of the Property” will be benefited, but not the Property. Again, in the context in which this case arises, the right of Appellants to terminate the subject Agreement which is of indefinite duration, clearly demonstrates Respondent will incur no liability or loss and will receive a windfall of \$114,897.25 if the Trial Court’s Order is affirmed.

C. The Special Assessments Agreement is not a valid lien against the Property.

Respondent’s argument that it had a valid lien against Appellants’ Property from and after the time it filed the Special Assessments Agreement is directly contrary to Minnesota law. Respondent’s argument that it had a lien without its City Council adopting an assessment is wrong. Minn.Stat. § 429.021, subd. 3 provides, in its first paragraph:

Subd. 3. Relation to charter and other laws. When any portion of the cost of an improvement is defrayed by special assessments, the procedure prescribed in this chapter shall be followed unless the council determines to proceed under charter provisions; but this chapter does not prescribe the procedure to be followed by a municipality in making improvements financed without the use of special assessments.

This Court of Appeals has also stated the same in Gadey v. City of Minneapolis, 517 N.W.2d 344, 348-49 (Minn.App. 1994) rev. den. August 24, 1994. Since Minn.Stat. § 429.061, subd. 2 provides the only manner for adopting an assessment by a municipality’s city council and also provides that the lien of

such special assessment levied occurs only after the adoption of such a resolution, the law in Minnesota is clear. Municipalities cannot avoid that statutory proceeding to create a levy for special assessments on any property. It certainly cannot do so by simply executing and recording a special assessments agreement. This legislative mandate is quite logical. Without it, a municipality could circumvent the rights of a landowner to recover for an abandoned assessment, something Respondent is doing in this instance, inadvertently or otherwise. As this case demonstrates, and Respondent is arguing, use of the Special Assessments Agreement in perpetuity eliminates any rights Appellants would otherwise have if Respondent had properly established a levy of special assessments, which if paid to Respondent at the time the MAC took Appellants' Property, would now have to be refunded to Appellants since the improvements presently being planned by Respondent "constitute a complex project, involving a complex design and financing from several parcels" which may benefit "adjoining" land, but does not benefit the Property Appellants formerly owned.

The other assertions by Respondent in paragraph V (C) are adequately argued by Appellants in Section IV, pages 23 through 29 of their principal brief.

D. Appellants believe their position with respect to the waiver issue are adequately briefed by them in their principal brief, Section V, pages 30 through 34, save and except for two points.

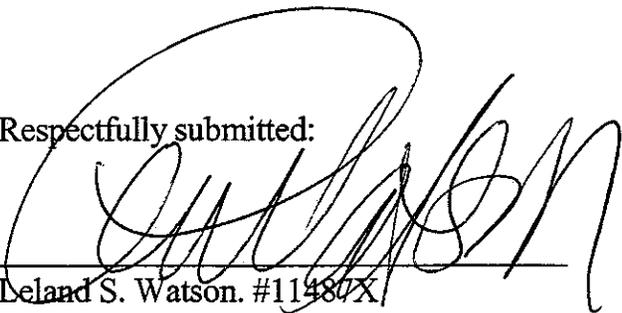
First, Respondent's assertion that Minn.Stat § 462.3531 is a substitute for the assessment adoption mandate in Minn.Stat. § 429.061, subd. 2 is erroneous.

The clear and specific language of Minn.Stat § 462.3531 does not provide any legislative repeal of the mandate of Minn.Stat. § 429.061, subd. 2 requiring Respondent's City Council to adopt a resolution for there to be a valid levy for special assessments upon any property.

Second, Appellants do not agree that the holding in Ruzic v. City of Eden Prairie, 479 N.W.2d 417 (Minn. App. 1991) is restricted to issues relating to duress or confusion of a party to a special assessments agreement. The language in Ruzic is not so confined as Respondent argues. A more rational and appropriate reading of Ruzic is it applies to any issue raised by a party relating to the validity of a waiver agreement used by a municipality, as Appellants argued at page 32 of their principal brief.

Dated: December 27, 2005

Respectfully submitted:



Deland S. Watson. #11487X

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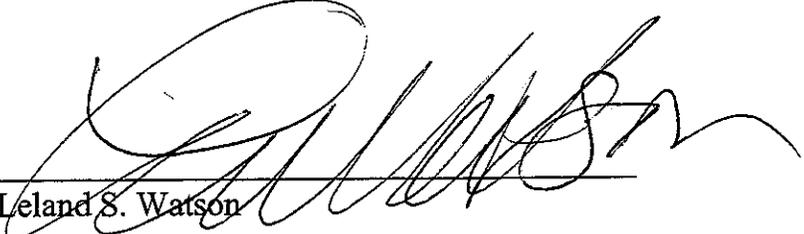
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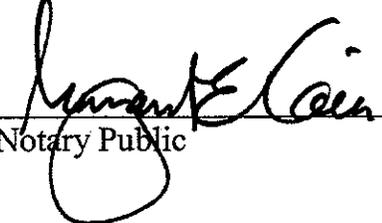
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Subscribed and sworn to before me this 27th day of December 2005.


Notary Public

