

NO. A05-2041

State of Minnesota
In Court of Appeals

William J. Bearman and Claudia A. Bearman,
Appellants,

vs.

City of Eden Prairie,
Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

I. WHETHER THE BEARMANS HAVE STANDING TO ASSERT A CLAIM TO THE ESCROW DEPOSIT FOR ASSESSMENTS.

Though the issue was raised, the trial court chose not to address this issue.

Apposite case:

- *Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 617 (Minn. Ct. App. 1995)

II. WHETHER THE DOCTRINE OF RES JUDICATA BARS THE BEARMANS' CLAIM TO THE ESCROW DEPOSIT FOR ASSESSMENTS.

Though the issue was raised, the trial court chose not to address this issue.

Apposite law:

- Minnesota Statute Section 117.145
- *Helgeson v. Gisselbeck*, 375 N.W.2d 557 (Minn. Ct. App. 1985)

II. WHETHER THE AGREEMENT REGARDING SPECIAL ASSESSMENTS IS VALID AND ENFORCEABLE.

Trial Court held: The Agreement Regarding Special Assessments is valid.

Apposite law:

- Minnesota Statute Section 462.3531
- *Ruzic v. City of Eden Prairie*, 479 N.W.2d 417 (Minn. Ct. App. 1991)

STATEMENT OF THE CASE

The Metropolitan Airports Commission (the "MAC") filed an eminent domain petition against a real estate parcel located in Eden Prairie, which was owned by the appellants (the "Property"). Before title to the Property transferred to the MAC, William J. Bearman and Claudia A. Bearman (the "Bearmans") sought approval to subdivide the Property. The Bearmans entered into the Agreement Regarding Special Assessments (the "Agreement") with the City of Eden Prairie (the "City") on August 21, 2001 concerning the financing of the construction of improvements that inure to the benefit of the Property (the "Improvements") and the levying of assessments for the Improvements. In the Agreement, the Bearmans consented to the levying of assessments in the amount of \$114,897.25 against the Property. The court-appointed condemnation commissioners awarded \$2,847,346 for the taking of 15.76 acres to be divided among the named interested parties, including the Bearmans, the City, Hennepin County, AgStar Financial Services, FLCA, successor in interest to Farm Credit Services of St. Cloud, ACA and First Commercial Bank. None of the parties appealed. On December 18, 2001, the MAC deposited \$114,897.25 with General American Corporation/North Star Title (the "Escrow Agent") for the City's assessments, and paid the remaining amount of the award to the other interested parties based on their respective interests in the Property. On March 24, 2005, the City and the Bearmans brought cross motions for an order directing the Escrow Agent to disburse \$114,897.25 to them respectively.

The Honorable LaJune T. Lange, Judge of Fourth Judicial District, State of Minnesota, issued an Order dated August 17, 2005 granting the City's motion for disbursement of the escrow deposit and denying the Bearmans' motion. Judgment was entered on August 22, 2005. On October 14, 2005, the Bearmans appealed the August 22, 2005 judgment.

Respondent requests oral argument in this matter.

STATEMENT OF THE FACTS

On February 23, 2001, the MAC filed an eminent domain petition pursuant to Minnesota Statute Section 473.601-473.679, Minnesota Chapter 117, and Minnesota Statute Section 360.033 against the Property, located at 9630 Eden Prairie Road, Eden Prairie, Minnesota, which was owned by the appellants. RA001-RA011. On February 26, 2001, the MAC filed a Notice of Lis Pendens with the Hennepin County Administrator's Office for condemnation of the Property. RA012-RA013. On March 26, 2001, the MAC gave notice that it would bring a motion pursuant to Minnesota Statute Section 117.042, which it did on May 22, 2001. RA017-RA022. The Court approved the MAC's eminent domain petition, appointed commissioners, and denied MAC's request for quick take pursuant to Minnesota Statute Section 117.042 on May 31, 2001. RA023-RA025.

