Nos. A07-1763
A07-1764
A07-1765
A07-1766
A07-1767

STATE OF MINNESOTA

IN COURT OF APPEALS

City of Saint Paul,

Plaintiff/Respondent,

vs.

The State of Minnesota Department of Revenue and Ward Einess, in his capacity as the Commissioner of the Department of Revenue,

Defendants/Appellants.

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. INTRODUCTION

This brief is submitted in reply to Respondent's Brief, which was served on counsel for Appellants on December 10, 2007.

Respondent ("City") contends that: (1) its so-called "storage" of street-cleaning debris on a site that is filled to capacity with the debris satisfies the requirement under Minn. Stat. § 282.01, subd. 1a, that the site be used "exclusively for snow removal and street cleaning disposal" (the "authorized public use" for which the property was conveyed by the Appellants ("Commissioner") to the City (Appeal No. A07-1766); and (2) use by the City of four other parcels for what it variously describes as "resource protection" or "open space," satisfies the requirement under section 282.01, subdivision 1a, that the parcels were to be used "exclusively for park purposes" (the authorized public use for which the parcels were conveyed to the City by the Commissioner (Appeal Nos. A07-1763, A07-1764, A07-1765, and A07-1767).

The City's position that the uses to which these parcels are being put satisfy the authorized public use requirement under the statute is not sustainable. First, in addition to placing a strained interpretation on the word "storage," the City disregards critical facts underlying its use of the street-cleaning parcel from 1995 to the present; and second, the City misconstrues its own legislation defining "park purposes" and "park," as well as improperly equating the use of vacant land as "open space," or for "resource protection," with the use of land for "park purposes."

II. NONE OF THE CITY'S VARIOUS USES OF THE PARCELS IN QUESTION SATISFIES THE AUTHORIZED PUBLIC USE REQUIREMENT UNDER MINN. STAT. § 282.01, SUBD. 1a.

A. The City's So-Called "Storage" Of Debris From 1995 To The Present Is Not Synonymous With The Use Of The Property For "Snow Removal And Street Cleaning Disposal" And Therefore Does Not Satisfy The Authorized Public Use Requirement Set Forth In The State Deed.

Initially, the City seems to argue that, because it "stored" debris on the site during the time it was actually using the property for snow removal and street cleaning disposal (from 1980 to 1995), its "storage" of debris from 1995 to the present should be considered a sort of extension, or continuation, of its street cleaning disposal activity. Resp. Br. at 10-11.[1] This argument is flawed, for a number of reasons.

First, and most important, the record in this case is replete with evidence that the so-called "storage" of the debris stretching from 1995 to the present bears no connection to the use of the property that ended in 1995. To the contrary, the record shows that the City has retained the property with the clear expectation that it would someday be suitable for development. *See* App. Br. at 12-13.[2] Thus, it is not accurate to suggest that allowing the debris to simply remain on the site somehow constitutes an integral part of

[1] "Resp. Br. at ___" refers to a specific page or pages in Respondent's Brief.
[2] "App. Br. at ___" refers to a specifc page or pages in Appellants' Brief.

the street cleaning disposal activity that ended in 1995. *See* Resp. Br. at 10-11.[3] The City first attempts to minimize its discussions regarding development of the property by accusing the Commissioner of attempting to "confuse the issue" by bringing the discussions to the attention of the Court; and then implies that the discussions are inconsequential past history regarding activity that will never take place. *See* Resp. Br. at 12. As the record shows, however, the discussions regarding future development of the property ranged from at least 1994 to 2005, *See* App. Br. at 12-13. and it defies belief that the City currently has no plans for this property other than to allow it to lie undeveloped forever as a debris depository. Clearly, the authorized public use for which the property was conveyed to the City in 1980 came to an end in 1995, and the City should have reconveyed the property to the State as required under Minn. Stat. § 282.01, subd. 1d.

