

Appellate Court Case No. A08-1814

STATE OF MINNESOTA

IN COURT OF APPEALS

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American National Bank of Minnesota,

Appellant.

vs

Housing and Redevelopment Authority  
for the City of Brainerd.

Respondent.

**APPELLANT'S**  
**BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## ARGUMENT

### INTRODUCTION

The HRA is contractually obligated to fully repay ANB. **AA-049**. Both the HRA and the Minnesota NAHRO argue that the HRA's liability is limited to the pledged security. That argument lacks merit. Nothing in the Loan Documents, particularly the Revenue Note, limits the HRA's obligation to repay ANB to the pledged security. Again, ANB is not claiming that this is a general obligation bond.

#### **I. There is a distinct difference between the terms "security" and "repayment"**

Both the HRA and the Minnesota NAHRO attempt to confuse this Court and blur the distinction between the terms "security" and "repayment." "Security" is collateral that is pledged in a transaction. "Repayment" is the source of the money to repay the amount borrowed. They are distinct and different terms.

Both the HRA and the Minnesota NAHRO argue that ANB is only entitled to be repaid the amounts it is owed from the pledged security. In this transaction, the Loan Documents place no restriction on the sources of repayment. Repayment is nowhere limited to the pledged security as claimed by the HRA and the Minnesota NAHRO. The HRA contractually agreed to fully repay ANB<sup>1</sup>. **AA-049 and AA-051**.

In their briefs, both the HRA and the Minnesota NAHRO repeatedly use the terms "security" and "repayment" interchangeably. The most egregious example of the attempt

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<sup>1</sup> The HRA "acknowledges itself to be indebted and for value received hereby *promises to pay*..." ANB \$2,159,200.00. **AA-049**. *Emphasis Added*. "In the event of any failure to make when due any interest payments or principal and interest payments required under this Note, the interest payment or principal and interest payment so in default shall *continue* as an obligation hereof until the interest payment or principal payment in default shall have been *fully paid*" **AA-051**. *Emphasis Added*.

to blur the distinction between the terms repayment and security is found on page 18 of the HRA's brief:

"More importantly, however, the Bond Transcript repeatedly states that repayment was to be limited to an enumerated list of agreed upon sources. For instance, section 5.01 of Resolution 469 within the Bond Transcript plainly and unambiguously discloses a finite list of sources from which ANB would be able to obtain repayment of the bond:

**Security for Payment of the Note, Payment of principal and interest due on the Note will be secured by** (i) a Combination Mortgage, Security Agreement, and Fixture Financing Statement, dated as of July 1, 2005...made by the Authority in favor of [ANB]...(ii) proceeds of the sales of ten (10) homes to be constructed...; (iii) an interest reserve fund in the amount of \$141,000, to be deposited with the Purchaser for the payment of interest payments during the construction period; and (iv) a pledge from the Authority to place all net proceeds from the sale of two commercial properties within the Brainerd Oaks Development, when sold, in trust to secure the Note...."

Respondent's brief, page 18.

Incredibly, the language that the HRA chooses to emphasize, in reality, adds emphasis to supports ANB's position. The emphasized language only describes the *security* for payment on the amounts owed, not the sources of repayment. The HRA's reading of the cited language is an extremely strained interpretation. The cited language does not limit the HRA's *repayment* obligation to the pledged security; it simply (and accurately) describes the collateral for the secured obligation.

Amazingly, the above language is not the only cited portion of the Loan Documents that the HRA uses to completely mischaracterize the unambiguous language of the Loan Documents. The HRA also adds emphasis to the following language found in

both the Amended and Restated Housing Finance Program document and the Revenue Note: "**Payment of principal and interest due on the Note will be secured by....**" Respondent's Brief page 19. Again that language does not limit the sources of repayment; it only states the *security* pledged for the amounts borrowed by the HRA. The cited language says nothing about repayment.

There is a distinct difference between the terms security and repayment. The HRA did not contractually limit repayment to the pledged security. It must be required to abide by its contractual obligation to fully repay ANB. If it had wanted to limit its obligation to repay, it could have, and would have needed to say so in the documents. It did not do so.

## **II. Bond Counsel's opinion is not binding**

The HRA uses Bond Counsel's opinion for their position that repayment is limited to the sources of security. Respondent's Brief page 18-19. Additionally, the Minnesota NAHRO relies heavily on Bond Counsel's advice for their position that the HRA is not required to fulfill its contractual obligation to repay ANB. Bond Counsel provided advice on documents that it drafted. Bond Counsel are not the arbiters of the law nor are their opinions final and binding. Bond Counsel opinions are simply that, opinions.

