

NO. A07-310

State of Minnesota
In Supreme Court

City of West St. Paul,

Appellant,

vs.

Alice Jane Kregel,

Respondent.

Respondent's Brief

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LEGAL ISSUES

- I. May the district court issue an injunction removing a person from her home when it has not been proven that a statutorily defined public nuisance occurred within 12 months prior to the permanent injunction hearing?

The Court of Appeals held in the negative.

Apposite Authority:

American Tower, L.P. v. City of Grant, 636 N.W. 2d 309 (Minn. 2001)
Hans Hagen Homes, Inc. v. City of Minnetrista, 728 N.W. 2d 536 (Minn 2007)
All Parks Alliance for Change v. Uniproop Manufactured Housing Communities Income Fund, 732 N.W. 2d 189, (Minn. 2007)
Minn. Stat. §§ 617. 81, 617.82 and 617.83.

- II. Do the procedures set forth in Minn. Stat. §§ 617.80 through 617.87 provide for a tolling process while an agreed abatement plan is in force for purposes of determining whether a statutorily defined public nuisance occurred within 12 months of the permanent injunction hearing?

The Court of Appeals held in the negative.

Apposite Authority:

State v. Moseng, 95 N.W. 2d 6 (Minn. 1959)
Larson v. Wasemiller, 738 N.W. 2d 300 (Minn. 2007)
Metropolitan Sports Facilities Commission, 561 N.W. 2d 513 (Minn. 1997)
Minn. Stat. §§ 617.81, 617.82 and 617.83.

STATEMENT OF THE CASE

By notice dated June 27, 2006, respondent Alice Krengel was notified that she had maintained or permitted a nuisance at her resident and that, if she failed to either abate the nuisance or enter into a new abatement plan within 30 days, appellant City of West St. Paul may seek relief in district court that could result in enjoining the use of her residence for one year. Upon the City's complaint and motion for a temporary injunction, the Dakota County District Court issued a temporary injunction, dated August 8, 2006, enjoining Ms. Krengel from living in her home at 823 Allen Avenue in West Saint Paul, Minnesota. On November 15, 2006, following a hearing on October 17, 2006, the Dakota County District Court issued an order for a permanent injunction, entered November 20, 2006, permanently enjoining Ms. Krengel from occupying her home for a period of one year.

On December 13, 2006, Ms. Krengel filed with the Court of Appeals a Petition For Writ Of Prohibition requesting a Writ prohibiting the Dakota County District Court from enjoining her from occupying her home, arguing that she was homeless and that an ordinary appeal would not be an adequate remedy at law because an appeal would not be resolved before the August 2007 expiration of the injunction. On January 16, 2007 the Court of Appeals issued an Order denying Ms. Krengel's petition for prohibition, noting that Ms. Krengel could move the district court to stay enforcement of the injunction pending appeal and, if necessary, could move the Court of Appeals to review an unfavorable stay decision by the district court.

On February 2, 2007 Ms. Kregel served and filed a motion in the Dakota County District Court requesting the Dakota County District Court to stay enforcement of its permanent injunction pending appeal. On February 9, 2007 Ms. Kregel filed and served upon the City of West St. Paul a Notice of Appeal of the Dakota County District Court's order for a permanent injunction. On March 19, 2007 the District Court issued an Order denying Ms. Kregel's motion for a stay of enforcement of its injunction. On May 3, 2007 Ms. Kregel filed with the Court of Appeals a Motion To Review And Reverse District Court Denial Of Appellant's Request For Stay Of Enforcement Of Injunction. The Court of Appeals denied her motion in an order dated May 22, 2007.

On July 26, 2007, shortly before the expiration of the permanent injunction, the City of West St. Paul moved the Dakota County District Court to extend the permanent injunction for six additional months. Following an August 9, 2007, hearing, the district court denied this motion because the City had not given Ms. Kregel the notice required by Minn. Stat. § 671.81, subd. 4 describing the nuisance being maintained or permitted and summarizing the evidence of the nuisance being maintained or permitted.

On August 15, 2007, after Ms. Kregel's appeal had been fully briefed and was awaiting oral argument, the City of West St. Paul filed a motion to dismiss the appeal as moot because the permanent injunction had expired. On August 28, 2007, the Court of Appeals issued an order deferring the motion to the panel considering the merits of the appeal.

The Court of Appeals in its opinion filed May 6, 2008, held that Ms. Kregel's appeal was not moot despite the expiration of the permanent injunction because the City could reasonably be expected to repeat its efforts to enjoin Ms. Kregel from living in her home. The Court of Appeals also held that the district court erred in issuing a permanent injunction because a district court may not issue a permanent injunction to abate a public nuisance pursuant to Minn. Stat. § 617.83 (2006) unless the nuisance exists at the time of the hearing on the request for the permanent injunction. The Court of Appeals concluded that the district court did not find that the City had proven that two or more separate behavioral incidents of statutorily defined nuisance activity occurred within the 12 month period preceding the hearing on the City's request for a permanent injunction.

STATEMENT OF FACTS

Respondent Alice Kregel is a 56 year old woman who has owned her home at 823 Allen Avenue, in West St. Paul for over 20 years. App. A. 26¹ She resided in her home until about August 5, 2006. App. A. 15. At that time the Dakota County District Court issued an Order temporarily enjoining her from residing in her own home. *Id.* Thereafter, on November 15, 2006 the district court permanently enjoined Ms. Kregel from occupying her home for a period of one year from the date the original temporary injunction was entered or until further order of the Court. App. A. 29. Because this injunction remained in effect during the pendency of Ms. Kregel's appeal to the Minnesota Court of Appeals, she was not

¹Respondent will refer to Appellant's Appendix as "App. A."

able to live in her home for one year while her appeal was pending. App. A. 44.

