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/Cross-Respondent,

vs.

City of Minneapolis,

Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT CITY OF MINNEAPOLIS

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INTRODUCTION

Respondent/Cross-Appellant City of Minneapolis respectfully submits this reply brief. Pursuant to Minn. R. Civ. App. P. 131.01, subd. 5, this brief is limited to matters argued in the "Response" section of Appellant/Cross-Respondent American Bank of St. Paul's "Response and Reply Brief" filed April 1, 2011.

PROCEDURAL HISTORY

American Bank filed a grey-covered "Reply Brief" on March 14, 2011. According to the Court's C-Track online record for this appeal, the Clerk of Appellate Court received that brief and "contacted [American's] attorney to see if this brief should be Appellant/Cross-Respondent's Response and Reply Brief on yellow color covers." American apparently understood that it was permitted to submit a new "Response and Reply Brief," with a yellow cover, that included several pages of new arguments that were not in its grey-covered "Reply Brief." *See* American's Response and Reply Brief at pp. 5-6, and 8. The Clerk's notation in C-Track, quoted above, implies that the Court likely asked American to re-submit the brief with a yellow cover - not submit a new, additional brief with supplemented arguments.

Language in American's new yellow-covered "Response and Reply Brief," filed April 1, 2011, indicates that American did not realize, until its counsel

received the Clerk's call, that it had failed to brief an issue. *See* p. 5 ("Although it is buried in the City's brief, the City has raised an issue on appeal....") But the City raised the issue by filing and serving a Notice of Related Appeal, and fully briefed the issue in its principal brief -- hardly buried. American's statement that the issue was "buried" thus indicates that American is trying to make excuses for failing to properly analyze the issue in the grey brief filed March 14, 2011.

American's maneuver in adding new arguments to its "replacement brief" is troubling and not contemplated by the rules. American had already filed its second and final brief. American did not move the Court to withdraw its original brief and replace it with a new brief. American did not notify the City of any issue with its brief. The City simply received a second brief and had to investigate to determine what occurred. This is especially troubling because some parts of American's brief, beyond the added "response" arguments, were also changed from their original form in the grey brief.[1]

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[1] The additions to the yellow brief chiefly include new arguments related to the summary judgment issue the City raised on appeal. *See* American's Response and Reply Brief at pp. 1 (last paragraph) 5-6 (heading I and subheading A), and 8 (last paragraph). But American also edited and supplemented other arguments that had been made in the earlier grey Reply brief. *See, e.g.*, American's Response and Reply Brief at p. 1, at lines 5-6; p. 3, at fact 9; and p. 7, at lines 2-4, 9-13, and 22.

REPLY ARGUMENT

I. THE DISTRICT COURT SHOULD NOT HAVE APPLIED THE SPECIAL BENEFIT TEST TO THIS ASSESSMENT AT THE SUMMARY JUDGMENT STAGE, BECAUSE IT IS NOT APPLICABLE TO THE REMOVAL OF AN ILLEGAL CONDITION.

While 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, the City has also argued in its principal brief that, 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 <u>improvement</u> 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). The District Court properly concluded here, after trial:

> 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. Accordingly, the summary judgment ruling was in error.

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.

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 previously held that abating nuisances on private property is a de facto improvement. *See Singer v. Minneapolis,* 1996 WL 208486 (Minn.App.1996) *citing* Minn. Stat. § 429.021, subd. 1 (1994) (listing the abatement of nuisances as an authorized improvement). Under *Singer*, this Court could

hold that the benefit conferred upon such property is equal to the cost of performing the abatement.

II. THE CITY IS NOT ASKING THIS COURT TO CREATE NEW LAW.

In its Response and Reply Brief, American asserts "the City asks this Court to create a new legal standard, in contradiction of the readily adopted Special Benefit Test." American's Response and Reply Brief at 5. American goes on to argue that, "[i]t is not the function of the Court of Appeals to create new law." *Id.* at 6.

The relevant limitation by which this Court is bound was set forth in *St. Aubin v. Burke*, 434 N.W.2d 282 (Minn. App. 1989). The *St. Aubin* court cited to the Minnesota Court of Appeals Internal Rules, which state:

> The Court of Appeals is an intermediate appellate court. It is primarily decisional and error correcting rather than a legislative or doctrinal court. Its primary function is the correction of error by application of legal principles. Its task is to find the law, to state it and to apply it to the facts. Only when there are no statutory or judicial precedents to follow will the Court of Appeals make new law.