The Minnesota NAHRO states that "smaller HRAs rely heavily upon the opinion of bond counsel..." and that if ANB "were to succeed in this case, it would negate an HRA's reliance on the opinion of bond counsel." Minnesota HAHRO Amicus Curiae Brief, pages 4-5. This is a very troubling argument.

There is no doubt that a client relies on its attorney or law firm for advice. However, those opinions cannot be imputed to an adverse party, as seemed to be claimed

by the Minnesota NAHRO. Bond Counsel can give misguided and erroneous opinions or advice. That is exactly what seems to have happened in this case. If Bond Counsel gives a wrong opinion, it is not grounds to renege on an HRA's contractual obligations.

**III. Minnesota Statutes § 469.034 does not limit the type of bond an HRA can issue**

According to the Minnesota NAHRO, it "has a strong interest in ensuring that its members, when financing housing, development and redevelopment projects through the issuance of bonds, *are free to determine the types of securities they issue....*" Minnesota NAHRO Amicus Curia Brief page 1, *emphasis added*. That is exactly what was done in this case. The HRA determined the type of bond to issue; a bond that did not limit the sources of repayment to the pledged security. The HRA had ample opportunity to make the bond repayable solely from the pledged security because it drafted the Revenue Note. **AA-160**. The HRA even had statutory language to make the bond payable solely from the pledged security, which was the revenue from this financed project. See Minn. Stat. § 469.034, subd. 1.

Both the HRA and the Minnesota NAHRO quote the same language from the Maytag Co. v. Comm'r of Taxation, 17 N.W.2d 37, 40 (Minn. 1944) case: "[w]here a statute enumerates the persons or things to be affected by its provisions, there is an exclusion of all others." Id. The HRA argues that the quoted language stands for the proposition that Minnesota Statutes § 469.034, subd. 1, provides *only* four authorized sources of repayment for revenue bonds and as a result excluded all other sources of repayment. Respondent's Brief, page 13 *emphasis added*.

That argument lacks merit. Minnesota Statutes § 469.034, subd. 1, states that the bonds an HRA can issue "*may be the type the authority determines*, including bonds on which the principal and interest are payable exclusively from the income and revenues of the project financed with the proceeds of the bonds, or exclusively from the income and revenues of certain designated projects, whether or not they are financed in whole or in part with the proceeds of the bonds." Minn. Stat. § 469.034, subd. 1, *emphasis added*.

Minnesota Statutes § 469.034, subd. 1, does not provide an exclusive or exhaustive list of the types of bonds an HRA can issue. That statute explicitly grants the HRA the authority to determine the type of bonds to issue and provides examples. By using the terms "may" and "including", the Minnesota Legislature did not intend to exclude all other types of bonds. The Minnesota Legislature simply provided examples, not an exhaustive list, as claimed by the HRA and the Minnesota NAHRO.

**a. The United States Supreme Court has held that the term "including" is an illustrative term, not a term of limitation**

In Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941), the United States Supreme Court stated, in construing a statute setting forth a general principle followed by an "including" list, as does the present statute, "[w]e recently had occasion under other circumstances to point out that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." Federal Land Bank of St. Paul, 314 U.S. at 99-100. Likewise, in Premier Products Co. v. Cameron, 400 P.2d 227, 228 (Or. 1964), *supra*, the Oregon Supreme

Court also found the use of "including" in a statute, to be a word of enlargement, or of illustrative application. Premier Products Co. v. Cameron, 400 P.2d 227, 228 (Or. 1964).

"Including" within a statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation. Black's Law Dictionary, 5th Ed, *citing Premier Products Co. v. Cameron*, 400 P.2d 227, 228 (Or. 1964).

To jump to the conclusion that "including" is in this instance a word of limitation rather than illustration or enlargement is overly simplistic and ignores the introductory wording of the statute, which uses the inclusive "may" the inclusive "of the type the authority determines," as well as the very word "including" itself.

Maytag, *supra*, is not on point. In Maytag, the Court was faced with two issues of statutory construction, neither of which is present in this case. The issue which discusses the maxim raised here by defendant was whether a statute's exclusion of one group of potentially-taxable transactions meant that the opposite group was intended to be taxed. The Court held that it was. Maytag did not concern dealing with an enumerated list of examples.

Likewise, the two cases on which the Maytag Court relied, Cohen v. Gould, 225 N.W. 435, 438 (Minn. 1929) and State v. Jackson, 16 N.W. 752, 755 (Minn. 1944), concern statutory issues which bear no similarity to the present issue. They simply, and obviously, hold that a statute which provided that Indians hunting off Indian reservation lands were subject to the statute should be construed to mean that Indians hunting on reservation lands were not subject to the statute. "By expressly limiting the offense

thereby created to persons other than Indians, this statute impliedly excluded Indians." State v. Jackson, 16 N.W. at 755.

