

Case No. A10-1740

STATE OF MINNESOTA
IN COURT OF APPEALS

American Bank of St. Paul, successor in interest
to 2700 East Lake Street, LLC,

Appellant,

vs.

City of Minneapolis,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT
CITY OF MINNEAPOLIS

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- 1. Whether Appellant failed to satisfy its burden of presenting competent evidence that overcame the presumption of validity of the assessment.**

The District Court concluded: Yes

Apposite authority:

Carlson-Lang Realty Co. v. City of Windom, 307 Minn. 368, 240 N.W.2d 517 (Minn. 1976).

G.E. Qvale v. City of Willmar, 223 Minn. 51, 54, 25 NW2d 699 (1946).

- 2. Whether the City demonstrated that the property benefited from the areaway assessment in an amount at least equal to the amount of the assessment.**

The District Court concluded: Yes

Apposite authority:

Carlson-Lang Realty Co. v. City of Windom, 307 Minn. 368, 240 N.W.2d 517 (Minn. 1976).

Quality Homes, Inc. and Another v. Village of New Brighton, 289 Minn. 274, 183 N.W.2d 555 (1971).

- 3. Whether the traditional special benefit test, of comparing a valuation of the property before an improvement, to a valuation of the property after an improvement, should apply when the special assessment is for the abatement of an illegal or nuisance condition.**

The District Court concluded: Yes (at summary judgment stage)

Apposite authority:

Charter of the City of Minneapolis, Chp. 10, § 8.

Singer v. Minneapolis, 1996 WL 208486 (Minn. App. 1996).

Village of Edina v. Joseph, 264 Minn. 84, 119 N.W.2d 809 (1962).

- 4. Whether Appellant failed to preserve for appeal its objection that trial testimony was improperly admitted, having failed to move for a new trial under Minn. R. Civ. P. 59.01.**

This issue was not presented to the District Court

Apposite authority:

Minn. R. Civ. P. 59.01

Sauter v. Wasemiller, 389 N.W.2d 200, 202 (Minn. 1986)

- 5. Whether the district court properly exercised its discretion in permitting the City to present testimony from its expert witness.**

The district court concluded: Yes

Apposite authority:

Minn. R. Civ. P. 26.02(4)(A)(i)

Frank-Bretwisch v. Ryan, 741 N.W.2d 910 (Minn. App. 2007).

Fowler v. Krepp, 1998 WL 531818 (Minn. App. Aug. 25, 1998).

STATEMENT OF THE CASE

This case arises out of an appeal of a special assessment levied by the City of Minneapolis ("the City") against real property located at 2700 East Lake Street, in Minneapolis, Minnesota ("the Property"). When the Property was originally constructed, its basement was extended beyond the face of the building, and under the adjacent sidewalk; the sidewalk served as the roof of the basement in this area. The portion of the basement located under the sidewalk, which is within the public right of way, is considered an "areaway." The areaway was ordered removed by the City of Minneapolis because it interfered with the Lake Street reconstruction project.

When the property owner did not arrange to have the areaway removed, the City hired contractors to do so, and assessed the cost as a special assessment on the property. The property's former owner, 2700 East Lake Street, LLC commenced this assessment appeal in Hennepin County District Court, but then lost the property in foreclosure. American Bank of St. Paul ("American") purchase the property at a sheriff's sale and began pursuing the appeal, arguing that the amount of the assessment exceeded the value of the areaway removal.

A bench trial was held before the Honorable Tanya S. Bransford. After the trial, the District Court issued Findings of Fact, Conclusion of Law, and an Order for Judgment in the City's favor. This appeal followed.

STATEMENT OF FACTS

I. The Project and the assessment

This case arises out of an appeal of a special assessment levied by the City of Minneapolis ("the City") against real property located at 2700 East Lake Street, in Minneapolis, Minnesota ("the Property"). When the Property was originally constructed, its basement was extended beyond the face of the building, and under the adjacent sidewalk; the sidewalk served as the roof of the basement in this area. The portion of the basement located under the sidewalk, which is within the public right of way, is considered an "areaway." Trial Transcript (Appellant's Addendum II) at 105-06 ("T-105-06"); T- 37-38.

Pursuant to City ordinance, areaways are allowed to exist so long as they do not interfere or conflict with the "public good." See Minneapolis Code of Ordinances ("MCO"), Chp. 95.90(c).¹ The ordinance gives examples of "public good" projects, including but not limited to street paving, curbs, gutters, and streetscapes. MCO Chp. 95.90(c).

The parties in this matter stipulated for trial that the areaway underneath and appurtenant to the property located at 2700 East Lake Street in Minneapolis was an encroachment into Hennepin County's right-of-way and it interfered with Hennepin County's project for the reconstruction of Lake Street East from

¹ Pertinent sections of the Minneapolis Code of Ordinances and the Minneapolis City Charter are reproduced in Respondent's Addendum.

Hiawatha to West River Road. Appellant's Appendix at 210 ("AA-210"). A contract existed between the City and the County, giving the City the ability to order the removal of encroachments in the County's right-of-way. *Id.*

The City notified the property owner, 2700 East Lake Street, LLC, owned by Frederick Lehmann, that it needed to arrange to have the areaway removed so the Lake Street project could be completed. AA-211. The City encouraged Lehmann to abate the areaway with his own contractor. T-114. The City makes a practice of encouraging all property owners to abate their conflicting areaways themselves, as opposed to taking over the work. *Id.* Despite being encouraged to arrange for the work himself, Lehmann asked the City to remove the areaway with a City-hired contractor, and to assess the cost of the removal to the Property's taxes over a five-year period. AA-211. Lehmann chose this alternative because he was unable to finance the project himself. T-50.

The parties have stipulated that the City had the legal right to order the removal of the areaway, and did so. AA-210. The parties have also stipulated that in choosing a contractor to carry out the required work, the City followed requisite municipal bidding law to properly award the contract for the areaway removal to the lowest responsive bidder. AA-211.

The City's contractor commenced work to remove the areaway in July, 2007. *Id.* The City ultimately terminated its agreement with the contractor due

to the contractor's nonresponsiveness, and completed the work with City crews. T-44. The City did not assess the Property for any of the costs attributable to the contract termination. T-112-113. The areaway removal was completed in September, 2008. AA-211.

The original contract price for the areaway removal was \$339,000.00; the cost of the approved changed orders for the project was \$13,823.46; the cost of the consultant fees for the project was \$37,700.00; and the City's administrative fees for the project were \$18,835.00. The total of the above items, \$409,358.46, was to be assessed to the property. *Id.* Lehmann was aware that his property would be assessed for the total of those component costs. T-113.

On March 27, 2009, the City assessed the Property in the amount of \$409,358.46 (the "assessment"). AA-83. The parties have stipulated that the City levied the assessment pursuant to proper legal authority, and followed all required legal procedures. AA-214. The assessment was levied over Lehmann's timely objection. AA-214.

American Bank of St. Paul ("American") foreclosed on its mortgage against the Property, and a sheriff's sale was held on March 26, 2009. AA-211. American, which was the holder of the first mortgage against the Property, bid \$3,452,017.44; this bid represented the amount that American was owed by

Lehmann. AA-110. There were no other bidders. *Id.* Thus, the property was struck off and sold to American. AA-211.

The parties agreed that the areaway abandonment was levied properly, and that it conferred a benefit to the Property. AA-211, 214.

II. Litigation

A. Lawsuit begins; City requests expert discovery and none is provided.

This assessment appeal was commenced by Lehmann for 2700 East Lake Street LLC. AA -0008. On September 8, 2009, the City served written discovery upon Lehmann's attorney. Respondent's Appendix at 3 ("RA-3"). Lehmann's responses were deficient in several respects and they provided no substantive information. AA-100 to AA-108. Lehmann had made several arguments in his Notice of assessment Appeal regarding why the assessment was unjust, and the City's Interrogatories 2 to 13 were propounded to inquire about the facts, witnesses, and documents that support the various grounds pleaded for the assessment appeal. AA-108 to AA-112. In his answers to interrogatories, he provided absolutely no substantive information to support these arguments. AA-100 to AA-108. In addition, Lehmann identified no particular records or documents that support his answers, and identified no witnesses that could be called to testify to these facts. Id.

The City's Interrogatory No. 20 asked Lehmann to identify any expert witnesses, their subject of expertise, their opinions, and a summary of the grounds for each opinion. AA-107-108 (at Interrogatory 20). Lehmann responded that he had not yet decided which expert witnesses he would retain, but anticipated that he would retain an expert witness knowledgeable as to real property values. *Id.* Lehmann stated that he would identify his expert witnesses pursuant to any pre-trial order. *Id.*

The City's attorney wrote and called Lehmann's attorney to try to obtain responses, but received no response. RA-4, RA-6-9. The City filed a Motion to Compel discovery.² RA-1. It was scheduled to be heard on November 6, 2009. RA-10.

