

NO. A10-1740

State of Minnesota
In Court of Appeals

American Bank of St. Paul, successor in interest to
2700 East Lake Street, LLC,

Appellant,

vs.

City of Minneapolis,

Respondent.

**BRIEF AND ADDENDUM OF APPELLANT
AMERICAN BANK OF ST. PAUL**

ANASTASI & ASSOCIATES, P.A.
Garth G. Gavenda (#310918)
T. Chris Stewart (#152316)
14985 – 60th Street North
Stillwater, MN 55082
(651) 439-2951

*Attorneys for Appellant
American Bank of St. Paul*

MINNEAPOLIS CITY ATTORNEY
Robin H. Hennessy (#294676)
Sara J. Lathrop (#310232)
350 South Fifth Street, Suite 210
Minneapolis, MN 55415
(612) 672-2072

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 CONTENTSi

TABLE OF AUTHORITIESiii

STATEMENT OF LEGAL ISSUESv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

STANDARDS OF REVIEW 19

LEGAL ARGUMENT20

 I. THE DISTRICT COURT ERRED BY APPLYING THE INCORRECT
 LEGAL STANDARD TO DETERMINE IF THE ASSESSMENT
 INCREASED THE MARKET VALUE OF THE PROPERTY IN AT
 LEAST THE AMOUNT OF THE COST ASSESSMENT.....20

 II. THE DISTRICT COURT ERRED IN FINDING THAT THE
 ASSESSMENT DID NOT EXCEED THE SPECIAL BENEFIT TO THE
 PROPERTY.....23

 III. THE DISTRICT COURT ERRED IN CONCLUDING THAT
 APPELLANT DID NOT INTRODUCE COMPETENT EVIDENCE
 THAT THE ASSESSMENT WAS ACTUALLY GREATER THAN THE
 BENEFIT27

 IV. THE DISTRICT COURT ERRED IN ALLOWING RESPONDENT TO
 INTRODUCE THE TESTIMONY OF UNDISCLOSED WITNESSES...32

 A. The District Court erred in allowing Respondent to call witnesses and,
 in particular, an expert witness, who was not previously disclosed to
 Appellant.....32

 B. The District Court erred in allowing Respondent to call witnesses and,
 in particular, an expert witness, despite Respondent’s failure to provide
 meaningful responses to Appellant’s Discovery Requests, including
 expert interrogatories.....33

1. Respondent wholly failed to provide responses to Appellant's Discovery Responses, with respect to the alleged value of the benefit and/or improvement to the Property derived from the abandonment of the Areaway.....33
2. Respondent wholly failed to provide responses to Appellant's Discovery Requests, with respect to the witnesses and any expert witnesses Respondent intended to call at the trial of this matter.....35

CONCLUSION.....37

TABLE OF AUTHORITIES

MINNESOTA CASES

<i>Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.</i> , 664 N.W.2d 303, 311 (Minn. 2003).....	20
<i>Anderson v. City of Bemidji</i> , 295 N.W.2d 555, (Minn.1980).....	22
<i>Bondy v. Allen</i> , 635 N.W.2d 244, (Minn. App. 2001).....	20
<i>Buettner v. City of St. Cloud</i> , 277 N.W.2d 199, 203 (Minn.1979).....	24
<i>Buzick v. City of Blaine</i> , 505 N.W.2d 51, (Minn.1993).....	22
<i>Carlson-Lang Realty Co. v. City of Windom</i> 307 Minn. 368, 240 N.W.2d 517 (Minn.1976).....	10, 19, 24, 25, 26, 30
<i>City of St. Louis Park v. Engell</i> , 283 Minn. 309, 168 N.W.2d 3 (Minn. 1969).....	21
<i>Continental Sales & Equip. v. Town of Stuntz</i> , 257 N.W.2d 546, 551 (Minn.1977).....	22
<i>Dennie v. Metropolitan Medical Center</i> , 387 N.W.2d 401, (Minn. 1986).....	36
<i>Don Kral, Inc. v. Lindstrom</i> , 286 Minn. 37; 173 N.W.2d 921, (Minn. 1970).....	20
<i>Dosedel v. City of Ham Lake</i> , 414 N.W.2d 751 (Minn.App.1987).....	19, 25
<i>Downtown Development Project, Marshall City Council Resolution No. 57 v. City of Marshall</i> , 281 N.W.2d 161 (Minn. 1979).....	21
<i>Frost-Benco Electric Association v. Minnesota Public Utilities Commission</i> , 358 N.W.2d 639 (Minn. 1984).....	20

<i>Gross v. Victoria Station Farms, Inc.,</i> 578 N.W.2d 757 (Minn. 1998).....	20
<i>Hass v. Harris,</i> 347 N.W.2d 838, (Minn.App.1984).....	20
<i>In Re Assessment for Paving Concord Street, St. Paul,</i> 148 Minn. 329, 181 N.W. 859, (Minn. 1921).....	19
<i>In re Appeals by Am. Oil Co. v. City of St. Cloud,</i> 295 Minn. 428, 206 N.W.2d 31 (Minn. 1973).....	22
<i>In re Collier,</i> 726 N.W.2d 328, (Minn. 1997).....	20
<i>Jadwin v. Minneapolis Star & Tribune Co.,</i> 367 N.W.2d 476 (Minn. 1985).....	20
<i>Krech v. Erdman,</i> 305 Minn. 215, 233 N.W.2d 555 (Minn. 1975).....	32
<i>Kroning v. State Farm Automobile Insurance Company,</i> 567 N.W.2d 42, (Minn. 1997).....	20
<i>Nyquist v. Town of Center,</i> 251 N.W.2d 695 (Minn. 1977).....	21, 25
<i>Phelps v. Blomberg Roseville Clinic,</i> 253 N.W.2d 390 (Minn. 1977).....	32
<i>Tri-State Land Co. v. City of Shoreview,</i> 290 N.W.2d 775, (Minn.1980).....	10
21, 30	
<i>Twin City Hide v. Transamerica Insurance Co.,</i> 358 N.W.2d 90, (Minn.App.1984).....	19
 <u>MINNESOTA STATUTES</u>	
Minn.Stat. § 429.051.....	21
Minn.R.Civ.P. 26.02.....	35
Minneapolis Code of Ordinances Chapter 95.....	4