Before the MAC filed its petition, the Property consisted of 15.76 acres. RA072. The only improvements that existed on the Property were a single-family residence and one barn. RA074. At that time the Property could be subdivided into 12 or less lots. RA073. During the spring of 2001, the Bearmans sought approval from the City to subdivide the Property. RA048. The Bearmans' proposed subdivision, Woodbear Highlands, received all preliminary approvals necessary for the project in March of 2001. RA048. On March 20, 2001, the City voted unanimously to rezone the Property from a rural classification that permits 2.5 lots per acre; to amend the City's comprehensive plan to include the Property within the Metropolitan Urban Service Area; to approve the Planned Unit Development

Concept Review and District Review for the Property; and to approve a preliminary plat of the Property dividing it into 31 single-family detached residential lots, subject to certain conditions to be performed prior to final plat approval, issuance of grading permit or building permit. RA072-RA073. The number of lots on the Property that could be subdivided increased from 12 to 31, which decreased the per-lot development costs and expenses and resulted in a significant increase in the present fair market value of the Property. RA073.

The Bearmans entered into the Agreement with the City on August 21, 2001 concerning the financing of the construction of the Improvements, which inure to the benefit of the Property, and the levying of assessments for the Improvements. RA058-RA061. The Bearmans and the City signed the Agreement on August 21, 2001. RA058. In the Agreement, the Bearmans consented to the levying of assessments in the amount of \$114,897.25 against the Property. RA058. The Bearmans petitioned the City to construct the Improvements. RA059. The Bearmans agreed that the benefit to the Property by virtue of the Improvements to be constructed is at least equal to if not greater than the amount of the assessments to be levied against the Property. RA059. The Bearmans also waived their rights as follows:

The Owners waive all right they have by virtue of Minnesota Statute Section 429.081 or otherwise to challenge the amount or validity of such assessments, or the procedures used by the City in making the assessments and hereby releases the City, its officers, agents and employees from any and all liability related to or arising out of the imposition or levying of the assessments.

RA059. Finally, the parties agreed that the Agreement and the assessments against the Property for the Improvements would be a lien on the Property and that the Bearmans would not have any individual liability or obligation for the assessments. RA059.

The Bearmans told the City that they were entering the Agreement in order to do the right thing for the community and to make sure the Property bore its fair share of the cost of the Improvements. RA049. The Improvements contemplated by the agreement were necessary for the Property to be developed. RA049. The Improvements are also necessary to complete the urbanization of the neighborhoods adjacent to Eden Prairie Road in the vicinity of the Property. RA049.

The date of taking of the Property was October 10, 2001. RA027. The court-appointed commissioners filed an Award of Commissioners in the amount of \$2,847,346 for the fee simple taking of the 15.76 acre parcel. RA027. The Bearmans withdrew their application for Woodbear Highlands. RA049. On October 16, 2001, the City Council ordered a feasibility study, using the assistance of SEH, Inc. as a consultant to perform work with respect to the feasibility study, the first step towards constructing the Improvements. RA049. The actual cost of the Improvements is estimated to be at least the amount the Bearmans agreed would be assessed against the Property. RA049. The Improvements are necessary to complete the urbanization of the neighborhoods adjacent to Eden Prairie Road in the vicinity of the Property. RA049. No developer has agreed to pay for the Improvements contemplated in the Agreement. RA049. The Bearmans agreed to encumber the Property

with an assessment that represents a small portion of the total cost of developing Eden Prairie Road. RA050. Numerous other properties will be assessed for their share of the Eden Prairie Road project, and the City will likely pay a portion out of its general fund. RA050.

The court-appointed condemnation commissioners awarded \$2,847,346 to be divided among the named interested parties, including the Bearmans, the City, Hennepin County, AgStar Financial Services, FLCA, successor in interest to Farm Credit Services of St. Cloud, ACA and First Commercial Bank. RA027. None of the parties appealed. On December 18, 2001, the MAC deposited \$114,897.25 with the Escrow Agent for the City's assessments, and paid the remaining amount of the award to the other interested parties based on their respective interests in the Property. RA062-RA063. The Bearmans sent a letter to the City, mailed on August 19, 2004, attempting to terminate the Agreement. RA064. The City did not consent to the Bearmans' attempted termination. RA065-RA066.