Ms. Krengel first received a Notice of Injunctive Action dated July 29, 2005 from the West St. Paul City Attorney asserting that 13 separate incidents had taken place at Ms. Krengel's home between September 28, 2004 and July 12, 2005. App. A. 8-11. In this notice the City Attorney informed Ms. Krengel that, pursuant to Minnesota Statutes, Section 617.81, the City would commence an action in district court to enjoin her from using her residence for one year if she did not either abate the nuisance or enter into an agreed abatement plan within 30 days of service of the notice. *Id.* Only two of the incidents summarized in the notice ultimately resulted in Ms. Krengel pleading guilty to maintaining or permitting a nuisance. App. A. 26. Those incidents occurred on November 14, 2004 and April 10, 2005. None of the other incidents summarized in the notice were proven to be a nuisance under Minn. Stat. §§ 609.74(1) or 609.745. App. A. 26-29.

After receiving the City's July 29, 2005 notice, Ms. Krengel and the City entered into an agreed abatement plan, dated August 17, 2005. App. A. 4-5. Under this abatement plan Ms. Krengel 1) was not to use alcohol or controlled substances, 2) was not to allow alcohol containers or controlled substances in the residence or on the property, 3) was not to allow more than three unrelated occupants to reside in the residence, 4) agreed to random visits and entry to her home by certain police officers, 5) agreed to submit to random preliminary breath tests given by certain police officers, and 6) agreed to attend 90 meetings of Alcoholics Anonymous within 120 days and submit verification of her attendance to the city attorney's

office. *Id.* This abatement plan was to remain in effect for a period of one year. *Id.* In this plan Ms. Kregel acknowledged “that any violation of the terms and conditions of the Abatement Plan will allow the City Council to pursue injunctive action as stated in the Notice of Injunctive Action.” *Id.*

The City of West St. Paul was not able to assert or prove that Ms. Kregel maintained or permitted a nuisance in her residence or on her property while the abatement plan was in effect. App. A. 8-11. However, the City served Ms. Kregel with a second Notice of Injunctive Action and initiated a complaint for relief in district court based on the following four violations of the agreed abatement plan: 1) on September 17, 2005 Ms. Kregel was seen leaving the corner liquor store with a bottle of rum she had purchased, and when city police officers came to her home, she refused to open the door; 2) on March 16, 2006 a boarder was seen purchasing a 12 pack of beer and subsequently entering Ms. Kregel’s home, and city police officers upon subsequent investigation and inspection of her home found no alcoholic beverages; 3) on May 6, 2006, during a random inspection by a city police officer, Ms. Kregel opened the door, told the officer she was okay, and then closed the door; and 4) on May 7, 2006, during a random inspection, a city police officer detected an odor of alcohol and slurred speech from Ms. Kregel, and when he requested a breath test, Ms. Kregel shut the door and locked it. *Id.*

The second Notice of Injunctive Action, dated June 27, 2006, asserted the same 13 incidents asserted in its July 29, 2005 Notice of Injunctive Action. App. A. 1-3 and 8-11.

In addition, it asserted the four above-described instances of non-compliance with the abatement plan. App. A. 8-11. In this notice Ms. Kregel was notified that the city council on June 26, 2006 “authorized pursuing district court action to enjoin the use of your residence.” *Id.* The June 27, 2006 Notice of Injunctive Action further provide as follows.

Pursuant to Minnesota Statutes, Section 617.81, if you fail to either abate the nuisance or enter into a new abatement plan *within 30 days of service of this Notice*, the City may file a complaint for relief in district court that could, among other remedies, result in enjoining the use of your residence for any purpose *for one year*.

Id.

This notice did not identify any incidents of nuisance or conditions of nuisance that Ms. Kregel was maintaining or permitting which she was directed to abate. *Id.*

On July 28, 2006, Ms. Kregel was served with a notice of the City’s motion for a temporary injunction enjoining her from residing in her home. App. A. 14. On August 10, 2006, the district court issued a temporary injunction order granting the City’s motion and enjoining Ms. Kregel from residing in her home. App. A. 13-15. Ms. Kregel was ordered to vacate her property by August 5, 2006. *Id.* In its Findings of Fact in support of its temporary injunction, the district court, among other things, found as follows: 1) that “although Alice Jane Kregel offered to extend the Abatement Plan for an additional period of time, the City Council rejected the offer” and 2) that “as of the hearing date on Plaintiff’s Motion for a Temporary Injunction, Alice Jane Kregel has failed to voluntarily abate the nuisance at 823 Allen Avenue.” *Id.* While the district court concluded that “the conduct at

823 Allen Avenue and Alice Jane Krengel is found to be a nuisance as defined in Minn. Stat. §617.80 and this conduct is a violation of Minn. Stat. §§617.80 to 617.87,” the court’s temporary injunction order did not identify any incidents of nuisance or nuisance conduct that had occurred while the agreed abatement plan was in effect, or that was being maintained or permitted, which it was enjoining. *Id.*

The City then proceeded to seek a permanent injunction enjoining Ms. Krengel from residing in her home. App. A. 26-29. The district court conducted a hearing on October 17, 2006. *Id.* The district court subsequently issued Findings of Fact and Conclusions of Law in an order that was signed by the district judge on November 15, 2006, and filed with the court administrator on November 20, 2006. *Id.*

In its “Conclusions of Law” the district court, referring to the language of Minn. Stat. § 609.74(1), noted that “whoever intentionally maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public is guilty of a public nuisance.” *Id.* The court did not identify any specific nuisance maintained or permitted in violation of this provision within the 12 months prior to the permanent injunction hearing. *Id.*

