

STATE OF MINNESOTA
IN COURT OF APPEALS

No. A08-1814

American National Bank of Minnesota,

Appellant,

v.

Housing and Redevelopment Authority
for the City of Brainerd,

Respondent.

**BRIEF FOR NATIONAL ASSOCIATION OF
HOUSING AND REDEVELOPMENT OFFICIALS,
MINNESOTA CHAPTER, AS *AMICUS CURIAE***

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Housing and Redevelopment Officials, Minnesota Chapter (“Minnesota NAHRO”), is a non-profit organization established in 1955 with a membership of over 150 public agencies, mostly housing and redevelopment authorities (“HRAs”), which operate public housing, community development or redevelopment programs throughout the state.¹ Minnesota NAHRO has a strong interest in ensuring that its members, when financing housing, development and redevelopment projects through the issuance of bonds, are free to determine the types of securities they issue and that the parties who receive such securities cannot look to unauthorized sources of repayment in the event of default. In the present case, Minnesota NAHRO respectfully urges this Court to affirm the trial court’s decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the Municipal Housing and Redevelopment Act was enacted in 1947, the Legislature had declared that there was an “[in]sufficient supply of adequate, safe, and sanitary dwelling accommodations” in the state. 1947 Minn. Laws 767, Ch. 487, Art. 1, § 2. It was in the public interest to require “clearance, replanning, reconstruction, and neighborhood rehabilitation of such substandard and unsanitary areas,” all of which would be replaced by “decent, safe, and sanitary housing for persons of low income and their families” 1947 Minn. Laws 768, Ch. 487, Art. 1, § 2. The Legislature acknowledged that “such housing for persons of low income and their families [is]

¹ Pursuant to Minn. R. App. Civ. P. 129.03, *amicus* Minnesota NAHRO certifies that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to the preparation or submission of this brief.

essential to protect . . . public revenues . . . [and] the financial stability of communities.”

Id. In those passages, the modern-day HRA was born.

Today, just as sixty years ago, HRAs are creatures of statute, and they appear in a variety of shapes and sizes. All cities in Minnesota, from the smallest to the largest, may create “a public body, corporate and politic, to be known as the housing and redevelopment authority” Minn. Stat. § 469.003, subdiv. 1. (2008). Moreover, any county, or group of counties acting in concert with one another, may form their own HRAs. Minn. Stat. § 469.004, subdivs. 1 and 2. They are governed by boards of commissioners, who are appointed for a term of years by their jurisdiction’s executive. They each engage in the planning and implementation of new housing and economic redevelopment. The statutory duties of an HRA are clearly prescribed.

However, despite their autonomous nature and considerable authority over civic affairs, HRAs occupy a precarious perch, one whose stability is directly affected by this case. To that end, *amicus* Minnesota NAHRO intends to demonstrate that because HRAs possess limited resources, they lack highly specialized knowledge of development financing, and must rely on bond counsel in the course of making financing decisions. Furthermore, Minnesota law clearly states that HRAs must satisfy certain statutory requirements before they can even issue general obligation bonds, requirements that are designed to prevent HRAs from hastily pledging the full faith and credit of their jurisdictions.

ARGUMENT

I. HRAs ARE ENTITIES WITH LIMITED RESOURCES AND THE CONSEQUENCES OF APPELLANT'S SUCCESS WOULD UNDERMINE THEIR PURPOSE AND EFFECTIVENESS.

A. An HRA's Existence Depends Upon Limited and Discretionary Sources of Government Funds, which Impacts its Level of Specialized Knowledge.

All HRAs obtain monies for their operating and capital investment funds through the same two sources: (1) appropriations and grants from federal and state government and (2) local tax levy authority. Because these amounts are fluid and subject to larger economic currents, HRAs simply cannot afford to perform their core function and employ highly specialized staff, such as in-house or general counsel, at the same time. This financial reality affects how HRAs behave in housing development transactions.

By examining government appropriations more closely, it is evident that housing funding in Minnesota is thinly spread. In fiscal year 2007, federal money covering both operating and capital funds for public housing in Minnesota equaled only \$82,198,000. According to the Minnesota Housing Partnership, annual funding from state government dropped over a recent five-year period from approximately \$95,000,000 per year to just over \$80,000,000 per year.² Confronted by another budget shortfall, the State Legislature will most likely continue to reduce state funding. At the federal level, there is no indication that its levels of funding will be maintained, let alone rise. Accordingly, trends for state and federal government assistance are of little comfort to HRAs in Minnesota.

² Minnesota Housing Partnership, *Investment at Risk: Public Housing in Minnesota*, May 2008.

Similarly, taxes levied by HRAs do not produce a source of funds sufficient to address housing needs. The Legislature has acknowledged this in the wake of successive budget crises, and local government levy authority has been an important topic of discussion for state policymakers. In the most recent session, the Legislature voted to raise all HRAs' levy authority from .0144% to .0185% of their jurisdictions' taxable market value. 2008 Minn. Laws 48, Ch. 366, Art. 5, § 11. This small numerical adjustment was considered a victory, as it constituted the first levy adjustment in over a decade.³ It does not, however, represent a lasting solution. For example, the eight-year median tax levy for the Brainerd HRA equals only \$70,563,⁴ and local taxpayers can little afford to give more in current economic times. In short, the pie is shrinking, and HRAs can do little to stop it.