At that time, American approached the City and indicated that it had foreclosed upon the mortgage of the Property. RA-12. In a letter, American asked the City to postpone its motion to compel so as to allow American to contemplate whether it would substitute itself for Lehmann in this lawsuit. RA-12. The City and counsel for American then entered into a stipulation to amend the scheduling

² American states as a fact that the City "withdrew its [discovery] requests and cancelled its motion to compel upon the parties entry into the stipulation" to amend the scheduling order. Appellant's Brief at p. 7, ¶ 25. This assertion is completely false, and moreover the portion of the record to which American cites for support (AA-112-113) includes no such information. The City never withdrew any discovery requests, nor withdrew the motion to compel. T-22 to T-23.

order. AA-112 to AA-113. The amended scheduling order gave the parties another month to complete discovery. *Id.*

B. American fails to substitute itself as a party; never answers discovery.

American did not move to substitute itself as a party in this matter. T-8.³ Additionally, American was aware of the fact that the City had a pending motion to compel discovery against Lehmann. RA-12. Despite having this information, American did not send any discovery responses, nor did it update the deficient responses provided by Lehmann. As such, neither Lehmann, nor American ever provided substantive responses to the City's discovery requests; this includes the names of witnesses, including expert witnesses. *Id.* Lehmann and American's only response regarding the evidentiary support for its assessment appeal was that the reasons were "self-evident." A-104 to A-105.

³ In a motion in limine, the City asked the Court to rule on whether American was even properly before the Court as it was not a party. AA-231. The City noted that the Plaintiff properly before the Court, 2700 East Lake Street LLC, had no standing because it had lost the building in foreclosure. *Id.* At trial, Judge Bransford asked American's attorney about the failure to substitute American as a party:

I don't really know why the attorneys didn't file a motion, however, under Rule of Civil Procedure 25.03 noting a transfer of the interest because right now the caption of the case is 2700 East Lake Street LLC so they're still the plaintiff. There's been nothing to amend the caption or change the parties to the case *** the bank is stepping in but didn't do anything to amend the caption or even make a motion to indicate the transfer of interest. Why?

T-8.

In summary, the only response received in response to the City's expert interrogatory was that the plaintiff would disclose them pursuant to the pre-trial order. A-108. Similarly, the City's response to American's interrogatory requesting the identity of experts was that the City would disclose witnesses pursuant to the pre-trial order. AA-260 to AA-261.

C. Summary Judgment

In its Motion for Summary Judgment, the City argued that the traditional, "special benefit test" of looking for an increase in property value does not apply to the abatement of illegal conditions, or nuisances. AA-177-182; Respondent's Addendum (Summary Judgment Transcript) ("SJT") at 5. Rather, the abatement of an illegal condition constitutes a de facto improvement, and the benefit conferred upon the property must be equal to the cost the City incurred in performing the abatement. AA-21-22.

American argued that a fact issue existed as to the value of the areaway removal and that the special benefit test must be applied. AA-142-145; SJT-11-13. American referenced an appraisal and suggested that the value of the Property had gone down in value. SJT-13. In support of its contention, American submitted the first three pages of a 191-page appraisal report. AA-148 to AA-150; T-12.

In its Order and Memorandum Denying Defendant's Motion for Summary Judgment, the District Court concluded that "[t]here [was] a genuine issue of material fact as to whether the assessment for the abatement [was] excessive," and therefore denied the City's motion. AA-192-193. Thus, a bench trial⁴ was held to decide the matter of whether the special benefit conferred on the Property as a result of the areaway abandonment met or exceeded the amount of the City's assessment.

D. Trial

1. *Motions in limine*

American and the City both filed witness and exhibit lists prior to the trial. American moved in limine to generically exclude all evidence and witnesses not disclosed in the City's responses to discovery. AA-224. At trial, American more specifically asked the District Court to exclude the testimony of the City's expert witness, Minneapolis City Assessor Patrick Todd. T-13 to T-16.

American argued that it would be unfair to permit the City to introduce an expert opinion on the value of the Property, in that the City had not disclosed that valuation before trial. *Id.* In response to the motion, the City noted that the City Assessor would not be providing an opinion on the appraised value of the

⁴ In appealing from a municipal assessment, a property owner does not have the right to a jury trial. *Ewert v. City of Winthrop*, 278 N.W.2d 545, 550-52 (Minn. 1979).

property, so there would be no surprise introduction of such an opinion. T-14 to T-16. In addition, the City noted that American had wrongfully withheld its expert's opinion as well: American's counsel did not provide 188 out of 191 pages of the opinion of American's expert appraiser Anthony Ruzek until three days before the trial. T-12, T-16, T-21; AA-236.⁵ In addition, American failed to respond in any way to the City's expert interrogatory. T-18 to T-19.

Similarly, the City had asked the District Court to exclude American's witnesses and evidence for not having been properly disclosed in discovery as well. RA-16 to RA-19.⁶ American argued that it should have had an opportunity to depose Todd (T-14, T-18), but the City noted that it similarly was denied an opportunity to depose Ruzek because he was never identified in discovery, and American's so-called "disclosure" of him was limited to American attaching three pages from his 191-page September 2009 appraisal to a summary judgment memorandum *after* discovery had closed. T-19.

The District Court denied the City's motion to exclude American's witnesses and evidence, deciding to "let it all come in." T-26 to T-27. With regard to

⁵ American claimed at trial that it withheld all but three pages of a 191-page expert report from the City "for the sake of saving a tree." T-21.

⁶ Appellant's Appendix included the City's request that the Court exclude American's witnesses and exhibits at AA-233 to AA-236, but excluded one page of the City's document. (It would appear between A-233 and A-234.) The entire document is reproduced at RA-14 to RA-24.

American's motion to exclude the testimony of City Assessor Patrick Todd for not having been disclosed in discovery, the District Court noted that American similarly had not responded to the City's discovery requesting expert identities and opinions. T-24 to T-27. The District Court pointed out that American "was under an obligation to continue to respond to discovery that had previously been put forth, and they did not do so." T-26. As such, the District Court concluded that what was fair for the City was fair for American, and subsequently denied American's motion to exclude the testimony of Todd. T-26.

2. *Evidence presented at trial*

a. American's evidence

During trial, American offered the 2007 tax assessed value of the Property into evidence through its witness, former Property owner, Fred Lehmann. T-45-48. Per the tax statement that was entered into evidence, the 2007 tax assessed value for the Property was \$3,850,000.00. T-46. American relies on the 2007 tax assessed value as "competent evidence" of the value of the property *before* the assessment was levied. *Id.*

Later, American elicited the testimony of its expert witness, Anthony Ruzek, who testified that he performed an appraisal of the property on September 28, 2009, and that on that day, the value of the property was

\$3,030,000.00.⁷ T-68. American argues that this amount represents "competent evidence" of the *after* valuation of the Property as a result of the areaway removal.

Ruzek testified that a governmental tax assessed valuations of real property are based on a "fee simple" property interest. Ruzek also testified that the appraisal he did in 2009 was not the fee simple property interest, but rather the "leased fee" property interest. T-81.

The City's expert, City Assessor Patrick Todd, was certified by the Court as an expert in the area of appraisals of real property. T-129. Todd explained that a fee simple property interest is the full bundle of rights, and that a leased fee interest is based on the income stream of a property. T-132-133.

Upon cross examination, Ruzek admitted that the leased fee analysis (the method used in his 2009 appraisal) is not comparable to the fee simple analysis, unless the building appraised is at full or nearly full rental capacity. T-78-79. Ruzek testified that only 58% of the property was rented out at the time of the appraisal. T-79. Ruzek also admitted upon cross-examination that to do a proper leased fee analysis, that one first needs to determine the fee simple value. T-82. He admitted that he did not determine the fee simple value. *Id.*

⁷ The purpose of Ruzek's appraisal was not for use in an assessment appeal; instead, it was commissioned by American for "Bank REO" purposes. T-82; AA-598.

Ruzek's appraisal was performed in September, 2009, a full year after the areaway was removed. T-67. Ruzek admitted upon cross examination that property values are influenced by many variables, and that values change over time. T-84-86. More specifically, Ruzek conceded that the value of the Property would have gone down between 2007 and 2009 based solely on the widespread diminishing commercial real estate market. T-85.

The City's expert Todd also explained that property values are affected by many factors, that values change over time, and that the *purpose* of the appraisal is critical. T-136-139. Todd explained that the only way to capture the accurate historical value of a property from an earlier point in time, is to perform a "retrospective appraisal". T-136. Ruzek's appraisal was performed a full year after the areaway was removed, it was not performed for the purpose of valuing the areaway removal, and was is not a retrospective appraisal, as it represented the leased fee interest value as of the day it was performed in September 2009. T-68, 82, 84.

