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Case No. A11-644  
Case No. A11-1471

STATE OF MINNESOTA  
IN SUPREME COURT

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Roger Anda, Elizabeth J. Anda and  
James H. Martin, LLC; Betty Anda,  
Roger Anda, Kathleen Martin and  
James Martin,

Appellants,

vs.

City of Brainerd,

Respondent.

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**APPELLANTS' BRIEF, ADDENDUM AND  
APPENDIX**

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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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## ISSUE PRESENTED

Is State land counted in determining whether a petition has been signed by owners of 35% of the property abutting a proposed special assessment project?

Minn. Stat. § 429.031, subdivision 1(f) (2010);  
Op. Att’y. Gen. 408-c (Oct. 28, 1954).

### I. STATEMENT OF THE CASE

Appellants Betty Anda, Roger Anda, Kathleen Martin and James Martin seek review of the Court of Appeal’s finding that the City of Brainerd properly commenced a Chapter 429 special assessment project using a petition by the State of Minnesota. Appellants Anda and Martin own apartment buildings on West College Drive across from Central Lakes College just west of the Mississippi River in Brainerd, Minnesota. Using state and federal funds, the City of Brainerd (“City”) is proceeding to convert College Drive into a four-lane regional transportation artery. Despite the fact that the City Engineer recommended that the project does not provide a special benefit and should be funded by general revenues, the City has decided instead to attempt to fund its local funding share out of special assessments imposed on Anda and Martin’s apartments.

Anda and Martin asserted at the District Court that the City unlawfully accepted the petition of the State of Minnesota as representing 35% of the property to be assessed, thus evading the requirement that special assessment projects be approved by a super-majority of the Council. See Minn. Stat. § 429.031, subd. 1(f); Op. Att’y. Gen., No. 56, 133 (June 30, 1936) (A 6-8); Op. Att’y. Gen., 408-c (Oct. 28, 1954) (A 14-15); Op. Att’y

Gen., 387-B-10 (June 29, 1954) (A 9-13); League of Minnesota Cities, Special Assessment Guide, page 16 (May 2010), (A 5). They challenged the sufficiency of the petition by review pursuant to Minnesota Statutes Section 429.036<sup>1</sup>.

When the City commenced eminent domain and quick take proceedings against Anda and Martin's land, Anda and Martin also challenged the taking on the grounds that Minnesota Statutes Section 429.021, subdivision 3 prohibits commencement of a special assessment project, except in compliance with Chapter 429. The District Court concluded that a challenge to improper project authorization is not germane to the taking of property. In the consolidated appeal from the eminent domain and assessment challenges, the Court of Appeals decision on the assessment challenge made a ruling on the eminent domain challenge unnecessary.

## **II. FACTS AND PROCEDURAL HISTORY**

Appellants Anda and Martin own apartment buildings on West College Drive across from Central Lakes College ("College"), just west of the Mississippi River in Brainerd, Minnesota. In the 1970's, the neighborhood was a quiet college residential neighborhood with a number of unpaved side-streets. In the 1970's, the City's

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<sup>1</sup> At the Court of Appeals, their statutory appeal was consolidated with the review of their challenge to eminent domain proceedings. In their challenge to the eminent domain proceedings, Appellants asserted that the City had violated mandatory procedures for commencement of a special assessment project. Civil Number A11-644. That appeal was deemed moot when the Court of Appeals affirmed the District Court's finding that the State can be the sole petitioner on a special assessment project.

engineering department projected that, by 2006, College Drive would remain local residential and serve about 1300 cars per day. In 1973, to service the local traffic, the City constructed a two-lane bridge across the Mississippi River and paved Southwest 6th Street to provide access to Appellants' apartments. Because the pavement project was deemed primarily of local benefit, the City imposed special assessments to pay for the project on surrounding properties, including the Anda and Martin properties. See Summary Judgment Exhibit L (A 20-23).<sup>2</sup> Thus, the Anda and Martin properties have already been assessed for street and related services.

However, in the 1990's, City traffic planners began to envision College Drive as a regional artery servicing cross-Mississippi river traffic. Describing College Drive as a "regional hub, [serving] employment, education and commercial connections," the City and its engineering staff redesignated College Drive as a regional arterial. See(A 20).<sup>3</sup> By 2005, the average daily traffic count traveling on College Drive had exploded to 13,000 vehicles and is now projected to rise as high as 30,000 cars. For this reason, the City's engineering staff began to plan for a major road and bridge expansion using state and federal funding support. As the City's staff explained:

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<sup>2</sup> See Exhibit L (Document No. 156 - 159) (A 20-23) to Affidavit of Jerry Von Korff, filed on February 2, 2011, in support of Appellants' Motion for Summary Judgement.

<sup>3</sup> See Exhibit L (Document No. 156-159) (A 20-23), Affidavit of Jerry Von Korff, filed on February 2, 2011, in support of Appellants' Motion for Summary Judgement.

In 2005, recognizing we have an explosive increase in traffic, city asked for funds to expand College Drive from Region 5 of [MnDot]. They [the City] proposed to construct a four lane with intersection traffic control. Secured \$1.7mm in federal money to reconstruct and improve capacity.” Id.

However, state and federal funding constraints required local cost sharing. All aspects of the project were controversial – financing, use of special assessments, cost, and configuration. Some Council members opposed the project as configured and advocated for a greatly stripped down project that would reduce the public’s funding burden and drastically reduce the City’s local funding obligation. A majority of the Council proved unwilling to use local tax revenues to support the \$600,000 to \$800,000 in local share needed to make the project go. Consequently, the City began to explore the potential use of special assessments against local property owners as a source of the local match instead of general fund tax-funded revenues.

