

Nos. A11-644 and A11-1471

State of Minnesota
In Supreme Court

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

v.

City of Brainerd,

Respondent.

RESPONDENT'S BRIEF, ADDENDUM AND APPENDIX

Gerald W. Von Korff (#113232)
RINKE-NOONAN
1015 West St. Gemain Street
Suite 300
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

Attorney for Appellants

George C. Hoff (#45846)
Justin L. Templin (#0305807)
HOFF, BARRY & KOZAR, P.A.
160 Flagship Corporate Center
775 Prairie Center Drive
Eden Prairie, MN 55344
(952) 941-9220

Attorneys for Respondent

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	3
RELEVANT STATUTES.....	7
STANDARD OF REVIEW	10
ARGUMENT	10
I. Central Lakes College is the “owner” of over thirty-five percent of the real property abutting the Project.....	11
II. Appellants ignore the statute’s plain meaning, relying instead on antiquated attorney general opinions	15
III. Central Lakes College has agreed to pay its proportional share of the special assessment.....	20
CONCLUSION	24
CERTIFICATE OF COMPLIANCE	25

TABLE OF AUTHORITIES

Cases

<u>Billigmeier v. Hennepin County,</u> 428 N.W.2d 79 (Minn. 1988)	17, 19
<u>City of Granite Falls v. Soo Line R. Co.,</u> 742 N.W.2d 690 (Minn. Ct. App. 2008)	17, 19
<u>Dicks v. Minn. Dept. of Admin.,</u> 627 N.W.2d 334 (Minn. 2001)	14, 15
<u>Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n,</u> 358 N.W.2d 639 (Minn. 1984)	10
<u>Hyatt v. Anoka Police Dept’,</u> 691 N.W.2d 824 (Minn. 2005)	12
<u>International Trust Co. v. Am. Loan & Trust Co.,</u> 65 N.W. 78 (Minn. 1895)	13, 14
<u>Krummenacher v. City of Minnetonka,</u> 783 N.W.2d 721 (Minn. 2010)	passim
<u>Lenz v. Coon Creek Watershed Dist.,</u> 153 N.W.2d 209 (Minn. 1967)	11
<u>Lorillard v. Pons,</u> 434 U.S. 575 (1978)	20
<u>Mattson v. Flynn,</u> 13 N.W.2d 11 (Minn. 1944)	13, 14
<u>Phelps v. Commonwealth Land Title Ins. Co.,</u> 537 N.W.2d 271 (Minn.1995)	12
<u>Rowell v. Bd. of Adjustment of Moorhead,</u> 446 N.W.2d 917 (Minn. Ct. App. 1989)	15, 16
<u>Star Tribune Co. v. Univ. of Minn. Bd. of Regents,</u> 683 N.W.2d 274 (Minn. 2004)	16
<u>State ex rel. Hansen v. Walsh,</u> 247 N.W. 523 (Minn. 1933)	14
<u>State v. Rat Portage Lumber Co.,</u> 115 N.W. 162 (Minn. 1908)	12
<u>State v. Thompson,</u> 754 N.W.2d 352 (Minn. 2008)	12

Statutes

Minn. Stat. § 117.042	1, 5
Minn. Stat. § 117.075	1
Minn. Stat. § 135A.131	22
Minn. Stat. § 136F.60	18
Minn. Stat. § 3.754	6
Minn. Stat. § 429.011	12

Minn. Stat. § 429.031	passim
Minn. Stat. § 429.035	4, 8
Minn. Stat. § 429.036	8
Minn. Stat. § 429.081	23
Minn. Stat. § 435.19	passim
Minn. Stat. § 462.357	15
Minn. Stat. § 645.08	9, 12
Minn. Stat. § 645.16	9, 11

Other Authorities

Black’s Law Dictionary (7th ed. 1999), 1130.....	12
Webster’s New World College Dictionary (4th ed. 2004), 1030.....	13

STATEMENT OF THE ISSUE

I. **Whether the State of Minnesota is an “owner” of property under the plain language of Minn. Stat. § 429.031.**

The District Court found in favor of the City on cross-motions for summary judgment in an order dated July 22, 2011. The Court of Appeals upheld that decision in an opinion issued April 2, 2012. The lower courts determined that, under the plain language of the statute, Central Lakes College (an instrumentality of the State) is the “owner” of more than thirty-five percent of the affected real property frontage of the project area. As a result, Central Lakes College’s petition for the public improvements is valid.

Most apposite authority:

Minn. Stat. § 429.031

Krummenacher v. City of Minnetonka, 783 N.W.2d 721 (Minn. 2010)

STATEMENT OF THE CASE

The parties to this appeal are involved in two separate cases originating in Crow Wing County District Court. Both were decided in the City’s favor.

Case No. A11-644 (the “Chapter 117 Case”), involved a challenge to the District Court’s Order granting an eminent domain petition and quick take filed by the City on March 17, 2011. See Add. 15-19. In that Order, the District Court found based on a hearing and the contents of the file that (1) the proposed taking is “necessary” and for a “lawful purpose;” and (2) the proceeding was duly authorized by the City Council and a Certified Copy of the Council’s Resolution is on file. The District Court’s Order appointed commissioners under Minn. Stat. § 117.075, set their first meeting and rate of compensation, and granted the City’s request for early possession of the various properties in accordance with the quick take provisions of Minn. Stat. § 117.042.

