

NO. A11-0067

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State of Minnesota  
**In Supreme Court**

City of Oak Park Heights,

*Petitioner,*

v.

County of Washington,

*Respondent.*

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**REPLY BRIEF OF PETITIONER  
CITY OF OAK PARK HEIGHTS**

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JARDINE, LOGAN & O'BRIEN,  
P.L.L.P.

Pierre N. Regnier (#90232)  
Jessica E. Schwie (#296880)  
8519 Eagle Point Boulevard  
Suite 100  
Lake Elmo, MN 55042  
(651) 290-6500

*Attorneys for Petitioner*

PETE ORPUT, COUNTY ATTORNEY  
WASHINGTON COUNTY, MN

George Kuprian (#147722)  
15015 – 62nd Street North  
P.O. Box 6  
Stillwater, MN 55082  
(651) 430-6115

*Attorneys for Respondent*

LEAGUE OF MINNESOTA CITIES

Susan L. Naughton (#0259743)  
145 University Avenue West  
St. Paul, MN 55101-2044  
(651) 281-1232

*Attorney for Amicus Curiae*

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## ARGUMENT

- I. Because Respondent had a remedy for its claimed injury, there is no reason for this Court to promulgate the proprietary capacity exception which has been used only to provide exceptions to general rules of law that would otherwise deprive claimants of a remedy and reversal of the lower courts is proper.**

Whether review of a claim against a governmental entity should be limited to certiorari review is a question of subject matter jurisdiction. *Tischer v. Hous. & Redev. Auth.*, 693 N.W.2d 426, 430 (Minn. 2005). Whether subject matter jurisdiction properly lies within a court is determined by reference to constitutional provisions<sup>1</sup>, statutes, and procedural rules. *Id.*

The County admits at pages seventeen and nineteen of its brief that there is no case holding that subject matter jurisdiction is determined by reference to the proprietary capacity exception. As discussed in the City's moving brief and herein, although this Court has occasionally referred to the proprietary capacity exception in order to avoid otherwise harsh results, there is no harsh result here that would merit recognition of the proprietary capacity exception for purposes of determining subject matter jurisdiction.

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<sup>1</sup> It is incorrect to state that the constitutional principle of separation of powers is not a concern simply because a decision of a city council was rendered in its "proprietary capacity." *See Resp. Brief p. 18-19*. Concerns related to the separation of powers arise immediately upon a court being called to review a decision of a city council. *See Dead Lake Ass'n v. Otter Tail County*, 695 N.W.2d 129, 134 (Minn. 2005). Such concern, however, does not necessitate review by certiorari. *Id.* Rather, whether the requirements of the constitutional principal are met in cases challenging the decision of the city council is determined by reference to the constitution, statutes, and procedure. *Id.*; *Tischer*, 693 N.W.2d at 430.

***This case is not about whether Respondent has a remedy, the question is what is the proper remedy.***

The parties do not dispute that if<sup>2</sup> the County overpaid the City for sewer and water services, it has (or had) a remedy<sup>3</sup>. The dispute is over the proper remedy—certiorari or an unjust enrichment claim in the district court. The distinction is an important one for resolving the issue of whether the proprietary capacity exception should be applied here because the exception, to the extent that it is used, is used only to alleviate harsh applications of general rules of law.

***The proprietary capacity exception was created for purposes of providing a remedy where there would be harsh results otherwise.***

Contrary to Respondent’s assertions, it is correct to suggest that all undertakings of a city are governmental. *Resp. Brief p. 4, 9*. That is the general rule of law—city council decisions are either legislative, quasi-judicial (also referred to as discretionary) or administrative (also referred to as ministerial). *Dead Lake Ass’n*, 695 N.W.2d at 134; *Oakman v. City of Eveleth*, 163 Minn. 100, 107, 118, 203 N.W. 514 (Minn. 1925). The

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<sup>2</sup> In its recitation of the facts, without citation to the record, the County suggests that the subject billing discrepancy did not come to its attention until an audit was performed in response to a change in the sales tax laws. *Resp. Brief p. 3*. The record, however, establishes that the City regularly questioned the County regarding the meter readings and its usage of sewer and water throughout 2004-2008. *A.22-23*, ¶ 6.