STATEMENT OF LEGAL ISSUES

I. WHETHER THE DISTRICT COURT ERRED BY APPLYING THE INCORRECT LEGAL STANDARD TO DETERMINE IF THE ASSESSMENT INCREASED THE MARKET VALUE OF THE PROPERTY IN AT LEAST THE AMOUNT OF THE COST ASSESSMENT.

How the issue was raised below?

Via Appellant's response to Respondent's motion for Summary Judgment; Appellant's Trial Brief; and Appellant's Motion in Limine.

Concise statement of the District Court's ruling:

The District Court ruled "The proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value the property from the moment the order compelling their removal of the condition is issued, to the value of the property immediately after that illegal condition is remedied."

Most apposite authorities:

Minnesota Statutes § 429.051; *In re Appeals by Am. Oil Co. v. City of St. Cloud*, 295 Minn. 428, 206 N.W.2d 31 (1973); *City of St. Louis Park v. Engell*, 283 Minn. 309, 316, 168 N.W.2d 3, 8 (1969); and *Nyquist v. Town of Center*, Minn., 251 N.W.2d 695 (1977).

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE ASSESSMENT DID NOT EXCEED THE SPECIAL BENEFIT TO THE PROPERTY.

How the issue was raised below?

Via Appellant's response to Respondent's motion for Summary Judgment; Appellant's Motion in Limine; Appellant's Trial Brief; and trial testimony of Mr. Frederick Lehmann and Mr. Anthony Ruzek.

Concise statement of the District Court's ruling:

The District Court ruled that the benefit conferred to the real property was equal to or greater than the amount of the assessment upon the real property.

Most apposite authorities:

Minnesota Statutes § 429.051; *In re Appeals by Am. Oil Co. v. City of St. Cloud*, 295 Minn. 428, 206 N.W.2d 31 (1973); *City of St. Louis Park v. Engell*, 283 Minn. 309, 316, 168 N.W.2d 3, 8 (1969); and *Nyquist v. Town of Center*, Minn., 251 N.W.2d 695 (1977).

III. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT APPELLANT DID NOT INTRODUCE COMPETENT EVIDENCE THAT THE ASSESSMENT WAS ACTUALLY GREATER THAN THE BENEFIT.

How the issue was raised below?

Via trial testimony of Mr. Frederick Lehmann and Mr. Anthony Ruzek.

Concise statement of the District Court's ruling:

The District Court ruled that the benefit conferred to the real property was equal to or greater than the amount of the assessment upon the real property.

Most apposite authorities:

Continental Sales & Equip. v. Town of Stuntz, 257 N.W.2d 546, 551 (Minn.1977); *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 203 (Minn.1979); *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 370, 240 N.W.2d 517, 519 (1976).

IV. WHETHER THE DISTRICT COURT ERRED IN ALLOWING RESPONDENT TO INTRODUCE THE TESTIMONY OF UNDISCLOSED WITNESSES.

How the issue was raised below?

Via Appellant's Discovery Requests, Appellant's Motion in Limine, and objection at trial.

Concise statement of the District Court's ruling:

The District Court allowed Respondent to introduce the testimony of Ms. Jennifer Lortiz, Mr. Donald Elwood, and Respondent's undisclosed expert, Mr. Patrick Todd despite Respondent's failure to disclose any as witnesses or to furnish an expert report.

Most apposite authorities:

Minn.R.Civ.P. 26.02(4)(A)(i); *Boland v. Garber*, 257 N.W.2d 384, 387 (Minn.1977); *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 404 (Minn.1986); *Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390, 394 (Minn.1977).

STATEMENT OF THE CASE

This matter involves an assessment appeal. Respondent, the City of Minneapolis (“City”), abated an encroachment associated with property located at 2700 East Lake Street in Minneapolis. The encroachment was an "areaway," which was an extension of the basement of the building on the property, which extended past the property line, into the land under the adjacent streets, which therefore encroached upon Hennepin County's right-of-way. Under a Minneapolis ordinance, areaways may exist unless they interfere with the "public good."

During Hennepin County's reconstruction of Lake Street, it was determined that this areaway interfered with the underground portion of the reconstruction project. The abandonment and removal of the areaway was ordered by Respondent. The City gave the property owner an opportunity to arrange for the removal. Instead, the owner agreed that Respondent would remove the areaway and assess the cost of the remediation to the property's taxes. Respondent acted pursuant to its ordinances and completed the removal of the areaway. Respondent's cost of completing the areaway abandonment was levied against the property as a special assessment, despite the objections of the then-owner of the property, 2700 East Lake Street LLC, a Minnesota limited liability company, to the amount of assessment.

This assessment appeal was commenced by 2700 East Lake Street LLC, the former owner of the property. 2700 East Lake Street LLC lost its interest in the property through foreclosure. Appellant, American Bank of St. Paul, a Minnesota banking corporation (“American”), foreclosed on its mortgage against the property and a Sheriff's

sale of the property was held on March, 26, 2009. American obtained fee ownership to the subject property after the running of the period of redemption.