The City also argues that, because it stopped adding street cleaning debris to the property only when the site reached capacity, the Commissioner's position on this issue is

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[3] The City claims that "Ramsey County's Inspector [James Carroll] even agrees that storage of street sweeping debris would probably be a use compliant with that specified in the use deed." That is a mischaracterization of Mr. Carroll's deposition testimony The context of his testimony, reproduced in Respondent's Appendix at 83, was as follows:

Counsel: If there was, in fact, street sweepings on the property, would you consider that in compliance with the use-deed?

Witness: I'm not sure. Probably.

Witness: Can I go back to that last question?

Counsel: Yes.

Witness: The reason I hesitated was because if all of a sudden I had seen street sweepings being dumped on there when previously they weren't, then I would have maybe questioned why when previously to that I hadn't seen anything.

"unreasonable." Resp. Br. at 12. To the contrary, there is nothing unreasonable about reading "street cleaning disposal" as just that — disposal of street cleaning debris. Likewise, there is nothing unreasonable about the Commissioner's position that merely allowing debris to rest on a site, while contemporaneously discussing future development of the site when the "soils [on the site] are stabilized," App. Br. at 12, does not qualify as use of the land for *disposal* of the debris.

Finally, the City purports to be "confused" about the Commissioner's "complete change of position" with respect to the property. Resp. Br. at 13. First, the Commissioner has not "changed" his position. Whether or not the Commissioner could or should have issued a declaration of reversion at some earlier date is irrelevant.[4] It is the grantee's responsibility to reconvey property to the State at the termination of its authorized public use. Minn. Stat. § 282.01, subd. 1d. Second, the fact that the assessor's estimated market value of the property increased substantially between 2000 and 2004, *id.*, is likewise irrelevant. There is nothing nefarious or suspect about the fact that Ramsey County, and the State for that matter, are interested in furthering the public policy that land subject to taxation be placed on the tax rolls. Nor is it relevant with respect to the issues in this case that Ramsey County's Tax Forfeited Land Division is funded by sales of tax-forfeited properties. The City neglects to point out that any

[4] The City attempts to put the onus on the Commissioner by contending that "it can be assumed" the Commissioner had previously found the property to be "in compliance" because he took no action regarding reversion of the property to the State. Whether or not the Commissioner's past inspections of the property were deficient is irrelevant. The relevant fact is the City's use (or lack thereof) of the property after it ceased dumping snow and street cleaning debris on the property.

amount received by the Division in excess of its budgetary needs is distributed for the benefit of the public as follows: 40 percent to counties, 40 percent to school districts, and 20 percent to cities. *See* Respondent's Appendix at 43 (Kujala Deposition, page 13, line 3, through page 14, line 25).

For all of the foregoing reasons, the Commissioner's declaration of reversion with respect to the snow removal and street cleaning disposal parcel should be sustained. This parcel is identified as PIN 32-29-22-22-0133 (Appeal No. A07-1766).

B. The City Has Never Put The "Park Purposes" Parcels To The Authorized Public Use Specified In The State Deeds.

At the outset of its argument regarding the "park purposes" parcels (Appeal Nos. A07-1763, A07-1764, A07-1765, and A07-1767), the City misconstrues plain language in the City's Charter and Legislative Code to incorrectly contend that the definition of land used for "park purposes" includes land used for "open space," even if the land is not used, or at least made available to the public for, recreational purposes. Resp Br. at 14-15.

Specifically, the City reads the following language in the Charter and Code to mean that land used for *any* open space purpose, recreational or otherwise, qualifies as land used for park purposes:

> Park purposes" shall include, but not be limited to mean, playground, trail, parkways, open space *and* any other recreational purpose.

St. Paul, Minn. Charter § 13.01.1 (emphasis added).

> Open space. Land and water areas retained for use as active or passive recreation areas *or* for resource protection.

St. Paul, Minn. Leg. Code § 60.216 (emphasis added).