<sup>3</sup> At page six of its brief, Respondent suggests that one such remedy was settlement, but that “the City had declined meaningful settlement.” Respondent did not cite to the record, since there is no support for that proposition. To the contrary, this Court need only look to the Complaint in this matter to understand that it is the County’s contention that any compromised settlement was invalid since the County employees who would have agreed to the settlement were without authority to settle or compromise a claim since the authority to settle a claim resides exclusively with the County Board. *A.48*, *Complaint at* ¶28.

notion that a city council's decision might be proprietary is an exception to the general rule that the decision is governmental.

Although Respondent suggests that the City has ignored or misconstrued the law of this state, both parties agree that there is a "century's worth" of cases in which this Court has referred to the proprietary capacity exception. Case law holds that the injured should have available a remedy; and, therefore, the law is generally interpreted in a manner so as to provide a remedy. *City of Crookston v. Crookston Water Works, P. & L. Co.*, 150 Minn. 347, 353, 185 N.W. 380 (Minn. 1921)(applying the proprietary capacity exception to the general rule of law that would have otherwise barred a remedy to the injured party).

Consistent with this general principle of law, in all cases cited to this court (by both parties) in which the proprietary capacity exception is discussed, the court has applied the exception (or refused to apply the exception) in a manner so as to provide an injured person with a remedy from a governmental entity. *See e.g. Id.* (applying proprietary capacity doctrine to serve as an exception to general rule of law that would have barred remedy from governmental entity); *Keever v. City of Mankato*, 129 N.W. 158 (Minn. 1910)(same); *Cf. St. Paul v. Chicago, M. & S.P.R. Co.*, 45 Minn. 387, 396 (1891) (rejecting the invitation to adopt and apply the exception so as to allow the city to avoid application of statute of limitations). In short, the proprietary capacity exception has been applied by the judiciary in this state only as necessary to alleviate claimants from the otherwise harsh results of general rules of law that, that but for the application of the exception, would serve to deprive the claimants of a remedy.

***Proscribing a method of review does not create such harsh results such that promulgation of the proprietary capacity exception is necessary.***

As set forth above, the proprietary capacity exception has been employed so as to avoid the harsh result of depriving a claimant of a remedy. Limiting review by writ of certiorari, however, does not deprive a claimant of a remedy. *Tischer*, 693 N.W.2d at 430; *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 fn. 3 (Minn. 1996).

Review by certiorari has both a procedural component as well as providing remedial relief. *Tischer*, 693 N.W.2d at 430; *Willis*, 555 N.W.2d at 282 fn. 3. The remedial relief afforded by writ of certiorari is more limited than that which might otherwise be available at law. *State ex rel. Spurck v. Civil Service Board*, 226 Minn. 240, 249-253 (Minn. 1948). On certiorari review, the court is generally limited to affirming or reversing the decision of city council with instructions to the city council to enter a decision consistent with the holdings of the court. *Id.*

Some have said that while it may be appropriate to limit review and remedy of those claims that challenge the basis for, or the propriety of a city council's decision, in order to preserve the separation of powers doctrine, it is not appropriate and even "harsh" to limit claims that challenge a city council's interpretation of a contract. *See e.g. Tischer v. Hous. & Redev. Auth.*, 693 N.W.2d 426, 432 (Minn. 2005) (Justice Paul Anderson's dissenting opinion, joined in by Justice Alan Page); *Willis*, 555 N.W.2d at 283 (Justice

Keith's dissenting opinion, joined by Justices Gardebring and Page).<sup>4</sup> Respondent has never made this argument in this case, nor can it.