On March 15, 2005, the MAC filed a Final Certificate, which was approved by the district court on April 7, 2005. RA033-RA035. On March 24, 2005, the City and the Bearmans brought cross motions for an order directing the Escrow Agent to disburse \$114,897.25 to them respectively. RA029-RA032. That amount is the cost of the Improvements that will be assessed against the Property, pursuant to the Agreement. RA058-RA061. The Court granted the City's motion and denied the Bearman's motion. RA036-RA037. The Bearmans appealed the Court's Order dated August 17, 2005. RA069-RA070.

ARGUMENT

I. SUMMARY OF ARGUMENT.

The Bearmans are barred under the doctrine of res judicata from asserting a claim to the \$114,897.25 held in escrow for assessments because they didn't appeal the commissioners' award. Furthermore, the Bearmans do not have an interest in the escrow for pending assessments because they no longer own the land encumbered by the Agreement. Even if the Bearmans' claim isn't barred and they have standing, the district court properly found that the Agreement is valid and enforceable. The Agreement is not void as *ultra vires* because it does not impair the City's power to assess the Property for additional sums. The Agreement is not an executory contract and, therefore, may not be terminated by the Bearmans. Pursuant to the plain language of the Agreement, the Agreement became a lien against the Property upon execution of the Agreement. Furthermore, the Bearmans waived their right to appeal the assessments in the Agreement. Therefore, the district court correctly concluded that the City is entitled to the sum of \$114,897.25, escrowed for assessments.

II. STANDARD OF REVIEW.

A court's primary role in interpreting contracts is to ascertain and give effect to the intention of the parties. *Metro. Sports Facilities Comm'n v. Gen. Mills*, 470 N.W.2d 118, 122-3 (Minn. 1991). In ascertaining the parties' intent, courts must consider the contract provisions within the context of the language and the purpose of the contract as a whole. *Republic Nat'l Life Ins. Co. v. Lorraine Realty, Corp.*, 279 N.W.2d 349, 354 (Minn. 1979).

In doing so, courts give language in a contract its plain and ordinary meaning. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). The construction and effect of a contract are questions of law for the court. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). Where the trial court bases its order on a question of law, a reviewing court applies a de novo standard of review. *Halla Nursery v. Baumann-Furie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

III. THE BEARMANS DON'T HAVE STANDING BECAUSE THEY DON'T HAVE AN INTEREST IN THE PROPERTY OR ESCROW ACCOUNT.

The Bearmans do not have standing to contest the Court's Order disbursing the escrowed funds for pending assessments to the City. An individual has standing to maintain a suit if that person can "show an injury to some interest, economic or otherwise, which differs from injury to the interests of other citizens generally." *Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 617 (Minn. Ct. App. 1995).

In *Vern*, a property owner conveyed land, upon which a taking had occurred, before receiving compensation. 539 N.W.2d at 617. The Court of Appeals rejected the argument that the new owner did not have standing to pursue an inverse condemnation action because he didn't own the land at the time of the taking. *Id.* at 618. Because the former owner did not sell the property at a discount, awarding him condemnation proceeds would result in a windfall. *Id.* In this case, awarding the \$114,897.25 escrowed for assessments to the Bearmans would result in a windfall to them. The Bearmans did not receive a discounted award for raw land that could not be developed.

Before the MAC filed its petition, the Property consisted of 15.76 acres. RA072. The only improvements that existed on the Property were a single-family residence and one barn. RA074. At that time the Property could be subdivided into 12 or less lots. RA073. During the spring of 2001, the Bearmans sought approval from the City to subdivide the Property. RA048. The Bearmans' proposed subdivision, Woodbear Highlands, received all preliminary approvals necessary for the project in March of 2001. RA048. On March 20, 2001, the City voted unanimously to rezone the Property from a rural classification that permits 2.5 lots per acre; to amend the City's comprehensive plan to include the Property within the Metropolitan Urban Service Area; to approve the Planned Unit Development Concept Review and District Review for the Property; and to approve a preliminary plat of the Property dividing it into 31 single-family detached residential lots, subject to certain conditions to be performed prior to final plat approval, issuance of grading permit or building permit. RA072-RA073. The number of lots on the Property that could be subdivided increased from 12 to 31, which decreased the per-lot development costs and expenses and resulted in a significant increase in the present fair market value of the Property. RA073.