The parties agreed that the areaway abandonment was necessary for a public good project, that 2700 East Lake Street LLC had an opportunity to complete the areaway abandonment with its own contractor, but was unable to do so, that Respondent acted pursuant to proper legal authority, and that Respondent followed all of the proper legal procedures in ordering the abandonment and assessing related costs.

The parties also agreed that the removal of the areaway did confer a benefit to the property. Appellant's burden at trial was proving that the amount of the assessment exceeded the areaway abandonment's actual benefit to the property, judged on a "fair market basis."

Respondent introduced no evidence of an increase of value in the property at trial. Respondent also called witnesses, including experts, who were not properly disclosed to American, prior to trial. American provided an appraisal and testimony from its appraiser that the property did not constitute a benefit in an amount equal to the amount the city imposed by the assessment.

Judge Bransford, of Hennepin County District Court, subsequently issued an order denying American's appeal. Judge Bransford incorrectly adopted a legal standard, which provides, in summary:

The value of the property decreased in value in an amount equal to the assessment, at the time the same was imposed. Once the work on the abatement was complete, the property increased in value equal to the amount of the assessment.

The legal standard adopted by the District Court makes any appeal of an assessment moot, as the value of the assessment would always, upon the assessment, decrease the value of the property and then, upon completion of the abatement, increase the value equally.

STATEMENT OF FACTS

1. This matter involves and affects certain real property located in the County of Hennepin, State of Minnesota, legally described as:

Lot 13, excepting that portion taken for the widening of East Lake Street, Lots 14, 15, 16, and 17, and the South 22.5 feet of Lot 18, Block 24, South Side Addition to the City of Minneapolis, according to the recorded plat thereof, Hennepin County, Minnesota (“Property”).

Appellant’s Appendix (“App. Appendix.”) at p.133.

2. The Property was owned by 2700 East Lake Street LLC, a Minnesota limited liability company (“2700 LLC”). *App. Appendix at p. 133.*

3. On April 2, 2003, 2700 LLC, made, executed and delivered to American that certain promissory note in the original principal amount of \$3,470,000.00, as modified from time to time, most recently evidenced by that certain loan modification agreement dated March 5, 2008 (collectively, “Note”). *App. Appendix at p.132.*

4. The Note was secured, in part, by that certain mortgage, security agreement and fixture financing statement executed by 2700 LLC, in favor of American, dated April 2, 2003, and recorded on April 4, 2003, as Document No. 8002022, in the Office of the County Recorder in and for Hennepin County, Minnesota (“Mortgage”), encumbering the Property. *App. Appendix at pp.132-133*

The Areaway, its abandonment, and the City's Assessment

5. An areaway is "a below-grade area which is or was used as an extension of, or adjunct to, a building or structure and which extends into and occupies a portion of a street or other public right-of-way." Minneapolis Code of Ordinances ("MCO") Chapter 95.90(a). *App. Appendix at p. 210.*

6. That pursuant to City ordinance, areaways are allowed to exist so long as they do not interfere or conflict with the "public good." *See* MCO Chp. 95.90(c). The ordinance gives examples of "public good" projects, including but not limited to street paving, curbs, gutters, and streetscapes. *Id. App. Appendix at p. 210.*

7. Hennepin County determined that an areaway underneath and appurtenant to the Property ("Areaway"), was an encroachment into Hennepin County's right-of-way and it interfered with Hennepin County's project for the reconstruction of Lake Street East from Hiawatha to West River Road. *App. Appendix at p. 210.*

8. A contract existed between the City and Hennepin County, giving the City the ability to order the removal of encroachments in the County's right-of-way. *App. Appendix at p. 210.*

9. The City had the right to and the City did order the removal of the Areaway. *App. Appendix at p. 210.*

10. The City gave notice to the then-property owner, 2700 LLC, to arrange to have the areaway removed, but that instead the owner of 2700 LLC agreed to have the City remove the Areaway and to assess the cost to the property's taxes over a five-year period. *App. Appendix at p. 211.*

11. The City followed municipal bidding law to award the contract for the Areaway removal and the contract was properly awarded to the lowest responsive bidder. *App. Appendix at p. 211.*

12. The bidder commenced work to abate the areaway in July, 2007, however the bidder failed to complete the work to abate the areaway and the City subsequently acted take over the project and abate the Areaway. *App. Appendix at p. 211.*

13. The total assessed to the Property as and for the abatement of the Areaway was \$409,358.46, which consisted of:

- a. The original contract price for the Areaway removal of \$339,000.00.
- b. The cost of approved changed orders of \$13,823.46.
- c. The cost of the consultant fees of \$37,700.00.
- d. Administrative fees for the City of Minneapolis of \$18,835.00.

App. Appendix at p. 211.