The express limitation in that statute is precisely the opposite situation from the inclusive wording in the statute at issue here.

The only other case cited by the Minnesota NAHRO is Brandt v. Hallwood Management Co., 560 N.W.2d 396, 400 (Minn. Ct. App. 1997). Brandt also deals with a far differently worded statute than Minnesota Statutes § 469.034. Brandt concerns Minnesota Statutes § 541.051, which contains a list of specific items to which it applies, but unlike Minn. Stat. § 469.034 does not use "including" and therefore there is no issue as to whether the list is one of illustration and enlargement or one of limitation. In that instance, it is reasonable to conclude, as the Court did, that the list was simply one of limitation.

In fact, although Maytag has been cited in a dozen or more subsequent cases dealing with statutory construction, all have dealt with a straightforward list of items, and none has dealt with a statute such as Minn. Stat. § 469.034 which incorporates the terms "including," "may," and "of the type the authority determines." There have been no Minnesota cases interpreting "including" as a narrowing term rather than a word of enlargement or of illustrative application, nor are we aware of any such cases from other jurisdictions.

The Maytag principle was explicitly rejected in construing the statute under review in Pitkin v. Gross, 385 N.W.2d 367 (Minn. 1986). In Pitkin, despite an argument that Maytag was applicable in construing a request for an award of attorneys' fees, the

Court indicated that the whole of the statute must be considered: "...in ascertaining the intent of the legislature, this court must be guided by the presumption that the legislature intends the entire statute to be effective and certain. Pitkin, 385 N.W.2d at 371.

The statute here permits an HRA to issue bonds "the type the authority determines...." A bond is nothing more than a promise to repay an obligation. In fact, the definition of "bonds" includes the catch-all "or other obligations." Minnesota Statutes § 469.002, subd. 19.

Here, the HRA has borrowed money from ANB and given its promise to repay. No documents executed by either the HRA or ANB, or both, limits that promise in any way. The HRA has issued a bond "of the type the authority determines" and now, when the security given as collateral for the loan proved insufficient, wants to hide behind the statute and claim that it in fact it never had the statutory authority to issue the bond of the type it determined. Had the HRA wanted to issue the type of bond which would limit repayment resources to revenue from a project or projects, all it had to do was say so in the Loan Documents. It did not do so and as a result cannot now claim that it does not have to repay ANB the amounts that are rightfully due and owing to ANB<sup>2</sup>.

#### **IV. The HRA must repay ANB, as it contractually agreed to do**

At the time the transaction at issue in this case was coming together was the height of the construction and housing boom. The HRA got caught up in the housing speculation and now, like many other developers and contractors, cannot pay its obligations that are

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<sup>2</sup> The HRA "acknowledges itself to be indebted and for value received hereby promises to pay" to ANB, \$2,159,200.00 AA-0049

contractually due and owing. The HRA contractually agreed to fully repay ANB and to continue to repay ANB until ANB was paid in full. **AA-049 and AA-051.**

Both the HRA and the Minnesota NAHRO attempt to garner this Court's sympathy by stating that HRA's have little money and they are on tight budgets. That very well may be true. However, the HRA's financial condition is of no consequence for this Court. Whether ANB will ultimately be able to collect on the amounts it is owed is ANB's issue, not this Court's. It is surprising that the HRA takes the "poor me" approach when it is the one that contractually agreed to repay the amounts it owed, yet now is now refusing to repay ANB.

The HRA should not have signed the Revenue Note with a promise to pay if it did not want to fully repay ANB. Because the HRA signed the Revenue Note, which contractually obligated the HRA to fully repay ANB, it must be required to do so and not shirk its contractual obligations.

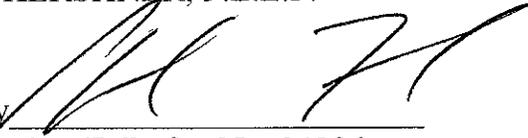
CONCLUSION

The HRA must fully repay ANB. It is contractually obligated to do so. The District Court erroneously ruled that repayment to ANB is limited to the pledged security. Nowhere in the documents does it so state. The HRA must be held to its contractual obligations.

Respectfully Submitted,

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Dated: January 5, 2008

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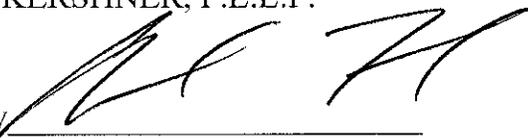
CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, subdvs. 1 and 3. The length of this brief is 2,540 words. This brief was prepared using Windows Vista, Microsoft® Word 2007 software.

Respectfully Submitted,

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