The commissioners awarded \$2,847,346 to be divided among the named interested parties because the Bearmans were able to show, with the Agreement, that the Property was developable. The Bearmans do not have standing because they do not have an interest in the \$114,897.25 escrowed for assessments.

The Bearmans do not have an interest in the escrow for pending assessments because they no longer own the land encumbered by the Agreement. The Bearmans mailed notices of termination to the City on August 19, 2004, more than 33 months after the MAC took the Property on October 10, 2001. RA064. The Bearmans attempted to unilaterally terminate the Agreement at a time when they had no interest in the Property. This is important because the Agreement runs with the land and continues to encumber the Property. The Agreement provides that “the assessments against the Property for the Improvements shall be a lien on the Property and that the Owners shall have no individual liability or obligation with regard thereto at any time.” RA058-RA061. The Bearmans’ attorney insisted that this provision be included in the Agreement. RA055-RA056. The Bearmans specifically negotiated for this provision. *Id.* The Bearmans now claim to have an interest in the Property and funds held in escrow for pending assessments. If they were individually liable for the assessments, the Bearmans would have standing to bring a motion for distribution of the funds held in escrow for pending assessments. Because they have absolved themselves of all personal liability and only agreed to encumber the Property, the Bearmans do not have standing to contest the City’s motion for distribution of the escrowed funds. The Bearmans no longer have any interest in the Property or the assessments against the Property. Because the Bearmans no longer have an interest in the Property encumbered by the Agreement, the Bearmans do not have standing to contest the assessment or to bring a motion for the escrowed funds for

pending assessments. The Bearmans also do not have standing to contest the district court's Order disbursing the escrow deposit to the City.

IV. THE DOCTRINE OF RES JUDICATA BARS THE BEARMANS' CLAIM TO THE ESCROW DEPOSIT FOR ASSESSMENTS.

Under the doctrine of res judicata:

A judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein.

Dorso Trailer Sales v. Am. Body & Trailer, 482 N.W.2d 771, 774 (Minn. 1992). Res judicata prevents a plaintiff from splitting a cause of action and bringing successive suits involving the same set of facts. *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978). Res judicata prohibits parties from relitigating claims after an adjudication of a dispute between parties arising from the same circumstances. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004).

In condemnation proceedings, the condemnation award constitutes final judgment. *Helgeson v. Gisselbeck*, 375 N.W.2d 557 (Minn. Ct. App. 1985). Dissatisfied parties to a condemnation proceeding may appeal to the district court from any award of damages or from any omission to award damages. *Id.* at 560; see also Minn. Stat. § 117.145. The district court is authorized to reassess the damages de novo and apportion the same as evidence and justice require. *Id.* Parties may not relitigate the issue of apportionment of damages in

district court without appealing from the award as required by statute. *Id.* Failure to appeal an award of commissioners constitutes acceptance of the award. *Id.*

The commissioners' award in this case constitutes a final judgment. The commissioners identified the City as a party with an interest in the Property based on the Agreement, which encumbers the Property. RA026-RA028. The commissioners did not break down their award by various interests. RA026-RA028. Pursuant to the Agreement and the commissioners' award, the City is entitled to funds held in escrow. Because the commissioners' award is a final judgment under *Helgeson* and no one appealed the award, the Bearmans' claims are barred by the doctrine of res judicata.

V. THE AGREEMENT REGARDING SPECIAL ASSESSMENTS IS VALID AND ENFORCEABLE.

Even if the Bearmans' claims are not barred and they have standing, the district court properly found that the Agreement is valid and enforceable.

A. The Agreement Regarding Special Assessments Is Not Void As *Ultra Vires*.

The Bearmans argue that the Agreement is *ultra vires* and that it impairs the City's taxing power. Section 1 of Article 10 of the Minnesota Constitution provides that "the power of taxation shall never be surrendered, suspended or contracted away." Agreements are *ultra vires* when the municipality does not have authority to act on the subject. The reserved power doctrine says that municipalities are not allowed to contract away their power of taxation.

The Agreement is not *ultra vires* and does not violate the reserved power doctrine because the City did not contract away its taxing power. The City estimated the cost of the improvements to the Property before entering the Agreement and the Bearmans agreed to pay that cost. RA049.