Respondent has advanced an unjust enrichment claim in which it challenges the propriety of the City's decision to keep (allegedly "wrongly") the money paid to it by the Respondent. *Resp. Brief* p. 6. Respondent is not asking this Court, nor has it ever asked any court, to interpret the terms of contract between it and the City for the provision of sewer and water services. *See Resp. Brief* p. 2, 6-7, 10-11, 27-28. To the contrary, Respondent asserts that it is not subject to any policies or practices that may have been adopted by the City regarding the provision of sewer and water services.<sup>5</sup> *Brief in Opp.*

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<sup>4</sup> It is worthwhile to note in this case that neither the dissenting opinion in *Tischer*, nor the dissenting opinion in *Willis* premised their conclusions upon the proprietary capacity doctrine. Rather, both dissenting opinions state that there is no separation of powers concern where a claimant brings a breach of contract claim that requires only an interpretation of contract as opposed to a review of the merits of the decision to breach the contract. *Tischer*, 693 N.W.2d at 432; *Willis*, 555 N.W.2d at 283. As discussed herein, Respondent is not seeking an interpretation of a contract with the City; it is seeking a review of the merits of the decision to "wrongly" keep the County's money. *Resp. Brief* p. 3, 6-7.

<sup>5</sup> Respondent attempts to separate itself from the City's utility appeal policy by claiming that its request was for reimbursement of an overcharge as opposed to a "bill dispute subject to the City's utility bill appeal policy." *Resp. Brief* p. 6-7. First, the policy itself does not refer to billing but is rather "Appeal process for charges – if a customer feels that charges for utility accounts have been improperly assessed the following process shall be utilized to handle appeals." A.54. Furthermore, Respondent's own appeal papers to the City Council points out that the overcharges were based on meter readings and "billing calculation." A.11. Also, the County in its submittal to the City Council refers to the documentary record relating to the "billing invoices" and the "the billing errors." A-16. Furthermore, Respondent's complaint in this lawsuit refers to the City Council's resolution "denying Plaintiff's appeal of its water bills." A. 49, *Complaint* ¶35.

p. 6-7, 22. In such circumstances, review by certiorari is the proper method of review.<sup>6</sup>

Certiorari review determines calls for the court to determine (1) what the law is and what the legal rights of the parties are, (2) whether the city council kept within its jurisdiction; (3) whether the city council's decision was arbitrary, capricious, oppressive, or fraudulent, and (4) whether there was evidence supporting the city council's decision. *See City of Shorewood v. Metropolitan Waste Control Commission*, 533 N.W.2d 402, 404 (Minn. 1995).

In this case, certiorari review is the most appropriate review because the case (1) calls for a determination of the applicable standard for resolving the bill dispute in light of the fact that Respondent disputes that it is subject to the policies and practices of the City, (2) requires a determination of whether the city council correctly applied the applicable law and policies when it decided to keep the money, (3) requires a determination of whether the city council's decision to keep the money was supported by the evidence, (5) prevents the improper usurpation of the city council's power to resolve such disputes and to interpret its own policies and procedures for resolving such disputes, and (4) allows the court to reverse the city council's decision to keep the money and order further proceedings consistent with its rulings. *See City of Shorewood*, 533 N.W.2d

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<sup>6</sup> The City recognizes that in *Sloan v. City of Duluth*, 194 Minn. 48, 259 N.W. 393 (Minn. 1935), the Court concluded that a claim for unjust enrichment relating to the overpayment of sewer and water assessments should be permitted to proceed in district court. The court in *Sloan*, however, was not called upon to decide whether certiorari review would provide the most appropriate remedy as necessary to provide relief, but also to preserve the separation of powers doctrine as is the issue here. Therefore, it is not of instructional value. *Lund v. Comm'r of Pub. Safety*, 783 N.W.2d 142, 143 (Minn. 2010)(case law that does not address the issue at hand lacks persuasive value).