Todd testified that for the tax statement valuation performed by the City Assessor's office, valuations done on a mass basis generally do not take into account the existence of illegal conditions on the property, and do not include a search for orders to abate illegal conditions. T-133.

The District Court made the following Findings of Fact regarding the competence of American's evidence at trial:

28. Mr. Todd pointed out that an appraisal done months or years after the completion of the work would not be an accurate value of the work performed, because the property's value can be influenced by other market factors or extraneous conditions over time.

29. Mr. Todd testified that it would be possible to do an accurate appraisal of the value at the moment the work was completed by doing a "retrospective appraisal" based on historical values.

30. Mr. Todd testified that comparing the Assessor's estimated tax value from years before the areaway was removed to an appraisal done years after the areaway was removed, would not be an accurate way to evaluate the value of the areaway removal. Instead, the values upon which Plaintiff rely do not explore the value of the areaway removal because they are done far before and far after the areaway removal, and miss that period of value change relating to the areaway removal.

33. The valuations that the Plaintiff relies on, the 2007 tax value, the purchase price at the Sheriff's Sale, and the 2009 appraisal, are not competent evidence of the value of the areaway removal. Those values are not contemporaneous with the areaway removal. They reflect periods far before and far after the areaway removal and do not reveal the value of the Property during that period between the City's order to remove the areaway, and the completion of the removal project. That is, they do not reflect the actual benefit that the areaway removal conferred to the Property. Further, attributing the change in property value solely to the areaway does not take into account fluctuations in the market and nationwide drop in the real estate market.

35. Mr. Todd's testimony was credible, competent and compelling.

* * *

37. American failed to introduce competent evidence showing the value of the Property immediately before the areaway was removed. American also failed to produce competent evidence that compared that figure to the value of the Property immediately after the areaway removal was completed.

38. American failed to introduce competent evidence showing that the Property did not benefit in an amount equal to the assessment.

Appellant's Addendum I at 6-7.

b. The City's evidence

During the trial, the City introduced the assessment Roll that included the assessment, and it was accepted into evidence without objection. T-112.

The City's direct examination of Todd and cross examination of Ruzek established the manner in which the valuation of the abatement of an illegal or nuisance condition could be valued: according to their testimony, a lawful order to remove or abate an illegal or nuisance condition on private property will create an automatic decrease in the market value of that property. The decrease in the property's market value is equal to the cost of remediating the illegal or nuisance condition. Once the illegal or nuisance condition has been remediated,

the property's value is then restored in an equivalent amount. See T-133-136; T-87-88.

Todd explained this concept at trial by applying it to a hypothetical example of a real estate transaction: in that example, a seller has entered into a purchase agreement to sell a property for \$1,000,000, but before the transaction is closed, the seller is notified that the property has an unlawful condition that will cost \$100,000 to remediate. Todd explained the affect of the order to remediate the condition on the property value:

. . . if we have a particular building worth \$1,000,000 and a government agency comes in and says that there's an illegal use or . . . a contamination, or you use a [diseased] tree, or there could be an areaway and they say that you need to remove this issue or this problem, what would happen to that particular property, it would be diminished and it's often times diminished at the cost to fix the problem, because if a buyer was buying it at market for \$1,000,000 and after they purchased it there were certain assumptions that usually go along with that purchase, but if it was new information and they find out after they've offered that million dollars that it would . . . be very common for a buyer to come back and say we have to renegotiate the price. This is not what I paid for. The cost to secure it is \$100,000 either you reduce your price by \$100 [thousand dollars] or you pay to have that fixed.

* * *

So it would be diminished by \$100,000 unless the seller were to fix it themselves out of their own pocket.

T-134-135.

Staying with that hypothetical illustration, Todd testified that, if the order to remediate an illegal condition is issued, and a third party comes in a

remediates the illegal condition, then the building would be "made whole again" and the property value would rise in an amount equal to the cost of remediating the illegal condition. T-135-136. In the hypothetical example, if the third party came in and remediated the illegal condition, it would raise the property value from \$900,000 (the value of the property once the order to remediate was issued), back to \$1,000,000. Todd testified that thus, the value of the abatement of a nuisance is ideally evaluated by looking at the liability the property owner was facing when the order to remediate is issued, compared against the return of the property's value once the remediation has been completed. T-136. Otherwise, a retrospective appraisal would be required. *Id.*

Ruzek admitted upon cross examination that his appraisal did not compare the value of the property just before, and just after, the areaway was removed. T-84. Ruzek admitted if you are trying to evaluate the value of work performed on a property, you would need to compare the values right before and right after the work was completed, instead of a value from a much later period. T-87-88. As noted above, Ruzek's appraisal was performed a full year after the areaway was removed, it was not performed for the purpose of valuing the areaway removal, and was is not a retrospective appraisal, as it represented the leased fee interest value as of the day it was performed in September 2009. T-68, 82, 84.

The District Court considered the foregoing, and made the following

Finding of Fact:

36. The evidence in this case established that the proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value [of] the property from the moment the order compelling the removal of the condition is issued, to the value of the property after the illegal condition is remedied.

* * *

39. Here, once the City lawfully ordered that the Areaway be removed to make way for the Lake Street reconstruction project, the property owned by Plaintiff dropped in value in an amount equal to the cost of removing the Areaway.... Once the illegal Areaway was removed, the value of the property went back up to the pre-removal-order value.

40. The Court must determine the benefit the property received as a result of the Areaway removal. The property owner chose to have that work performed by a contractor hired by the City. The only lawful way for the City to hire a contractor for the work was through the municipal competitive bidding process, through which the City awarded the bid to the lowest responsive bidder. The cost charged by the lowest responsive bidder was [\$409,358.46]. Once the city expended [\$409,358.46] to have the Areaway removed, the property was no longer facing the cost of removing the illegal condition. Therefore, the benefit conferred to the property was equal or greater than [\$409,358.46].

Appellant's Addendum I at pp. 5, 8.

Based on all of the evidence presented, the District Court found that, "the Property conferred a benefit as a result of the areaway removal in an amount equal to or greater than the amount of the City's assessment." Appellant's

Addendum I at p. 8, at Finding 41. The District Court ultimately ruled that "American did not satisfy its burden of proving that the assessment was greater than the benefit conferred to the property." Appellant's Addendum I at p. 12, at Conclusion 17. Accordingly, the District Court entered judgment in the City's favor. *Id.* at p. 13. This appeal followed.

STANDARD OF REVIEW

A. Special assessments

Actions involving the appeal of an assessment levied by the City of Minneapolis are governed by the Minneapolis City Charter. The Charter provides that, "... the judgment of the Court shall be either to confirm or annul the proceedings only as the same affects the property of the appellant . . ."

Minneapolis, Minn., City Charter ch. 10, § 6. The Charter is consistent with Minnesota case law which limits the relief a court may grant with respect to assessment appeals, to either: (1) affirm the individual challenged assessment; or (2) set aside the individual assessment and order a reassessment by the municipality. *See Village of Edina v. Joseph*, 264 Minn. 84, 119 N.W.2d 809 (1962).

The apportionment of assessments is a legislative function and, when regularly made in due process, under express legislative authority, assessments are prima facie valid. In the absence of fraud, mistake or illegality, assessments

are conclusive upon the courts. See *Quality Homes, Inc. and Another v. Village of New Brighton*, 289 Minn. 274, 183 N.W.2d 555 (1971).

A city's submission of an assessment roll into evidence constitutes prima facie evidence that the amount of the assessment is valid. See *Bisbee v. City of Fairmont*, 593 N.W.2d 714, 718. Once a city establishes its prima facie case, the burden falls upon the property owner to demonstrate that the amount of the special assessment was greater than the increase in the market value of the subject properties as a result of the municipal improvements, and thus invalid. *Id.*

With the foregoing in mind, the only questions open for review by the courts are whether or not the property assessed received a special benefit, and whether or not the assessment made was in excess of any special benefit received. See *Quality Homes, Inc. and Another v. Village of New Brighton*, 289 Minn. 274, 183 N.W.2d 555 (1971). The burden rests upon the objector to prove the invalidity of an assessment. *G.E. Qvale v. City of Willmar*, 223 Minn. 51, 54, 25 NW2d 699, 702 (1946).

Minnesota Statutes Chapter 429 governs the ability of municipalities to make improvements and levy costs therefore. Minneapolis is a home rule charter city. Any city operating under a home rule charter may proceed either under Minnesota Statutes Chapter 429 or under its own charter in making an

improvement. Minn. Stat. § 429.111. In the special assessment proceeding in the instant case, the City opted to proceed under its own charter; the relevant charter provision is found at Minneapolis Minn., City Charter ch. 10, § 8. It is undisputed that the City followed all of the special assessment procedures set out by its Charter and Ordinances. AA-214.

