

NO. A11-0067

STATE OF MINNESOTA
IN SUPREME COURT

City of Oak Park Heights,

Petitioner,

v.

County of Washington,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUE

I. DID THE COURT OF APPEALS ERR WHEN IT AFFIRMED THE DISTRICT COURT'S DISMISSAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION?

Since jurisdiction of Respondent's equitable unjust enrichment action is properly in the district court, the court of appeals did not err in affirming the district court's decision to dismiss Appellant's motion for summary judgment.

STATEMENT OF THE CASE

Appellant's interlocutory appeal has its genesis in its failed attempt to divest the district court of its jurisdiction over an unjust enrichment action brought by Respondent to recover approximately \$114,000 it overpaid Appellant for sewer and water services. The Appellant contends the district court must forfeit its jurisdiction over this equitable action because the decision of its city council rendered pursuant to the City's self-prescribed utility bill policy denying Respondent's reimbursement request was quasi-judicial and only be reviewable by writ of certiorari.

The district court rejected Appellant's theoretical abstraction finding the city council's decision was rendered in the City's proprietary rather than governmental role and, *a fortiori*, was not a quasi-judicial decision warranting certiorari review. In articulating its reasoning behind its dismissal of Appellant's motion for summary judgment, the district court, citing to *City of Crookston v. Crookston Waterworks*, 185 N.W. 380 (Minn. 1921), held that the Appellant "in providing water...acts in its proprietary capacity," and is, thus, only accorded

“...the same rights...as private corporations,” citing *Keever v. City of Mankato*, 129 N.W. 158 (Minn. 1910).

The City appealed the district court’s denial of its motion; and, in a published opinion, the court of appeals affirmed the district court’s decision. *County of Washington v. City of Oak Park Heights*, 802 N.W.2d 767 (Minn. App. 2011). The court of appeals reasoned much as the district court, perpending that because the City’s role in providing the County with sewer and water services was a proprietary function rather than governmental, the city council’s decision denying Respondent’s request for reimbursement of the overcharge was not quasi-judicial, and the district court remained the proper forum to contest the overcharge. *Id.* at 771.

STATEMENT OF FACTS

For the most part, there is little quarrel with the actual facts presented by Appellant’s narrative. However, because Appellant’s theory of the case does not conform to Respondent’s, Appellant’s rendering of these facts is at variance with Respondent’s view of the matter, and, therefore, Respondent takes the liberty to make its own presentment.

The Washington County Law Enforcement Center (LEC) lies within the boundaries of the City of Stillwater; but, because the City of Oak Park Height’s infrastructure for sewer and water was readily available, the Respondent entered into an agreement with Appellant to provide its LEC with sewer and water services. The County has been and continues to be one of the City’s long time customers for these services.

While performing an audit in response to a change in the sales tax laws, the County discovered to its chagrin that during the period January 1, 2005 to June 30, 2006, the City overcharged Respondent “north” of \$114,000 for the sewer and water services it provided during that timeframe. Respondent made the overcharge known to the City and settlement talks ensued.

Parley between city and county staff concerning settlement of the overcharge proved unavailing, and to bring settlement talks to a close, the city administrator suggested the Respondent place its claim before the city council. Although it was evident from the tenor of negotiations at the staff level that appearing before the city council would likely prove an exercise in futility, the Respondent acceded to the prompting of the city administrator and presented its claim to the city council. *A.11-13.*

The County’s restitution request came before the city council at its September 8, 2009 regularly scheduled meeting. *A.14.* It is instructive to note that although Appellant portrays the city council’s decision making process in this matter as quasi-judicial the agenda for the meeting noticed Respondent’s presentation as new business instead of a public hearing somewhat belying Appellant’s contention the council was acting as fact finder.

The County’s finance director presented Respondent’s case; and, after some discussion amongst the council members, the council decided to hold over any decision to its October 13, 2009 meeting at which time the city council rendered its denial of the County’s request for restitution of the overcharge. The council’s denial was memorialized in

Resolution #09-10-39. A.18-26. After receiving the resolution, the Respondent filed an unjust enrichment action in the district court. A.41-53.

ARGUMENT

I. INTRODUCTION

A reading of the case theories propounded by Appellant and its Paladin, the League of Minnesota Cities, brings to mind the words of the English jurist Lord Charles Bowen: “I am reminded of a blind man in a dark room looking for a black hat which isn’t there.” The expostulations offered by the County’s worthy antagonists are mere ciphers; dissembled renderings of the issues and law with theories built upon a framework of distorted apocrypha and casuistic legal analysis. Interestingly, study of their disquisitions evidence that whether purposely or through happenstance the City and amicus have formulated their theories of the case through the implementation of faulty Platonic reasoning. While this observation may be arcane and unintentionally appear sententious, their application of this form of reasoning is so obvious an explanation for their “hen-headed” postulations that its dissection was warranted.