Appellants did not challenge that the properties are “necessary” to the project or that the

public improvements (roads and associated facilities) are a “lawful purpose.” Rather, Appellants sought to overturn the District Court’s March 17, 2011 Order based on the contention that the City did not have proper authority to commence eminent domain proceedings in this instance at all.

In Case No. A11-1471 (the “Chapter 429 Case”), Appellants challenged the City’s procedures for undertaking a special assessment to finance the City’s portion of a reconstruction and improvement project involving a segment of College Drive in the City. Appellants sought to reverse the City’s determination under Minn. Stat. § 429.031, subd. 1(f) that a petition for those public improvements, submitted by Central Lakes College as the owner of more than thirty-five percent of the affected real property frontage of that area, is valid. Appellants asserted that an instrumentality of the state was not an “owner” under the statute. The lower courts applied a plain meaning analysis to the statute and found that Central Lakes College was, in fact, the owner of more than thirty-five percent of the affected real property and that the City’s procedures (i.e. authorizing the special assessment by a vote of the majority of the City Council members) were lawful. By Order dated July 22, 2011, the District Court granted the City’s motion for summary judgment, denied Appellants’ motion for summary judgment, and dismissed Appellants’ claims in their entirety. See Add. 20-37. Judgment on that order was entered August 16, 2011. See R. Add. 1-2. Appellants filed an appeal the following day, August 17, 2011. See R. 116.

Also on August 17, 2011, Appellants sought to consolidate their second appeal, the Chapter 429 Case, with their original appeal of the District Court’s determination in

the Chapter 117 Case. By order filed September 8, 2011, the Court of Appeals granted that motion for purposes of oral argument and decision, but maintained separate briefing in the two cases. See R. Add. 3-5.

The Court of Appeals affirmed the District Court decision in the Chapter 429 Case in an opinion dated April 2, 2012. See Add. 1-14. The Court of Appeals noted that a decision in the Chapter 117 Case was rendered unnecessary by its decision. See Add. 14. This Court granted Appellant's Petition for Further Review on June 27, 2012.

STATEMENT OF THE FACTS

After consideration of alternatives for reconstruction of a portion of College Drive within the City, on February 2, 2009, the City chose from among several options ("Project"). See Affidavit of Justin Templin, March 28, 2011, R. 8-10. The Project involves the reconstruction of the College Drive corridor from the intersection of County State Aid Highway ("CSAH") 48 to the intersection of South 5th and Quince. See Id., R. 37. That portion of College Drive is presently configured as a two-lane road with a center turn lane. Following completion of the project, it will be a four-lane divided road with a center median. Additionally, the project will provide control features for key intersections, improve safety, include paths for pedestrian and bicycle access, and upgrade storm water systems, lighting, and landscaping in the immediate area. See Id.

Central Lakes College, a state institution, owns a substantial portion of the property in the Project area. By letter dated December 17, 2009, Central Lakes College indicated in response to an inquiry from the City that it "intends to pay the special assessments for the College Drive Project"—as it had done following previous public

infrastructure work relating to College Drive in 1986 (see Id., R.48-51)—but Central Lakes College first sought the “full financial picture of the impact of the project.” Id., R. 22. On September 15, 2010, the City Engineer completed a feasibility report for the Project, including a breakdown of proposed funding. Id., R. 40-41. The overall cost of the Project was estimated at \$6.9 million, including engineering, right of way, and construction costs. Id. The “Local Share” of those Project costs—to be repaid by special assessments—was estimated at \$621,200.¹ Id.

On October 18, 2010, Central Lakes College’s Vice President of Administrative Services, knowing the estimated costs, sent a memo to the City in which Central Lakes College again committed to paying special assessments: “The primary driver for this project is safety, and that is the reason why Central Lakes College is willing to pay assessments for this project.” Id., R. 26.

On November 15, 2010, the City received correspondence from Central Lakes College formally petitioning the City to reconstruct College Drive in accordance with the plan previously selected by the City Council pursuant to Minn. Stat. § 429.035. See Id., R. 20 (“Petition”). The City Council, via Resolution No. 55:10, determined that the

¹ The estimated \$6.9 million cost of the Project is to be funded as follows:

Federal	\$2,234,300
State Aid	\$3,809,918
BPU	\$193,700
Crow Wing County	\$40,882
Local Cost share	\$621,200

The amount of the Local Cost share (i.e. the special assessments) is approximately *nine percent* of the total project funding. See Templin Aff., R. 41.

Petition met the required percentage² of owners of property affected by the improvement and special assessment in order to proceed with the Project funded in part by special assessments. See Id., R. 47. On December 6, 2010, the City Council held a public hearing and approved the Project, by a 4-3 vote on Resolution 58:10, and ordered that the Project should proceed. Id., R. 52-66.