In April 2008, the engineering staff recommended against the use of special assessments for the new project, because the purpose of the project was regional in nature and there was not a local special benefit. City Engineer Jeff Hulsether wrote:

I[n] my view the proposed project is being driven by increasing regional traffic demand in the corridor, not the adjacent land uses, therefore, my recommendation will be no special assessments. Exhibit P (A 16).<sup>4</sup>

Stymied by unwillingness of a Council majority to use general revenues for the local match, the City persisted in considering raising its local match with special assessments

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<sup>4</sup> See Exhibit P (Document No. 251) (A 16), Affidavit of Jerry Von Korff, filed on February 2, 2011, in support of Appellants’ Motion for Summary Judgment.

on adjoining landowners. The problem was that Council-initiated projects funded in part by special assessments require a petition from property owners within the assessment area or a super-majority of the Council to approve the project, and neither was forthcoming. See Minn. Stat. § 429.031 subdivision 1(f).

In 2009, the City wrote College Vice-President Christianson inviting comment on whether the College would be willing to make a contribution to the project. The letter acknowledged that the City's staff believed that applicable statutes left contribution "somewhat optional for the State." See Exhibit D, (A 17-18). It asked the College to consider whether it might be willing to make a contribution in the amount of \$90,000, and inquired as to the meaning of the provisions of section 435.19, which limited enforcement of any resulting agreement to available appropriated funds. On December 17, 2009, the College responded that "the college – like the city – is facing serious budgetary pressures." The College made no commitment, but rather suggested the possibility of offsetting any contribution by the College against acquisition of easement costs. See Exhibit E, (A 19).

As of November of 2010, controversy over the cost, financing and configuration of the project still prevented the City from initiating the project with the required super-majority. Unable to convince the few abutting private landowners like Anda and Martin to petition for a special assessment project, the City devised a plan to move forward with special assessments by treating the State of Minnesota itself as a special assessment

petitioner. As part of this plan, the City would treat the Community College lands as if it were in the special assessment area and accept the College President's petition for a Chapter 429 special assessment project as if the State of Minnesota were an assessed landowner. Since the State owned more than 35% of the land adjoining the project, the City decided that it would approve the project using special assessments for its local share with only a bare majority of the Council approving.

On November 15, 2010, the President of the College presented the City with a petition. As of November 15, 2010, the City and the College had no binding agreement assuring that the College would contribute to project costs, nor had the College and City agreed on the configuration of the improvements themselves<sup>5</sup>. Nonetheless, the Council decided to treat the College lands as within the special assessment area, approved the petition, and without a 4/5 majority of the Council, commenced the College Drive project as a special assessment project under Minnesota Statutes Chapter 429 on the strength of the College's signature alone. Anda and Martin appealed from the City's decision under Minnesota Statutes Section 429.036, which grants landowners within the proposed assessment area the opportunity to challenge the sufficiency of the special assessment

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<sup>5</sup> Minnesota Statutes Section 435.19 creates a procedure whereby a City can ask the State to make a contribution in an amount that the property "would have been assessed," if owned by a private property owner. The City did not follow the statutory procedure that allows it to initiate that request. See Minn. Stat. § 435.19 subd. 2.

petition in a special appeal to the District Court. Cf. Nastrom v. City of Blaine, 498 N.W.2d 49 (Minn. App. 1993).

In the meantime, the City commenced quick-take condemnation proceedings against Anda and Martin's property. Anda and Martin challenged the quick-take, arguing that the City had initiated the project in violation of Section 429 subdivision 1(f), but the District Court ruled that it need not decide whether the City had complied with Chapter 429, because the City had the right to take their property, whether it had commenced the project lawfully or not. (Anda's appeal from that decision in Civil Number A11-644 was consolidated with this appeal, but in the view of the Court of Appeals, rendered moot by the Court's decision that Brainerd had complied with Chapter 429).

In the District Court, Anda and Martin argued that since 1936, the language now found in section 429.031, subdivision 1(f) has consistently been interpreted to exclude public lands from petitioning to initiate a municipal improvement project funded by special assessments, because the petition process was designed to erect a procedural barrier to special assessments opposed by the citizens who must bear the costs of that project. Anda and Martin contended that when the 1953 legislature enacted the new public improvements code in Chapter 429<sup>6</sup>, it intentionally incorporated language from

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<sup>6</sup> Prior to 1953, two sets of disparate public improvement provisions for smaller cities and towns had been codified into Chapter 429 and Chapter 412. Both were subsequently repealed and replaced, as explained below. When discussing the legislative history, we refer to the pre-1953 Chapter 429 as "old Chapter 429."

Section 1815 (419, G.S. 1923, § 1815), knowing that this language had been interpreted by the Attorney General as barring public petition signers. See Op. Att’y. Gen., No. 56, 133 (June 30, 1936) (A 6-8). The City’s answer claimed that the City could treat the State of Minnesota as a special assessment petitioner because it supposedly had an agreement with the State to pay an assessment. But when Anda and Martin made a formal data request to the State for a copy of that agreement, it turned out that no such agreement existed<sup>7</sup>. In the District Court appeal from the City’s ruling on the petition, both parties filed cross-motions for summary judgment. The City brought forward a contribution agreement signed in March of 2011, four months after the City accepted the petition, and argued that this agreement retroactively validated the City’s petition. Anda and Martin argued that the Attorney General had interpreted the Statute to bar public petitioners, whether or not they agreed to contribute to the project. Anda and Martin further argued that the State’s agreement to contribute part of its condemnation award to the project merely evidenced the State’s belief that the regional transportation project was in the public interest. See Op. Att’y. Gen., 408-c (Oct. 28, 1954) (City of Hutchinson) (A 14-15).