B. Findings of Fact

In an appeal from a bench trial, an appellate court gives the district court's factual findings great deference, and does not set them aside unless clearly erroneous. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002). Under the clearly erroneous standard, due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. A finding is "clearly erroneous" when an appellate court has "the definite and firm conviction that a mistake has been made." *Vangness v. Vangness*, 607 N.W.2d 468, 472 (Minn. App. 2000). If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). When determining whether findings are clearly erroneous, this court views the record in the light most favorable to the district court's findings. *Vangness*, 607 N.W.2d at 472.

C. Admission of Evidence

Appellate courts apply an abuse-of-discretion standard of review to a district court's ruling on the admissibility of evidence, including expert testimony. *State v. Bird*, 734 N.W.2d 664, 672 (Minn. 2007) (expert standard); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (evidence standard). An abuse of that discretion occurs only if the district court resolves the matter in a manner that is against logic and the facts on the record. *Frank-Bretwisch v. Ryan*, 741 N.W.2d 910, 914 (Minn. App. 2007).

A district court may admit expert testimony if the expert's specialized knowledge will assist the fact finder, "to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test—that is, whether the testimony will assist the [fact finder] in resolving factual questions presented." *Hayes v. Commissioner of Public Safety*, 773 N.W.2d 134, 137 (Minn. App. 2009) (internal citations omitted).

SUMMARY OF ARGUMENT

To win at trial, American had to overcome the presumption that the assessment was valid by introducing "competent evidence" that the assessment amount was greater than the increase in market value caused by the removal of the areaway at 2700 East Lake Street.

After the trial, the District Court correctly entered judgment in the City's favor, affirming the assessment, for several reasons.

First, the evidence introduced by American, purporting to show that the assessment was greater than the benefit conferred to the property, was not "competent":

- The comparison of a fee-simple valuation from a 2007 tax statement, to a leased-fee appraisal from 2009, is comparing apples to oranges.
- American's bid on the property at the Sherriff's Sale did not reflect a value of the property, but rather reflected the amount owed by Lehmann on the mortgage.
- The 2007 tax statement and the 2009 appraisals did not value the property at the relevant time periods, and could have reflected many variables that affected the valuation of the property, including a widespread depression of commercial real estate values at that time.
- None of the "valuations" presented by American specifically took into account the value of the remediation of an illegal condition.

Second, the City did present evidence at trial establishing that the value of the areaway abatement was equal to or greater than the amount assessed to the property, and thus satisfied the traditional "special benefit test."

Third, in the alternative, the traditional "special benefit" test does not easily apply to the abatement of nuisance conditions because it requires the parties to have an accurate measurement of the increase in the market value of the land as a result of the "improvement." Under the traditional "special benefit test," an assessment is valid if (a) The land receives a special benefit from the improvement being constructed; (b) the assessment is uniform upon the same

class of property; and (c) the assessment does not exceed the special benefit. See *Quality Homes, Inc. and Another v. Village of New Brighton*, 289 Minn. 274, 183 N.W.2d 555 (1971) (emphases added). To determine the value of a special benefit, the taxing authority must consider "what increase, if any, there has been in the market value of the benefited land." *City of St. Louis Park v. Engell*, 283 Minn. 309, 316, 168 N.W.2d 3, 8 (1969). While the City was able to prove here that the Property did receive a benefit equal in value to the amount of the assessment when the City paid to have the areaway removed, it makes little sense to apply the special benefit test to the removal of illegal conditions. They do not fit the traditional test well because they are not traditional "improvements"; and they apply only to individual properties, not a "class of properties." Because the City is forced to undertake the remediation for the private problem of a private property owner, the taxpayers should not have to bear the burden of paying that cost.

Fourth, American's argument that the District Court abused its discretion in admitting the testimony of the City's expert was not preserved for appeal, because it was not raised in a new trial motion under Minn. R. Civ. P. 59.

Fifth, in any case, the District Court properly exercised its discretion in permitting the City's expert to testify.

Accordingly, the City respectfully requests that District Court's judgment be affirmed by this Court.

ARGUMENT

I. APPELLANT FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY OF THE ASSESSMENT AGAINST ITS PROPERTY.

First, American's appeal to this Court fails because it did not satisfy its initial burden overcoming the presumed validity of the assessment for the removal of the areaway, because American did not introduce "competent evidence" that the amount of the assessment was greater than the value of the areaway removal to the property. The burden rests upon the objector to prove the invalidity of an assessment. *G.E. Quale v. City of Willmar*, 223 Minn. 51, 54, 25 NW2d 699, 702 (1946).

The parties agree that the City levied the assessment pursuant to proper legal authority, and followed all required legal procedures. AA-214. Additionally, the assessment roll for the assessment was admitted into evidence without objection, and therefore prima facie evidence of its validity was introduced. T-112. In actions contesting special assessments, there is a presumption that the city's assessment is valid until proven otherwise. *Tri-State Land Co. v. Shoreview*, 290 N.W.2d 775,777 (Minn. 1980). However, this presumption can be overcome "by introducing competent evidence that the assessment is greater than the increase in market value of the property due to the

improvement." *Carlson-Lang Realty Co. v. Windom*, 240 N.W.2d 517, 519 (Minn. 1976).

Thus, American bore the burden of proving that the assessment was invalid by presenting *competent* evidence at trial to demonstrate that the Property did not confer a benefit in at least the amount of \$409,358.46 as a result of the areaway removal. The trial court addressed this question directly and found that, "[Appellant] failed to introduce competent evidence showing that the property did not benefit in an amount equal to the assessment. Appellant's Addendum at 7.

American argues that "[it] provided compelling and competent evidence... and showed that the assessment imposed as a result of the areaway removal was not equal to the costs associated with the same." Appellant's Brief at 31. Based on the evidence presented, the trial court found otherwise. Appellant's Addendum at 7. In its Findings of Fact, the trial court explained that, "American failed to introduce competent evidence showing the value of the Property immediately before the areaway was ordered removed. American also failed to produce evidence that compared that figure to the value of the property immediately after the areaway removal was completed. *Id.* These rulings were correct.

- A. The denial of summary judgment meant that American had enough evidence to proceed to trial; not that American had already won the trial.

American first argues that the District Court issued contradictory rulings regarding whether American met its burden of providing competent evidence that the assessment exceeded the value of the areaway removal. American appears to argue that because the District Court denied the City's motion for summary judgment, finding that American had presented enough evidence to proceed to trial, that it could not later, after the trial, find that the evidence American was not "competent." Appellant's Brief at 28 to 30. American notes that the District Court concluded, "the evidence submitted by American suggests that the Property after the abatement is worth less than it was before the City's work." Appellant's Brief at 29 citing AA-192. American argues, "based on the very same evidence proffered by American in March of 2010, the District Court rendered a Finding of Fact, a scant four (4) months later, taking a totally opposite view of the very same evidence, and found that it was 'not competent evidence of the areaway removal.'" *Id. citing AA-192-193.*

American's argument that the trial court issued contradictory opinions lacks merit. In its Summary Judgment Order, the trial court concluded that, American's evidence "*suggested*" that the property after the abatement was worth less than before the City's work, and therefore it would be required to make a

factual determination on the assessment. *See* AA-192-193. The court went on to explain, “There is a genuine issue of material fact as to whether the assessment for the abatement is excessive . . .” *Id.*

The District Court's conclusion that there was enough evidence to go to trial, and that it would make a factual determination, could only mean that the finder of fact would receive, weigh and examine evidence during a trial. The *Carlson-Lang* analysis can only be applied and evaluated at a trial, where evidence is subject to cross-examination, and can be properly weighed in context. A District Court, in reviewing a motion for summary judgment, cannot weigh the evidence, but can only make an evidentiary determination whether there exists a disputed genuine issue of material fact. *Fairview Hosp. & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995). When deciding a motion for summary judgment, “[t]he evidence must be viewed in the light most favorable to the non-moving party.” *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn.1992).

Thus, the District Court's summary judgment conclusion that American had produced enough evidence to proceed to trial did not bind that Court to rule in American's favor after a bench trial.

B. American's evidence purporting to show a decline in value is not competent.

The District Court properly found that American did not introduce competent evidence that the property did not receive a benefit that was equal to or greater than the amount of the assessment. In an appeal from a bench trial, an appellate court gives the District Court's factual findings great deference, and does not set them aside unless clearly erroneous. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002). Under the clearly erroneous standard, due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. A finding is "clearly erroneous" when an appellate court has "the definite and firm conviction that a mistake has been made." *Vangness v. Vangness*, 607 N.W.2d 468, 472 (Minn. App. 2000). If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). When determining whether findings are clearly erroneous, this court views the record in the light most favorable to the district court's findings. *Vangness*, 607 N.W.2d at 472.