Appellants submitted a Notice of Appeal to the City dated December 14, 2010, challenging the City's decision that the petition is valid and seeking an injunction to stop the Project. See R. App. 3-5. In a separate litigation by petition dated January 7, 2011, the City commenced eminent domain proceedings under Minn. Stat. § 117.042 to acquire temporary construction easements and permanent right-of-way and drainage and utility easements to accommodate the Project. The District Court held the requisite public purpose hearing on March 16, 2011. During that hearing, counsel for the City, Thomas A. Fitzpatrick, presented evidence from other owners of the properties involved indicating that they did not object to either the eminent domain petition or the quick take. See Transcript, March 16, 2011, pp. 4-6. The City presented evidence of the City's authority to utilize eminent domain. Id., p. 7. The City also presented testimony from its City Engineer, Jeff Hulsether, identifying the Project, the location of improvements and the property to be taken, and explaining the public necessity for the Project. Id., pp. 8-35.

² City staff calculated the percentage ownership of abutting properties based on the existing right of way in the area encompassed by the Project. Central Lakes College owns 4,867.72 feet, or 39.98 percent, of the total 12,174.71 feet of right of way frontage involved in the Project. See Templin Aff., R. 67.

The District Court granted the City's petition by order dated March 17, 2011. See App. 15-19.

The City and Central Lakes College executed a final agreement for the City's purchase of easements from Central Lakes College and memorializing the prior agreement to pay special assessments of Central Lakes College's property for the Project. See Second Templin Affidavit, April 15, 2011, R. 87-115. Under that Agreement, Central Lakes College confirmed its previous agreement to pay special assessments for the Project. Id., R. 88-89. "[T]he Petition represents the College's agreement to pay an assessment in the Assessment Amount (defined below) with respect to the property described...." Id. R. 88. The Assessment Amount totals \$359,882.80, including \$207,882.80 for street improvements and \$152,000 for sidewalk and pedestrian improvements. Id. R. 89. Central Lakes College specifically agreed that "the proposed improvement to College Drive is a special benefit to the College... and that the assessment as agreed to in [Central Lakes College's letter to the City dated December 17, 2009] is fairly assessed in consideration of the benefit received pursuant to Minn. Stat. § 3.754." Central Lakes College further agreed that it budgeted for the payment of the assessment pursuant to Minn. Stat. § 435.19, subd. 2 and has waived its right to challenge the assessment as excessive or demand hearings under Minn. Stat. Chap 429.³ Id., R. 88, 90. In the same agreement, the City agreed to a purchase price to be paid for easements needed for the project. Id. R. 89.

³ The parties' agreement states that the Recitals "are a material part of this Agreement and are incorporated herein." See Second Templin Aff., R. 89, ¶ 1.

In a letter dated March 25, 2011, Gerald W. Von Korff, counsel for Appellants in this matter, complained to Derrell Turner, Federal Highway Administrator (Minnesota Division), and Kevin Howieson, MnDOT District 3 Area Engineer, about the City's "unlawful" actions in the eminent domain and special assessment proceedings in connection with the reconstruction of College Drive ("Project"). See Id., R. 81-84 ("Von Korff Letter"). The Von Korff Letter contains the same arguments advanced in the lawsuit and in the unsuccessful attempt to prevent the City's quick take of property required for the Project. See Templin Aff., R. 42-46. MnDOT personnel reviewed the condemnation proceedings and documents in this litigation and indicated that the Project should proceed with its planned funding intact. See Second Templin Aff., R. 85-86.

RELEVANT STATUTES

The following Minnesota statutes are relevant to this Court's consideration of this matter and are reproduced here for the Court's convenience:

Minn. Stat. § 429.031. Preliminary plans, hearings

Subd. 1. Preparation of plans, notice of hearing

...

(f) 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 vote of a majority of all members of the council when the improvement has been petitioned for by the owners of not less than 35 percent in frontage of the real property abutting on the streets 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; provided that if the mayor of the municipality is a member of the council but has no vote or votes only in case of a tie, the mayor is not deemed to be a member for the purpose of determining a four-fifths majority vote.

...

Minn. Stat. § 429.035. Improvements, petition

When any petition for the making of any improvement in any statutory city, town, or city of the second, third, or fourth class, however organized, for the cost of which special assessments may be, in whole or in part, levied therefor, is presented to the governing body of the municipality, this body shall, by resolution, determine whether or not the petition has been signed by the required percentage of owners of property affected thereby.

Minn. Stat. § 429.036. Appeal from determination of legality of petition

Any person, being aggrieved by this determination, may appeal to the district court of the county in which the property is located by serving upon the clerk of the municipality, within 30 days after the adoption and publication of the resolution, a notice of appeal briefly stating the grounds of appeal and giving a bond in the penal sum of \$250, in which the municipality shall be named as obligee, to be approved by the clerk of the municipality, conditioned that the appellant will duly prosecute the appeal, pay all costs and disbursements which may be adjudged against the appellant, and abide by the order of the court. The clerk shall furnish the appellant a certified copy of the petition, or any part thereof, on being paid by appellant of the proper charges therefor. The appeal shall be placed upon the calendar of the next general term commencing more than 30 days after the date of serving the notice and filing the bond and shall be tried as are other appeals in such cases. Unless reversed upon the appeal, the determination of the governing body as to the sufficiency of the petition shall be final and conclusive.