14. The areaway removal was completed in September, 2008, and the Property was subsequently assessed in the amount of \$409,358.46. *App. Appendix at p. 211.*

15. The parties agree that the completion of the areaway abandonment bestowed a benefit to the Property, but disagree as to what value the abatement of the Areaway had to the market value of the Property. *App. Appendix at p. 211.*

American forecloses on the Property

16. During the time of the abatement of the Areaway, 2700 LLC breached the terms of the Note and Mortgage. Pursuant to its rights under the Mortgage, American

commenced foreclosure by advertisement proceedings, with respect to the Property. *App. Appendix at p. 133.*

17. A Sheriff's sale of the Property was held on March, 26, 2009, at the Hennepin County Sheriff's Department and the Property was struck off and sold to American for the amount of \$3,452,017.44 ("Sale"). *App. Appendix at p. 211.*

18. 2700 LLC failed to redeem from the Sale and as of September 29, 2009, American became the fee owner of the Property. *App. Appendix at p. 133.*

The Assessment appeal

19. 2700 LLC previously commenced the present action as and for an appeal of the assessment against the Property for the abandonment of the Areaway. *App. Appendix at p. 10.*

20. Upon American becoming owner of the Property, legal counsel for American worked with the City's attorneys to amend the prior scheduling order and allow American to proceed with the current appeal, commenced by 2700 LLC. *App. Appendix at p. 111.*

21. James Moore, assistant City attorney, executed that certain Stipulation to Amend Civil Scheduling Order and Referral to Mediation Dated June 24, 2009 ("Stipulation"), on November 5, 2009, and the Stipulation was submitted to the Court for execution. *App. Appendix at p. 112.*

22. The Stipulation was entered into specifically to provide the parties with the opportunity to conduct discovery, as the Stipulation extended the period for discovery to December 11, 2009. *App. Appendix at p. 112.*

23. On November 11, 2009, legal counsel for American timely served the City with discovery requests (“American’s Discovery Requests”), pursuant to the terms of the Stipulation, which requests focused on the alleged benefit and/or improvement to the Property allegedly caused by the abatement of the Areaway. *App. Appendix at p. 117.*

24. The City did not serve legal counsel for American with any discovery. *Addendum II at pp. 10-12.*

25. The City previously served 2700 LLC with discovery requests and scheduled a motion to compel to obtain responses, but the City withdrew its requests and cancelled its motion to compel upon the parties entry into the Stipulation. *App. Appendix at pp. 112-113.*

26. On December 30, 2009, the City served legal counsel for American with responses to American’s Discovery Requests (“City’s Discovery Responses”). *App. Appendix at p. 166.*

27. Among other things, the City’s Discovery Responses failed to provide adequate responses to the primary issue at hand, the value of the benefit and/or improvement to the Property:

17. Set forth in detail, and not in summary fashion, all facts, evidence, information, and the like to support the City’s claim that the benefit and/or improvement to the property owned by Plaintiff, its successors, or assigns, derived from the subject assessment has a value equal to \$409,358.46.

ANSWER: The duty to remove the areaway in the public interest was the property owner’s. The property owner had the option of financing the areaway abandonment privately but opted instead to have the City remove the areaway as allowed by ordinance and to have the city assess the cost to the property to be paid over 20 years at an interest rate equal to that at

which the bonds were sold. The basis of the assessment is set forth in the attached documents.

19. Set forth in detail, and not in summary fashion, all facts, evidence, information, and the like to support the City's claim that the value of the property owned by Plaintiff, its successors, or assigns, has increased by \$409,358.46, due to the abatement of the areaway.

ANSWER: See Answer to Interrogatory No. 17.

App. Appendix at pp. 159-161.

28. None of the documents produced through the City's Discovery Responses spoke to the value of the Assessment, but rather to the cost incurred by the City. *App. Appendix at pp. 153-170.*

29. Further, the City was requested to identify all persons, including experts, who the City intended to introduce. The City responded as follows:

33. Identify all persons that you expect to call at a trial of this matter and for each such person, set forth their name, address, and telephone number and indicate whether the person is to be called as an expert witness or a factual witness, and provide a detailed summary of the substance of the expected testimony of each witness.

ANSWER: Unknown at this time. Defendant's witness list will be provided pursuant to the Trial Order in this matter. Defendant may call all or some of the individuals named in the enclosed documents.

34. As required by the Minnesota Rules of Civil Procedure, identify all experts retained or consulted by you with respect to this litigation, and as further required by the rules, for each such expert, set forth a detailed description of that person's background including, but not limited to, the name, address, and special qualifications of the expert, his/her educational/academic and professional background, the subject matter of that person's knowledge, the actual or claimed basis for such knowledge or information, the date, place, and circumstances of obtaining such knowledge or information, whether such person has been interviewed by you or your representatives either prior or subsequent to the commencement of this present action, the substantive contents of any

interview or statements given, his/her experience and qualifications as an expert, the date you retained him/her as an expert. The purpose for which retained him/her as an expert (e.g. whether for trial or otherwise), the identity of any documents prepared by him/her for you, the subject matter upon which the expert is expected to testify, a summary of the facts which the expert has been or will be asked to assume the substantive facts and opinions to which the expert is expected to testify, a detailed summary of the grounds for each opinion (include a complete description of all publications upon which the expert has relied or will rely in justifying or supporting the opinions held), a detailed description of all documents of any kind prepared by the expert which pertain or relate in any way to the subject matter of this litigation, and the identify of any articles, books, publications, or other documents which he/she has written or to which he/she has contributed.

ANSWER: See Answer to Interrogatory No. 33.

App. Appendix at pp. 165-166.

