

A06-2324

**State of Minnesota  
In Court of Appeals**

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Alec G. Olson and  
Butterworth Limited Partnership,

Appellants,

v.

State of Minnesota, Matthew Kramer,  
Commissioner of the Minnesota Department  
of Employment and Economic Development,  
and Daniel A. Salomone, Commissioner of  
the Minnesota Department of Revenue,

Respondents.

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**REPLY BRIEF OF APPELLANTS  
ALEC G. OLSON AND BUTTERWORTH  
LIMITED PARTNERSHIP**

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Kay Nord Hunt (#138289)  
John P. James (#0049608)  
Stephen C. Rathke (#89771)  
LOMMEN, ABDO, COLE,  
KING & STAGEBERG, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

**Attorneys for Appellants**

Lori Swanson, Attorney General  
Michael J. Vanselow (#152754)  
Bradford Delapena (#219046)  
Rita Coyle DeMeules (#191644)  
OFFICE OF THE MINNESOTA  
ATTORNEY GENERAL  
445 Minnesota Street  
St. Paul, MN 55101-2128  
(651) 296-3421

**Attorneys for Respondents**

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Appellants have standing because (1) a taxpayer has standing to challenge expenditures of tax monies, including exemptions from taxation; (2) Appellants pay taxes; and (3) the Programs being challenged exempt property and businesses within their community's borders from state and local taxes. (Appellants' Brief, pp. 8-16.) The trial court's dismissal of this lawsuit should be reversed.

**I. APPELLANTS DO OBJECT TO EXPENDITURES AT THE LOCAL GOVERNMENT LEVEL.**

The parties have stipulated:

- The JOBZ Program has no features other than tax benefits. (A. 15.)
- The JOBZ Program and the Business Zone Program each uses long term (up to 12 year) state and local tax reductions as an incentive for businesses to locate operations in the zones. They are intended to significantly reduce, or completely eliminate, the state and local taxes of multiple types otherwise due from qualifying businesses in the years 2004 through 2016. (A. 14-15.)
- "Beginning with property taxes payable in 2005, commercial and industrial property in a zone is exempt from property taxation . . . ." (A. 19.)
- Property in a JOBZ Zone, an APF Zone or the Bioscience Zone is exempt from the statewide property tax on commercial industrial property. (A. 59.)

The net result of granting an exemption or a credit to others does not differ in substance from the spending of tax monies.<sup>1</sup> In either situation, the conduct complained of causes a diminution in the treasury of the taxing authority. Appellants, as taxpayers who are not

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<sup>1</sup> Credits, exemptions and exclusions constitute a form of hidden spending. Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists and the Role of the Legal Academy*, 83 Cornell L. Rev. 365, 377 n.30 (1998). This acknowledgment has been used by government as a tool in analyzing budgetary policy. Kotterman v. Killian, 972 P.2d 606, 620 (Ariz. 1999), citing Jean Harris, *Tax Expenditures: Concept and Oversight in Public Budgeting and Finance* 385, 397 (4<sup>th</sup> rev. ed. 1997).

granted such exemptions, must pay more. (See Appellants' Complaint ¶ 31-34, 42, 43; A. 78-79, 81-82.)

As set out in detail in Appellants' Complaint and not refuted by Respondents, the way property taxes operate in Minnesota is that "the exemption from property tax of any property that would otherwise be taxable requires that, to raise the funds determined to be necessary to run the local governments, the property tax payable by the other taxable properties in the local taxing jurisdiction must be higher than it would have been had the exemption not been granted." (Complaint ¶ 32; A. 79; Respondents' Answer ¶ 28, A. 108.) Nor do Respondents dispute that when commercial industrial property is exempt from state property tax, "other commercial industrial properties throughout Minnesota will pay a higher state property tax than they would have paid had these programs not been enacted." (Complaint ¶ 35; A. 80; Answer ¶ 30, A. 109.) As other jurisdictions have recognized and Respondents cannot dispute, a decrease in the tax base is a cognizable injury to the taxpayer. (See Appellants' Brief, pp. 11-16.) Appellants have standing to sue as a taxpayer injured by the statutes at issue. (See Complaint ¶¶ 42-43; A. 81-82.)<sup>2</sup>

Moreover, public expenditures clearly occur in the administration of the Programs. DEED and local governments make expenditures in the process of establishing the zones, in every consideration of a possible "deal" under the Programs and in the ongoing administration of the Programs. When the Programs result in a business being located in a community where it would not otherwise have been operating, local governments incur

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<sup>2</sup> Notably, Respondents did not assert lack of standing as an affirmative defense in their Answer. (A. 116.)

public expenditures as a result of the new development. (See Complaint ¶ 36; A. 80.)

And, as stated above, because the properties will be exempt from property tax, those expenditures will be funded by other property owners. Accordingly, Appellants, as those other property owners, do challenge local spending.