Minn. Stat. § 435.19. Assessment on public property; exception; sue to be paid

Subd 1. By city or town. Any city, however organized, or any town having authority to levy special assessments may levy special assessments against the property of a governmental unit benefited by an improvement to the same extent as if such property were privately owned, but no such assessments, except for storm sewers and drain systems, shall be levied against a governmental unit for properties used or to be used for highway rights-of-way. A “governmental unit” means a county, city, town, public corporation, a school district and any other political subdivision, except a city of the first class operating under a home rule charter and the school district, park board or other board or department of such city operating under such charter. If the amount of any such assessment, except one

against property of the state, is not paid when due, it may be recovered in a civil action brought by the city or such town against the governmental unit owning the property so assessed

Subd. 2. State property. In the case of property owned by the state or any instrumentality thereof, the governing body of the city or town may determine the amount that would have been assessed had the land been privately owned. Such determination shall be made only after the governing body has held a hearing on the proposed assessment after at least two weeks' notice of the hearing has been given by registered or certified mail to the head of the instrumentality, department or agency having jurisdiction over the property. The amount thus determined may be paid by the instrumentality, department or agency from available funds. If no funds are available and such instrumentality, department or agency is supported in whole or in part by appropriations from the general fund, then it shall include in its next budget request the amount thus determined. No instrumentality, department or agency shall be bound by the determination of the governing body and may pay from available funds or recommend payment in such lesser amount as it determines is the measure of the benefit received by the land from the improvement.

...

Minn. Stat. § 645.08. Canons of construction

In construing the statutes of this state, the following canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute:

(1) words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition

...

Minn. Stat. § 645.16. Legislative intent controls

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

...

STANDARD OF REVIEW

Appellants identify a single issue for this Court's review, pertaining to the application of Minn. Stat. § 429.031, subd. 1(f), but fail to identify a standard of review. This Court's review of the lower courts' application of a statute to undisputed facts is *de novo*. Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

ARGUMENT

As they have throughout this litigation, Appellants skip the critical first question in any statutory analysis problem: is the statute ambiguous? It is not. Its plain meaning resolves this dispute. In a glaring omission from their brief in this case, Appellants fail even to cite, much less attempt to distinguish, this Court's own recent precedent dealing with a significant statutory interpretation question. See Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 726 (Minn. 2010) (stressing the primacy of plain meaning in statutory analysis). Instead, Appellants rely on half-century old attorney general opinions. Even if those opinions were binding on this Court (which, of course, they are not), Appellants fail to account for a statutory change enacted after those opinions were issued rendering the guidance they can offer questionable, at best. Appellants also argue that Central Lakes College did not *really* agree to pay special assessments until after the petition process. But that contention is belied by the undisputed facts in this case.

The lower courts properly recognized that Minn. Stat. § 429.031, subd. 1(f) has a plain meaning that can and must be applied in this case. This Court should uphold that sound conclusion.

I. Central Lakes College is the “owner” of over thirty-five percent of the real property abutting the Project.

This case turns on the meaning of a word contained in Minn. Stat. § 429.031, subd. 1(f): “...when the improvement has been petitioned for by the *owners* of not less than 35 percent in frontage of the real property abutting on the streets named in the petition as the location of the improvement” (emphasis added). Appellants contend that the meaning is ambiguous. See Appellants’ Br., pp. 24-25. But they offer no support for this conclusion. In fact, the term “owner” seems to require very little if any elucidation in the context of this statute.⁴ A court’s goal in statutory interpretation is to ascertain and effectuate legislative intent. Minn. Stat. § 645.16. This Court has long held, and recently reaffirmed, that it will presume that plain and unambiguous statutory language manifests legislative intent. Lenz v. Coon Creek Watershed Dist., 153 N.W.2d 209, 216 (Minn. 1967); Krummenacher, 783 N.W.2d at 726 (noting, in reversing a long relied-upon decision, that the Court of Appeals “essentially rewrote [a] statute”). The principal

⁴ Appellants, after ten pages of argument on other topics, finally address the actual language of the statute at issue, and then only to suggest that the term “owner” cannot carry its common and accepted meaning. See Appellants’ Brief, p. 25. Appellants submit that the legislature must really have meant “*owners of property that is countable in the assessment project.*” Id., p. 26. Of course, if that is what the legislature intended, it could have included that language in the statute. It did not. Minn. Stat. § 429.031, subd. 1(f). Courts cannot rewrite unambiguous statutory language. Krummenacher, 783 N.W.2d at 726. Moreover, Appellants fail to recognize that the state in this case unconditionally committed to pay its proportional share of the special assessment.

method of determining the legislature's intent is to rely on the plain meaning of the statute.” State v. Thompson, 754 N.W.2d 352, 355 (Minn. 2008). If statutory language is plain and unambiguous, the court must apply its plain meaning. Phelps v. Commonwealth Land Title Ins. Co., 537 N.W.2d 271, 274 (Minn.1995). See also Hyatt v. Anoka Police Dep't, 691 N.W.2d 824, 827 (Minn. 2005) (holding that plain meaning governs in all but rare cases where it “utterly confounds a clear legislative purpose”).⁵ It is not within the power of courts to avoid legislation even if it seems “drastic,” “inexpedient,” or “unwise” or because of hardship that may result due to application of the law to particular circumstances. State v. Rat Portage Lumber Co., 115 N.W. 162, 164 (Minn. 1908). If the act in question expresses legislative intention in exact and apt words, an argument based on inconvenience is out of place. Id.