30. American's Discovery Requests also requested that the City produce "[c]opies of any and all documents used, consulted, reviewed, identified or which otherwise relate to your response to" each of the foregoing interrogatories. *App. Appendix at pp. 120-124.*

31. The City did not provide any documents relating to expert testimony or the report of an expert. *App. Appendix at pp. 153-168.*

32. On January 29, 2009, the District Court heard argument on a motion for Summary Judgment brought by the City, which motion was subsequently denied pursuant to that certain Order and Memorandum Denying Defendant's Motion for Summary Judgment dated March 22, 2010 ("Summary Judgment Order"). *App. Appendix at p. 186.*

33. The Summary Judgment Order, among other things, established the law of the case providing, in relevant part:

- a. A city's power of special assessment is limited by the following: (a) the land must receive a special benefit from the improvement being constructed, (b) the assessment must be uniform upon the same class of property, and (c) the assessment may not exceed the special benefit. *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 370, 240 N.W.2d 517, 519 (1976).
- b. In actions contesting special assessment, there is a presumption that the city's assessment is valid until proven otherwise. *Tri-State Land Co. v. City of Shoreview*, 290 N.W.2d 775, 777 (Minn.1980).
- c. However, this presumption can be overcome "by introducing competent evidence that the assessment is greater than the increase in market value of the property due to the improvement." *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 370, 240 N.W.2d 517, 519 (1976).
- d. "When evidence is also received that the assessment is equal to or less than the increased market value, the district court must make a factual determination." *Id.* at 519-520.

App. Appendix at pp. 186-193.

Pre-trial motions and trial

34. This matter was set for a judicial trial in Hennepin County District Court on April 20, 2010 ("Trial").

35. On March 29, 2010, the City provided American with its Witness List, which identified four (4) witnesses, Jenifer Loritz, P.E., Guillermo Arriondo, Patrick Todd, and Donald Elwood. *App. Appendix at pp. 194-195.*

36. The City further designated Patrick Todd as an expert witness. *App. Appendix at p. 195.*

37. As set forth specifically above in paragraphs 29-31, the City did not provide an expert report from Mr. Todd and the City did not disclose any documents relating to Mr. Todd, nor any of its other witnesses. *App. Appendix at pp. 226-230.*

38. American's Discovery Requests, specifically asked for all facts or evidence tending to prove the "value of the benefit and/or improvement to the Property was equal to or greater than the amount of the Assessment." *App. Appendix at pp. 127-131.*

39. The City did not provide any facts of evidence relating to the value of the benefit and/or improvement to the Property, instead relying solely on the City's argument that the value was equal to the amount of the Assessment. *App. Appendix at pp. 226-230.*

40. Pursuant to the Amended Order for Court Trial issued on March 3, 2010 ("Pre-Trial Order"), required that any motions in limine be filed no later than March 29, 2010. *App. Appendix at p. 184.*

41. American timely served and filed its Motion in Limine on March 29, 2010, wherein American objected to the City's intention to introduce evidence relating to the value of the benefit and/or improvement to the Property, which the City failed to provide in the City's Discovery Responses. *App. Appendix at pp. 226-230.*

42. On April 5, 2010, the City served and filed Defendant's Memorandum in Response to Plaintiff's Trial Brief, Motions in Limine, and Witness and Exhibit Lists, which was untimely pursuant to the Trial Order ("City's Trial Motion"). *App. Appendix at p. 240.*

43. On April 8, 2010, American served and filed its Reply Memorandum objecting to the City's Trial Motion. *App. Appendix at p. 245.*

44. On April 20, 2010, this matter came before the District Court for a bench trial.

45. At the outset, the District Court heard argument on American's Motion in Limine. The District Court also considered argument on the City's Trial Motion, even though it was untimely. *App. Appendix at pp. 231-240.*

46. American objected to any introduction of testimony and evidence by the City, due to the City's abject failure to provide meaningful responses to American's Discovery Requests. *Addendum II at pp. 12-26.*

47. American also vehemently objected to the City's intention to introduce testimony of the City's expert, Patrick Todd, due to the City's failure to identify Mr. Todd as an expert witness and the Mr. Todd's failure provide an expert report. *Addendum II at pp. 12-26.*

48. In response to American's Motion in Limine, the City argued, for the first time, that the City served 2700 LLC with discovery requests, which somehow American was bound to respond to; even though the City never provided these requests to American, never pursued its previously scheduled motion to compel responses to these requests, and never otherwise asked American to respond. *Addendum II at pp. 12-26.*

49. The City's argument was a "tit-for-tat" response to American's Motion in Limine, because the City had no legal argument to justify its failure to provide American with adequate responses to American's Discovery Requests. *See Transcript, Addendum II at 10-27.*

50. The District Court denied American's Motion in Limine, essentially on the "tit-for-tat" basis that both American and the City failed to respond to discovery.

51. At trial, American introduced testimony from Fred Lehmann (“Lehmann”), the principal of 2700 LLC, who testified in most relevant part:

- a. that 2700 LLC acquired the Property in 1999. *Id.* at p. 35.
- b. that Lehmann obtained a quote for the abatement of the Areaway from McGough Construction in the amount of \$200,000.00. *Id.* at pp. 39-40.
- c. that Lehmann could not obtaining financing to pay McGough for the abandonment of the Areaway and thus, had to allow the City to complete the abandonment. *Id.* at pp. 40-42.
- d. that the City put the abandonment project out for bid, which bid was awarded to LS Black, which commenced work in July, 2007. *Id.* at p. 43.
- e. that LS Black failed to complete the abandonment project and the City subsequently took the project over. *Id.* at pp. 43-44.
- f. that as a result of LS Black’s failure to complete the abandonment project and the City subsequently taking the project over, the abandonment project took fifteen (15) months to complete. *Id.* at p. 44; *see* Stipulated Facts.
- g. that the “market value” of the Property, pursuant to the property tax statement Lehman received from Hennepin County, was \$3,850,000.00. *Id.* at pp. 46-47.
- h. that Lehman listed the Property for sale in 2009, for \$4,000,000.00, but that he never received offers to purchase the Property for more than \$2,000,000.00 - \$ 2,500,000.00. *Id.* at p. 49.
- i. that Lehman was not able to sell the Property for his asking price of \$4,000,000.00. *Id.* at p. 59.
- j. that instead of being able to sell the Property, American foreclosed on the Mortgage granted by 2700 LLC. *Id.*
- k. and that the bid amount at the foreclosure sale was “\$3.4 [million] and change” *Id.*

52. American then introduced testimony from its expert witness, Anthony Ruzek (“Ruzek”), a commercial appraiser with Mark A. Oehrlein Appraisals, Inc. (“Oehrlein Appraisals”), who prepared an expert report/appraisal of the Property dated October 2, 2009.