Appellant’s and amicus’ polemics arise from their ideal of city governance, which, as their writings indicate, are an *a priori* notion that all undertakings of a city are government *qua* government, which leads to their belief that every decision made by the city council is governmental in nature or should be viewed as such. In fulfillment of this ideal, both Appellant and amicus assert through a contrived empiricism the establishment of a form of

suzerainty. However, this ideal has long ago been confounded by the principle of proprietary capacity. Nevertheless, in its attempt to impose this ideal, Appellant and amicus drive out the real and particular fact that cities function in a proprietary as well as in a governmental capacity; and when they act in a proprietary role, governments suffer a devolution of prerogatives and enjoy only those privileges accorded business enterprises.

As mentioned, the League of Minnesota Cities has joined the fray as amicus. A reading of its contribution shows it adds little to the discourse essentially aping Appellant's argument. It does sardonically hint at disapprobation of the actions of both county and court of appeals in a manner which seems to impugn the integrity of both. It sneers at the County for contesting the City's appeal in order to gain its thirty pieces of silver, *Am. Br. p.2*, and provocatively implies the court of appeals inappropriately demonstrated a tendentious bent toward the County, musing that "[i]t's possible that the court of appeals chose this erroneous approach out of sympathy either for the County which missed the appeal deadline for certiorari review or out of sympathy for individuals that may have payment disputes with municipal utilities in the future." *Am. Br. p.4*. Contrary to its puerile caricature, the court of appeals chose its approach because, simply put, it had a century's worth of precedent upon which to draw and rejected out of hand amicus' purblind implication that a city council is a transcendent body that can magically transform a proprietary function into one which is governmental. Moreover, the County had no intention of ever proceeding on a writ of certiorari; its intention always was to cross the Rubicon and file an unjust enrichment suit

against the City. Before casting stones, the League of Minnesota Cities should first look at its ally's role in this affair. It was the City that declined meaningful settlement, and it was the City that raised and then appealed the jurisdictional issue.

The foundation of Appellant's argument is corrupted from pillar to post. It begins with a mischaracterization of the County's claim as a disputed bill when in truth it concerns money the City wrongly holds; then, proceeds with a portrayal of the principle of proprietary capacity that is a perversion; and ends with a jurisdictional presentment that is, in a word, farce. The City has taken a simple suit in equity and transformed it into a constitutional battle royal. It is a mystery as to why the City continues to importune as there is no rhyme nor reason for Appellant to attempt to kidnap the district court's jurisdiction in a matter that so obviously sounds in unjust enrichment.

II. THE BASIS OF THE COUNTY'S LAWSUIT A RETURN OF THE OVERPAYMENT MADE TO THE CITY AND NOT THE AMOUNT OWED ON A PARTICULAR BILL.

The Appellant misapprehends the County's action as a bill dispute subject to the City's utility bill appeal policy. *App. Br. p.2; A.54*. Rather, the County seeks restitution from the City for the money it holds after the County paid the City approximately \$114,000 for services the City never provided. Lost on Appellant is the construct of Respondent's suit, *A. 41-53*, the framework of which is designed upon the overcharge and the money wrongly kept by the City and not on the discrete individual charges. *See, Sloan v. City of Duluth, 259 N.W. 393 (Minn. 1935)*. All bills submitted to the County by the City during the timeframe

in question were paid without protest and, at the time of payment, without dispute as to the amount assessed. It is only now, some four years later (County's suit was filed in December, 2009), that the County is seeking indemnification through this unjust enrichment action for the money mistakenly paid to and wrongly kept by the City. *A.41-53*.

In *Sloan*, supra, a case replete with similar issues to the case at bar, this Court noted that “the obligation of a [city] to repay [for utility overcharges] **does not rest upon the [City’s] authority to collect** the money but arises from the moral obligation....to make restitution where [it] has received without consideration the money of another which it has no right to retain.” (emphasis added). *Id.* at 396 citing *Sibley v. County of Pine*, 17 N.W. 337, 338 (Minn. 1883). The City stretches credulity to contend that overpayments made over a one and a half year period nearly four years ago, *A.41*, are still subject to its utility bill appeal policy, which by its terms clearly appertains to discrete, individual charges assessed prior to a payment being due and is no more than a settlement protocol. *A.54*.

III. IN PROVIDING SEWER AND WATER SERVICES, THE CITY ACTS IN A PROPRIETARY RATHER THAN GOVERNMENTAL ROLE.

Appellant quixotically tilts against the concept of proprietary capacity in the faint hope of vanquishing its bane from Minnesota law. As mentioned, the City has been joined in this duel by the League of Minnesota Cities which like the Myrmidon serving Achilles gives aid to the City in its struggle to banish its *bête noir*. However, the League's “sky is falling” grumblings add little to the dialogue; and, except for a few instances, Respondent will content itself with merely addressing Appellant.

The gravamen of the court of appeals' decision affirming the district court is its determination that, when providing sewer and water services, the City acted in a proprietary capacity, holding that "[b]ecause these non-governmental decisions [did] not implicate separation-of-powers concerns, there [was] no reason to exclude them from the district court's jurisdiction". *County of Washington*, 802 N.W.2d at 770. The City takes exception and imperiously charges that the court of appeals needlessly expanded "the proprietary capacity doctrine into the area of jurisdiction." *App. Br. pp.15-17*. However, Appellant is badly mistaken in its rejoinder; in making its assessment, the court of appeals was doing no more than following a century's worth of this Court's decisions. *See, e.g., Kever v. City of Mankato*, 129 N.W. 158 (Minn. 1910); *Reed v. City of Anoka*, 88 N.W. 981 (Minn. 1902); *City of Staples v. Minnesota Power & Light Co.*, 265 N.W. 58 (Minn. 1936). While the court of appeals conformed its holding to the great body of law created by this Court, the City formulated its counterattack through art and artifice.