at 404(holding that methodology for calculating sewer costs to be invoiced was reviewable only by certiorari because there was no precise formula for making such calculation in statute); *Dietz v. Dodge County*, 487 N.W.2d 237 (Minn. 1992)(explaining the purpose and scope of certiorari review); *Youngstown Mines Corp. v. Prout*, 266 Minn. 450, 124 N.W.2d 328 (1963)(rejecting argument that certiorari review was improper because the underlying conduct was proprietary; certiorari review was proper to review decision of whether to refund overpayments); *Spurck*, 226 Minn. at 249-253 (explaining the remedy that may be awarded to a party if it is concluded on certiorari review that a body has acted arbitrarily). In short, any moral obligation that the City might have to return money allegedly wrongly kept can be adequately addressed and remedied through the certiorari process while still preserving, as this court must do, the constitutional principle of separation of powers.

Exceptions are to be avoided and applied only as necessary to avoid the harsh result of being left without a remedy. *See e.g. Imlay v. Lake Crystal*, 453 N.W.2d 326, 330 (Minn. 1990) (rejecting invitation to revive the proprietary capacity exception for purposes of evading statutory caps on liability); *In re Petition of Brainer Nat'l Bank*, 383 N.W.2d 284, 289 (Minn. 1986) (rejecting invitation to create an exception to a general rule of torrens law because it would negatively impact the predictability of the general rule); *Peterson v. Balach*, 294 Minn. 161, 168 (Minn. 1972)(noting that exceptions are oftentimes used to “whittle away” at general rules of law that have harsh results, but that the use of such exceptions can lead to “complex, confusing, inequitable and, paradoxically, nonuniform” results); *Spanel v. Moundsview School District No. 621*, 264

Minn. 279, 285, 118 N.W.2d 795 (1962)(abandoning the use of the proprietary capacity exception for purposes of determining tort liability of governmental entities). Because there was a remedy available to Respondent to seek redress for its claimed injury, there is no harsh result in this case that merits the adoption and promulgation of the proprietary capacity exception. Furthermore, in this case, there is no other basis for concluding that limiting Respondent to certiorari review would be harsh. Accordingly, this Court should reject the invitation to adopt the proprietary capacity exception as a reference for determining subject matter jurisdiction.

***Present subject matter jurisdiction test, the Handicraft test, dictates certiorari review.***

Throughout the litigation of this matter, Respondent has not disputed that:

1. Respondent's suit challenges the October 13, 2009 City of Oak Park Heights City Council decision to deny its request for a refund for sewer and water charges. *A-49, 52, Complaint at ¶¶35 and 45.*

2. If subject matter jurisdiction is determined without any reference to the proprietary capacity exception, it is determined by reference to the factors specified in *Handicraft Block P'Ship v. City of Minneapolis*, 611 N.W.2d 16, 20 (Minn. 2000).

3. Under *Handicraft*, absent statute vesting district court jurisdiction, claims attacking a quasi-judicial decision of a governmental entity are to be heard via writ of certiorari. *Id.; Tischer.*, 693 N.W.2d at 428.

4. Application of the *Handicraft* test to the facts of this case dictates that the October 13, 2009 decision by the City Council to deny Respondent's appeal was quasi-judicial in nature because it was a binding decision that followed investigation into a set

of facts, application of facts to a proscribed standard, and consideration of arguments by opposing parties.<sup>7</sup>

5. There is no statute providing for district court review of a municipal decision to deny an appeal seeking refund of sewer and water charges. *See Resp. Brief to the Court of Appeals p. 14 citing* Minn. Stat. Ch. 444, 412, 465, 471 (enumerating municipal powers, including the provision of sewer and water services and ability to charge for the same, but lacking statutory authority for district court review and jurisdiction)<sup>8</sup>.