On July 21, District Court Judge Askegaard granted the City’s motion for summary judgment finding that the State of Minnesota may petition for local special assessments.

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<sup>7</sup> The City’s evidence that there is an agreement is an agreement signed by the City and the College months after the petition was accepted by the City.

The District Court recognized that the Attorney General had three times interpreted Chapter 429 and its predecessor statutes as excluding public entities as assessed landowners for petition purposes. However, the District Court found that the statute unambiguously provides that the State is an “owner” and consequently those opinions would not be entitled to weight in construing the statute. Anda and Martin then appealed to the Minnesota Court of Appeals.

The Minnesota Court of Appeals tracked the approach taken by the District Court, focusing on the word owner. “The goals of statutory interpretation,” the Court explained, are to “ascertain and effectuate the intention of the legislature.” City of Brainerd v. Brainerd Inves. P’ship, 812 N.W.2d 885 (Minn. Ct. App. 2012) (quoting Minn. Stat. § 645.16 (2010)). In doing so, we construe words and phrases according to their plain and ordinary meaning.” The Court recognized that Anda and Martin relied upon three Attorney General Opinions, but rejected those interpretations because “they conflict with the plain language of the statute.” The Court continued:

Without a statutory definition, the word “owner” is construed according to the rules of grammar and according to its “common and approved usage.” Minn. Stat. § 645.08(1) (emphasis added). The common definition of the word “owner” is “[o]ne who has the right to possess, use, and convey something.” Black’s Law Dictionary 1214 (9th ed. 2009). It is undisputed that CLC is the record owner of at least 35% of the real property frontage abutting College Drive. Therefore, under the plain language of chapter 429, CLC is an “owner” for purposes of the “35 percent owner rule.”

The Court acknowledged that “appellants’ argument makes sense in light of the current statutory framework that appears to grant the state wide discretion to determine if, and

how much, it should be assessed. This statutory framework could lend the appearance of unfairness.” However, it said, in this particular circumstance, appellants had not shown that the amount that the State had agreed to pay was not unfair. Relying on the City-State agreement generated long after the petition had been accepted by the City, the Court found,

there is nothing in the record to indicate that CLC is “sticking it” to the private landowners who will be assessed for the project, or that CLC is getting “more bang for their buck.” Moreover, as an owner of property along College Drive, it is imperative that CLC has standing to look out for the health and welfare of its business and the people associated with the business.

Since Brainerd had a valid petition, the argument that unlawful commencement of a municipal improvement project now became moot.

### **III. SUMMARY OF THE ARGUMENT**

Appellants contend that the approach to statutory construction in the Courts below involved an unduly narrow attempt to focus on a single word, “owner”, without considering its context and the statutory purpose. This Court has often stated that it is an unsafe way of construing a statute to divide it by a process of etymological dissection into separate words, then apply to each thus separated from its context some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. International Trust Co. v. American L. & T. Co., 62 Minn. 501, 65 N.W. 78 (1895); Mattson v. Flynn, 216 Minn. 354, 13 N.W.2d 11 (1944) . Legislative interpretation ultimately seeks to determine what the legislature intended to accomplish,

and this requires the Court “to look beyond mere words and inquire into the operation of the statute”. State ex rel. Hansen v. Walsh, 188 Minn. 412, 247 N.W. 523 (1933). A literal construction is not to be adopted contrary to the general policy and object of the statute. United States v. American Trucking Assn., 310 U.S. 534 (1940).

Minnesota Statutes Chapter 429 provides a mechanism for initiating special assessment improvement projects that is mandatory for any municipal project that will be financed in whole or in part by special assessments. Minn. Stat. § 429.021, subd. 3<sup>8</sup>. See Metro. Airports Comm'ns v. Bearman, 716 N.W.2d at 405 (2006). The language requiring a petition signed by 35% of abutting owners comes to us directly from a ninety-year-old Minnesota statute, a provision designed to prevent local government from being tempted to shift the costs of a project of general public benefit onto individual landowners who happen to live near the public improvement. League of Minnesota Cities, Special Assessment Guide, 10 (May 2010) (“The availability of special assessment financing often tempts city officials to underwrite the cost of governmental programs that should be an obligation of the entire city.”) (A 1-5).

Part IV-A of this Brief tracks the history of the language governing the petition requirement ultimately inserted into section 429.031 subdivision 1(f) when the legislature adopted a new municipal improvement code, which we call “new Chapter 429”. New

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<sup>8</sup> An exception applies in the event that a home rule charter city elects to utilize special assessment procedures found in the City Charter, but that exception does not apply here, for Brainerd chose to utilize Chapter 429 procedures.

Chapter 429 was the product of a task force composed of municipal law experts commissioned to develop one comprehensive municipal improvement code in place of the multiple codes that existed at that time. These experts most certainly would have been aware of the Attorney General's 1936 interpretation of section 1815. The task force and legislature adopted that language, without substantial change in the New Chapter 429. The incorporation of this language was designed to incorporate existing practice and existing interpretation of the statute, i.e., that it is not the word "owner" alone that must be interpreted, but the entire sentence as it has been used in Minnesota municipal improvement law.

