

**No. A06-109**

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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**Allen Javinsky, P.E.,**

*Appellant,*

vs.

**Commissioner of Administration,  
Dana Badgerow, in her official capacity  
as head of the Minnesota  
Department of Administration.**

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

Respondent raises only one novel argument in its Brief -- timeliness of appeal for denial of writ of mandamus. Unfortunately, black letter law expressly rejects Respondent's reading of Rule 104.01, MINN. R. APP. P.

The remainder of Respondent's arguments are adequately addressed in Appellant's Brief and Appendices, volume I and II -- Appellant supplements his Brief only to emphasize a point somewhat obscured by Respondent: this Court is not bound to defer to the decision of an administrative agency on a pure question of law.

### **I. RESPONDENT MISSTATES THE LAW REGARDING TIME FOR APPEAL OF PARTIAL JUDGMENTS.**

Respondent ignores black letter law when it asserts that the appeal of the denial of the writ of mandamus is untimely. An intermediate appeal under Rule 54.02, MINN. R. CIV. P., is *permissive*, not mandatory. Respondent's reading of that rule, along with Rule 104.01, Subd. 1, MINN. R. APP. P., would force litigants into expensive and costly piecemeal litigation, a position at odds with public policy and judicial economy. *See, e.g., Novus Equities Corp. v. EM-TY Partnership*, 381 N.W.2d 426, 428 (Minn. 1986) (the purpose of Rule 54.02 is "to prevent piecemeal, interlocutory appeals and possible prejudice from the adjudication of less than all claims involved").

There is no dispute that the trial court entered judgment against part, but not all, of Appellant's claims on December 16, 2004, and did so pursuant to Rule 54.02, Minn. R.

Civ. P., by directing that “There is no just reason for delay” and “Let judgment be entered accordingly.” App., vol. II, at 217.

Where Respondent goes wrong is asserting that the permissive language of Rule 104.01, Subd. 1, be read to require that an appeal of a partial judgment must be filed within 60 days (as opposed to waiting until 60 days after final judgment disposing all of a party’s claims). Respondent’s reading contradicts the plain language of Rule 104:

**104.01 Time for Filing and Service**

**Subdivision 1. Time for Appeal. . . .**

An appeal *may* be taken from a judgment entered pursuant to Rule 54.02, Minnesota Rules of Civil Procedure, within 60 days of the entry of the judgment only if the trial court makes an express determination that there is no just reason for delay and expressly directs the entry of a final judgment. The time to appeal from any other judgment entered pursuant to Rule 54.02 shall not begin to run until the entry of a judgment which adjudicates all the claims and rights and liabilities of the remaining parties.

Rule 104.01, Minn. R. App. P. (emphasis added).

The Minnesota Supreme Court has held an appeal of a partial judgment is timely if consolidated with an appeal of final judgment on all claims at the conclusion of district court proceedings. In *Engvall v. Soo Line R.R. Co.*, 605 N.W.2d 738 (Minn. 2000), the Court held:

A rigid determination that these types of appeals are mandatory would be inconsistent with the policy evinced in both *McGowan* and *Shorewood*. Such a rule would also be inconsistent with the collateral order doctrine of the federal system, under which similar appeals are permissive rather than mandatory. Finally, consistent with our policy against piecemeal litigation, **construing these interlocutory appeals as permissive allows appellants**

**to wait to appeal from the final judgment if they so choose.** This avoids "trap[ping] some parties in a box framed by a rule designed to alleviate untoward risks, not to create them." Charles A. Wright, et al., supra, § 3911 at 359. **The better rule is that failure to appeal from such an interlocutory order or judgment does not result in forfeiture of the right to appeal from the final judgment.** Therefore, to the extent that the court of appeals' holdings in this case and in Semiconductor are inconsistent with this rationale, they are overruled.

*Engvall, id.* (emphasis added) (citing *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995); *Shorewood v. Metropolitan Waste Control Comm'n*, 533 N.W.2d 402 (Minn. 1995); and Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 3911 at 359 (2d ed. 1992).

*Engvall* is identical to the present case as far as timeliness of the appeal goes. In *Engvall*, judgment on the third-party complaint was entered on August 13, 1998; final judgment on all other claims was entered on October 12, 1998; and the notice of appeal was filed on January 8, 1999. *Id.* In the present case, judgment on part of Appellant's claims was entered on December 16, 2004; judgment on Appellant's remaining claims was filed on November 14, 2005; and Appellant's notice of appeal was timely filed on January 13, 2006.

One last point -- there can only be one final judgment which adjudicates all claims of all parties in a case. To hold otherwise -- to hold that there is more than one final judgment -- means that different claims are automatically bifurcated into different cases when partial "final" judgment is issued. This is contrary to public policy and judicial

economy for the reasons cited by the Minnesota Supreme Court in *Engvall*. Thus an appeal from a final judgment dismissing all remaining claims must inherently incorporate by reference any preceding partial “final” judgment. Otherwise it makes no sense to permit a party to wait until final judgment to appeal all its claims, regardless of when some claims may have been dismissed.