53. Ruzek testified, in most pertinent part:

- a. that Ruzek had been employed by Oehrlein Appraisals for a little over eleven (11) years, that he exclusively appraises commercial property, such as the Property at issue, and that he has conducted over 500 commercial appraisals. *Id.* at p. 62.
- b. that Ruzek previously worked in the City of St. Cloud’s assessor’s office where he worked to establish tax assessed market values for various real properties. *Id.* at pp. 63-64.
- c. that there are two (2) ways to appraise commercial properties: the “sales” approach and the “income” approach. *Id.* at pp. 64-65.
- d. and that as an appraiser, Ruzek was required to complete continuing educational courses and that Ruzek did complete all required continuing education courses to maintain his appraiser’s license. *Id.* at p. 65-66.

54. Upon the foregoing testimony, Mr. Ruzek was qualified as an expert by the District Court, without objection from legal counsel for the City. *Id.* at p. 66.

55. Ruzek then testified about the Property at issue, in most pertinent part:

- a. that Oehrlein Appraisals was engaged in August, 2009 to prepare an appraisal of the Property, pursuant to the Uniform Standards of Professional Appraisal Practice (“USPAP”). *Id.* at p. 67.
- b. that Ruzek, on behalf of Oehrlein Appraisals, prepared the “summary appraisal report” for the Property dated October 2, 2009, in compliance with USPAP (“Appraisal”). *Id.* at p. 68.
- c. that the Appraisal evidences Ruzek’s conclusion that the fair market value of the Property, as of September 28, 2009, was \$3,030,000.00 (“Appraised Value”). *Id.* at p. 68.

- d. that Ruzek performed both the “sales” and “income” approaches to determine the Appraised Value. *Id.* at p. 69.
- e. that the “sales” approach indicated a value of \$2,850,000.00, and that the “income” approach indicated a value of \$3,100,000.00. *Id.* at p. 70.
- f. that to reach the “sales” approach value, Ruzek considered the sales of comparable properties, which are identified on page 46 of the Appraisal. *Id.* at p. 70.
- g. that to reach the “income” approach value, Ruzek considered the lease of space in comparable properties, which analysis is evidenced on on pages 53-76 of the Appraisal. *Id.* at p. 71.
- h. that Ruzek also considered the tax assessed value of the Property, as determined by Hennepin County, which consideration is set forth on page 23 of the Appraisal, and that the Hennepin County assessor determined the value of the Property to be:
 - i. \$3,833,500 for 2008, for property taxes payable in 2009; and
 - ii. \$3,530,600 for 2009, for property taxes payable in 2010.
Id. at p. 72-73.
- i. and that Ruzek took all of these various factors into consideration to determine the fair market value of the Property was \$3,030,000.00, as of September 28, 2009. *Id.* at p. 73.

56. The City did not dispute the decrease in the market value of the Property at all times during the determination of the Assessment in 2007, through the completion of the abandonment in 2008. *Id.* at pp. 76-94.

57. Instead, the cross examination of Mr. Ruzek by legal counsel for the City attempted to create a “new” standard for valuation of real property that would require an appraisal of the real property on the day before the abandonment was ordered, as well as an appraisal the day after the abandonment was completed. *Id.* at pp. 92-94.

58. On redirect, Mr. Ruzek stressed that he took the abandonment of the Areaway into consideration when he determined the fair market value of the Property was \$3,030,000.00, as of September 28, 2009. *Id.* at pp. 97-98.

59. American rested its case, at which time the City moved for a directed verdict, which was denied by the District Court. *Id.* at p. 99-103.

60. The City subsequently called Jennifer Loritz, a principal professional engineer, to testify about the construction process undertaken by the City to abandon the Areaway. *Id.* at p. 103.

61. Ms. Loritz provided no testimony as to the value of the Property or the benefit, measured in market value, the Property received from the abandonment of the Areaway. *Id.* at pp. 103-94.

62. Ms. Loritz specifically admitted that she “cannot testify to market value” because she does not “have experience in that area”. *Id.* at pp. 117-118.

63. The City subsequently called Donald Elwood, a civil engineer for the City, to testify about the construction and assessment process undertaken by the City to abandon the Areaway. *Id.* at pp. 119-125.

64. Mr. Elwood provided no testimony as to the value of the Property or the benefit, measured in market value, the Property received from the abandonment of the Areaway. *Id.*

65. The City concluded its case by calling Patrick Todd, assessor for the City, to testify about establishing values of real property in and for the City of Minneapolis. *Id.* at pp. 125-139.

66. Mr. Todd provided no testimony as to the value of the Property or the benefit, measured in market value, the Property received from the abandonment of the Areaway. *Id.*

67. Mr. Todd acknowledged he did not provide the City with an “opinion regarding the effect that [the] areaway work had on the value either positively or negatively of 2700 East Lake Street after the areaway work was completed”. *Id.* at pp. 130; 141.

68. The City rested its case without the introduction of any evidence as to the value of the Property or the benefit, measured in market value, the Property received from the abandonment of the Areaway. *Id.* at 142.

The District Court’s Order

69. On July 30, 2010, the District Court issued that certain Findings of Fact, Conclusions of Law and Order (“Order”), denying American’s appeal of the Assessment.