Shortly after the legislature adopted new Chapter 429, the Attorney General again ruled that neither State nor City lands could be counted in computing the 35% requirement under Chapter 429. Since that time, the League of Minnesota Cities, a participant in the original drafting process, has instructed its member cities that public lands do not count towards the petition requirement. League of Minnesota Cities, Special Assessment Guide, page 16, (A 5). Moreover, when the legislature amended Chapter 429 to assure notice to impacted landowners, the notice requirement was targeted to owners of property within the area proposed to be assessed, further suggesting that the legislature was comfortable with the Attorney General's opinion. See Minn. Stat. § 429.031, subd. 1(a).

The City has contended that the Attorney General's opinions should be disregarded because allegedly the statutory language is clear. That contention flies in the face of the fact that each time the Attorney General has faced this precise issue, he has read the statute exactly the opposite way the City does. This statute has never been interpreted in the way that the City proposes, not by the Attorney General, not by the Courts, and not by the primary legal advisor to Minnesota cities, the League of Minnesota Cities.

The Court of Appeals' contention that the word "owner" clearly applies to all owners, whether public or private, leads to an array of interpretive difficulties. The federal government is an owner under this interpretation; this interpretation would lead to the absurd conclusion that the federal government could use federal lands to facilitate a petition, and then assert sovereign immunity as a defense to the assessment.

Alternatively, the federal government could stymie the use of assessments to fund necessary improvements abutting federal lands or buildings by refusing to sign a petition. Under the Court of Appeals' interpretation, a City could define the limits of a public improvement in a way that treats the adjoining municipal right of way or parkway as abutting property, and then use that land to petition the project. The logic of the Attorney General's 1936 opinion and subsequent interpretations is that the legislature plainly intended the petition requirement as a mechanism to allow assessed property owners a voice in whether they will be forced to pay for projects, absent a statutory super majority.

The City also contends that acceptance of the State's petition in November 2010 is retroactively validated by an assessment agreement entered into by the State in March of 2011. That position is untenable for several reasons. The Attorney General opinions make it clear that the State's voluntary agreement to make contributions in lieu of assessment is insufficient to convert it into a petitioner. The rationale for refusing to count the State is not a mere technicality. It is founded on the core function of the statute, which is to serve as a protection against abuse of the special assessment power by Councils that might otherwise be tempted to shift costs which are of a general public nature onto a few landowners like Anda and Martin. That purpose is not served when the State, as representative of the general public, decides to support a project that serves a generalized state transportation purpose.

The City argues that the logic of the Attorney General's opinions has been undermined by passage of an amendment to Minnesota Statutes section 435.19 clarifying the mechanism by which the State can agree to pay assessments. We disagree. That statute does not allow special assessments against lands of the state. On the contrary, it authorizes the City to request the State to make a contribution in an amount equivalent to the assessment that would be levied, and it specifically provides that the State agency can decide whether and how much to pay. At the time this legislation was passed, the Attorney General had ruled that a voluntary payment by the State would not convert the State into a proper petitioner. Passage of legislation to facilitate voluntary payments

would thus not be a sufficient indication that the legislature intended to disapprove the Attorney General's interpretation. Indeed, the legislature's failure specifically to amend Chapter 429 can be regarded as powerful evidence that the legislature intended to retain and confirm the Attorney General's position.

#### IV. ARGUMENT

##### A. **The 1953 Legislature Signified its Adoption of the Attorney General's Interpretation by Incorporating the Same Language Barring Assessments by Public Entities into New Chapter 429**

The language governing petitions for commencement of municipal improvements funded by special improvements comes to us directly from old Minnesota Statutes Section 1815, one of two such statutes passed in the 1920's. See Borgerding v. Freeport, 166 Minn. 202 (Minn. 1926). See 1929 Minn. Stat. § 1815 (35% petition requirement); Laws 1925, p. 512, c. 382 (51% petition requirement)<sup>10</sup>. These petition requirements had two primary purposes. First, they sought to prevent local government from carelessly obligating local government to major public improvements, without surmounting

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<sup>9</sup> Section 1815 was amended in 1926 to increase the percentage of owners from 25 to 35%. Laws 1927, Chapter 185, section 1.

<sup>10</sup> These older statutes have a complex codification history. See Laws 1949 Section 412.411 (Village Code-35%) and Laws 1949 Section 429.03 (51%, supplanted by 1953 recodification). In the 1920's, municipal law had provisions governing Villages (Sections 1111-1264-5), Cities (Sections 1265-1310), Provisions Relating to Cities of First Class, (Sections 1392-1030-2), Provisions Relating to Cities of Second Class, (Sections 1631-1664-42), Provisions Relating to Cities of Third Class, (Sections 1665-1716), and Provisions Relating to Cities of Fourth Class (Sections 1717-1828-99) and a set of Provisions Relating to Cities, Villages, Boroughs and Towns, §§ 1829-1933-22.

obstacles designed to promote caution. Second, they sought to resist the temptation to fund public projects of a general nature by shifting costs which should be funded out of the general fund onto a small group of landowners lacking clout. This latter goal imposes a procedural barrier against the use of special assessments as an evasion of the constitutional uniformity of taxation requirement.