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<sup>7</sup> In its Statement of Facts at page three, but nowhere in the Argument section of its brief, Respondent implies that the City Council's decision was not quasi-judicial because the request for refund made by Respondent was placed in the city council minutes under New Business as opposed to under Public Hearings which belies Appellant's contention that the council was acting as a factfinder. It is obvious why Respondent did not pursue this argument in the Legal Argument portion of its brief. This Court has specifically rejected the need for a hearing in order to have a matter considered quasi-judicial. *Dokmo v. Independent School District No. 11*, 459 N.W.2d 671, 675-676 (Minn. 1990). Furthermore, in this case, the Respondent has never claimed that the record is inadequate. To the contrary, the County submitted a letter argument to the City Council pointing out that the County believed that "the documentary record provides compelling evidence that the County was overcharged . . . ." A.16.

<sup>8</sup> The City notes that throughout its brief to this Court, Respondent treats sewer and water utilities as being interchangeable with other utilities, such as electric. *See e.g. Resp. Brief p. 9, 12*. It is improper for the County or any other entity to refer to the utilities interchangeably. As the Respondent recognized in the court below, sewer and water utilities operate under their own specific statutory scheme. *See* Minn. Stat. § 444.075. This statutory scheme, unlike others, such as Minn. Stat. Ch. 453 as cited to by Respondent, does not provide that sewer and water utilities may be treated like private corporations, nor does it address the treatment of its employees. Therefore, as Respondent also admits at pages nine and twelve of its brief, the unrelated statutes and case law are not instructional here. *See Peterson v. Commissioner of Revenue*, 533 N.W. 710, 715 (Minn. 1997)(rejecting citation to case law and statutes that contained different standards than those at issue).

Under these circumstances, if this Court agrees that subject matter jurisdiction should be determined without reference to the proprietary capacity exception, then it is undisputed that the County's unjust enrichment claim had to be reviewed by writ of certiorari and that the district court, therefore, lacked jurisdiction. In this circumstance, the City would be entitled to reversal of the decisions of both lower courts and entry of judgment, dismissing the Complaint.

***If this court adopts the proprietary capacity exception for purposes of determining jurisdiction, it should specify what factors should be considered for determining whether an entity is acting in its proprietary capacity.***

At page thirteen of its brief, the County suggests that the City is asking this Court to remand the case to the district court to determine what the test should be for determining whether a governmental entity is acting in its proprietary capacity. This is not what the City is asking for, and, such request would be inappropriate.

It is for this Court, not the district court, to identify whether a new legal principle has been adopted and the terms of the principle. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 635 (Minn. 2007). Once the new legal principle is adopted, and its terms specified, it is the role of the lower court, on remand, to resolve any fact disputes that may related to the newly created legal principle(s). *Id.* Accordingly, in this case, it is the role of this Court to specify in this case (1) whether subject matter jurisdiction should be determined by reference to the proprietary capacity exception, and, (2) if so, to specify the test for determining whether a governmental entity is acting its proprietary capacity.

Respondent further asserts that there is no reason for this Court to specify the test for determining whether a governmental entity is acting in its proprietary capacity. At page thirteen of its brief, it argues that the City is *ipso facto* acting in its proprietary capacity “with regard to providing sewer and water”. Yet, at pages ten through eleven of its brief it recognizes that some activities related to the provision of sewer and water are not proprietary. This is the precise type of confusion this Court should address should it adopt the rule of law proposed.

It is correct to say that there is case law which holds that the operation of a sewer and/or water utility, even though operated without a profit, is proprietary conduct because the city “is voluntarily engaged in the same business which, when conducted by private persons, is operated for profit.” *Keever*, 129 N.W. at 60-61. On the other hand, as set forth in the City’s moving brief, and undisputed by the Respondent, there is also the more fact-intensive test suggested by this Court in *Stein v. Regent of University of Minn.*, 282 N.W.2d 552, 555 (Minn. 1979). The *Stein* test requires discovery and an inquiry into, the nature of the operations, including review of financial data, the primary beneficiaries of the operation, funding of the operation, the purpose of the operation, and whether any private corporations are providing similar operations. *Id.*

Furthermore, in the recent unpublished opinion of *Williams v. Smith*, the Minnesota Court of Appeals utilized in part a “public interest”<sup>9</sup> test. *Williams v. Smith*, 2011 Minn. App. Unpub. LEXIS 947 (Minn. Ct. App. Oct. 17, 2011). There the Court of

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<sup>9</sup> If that is going to be the test, then Respondent admits at page ten of its brief that the City’s sewer and water utility service is governmental and not proprietary since it “serves a public purpose.”