Considering this financial backdrop, HRAs must do what they can with staff they can afford. Admittedly, HRAs in larger, more prosperous communities may have the resources to retain outside counsel,⁵ but they are in a distinct minority, and none employ in-house or general counsel in the traditional sense. Indeed, the vast majority of HRAs exist in smaller, rural areas of Greater Minnesota. They lack the resources to retain specialized counsel during the negotiation and pre-agreement phase of a redevelopment financing deal. Therefore, in determining whether the terms of the bond issuance and debt service are favorable, and before executing the agreement, these smaller HRAs rely

³ Minnesota NAHRO, *2008 Minnesota Legislative Session Report*, at 3. The legislation was not only prompted by shortages in HRA operating funds throughout the state, but also as a response to increasingly grave public housing issues caused by the mortgage foreclosure crisis.

⁴ This information was provided by Doug Grout, Executive Director of the Brainerd Housing and Redevelopment Authority.

⁵ According to their website, the Minneapolis law firm of Best & Flanagan permits its municipal practice attorneys to act as counsel for the Golden Valley and Wayzata HRAs.

heavily upon the opinion of bond counsel. That reliance makes redevelopment projects possible, and without it, HRAs and the communities they serve would suffer adverse consequences.

B. If Appellant Succeeds in this Case, HRAs Will No Longer Be Able to Rely Upon Bond Counsel in Redevelopment Projects and Redevelopment Will Suffer.

Because small HRAs rely so much upon the opinion of bond counsel in redevelopment financing agreements, the words in the agreements must mean what they say. Accordingly, when bond counsel uses the words “revenue bonds,” the HRA should expect that their plain meaning will apply. Revenue bonds, quite simply, are those “issued by an agency commissioned to finance the building or improving of a public property . . . *the revenue from which will pay for the bond.*” AMERICAN HERITAGE DICTIONARY 1148 (4th ed. 2006). The reader can deduce from this sentence that both the bondholders and the borrowers intend for repayment to come from the completed project, whatever that project might be. As discussed in Section II, Minnesota law acknowledges this definition and understands the limited resources of HRAs throughout the state, so it gives HRAs—and them alone—the authority to choose the type of bonds they use as the source of their financing.

If Appellant were to succeed in this case, it would negate an HRA’s reliance on the opinion of bond counsel. Unless bond counsel’s opinion expressly states that the bonds are “general obligation” in nature, bondholders—in the event of default—cannot be allowed to reach beyond the revenues of a particular project to the general assets of an HRA. This would be extraordinarily harmful to housing and economic redevelopment in

the state. The key distinction between revenue bonds and general obligation bonds would be erased, and there would be little to no certainty for HRAs in municipal finance transactions. Using a simple cost-benefit analysis, HRAs would not want to engage in redevelopment projects at the potential cost of bankrupting their organization. The reliance on bond counsel's opinion and the certainty of the language in the bond transcript must be present, or HRAs will have no incentive to perform their redevelopment activities.

II. THE HRA DETERMINES WHAT TYPES OF SECURITIES IT ISSUES AND MAY NOT ISSUE GENERAL OBLIGATION BONDS ABSENT SATISFACTION OF THE CONDITIONS IN MINN. STAT. § 469.034, SUBDIV. 2.

A. Minn. Stat. § 469.034, Subdiv. 1 Grants HRAs Sole Authority to Determine the Types of Securities They Issue and Limits the Sources of Repayment of Revenue Bonds.

Minnesota Statutes section 469.034 establishes authority under which an HRA may issue bonds for corporate purposes. It provides that such bonds “may be the type *the authority* [i.e., the HRA] *determines*, including bonds on which the principal and interest are payable exclusively from the income and revenues of the project financed with the proceeds of the bonds, or exclusively from the income and revenues of certain designed projects.” Minn. Stat. 469.034, subdiv. 1 (2008) (emphasis and clarification added); Minn. Stat. § 469.002, subdiv. 2 (2008) (defining “authority” as an HRA). Revenue bonds issued by an HRA may also be secured by (1) contributions from the federal government or other sources; (2) the HRA's income or revenues from the project for

which the bond proceeds are to be used; or (3) a mortgage of any project or other property of the HRA. Minn. Stat. § 469.034, subdiv. 1 (2008).

Minnesota Courts recognize that “[w]here a statute enumerates the persons or things to be affected by its provisions, there is an exclusion of all others.” Brandt v. Hallwood Mgmt. Co., 560 N.W.2d 396, 400 (Minn. Ct. App. 1997) (quoting Maytag Co. v. Comm’r of Taxation, 218 Minn. 460, 463, 17 N.W.2d 37, 40 (1944)); see also Minn. Stat. § 645.19 (2008). Further, a reviewing court “cannot supply that which the Legislature purposely omits or inadvertently overlooks.” Northland Country Club v. Comm’r of Taxation, 308 Minn. 265, 271, 241 N.W.2d 806, 809 (1976); see also Minn. Stat. § 645.16 (2008) (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded”). Thus, the plain meaning of Minnesota Statutes section 469.034, subdivision 1 is that an HRA has sole discretion over the types of securities it issues and may issue revenue bonds secured only as provided in subdivision one. Any alternate construction would ignore the Legislature’s intent and violate the statute.