The City did not impair its taxing power by agreeing to construct certain improvements at a fixed sum. Minnesota law allows property owners to agree to pay an amount certain for an assessment and waive their right to appeal that assessment. Minnesota Statute Section 462.3531 specifically authorizes assessment agreements as an alternative to the notice, hearing, and appeal process. Minnesota Statute Section 462.3531 provides:

Any waiver of rights of appeal under section 429.081 is effective only for the amount of assessment estimated or for the assessment amount agreed to in the development agreement.

MINN. STAT. §462.3531. The property owners give up their rights to notice and a hearing when they enter into an assessment agreement. Municipalities do not give up their right to assess when they enter into assessment agreements. Assessment agreements merely set the amount of the assessment that is not subject to the notice, hearing, and appeal process. If the City needs to assess the Property in an amount greater than provided in the Agreement, it would have to go through the process of notice, hearing and appeal set forth in Minnesota Statute Chapter 429. Nothing in the Agreement negates this statutory right. Further the City may pay for that portion of the Improvements not levied as a special assessment through its general ad valorem tax levied against all property in the City. Assessment agreements are

allowed by statute and do not violate the Minnesota Constitution. *See Ruzic v. City of Eden Prairie*, 479 N.W.2d 417 (Minn. Ct. App. 1991) (holding that the right to appeal an assessment may be waived and that assessment agreements are valid).

The caselaw cited by the Bearmans leads to the conclusion that the Agreement is not void as *ultra vires*. The Bearmans cite *In re Minnehaha Parkway*, 167 Minn. 258, 209 N.W.939 (Minn. 1926) for the proposition that the reserved power doctrine applies to assessment agreements. (Appellants' Br. at 11.) In *Minnehaha Parkway*, the Minnesota Supreme Court found provisions in land contracts that exempt a party to the contract from assessments, limited to a certain amount, are not prohibited by the Minnesota Constitution. *In re Minnehaha Parkway*, 209 N.W. at 940. These exemption provisions did not violate the reserved power doctrine because the exemptions were to be satisfied out of the sum agreed upon as the consideration for the land conveyed. *Id.* Likewise in this case, the Improvements are to be paid for by the assessment the Bearmans agreed would encumber the Property and the assessments against other properties. If the City needs to assess the Property in an amount greater than provided in the Agreement, it can go through the process of notice, hearing and appeal set forth in Minnesota Statute Chapter 429. Therefore, the City is not suffering a loss or impairing its taxing power.

The Bearmans argue that the form agreement used by the City is unconstitutional because it does not automatically adjust for inflation. (Appellants' Br. at 15-16.) The Bearmans also argue that the City used another form for special assessment agreements in

2001 that was constitutional because it did not include a specific amount to be assessed. *Id.* In 2001, the legislature enacted Minnesota Statute Section 462.3531, which provides that the waiver of rights of appeal under Minnesota Statute Section 429.081 is only effective for the amount of the assessment estimated or agreed to. That new law went into effect on August 1, 2001. The Agreement in this case is dated August 21, 2001. Therefore, in order for the Bearmans' waiver to be effective, the City had to include a specific amount in the Agreement. The provision including a specific amount is not unconstitutional; it is mandated by statute.

B. The Agreement Regarding Special Assessments Is Not An Executory Contract And, Therefore, Cannot Be Terminated By The Bearmans.

The Bearmans argue they terminated the Agreement by giving the City notice that they terminated the Agreement. (Appellants' Br. at 17.) The Bearmans mailed notices of termination to the City on August 19, 2004, more than 33 months after the MAC took the Property on October 10, 2001. RA064-RA065. The Bearmans attempted to unilaterally terminate the Agreement at a time when they had no interest in the Property.¹ This is important because the Agreement runs with the land and continues to encumber the Property.

The Agreement provides that "the assessments against the Property for the Improvements shall be a lien on the Property and that the Owners shall have no individual liability or obligation with regard thereto at any time." RA058-RA063. Because they have absolved

¹ The current owner of the Property, the MAC, did not object to the disbursement of \$114,897.25 to the City. RA057.

themselves of all personal liability and only agreed to encumber the Property, the Bearmans do not have standing to terminate the Agreement.