1. *The comparison of a fee-simple valuation from a 2007 tax statement, to a leased-fee appraisal from 2009, is comparing apples to oranges.*

As noted in the Statement of Facts, American introduced the 2007 tax assessed value of the Property, which valued the fee simple property interest at at \$3,850,000.00. American pointed to this value as "competent evidence" of the value of the property *before* the assessment was levied. For an "after" value, American introduced the September 2009 appraisal by Anthony Ruzek, which asserted that the value of the leased fee property interest on September 28, 2009 was \$3,030,000.00. American argues the comparison of these two values shows that the property's value declined during the time that the City paid to have the areaway removed, and therefore, American's burden has been satisfied.

The 2007 tax value and the 2009 appraisals are not competent evidence of a decline in value. Ruzek and Todd both testified that fee simple and leased fee interests measure different property interests, and are not comparable. T78-79, T-132-133. Further, Ruzek acknowledged that in order to properly determine the value of the leased fee interest, one must first determine the value of the fee simple interest; he further admitted that he had not done so in this case. T-82.

The District Court properly found that the evidence introduced by American was not competent to invalidate the assessment. The District Court's findings shall not be disturbed unless clearly erroneous, where this Court has the "the definite and firm conviction that a mistake has been made." *Fletcher*, 589

N.W.2d at 101. The record must be viewed in the light most favorable to the findings, *Vangness*, 607 N.W.2d at 472, and where reasonable evidence supports the District Court's findings, this Court should not disturb them. *Fletcher, supra*.

Because the two values were not comparable, the comparison of them was not meaningful in this case. In short, the evidence was not competent to overcome the presumed validity of the special assessment.

2. *The 2007 tax statement and the 2009 appraisal did not value the property at the relevant time periods, and could have reflected many variables that affected the valuation of the property, including a widespread depression of commercial real estate values at that time.*

The valuations introduced by American is also not competent to challenge the presumed valid assessment because they do not relate to the relevant time periods, and could have reflected several variables that affected the valuation of the property.

As previously set out, the parties stipulated to the fact that the areaway removal was ordered in February, 2006, that work commenced in July, 2007, and that the work was completed in September, 2008. AA-211.

Again, the "before" number offered by American was a 2007 tax assessed value. The "after" number was a September 2009 appraisal -- a full year after the areaway was removed. Ruzek admitted upon cross examination that property values are influenced by many variables, and that values change over time. T-84-86. More specifically, Ruzek conceded that the value of the Property would have

gone down between 2007 and 2009 based solely on the widespread diminishing commercial real estate market. T-85.

The City's expert Todd also explained that property values are affected by many factors, that values change over time, and that the *purpose* of the appraisal is critical. T-136-139. Todd explained that the only way to capture the accurate historical value of a property from an earlier point in time, is to perform a "retrospective appraisal". T-136. Ruzek's appraisal was performed a full year after the areaway was removed, it was not performed for the purpose of valuing the areaway removal, and was is not a retrospective appraisal, as it represented the leased fee interest value as of the day it was performed in September 2009. T-68, 82, 84.

Accordingly, the District Court found that American's evidence were "not competent evidence of the value of the areaway removal" because the valuations were "not contemporaneous with the areaway removal. They reflect periods far before and far after the areaway removal and do not reveal the value of the Property during that period between the City's order to remove the areaway, and the completion of the removal project." Appellant's Addendum I at p. 7, at Finding 33. The Court went on, "they do not reflect the actual benefit that the areaway removal conferred to the Property. Further, attributing the change in

property value solely to the areaway does not take into account fluctuations in the market and nationwide drop in the real estate market." *Id.*

Given the "clearly erroneous" standard through which this Court must view the District Court's findings of fact, it simply cannot be said that the findings should be disturbed. The evidence in the record supports the findings, and therefore they must not be overturned.

3. *American's bid on the property at the Sherriff's Sale did not reflect a value of the property, but rather reflected the amount owed by Lehmann on the mortgage.*

American also argues that its bid at the March 26, 2009 sheriff's sale for the Property establishes an "after" value, showing that the Property did not receive a benefit equal to the amount of the assessment. But the record shows that American's bid did not represent the actual value of the property -- instead, it represented that amount that American was owed by Lehmann on the mortgage at that time. AA-110. There were no other bidders besides American. *Id.* Quite simply, the bid is not a "valuation" at all.

Accordingly, the District Court correctly found that the sheriff's sale bid did not represent "competent evidence" that the amount of the assessment was greater than the value of the areaway abandonment.

4. *None of the "valuations" presented by American specifically took into account the value of the remediation of an illegal condition.*

Ruzek's appraisal did not take the liability associated with the City's order to remove the areaway into account, nor was it performed for the purpose of valuing the benefit that the areaway removal had on the Property. T-82-83. Ruzek testified that his appraisal was based on a "finished project" and that his appraisal did not attribute a dollar amount to the enhanced value associated with the areaway removal. T-98. Finally, at no point did Ruzek testify as to his opinion regarding the value associated with the actual work performed to complete the removal of the areaway.

Todd testified that for the tax statement valuation performed by the City Assessor's office, valuations done on a mass basis generally do not take into account the existence of illegal conditions on the property, and do not include a search for orders to abate illegal conditions. T-133.

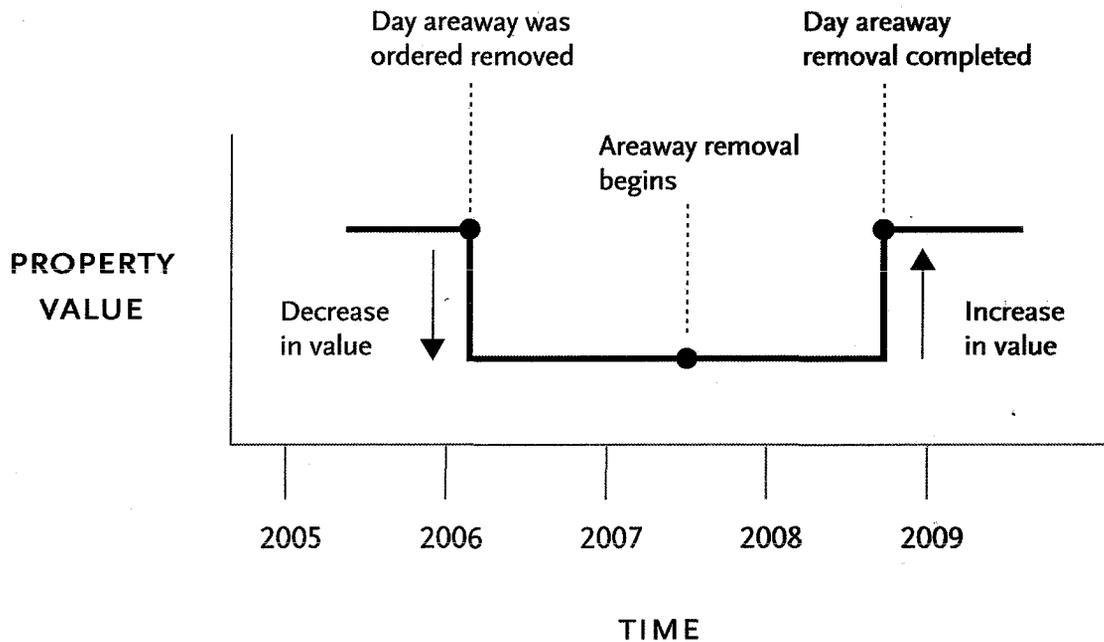
Given all this evidence, the District Court's finding that American did not present competent evidence is strongly supported by the record. In light of the presumption of validity, there is little room for doubt as to whether the evidence supported the trial court's findings. The District Court clearly found that Appellant failed to overcome its burden of proving that the assessment was invalid.

II. THE ASSESSMENT SATISFIED THE SPECIAL BENEFIT TEST BECAUSE APPELLANT'S PROPERTY BENEFITED FROM THE IMPROVEMENT IN AN AMOUNT AT LEAST EQUAL TO THE COST OF THE ASSESSMENT.

Second, American's appeal fails because the City demonstrated that the Property did benefit from the areaway removal in an amount at least equal to the amount of the assessment, and thus satisfied the traditional "special benefit test." Under the traditional "special benefit test," an assessment is valid if (a) The land receives a special benefit from the improvement being constructed; (b) the assessment is uniform upon the same class of property; and (c) the assessment does not exceed the special benefit. See *Quality Homes, Inc. and Another v. Village of New Brighton*, 289 Minn. 274, 183 N.W.2d 555 (1971) (emphases added). To determine the value of a special benefit, the taxing authority must consider "what increase, if any, there has been in the market value of the benefited land." *City of St. Louis Park v. Engell*, 283 Minn. 309, 316, 168 N.W.2d 3, 8 (1969).