The flaw in the City's argument rests with its refusal to recognize that the plain meaning of the quoted Charter provision includes open space as land used for "park purposes" only to the extent the land is used for a *recreational purpose*. In short, the City reads the phrase ". . . and any other recreational purpose" out of the Charter, in violation of the rule of construction that "[A] statute is to be construed as a whole so as to harmonize and give effect to all of its parts." *Willmus v. Comm'r of Revenue*, 371 N.W.2d 210, 213 (Minn. 1985), citing *Anderson v. Comm'r of Taxation*, 93 N.W.2d 523, 528 (Minn. 1958).[5] Coupled with the City's erroneous reading of Charter § 13.01.1, it disregards the disjunctive "*or*" in Leg. Code § 60.216, which makes it clear that the legislation contemplates *two* kinds of open space — one used for recreation, the other for resource protection — with only the former qualifying as open space used for recreational park purposes.

The City further contends that it "expressed its intent [at the outset] to use these properties in a manner consistent with the Charter and Code." Resp. Br. at 14. For example, the City states that its application for parcel 0123 (Appeal No. A07-1767) "expressly informed the State that the property was sought for 'Open Space-Natural Prairie Remnant.'" Resp. Br. at 14. A review of the application, reproduced in

[5] The City states that the Commissioner takes the position that land must be used as a "municipal park" in order to qualify as land used for "park purposes." Resp. Br. at 14. That does not accurately state the Commissioner's position. The Commissioner cited St. Paul, Minn. Leg. Code § 170.01, which defines "park" as "all the public grounds and squares maintained as pleasure grounds and designated recreation areas by the City of Saint Paul," as a definition *consistent with* the definition of "park purposes" in section 13.01.1 of the Charter. *See* App. Br. at 8. This definition simply reinforces the Commissioner's position in this case.

Respondent's Appendix at 96, shows that that statement is not accurate. The application describes "the intended public use to be made of the property" as "Park Purposes." The "Open Space-Natural Prairie Remnant" language merely responds to the question: "State the need for the property . . . why this property instead of some other property?"[6] The clear import of this response is that the property is needed because it is *suitable* for park purposes use — not that use for resource protection is equivalent to use for park purposes. For additional examples of this distinction, *see* Respondent's Appendix at 339, footnote 3 reproduced thereon.

The City also states that the resolutions passed [by the City] with respect to parcels 0080, 0081, and 0053 (Appeal Nos. A07-1764, A07-1763, and A07-1765, respectively), "expressed the City's desire to use the properties to preserve wet lands and a parkway." Resp. Br. at 14. Presumably, the City is making this statement to show that the Commissioner must have known that it intended to use the properties for "resource protection." The problem with this approach is that there is no evidence the Commissioner ever saw the City's resolutions (Respondent's Appendix at 92-95). The deeds conveying the parcels to the City make no mention of "wetlands" or a "parkway," but all state that the parcels are to be used "exclusively for park purposes." *See* Appellants' Appendix at 57, 65, and 73. These conveyances clearly were made, not on the basis of the City's resolutions, but in reliance on the City's applications for state

[6] The "need for" section of the application conforms to the requirement in Minn. Stat. § 282.01, subd. 1a, that the applicant state not only "the use to be made of" the property but also the "need therefor." *See* Respondent's Appendix at RA 129-130. (Deposition of Derrick Hodge, page 84, line 3, through page 87, line 21).

deeds, which stated that the parcels were to be used for "park purposes." *See, e.g.*, Respondent's Appendix at 96.

Notwithstanding that the Commissioner has consistently taken the position in these cases that the required element for "park purposes" use is public availability for purposes of recreation or enjoyment, the City asserts arbitrariness on the part of the Commissioner. To the contrary, the Commissioner is relying on a common sense approach in determining whether land is used for park purposes, buttressed by persuasive, albeit non-binding, case law, as well as by the City's own Charter and Legislative Code that define park purposes land as land used for a recreational purpose. Again, the implication that the Commissioner may have been deficient with respect to past inspections of these properties is irrelevant to the issue of their actual use during the time periods in question. Furthermore, the implication that a decision sustaining the Commissioner's declarations of reversion in these cases would allow him to act inconsistently or arbitrarily in the future is a red herring that adds nothing to the resolution of these appeals. Rather than now claiming that the use of land to preserve wetlands or for a parkway is the same as use of the land for park purposes, Respondent's Brief at 14, the City should have disclosed those proposed uses to the County and the Commissioner at the time it applied for the deeds to the properties.