The Bearmans cite caselaw regarding the termination of contracts with an indefinite term as support for their termination argument. *Id.* A classic example of a contract with an indefinite term is a contract wherein one party agrees to regularly and indefinitely purchase goods from another party. That's exactly what happened in the cases cited by the Bearmans.

In *Benson Coop. Creamery Ass'n v. First Dist. Ass'n*, 276 Minn. 520, 151 N.W.2d 422 (1967), the plaintiff alleged that First District Association (the "Association") agreed to pick up all of Benson Cooperative Creamery Association's ("Benson") milk while Benson was a member of the Association. The Association stopped picking up all of Benson's milk while Benson was still a member of the Association. The Court applied the general rule that a contract having no definite duration, expressed or which may be implied, is terminable by either party at will upon reasonable notice to the other.

Likewise, in *Hayes v. Northwood Panelboard Co.*, 415 N.W.2d 687 (Minn. Ct. App. 1987), the Minnesota Court of Appeals held that the agreement, which required the defendant to purchase pulpwood from the plaintiff as long as the defendant was in business, was a contract with an indefinite duration and terminable by either party at reasonable notice.

These cases are distinguishable from the case at bar because the Agreement in this case does not include an indefinite term. The Agreement was effective when it was executed and immediately became a lien upon the Property. RA058-RA061. *See, Lake Superior*

Paper Indus. v. State, 624 N.W.2d 254 (Minn. 2001) (holding that assessment agreements become effective when signed). There is no language in the Agreement that indicates the parties intended the contract to have an indefinite term or to be terminable.

While the City has not completed the Improvements contemplated in the Agreement, the City is proceeding with the process that leads to construction of the Improvements. RA048-RA054. On October 16, 2001, the City Council ordered a feasibility study, using the assistance of SEH, Inc. as a consultant to perform work with respect to the feasibility study, the first step towards constructing improvements. *Id.* The Agreement does not require the City to complete the Improvements by a specific date. RA058-RA061. The Agreement only requires that the City not commence any improvements until on or after November 1, 2001. *Id.* Because the Agreement does not have an indefinite term, it was effective when executed and the Bearmans may not now unilaterally terminate the Agreement.

The Bearmans argue that the City hasn't lived up to its own plan to act with "all convenient speed." (Appellants' Br. at 19, 22.) The City never promised to construct the Improvements contemplated by the Agreement by a certain date.² Any comments made by the City regarding their desire to act promptly simply have no bearing. The Improvements contemplated by the Agreement constitute a complex project, involving a complex design

² Furthermore, the law does not require that the City construct the improvements by a certain date. The time limit for improvements set forth in Minnesota Statute Section 435.191 does not apply to this case because the City has not adopted a resolution ordering the improvements contemplated in the Agreement.

and financing from several parcels. The Agreement is just one little piece of a very large puzzle. There is no proof that the City abandoned the project. On the contrary, it is undisputed that the City has continued to work on the project. Therefore, there is no basis for the Bearmans to terminate the Agreement.

The Bearmans argue that they can terminate the Agreement because the purpose of the Agreement failed when the MAC took the Property. (Appellants' Br. at 18.) The Bearmans also argue that the purpose of the Agreement was to provide utilities to the homes to be developed in the Woodbear Highlands. *Id.* The Bearmans allege they knew at the time they entered into the Agreement that the MAC *might* take the Property, but that the MAC *might* abandon the condemnation. (Appellants' Br. at 4-5.) The truth is that at the time the Bearmans entered the Agreement, the MAC's eminent domain petition had already been approved by the district court. The eminent domain petition in this case is dated February 23, 2001. The district court issued an order approving the eminent domain petition on May 31, 2001. The Agreement is dated August 21, 2001. The condemnation petition was already approved by the Court when the Agreement was signed. There is nothing in the record that supports the allegation that the MAC might abandon the condemnation. And in fact it didn't. When the Bearmans entered the Agreement, they knew that the eminent domain petition had already been approved. They can hardly argue that the Agreement failed in its purpose because of an event that occurred before they entered the Agreement.