The district court also referred in its “Conclusions of Law” to the language of Minn. Stat. § 609.745, noting that “whoever having control of real property permits it to be used to maintain a public nuisance or lets the same knowing it will be so used is guilty of a misdemeanor.” *Id.* Without identifying any specific nuisance permitted or maintained under

this provision within the 12 months prior to the permanent injunction hearing, the court concluded that Ms. Kregel “had control of the property at 823 Allen Street, West St. Paul, Dakota County, MN at all times that a public nuisances at that property had occurred.” *Id.* The district court also concluded generally that Ms. Kregel “... failed to refrain from interfering with the use and enjoyment of others [sic] right in enjoying their property.” *Id.*

The district court’s Order stated that Ms. Kregel is enjoined from occupying her home for one year from the date of the issuance of the temporary injunction, except that she may “enter the premises on five days from the hours of 8 a.m. to 5 p.m. to pack up personal belongings and to secure valuables and other items.” *Id.* The court’s permanent injunction again did not identify any specific incidents of nuisance or nuisance conduct being maintained or permitted which it was enjoining. *Id.* However, the district court did conclude that “[i]f Defendant is barred from her home, she may seek the chemical dependency treatment she desperately needs, followed by a long term placement in a halfway house.” *Id.*

Though she made three attempts to stay enforcement of the injunction while she pursued her appeal, none was successful. App. A. 44. First, on December 13, 2006, Ms. Kregel filed a petition for a writ of prohibition with the Court of Appeals, seeking to preclude the district court from enforcing the permanent injunction. *Id.* Her petition was denied in an order dated January 16, 2007. *Id.* Second, on February 14, 2007, Ms. Kregel filed a motion in the district court to stay enforcement of the permanent injunction pending

appeal. *Id.* The district court conducted a hearing on February 27, 2007, and denied the motion in an order dated March 21, 2007. *Id.* Third, on May 3, 2007, Ms. Kregel requested the Court of Appeals to review and reverse the district court's denial of her motion for a stay. *Id.* The Court of Appeals denied her motion in an order dated May 22, 2007. *Id.*

On July 26, 2007, shortly before the expiration of the permanent injunction, the City moved the district court to extend the permanent injunction for six additional months. *Id.* Following an August 9, 2007 hearing, the district court denied this motion because the City had not given Ms. Kregel the notice required by Minn. Stat. § 617.81, subdivision 4 describing the nuisance being maintained or permitted and summarizing the evidence of the nuisance being maintained or permitted. *Id.*

On August 15, 2007, after Ms. Kregel's appeal had been fully briefed and was awaiting oral argument, the City filed a motion to dismiss the appeal as moot because the permanent injunction had expired. *Id.* On August 28, 2007, the Court of Appeals issued an order deferring the motion to the panel considering the merits of the appeal. *Id.*

The Court of Appeals in its opinion filed May 6, 2008 held that Ms. Kregel's appeal was not moot despite the expiration of the permanent injunction because the City could reasonably be expected to repeat its efforts to enjoin Ms. Kregel from living in her home. App. A. 38-59. The Court of Appeals also held that the district court erred in issuing a permanent injunction because a district court may not issue a permanent injunction to abate a public nuisance pursuant to Minn. Stat. § 617.83 unless the nuisance exists at the time of

the hearing on the request for the permanent injunction. *Id.* The Court of Appeals concluded that the district court did not find that the City had proven that two or more separate behavioral incidents of statutorily defined nuisance activity occurred within the 12 month period preceding the hearing on the City's request for a permanent injunction. *Id.*

STANDARD OF REVIEW

Statutory construction is a question of law, which the court reviews de novo. *American Tower, L.P. v. City of Grant*, 636 N.W. 2d 309, 312 (Minn. 2001); *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W. 2d 390, 393 (Minn. 1998). Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on the court. *O'Malley v. Ulland Bros.*, 549 N.W. 2d 889, 892 (Minn. 1996).

ARGUMENT

A. MINNESOTA'S PUBLIC NUISANCE STATUTE PROVIDES A CLEAR, SIMPLE AND COMPLETE PROCEDURE FOR ABATING A PUBLIC NUISANCE.

Minnesota's "Public Nuisance Law" codified at Minn. Stat. §§ 617.80 through 617.87, provides a means by which a city may abate a public nuisance. The statute defines "public nuisance" by enumerating nine types of activities. Only two of these enumerated types of nuisance are relevant to this case: "(3) maintaining a public nuisance in violation of section 609.74, clause (1) or (3)" and "(4) permitting a public nuisance in violation of section

609.745.² Minn. Stat. § 617.81, subd. 2(a).

“[A] public nuisance exists upon proof of two or more separate behavioral incidents of one or more of the [nine types of nuisance activities enumerated in section 617.81, subdivision 2(a)] committed within the previous 12 months within the building.” Minn. Stat. § 617.81, subdivision 2(a).

Four steps are required under the Public Nuisance Law in obtaining a permanent injunction to abate a public nuisance.

First, if a city has reason to believe that a nuisance is being maintained or permitted on property within its jurisdiction and intends to seek abatement of the nuisance, the prosecuting attorney is required to provide a written notice to the owner of the property 1) specifying the kind or kinds of nuisance “being maintained or permitted,” 2) summarizing the evidence that a nuisance “is maintained or permitted” on the property, including the date or dates on which nuisance-related activity or activities are alleged to have occurred, and 3) informing the property owner that failure to abate the conduct constituting the nuisance within 30 days may result in the filing of a complaint for relief in district court that could result in enjoining the use of the property for one year. Minn. Stat. §617.81, subdivision 4(a)(1)-(3). This written notice is a prerequisite to a civil action in district court and must be

²Section 609.74(1) provides that it is a misdemeanor if a person “maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public.” Minn. Stat. § 609.74(1) (2006). Section 609.745 provides that “whoever having control of real property permits it to be used to maintain a public nuisance or lets the same knowing it will be so used is guilty of a misdemeanor.” Minn. Stat. § 609.745 (2006)

served on a property owner and all interested persons at least 30 days in advance of initiating a civil action. Minn. Stat. §617.82(c).