The concept of proprietary capacity is not, as Appellant insidiously portrays, a novel idea of recent vintage but has been part of Minnesota's jurisprudential landscape for well over a century. *See, City of St. Paul v. Chicago, M & St. P. Ry. Co.*, 48 N.W. 17 (Minn. 1891). More pointedly, proprietary capacity has been associated with the purveyance of sewer and water services for over 100 years, *See, Reed v. City of Anoka*, 88 N.W. 981 (Minn. 1902); and contrary to Appellant's implication has grown in stature and importance with regards to a city's business of providing utility services. *See e.g., City of Staples, supra.; City*

of *Crookston v. Crookston Waterworks, Power & Light Co.*, 185 N.W. 38 (Minn. 1921). Antithetical to the simplistic assertion made by amicus that the purveyance of water is so vital a service that it should be considered governmental conduct, even the legislature has weighed in on the matter.¹ It has statutorily recognized that providing utility services is a business enterprise and crafted language into a statute which permits cities that create electric power agencies to operate these agencies as private corporations. *Minnesota Statutes* §§ 453.51-453.62 (1996). See, *Southern Minnesota Municipal Power Agency v. Boyne*, 578 N.W.2d 362 (Minn. 1998). Although this statute is not applicable to this case, it nevertheless indicates the legislature views the furnishing of utility services by cities to be business ventures.

The concept of proprietary capacity was born of a recognition that not every activity conducted by a governmental entity is governmental in nature. Many of the activities in which governmental entities are engaged are proprietary, mimicking those of a business. However, proprietary is merely an appellation, a name describing a governmental entity acting in a business capacity. It is not as the City would like to convey a one size fits all concept. The principle itself is found in the oft quoted: "When the municipality enters the field of ordinary private business, it does not exercise governmental powers. Its purpose is,

¹ Respondent characterizes amicus' assertion as simplistic because even though providing its citizens water is recognized as a public purpose, a City's role in providing the water is, as will be discussed later, an amalgamation of activities, some of which are governmental and others proprietary.

not to govern its inhabitants, but to make for them and itself private benefit”. *Keever v. City of Mankato*, 129 N.W. at 160 quoting *East Grand Forks v. Luck*, 107 N.W. 393 (Minn. 1906). This Court gave further clarification when it opined that “actual profit is not the test, and it is enough that the city is in a profit making business”, *Hahn v. City of Ortonville*, 57 N.W. 2d 254, 260 (Minn. 1953). In other words, “...an enterprise is proprietary when it is profit making in this sense that when conducted by private persons it is operated for profit.” *Id.*

Admittedly, utilities, including water and sewer, serve a public purpose. However, any utility is an amalgamation of discrete activities some of which are deemed to be governmental in nature and others proprietary. For example, the decision to construct the infrastructure for a particular utility is governmental, *See, In re Village of Burnsville*, 245 N.W.2d 445 (1976) (assessments for waterworks infrastructure is a quasi-legislative decision) as is the establishment of fees and connection charges for a given utility. *See, Crown Cork & Seal, Inc. v. City of Lakeville*, 313 N.W.2d 196 (Minn. 1981) (sewer and water connection charge is a quasi-legislative decision). On the other hand, the actual supply of the utility service is proprietary. *See e.g., City of Staples, supra*. The distinction arises from the fact that activities such as the construction of the infrastructure and the imposition of fees and charges impact the population as a whole and is by necessity a shared cost and endeavor while the supply of water, electricity, gas, etc., to individual customers is a contractual relationship between the City and individual consumer, *See, Lund v. Village of*

Princeton, 82 N.W.2d 197 (Minn. 1957) (Supply of electrical power is through an implied contract), and entails the furnishing a commodity at a given unit price. *Powell v. City of Duluth*, 97 N.W. 450 (Minn. 1903); *Reed v. Anoka*, supra. In fact, as in this case, the sale of the service is not limited to a city's residents and may be made outside its boundaries. See, *Minn. Stat. § 412.321*, subd. 3.

Appellant devotes a good deal of its narrative to writing an obituary for proprietary capacity. However, its requiem is no more than an allusional contrivance, employing an inordinate amount of paper prosing on the suppositious "fall" of proprietary capacity in areas totally unrelated to utilities. *App. Br. p.9-14*. But, to paraphrase the eminent Samuel Clemens: The report of the demise of proprietary capacity is greatly exaggerated. While proprietary capacity may have outlived its usefulness in some areas, a valedictory is unwarranted. To reiterate, the proprietary role of municipalities in providing utility services has been part of Minnesota law for over a century, and that view has not changed one "jot or tittle."