In adopting a statute, the state legislature is presumed to have intended the “common and approved usage” of words and phrases unless it separately defines them. Minn. Stat. § 645.08 (1). The statute at issue contains a separate definitions section (Minn. Stat. § 429.011), but “owner” is not defined. Dictionary definitions match up with the common understanding of the term: an “owner” is “one who has the right to possess, use, and convey something.”⁶ “Ownership” means “the collection of rights

⁵ Appellants seem to suggest that to read “owners” to mean “owners” would somehow mean failing to interpret the statute in context. See Appellants’ Br., p. 25. But Appellants’ concern is not based in some lack of proper context or ambiguity in the statute because they can point to none. Rather, the concern only arises because Appellants are not part of the thirty-five percent of owners who petitioned for the project and they simply do not want it to proceed.

⁶ See Black’s Law Dictionary (7th ed. 1999), 1130.

allowing one to use and enjoy property, including the right to convey it to others.”⁷ The term “owner” has a clear meaning that is ready-to-apply.⁸ Appellants state that municipalities “should go to the legislature and seek an amendment to Chapter 429” in order for the statute to apply to all “owners” of property, but it is Appellants who should follow that advice. See Appellants’ Br., p. 30. If what they want the statute to say is that it applies to “owners of property subject to a non-voluntary special assessment” or “owners of property that is countable in the assessment project” or something akin to that, instead of what the statute actually says now, it is Appellants who should seek a legislative change. The statutory language, as written, requires no additional construction or analysis and, given that, Minnesota law permits none.

None of the cases Appellants cite on this issue support their position. This Court in International Trust Co. v. Am. Loan & Trust Co., 65 N.W. 78, 79 (Minn. 1895), interpreting whether an entity could be said to “embrace banking privileges,” reiterated the unremarkable idea that ambiguous words and phrases are to be considered in context. Mattson v. Flynn, 13 N.W.2d 11, 14 (Minn. 1944), is an example of this Court’s

⁷ Id., 1131. See also Webster’s New World College Dictionary (4th ed. 2004), 1030 (defining “ownership” as “legal right of possession; lawful title”).

⁸ Appellants attempt to sound a warning that if “owners” really means “owners,” cities will authorize assessments against every property, including that owned by the federal government, despite the existence of sovereign immunity. See Appellants’ Br., p. 27. But Appellants’ dire prediction fails to recognize that it is the *petition* process at issue in the instant case, not involuntary assessments. Cities *may* authorize assessments based on a valid petition; they are not *required* to do so. See Minn. Stat. § 429.031, subd. 1(f). The legislature has trusted local governments to be prudent enough not to authorize assessments they could never collect, but left open the possibility that necessary projects can proceed funded in whole or in part by voluntary payments. This Court should not disturb that balance.

examination of a statutory provision it found to be “obscure and ambiguous.” Likewise, State ex rel. Hansen v. Walsh, 247 N.W. 523, 524 (Minn. 1933), dealt with language that was ambiguous when applied. In none of these cases did this Court *rewrite* the language at issue as Appellants would have this Court do here. This Court, in International Trust, used another article of the constitution to inform the meaning of an unclear phrase and, in Mattson, undertook conventional examination of supporting materials to supply context to ambiguous statutory language. In State ex rel. Hansen, the Court flatly stated that the statute there was “poorly drawn,” concluded that it could not divine what the legislature intended, and denied the claim on public policy grounds. 247 N.W. at 525. In this case, Appellants make no attempt even to identify how the statute is ambiguous, much less to supply needed context from elsewhere in the Chapter⁹ or utilize any other method of understanding what the statute at issue in this case means if it does not mean what it plainly says. Appellants simply claim that there is ambiguity and then ask this Court to rewrite the statutory provision to suit their desires.¹⁰ Minnesota law does not support such an endeavor.

⁹ Appellants reference a statutory provision that would allow a city to waive the initial “improvement hearing” in the event it receives a petition from *all* affected property owners. See Appellants’ Br., p. 27; Minn. Stat. § 429.031, subd. 3. However, it is difficult to discern the point Appellants attempt to make by citing that provision, particularly when Appellants have failed to identify an ambiguity in the statute. That provision—an entirely different and fully discretionary option available to cities—is another tool the state legislature has provided to cities to streamline the two-step hearing process in the event 100 percent of property owners in a project area are in favor of it and willing to pay the entire cost. That provision has no bearing whatsoever on the petition and challenge to it brought by Appellants in this matter.

¹⁰ Appellants also rely on the Court of Appeals’ decision in Dicks v. Minn. Dept. of Admin., 627 N.W.2d 334 (Minn. 2001). That case held that the Minnesota Prevailing

Because it is undisputed that Central Lakes College is the record owner of 39.98% of the real property frontage abutting on College Drive in the Project area (see R. 67), Central Lakes College's Petition meets the statutory criteria of Minn. Stat. § 429.031, subd. 1(f). No additional analysis is needed or allowed. This Court should uphold the lower court's rejection of Appellants' challenge to the Project.