70. In pertinent part, the Order made “Findings of Fact”:

- a. at the time work on the Areaway commenced in July, 2007, the tax assessed value for the Property was \$3,850,000.00. *Id.* at ¶ 21.
- b. the Property was appraised at \$3,030,000.00, by Anthony Ruzek of Oehrlein Appraisals, as of September 28, 2009, which appraisal took into consideration the Areaway work. *Id.* at ¶¶ 22-23.
- c. that Patrick Todd, assessor for the City, testified that:
 - i. “a property facing an order for an Areaway removal is diminished in value in the amount equal to the cost of having the Areaway removed. The property’s value is restored immediately after that Areaway removal is completed.” *Id.* at ¶ 26.

- ii. “an appraisal done months or years after the completion of the work would not be an accurate value of the work performed”. *Id.* at ¶ 28.
 - d. that “the 2007 tax value, the purchase price at the Sheriff’s Sale, and the 2009 appraisal, are not competent evidence of the value of the Areaway removal... That is, they do not reflect the actual benefit that the Areaway removal conferred to the property.” *Id.* at ¶ 33.
 - e. that “Mr. Todd’s testimony was credible, competent, and compelling”. *Id.* at ¶ 35.
 - f. that “[t]he evidence in this case established that the proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value of the property from the moment the order compelling the removal of the condition is issued, to the value of the property after the illegal condition is remedied.” *Id.* at ¶ 36.
 - g. that “[h]ence, once the City lawfully ordered that the Areaway be removed... the property owned by Plaintiff dropped in value in an amount equal to the cost of removing the Areaway... [o]nce the illegal Areaway was removed, the value of the property went back up to the pre-removal-order value.” *Id.* at ¶ 39.
71. In pertinent part, the Order made “Conclusions of Law”:
- a. “The proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value the property from the moment the order compelling ther removal of the condition is issued, to the value of the property immediately after that illegal condition is remedied.” *Id.* at ¶ 12.
 - b. “Hence, once the City lawfully ordered that the Areaway be removed... the property owned by Plaintiff dropped in value in an amount equal to the cost of removing the Areaway. In order to place a valuation on a benefit that is conferred to the property from the removal of the Areaway, the Court must look to the cost that the City incurred in removing the illegal condition. Once the illegal Areaway was removed, the value of the property went back up to the pre-removal-order value. *Id.* at ¶ 13.
72. American subsequently commenced the present appeal.

STANDARDS OF REVIEW

A. Special Assessments

The scope of the Court of Appeals' review on the issue of special assessments is a careful examination of the record, to ascertain whether the evidence as a whole fairly supports the findings of the district court and whether these in turn support its conclusions of law and judgment. *Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 370, 240 N.W.2d 517, 519 (1976).

The evidence must be against the findings to justify a reversal. *In Re Assessment for Paving Concord Street, St. Paul*, 148 Minn. 329, 332, 181 N.W. 859, 860 (Minn. 1921). The duty of this court is to review the record in order to ascertain whether the evidence supports the District Court's findings and whether the findings support the conclusions. *Dosedel v. City of Ham Lake*, 414 N.W.2d 751, 756 (Minn.App.1987). As a result, the appropriate standard of review is "not to weigh the evidence as if trying the matter de novo, but rather to determine if the evidence as a whole sustains the District Court's findings." *Twin City Hide v. Transamerica Insurance Co.*, 358 N.W.2d 90, 92 (Minn.App.1984); *Hass v. Harris*, 347 N.W.2d 838, 839 (Minn.App.1984) *Don Kral, Inc. v. Lindstrom*, 286 Minn. 37, 42, 173 N.W.2d 921, 924, (Minn. 1970).

B. Questions of Law

On appeal, the court is not bound by lower court conclusions with respect to issues of law, and instead conducts an independent review of the record. *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 483 (Minn.1985). "An appellate court is not bound by, and need not give deference to, the district court's decision on a question of law."

Bondy v. Allen, 635 N.W.2d 244, 249 (Minn.App. 2001) (citing *Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, 358 N.W.2d 639, 642 (Minn. 1984)). The Appellate Court reviews questions of law decided by the district court *de novo*. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003). *In re Collier*, 726 N.W.2d 328, 333 (Minn. 1997).

C. Admission of Evidence

The admission of evidence rests within the broad discretion of the district court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion. *Kroning v. State Farm Automobile Insurance Company*, 567 N.W.2d 42, 45-46 (Minn. 1997). Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error. *Id.* A district court's evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the district court and will not be reversed unless it is based on an erroneous view of the law or constitutes an abuse of discretion. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760-761 (Minn. 1998).

LEGAL ARGUMENT

I. THE DISTRICT COURT ERRED BY APPLYING THE INCORRECT LEGAL STANDARD TO DETERMINE IF THE ASSESSMENT INCREASED THE MARKET VALUE OF THE PROPERTY IN AT LEAST THE AMOUNT OF THE COST ASSESSMENT.

The District Court, in its Summary Judgment Order, correctly summarized the legal standard applicable to the appeal of an assessment. However, in its ultimate Order subsequent to trial, the District Court failed to apply the well-established standard to

determine if the Areaway abandonment caused a benefit to the Property, which value was equal to, or greater than, the amount of the cost of the Assessment.

The legal standard begins with the statutory requirements: “The cost of any improvement, or any part thereof, may be assessed upon property benefited by the improvement, based upon the benefits received...” Minn.Stat. § 429.051. Special assessments are presumed to be valid only if:

- (1) the land receives a special benefit from the construction of the improvement;
- (2) the assessment is uniform upon the same class of property; and
- (3) the assessment does not exceed the special benefit to the property.