In a backhanded reproach of proprietary capacity that proves to be more artifice than concern, the Appellant and amicus raise a series of suppositional concerns which cities purportedly will face if the decision of the court of appeals stands. They have asked in insidious, rhetorical fashion: What is to become of those few municipal employees working in the sewer and water department if they are terminated; what effect will proprietary capacity have on open meeting and data practices issues, *App. Br. p.14*; and how will

dangerous dog decisions be viewed? *Am. Br. p.6*. Apparently, unbeknownst to the County's foils, these very questions have been addressed by this Court. As mentioned previously, proprietary capacity is not a novel concept. Cities furnishing utilities have operated within its strictures for over a century, and cities have apparently accommodated themselves to working within its precincts. There is no reason employees of the city's waterworks would be considered anything other than public employees and dealt with under current law public employment law. *See, Dokmo v. I.S.D. No. 11*, 459 N.W.2d 671 (Minn. 1990) and its progeny. *Cf., Minn. Stat. § 453.61* (employees of municipal power agencies deemed private corporations shall be considered public employees). This Court addressed data practices and open meeting principles in *Southern Minnesota Municipal Power Agency, (SMMPA)* supra, at least as it pertains to *Minn. Stat. Chapt. 453*. Although this Court's decision in *SMMPA* revolved around a statutory interpretation of Chapter 453, a reading of this Court's decision in tandem with the court of appeals decision in *SMMPA* which was reversed by this Court, *See, Southern Municipal Power Agency v. Boyne*, 563 N.W2d 761 (Minn. App. 1997), should at least give cities enough direction to enable them to determine "which way the wind blows." Even the dangerous dog issue raised by amicus was answered by the court of appeals in *Sawh v. City of Lino Lakes*, 800 N.W. 2d 663 (Minn. 2011) rev. granted and now awaits this Court's decision. In the end, the possibility that continued validity of proprietary capacity may pose problems for cities is not reason enough to abrogate a principle that has been a part of Minnesota "lore" for well over a century.

Realizing that convincing this Court to banish a century's old principle is no mean task, the Appellant has importuned that if this Court does not abandon the principle of proprietary capacity it should at least remand this matter to the district court to establish a test for proprietary capacity. *App. Br. p.22*. However, with regards to providing sewer and water services, if this Court should accede to Appellant's invitation, and there is no reason it should, the test would be prosaic and has already long been articulated by this Court, to wit: If a City is providing a utility service, it is *ipso facto* acting in a proprietary role. *City of Staples, supra*.

IV. BECAUSE APPELLANT WAS ACTING IN A PROPRIETARY CAPACITY, THE CITY COUNCIL WAS NOT FUNCTIONING AS A QUASI-JUDICIAL BODY WHEN DENYING RESPONDENT RESTITUTION.

As the court of appeals obliquely noted in its opinion, the Appellant initially paid little heed to the concept of proprietary capacity. *County of Washington*, 802 N.W.2d at 769 (City does not dispute the proprietary nature of its conduct). However, inasmuch as the court of appeals ascribed its decision affirming the district court to the city's proprietary role in providing sewer and water services, the Appellant has turned to tub-thumping polemics in its vain attempt to beat, bludgeon and bury the principle. Yet, the City continues to dispatch proprietary capacity with a dismissive, airy waive of the hand, propounding the bald assertion that it is not and never has been a component of jurisdictional analysis, *App. Br. p.15*. The City claims instead that "a trilogy of [Minnesota Supreme court] decisions sets forth the test for determining whether a decision is quasi-judicial as opposed to legislative in nature." *App.*

Br. p.7. Unfortunately for the Appellant, its road to this “three part test” is blocked at the entrance by its bugbear, proprietary capacity.

A. THE CITY FUNCTIONS IN A DUAL ROLE, GOVERNMENTAL AND PROPRIETARY.

The City’s statement that “a trilogy of decisions [setting] forth the “test” for differentiating quasi-judicial from quasi-legislative (emphasis added), *App. Br. p7*, gives strong indication that the City is on the right track but on the wrong train. This Court has long recognized the dualistic nature of local government. *See, City of St. Paul v. Chicago, M & St. P. Ry. Co.*, 48 N.W. 17, 20 (recognition of actions brought as sovereign or in a governmental capacity as opposed to proprietary or such as a private person might bring). *See also, Salsa v. State*, 247 N.W. 2d 907, 909 (Minn. 1976) (drew distinction between state’s governmental and proprietary activities). However, it is the precursor form of dualism with which the City fails to come to terms. While the determination of whether a City is functioning in a quasi-judicial or quasi-legislative capacity is a critical component of jurisdictional analysis, it is the dualism associated with the question: Is the function proprietary or governmental? – that must first be answered.

In the main, cities function in a governmental capacity, but they also take on a subsidiary role serving in a proprietary manner where its activities are akin to a private business enterprise. As discussed previously, this court has long held it axiomatic that when functioning in its proprietary capacity, governance by a city is no longer its primary objective, rather, the overarching purpose of a city acting in a proprietary role is to secure for

it and its citizens a private benefit. *Keever*, 129 N.W. at 160. However, actual profit is not the inquiry, and it is sufficient that the city is in a profit making business. *Hahn*, 57 N.W. 2d at 260. The critical aspect for the City acting in a proprietary role is the devolution of its governmental prerogatives to those of private businesses. *See, Youngstown Mine Co. v. Prout*, 124 N.W. 2d 328, 344 (Minn. 1963); *Reiersen v. City of Minneapolis*, 118 N.W. 2d 223 (Minn. 1962).