Before the Agreement was signed, the Bearmans were in the process of seeking approval of the Woodbear Highlands subdivision and had received preliminary approvals necessary for the project in March of 2001. RA048-RA054; RA071-RA075. The Improvements contemplated by the Agreement were necessary for the Property to be developed. *Id.* The Bearmans told the City at the time the Agreement was executed that they agreed to the assessments in order to do the right thing for the community and to make sure that the Property bore its fair share of the cost of the Improvements. *Id.* Therefore, the purpose of the Agreement - for the Property to be encumbered for the Improvements that would benefit it - did not fail when the MAC took the Property.

The Bearmans also argue that the Agreement failed because the City did not approve the Woodbear Highlands plat and subdivision. The Agreement does not require the City Council to approve the Woodbear Highlands plat and subdivision. RA058-RA061. The Bearmans claim there is no need for the Improvements because the Woodbear Highlands was never approved.³

The Improvements are necessary to complete the urbanization of the neighborhoods adjacent to Eden Prairie Road in the vicinity of the Property. RA048-RA054. The Bearmans cannot avoid the Agreement, which is effective and binding, by claiming that the purpose of the Agreement was frustrated. Once again the purpose of the Agreement - for the Property to

³ The Bearmans withdrew their application on their own initiative. RA048-RA054.

be encumbered for the Improvements that would benefit it - did not fail when the MAC took the Property. For all of these reasons, the Agreement is not an executory contract and cannot be terminated by the Bearmans.

C. The Agreement Regarding Special Assessments Is A Valid Lien Against The Property.

The Bearmans argue that the Agreement is not a valid lien against the Property because the City did not adopt an assessment under Minnesota Statute Section 429.061. (Appellants' Br. at 23.) The City is not required to give notice or hold a hearing under Minnesota Statute Section 429.061 because the Bearmans waived these rights in the Agreement. The City entered into the Agreement with the Bearmans pursuant to Minnesota Statute Section 462.3531, which specifically authorizes assessment agreements as an alternative to the notice, hearing, and appeal process.

The Bearmans agreed that the Agreement is a lien upon the Property. RA058-RA061. The Agreement specifically states that "the assessments against the Property for the Improvements shall be a lien on the Property." RA058-RA061. The Bearmans argue that paragraph 9 of the Agreement requires both the execution of the Agreement and an assessment for a valid lien to exist. Paragraph 9 provides as follows:

The parties agree that this Agreement and the assessments against the Property for the Improvements shall be a lien on the Property and that the Owners shall have no individual liability or obligation with regard thereto at any time.

Id. The Bearmans argue that the use of the term “and” in this provision means that the City must adopt an assessment in order for the Agreement to be a lien against the Property. (Appellants’ Br. at 25.) This argument is strained and unconvincing. The use of the conjunctive in this provision merely conveys that *both* the Agreement and the assessment are liens against the Property. The Agreement does not specify any conditions precedent for the Agreement to become a lien against the Property. According to the plain language of the Agreement, the Agreement became a lien against the Property upon execution of the Agreement.

The Bearmans argue that the Agreement is not a valid lien because there is no debt supporting the lien. (Appellants’ Br. at 24-25.) The Agreement specifically provides that it is a lien against the Property. When a city makes a statutory assessment, there is no debt at the time of the lien. In fact, there is never a debt between a city and a property owner. An assessment is only a lien against property. Property owners are never personally liable for special assessments.

Cities are allowed to enter assessment agreements prior to an improvement contract being entered into or improvements completed. Under Chapter 429, a debt does not have to be incurred prior to the levy for the assessment. The Agreement provides that “the parties hereto desire to enter into an agreement concerning the financing of the construction of the Improvements, all of which inure to the benefit of the Property and the levying of assessments for said Improvements.” RA058-RA061. The Bearmans agreed to encumber

the Property with the Agreement which specifically calls for a lien for assessments in the amount of \$114,897.25. It bound the Property and ran with the land as soon as the Bearmans and the City executed it. Because the Agreement is not executory, completion of the Improvements is not necessary for the City to have a valid lien against the Property. The City had a valid, perfected lien against the Property the moment the Agreement was signed and filed.

Appellants argue that they are entitled to a refund of the \$114,897.25 because they allege the City has abandoned the Improvements. As discussed above, the Improvements contemplated by the Agreement constitute a complex project, involving a complex design and financing from several parcels. The Agreement is just one little piece of a very large puzzle. There is no proof that the City abandoned the project. On the contrary, it is undisputed that the City has continued to work on the project. Therefore, the Bearmans are not entitled to the funds held in escrow for assessments.