Second, if the property owner fails to abate the nuisance or comply with an agreed abatement plan within 30 days of receiving the above described notice, and “the prosecuting attorney has cause to believe that a nuisance described in section 617.81, subdivision 2, exists” the prosecuting attorney may initiate a complaint for relief in the district court. Minn. Stat. § 617.82(a)-(c).

Third, the prosecuting attorney may obtain a temporary injunction only “[u]pon proof of a nuisance described in section 617.81, subdivision 2...” and “[a] temporary injunction issued must describe the conduct to be enjoined.” Minn. Stat. § 617.82(c). Unlike Section 617.83, which authorizes the issuance of a permanent injunction, Section 617.82, which authorized the issuance of a temporary injunction, does not authorize the closing of a homeowner’s home in order to abate a nuisance.

Fourth, the court shall issue a permanent injunction only “[u]pon proof of a nuisance described in section 617.81, subdivision 2...” Minn. Stat. § 617.83. The permanent injunction must describe the conduct permanently enjoined.” *Id.*

B. THE PLAIN LANGUAGE OF MINNESOTA’S “PUBLIC NUISANCE LAW” IS CLEAR AND UNAMBIGUOUS.

- 1. The plain language application of the law by the Court of Appeals is sound, reasonable and correct: A public nuisance did not exist at the time of the hearing on the City’s request for a permanent injunction enjoining Ms. Kregel from living in her home because the behavioral incidents upon which the City based its request occurred more than 12 months before the hearing.**

The Court of Appeals correctly held that the meaning of Minnesota’s public nuisance statute is clear and unambiguous on its face when its relevant sections are read together and the common and ordinary meaning is given to its words. The plain language of the law, as properly applied by the Court of Appeals to Ms. Kregel’s circumstances, did not authorize the district court to issue a permanent injunction excluding Ms. Kregel from her home for a year. This is because the City of West Saint Paul failed to prove that the behavioral incidents upon which it based its request for a permanent injunction occurred within 12 months of the permanent injunction hearing.

If a statute’s meaning is plain, judicial construction is neither necessary nor permitted. *American Tower, L.P. v. City of Grant*, 636 N.W. 2d 309, 312 (Minn. 2001); *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W. 2d. 536, 539 (Minn. 2007). The court presumes that plain and unambiguous statutory language manifests legislative intent. In determining whether the words of a statute are plain, each section must be read in context, i.e., in light of the surrounding sections, in order to avoid conflicting interpretations. *All Parks Alliance for Change v. Uniprop Manufactured Housing Communities Income Fund*, 732 N.W. 2d 189,

193 (Minn. 2007); *Glen Paul Court Neighborhood Association v. Paster*, 437 N.W. 2d 52 56 (Minn. 1989).

Under Minn. Stat. § 617.81, subdivision 1, a permanent injunction excluding a homeowner from her home must comply with Section 617.83. A permanent injunction under Section 617.83 may be issued only upon “proof” of a nuisance described in Section 617.81 subdivision 2. And under Minn. Stat. § 617.81, subdivision 2 “a public nuisance exists upon proof of two or more separate behavioral incidents...[of those enumerated in subdivision 2]...committed within the previous 12 months within the building...” Reading these sections together and in context, the “proof” plainly required is proof of at least two separate statutorily defined behavioral incidents measured backwards from the date of the permanent injunction hearing, since that is the time when the City is required to offer its final “proof” of a nuisance.

The final proof offered as the basis for the issuance of a permanent injunction, excluding Ms. Kregel from her home for one year, was required to be, and was in fact, presented by the City at the permanent injunction hearing. Absent this final offer of proof of “two or more separate behavioral incidents...[of those enumerated in Section 617.81 subdivision 2]...committed within the previous 12 months...” at the permanent injunction hearing, the district court was not authorized to exclude Ms. Kregel from living in her own home.³ This offer of proof, as well as the sufficiency of this proof, was the triggering event

³The closing of the building for a year is only authorized under Minn. Stat § 617.83 following the proof required under that provision. Closing of the building and excluding a home

for measuring the “within the previous 12 months.” Without this final proof, the district court was not authorized to exclude Ms. Kregel from her home.

This plain reading and application of Minnesota’s public nuisance law is further mandated by the principle that the words and phrases of a statute should be given their ordinary meaning. *American Tower*, 636 N.W. 2d at 312; *Glen Paul Neighborhood Association*, at 56. Section 617.81, using the present tense, authorizes a permanent injunction only when a public nuisance “exists.” As the Court of Appeals correctly noted, a nuisance can only exist if it has not been abated or resolved. No proof was offered by the City at the permanent injunction hearing that the behavioral incidents upon which it relied, occurring more than 12 months earlier, had not been abated or resolved. Applying the common and ordinary usage of the word “exists”, an incident ending more than 12 months before the permanent injunction hearing cannot be said to exist. Nothing is left to abate or enjoin.

The conclusion that the statute requires the “existence” of a public nuisance is buttressed by the language of Section 617.81 subdivision 4(b)(2) which requires that the Notice to the property owner summarize the evidence that a nuisance is “maintained or permitted” on the property. The ordinary meaning of the word “maintain” is “to keep in existence or continuance; preserve; retain.” *Webster’s Encyclopedic Unabridged Dictionary*

owner from her home is not authorized following the proof required under Minn. Stat. § 617.82(c), the provision authorizing a prosecuting attorney to obtain a temporary injunction. A temporary injunction may be directed only to the conduct to be enjoined.

of the English Language, New Revised Edition, 1997.