The Attorney General first opined that Minnesota Statutes Section 1815 barred a public entity from petitioning for a special assessment in 1936. Op. Atty. Gen., No. 56, 133 (June 30, 1936), (A 6-8). The occasion was a request from the City of New Ulm, which had received a street-improvement petition from 60% of the private landowners, all located on the southerly side of German Street, to tar, curb and gutter 6 blocks of German Street. The northerly side of German Street was owned by the City for park purposes. The City Attorney recognized that the petition would be inadequate (30% of the front footage), if the City's property were counted. The City Attorney sought an opinion on whether the property should be counted<sup>11</sup> in calculating the amount of land required to be represented by petition, and if so, whether the City could sign the petition<sup>12</sup>. The Attorney

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<sup>11</sup> "In determining whether said petition has been signed by the required 35%, under the one section, or the required 51% under the other, of the owners of abutting property, is the park property owned by the city to be considered as part of the abutting property?"

<sup>12</sup> "Is the City of New Ulm, as owner of said park property, entitled to sign and join in said petition for the improvement of said street?"

General reviewed both statutes referred to in the Borgerding case, cited above. The 35% statute, which survives in today's section 429.031 subdivision 1(f) stated:

In any city of the fourth class \* \* \* the council shall have power to improve any street, \* \* when petitioned for by the owners of not less than thirty-five per cent (35%) in frontage of the real property abutting on such street . . . .  
Mason's Minnesota Statutes of 1927, Section 1815 (1927)<sup>13</sup>.

The second statute, which ultimately found its way into old (pre-1953) Chapter 429 stated:

Before the council shall take any proceedings in reference to the making of any such improvement, a petition that an improvement be made shall be signed by the owners of at least 51 % in frontage of the real property abutting the parts of the street or streets named in the petition<sup>14</sup> \* \* \* .  
Mason's Minnesota Statutes of 1927, Section 1918-17 (1927).

The Attorney General explained that the word "owner" had to be interpreted in the context of the entire statute:

It would seem, therefore, that the answers to your questions devolve on whether the city of New Ulm is the "owner" of such abutting property within the contemplation of the above referred to statutory provisions. In other words, if the city is to be deemed an "owner" of such abutting property within the meaning of said statutory provisions, it necessarily follows that the city is entitled to sign and join in said petition-otherwise not. It would seem to also follow that if the city is an "owner" within the language above quoted that the property owned by the city and used for

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<sup>13</sup> In 1936, this language was located in the portion of Minnesota Statutes governing Cities of the Fourth Class. This language ultimately was moved into the Village Code developed in 1949. Laws 1949, Chapter 119 section 51, see below, and then adopted as the petition requirements for all municipalities in new Chapter 429.

<sup>14</sup> In 1936, this language was located in that part of Minnesota Statutes governing Cities, Villages, Boroughs and Towns. It was ultimately codified into old Chapter 429, Minnesota Statutes §429.03 (1949), and then repealed.

such park purposes should be considered a part of the frontage of the real property abutting on the street named in the petition.

The Attorney General's opinion recognized that New Ulm had the authority to make a payment towards the project in such amounts as it deemed appropriate to cover the portion not paid for by assessments, or in recognition of the benefit received by its own property:

We also assume that the tract of land owned by the city and used for park purposes will not be subject to special assessments levied for the purpose of paying a portion of the cost of such improvement, but that the city will pay its proportionate share of such cost from city funds provided for such purpose as contemplated by the provisions of Sections 1816 and 1918-22 of the statutes.

Notwithstanding the City's willingness to make a general fund contribution to the project, the Attorney General opined that allowing a public entity to sign the petition would undermine the purpose of the statute:

[T]here is considerable force in the contention of appellant that public policy should deny the city the right to petition itself to carry on the work of public improvement; that the right to petition should be confined to the individual taxpayer who bears the greater part of the burden imposed by the special assessment. Herman v. City of Omaha, 106 N. W. 693 (Nebr. 1906). (Emphasis added).

The Attorney General quoted an opinion issued by the Utah Supreme Court, which stated:

So far as proceeding with the improvement or assisting in acquiring jurisdiction are concerned, we have been unable to find any case where public property situated within the confines of a local improvement district has been permitted to affect the result, either one way or the other; and we think that the establishment of such a rule would not only be wrong in principle and wrong in theory, but it would also be contrary to the spirit and

intention of the statutes providing for special improvement assessments."  
Armstrong v. Ogden, 12 Utah 476, 43 Pac. 119. (Emphasis added).

The fact that a public body not subject to assessment could make a contribution to the cost of the improvement did not change the result. The Minnesota Attorney General explained:

Applying the rules of law laid down in the above referred to cases to the questions submitted in your inquiry, we are impelled to the conclusion that both of your questions should be answered in the negative. In other words, the city is not an "owner" of such abutting park property within the meaning of the above quoted statutory provisions and such park property should be excluded by the city authorities in determining the sufficiency of the petition.

The Court of Appeals wrongly dismissed the municipal opinions of the Attorney General as unimportant to its inquiry. Attorney General's opinions play a special role in municipal governance. A review of annotated municipal statutes a half-century ago and even now, shows that the vast majority of interpretation of municipal law historically derived from the municipal opinions office of the Attorney General. Attorney General's opinions permeate the annotations to Chapter 429, and many other local government statutes, because the procedures regarding municipal improvements are fraught with interstitial questions that require interpretative practical solutions. Administrative law solves this problem for state agencies by granting them statewide interpretative powers, by conferring the power to craft regulations, and by affording great weight to agency expertise. Other than the Attorney General's opinions, there exists no administrative body with authority to issue those interpretations in a body of regulations. In the day-to-

day practice of local government law, these opinions are regularly relied upon and followed by the municipal bar as the sole reliable source of interpretation, short of litigation, available uniformly to all municipalities. They allow city attorneys to apply municipal legislation consistently, as opposed to applying them situationally and differently from city to city. This ability to rely upon Attorney General guidance on doubtful questions is an important device to instill confidence in municipal clients and the public that the law is being fairly applied.