## **II. RESPONDENTS' "BIG POND/SMALL POND" THEORY TO DENY STANDING MUST BE REJECTED.**

Respondents' "big pond/small pond" dichotomy (Respondents' Brief, pp. 23-24) is mistaken for two reasons. First, as explained above, the Programs involve "small pond" expenditures by local governments. Second and contrary to Respondents' argument, the Supreme Court in Arens v. Village of Rogers, 240 Minn. 386, 61 N.W.2d 508 (1953), and McKee v. Likins, 261 N.W.2d 566 (Minn. 1977), did not base its decisions on the fact that they involved the "small pond" of city or county government. Nothing in either case nor any other case, suggests a standing distinction between illegal expenditure at the local as opposed to the state level. In fact, the Supreme Court in McKee, 261 N.W.2d at 571, quotes Arens, 61 N.W.2d at 513, stating:

More recently, this Court stated that "it has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds."

In Arens, the Minnesota Supreme Court cited as support for its holding its earlier decision in Regan v. Babcock, 188 Minn. 192, 247 N.W. 12, 13 (1933). 61 N.W.2d at 513. In Regan, the Supreme Court determined that a taxpayer had a substantial interest in funds raised through state auto license fees and state gasoline taxes to permit the taxpayer's suit to have paving and grading contracts declared void. The Supreme Court

in Regan explained: “We regard this [payment of auto license fees and state gas tax] as sufficient interest. It is true that they [the taxpayers] would pay these taxes anyway, but in our opinion they have a substantial interest in the honest expenditure of the funds into which their taxes are paid.” 247 N.W. at 13.

### **III. APPELLANTS DO CHALLENGE THE PROCEDURE WHICH CREATED THE PROGRAMS.**

Respondents concede that procedural violations confer standing on those complaining of them, stating that “taxpayers have standing to challenge alleged procedural violations in the expenditure of public funds.” (Respondents’ Brief, p. 17.) Before the trial court, Respondents even acknowledged that “[a]t first blush, there is some plausibility to the claim that Program business subsidy agreements contract away the State’s taxing power.” (Defendants’ Memorandum in Support of Summary Judgment, p. 26, dated July 11, 2006.) Respondents now contend that “Appellants cannot benefit from McKee by recasting their substantive constitutional claims as the Legislature’s ‘procedural mistakes’ that allegedly defy constitutional mandates or as a ‘violation of the procedural norms for the exercise of the power of taxation.’” (Respondents’ Brief, p. 19.) There is no recasting here.

Appellants’ core complaint is about procedure and its consequences. (See Complaint at A. 69.) The Programs at issue here disregard the procedural mandate explicitly prescribed by the Minnesota Constitution: “The power of taxation shall never be surrendered, suspended or contracted away.” Minn. Const. Art. X, § 1. Appellants, as payers of the very taxes at issue, have standing to ask the courts to determine whether the

Legislature has overstepped its constitutional bounds by the procedure for exercise of the power of taxation that it adopted in the Programs.<sup>3</sup> (See Complaint ¶ 41; A. 81.)

From time immemorial, the power of taxation has been exercised by legislative enactment, sometimes followed by an administrative agency such as the Minnesota Department of Revenue promulgating rules to flesh out the statute, and ultimately ending up with a law from which taxpayers can tell whether or not they are affected by reading the law in relation to their facts. Instead, the Legislature here has delegated to others the discretion to provide up to 12 year exemptions from state and local taxes to select businesses operating in geographic areas also determined at the discretion of local officials and DEED. Long-term tax exemptions are then granted to these businesses by private contract. (See sample contract at A. 63.) What is at issue here is procedure.

Respondents' reliance on cases such as St. Paul Area Chamber of Commerce v. Marzitelli, 258 N.W.2d 585 (Minn. 1977), is misplaced. (See Respondents' Brief, p. 23.) Marzitelli involved a loss of federal assistance which the Minnesota Supreme Court held "does not analogize to illegal use or waste of state taxpayer's money . . . ." Id. at 589. Lott v. Davidson, 261 Minn. 130, 109 N.W.2d 336 (1961), also cited by Respondents, involved a personal injury action for injuries sustained in a collision between an auto and a taxicab at an uncontrolled intersection. State ex rel. Smith v. Haveland, 223 Minn. 89, 25 N.W.2d 474, 477 (1976), involved a relator who renounced the benefit of a tax exemption and sought to be taxed. Under those unique facts, the Supreme Court held:

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<sup>3</sup> While Respondents assert Appellants do not have standing, nowhere do they suggest who might have standing to challenge a contracting away of the taxing power.

“The mere denial of a desire to be taxed is not an act adverse or hostile to any legal interest of relator.” Id.