In considering the special benefit test, any method resulting in a fair approximation of the increase in market value for a benefited parcel may be used by the city. A method which on its face appears to be a fair approximation will be presumed valid, with the burden resting upon the objector to show its invalidity. *Eagle Creek Townhomes, LLP v. City of Shakopee*, 614 N.W.2d 246, 251 (Minn.App. 2000) citing *DeSutter v. Township of Helena*, 489 N.W.2d 236, 237-238 (Minn.App. 1992).

The “approximation of the increase in market value” used by the City in the matter at hand considers the effect that an order to abate an illegal conditions has upon an affected property. The City’s valuation method relies on the premise that any lawful order to remove or abate an illegal or nuisance condition on private property will have an automatic negative effect on the value of that property. The negative effect on the property’s value is equal to the cost of remediating the illegal or nuisance condition. Once the illegal or nuisance condition has been remediated, the property’s value is automatically restored in an equivalent amount. See T-149-151. For illustrative purposes, a graphic depiction of the City’s valuation method, as it applies to the assessment at issue, is set forth below:



Todd explained this concept at trial by applying it to a hypothetical example of a real estate transaction: in that example, a seller has entered into a purchase agreement to sell a property for \$1,000,000, but before the transaction is closed, the seller is notified that the property has an unlawful condition that will cost \$100,000 to remediate. Todd explained the order to remediate the condition would decrease the property value by \$100,000. T-134-135.

Staying with that hypothetical illustration, Todd testified that, if the order to remediate an illegal condition is issued, and a third party comes in and remediates the illegal condition, then the building would be "made whole again" and the property value would rise in an amount equal to the cost of remediating the illegal condition. T-135-136. In the hypothetical example, if the third party came in and remediated the illegal condition, it would raise the property value from \$900,000 (the value of the property once the order to remediate was issued), back to \$1,000,000. Todd testified that thus, the value of the abatement of a nuisance is ideally evaluated by looking at the liability the property owner was facing when the order to remediate is issued, compared against the return of the property's value once the remediation has been completed. T-136.

In this case, on the day that the City ordered the areaway removed, the value of the property dropped in an amount equal to the cost of removing the

areaway. Lehmann did not hire anyone to remove the areaway, and did not undertake to remove the areaway himself. The areaway needed to be removed for the Lake Street project to be completed. Therefore, the City had no choice but to hire contractors to remove the areaway and assess the property for the cost. Once the City completed the removal of the areaway, the value of the property increased. The value of the increase can only be measured by the cost of removing the illegal condition. And that value can only be measured by looking very strictly at the time period from when the areaway was ordered removed, to immediately after the areaway was removed.

Ruzek admitted upon cross examination that his appraisal did not compare the value of the property just before, and just after, the areaway was removed. T-84. Ruzek admitted if you are trying to evaluate the value of work performed on a property, you would need to compare the values right before and right after the work was completed, instead of a value from a much later period. T-87-88.

The trial court considered the foregoing as evidenced by its findings, which state:

25. Mr. Todd testified that if two parties reached an agreement on a property sale amount and later discovered that the property was facing a liability in an established amount, it would be "very common" for the would-be buyer to [re]negotiate the price of the property in an amount equal to the cost of removing the liability.

26. Mr. Todd testified that a property facing an order for an areaway removal is diminished in value in the amount equal to the cost of having the areaway removed. The property's value is restored immediately after the areaway removal is completed.

27. Mr. Todd explained that in order to place a valuation on the removal of a liability against a particular property, the valuation of the property must take place immediately before and immediately after the liability is removed, and further that the value of abating an illegal condition on a property would be equal to the cost of remediating that illegal condition.

36. The evidence in this case established that the proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value [of] the property from the moment the order compelling the removal of the condition is issued, to the value of the property after the illegal condition is remedied.

Here again, ample evidence was admitted through the City's expert to support the trial court's Findings. As established above, an appellate court gives the district court's factual findings great deference, and does not set them aside unless clearly erroneous. *Porch*, 642 N.W.2d at 477.

The District Court found Todd's testimony to be competent and compelling. Appellant's Addendum I at p. 7. The Court issued no such finding where American's expert witness was concerned. This court has previously established that the weight and believability of witness testimony is an issue for

district court, and the appellate court defers to district court's credibility determinations. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003). In light of the foregoing, the trial court's findings should not be disturbed.

American argues that the City's valuation method focuses solely on the cost of the assessment, and fails to consider the *value* associated with the completed work. Appellant's Brief P. 22. American's argument fails to account for the fact that the City went a step further and demonstrated, in this case, that the value of the work was equal to the cost of the work; thus, value was in fact considered. *See T-134-136*. Additionally, American does not explain why it is not fair to focus on the cost of the assessment -- it cites no legal authority that states that the cost of an "improvement" cannot establish its value.

When considering whether the City's valuation method is proper, American bears the burden of proving its invalidity. In *Nyquist v. Town of Crow Wing County*, 312 Minn. 266, 251 N.W.2d 695 (Minn. 1977) the Minnesota Supreme Court stated that, "[The city's] presumption of validity may only be rebutted by the taxpayer upon a clear showing that the assessment does not bear any reasonable relationship to the value of special benefits." *Id* at 268 (Citing) *E.H. Willmus Prop. Inc. v. Village of New Brighton*, 293 Minn. 356, 199 N.W. 2d 435 (1972).

The City applied and has articulated a valuation method that falls within the parameters of existing precedent. The City agrees that it must approximate “what a willing buyer would pay a willing seller for the property before, and then after, the improvement has been constructed. This test was set forth in *Carlson-Lang Realty Co. v. City of Windom*, 240 N.W.2d at 519 (1976). The valuation method applied by the City took into account what a willing buyer would pay for a property facing a lawful, established liability requiring remediation (before construction); it also considered what a willing buyer would pay for that same property following the required remediation (after construction). See T-134-136.

In *Carlson-Lang* the court considered what a willing buyer would pay for nine vacant lots that:

had no fire hydrants; had no permit or franchise from the city; required septic tanks for each lot; emptied into the river and could not meet all governmental regulations, perhaps making mortgage money more difficult to obtain; was not straight for line-of-sight inspection between manholes; and was, in some instances, laid inside lots and not within the easement strip.

Carlson-Lang, 240 N.W.2d at 519. The Court explained, “the second determination was then how much more a willing buyer would pay for the same property if it was to be served by an additional new system which would correct the above deficiencies. This increase in market value was the special benefit conferred.” *Id.*

The valuation method applied by the City is no different than that applied in the *Carlson-Lang* example, but-for the relevant facts. The major distinction between the two scenarios is that, rather than speculating about the potential market values of the property as offered by an appraiser, the City is focusing on the cost associated with completing the "improvement." This distinction can be justified because the "improvement" at issue in this instant case is the result of remediating an illegal condition that was initially within the control of the property's owner.

- A. Where the municipal bidding process is employed, the cost of the work is controlled by statutory safeguards.

American complains that the City unfairly relies upon the "cost" of the areaway removal project to establish the "value" of the benefit conferred by the removal of the areaway. Appellant's Brief at 22-23.

In the matter at hand, a property owner knowingly purchased a building with an illegal condition. The City ultimately ordered the condition removed, and requested that the property owner perform the necessary work to abate the condition. Rather than performing the work itself, per the City's request, the property owner availed itself of an automatic loan from the City, in the form of a special assessment. That same property owner later objected to the City's assessment and argued that it was excessive.

It is well-settled that Minnesota cities are subject to strict competitive bidding requirements. See e.g. Minn. Stat. § 431.345 and *Buffalo Bituminous, Inc. v. Maple Hill Estates, Inc.*, 311 Minn. 468, 250 N.W.2d 182 (1977). In Minneapolis, the City must advertise for bids whenever project costs are likely to exceed \$50,000; the City must then choose the lowest responsive bidder. See Minneapolis Code of Ordinances, Chapter 18.60-18.90. The City does not ultimately control, or pre-determine the costs associated with public good projects; rather, the costs are based on fair market competition as elicited through the public bidding process. See *id.* The process ensures that the City gets the best value possible for its dollars. *Diamond v. City of Mankato*, 89 Minn. 48, 54, 93 N.W. 911, 913 (1903).

When property owners fail to abate their own illegal or nuisance conditions, cities are left with few alternatives. Because the illegal condition must be removed for the project to continue, the City must take over the project and assess the costs. Under existing special assessment laws, these same property owners are allowed to later object to the assessment, which was essentially self-imposed. See Minn. Stat. § 429.061 and the Charter of the City of Minneapolis, Chp. 10, § 6.