Id., 434 N.W.2d at 284. But the City is not asking this Court to make new law. The City is asking this court to draw on existing legal principles, state the law, and apply the law to the facts in this novel matter. Recognizing that the abatement of an illegal or nuisance conditions are de facto improvements, and that such services should be measured based on cost, is justifiable under existing law, and does not contravene existing precedents.

The Minnesota Constitution grants the legislature the authority to prescribe the manner in which assessments for local improvements may be made upon property fronting thereon, or upon benefited property, or upon both. Minn. Const. art. 9, § 1 (amend. 1869).

Minneapolis City ordinances and applicable law establish the validity and propriety of the assessment charge at issue. Minn. Stat. Ch. 429 establishes the basic, primary framework for the analysis of any municipal assessment appeal. Additionally, the Minneapolis Code of Ordinances sets forth the ability of the City to levy an assessment for the removal of an encroachment, as well as the procedures to be followed. *See* Minneapolis Code of Ordinances, Chapter 95.90 (c). Within the construct of Minn. Stat. Chapter 429, the Minnesota Legislature has set aside authority to collect special assessments for, "Unpaid Special Charges." *See* Minn. Stat. § 429.101. These "special charges" are unique in that they are not typical "local improvements" such as those listed at Minn. Stat. § 429.021.

While the assessment of "local improvements" requires application of the special benefit test, the Minnesota Court of Appeals cases dealing with special assessments have not yet addressed whether or how the special benefit test is to be applied to special charges such as the abatement of private illegal conditions.

This court has the ability to clarify this issue, just as it has where dozens of other novel special assessment issues are concerned.

In addition, amicus League of Minnesota Cities has argued that the special benefit was designed to enforce the constitutional limitation on municipal taxing power in connection with the construction of local improvements. But public nuisance abatements are not an exercise of municipal taxing power; they are an exercise of municipal police power. *See* Amicus brief at 4. As a result, they should not relate to market value -- and this Court may conclude, based upon existing law, that the special benefit test did not readily fit the assessment in this case for the abatement of a public nuisance. The City asks this Court to affirm the District Court's application of existing law to this matter.

III. TREATING NUISANCE ABATEMENTS AS DE FACTO IMPROVEMENTS DOES NOT DEPRIVE PROPERTY OWNERS OF DUE PROCESS RIGHTS.

American also argues that the City is requesting, "a legal standard that would wholly deprive property owners of their due process rights to challenge assessments relating to illegal or nuisance conditions." Response and Reply Brief of American Bank of St. Paul at 8.

To the contrary, when a property is assessed for the removal of a private illegal or nuisance condition, the property's owner may still challenge the assessment on procedural due process grounds, on the ground that the original

condition was not in fact illegal, on the ground that the City did not follow the proper municipal bidding requirements, or other defects. The City has not suggested that its ability to levy special assessments for the abatement of illegal conditions should be completely immune to legal challenge; rather, the City is requesting that it be subjected to a logical and fair standard.

CONCLUSION

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

Respectfully submitted,

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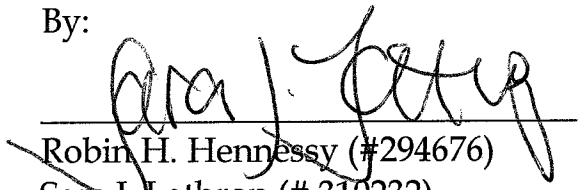
By:



Date: April 11, 2011

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 for a brief produced with a proportional font. The length of this brief is 2076 words, not including any tables, certifications, or indices. This brief was prepared using Microsoft Word 2003.

SUSAN L. SEGAL
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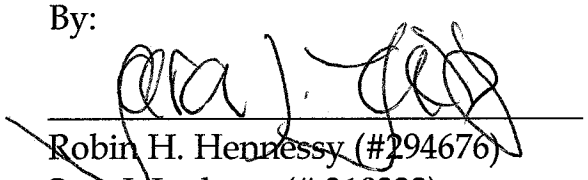
By:



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