In discussing the foreign decisions cited by the Commissioner in Appellants' Brief at 9-10, the City does no more than incorrectly hold out those decisions as support for its contention that any piece of vacant, undeveloped land, such as the parcels at issue in these cases, qualifies as land used for park purposes. Resp. Br. at 17-18. That simply is

not the law. While the Commissioner agrees that land, in order to qualify as land used for park purposes, need not be formally landscaped, there at least must be some effort to maintain the land for the recreation or enjoyment of the public. *See Cohen v. City of Lynn*, 598 N.E.2d 682, 686 (Mass. App. 1992), *rev. den.* 602 N.E.2d 1094. Affirmance of the District Court's decisions in these consolidated cases would signal that any vacant parcel of land would qualify as land used for park purposes because it is "open space." It is difficult to conceive of a broader, more vague test than this. The irony in the position the City has taken in these cases is the fact that it stems from the City's misconstruction of its own Legislative Code and Charter, which it holds out as support for the argument that any kind of land, so long as it is undeveloped and can be called "open space" or "resource protection" land, qualifies as land used for "park purposes".

The City's final argument in support of its position in these cases, though expressed somewhat differently over the final three pages of Respondent's Brief, can be distilled into one basic argument: The Commissioner should not have conveyed the properties to the City in the first place if he did not believe they qualified as park purposes land, and his declarations of reversion at this point in time reflect inconsistent treatment of the City in cooperation with efforts by Ramsey County to reclaim the parcels.

First, as the City is well aware, the Commissioner is not in a position to review each parcel before it is conveyed to a governmental subdivision applying for a use deed. Minn. Stat. § 282.01, subd. 1a, provides in part that the Commissioner may convey tax-forfeited land to a governmental subdivision for an authorized public use "if an

application is submitted to the Commissioner which includes a statement of facts as to the use to be made of the tract and the need therefor and the recommendation of the county board." The Commissioner relied upon the City's representation regarding the uses to which the properties would be put; and the responsibility for putting them to the authorized public uses set forth in the deeds rested with the City, not with the Commissioner.

Second, the City's contention that the Commissioner's declarations of reversion are inconsistent with his earlier findings of compliance regarding the uses to which the properties were put, Resp. Br. at 21, is yet another attempt to distance itself from the responsibility of putting the properties to the authorized public use — park purposes— shown on the deeds of conveyance. As the City is aware, the past practice of the Commissioner was to periodically send a form questionnaire to the grantee of the property requesting a "check-the-box" "yes" or "no" answer as to whether the entity was using the property for the authorized public use for which it was conveyed. *See* Respondent's Appendix at 128-29 (Deposition of Derrick Hodge, page 79, line 7, through page 81, line 5). Only over the past two to three years has that procedure been revised to require an affirmative description of the use to which the property is being put. *Id.*, page 81, lines 6 through 20. Thus, contrary to the City's assertion, the Commissioner has not made inconsistent or in any way prejudicial determinations with respect to whether or not the parcels in question were being put to the authorized public use set forth in the deeds. Rather, the Commissioner has relied upon the City's assurances that the properties were being put to that use.

Finally, the City complains because the Commissioner declined to reconvey the properties to it by issuing amended deeds "consistent with the actual use" of the properties, e.g., storm water ponding, drainage, and bluff preservation (as contrasted with the authorized public use for which the properties were conveyed to the City). See Resp. Br. at 20. The Commissioner stands by his position that this request constitutes an admission by the City that it was not using the properties for the authorized public use of park purposes. *See* App. Br. at 10-11.

CONCLUSION

Based on the foregoing reasoning and authorities, the Commissioner respectfully requests that the Court reverse the decisions of the District Court in these consolidated cases, and sustain the validity of the declarations of reversion at issue.

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Respectfully submitted,

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