Current section 429.031 subdivision 1(f) results from a transplantation of the section 1815 language into old Chapter 412 and eventually into new Chapter 429. The period from 1940 to 1953 witnessed a series of efforts to recodify and simplify the diverse procedures available to different classes of local government, but the language interpreted by the Attorney General was preserved throughout. In 1949, the legislature completely repealed the former Village Code, Chapter 412, (see Laws 1949 Chapter 119 section 110) and supplanted it with a new Village Code, borrowing extensively from other previously existing statutes<sup>15</sup>. New Village Code section 412.411 became the provision governing “preliminary plans; estimated cost; hearings on petition” for public improvements and adopted wholesale the 35% petition requirement previously interpreted by the Attorney General his 1936 New Ulm opinion as excluding petitions by

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<sup>15</sup> This period witnessed significant activity at the legislature to recodify, simplify and reorganize a number of statutory codes.

the public<sup>16</sup>. But the legislature added to that language a new sentence granting the Council an escape valve in the event that petitioners could not be found, allowing the council to approve public improvements funded by special assessments upon a 4/5 vote<sup>17</sup>. In the meantime, the other language described in the 1936 opinion – requiring a 51-percent-property-owner petition had found its way into old Chapter 429. 1949 Minn. Stat. § 429.03.

In 1953, the legislature consolidated all of the various local improvement sections into one comprehensive Chapter 429, (repealing old Chapter 429 which dealt only with villages, boroughs and cities of the fourth class). Laws Minnesota 1953 Chapter 398. The process of consolidation required a comprehensive review of the various provisions governing municipal improvements. The legislation was

drafted by a committee of experts in municipal law and finance, and endorsed for passage by the League of Minnesota Municipalities, [and] provides a simpler procedure and answers more questions than any of the previous improvement-assessment statutes, with the exception of the local improvement sections of the Village Code, from which the new law mainly derives. It is also an advantage to have but one uniform procedure for all city and village improvements. To municipal officers and attorneys, it means having to be familiar with only one statute instead of several; and to

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<sup>16</sup> “The hearing may be adjourned from time to time and a resolution ordering the improvement may be adopted at any time within six months after the date of the hearing by the council by a majority vote of all its members when the improvement has been petitioned for by the owners of not less than 35 per cent in frontage of the real property abutting on the street, alley, or part of the street or alley, which may be named in the petition as the location of the improvement.” Laws 1949 Chapter 119, section 51.

<sup>17</sup> “In every case where there has been no such petition the resolution may be adopted only by a vote of four-fifths of all the members of the council.”

bond dealers and investors, it means absence of doubt as to the nature of the obligation of municipal improvement bonds. 38 Minn. L Rev 582, supra at 583.

The committee of experts surely would have been aware of the Attorney General's interpretation, for it would have appeared in annotated versions of the statute and the rule would have been embodied in existing practice. The Minnesota League of Cities was involved in the drafting, and if the drafting committee regarded the Attorney General's opinion as inappropriate, the statutory language could have been changed in a way that signified clearly that the legislature was overriding existing practice. Instead, new Chapter 429, section 429.031, incorporated the very language interpreted by the Attorney General's opinion. Laws Minnesota 1953 Chapter 398 Section 3. The abutting owner language adopted by the newly consolidated Chapter 429 is the same as the language in the current statute, supplemented by the 4/5 super-majority which had been inserted in the Village Code in 1949.

**B. Post-1953 Attorney General Opinions Confirm that Public Entities Should Not be Counted in Petition Requirements**

Perhaps because of the comprehensive consolidation of the municipal improvement provisions, shortly after passage of the New Chapter 429, the legal representatives of two municipalities sought the Attorney General's opinions regarding whether the previous opinion would remain in effect. In 1954, the City of Hastings wrote the Attorney General to find out if the same interpretation would be imposed on substantially the same language in Chapter 429. Minn. Att'y. Gen. Op., No. 387-B-10

(June 29, 1954); (A 9-13). The City of Hastings wanted to construct a sanitary sewer abutting a municipal park. If the city were considered an owner abutting the improvement, then the city could sign the petition, and a 4/5 vote would not be necessary to authorize the improvement. The Attorney General ruled that new Chapter 429 was intended to preserve the previous Attorney General's opinion. The legislative language was the same as in 1936, the Attorney General explained:

The pertinent portion of MSA 429.031 is this: Subdivision 1. . . a resolution ordering the improvement may be adopted. . . by vote of a majority of all members of the council when the improvement has been petitioned for by owners of not less than 35 percent in frontage of the real property abutting on each street named in the petition as the location of the improvement. When there has been no such petition, the resolution may be adopted only by vote of four-fifths of all members of the council." Op. Att'y. Gen., 387-B-10 (June 29, 1954) (A 9-13) (emphasis added).

The issue was whether the new statute should be read to preserve the same meaning as the old, and the Attorney General ruled that it did.

The portions of M.S. 1949 Section 429.03<sup>18</sup> involved in the opinions mentioned read that "a petition that an improvement be made shall be signed by the owners of at least 51 per cent in frontage of the real property abutting on the parts of the street or streets named in the petition as the location of an improvement for." In his [1936] opinion, the then Attorney General ruled that a city owning a city park property abutting upon the street named as the location for the improvement was not an "owner" within the requirements of section 3. . . and that, accordingly, such city park property should be excluded in determining the sufficiency of the petition thereunder. . . . Upon its authority, your first question is answered in the negative.