2. **The plain language of the statute clearly provides that either the behavioral incidents identified in the original notice of Injunctive Action or more current behavioral incidents may be the basis for filing a nuisance action.**

The City erroneously asserts that Minnesota's public nuisance statute is ambiguous because it 1) fails to define the phrase "within the previous 12 months" and 2) fails to differentiate between nuisance activity identified in the original Notice of Injunctive Relief as it existed prior to execution of an agreed abatement plan and other more recent or current nuisance activity as the nuisance activity which the statute requires to be proven at the permanent injunction hearing after a property owner fails to comply with an agreed abatement plan. There is no need, however, to further define the meaning of the statute's phrasing or differentiate between earlier and later incidents of nuisance activity. As noted previously, the meaning of the phrase "within the previous 12 months" is clear and unambiguous. It means within 12 months of the permanent injunction hearing. Therefore, any nuisance activity which can be proven to have occurred within 12 months of that permanent injunction hearing may be the basis for the relief authorized by Section 617.83. If nuisance activity originally identified can be proven to have occurred within this 12 month period, the permanent injunction relief described in Section 617.83 may be based on such nuisance activity. If more current nuisance activity can be proven to have occurred within this 12 month period, the permanent injunction relief described in Section 617.83 may also be based on such activity. All that is needed is proof that at least two incidents of statutorily

defined nuisance occurred within 12 months of the permanent injunction hearing.

When Ms. Krengel failed to comply with the agreed abatement plan, the City was authorized under Section 617.82(b) to initiate a complaint for relief in the district court consistent with paragraph (c) of that Section. The City was therefore required to pursue any temporary or permanent injunction in compliance with Section 617.81, subdivision 2, which, as noted in the previous section, required proof of nuisance activity within 12 months of the permanent injunction hearing.

The statute is simple and clear. If the nuisance activity occurred within 12 months of the permanent injunction hearing it may be enjoined. Because the language of the statute is not reasonably susceptible of more than one meaning, it is not ambiguous, and judicial construction therefore is not appropriate *American Tower, L.P. v. City of Grant*, 636 N.W. 2d. 309, 312 (Minn. 2001); *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W. 2d. 536, 539 (Minn. 2007).

3. The plain language of the statute neither expresses nor implies that failure to comply with an abatement plan perpetuates a former nuisance.

The City also erroneously asserts that Minnesota's public nuisance statute is ambiguous because it is unclear whether failure to comply with an abatement plan perpetuates the former nuisance. The statute plainly does not provide, or suggest in any way, that failure to comply with any abatement plan automatically perpetuates a former nuisance. Clearly, the non-compliance must rise to the level of a nuisance as defined in the statute. There is no indication, express or implied, in the statute that the legislature intended that

behavior which could not be proven to be a statutorily defined nuisance, if it was not in strict compliance with an abatement plan, should result in an injunction excluding a home owner from her home for a year. If, on the other hand, a property owner's failure to comply with an abatement plan does in fact perpetuate a statutorily defined nuisance, such that statutorily defined incidents of nuisance continue to occur while the abatement plan is in effect, a City should have no difficulty proving that such nuisance activity occurred within 12 months of the permanent injunction hearing.

C. THE PLAIN LANGUAGE OF MINNESOTA'S "PUBLIC NUISANCE LAW" PROVIDES THE CITY'S PROSECUTOR WITH AN ADEQUATE AND WORKABLE PROCEDURE FOR ABATING AN EXISTING NUISANCE.

1. The City's prosecutor has ample tools available to protect the health, safety and welfare of its citizens.

The City asserts that giving effect to the plain language of Minnesota's public nuisance law limits its discretion to exercise its police power to ensure public health, welfare and safety and to achieve the objectives of the law, and discourages cities from using abatement agreements. The City is simply wrong.

The obvious ultimate objective of the Minnesota's public nuisance law is to provide an effective procedure for abating public nuisances as defined by law. A closely related legislative purpose of the law is to encourage property owners to abate nuisances themselves. *City of St. Paul v. Spencer*, 497 N.W.2d 305 (Minn. App. 1993). To carry out these objectives the legislature has provided city prosecutors with a complete set of tools.

First, a notice is given to the property owner providing the owner with an opportunity

to take the steps necessary to abate the nuisance over a period of 30 days. Minn. Stat. § 617.81, subdivision 4. If no further nuisance activity occurs within those 30 days the ultimate objective of the law is accomplished and no further action by a city is needed or authorized.

Second, an owner may also enter into an abatement plan agreement within 30 days of the filing of the notice. Minn. Stat. § 617.82. In negotiating an abatement plan agreement a city prosecutor enjoys considerable leverage and bargaining power in establishing the terms of the agreement. As part of the agreement a city's prosecutor can require that a property owner not engage in behavior likely to perpetuate the continuation or reoccurrence of a statutorily defined nuisance. Also, as part of the agreement, a city's prosecutor has the power to retain discretion to determine when a legal action may be initiated to enjoin the nuisance activity and ultimately seek to have the property owner excluded from the property so as to ensure that nuisance activity can be proven to have occurred within 12 months of when a permanent injunction hearing is scheduled. The city's prosecutor could retain the discretion to terminate the abatement plan agreement and initiate a legal action upon any breach of the agreement or upon the occurrence of any specified condition.⁴

Third, the city's prosecutor, after assessing the situation, may determine that an

⁴The abatement plan agreed to by Ms. Krengel provided that "any violation of the terms and conditions of the Abatement Plan will allow the City Council to pursue injunctive action as stated in the Notice of Injunctive Action." The City was therefore authorized to initiate a legal action immediately upon the violation of any term of the agreement without waiting for the one year time period of the plan to conclude.

abatement plan agreement is not workable and exercise discretion to initiate a legal action immediately upon the expiration of the 30 days provided in the notice if the property owner has not brought the statutorily defined nuisance activity to an end.