As Patrick Todd testified, if the order to remediate an illegal condition is issued, and a third party comes in and remediates the illegal condition, then the

building would be "made whole again" and the property value would rise in an amount equal to the cost of remediating the illegal condition. T-135-136. The only way to assess the value of the removal of the areaway is to determine the cost of the areaway. Because the City is required to hire the lowest responsive bidder for the project, there is a safeguard in place to protect the homeowner from being fleeced. It would be absolutely unfair for a property owner to avoid repaying the taxpayers the cost of remediating an illegal condition on private property. Because the owner essentially chose to have the City finance his private project (and because the City has no choice but to do so), the owner should not be rewarded by being able to evade that responsibility.

Another example would be if the City ordered a property owner to remove a diseased tree from their property. If the property owner does not arrange to remove the tree, the City must do so to protect other trees. The only fair way to evaluate how much that property owner should be charged for the work done by the City's contractors would be to figure out how much it cost the City to remove the tree. Municipal bidding law ensures that the cost assessed was the lowest one available to the City.

In short, the City satisfied the special benefit that the amount of the assessment does not exceed the special benefit conferred to the property. Accordingly, the judgment below should be affirmed.

III. IN THE ALTERNATIVE, APPLICATION OF THE TRADITIONAL "SPECIAL BENEFIT TEST" DOES NOT READILY APPLY TO THE ABATEMENT OF ILLEGAL OR NUISANCE CONDITIONS,

Third, the City proved at trial that it could satisfy the special benefit in this case because the removal of the areaway increased the value of the property in an amount equal to the cost of the areaway removal. However, in the alternative, American's appeal fails because the traditional special benefit test does not readily apply to the abatement of an illegal condition, such as an areaway removal. Instead, property owners such as American should repay the City for the cost of the removal of illegal and nuisance conditions as a *de facto* matter.

Again, under the traditional "special benefit test," an assessment is valid if

- (a) The land receives a special benefit from the improvement being constructed;
- (b) the assessment is uniform upon the same class of property; and (c) the assessment does not exceed the special benefit. See *Quality Homes, Inc. and Another v. Village of New Brighton*, 289 Minn. 274, 183 N.W.2d 555 (1971) (emphases added). To determine the value of a special benefit, the taxing authority must consider "what increase, if any, there has been in the market value of the benefited land." *City of St. Louis Park v. Engell*, 283 Minn. 309, 316, 168 N.W.2d 3, 8 (1969).

The District Court properly concluded here:

9. The traditional special benefit test does not readily apply for the removal of an illegal condition like an areaway. An assessment for the removal of an illegal condition applies only to one property rather than a group of properties. The requirement that the 'assessment is uniform as applied to the same class of property' is inapplicable to the present situation.

10. Similarly, traditional ways of establishing the value of the benefit to the property, such as tax values, sales prices, or appraisals done over time, do not properly explore or reflect the true value of the removal of an illegal condition. This is so because those values reflect only the changing market value of a property over a long period of time -- a period in which many factors may influence the rising or falling value of the property.

Appellant's Addendum I at 11. While the City was able to prove here that the Property did receive a benefit equal in value to the amount of the assessment when the City paid to have the areaway removed, it makes little sense to apply the special benefit test to the removal of illegal conditions. They do not fit the traditional test well because they are not traditional "improvements"; and they apply only to individual properties, and thus cannot be applied uniformly to a "class of properties." Because the City is forced to undertake the remediation for the private problem of a private property owner, the taxpayers should not have to bear the burden of paying that cost.

In the instant case, the parties agree that the areaway constituted an illegal condition that interfered with a public good project, and therefore the City's removal order was lawful. AA-210-211. There is also no dispute that the then-

property owner, Lehmann could not secure sufficient financing to perform the work with his own forces. T-53. Lehmann therefore opted to allow the City to perform the work with a City-hired contractor and assess the costs against the Property. *Id.*

During trial, the City established the fact that abatement projects are different than public improvement, or “capital improvement” projects in that, “[they are] associated with a property . . . a deficiency or problem specific to that property. . . it’s an individual deficiency in a property . . .” T-123. Capital improvement projects, on the other hand, include improvements that benefit the public as a whole, such as, roads, bridges, bike trails, and utility connections. T-121. Roadways, for example, “are assessed by a uniform assessment rate for all properties along the roadway.” T-122.

The City further established the fact that, if the City fails to receive compensation for an abatement activity, such as an areaway removal, the cost “would be spread out amongst all the taxpayers . . . through the property tax system . . . The City has no other revenue other than taxes so it would have to be paid by taxes. T-124.

In the matter at hand, a property owner knowingly purchased a building with an illegal condition. The City ultimately ordered the condition removed, and requested that the property owner perform the necessary work to abate the

condition. Rather than performing the work itself, per the City's request, the property owner availed itself of an automatic loan from the City, in the form of a special assessment. That same property owner later objected to the City's assessment and argued that it was excessive.

As noted in Section II above, Minnesota cities are subject to strict competitive bidding requirements. When property owners fail to abate their own illegal or nuisance conditions, cities are left with few alternatives. In light of timing considerations, taking over the project and assessing costs is often the only feasible course of action. Under existing special assessment laws, these same property owners are allowed to later object to the assessment, which was essentially self-imposed. *See* Minn. Stat. § 429.061 *and* the Charter of the City of Minneapolis, Chp. 10, § 6.

Illegal or nuisance conditions are distinguishable from traditional public improvement projects (which are subject to the special benefit test) in that the City's impetus is to remediate a private illegal condition for the public good, *not to improve the property itself*. When the condition is abated, the resulting improvement to the property automatically occurs as a secondary matter. *See* T-134-136. Forcing abatement projects to fit into the existing scheme of the traditional special benefit test places cities at a severe disadvantage, and creates an unfair burden on taxpayers.

This Court touched on the foregoing issue, in its unpublished opinion, *Singer v. Minneapolis*, 1996 WL 208486 (Minn. App. 1996). In *Singer*, the Court appeared to opine that, as a *de facto* matter, "Abating nuisances on private property is an improvement. (*citing*) *e.g.*, Minn. Stat. § 429.021, Subd. 1 (1994) (listing authorized improvements). *Id* at 3. However, the *Singer* court provided no analysis to explain or support this contention. Other than the *Singer* opinion, Minnesota appellate courts have been silent as to whether and how the special benefit test is to be applied to the abatement of nuisances or illegal conditions on private property.

In *Singer*, a Minneapolis property was lawfully assessed for work done by the City in 1993, "including removal of: carpet, furniture and miscellaneous debris-\$199.88; tall grass and weeds-\$232.00; long grass, weeds, and brush-\$232.00; discarded couch-\$199.88." In his appeal, the property owner claimed that, "cutting weeds and hauling away old furniture is not an improvement and actually decreases the property's value by removing things from his property." As previously noted, the *Singer* court held that this argument lacked merit. "Abating nuisances on private property is an improvement." (*citing*) *e.g.*, Minn. Stat. § 429.021, Subd. 1 (listing authorized improvements) *Id* at 3.

This factual scenario illustrates the difficulty associated with applying the special benefit test to the abatement of illegal and nuisance conditions. Placing

cities in a position wherein they must demonstrate how the market value of property benefits from the removal of illegal conditions, such as garbage, weeds, and the like is a daunting, if not impossible, task.

Accordingly, this Court should hold that special assessments for the abatement or removal of illegal or nuisance conditions are recoverable from the property owner as a de facto matter. Property owners could still challenge the assessment on procedural due process grounds, or on the ground that the illegal condition did not exist at all. But it simply does not make sense to apply the special benefit test where the work done by the government is not a traditional "improvement," where the assessment is not on a "class of properties," and where the market value change could be very difficult for a City to prove. This Court could also affirm the judgment below on that ground, relying upon *Singer*.

IV. AMERICAN DID NOT MOVE FOR A NEW TRIAL UNDER MINN. R. CIV. P. 59.01, THUS IT FAILED TO PRESERVE ITS ARGUMENT THAT THE TRIAL COURT IMPROPERLY ADMITTED TESTIMONY.

American argues it is entitled to a new trial because the trial court improperly admitted the expert testimony of Patrick Todd. This argument fails because American did not properly preserve this issue for appeal, not having raised it in a post-trial motion under Minn. R. Civ. P. 59.01. American made no post-trial motions.