II. Appellants ignore the statute's plain meaning, relying instead on antiquated attorney general opinions.

As they have throughout this litigation, Appellants once again bypass consideration of the statute's actual language in favor of other resources. But this Court, reviewing the City's actions under plain and unambiguous statutory language, need not look beyond the face of that statute. As noted, this Court recently underscored the importance of plain statutory language in Krummenacher, 783 N.W.2d at 726. In that case, the court reviewed the consistent standards under which local governments had been considering variance applications since the Court of Appeals' decision in Rowell v. Bd. of Adjustment of Moorhead, 446 N.W.2d 917 (Minn. Ct. App. 1989). Minn. Stat. § 462.357, subd. 6, states that "undue hardship" means that "the property in question cannot be put to reasonable use if used under conditions allowed by the official controls." But under guidance provided by Rowell, local governments could and routinely did over a period of more than twenty years find an "undue hardship" and grant a variance

Wage Act did not apply to state employees. The court determined that such an interpretation would produce an absurd result because it would directly conflict with an existing collective bargaining agreement approved by the same state legislature. Id. at 337. Appellants point to no competing legislative enactments in this case that would make the holding in Dicks applicable here.

whenever a property owner sought to use property in a reasonable manner that a particular ordinance requirement would otherwise prohibit. Id. at 922. Despite that consistent practice and application of the law across the entire state, this Court recited familiar principles of statutory analysis, held that Rowell “essentially rewrote the statute” in an impermissible manner, and abrogated that decision on the way to reversing the lower courts. Krummenacher, 783 N.W.2d at 728. A statute’s plain language dictated that outcome, notwithstanding that it up-ended a widely-accepted and frequently utilized legal standard. Id. In this case, too, this Court should apply plain statutory language.

Appellants present a far less compelling argument for adherence to existing precedent than the city in Krummenacher did. In fact, Appellants offer *no* existing precedent at all. Instead, Appellants rely entirely on three attorney general opinions, all written prior to a significant amendment to the statute at issue. See A. 6-15. At the outset, it should be noted (as the lower courts in this matter did¹¹) that opinions of the attorney general are not binding on the courts. Appellants seem to suggest that attorney general opinions are owed deference on matters of statutory construction. See Appellants’ Brief, p. 23. They are not. Such opinions are purely advisory and courts can and do disregard them when circumstances warrant. In Star Tribune Co. v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274, 289 (Minn. 2004), this Court noted that attorney general opinions are not binding on the courts and further rejected an opinion because “the conclusory

¹¹ Appellants refrain from claiming here, as they did in the Court of Appeals, that the District Court failed to honor existing “consistent interpretation” because the District Court quite rightly recognized that decades-old attorney general opinions, even if they were helpful after a statutory change, are not precedent.

approach of this letter opinion renders it less than persuasive.” Similarly, in Billigmeier v. Hennepin County, 428 N.W.2d 79, 82 (Minn. 1988), this Court (even after recognizing that attorney general opinions, “when appropriate,” are “entitled to careful consideration”) flatly rejected a letter opinion, calling it “troubling” that the opinion brushed past the language of the statute at issue, failing to offer any analysis of it. In City of Granite Falls v. Soo Line R. Co., 742 N.W.2d 690, 699 (Minn. Ct. App. 2008), the Court of Appeals rejected reliance on older attorney general opinions because of changed circumstances in the law at issue. This Court is not bound to accept attorney general opinions, written as they are by assistant attorneys general in response to specific queries, without being tested in the fires of the adversary process.

Even if this Court considers them, the cited attorney general opinions are readily distinguishable from the instant case. The most recent of them, Op.Att’y.Gen. 408-c (Oct. 28, 1954) (A. 14-15), references and relies upon both of the others cited by Appellants. The opinion addressed two questions: (1) whether property owned by the state (MnDOT, in that case) and committed to public use could be subject to a special assessment absent statutory authority; and (2) whether such property could be included when calculating whether thirty-five percent of affected owners consented to the assessment. Id. The opinion answered both questions in the negative, without any discussion of whether the legislation in question had a plain and unambiguous meaning. But even overlooking this patent defect in the opinion’s analysis¹², it is plainly distinguishable.

¹² Neither of the two previous opinions of the attorney general on which the most recent of the three relied contains any discussion of the critical first step in any useful statutory

As to the first issue, the opinion contemplates state-owned property that is already *devoted to public use*. In the instant case, the property is owned by a state instrumentality (it is part of a college campus), but it is not open to the public at large. While neither the opinion nor any of the previous ones it relies upon offer extensive analysis of the issue, the force of logic behind barring assessments against property already devoted to public use (e.g. a public road or right of way) does not translate directly, if at all, to barring assessments against property utilized only by a select few. See Minn. Stat. § 136F.60, subd. 1 (entities under MnSCU are authorized to own and acquire property “necessary for the development of a state college or university”).