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<sup>18</sup> See also Minnesota Statutes 412.411 (35% petition and 4/5 majority).

As in the previous opinion, the Attorney General specifically noted that the City had authority to voluntarily make contributions towards the cost of the improvement from ad valorem tax levies towards the improvement, but he opined nonetheless that the 4/5 provision applied.

On October 28, 1954, the City of Hutchinson directly queried whether a voluntary agreement by a state instrumentality towards a special assessment project would allow Hutchinson to count state lands towards the petition requirement. The Attorney General opined that it could not be counted, even if the State were willing to make voluntary payments in lieu of assessment. Op. Att’y. Gen., 408-c (Oct. 28, 1954) (A 14-15). The Hutchinson opinion confirmed that prior Attorney Generals’ opinions were applicable to the State of Minnesota, stating “it is my opinion that it [the State] is not an “owner” within the requirements of 429.031 supra and that neither it as an owner nor its property could be considered in determining the ‘owners of not less than 35 percent in frontage of the real property abutting’ petitioning for or in favor of the improvement.” Op. Att’y. Gen., 387-B-10 (June 29, 1954), (A 14-15)

**C. Sound Principles of Statutory Construction Counsel that the Consistent Interpretation of the Local Improvements Petition Requirement be Maintained**

When a Court construes statutory language, it seeks to give effect to clear and unambiguous language, but that determination is not to be conducted in a vacuum, devoid of the application of reason. A statute is ambiguous when the language therein is subject

to more than one reasonable interpretation. Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000) (citation and quotation omitted). A statute should be interpreted, whenever possible, to give effect to all of its provisions; “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” Id. (quoting Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999)). And the Courts have said, “[w]e are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” Id.; see also Minn. Stat. §§ 645.01-.51; Harris v. County of Hennepin, 679 N.W.2d 728 (Minn. 2004). In other words, the interpretation is done in context. The Court will look to other sections of the law and our canons of statutory construction to determine the intent of the legislature. The Court may examine, among other considerations, the “occasion and necessity for the law” and “the circumstances under which it was enacted.” Minn. Stat. § 645.16 (2002). The Court may also look to the state of the law before a statute was enacted. Id. In doing so, the Court must attempt to read statutes in a way that gives effect to all their provisions. Id. Statutes should be read as a whole with other statutes that address the same subject. See State v. Chambers, 589 N.W.2d 466, 480 (Minn.1999).

Pulling the word “owner” out of the statute, and construing its meaning in isolation from the purpose of the statute is not consistent with sound principles of statutory construction. This Court has often stated that it is an unsafe way of construing a statute to divide it by a process of etymological dissection into separate words, apply to each thus

separated from its context some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. International Trust Co. v. American L. & T. Co., 62 Minn. 501, 65 N.W. 78; Mattson v. Flynn, 216 Minn. 354, 13 N.W. (2d) 11 (1944). Legislative interpretation ultimately seeks to determine what the legislature intended to accomplish, and this requires the Court “to look beyond mere words and inquire into the operation of the statute”. State ex rel. Hansen v. Walsh, 188 Minn. 412, 247 N.W. 523. A literal construction is not to be adopted contrary to the general policy and object of the statute. United States v. American Trucking Assn., 310 U.S. 534 (1940).

The problem with the term “owner” is not that the state does not own its property. The Attorney Generals’ opinions never suggested that the State or the City itself is not an owner of property in the vicinity of the improvement. The Attorney Generals’ rationale has been that the property that the State (or City) owns is not the property that Chapter 429 grants the power to assess, and consequently, the State does not own property that is countable in the assessment project. When the legislature uses generic terms like “owner” and “person,” it cannot be presumed that the legislature intends those terms to encompass the State itself. On the contrary, in the absence of express and clear language, it is reasonable to conclude that generic non-specific statutory language does not encompass the State of Minnesota. See Dicks v. Minnesota Department of Administration, 627

N.W.2d 334 (Minn. App. 2001); Minn. Stat. § 654.27 (state not bound by passage of a law unless named therein).

The addition of subdivision 3 to section 429.031 similarly reinforces the persistence of the Attorney General's 1936 and 1943 positions. Under that subdivision, "whenever all owners of real property abutting upon any street named as the location of any improvement shall petition the council to construct the improvement and to assess the entire cost against their property, the Council may order the improvement without convening a hearing." If the word owners was meant unambiguously to extend to all owners, including State, City, and Federal Government, it would mean that the statute purports to authorize assessments against all of these entities, despite the existence of sovereign immunity.

Finally, the focus on the word owner, in isolation, ignores the way in which the blue ribbon task force and legislature adopted section 429.031. They did not pull the word "owner" out of the existing municipal improvements statute, they adopted wholesale the petition language that had already been construed by the Attorney General. That entire sentence as used by the municipal bar was understood to require petition by property owners subject to assessment. It is hard to imagine that the drafting committee would have utilized that language if they had intended to reverse existing practice. When the legislature incorporates existing statutory language, it presumptively intends to

incorporate that existing interpretation of that language. See Lorillard v. Pons, 434 U.S. 575 (1978); Appeal of Van Dyke, 217 Wis. 528, 259 N.W. 700 (Wis. 1935).