The existing statutory scheme thus empowers city prosecutors with a multitude of options to abate statutorily defined nuisances. A prosecutor can choose to creatively tailor an abatement plan to address a particular set of circumstances, retaining as much discretion as necessary to ensure that a legal action can be initiated in a timely manner if necessary. Or, a prosecutor can elect to initiate a legal action to enjoin a continuing nuisance without entering into an abatement plan agreement if she/he believes this to be the best way to protect the public.

2. The City's prosecutor is limited only in the extent to which it can regulate homeowners whose behavior does not result in a nuisance.

The district court, in its Conclusions of Law, number 8, as a basis for issuing a permanent injunction excluding Ms. Kregel from her home for a year, stated as follows: "If Defendant is barred from her home, she may seek the chemical dependency treatment she desperately needs, followed by a long term placement in a halfway house." App. A. 29. The City also asserts that many times it makes sense to address underlying conduct which may lead to nuisance activity. While a prosecutor certainly has the discretion to creatively address underlying conduct in an abatement plan agreement, Minnesota's public nuisance law nowhere empowers a prosecutor to seek and obtain an injunction excluding a homeowner from her own home for behavior which does not actually result in an incident of statutorily

defined nuisance activity.

The district court exceeded its authority in using Minnesota's public nuisance law to issue a permanent injunction, excluding Ms. Kregel from residing in her own home for one year, for the purpose of compelling her to seek chemical dependency treatment and long term placement in a halfway house. The purpose of Minnesota's public nuisance law is clearly not to compel long term chemical dependency treatment of property owners whose use of alcohol does not in fact result in a statutorily defined nuisance. Regulating Ms. Kregel's use of alcohol in her own home when that behavior does not result in statutorily defined nuisance is not authorized under Minnesota's public nuisance law. Both the City and the district court are limited in this narrow respect under Minnesota's public nuisance law. The improper exercise of such discretion is intrusive and crosses a line beyond which it is not necessary to go to protect the health, safety and welfare of the public.

3. A clear, certain and ample amount of time is available to a city prosecutor to complete the action steps needed to abate and enjoin an existing nuisance.

The City erroneously asserts that Minnesota's public nuisance statute is confusing because it presents three different time frames for measuring the 12 month period within which two separate incidents of nuisance activity must be proven to have occurred. The three time frames which the City argues are in play are: 1) measurement back from the date that the Notice of Injunctive Action is served;⁵ 2) measurement back from the date that the

⁵The City, to support its argument that the statute ambiguously allows for the measurement of the 12 month period backwards from the date the Notice of Injunctive Action is

temporary injunction hearing is held; and 3) measurement back from the date that the permanent injunction hearing is held. The bottom line, however, is that the plain language reading by the Court of Appeals of the statute, concluding that this 12 month period is measured backwards from the date of the permanent injunction hearing, yields the same results no matter which of these measurements is applied.

If there is no evidence of two incidents of statutorily defined nuisance occurring within 12 months of the date that the Notice of Injunctive Action is served pursuant to Section 617.81 subdivision 4, then it certainly cannot be proven that such incidents of nuisance occurred within 12 months of the permanent injunction hearing held pursuant to Section 617.83. Therefore, the absence of proof of such nuisance activity within the earlier time frame results in an absence of proof of such nuisance within the latter time frame.

Likewise, if there is no evidence of two incidents of statutorily defined nuisance occurring in the 12 months prior to the time the temporary injunction hearing is held pursuant to Section 617.82, then it cannot be proven that such incidents of nuisance occurred within

served, erroneously asserts that the term “evidence” as used in Section 617.81, subdivision 4(b)(2) is a clear substitute for the term “proof”. This section requires that the Notice summarize the “evidence” that a nuisance is maintained or permitted. While the terms “evidence” and “proof” are interrelated, they clearly have separate and distinct meanings. The definition of “evidence” in *Black’s Law Dictionary* is “[a]ny species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention;” and the definition of “proof” in *Black’s Law Dictionary* is “[t]he effect of evidence; the establishment of a fact by evidence.” *Black’s Law Dictionary, Abridged Sixth Edition*, 1991. The summary of “evidence” required in the Notice of Injunctive Action therefore leads to the proof of a nuisance but is not the final “proof” required to be presented at the permanent injunction hearing.

12 months of the permanent injunction hearing held pursuant to Section 617.83. Once again, the absence of proof of such nuisance activity within the earlier time frame results in an absence of proof of such nuisance within the latter time frame.

If a prosecutor exercises sound planning and judgment in determining whether an abatement plan agreement is practical under the circumstances, and if she/he, in drafting an abatement agreement, reserves the discretion needed to initiate a timely legal action, she/he need not be hampered by the requirement that two incidents of statutorily defined nuisance be proven to have occurred within 12 months of the permanent injunction hearing. A prosecutor need not allow nuisance activity to become “stale” (as the City appears to fear will occur), if the proper planning and judgment are exercised. If, however, the past nuisance activity becomes “stale” because the property owner has not engaged in any incidents of nuisance activity within 12 months of the permanent injunction hearing, the purpose of the law will have been fulfilled - the nuisance will have been abated, leaving no existing nuisance to enjoin and no reason to exclude the home owner from her home.