Further, and critically in this situation, the attorney general opinion itself includes a caveat that even such public property could be subject to a special assessment if authorized by statute. A.14 (“property of the State devoted to public use may not be subjected to special assessment for an improvement *unless expressly made so by legislative enactment*”) (citations omitted) (emphasis added). At the time the opinion was written in 1954, Minn. Stat. § 435.19 dealt only with authorizing special assessments against school district or county property. It did not address state-owned property. However, in 1957 (and after the attorney general opinions on which Appellants rely were issued), the statute was amended significantly to include Minn. Stat. § 435.19, subd. 2, authorizing assessments against state-owned property. While the special assessments contemplated are subject to contingencies (i.e. the state instrumentality having funds

analysis, i.e. determining whether the statute has a plain meaning. As noted herein, this Court has declined to rely upon attorney general opinions for precisely this reason.

available to pay them and consenting to the valuation of benefit of the improvement), it is nonetheless *express statutory authority for a special assessment*.¹³ See Op.Att’y.Gen. 408-c (Oct. 28, 1954) (noting exception for state-owned property made subject to assessment by legislative enactment). See City of Granite Falls, 742 N.W.2d at 699 (Minn. Ct. App. 2008) (rejected reliance on older attorney general opinions because of changed circumstances in the law).

As for the second issue in the 1954 attorney general opinion (finding that the city in that case could not count MnDOT among the consenting owners for purposes of reaching thirty-five percent), it too fails to hold up to scrutiny when the 1957 amendments to Minn. Stat. § 435.19 are considered. In 1954, the attorney general opined that MnDOT was not an “owner of property to be taxed or assessed” because it could not be subject to a tax or an assessment and so it could not be counted as part of the requisite thirty-five percent. However, after the new statutory language was enacted in 1957, property owned by an instrumentality of the state (Central Lakes College, in this case) may be subject to special assessment. See Minn. Stat. § 435.19, subd. 2. Thus, Central Lakes College *is* an “owner of property to be taxed or assessed” for purposes of Minn.

Billigmeier, 428 N.W.2d at 82.

¹³ Without benefit of citation to the record or any authority, Appellants engage in rank speculation about statutory goals (see Appellants’ Br., pp. 15-16), the objectives of a “committee of experts” (see Id., p. 22), and historical changes to statutes (Id., pp. 15-22) and how each may have related to attorney general opinions. Appellants use these pages of supposition to draw the conclusion that the legislature must have intended something different than what it enacted. Appellants’ baseless conclusions do not alter the bedrock principle of statutory interpretation: where a plain meaning can be ascertained from the face of the statute, it governs. See Krummenacher, 783 N.W.2d at 728.

Stat. § 429.031, subd. 1(f) if it consents to that assessment under Minn. Stat. § 435.19, as it did in this matter.¹⁴

Due to distinguishing factors in this case, and statutory changes since the last of the attorney general opinions on this subject was issued in 1954, those opinions—even if this Court decides to rely on them—do not foreclose inclusion of a state instrumentality like Central Lakes College among the requisite thirty-five percent of “owners” under the statutory scheme. State law specifically contemplates consent to the assessment. This Court should affirm the Court of Appeals’ decision.

III. Central Lakes College has agreed to pay its proportional share of the special assessment.

Contrary to statements in the Appellants’ Brief, the City does not contend that Central Lakes College’s commitment to the project, and paying its fair share for it, “retroactively validated” the petition. See Appellants’ Br., p. 28. And no reliance on a “subsequent” agreement was required.¹⁵ Id., p. 29. Rather, Central Lakes College committed early to paying a proportional share of special assessments for the College Drive reconstruction and has consistently supported the City’s efforts toward the

¹⁴ En route to misinterpreting the various language changes in the statute, Appellants cite Lorillard v. Pons, 434 U.S. 575 (1978). That case includes the proposition that Congress is presumed to be aware of existing administrative or judicial interpretation of statutes when it re-enacts a statute without changes. Id. at 580. That statement, even if federal court decisions had any applicability in this matter, has no bearing here. As noted, attorney general opinions are not binding on the courts and would not qualify as existing interpretations of law for purposes of the principle recited in Lorillard.

¹⁵ Appellants’ supposed concern about judicial review is likewise unfounded. See Appellants’ Br., 29. The lower courts, after taking the essential first step of applying the statute’s plain language before proceeding to other concerns, recognized that Central

planning and engineering of the project. Central Lakes College communicated with the City about safety issues in connection with nascent plans for College Drive's reconstruction since at least October 2006.¹⁶ By letter dated October 19, 2006, Central Lakes College expressed concerns about accidents and safe pedestrian crossings for its students. R. 74. Additional correspondence addressed the issue in March 2007, September 2009, and October 2010. R. 75-77.

The City selected design parameters from a number of alternatives at its meeting on February 2, 2009. R. 8-10. On December 17, 2009, in response to a direct inquiry from the City, Central Lakes College specifically stated that it "intends to pay the special assessments for the College Drive Project." R. 22. Preliminary work on the Project progressed. On September 15, 2010, the City Engineer submitted to the Mayor and City Council a feasibility report discussing the necessity for the Project and outlining estimated costs. R. 40-41. On October 18, 2010, Central Lakes College's Vice President of Administrative Services sent a memo to the City in which it reiterated the commitment to paying special assessments. R. 24-26. Appellants ignore all of these statements and claim no commitment to pay assessments existed. See Appellants' Br., p. 28.¹⁷ On

Lakes College committed to paying its proportional share of assessments before the City moved the process forward.

¹⁶ Central Lakes College's commitment to pay a proportional share of special assessments is consistent with its past practices. Central Lakes College paid special assessments totaling \$47,781.00 following completion of the 1986 construction project for College Drive. R. 48-51.