**D. The State's March 2011 Agreement Under Section 435.19 Does Not Retroactively Validate the College's November 2010 Petition**

The City responded to our appeal by contending that its March 2011 agreement somehow retroactively validated the November 2010 petition. This view of the petition process is unworkable and destroys the evident purpose of the petition process in the first place. At the time that the City accepted the petition, the State had not entered into an agreement with the City. In fact, it had made it clear to the City that its budget was extremely tight and that it might well be unwilling to make any cash contribution to the project. It retained the right under section 435.19 to disapprove any assessment determination by the City, and the City had not held the statutory hearing required to establish a proposed State payment in lieu. Thus, to the extent that the City is relying on the State's later agreement, it is opening the door to a kind of laundered petition, in which the State facilitates the City's need to obtain project approval without a 4/5 Council vote, but reserves the right to refuse to pay the amount of special benefit adjudicated by the City. The Court of Appeals recognized the problem with this approach, but suggested that an exception might be made because Anda and Martin did not present evidence that the City had arrived at an unfair agreement.

This approach is rife with problems. In the first place, the procedure for judicial review involves a review of the adequacy of the petition at the time presented to the City

Council. The Court of Appeals' reliance on a subsequent agreement is inconsistent with judicial review of the record of decision as it existed at the time that the decision was made. Second, the suggestion that any problems can be cured by an agreement in lieu of assessment is fundamentally inconsistent with the foundation of the Court of Appeals' decision. The Court decided that any owner of land, whether assessed or not, was unambiguously a proper petitioner. Once one goes down the road of analyzing whether the State has fairly compensated the City, one is essentially admitting that the statute does not mean that all owners can petition, and in that event, one must apply the statutory construction tools that the Court of Appeals refused to apply.

Third, the State's reservation of the right to determine the amount that it believes is fair is not consistent with a true special assessment. Special assessments are an exercise of the taxation power authorized by Article 1, Section 10 of the Minnesota Constitution<sup>19</sup>. The Constitution limits the legislature's delegation of the special assessment power to municipal corporations and municipal corporations lack the power to impose their will on the superior sovereign. Municipalities lack the power to levy an assessment against State lands, and they lack the power to determine the amount that the State must pay.

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<sup>19</sup> The relevant portion reads: "The legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefitted thereby without regard to cash valuation. The legislature by law may define or limit the property exempt under this section other than churches, houses of worship, and property solely used for educational purposes by academies, colleges, universities and seminaries of learning."

Unlike the voluntary payment involved here, special assessments are in rem levies against property based upon the increment in property value resulting from the improvement based upon the highest and best use of the property. Holden v. City of Eagan, 393 N.W.2d 526 (Minn. App. 1986). The amount of a special assessment is a legislative decision, made at a public hearing, and subject to the requirement that assessments, like other exercises of the taxation power, must be uniform on the same class of property. David E. McNally Dev. Corp. v. City of Winona, 686 N.W.2d 553, 556 (Minn. Ct. App. 2004). When errors of assessment infect all properties, or sustain a claim of unequal treatment, the Court may order a reassessment of all properties. Id. All property owners have a stake in the fair and equitable assessments of all other properties subject to assessment because true assessments are an exercise of the constitutional taxation power, subject to uniformity considerations. The logic of the Attorney General's opinions are as valid today as they were when written. If municipalities genuinely believe counting the State of Minnesota toward the petition requirement in all cases (whether for or against) is prudent public policy, they should go to the legislature and seek an amendment to Chapter 429.

**E. The State's Need to Assure A Safe Transportation Access to a MnSCU Community College is Not Grounds for Treating it as a Petitioning Property Owner**

The Court of Appeals felt that granting the State of Minnesota the right to petition for public improvements was prudent, because otherwise, the State would have no

“standing” to implement its need to encourage a safe transportation system. With respect, this argument garbles the distinction between the process by which public infrastructure serving the general public is approved and funded, as opposed to public infrastructure that is funded by special assessment. A great deal of municipal and state infrastructure is approved, constructed and funded without the use of special assessments. This particular project was a regional project designed to carry regional traffic to a growing commercial hub. When a project serves a broad public purpose, as this does, the democratic process, state and local, determines whether to allocate public funds better to serve shopping centers, universities, and the regional traveling public. The problem here was that the duly elected representatives on the Brainerd City Council refused to use general funds deriving from the taxpayers at large to expand this transportation artery. They made a considered decision that the combination of arguments for this project - the University’s interest in improved safety, the need for improved regional access to the City’s commercial centers, and all the rest - did not justify the use of public general funds. It does not solve this problem – the refusal to allocate general funds – by granting to the State a device to shift those public costs onto a couple of apartment owners.

Special assessments are justified only when a project confers a special local benefit, and only when that special local benefit increases the market value of property specially benefitted. The State of Minnesota is not primarily an economic actor. It does not operate its university system to maximize the value of its buildings. Its mission

statement is to foster education of the general public. When the State decides to allocate some of its resources to a transportation project, it need not be motivated by the incremental improvement in its property. And obtaining the State's signature on the petition does not serve the statutory purpose, which is to create an initial procedural barrier against the abuse of the taxation power and to prevent the shifting of public costs onto a few unlucky citizens who happen to own property near a regional transportation project.

## V. CONCLUSION

The Court of Appeals decision approving the content of the Petition as meeting the requirements of section 429.031 subdivision 1(f) should be reversed. If reversed, the issue regarding validity of the condemnation is no longer moot, and so the case should be remanded to the Court of Appeals for decision.

Date: July 27, 2012

Respectfully Submitted,

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