The City attempts to create a unique set of hypothetical circumstances in which a plain reading of the statute frustrates a prosecutor’s ability to bring a successful legal action to exclude a property owner from her home. The City supposes circumstances in which a property owner engaged in only one incidence of statutorily defined nuisance within the 12 months preceding the time a permanent injunction hearing could be scheduled where a one year agreed abatement plan was in effect; the property owner in this hypothetical had also

been responsible for several incidents of nuisance prior to entering the agreement and prior to the commencement of that 12 month period.⁶ The fundamental purpose of Minnesota's nuisance law actually is not frustrated under these circumstances as the City imagines it to be. If the property owner in the hypothetical becomes responsible for further incidents of nuisance within the 10 months following her last committed nuisance, the prosecutor will have time to initiate a legal action seeking temporary and permanent injunctive relief. If, on the other hand, this property owner is not responsible for any further incidents of nuisance within 12 months after this last committed nuisance, the nuisance will be officially abated under Minnesota's public nuisance law, and the health, safety and welfare of the public will have been protected.

4. **The abatement plan agreement the City entered with Ms. Kregel had the ultimate effect of abating the incidents of nuisance activity upon which the City based its injunctive action.**

The City laments that a plain language reading of Minnesota's public nuisance law will have the effect of discouraging prosecutors from ever agreeing to an abatement plan out of fear that they will have to start the proceedings all over again. This fear is not well founded. As noted previously, sound planning and good judgment in tailoring abatement plans to address particular circumstances can help preserve a prosecutor's opportunity to

⁶This hypothetical set of circumstances is significantly different from the real circumstances of the instant case. Ms. Kregel was not responsible for any incidents of statutorily defined nuisance while her abatement plan agreement was in effect. And the City was authorized to initiate an action for an injunction upon Ms. Kregel's non-compliance with any of the terms of the agreed abatement plan.

initiate a timely legal action when the property owner does not comply with the agreed abatement plan. And in many instances, even if the property owner does not fully comply with all of the terms and conditions of the agreement, and the time for initiating a legal action runs out, the abatement plan will have accomplished the purpose for which it was intended under the law. The actual nuisance the law was designed to abate will be abated, and this will be accomplished by the property owner, thereby obviating the need to initiate a legal action seeking temporary or permanent injunctive relief. This is a fundamental purpose of the law, and this is exactly what was accomplished in the case of Ms. Kregel. As the Court of Appeals noted, the abatement plan succeeded because it led to the elimination of the statutorily defined nuisance that previously existed; it was only because the plan imposed standards significantly more stringent than the statutory standard that all the issues with the City were not resolved. *City of West St. Paul v. Kregel*, 748 N.W. 2d 333,344, FN 3 (Minn. App. 2008)

Excluding Ms. Kregel from her home was clearly not necessary to fulfill the purpose of the law. It was intrusive and extended well beyond the authority conferred by the law and beyond that which was needed to ensure the health, safety and welfare of the public.

5. The legislative history of Minnesota’s “Public Nuisance Law” is consistent with the plain language application of that law by the Court of Appeals.

In the legislative history referenced by the City, there is no indication that the legislature did not intend that Minnesota’s public nuisance law be plainly read to say that the “within the previous 12 months” is measured backwards from the date of the permanent

injunction hearing, as articulated by the Court of Appeals. And nothing in the recording of the legislative hearing discussion submitted by the City as part of the Appendix to its Brief even remotely suggests that the legislature intended to give city prosecutors the broad discretion to seek and obtain an injunction enjoining a homeowner from residing in her own home for a year for using alcohol within her home in violation of an agreed abatement plan when she neither maintained nor permitted any statutorily defined nuisance in her home within the 12 month period prior to the permanent injunction hearing.

D. THE PLAIN LANGUAGE OF MINNESOTA’S “PUBLIC NUISANCE LAW” PROVIDES NO BASIS FOR IMPLYING THAT THE 12 MONTH PERIOD WITHIN WHICH THE OCCURRENCE OF TWO INCIDENTS OF NUISANCE ACTIVITY MUST BE PROVEN IS TOLLED WHILE AN AGREED ABATEMENT PLAN IS IN EFFECT.

The City contends that Section 617.82(a) “implies” that the statutory procedures are stayed or tolled while an abatement plan is in force and that the Court of Appeals completely ignored the language of this section, which provides that if the property owner abates the conduct constituting the nuisance or complies with an agreed abatement plan “... the prosecuting attorney may not file a nuisance action on the specified property regarding the nuisance activity described in the notice.”

The Court of Appeals, however, did not ignore this language. The Court recognized that the prosecutor was permitted to file a nuisance action regarding the nuisance activity in the notice. The Court also applied the plain language of the statute requiring that this nuisance activity ultimately be proven to have occurred within 12 months of the permanent

injunction hearing. As the Court of Appeals noted, while the City's prosecutor was not prohibited from initiating a complaint for relief in district court, it was required to do so "...consistent with paragraph (c)..." of Section 617.82, which in turn refers back to Section 617.81, subdivision 2, which provides that "a public nuisance exists upon proof of two or more separate behavioral incidents...committed within the previous 12 months." *City of West St. Paul v Krengel*, 781 N.W. 2d 333, 344 (Minn. App. 2008). Because the nuisance activity recited in the original notice could not be proven to have occurred within 12 months of the permanent injunction hearing, the City was not authorized under the law to obtain a permanent injunction enjoining Ms. Krengel from living in her home for a year.

As the Court of Appeals explained in a footnote, proof of "mere possession or consumption of alcoholic beverages" was not proof of a statutory nuisance and "the mere potential, propensity, or predisposition to engage in behavior that might constitute a public nuisance cannot substitute for the "separate behavioral incidents" that are required by the statute." *Krengel* at 344.