**IV. APPELLANTS’ OPPOSITION TO THE PROGRAMS IS NOT A REASON TO DENY STANDING.**

Respondents repeatedly emphasize that Appellants have an ideologically based policy dispute with what the Legislature did (Respondents’ Brief, pp. 1, 10, 12, 13, 14, 19, 20, 27, 32, 33, 34, RA 1-4), and therefore they have no standing. Under that rationale, the Minnesota Supreme Court should have denied standing in Arens and McKee. Arens was opposed to the Village of Rogers being in the liquor store business. 61 N.W.2d at 512. McKee was opposed to Minnesota state and local governments supporting abortions. 261 N.W.2d at 570. Arens and McKee each had standing, even though they clearly had major policy disagreements with the government. The fact that a plaintiff has a policy objection does not deprive him of taxpayer standing.

This is a narrow case in which the Legislature made a rare mistake – failing to follow the constitutional procedural rules for the exercise of the power of taxation. The closest case of which Appellants are aware is Wallace v. Commissioner, 289 Minn. 220, 184 N.W.2d 588 (1971). There the Minnesota Supreme Court held that the Legislature could not automatically adopt changes made by Congress to the Internal Revenue Code into the Minnesota Income Tax Act because such automatic adoption would be an impermissible surrender of the power of taxation to Congress. Id. at 591. Wallace happened to involve a reduction in the medical expense deduction, which led directly to

an increase in Mr. Wallace's taxes. Id. at 593. But it could as well have involved an enactment of an exemption from tax.

Appellants' concerns are narrowly focused. Appellants agree that the Legislature has enormous flexibility to do as it chooses in all manner of social and economic programs, certainly including economic development efforts, and with respect to taxation. The courts do not sit to determine whether legislated programs are good, bad or indifferent. For example, tax subsidy economic development programs are controversial and often criticized by economists as wasting public resources. But what economists think is irrelevant, because it is the Legislature's job to sort out all the contending viewpoints and decide what it wants to do. If all Appellants had was opposition to economic development programs, they would not have standing. But that is not Appellants' concern. Appellants' concern is narrow – exemptions from taxation were created here in a fashion that violates the constitutional exercise of the power of taxation. When the Minnesota Legislature defies constitutionally prescribed rules for taxation, Appellants, who are paying such taxes, have a pecuniary interest – and standing.

#### **V. STANDING IN THE FEDERAL COURTS IS NOT AT ISSUE HERE.**

The standing doctrine varies by jurisdiction. State courts generally have allowed easier access to court than do the federal courts. See, e.g., Taxpayer Suits: Standing Barriers and Pecuniary Restraints, 59 Temp. L.Q. 951, 980 (1986). The Minnesota Supreme Court has articulated the rules for taxpayer standing in Minnesota and has explicitly rejected the different test advanced for federal standing. McKee v. Likins, 261

N.W.2d at 570-71 and n.3&4. Federal standing cases are not applicable to a state taxpayer action. Id.

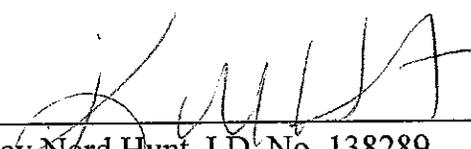
The Minnesota Supreme Court is not bound, of course, by the United States Supreme Court decisions on standing in federal court and has rejected the federal test. This Court is bound by the Minnesota Supreme Court's decisions on standing. Brainerd Daily Dispatch v. Dehen, 693 N.W.2d 435, 439-40 (Minn. Ct. App. 2005); Daimler Chrysler Corp. v. Cuno, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1854 (2006), and Lance v. Coffman, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1194 (2007), federal standing cases relied on by Respondents, cannot be considered by this Court in determining Appellants' standing in Minnesota state court. (See Respondents' Brief, pp. 28-30.)

### **CONCLUSION**

Appellants respectfully request that the trial court's denial of standing to Appellants be reversed and this case be remanded to proceed on the merits.

Dated: March 19, 2007

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

BY   
\_\_\_\_\_  
Kay Nord Hunt, I.D. No. 138289  
John P. James, I.D. No. 0049608  
Stephen C. Rathke, I.D. No. 89771  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

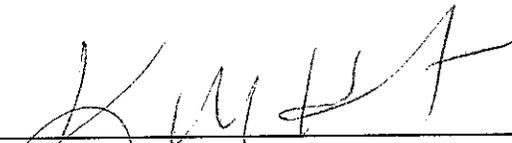
**Attorneys for Appellants**

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,056 words. This brief was prepared using Word Perfect 10.

Dated: March 19, 2007

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

BY  \_\_\_\_\_

Kay Nord Hunt, I.D. No. 138289  
John P. James, I.D. No. 0049608  
Stephen C. Rathke, I.D. No. 89771  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

**Attorneys for Appellants**