The Appellant, in this case, provides sewer and water services to customers via contract. *See, Lund*, 85 N.W.2d at 200 (breach of implied contract to supply electrical power to hatchery) and reason suggests that a person who pays the City for utility services ought to be entitled to seek the same remedy for wrongs as if committed by a private business. *See, Stein v. Regents of Univ. of Minnesota*, 282 N.W.2d 552, 556 (Minn. 1979) quoting *Carroll v. Kittle*, 457 P. 2d 21, 28 (Kan. 1959). As a corollary, it would be paradoxical, on the one hand, to hold Appellant accountable as a private enterprise, but on the other, to preclude the Respondent from seeking redress in the district court but rather requiring it to prosecute its claim against the Appellant before the city council. If, for example, Xcel had overcharged the County, the County would undeniably have recourse in district court. Employing this Court's rationale in *Stein* and *Keever*, it is axiomatic that the Respondent be allowed to pursue its anodyne in the district court. It would be farce to give the fox the warrant to guard the hen-house.

B. APPELLANT MISCONSTRUES THE QUASI-JUDICIAL ANALYSIS.

It is by now well established that the Appellant gainsays the court of appeals' reliance on the principle of proprietary capacity to find the city council was not acting quasi-judicially when it rejected the County's claim for reimbursement. *App. Br. p.7*. In a head-scratching rapprochement of the court of appeals, the Appellant asserts that "a trilogy of decisions² ... set forth the test for determining whether a decision is quasi-judicial as opposed to quasi-legislative in nature," *App. Br. p.7*, inveighing against introduction of proprietary capacity to the "test". *App. Br. P.8*. In framing its theory of the case, the City leans upon a reed; for behind the "bluff and bluster" of its words, Appellant's postulation is merely a house of cards. While the City is spot-on in its pronouncement that the test distinguishes between quasi-judicial and quasi-legislative activities, the Appellant fails to articulate how it gets to the test. The City's argument brings to mind Humpty Dumpty's admonition to Alice: "It means just what I choose it to mean – neither more nor less."

By its terms, a determination of whether a particular action is quasi-judicial or quasi-legislative presupposes a governmental activity. Even amicus recognizes the three part analysis was intended for governmental activity and campaigns for cities proprietary roles to

² The cases cited by Appellant are *Handicraft Block P'ship v. City of Minneapolis*, 611 N.W.2d 16 (Minn. 2000); *Minnesota Center for Environmental Advocacy v. Metropolitan Board*, 550 N.W.2d 275 (Minn. 1996), and *Meath v. Harmful Substance Compensation Bd.*, 550 N.W.2d 275 (Minn. 1996). If the analysis were pertinent to this case, this troika of cases would have been an apt choice with the former finding quasi-judicial action; the middle, quasi-legislative; and the later, neither.

be included in the test. *Am. Br. p.9*. Although the City would dearly love to use the test, it is mired in its proprietary role and is purblind with respect to understanding the underlying principles attending the analysis involved in the “three part test.” To borrow from the estimable Dr. Samuel Johnson: The County has found the City an argument; now it is obliged to find it an understanding.

The City’s continual remonstrance against the finding by court of appeals of the City’s proprietary role in furnishing sewer and water services demonstrates the City’s failure to grasp the *sine qua non* of the “three part” analysis, which is governmental activity. When the court of appeals in its opinion pointedly indicated; “...cases that determine jurisdiction solely on the distinction between quasi-judicial decision-making and quasi-legislative decision making...are premised on something absent here: decision making in the context of governmental conduct,” *County of Washington*, 802 N.W. 2d at 769-770, the City continued to whistle through the graveyard, wasting a lot of good paper prosing on how the city council’s decision fits this three part test while failing to establish or more accurately ignoring the necessity to establish the prerequisite governmental conduct. Appellant closes its eyes to the fact that governmental activity is an outrider in these quasi-judicial cases and anonymously subsumed. The Appellant is just plain wrong in its short sighted assertion that proprietary capacity has never been an ingredient of the jurisdictional brew; and while it spoils the taste for the cities, it enhances it for the customers. *App. Br. p. 12*.