Appeals determined that the University of Minnesota's basketball program was proprietary in part because there is "no public interest served by the basketball team." *Id.* at 16. Finally, as cited in the City's moving brief, a few other jurisdictions continue to recognize the proprietary capacity doctrine, those jurisdictions have also developed tests which may prove informative to this Court should it wish to move Minnesota's case law in the direction proposed.

This Court should not adopt the jurisdictional test proposed by the Court of Appeals in this matter because as set forth in the City's brief and even Respondent brief at pages ten and eleven, any proprietary capacity exception test adopted by this Court is likely to have confusing results.<sup>10</sup> However, if this Court chooses to adopt such a test, then this Court should clear up the tests presently existing in case law as outlined above and set forth the test that courts should employ going forward for purposes of determining when a city council is acting in its proprietary capacity.

Furthermore, this Court should then remand the matter to the district court to allow the parties to conduct the extensive fact discovery that would be necessary for such

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<sup>10</sup> At pages ten through eleven of its brief, Respondent confirms the very reasons cited by the City as to why the proprietary capacity exception should not be adopted here. Great confusion would arise from parsing out specific actions within the same government department when determining the issue of jurisdiction to hear a review of an employment discipline or termination proceeding. Respondent's argument when applied to this issue of jurisdiction would lead to the situation whereby an employee of the water department who constructs a water system or is involved with the charging for the water can only review their termination by a writ of certiorari whereas a water department person who operates the system could only challenge their termination by first going to district court. This is exactly why there is no legal or logical reason for adopting the proprietary versus governmental factor as a test for determining whether an action is quasi-judicial for purposes of determining jurisdiction.

analysis. *See e.g. Stein*, 282 N.W.2d at 555-557 (reviewing the many facts relevant to whether a hospital was operating in a proprietary capacity). Following discovery, the parties should then be entitled to have the matter heard by way of motion again under the new pronouncements of this Court, because the ultimate issue challenged still remains a jurisdictional issue which is a question of law, decided by the court and is immediately appealable.

### CONCLUSION

The Court of Appeal decision, which held that a decision of the city council rendered while the city council was operating in its proprietary capacity, is not a quasi-judicial decision, must be reversed. The statement of law represents the expansion of an analytically unsound doctrine that has been generally rejected by this Court and the nationwide majority. Furthermore, as it pertains to these specific parties, the correct application of the law calls for the application of the *Handicraft* test and reversal under that test because it is undisputed that under *Handicraft*, the October 13, 2009 decision of the City of Oak Park Heights' City Council was quasi-judicial.

DATED: \_\_\_\_\_

12/6/11

JARDINE, LOGAN & O'BRIEN, P.L.L.P.

By: \_\_\_\_\_

Pierre N. Regnier (A.R. #90232)

James G. Golembeck (A.R. #179620)

Jessica E. Schwie (A.R. #296880)

8519 Eagle Point Boulevard, Suite 100

Lake Elmo, MN 55042-8630

(651) 290-6500

*Attorneys for Appellant*

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a Brief produced with a proportional font. The length of the Brief is 4,073 words. This Brief was prepared using Microsoft Word 2003.

DATED: 12/6/11

JARDINE, LOGAN & O'BRIEN, P.L.L.P.



By: \_\_\_\_\_  
Pierre N. Regnier (A.R. #90232)  
James G. Golembeck (A.R. #179620)  
Jessica E. Schwie (A.R. #296880)  
8519 Eagle Point Boulevard, Suite 100  
Lake Elmo, MN 55042-8630  
(651) 290-6500

*Attorneys for Appellant*