¹⁷ Appellants worry the Court with the baseless assertion that this case is "opening the door to a kind of laundered petition" in which the state would collude with local government to bypass statutory strictures. Appellants' Br., p. 28. Appellants offer nothing but unchecked speculation about such conduct. If such conduct was in fact at issue, it

November 15, 2010, with its commitment in place, Central Lakes College filed its Petition urging the City to move forward with the Project. R. 20.

Consistent with this pledge to pay, Central Lakes College formalized the assessments by agreement with the City. R. 87-94. The agreement notes that the November 15, 2010 Petition by Central Lakes College stands as its commitment to pay special assessments: “[t]he Petition represents the College’s agreement to pay an assessment in the Assessment Amount (defined below) with respect to the property described....” R. 88. The agreement also acknowledges that the Project is a special benefit to Central Lakes College, sets forth the specific amounts to be paid for special assessments, and provides for the City’s acquisition of a portion of Central Lakes College’s real estate needed for the project. R. 88-90. Central Lakes College waives its right to hearings before the City and to contest the amount of the assessment. R. 92, ¶ 13. Central Lakes College also states that the assessment amount has been accounted for in its budget and represents less than five percent of its appropriation for repair and restoration, as required for an acceptable assessment under Minn. Stat. § 135A.131. R. 88. The agreement is signed by all necessary parties and is designated as binding on them. R. 91, ¶ 10; R. 93-94. Central Lakes College is bound by its agreement.

Appellants make much of the Court of Appeals’ reflection on the fact that Central Lakes College is paying its fair share, stating that such a concern does not align with the

would be a proper subject for legislative inquiry and statutory correction. In any case, Central Lakes College did nothing of the kind in this matter. It consented and is bound by contract to pay its share of special assessments. R. 87-115.

holding of the decision, i.e. that “owner” is a plain and unambiguous term that neither begs for nor brooks a resort to other methods of statutory construction. Appellants also assert that the Court of Appeals wrongly considered whether Central Lakes College would have the ability to look out for the health and welfare of students and staff absent the ability to petition for improvements. Appellants do not recognize that the Court of Appeals’ thoughts on the subject of fairness or standing to seek improvements are *obiter dicta*. Those comments, tacked on to the end of the Court of Appeals decision in this case, do not implicate its holding. Again, that holding is the simple and straight-forward point that plain and unambiguous statutory language must be applied as written, not subjected to judicial rejiggering. Add. 14. Where legislative intent can be gleaned from the language enacted, that language governs as written. See Krummenacher, 783 N.W.2d at 728 (reversing a case in which the Court of Appeals “essentially rewrote [a] statute”). The Court of Appeals’ statements about fairness and the ability for Central Lakes College to seek improvements simply reinforce the point. But Appellants seem to use those comments as a launching point for constitutional arguments about uniformity and that this case does not involve a “true” special assessment. See Appellants’ Br., pp. 29-30. Whatever the nature of this assertion, all owners of property will be paying assessments that correspond to the benefit received from the Project and, once the assessments are levied, the Appellants are free to challenge that determination. Minn. Stat. § 429.081. Moreover, no constitutional claim (if that is what the assertion is) was pleaded in this case. This Court should affirm the lower courts’ decision.

CONCLUSION

This case involves a single issue: whether “owners of not less than 35 percent in frontage of the real property abutting on the streets named in the petition as the location of the improvement” as included in Minn. Stat. § 429.031, subd. 1(f) means what it plainly says. Appellants assert that it does not. Relying on attorney general opinions from a half-century ago issued before a significant legislative change, Appellants state that the statute really ought to be read to include a further limitation of “owners” to “owners of *property subject to non-voluntary special assessment*” or similar added statutory language. Additionally, Appellants seek to obfuscate the fact that Central Lakes College is, and has been since before the project’s inception, concerned about safety and committed to paying its proportional and fair share of the costs. The Court of Appeals’ recognition of this point, in dicta, does not lessen the impact of its straight-forward holding.

Put simply, Appellants are asking this Court to rewrite the statute. This Court should decline the invitation and affirm the sound decision of the lower courts.

Dated: August 28, 2012



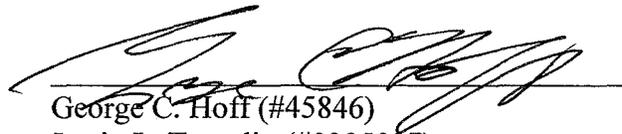
George C. Hoff (#45846)
Justin Templin (#0305807)
HOFF, BARRY & KOZAR, P.A.
775 Prairie Center Drive, Suite 160
Eden Prairie, MN 55344
(952) 941-9220

*Attorneys for Respondent
City of Brainerd*

CERTIFICATE OF COMPLIANCE
PURSUANT TO MINN. R. CIV. APP. P. 132.01, Subd. 3(a)

This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, Subd. 3(a) because this brief contains 7,380 words, excluding the parts of the brief exempted by Minn. R. Civ. App. P. 132.01, Subd. 3. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman with a 13 point font.

Dated: August 28, 2012


George C. Hoff (#45846)
Justin L. Templin (#0305807)
Attorneys for Respondent
City of Brainerd