To preserve for appellate review issues arising during the course of trial, such as the admission of testimony, a party must move the trial court for a new trial pursuant to Minn. R. Civ. App. P. 59.01 (in addition to taking other requisite steps, including making timely objection). See, e.g., *Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986); *Antonson v. Ekvall*, 289 Minn. 536, 539, 186 N.W.2d 187, 189 (1971). On appeal from a judgment where there has been no motion for a new trial, appellate review is limited to whether the evidence sustains the findings of fact, and whether the findings sustain the conclusions of law and the judgment. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 309 (Minn. 2003).

Minn. R. Civ. P. 59.01 lists the grounds for a new trial motion brought in the District Court after trial, and includes "[e]rrors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion." Rule 59.01(f).

American's objection to the admission of Todd's testimony was interposed at trial, but was not preserved for appeal, because it was not raised in a new trial motion under Rule 59. The purpose of a Rule 59 motion for a new trial is to give the trial court the opportunity to correct errors without subjecting the parties to the expense and inconvenience associated with an appeal. *Custody of Child of Williams v. Carlson*, 701 N.W.2d 274, 281 (Minn. App. 2005). Here, American

failed to make such a motion. Accordingly, American's objection to the admission of Todd's testimony was not preserved for appeal.

The failure of American to make a new trial motion highlights the folly of one of its arguments in particular. American argues that it deserves a new trial, based upon the admission of Todd's testimony, under an analysis of factors suggested by Herr and Haydock in a Minnesota Practice article. See Appellant's Brief at 36. But because American failed to properly preserve this issue by making a motion for a new trial, there is no evidence in the record on the majority of the Herr-Haydock factors on which American relies.

In any case, the evidentiary issue of whether Todd should have been permitted to testify at trial was not preserved for appeal. Accordingly, this Court should not consider the issue.

V. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN PERMITTING EXPERT PATRICK TODD TO TESTIFY.

As noted above, American did not properly preserve the issue of whether the District Court properly permitted Todd⁸ to testify at trial. But even if the Court examines the merits of that ruling, the judgment below should be affirmed

⁸ American also complains about the Court's decision to admit the testimony of two other City witnesses (see Appellant's Brief at p. vi), but only analyzes the Court's decision to permit Todd to testify. Accordingly, the City analyzes the issue of Todd only. An argument is deemed waived if a party fails to address it in the initial brief. *Balder v. Haley*, 339 N.W.2d 77, 80 (Minn. 1987). An argument that is not briefed in a principal brief cannot be raised in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n. 2 (Minn. App. 1990).

because the trial court properly exercised its discretion in permitting the City to call Todd as an expert witness at trial. As noted in the standard of review, appellate courts apply an abuse-of-discretion standard of review to a district court's ruling on the admissibility of evidence, including expert testimony. *Bird*, 734 N.W.2d at 672. This Court could only reverse the trial court's decision to admit the testimony of Todd if its ruling was against logic and the facts on the record. *Frank-Bretwisch*, 741 N.W.2d at 914. Because the trial court's ruling was entirely logical, and was based on the facts in the record, the trial properly exercised its discretion, and its decision was not in error.

The issue of whether the trial court properly permitted Todd to testify must be viewed in the context presented at trial: In October 2009, the City had sent the Plaintiff expert interrogatories. AA-107-108 (at Interrogatory 20). The Plaintiff's only response was that it had not yet decided which expert witnesses it would retain, but anticipated that it will retain an expert witness knowledgeable as to real property values. *Id.* Plaintiff stated that it would identify its expert witnesses pursuant to any pre-trial order. *Id.* Although American was aware that these discovery responses were deficient and that the City had moved to compel discovery, see RA-12, American never updated this interrogatory answer before trial to provide American's expert identities, opinions, and the basis therefor before trial.

American argues that the City was not prejudiced by its failure to disclose its expert in discovery, because the City received American's expert Anthony Ruzek's expert report in January 2010. Appellant's Brief at 37. But at that time, American provided only 3 of 191 pages of his report -- purposefully withholding 187 pages of 191 pages of opinions (or 98% of the report). American did not provide the full report until three days before trial. T-12, T-16, T-21; AA-236. On this basis, the City moved to exclude all of American's witnesses and evidence.⁹ AA-233 to AA-236. Judge Bransford denied the City's motion to exclude American's witnesses and evidence, deciding to "let it all come in." T-26 to T-27. As such, Ruzek was permitted to testify as to all the information in his 191-page report.

On this basis, the trial court ruled that American "was under an obligation to continue to respond to discovery that had previously been put forth, and they did not do so." T-26. Because American had withheld expert information just as the City had done, the trial court ruled that what was fair for the City was fair for American, and denied American's motion to exclude the testimony of Todd. T-26 to T-27. The trial court also noted that the issue of value was long-evident and American knew or should have known that it would be at issue during the trial. T-

⁹ American now claims that the City did not seek to exclude American's evidence at trial on the ground that it had not been disclosed in discovery. Appellant's Brief at 34. This is false. American's own appendix includes the City's motions in limine seeking to exclude all of American's witnesses and exhibits because they had not been disclosed in discovery. AA-233 to AA-236.

26 to T-27. In this context, American's claims of prejudice regarding the testimony of Todd ring hollow.

In *Fowler v. Krepp*, 1998 WL 531818 (Minn. App. Aug. 25, 1998), a plaintiff appealed after losing at trial, arguing that the defendant's expert's testimony should have been excluded because it was not disclosed prior to trial. *Id.* at * 1. This Court ruled that, even if the expert's testimony was not properly disclosed, the plaintiff should have been able to anticipate the testimony. *Id.* In addition, the Court noted that the plaintiff failed to seek a continuance after learning of the expert. *Id.*, citing *Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390, 394 (Minn. 1977). Similarly, in *Shymanski v. Nash*, 312 Minn. 304, 251 N.W.2d 854 (1977), the Minnesota Supreme Court noted because the party who was claiming surprise because an expert opinion was disclosed just a day before trial could not show prejudice because, in part, she had not sought a continuance to take the expert's deposition. *Id.*, 312 Minn. at 307, 251 N.W.2d at 857. As in *Fowler* and *Shymanski*, American did not seek a continuance to take Todd's deposition.

American's arguments appear even more artificial when one considers that American did not disclose its own expert in response to the City's expert interrogatory. Thus, American's argument that Minn. R. Civ. P. 26.02(4)(A)(i) (which permits expert discovery) requires a new trial here would apply with just as much force to American. American cannot have it both ways -- if it was unfair for

the City's expert to testify, it was also unfair for American's expert to testify, because neither party fulfilled its obligations under Rule 26.02 with regard to proper responses to expert discovery requests. Even worse, American itself did not provide the City with its expert's 191-page report until three days before the trial. The City made no similar infraction with regard to withholding an expert report.

In *Shymanski*, the Supreme Court noted that the purpose of Rule 33 is to prevent a party who fails to comply with the rules to profit from his own wrong. *Id.*, 312 Minn. at 307, 251 N.W.2d at 857. Here, American's own "wrong" was balanced out by the City's wrong. By permitting American's expert to testify, despite American's own failure to disclose the opinions in discovery, the Court eradicated any prejudice from the City's failure to disclose Todd in discovery. See *Dorn v. Home Farmers Mut. Ins. Ass'n.*, 200 Minn. 414, 419, 220 N.W.2d 503, 506 (1974) (trial court has flexibility in fashioning remedy for failure to disclose expert testimony and reduce potential prejudice). The District Court here weighed American's own failure to disclose, against the potential prejudice of the City's expert witness, and made a just, balanced, and practical ruling that was well within its broad discretion.

Given these facts, this Court could not properly conclude that the District Court abused its discretion in ruling that the discovery violations of both parties canceled each other out, and that she would permit both parties to present expert

testimony. Again, an abuse of that discretion occurs only if the district court resolves the matter in a manner that is against logic and the facts on the record. *Frank-Bretwischv*, 741 N.W.2d at 914. Here, the logic and the facts completely supported the trial court's resolution of the parties' cross-motions regarding the admission of expert testimony. It was the best way for the case to be decided on the merits. Accordingly, the trial court properly exercised its broad discretion, and its ruling was not in error. The judgment below should be affirmed.

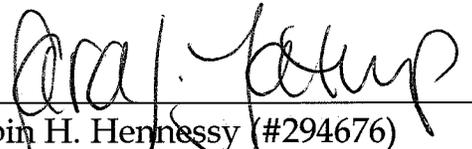
CONCLUSION

For all the foregoing reasons, the City respectfully requests that the judgment below be affirmed.

Respectfully submitted,

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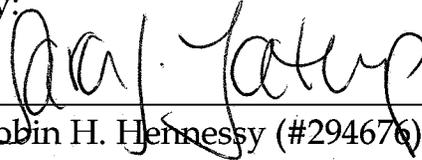
Date: March 2, 2011

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 13,826 words, not including any tables, certifications, or indices. This brief was prepared using Microsoft Word 2003.

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