As the court of appeals recognized in its decision, “a district court is a court of general

jurisdiction,” *County of Washington*, 802 N.W.2d at 769 (citing *Anderson v. County of Lyon*, 784 N.W. 2d 77, 80 (Minn. App. 2010)), and has been since this state’s infancy. This Court long ago established that the district court is “the one great court of general jurisdiction to which all may apply to have justice judicially administered, in every case where the constitution itself does not direct application to be had elsewhere.” *Agin v. Heyward*, 6 Minn. 110 (1861). One such exception created by the courts is the deference to be accorded to the quasi-judicial decisions of the executive branch of government. *See, Tischer v. Hous. And Redevelopment Authority*, 693 N.W.2d 426 (Minn. 2005). In such instances, the courts are limited to review by writ of certiorari. This doctrine has its roots in the principle of the separation of powers as a check against the judiciary’s intrusion upon the constitutional prerogatives of the other two branches of government and was bred to vouchsafe review where no other right of appeal has been provided. *Id.* Because the stated purpose of certiorari review is to give pay to the doctrine of separation of powers, the *sine qua non* of its application is governmental action. Because Appellant’s city council was acting on a proprietary matter when it passed on the County’s request for reimbursement, the requisite governmental activity was lacking and direct action in the district court was Respondent’s proper course. Moreover, in response to amicus’ head-scratching accusation that the court of appeals fails to focus “on the nature and process of the challenged decision making...” rather than “...on the underlying activity that the City was performing...,” *Am. Br. p. 3*, the Respondent would just say a city council is not a transcendent body whereby a city’s

proprietary activity transubstantiates to a governmental role merely because it is brought to the city council. A distillation of the arguments of the City and amicus results in a request to this Court to eschew the distinctions between the dichotomous roles of proprietary and governmental and meld them into one.

In the face of a century's worth of cases, the City makes the obtuse declaration that prior to the court of appeals decision in this case proprietary capacity had not been used to determine jurisdiction. *App. Br.* p.12. In a paroxysmal response to the court of appeals finding that [b]ecause the non-governmental decisions do not implicate separation-of-powers concerns, there is no reason to exclude them from the district court's jurisdiction, "*County of Washington*, 802 N.W.2d at 770, the City traduces the court of appeals for its sudden and unpredicted imposition of proprietary capacity in the determination of jurisdiction. *App. Br.* p.12. However, to quote Queen Gertrude in Hamlet: "The [City] doth protest too much, methinks."

As Appellant itself indicates, *App. Br.* p.9, proprietary capacity has long been utilized to counter the doctrine of sovereign immunity with regards to governmental torts, *See, e.g., Hahn*, 57 N.W.2d at 259. It is a doctrine of immunity sculpted by the judiciary. *Spanel v. Mounds View School District*, 118 N.W.2d 795, 802 (Minn. 1962). This tort immunity is similar in principle to the judicially engraved tenet of quasi-judicial authority. *See, Dokmo v. I.S.D. #11*, 459 N.W.2d 671, 674 (Minn. 1990).

The doctrine of sovereign immunity was a judicially created principle that gave

jurisprudential life to the common law creation of the “King can do not wrong”; and, although it must be pled as a defense, the tenet is nevertheless invested with jurisdictional dignity. *Nieting v. Blondell*, 235 N.W.2d 597, 599-60 (Minn. 1975). In short, like a governmental entity’s claim of quasi-judicial action, tort immunity is a question of subject matter jurisdiction. *See, Schaeffer v. State*, 444 N.W.2d 876, 879 (Minn. 1989) (State’s claim of immunity involves the issue of subject matter jurisdiction). Because the jurisdictional issues surrounding sovereign immunity mirror those revolving around the principle of quasi-judicial power and inasmuch as the principle of proprietary capacity was employed to counter the jurisdictionally preclusive effect of governmental tort immunity, proprietary capacity has been employed for purposes of conceding to district courts subject matter jurisdiction they would otherwise be proscribed from gaining. Empirical evidence adds credence to this proposition. Since the 1890’s, overcharges by city utilities have been successfully litigated in district courts via unjust enrichment actions with “nary” a jurisdictional challenge being mentioned much less raised. *See, e.g. Knutson v. City of Moorhead*, 84 N.W.2d 626 (Minn. 1967) (City unjustly enriched for sewer overcharges); *Sloan v. City of Duluth*, 259 N.W. 393 (Minn. 1935) (City unjustly enriched for excess water and sewer payment); *Paton v. Duluth Gas & Water Co.*, 52 N.W. 527 (Minn. 1892). (City unjustly enriched for excess sewer and water charges).

C. THE COUNTY’S CAUSE OF ACTION IS DISTINGUISHABLE FROM YOUNGSTOWN MINE CORP. V. PROUT.

The Appellant continues to confound with its misplaced reliance upon *Youngstown*

Mine Corp. v. Prout, 124 N.W.2d 328 (Minn. 1963) for the proposition that proprietary decisions by governmental entities maybe subject to certiorari review. *App. Br. pp.13-14*. However, as the court of appeals found, *Youngstown* is distinguishable from this case. *County of Washington*, 802 N.W.2d at 770. Nevertheless, the City is hidebound to draw parallels so offers a casuistic analysis of *Youngstown*, distorting the facts and omitting critical elements from its discussion.