D. Appellants Waived Their Right To Appeal The Assessments In The Agreement Regarding Special Assessments.

The Bearmans agreed to encumber the Property with a special assessment in the amount of \$114,897.25 and waived their right to appeal the assessment. RA058-RA061.

The Agreement provides:

In consideration of the City's agreement herein and particularly in consideration of the amount of the assessment against the Property as set forth in Paragraph 2 above the Owners waive all right they have by virtue of Minnesota Statute Section 429.081 or otherwise to challenge the amount or validity of such assessments, or the procedures used by the City in making the

assessments and hereby releases the City, its officers, agents, and employees from any and all liability related to or arising out of the imposition or levying of the assessments.

Id. Because the Bearmans have waived their right to appeal the assessment, they cannot avoid having the Property encumbered by the assessment.

Minnesota law allows property owners to agree to pay a specific amount for an assessment and waive their right to appeal that assessment. Minnesota Statute Section 462.3531 provides:

Any waiver of rights of appeal under section 429.081 is effective only for the amount of assessment estimated or for the assessment amount agreed to in the development agreement.

MINN. STAT. §462.3531. In *Ruzic*, the Minnesota Court of Appeals held that the right to appeal an assessment may be waived and that assessment agreements are valid. *Ruzic v. City of Eden Prairie*, 479 N.W.2d 417 (Minn. Ct. App. 1991).

The Bearmans cite *Ruzic* for the proposition that the right to appeal an assessment may be waived, but that the validity of that waiver may be determined at trial. (Appellants' Br. at 31-32, citing *Ruzic*, 479 N.W.2d at 420.) The Bearmans haven't alleged any facts that support their argument that they didn't waive their right to appeal. The Bearmans did not argue that they didn't understand the Agreement or that they had an unequal bargaining position or that they did not have the opportunity to negotiate with the City. Indeed, those arguments would be quite untenable as the Bearmans were represented by counsel when they entered into the Agreement and vigorously negotiated individual provisions of the

Agreement. The Bearmans simply do not provide any facts upon which the court could determine that the Bearmans' waiver was invalid.

Waivers are generally favored in the law. *Id.* at 419. The Minnesota Supreme Court provided the following analysis of waiver law:

A 'waiver' is a voluntary relinquishment of a known right. No consideration is required to support it, and when once established it is irrevocable even in the absence of consideration therefore. Waivers, where they operate to dispense with merely formal requirements in judicial procedure, should be favored, and except as limited by public policy a person may waive any legal right, constitutional or statutory.

Id. Individuals may waive the right to notice, public hearing, and appeal of assessments. *Id.*

The Bearmans did not provide any evidence to overcome the presumption that their waivers are valid.

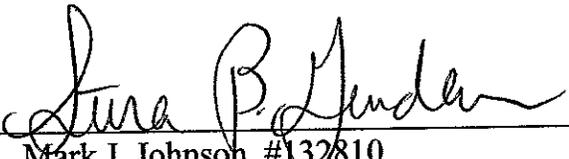
Chapter 429 of Minnesota Statutes sets forth the notice, hearing, and appeal procedures for assessing property. The Bearmans contractually waived their notice, hearing and appeal rights. However, the Bearmans are incorrect that Chapter 429 does not apply to this case because the parties entered the Agreement under Minnesota Statute Section 462.3531. The Bearmans agreed to an assessment in the amount of \$114,897.25 against the Property and waived their right to appeal that assessment. RA058-RA061. The Agreement, Minnesota Statute Section 462.3531, and the *Ruzic* case show that the City is entitled to the funds held in escrow for pending assessments.

CONCLUSION

The district court properly found that the Agreement Regarding Special Assessments is valid and enforceable, and correctly concluded that the City is entitled to the sum of \$114,897.25, escrowed with Great American Corporation/North Star Title. The City respectfully requests that the district court's decision be affirmed.

GREGERSON, ROSOW, JOHNSON & NILAN, LTD.

Dated: 12/14/05

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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) (with amendments effective July 1, 2007).