The Court of Appeals also properly concluded that "there simply is no provision in the statute for staying or tolling the statutory procedures while an abatement plan is in force." *Id.* The legislature could easily have provided for a staying or tolling while the abatement plan was in effect if that is what it intended. It plainly did not do so. When a question of statutory construction involves failure of expression rather than ambiguity of expression, a court is not free to substitute amendment for construction and thereby supply the omissions

of the legislature. *State v. Moseng*, 95 N.W. 2d 6, 11-12 (Minn. 1959); *Larson v. Wasemiller, M.D.*, 738 N.W. 2d. 300, 304, FN 1 (Minn. 2007). Similarly, the Supreme Court has declined to read into a statute a provision the legislature purposely omits or inadvertently overlooks. *Metropolitan Sports Facilities Commission v. County of Hennepin*, 561 N.W. 2d 513, 516 (Minn. 1997); *Reiter v. Kiffmeyer*, 721 N.W. 2d 908, 911 (Minn. 2006).

It is inappropriate for the City to request this Court to imply or read into the law a tolling provision which will have the effect of expanding the City's authority to regulate homeowners' behavior beyond that which is permitted by the plain language of the statute. Policy creating such expanded authority is more properly established by the legislature. It is not for the courts to make, amend, or change the statutory law, but only to apply it. *State v. West*, 173 N.W. 2d 468, 474 (Minn. 1970); *Johnson v. Johnson*, 277 N.W. 2d 208, 212 (Minn. 1973); *Waller v. Powers Department Store*, 343 N.W. 2d. 655, 658 (Minn. 1984).

E. EVEN IF STATUTORY CONSTRUCTION WERE PERMITTED IN THIS CASE, THE LEGISLATURE MAY NOT BE PRESUMED TO HAVE INTENDED THE ABSURD, UNREASONABLE AND UNJUST RESULT OF SUBJECTING MS. KRENGEL TO PUNITIVE MEASURES WHEN THERE WAS NO NUISANCE ACTIVITY LEFT TO ABATE.

Among other considerations, the intention of the legislature may be ascertained by considering the occasion, the mischief to be remedied, and the object to be obtained. Minn. Stat. § 645.16 (1), (3) and (4).

The object and necessity for Minnesota's "Public Nuisance" law, together with the object to be obtained, as noted previously, is to abate the nuisance and do so, if possible, by

encouraging the property owner to take action to abate it herself. This is the fundamental purpose of the law. In the case of Ms. Kregel, the mischief to be remedied was the maintaining or permitting of incidents of nuisance on her property.

When these considerations are applied to the facts and circumstances of this case, it becomes clear that the legislature's intent was completely carried out without excluding Ms. Kregel from her home for a year. The fundamental purpose, or object, of the law was carried out and fulfilled when, following the execution of an agreed abatement plan, Ms. Kregel succeeded in bringing about the cessation of all nuisance activity on her property. The mischief to be remedied was remedied. Removing Ms. Kregel from her home once the nuisance activity had ceased, was not necessary and was not what the legislature intended or authorized.

The City's assertion that Ms. Kregel should be removed from her home after she has succeeded for more than a year in preventing any nuisance activity to occur on her property, leads to an absurd and unreasonable result in violation of the presumption directed by Minn. Stat. §645.17(2) that the legislature does not intend a result that is absurd or unreasonable. Ms. Kregel completely succeeded in ending all statutorily defined nuisance activity on her property for over a year. The health, safety and welfare of the public was no longer adversely affected. There was nothing left to enjoin.⁷ Excluding Ms. Kregel from her home for a year

⁷Both Minn. Stat. § 617.82(c) and Minn. Stat. § 617.83 require that the conduct enjoined must be described. Significantly, neither the district court's temporary injunction nor its permanent injunction describe the conduct to be enjoined.

after she succeeded in abating the nuisance accomplished nothing more than had already been accomplished. She had accomplished everything the legislature intended be accomplished. To subject Ms. Kregel to further punitive measures when there was no nuisance activity left to abate was absurd, unreasonable and unjust. An intent to bring about such a result should not be attributed to the legislature. *See Lewis-Miller v. Ross*, 710 N.W. 2d 565, 569 (Minn. 2006).

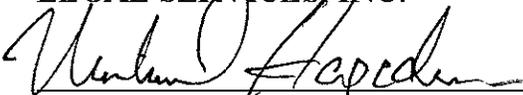
CONCLUSION

The plain language application of Minnesota's "Public Nuisance Law" by the Court of Appeals is sound, reasonable and correct. A public nuisance did not exist at the time of the hearing on the City's request for a permanent injunction enjoining Ms. Kregel from living in her home because the behavioral incidents upon which the City based its request occurred more than 12 months before the hearing. The Statute's plain language provided the City's prosecutor with an adequate and workable procedure for abating an existing nuisance. However, the plain language of the statute provided no basis for implying that the 12 month period for proving the existence of two incidents of nuisance activity was tolled while an agree abatement was in effect. To construe the law in a manner that would subject Ms. Kregel to needless punitive measures when there was no nuisance activity left to abate would be absurd, unreasonable, and unjust. For these reasons, Ms. Kregel respectfully requests this Court to affirm the decision of the Court of Appeals.

Dated: 9/11/08

Respectfully Submitted,

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STATE OF MINNESOTA
IN SUPREME COURT

City of West Saint Paul,

Appellant,

CERTIFICATE OF BRIEF LENGTH

v.

No. A07-310

Alice Jane Krengel,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subdivisions 1 and 3 for a brief produced with a proportional font. The length of this brief is 8705 words. This brief was prepared using WordPerfect 9.

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