For these reasons, and for the reasons given in his Brief, Appellant’s appeal of all issues decided by the Court below is timely.

## **II. RESPONDENT OVERSTATES THE DEFERENCE DUE TO AGENCY DECISION-MAKING**

Respondent’s argument that deference is due to an agency’s interpretation of the statutes it administers begs the question. This argument cleverly makes the false assumption that the State Designer Selection Board is “administered” by the Department of Administration.

Respondent’s assumption is false. The fact that the State Designer Selection Board works with the Department of Administration does not mean that the Department thereby administers the Designer Selection Board statute. The Department of Administration’s interpretation of the Designer Selection Board statute is entitled to no more deference than its interpretation of statutes establishing other departments it works with, such as the Department of Finance, or the Bureau of Criminal Apprehension.

In fact Respondent's assumption turns Minn. Stat. § 16B.33 on its head. The Legislature established the State Designer Selection Board as a separate agency in order to insulate design and building decisions from interference from political appointees of the Governor. Permitting the Department of Administration to interpret the jurisdiction of the Designer Selection Board puts the non-political Designer Selection Board at the mercy of the political appointees running the Department of Administration -- a result the Legislature expressly sought to avoid by creating the Designer Selection Board in the first place.

By way of analogy, Respondent would have the fox interpret the statute governing operation of the hen house.

Respondent's tortured reading of the law is hardly necessary. Whether projects are "buildings" within the meaning of Minn. Stat. § 16B.33 is a pure question of law, and this Court owes no deference to Respondent's interpretation of the statute, nor to the decision of the trial court. "When a decision turns on the meaning of words in a statute or regulation, a legal question is presented." *St. Otto's Home v. State, Dep't of Human Serv.*, 437 N.W.2d 35, 39 (Minn. 1989) (citations omitted). Reviewing courts are not bound by the decision of the agency and need not defer to agency expertise when considering questions of law. *Id.* at 39-40. No deference is given to the agency interpretation if the language of the regulation is clear and capable of understanding. *Id.* at 40 (citations omitted).

The only interpretation of “building” which deserves deference is the one made by the Legislature itself in Minn. Stat. § 16B.60, Sub. 6. In that statute, which does not govern the Designer Selection Board but which is certainly related to it by subject matter, the Legislature defines “public building” as follows:

Public building. **"Public building" means a building and its grounds** the cost of which is paid for by the state or a state agency regardless of its cost, and a school district building project the cost of which is \$100,000 or more.

Minn. Stat. § 16B.60, Subd. 6 (emphasis added). It makes far more sense to defer to the Legislature’s explicit definition of building than its does to Respondent’s self-serving interpretation adopted as part of a jurisdictional dispute with the Designer Selection Board.

It also makes more sense to use the Legislature’s interpretation of “building” than to adopt dictionary definitions which have no context and no connection to the present facts, as the trial court did when it cited Merriam-Webster and American Heritage dictionaries. App., vol. II, at 227 (the opinion of the trial court also failed to cite or distinguish Minn. Stat. § 16B.60, Subd. 6).

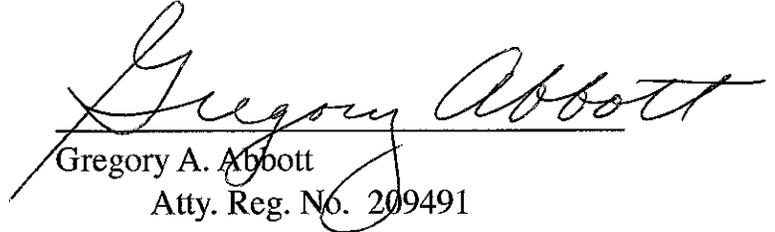
### III. CONCLUSION

For the reasons cited above, Appellant respectfully requests that this Court vacate the judgment of the court below, and remand the case with such instructions as necessary to establish justice and enforce the law.

Dated: June 22, 2006

Respectfully submitted,

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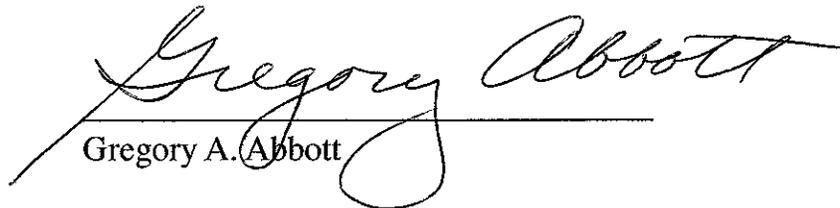
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**CERTIFICATE OF COMPLIANCE  
WITH RULE 132.01, Subd. 3**

The undersigned certifies that this Reply Brief contains approximately 1,589 words and otherwise complies with the type and volume limitations of Rule 132, Minn. R. App. P.

This Reply Brief was prepared using a proportional spaced font size of 13 points. The word processing software used to produce this document and to estimate the total number of words was Pages 2.0.1, published by Apple Computer, Inc.

  
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