B. An HRA Cannot Issue General Obligation Bonds Absent Express Authorization by a Governmental Unit and Its Own Affirmative Act.

In addition to revenue bonds, an HRA “*may* pledge the general obligation of the general jurisdiction governmental unit *as additional security* for bonds payable from income or revenues of the project or the authority.” Minn. Stat. § 469.034, subdiv. 2(a) (2008) (emphasis added). “General obligation” bonds pledge the full faith, credit and resources of the governmental unit. See Port Authority of City of St. Paul v. Fisher, 269

Minn. 276, 284, 132 N.W.2d 183, 190 (1964). However, before an HRA may issue general obligation bonds, the “general jurisdiction governmental unit whose general obligation is pledged” (i.e., the city where the HRA’s project is located) must approve the issuance, and both it and the HRA must hold hearings to allow public input. Minn. Stat. § 469.034, subdiv. 2(b), (d) (2008). Moreover, an HRA must also first “find that the pledged revenues will equal or exceed 110 percent of the principal and interest due on the bonds for each year” and ensure that the bonds will be issued consistent with Minnesota Statutes chapter 475. Minn. Stat. § 469.034, subdiv. 2(a) (2008). So while it is possible for an HRA to issue general obligation bonds, the language of section 469.034 is clear: the Legislature never intended for HRA-issued bonds to be considered “general obligation” unless the requirements of subdivision 2 were fulfilled. The following examples are illustrative.

First, an HRA “may” issue general obligation bonds if it actively chooses to do so. Minn. Stat. § 469.034, subdiv. 2(a) (2008). “When the term ‘may’ is used in a statute it means permissible . . . unless another intention clearly appears on the face of the statute.” Friends of Animals and Their Environment (FATE) v. Nichols, 350 N.W.2d 489, 491 (Minn. Ct. App. 1984) rev. denied (Minn. Dec. 20, 1984) (citing Minn. Stat. § 645.44, subdiv. 15). Here, even when the requirements of section 469.034, subdivision 2(a) are satisfied, an HRA cannot issue general obligation bonds unless it elects to hold public hearings on issuance of the bonds. Minn. Stat. § 469.034, subdiv. 2(b) (2008). Further, nothing in section 469.034 indicates that an HRA must issue general obligation bonds,

even if the public approves. Rather, the Legislature clearly intended that an HRA “may” issue general obligation bonds at its discretion, regardless of the attendant circumstances.

Second, even if an HRA elects to issue general obligation bonds, it must be “as additional security for bonds payable from income or revenues of the project or the authority.” Minn. Stat. § 469.034, subdiv. 2(a) (2008). This language indicates the Legislature intended that an HRA that finances a project through bond issuance must issue revenue bonds or provide security out of its own financial reserves first. Then, if the HRA wishes or is required to make an additional pledge, it may do so separately in the form of a general obligation bond, so long as the requirements of section 469.034, subdivision 2 are satisfied.

The policy underlying section 469.034 is that an HRA should be able to pledge as security only the revenues of the project financed with the proceeds of the bonds before pledging its own revenues or those of the governmental unit in which the project is located. The Legislature did not intend for secured parties to draw upon the general obligations of an HRA or a governmental unit without the express consent of either. Accordingly, the HRA and its limited resources can be protected.

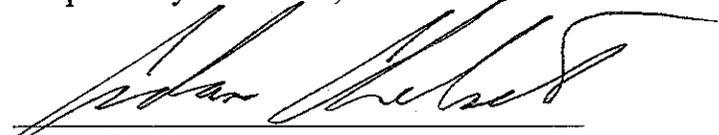
In sum, the Legislature unambiguously intended that no pledge of the full faith, credit and resources of a governmental unit occur absent express the satisfaction of the numerous conditions set forth in Minnesota Statutes section 469.034, subdivision 2, including express authorization by the governmental unit, the holding of public hearings, and a final affirmative act by the HRA.

CONCLUSION

For the foregoing reasons, Minnesota NAHRO respectfully urges this Court to affirm the decision of the trial court.

Dated: December 24, 2008.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH THE
REQUIREMENTS OF MINN. R. APP. P. 132.01**

I, Adam D. Chelseth, an attorney for *Amicus Curiae* National Association of Housing and Redevelopment Officials, Minnesota Chapter, hereby certify that this brief complies with the form and length requirements of Minnesota Rule of Appellate Civil Procedure 132.01, subdivisions 1 and 3. Attorneys for *amicus* prepared this brief using the word processing software Microsoft Office Word 2003. This brief was printed in 13-point type using the proportional font Times New Roman. According to the software's word count utility, the brief contains 2988 words, and, therefore, is within the 7000-word limit set forth in Minn. R. App. Civ. P. 132.01, subdiv. 3(c)(1).