A distillation of *Youngstown* shows Youngstown Mine Corp. (hereinafter the corporation) entered into a fifty year lease with the State of Minnesota to extract iron ore from a portion of the bed of Rabbit Lake. In consideration of the lease, the corporation paid the state royalties. *Youngstown Mine Corp.* 124 N.W.2d at 334. Subsequently, it was determined through a district court judgment that the state did not own the portion of the lake bed upon which the corporation had paid royalties. The corporation sought reimbursement of the royalties it paid the state by availing itself of Minn. Stat. § 6.136 9 (now Section 16 A. 48). *Id.* The statute is the means by which persons seeking reimbursement for monies wrongly paid to the state must proceed and requires a claimant to submit a verified claim of its liquidated damages to the head of the concerned agency which, in the case of *Youngstown*, was the Commissioner of Conservation. The Commissioner was then obligated to decide “nay” or “yeah” on the claim and to append “whys”. For a whole host of reasons, the Commissioner denied the corporations’ refund claim. *Id.* at 334. In response to the denial, the corporation petitioned the district court for and was granted a writ of certiorari. This

Court found certiorari review of the Commissioner's decision in this matter proper. Although the Appellant has affixed itself to this decision like a tick, *App. Br.* pp.13-14, a great divide exists between the issues presented in *Youngstown* and the case at bar, not the least of which is the claims statute or the lack thereof in this case requiring the claimant to bring its claim to the Commissioner. The City can point to no like statute which would require the County to present its claim to the city council. Interestingly, Minn. Stat. § 412.271 does contain a provision authorizing the city council to pay **liquidated** claims presented to it [emphasis added]. However, this Court has found even this provision was meant to merely allow the city council to sit as a board of audit and was not intended to allow the council to sit as a tribunal for assessing damages. *Lund v. Village of Princeton*, 85 N.W.2d at 205. *See also, Manson v. Village of Chisolm*, 170 N.W.2d 924 (Minn. 1919).

It is important to note that the claim in *Youngstown* was liquidated not by the commissioner pursuant to section 6.1369 but by prior district court cases determining the validity of the lease. In the case at bar, the Respondent's claim against the City is not liquidated. As the district court found in its decision denying Respondent's motion for summary judgment, "there are issues of material fact present...regarding the amount of the overcharge alleged by the County...". A.7. Therefore, as the court of appeals noted, the overarching dispute between the parties in *Youngstown* involved a precursor proprietary contract that was litigated in three district court actions, *Youngstown*, 124 N.W.2d at 344-345, which led to the action in *Youngstown* regarding the entitlement to a refund pursuant to

a claims statute. *County of Washington*, 802 N.W.2d 771. The Appellant in this case strongly contends that "...there is no logical distinction between the City Council decision to deny the refund in this case, and the decision of the Commissioner to deny the refund in the *Youngstown* case..." *App. Br. p.14 Fn. 1*. On the contrary, the disparities are legion, and the logic which Appellant propounds is twisted.

V. THE CITY'S DEMAND FOR QUASI-JUDICIAL POWER OVER THE COUNTY'S RESTITUTION IS AN UNCONSTITUTIONAL USURPATION OF THE DISTRICT COURT'S JURISDICTION.

In cliff notes summary, Respondent's unjust enrichment action calls upon the inherent equitable power of the district court to order the City to return to the County money the City wrongly holds. Because this is an action in equity, the district court has exclusive subject matter jurisdiction over this matter. *See, Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999). The Appellant, on the other hand, has declared this a jurisdictional struggle between it and the district court with the City obtusely declaiming exclusive authority for its city council over the County's claim of unjust enrichment, and the district court and court of appeals respectively holding otherwise. The City contends that when its city council denied the County's claim for the overpayment of a year and a half's worth of sewer and water bills the council was acting in a quasi-judicial capacity and, therefore, embargoing Respondent from seeking its justice in the district court. As suggested previously, the Appellant supports its thesis with a curious amalgam of arguments some of which are apocryphal, some beguiling and others mendacious but none which resonate with the facts comprising the

County's unjust enrichment action.

The County's suit against the City is brought to recover approximately \$114,000 in sewer and water overcharges. While the City professes this to be a suit over a sewer and water bill, analysis of the complaint, *A. 41-53*, evinces it to be a suit for the return of money collected and kept by the City, which the City has a moral obligation to pay back. *See, Sloan v. City of Duluth*, *supra*. The determinative aspect of *Sloan* and other suits grounded in unjust enrichment is the established dogma that the repayment is grounded in a moral imperative. It was the redoubtable English jurist Lord Mansfield who first crafted the equitable theory enabling courts to order a person to return the money of another where it would otherwise be morally reprehensible for him or her to retain. *Moses v. Macfarlan*, 2 Burr. 1005 (K.B. 1760). This equitable cause of action has grown to become an integral part of Anglo-American as well as Minnesota jurisprudence, *See, Stone v. White*, 301 U.S. 532 (1937); *Todd v. Bettinen*, 124 N.W. 443 (Minn. 1910), and is known by the appellation of unjust enrichment or money had and received. Unless the City voluntarily returns the money to the County the money it wrongly holds, which it has steadfastly refused to do, the sole means available to the County to gain restitution from the City is to proceed with its suit in unjust enrichment. In ordering restitution, the critical tool in the district court's "tool box" is its equitable power, and it is through its inherent equitable power that the district court may order the City to return the money of the County which the City is wrongly holding. *Thorn v. George Hormel Co.*, 289 N.W. 516, 518 (Minn. 1940). Still, the City continues to importune

the proposition that the city council's decision was quasi-judicial, and the district court must, therefore, bow to the city council's decision to deny the County a refund. Dangerously insinuated in Appellant's overreaching demand is an unconstitutional encroachment on judicial power. *See, Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999).

As noted previously, quasi-judicial power is a manifestation of the doctrine of separation of powers and is a vital component of our tripartite form of government. However, in its zeal to give deference to executive decisions, the courts must be mindful of protecting its own pretensions and not erode these prerogatives. *Id.* at 723. To protect against an unconstitutional appropriation by the executive, this court must scrutinize the rights the executive body oversees and the relief, whether statutory or equitable, that is sought. *Id.*

In the case at bar, the County is requesting the district court to order the City to return money to the County that the County paid to the City for sewer and water services the City did not provide, a suit in unjust enrichment. *See, Knutson Hotel Corp. v. City of Moorhead*, *supra*. No matter how this case is denominated, the remedy requested by the Respondent calls for the district court to exercise its inherent equitable powers. *Holmberg*, 588 N.W.2d at 725. *See Todd v. Bettingen*, *supra*. If this Court were to follow Appellant's postulation, it would consign to the city council the district court's inherent equitable power, a delegation which unconstitutionally infringes on the district court's original jurisdiction. *Id.* at 176. *See also, Breimhorst v. Beckman*, 35 N.W.2d 719 (Minn. 1949). If it is not viewed as such a transfer of power, then the city council's authority is as the Respondent contends, no more

than a settlement protocol. The County presented its claim to the city council in the vain hope that it would voluntarily refund the money. *See, Oakman v. City of Eveleth*, 203 N.W. 514, 516 (Minn. 1925). (All the ordinary rules of business conduct governing the settlement, adjustment and compromise apply to municipalities). The City refused the County's entreaty, and the County filed suit, calling upon the district court's equitable powers for restitution. *See, Meath v. Harmful Substance Compensation Bd.* 550 N.W.2d 275, 276 (Minn. 1996) (board's decision is nothing more than an offer claimant rejected).

To reiterate, if this Court should accede to Appellant's argument and delegate the district court's equitable powers to the city council, it would insinuate the city council with powers and responsibilities on a par with the district court, resulting in the anomaly of anointing the city with the authority to be judge, jury and executioner of its business disputes.

While the City may contend certiorari accords complainants judicial oversight, this Court has in the past appeared less sanguine about the protections afforded by certiorari observing that the availability of judicial review will not always provide the requested amelioration of all separation of powers concerns. *Holmberg, supra.; Wulf v. Tax Court of Appeals*, 288 N.W.2d 221 (Minn. 1979).

The basis of Appellant's claim of quasi-judicial authority is shrouded in a mist of obscurity and appears to be predicated on no more than a talismanic incantation of the appellation quasi-judicial. Appellant's proclaimed endowment of quasi-judicial power over the County's claim has no foundation and brings to mind the Latin maxim *ex nihilo nihil fit* –

from nothing comes nothing.

Quasi-judicial conduct arises in response to legislative initiatives enjoined upon administrative bodies, *See, Meath*, supra; *Holmberg*, supra. *See also, Breimhorst v. Beckman*, 35 N.W.2d at 732. These warrants engender a city authority to act quasi-judicially. A search of Minnesota's statutory framework reveals nothing even remotely conferring upon the City license to divest a district court of its jurisdiction over an equitable, common law unjust enrichment claim. *See, Willis*, 555 N.W.2d at 282 (common law defamation action was not subject to County's quasi-judicial determination); *Dietz*, 487 N.W.2d at 240 (principle underlying the quasi-judicial decision would not apply to an ordinary action for failure to perform a contract for goods and services). With all that said, even if there were such a statute, because the County's action calls for the district court to employ its inherent equitable power, such a statute would still constitute an unconstitutional usurpation of the district court's equitable power. *Holmberg*, 588 N.W.2d at 726.

CONCLUSION

Well over a century's worth of law has unequivocally established that a city acts in a proprietary role when it provides sewer and water services and, therefore, accorded only those privileges provided to private businesses. Because the City has collected the money for services it did not provide and refuses to make return to the County, the County calls upon the inherent equitable powers of the district court to order the City to make atonement. To yield its equitable power to a city council decision would be a grave assault on the district

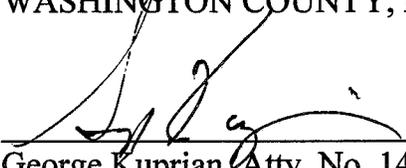
court's constitutional prerogatives and to transform this self-prescribed utility bill appeal policy into a quasi-judicial power would be to engage in legal alchemy. In short, to give one, who has wrongly taken the money of another and kept it after being asked to return it, the legal authority to determine if it is obligated to return this money and, if so, decide how much of it to return is not justice but burlesque. Therefore, this Court should affirm the court of appeals decision affirming the district court's denial of Appellant's motion for summary judgment for lack of subject matter jurisdiction.

Respectfully submitted,

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11/23/11


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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, subds. 1 and 3, for a Brief produced with a proportional font. The length of the Brief is 7,412 words. This Brief was prepared using Microsoft Office Word 2007.

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