Tri-State Land Co. v. City of Shoreview, 290 N.W.2d 775, 777 (Minn.1980).

To determine the value of a special benefit, the taxing authority must consider “what increase, if any, there has been in the market value of the benefited land.” *City of St. Louis Park v. Engell*, 283 Minn. 309, 316, 168 N.W.2d 3, 8 (1969); *Nyquist v. Town of Center*, Minn., 251 N.W.2d 695 (1977) (overruled on other grounds by *Downtown Development Project, Marshall City Council Resolution No. 57 v. City of Marshall*, 281 N.W.2d 161 (1979)).

The test is whether the improvement for which the assessment was levied has increased the market value of the property, against which the assessment operates, in at least the amount of the assessment. *In re Appeals by Am. Oil Co. v. City of St. Cloud*, 295 Minn. 428, 206 N.W.2d 31 (1973) (emphasis added). The benefits from an improvement are calculated on the market value of the land before and after the improvement. *Buzick v. City of Blaine*, 505 N.W.2d 51, 53 (Minn.1993) (citing *Anderson*

v. *City of Bemidji*, 295 N.W.2d 555, 560 (Minn.1980)).

Perhaps most importantly, an assessment is “void on its face” if it fails to even “approximate a market-value analysis.” *Continental Sales & Equip. v. Town of Stuntz*, 257 N.W.2d 546, 551 (Minn.1977).

Instead of applying the foregoing standard, the District Court created its own legal standard. The District Court, in its Order, established the following “Conclusions of Law”:

“The proper way to measure the benefit to the property of the removal of an illegal condition, such as an areaway removal, is to compare the value the property from the moment the order compelling the removal of the condition is issued, to the value of the property immediately after that illegal condition is remedied.” *Order* at ¶ 12.

“Hence, once the City lawfully ordered that the Areaway be removed... the property owned by Plaintiff dropped in value in an amount equal to the **cost of removing the Areaway. In order to place a valuation on a benefit that is conferred to the property from the removal of the Areaway, the Court must look to the cost that the City incurred in removing the illegal condition.** Once the illegal Areaway was removed, the value of the property went back up to the pre-removal-order value. *Id.* at ¶ 13 (emphasis added).

The standard adopted by the District Court wholly fails to consider the value of the completed work to remove the Areaway. Instead, the District Court focuses solely on the cost of the Assessment. The practical effect of the District Court’s “test” is that any assessment will be conclusively valid, because only the cost of the completed assessment is considered. This standard made it impossible for American to succeed on its appeal, no matter what evidence might have been introduced, because the cost of the Assessment was relied upon and there was no consideration given to the extensive evidence regarding the value of the Assessment.

Applying the District Court's "standard" to the facts at issue, assume the Property had a value of \$3,500,000.00, the moment before the City ordered the removal of the Areaway. Once the order for the removal of the Areaway was decided, the "value" of the Property dropped by "the cost of removing the Areaway". Under these facts, the Property at that moment drops in "value" by \$409,358.46, to \$3,090,641.54, until the removal of the Areaway is complete. At the moment of completion, the "value" of the Property goes back up in the precise amount of the "the cost of removing the Areaway".

This "standard" wholly ignores the market value of the Property, focusing only on the cost of the work. The standard adopted and applied by the District Court at trial is wholly inconsistent to the analysis of value that is required. This matter must be remanded for the District Court to apply the correct legal analysis applicable to an assessment appeal.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE ASSESSMENT DID NOT EXCEED THE SPECIAL BENEFIT TO THE PROPERTY.

Similar to the argument above, the District Court also failed to weigh any of the evidence to determine if the Assessment did not exceed the actual benefit, measured in market value, that the Property received as a result of the Areaway removal.

An assessment that exceeds the benefit constitutes a taking of property without fair compensation in violation of the Fourteenth Amendment of the United States Constitution. *See Carlson-Lang*, 307 Minn. at 370, 240 N.W.2d at 519. When the issue is whether there has been an unconstitutional taking, the district court cannot abrogate its duty by deferring to the taxing authority; rather, its decision must be based upon

independent consideration of all the evidence. *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 203 (Minn.1979).

A city is presumed to have legally assessed its property until proven to the contrary, and the introduction of its assessment roll into evidence constitutes prima facie proof that the assessment does not exceed the special benefit. *Carlson-Lang*, 307 Minn. at 370, 240 N.W.2d at 519. The party appealing the assessment can overcome this presumption by introducing competent evidence that the assessment is actually greater than the benefit. *Id.* If the city then presents evidence that the amount of the assessment is equal to or less than the increase in the market value of the property, **the district court must weigh the parties' evidence and make a factual determination.** *Id.* at 370, 240 N.W.2d at 519-520 (emphasis added).

A property owner can overcome the presumption created by the assessment roll by identifying the maximum benefit and testifying that the assessment exceeded the benefit. *Dosedel v. City of Ham Lake*, 414 N.W.2d 751, 756 (Minn.App.1987).

To determine the value of a special benefit, the taxing authority must consider “what increase, if any, there has been in the fair market value of the benefitted land.” *Nyquist*, 312 Minn. at 269, 251 N.W.2d at 697. This difference in market value should be computed by determining the following:

[W]hat a willing buyer would pay a willing seller for the property before, and then after, the improvement has been constructed... If the assessment is set higher than the special benefit conferred, it is a taking without compensation to the extent of the excess.

Carlson-Lang, 307 Minn. at 369-70, 240 N.W.2d at 519; *Tri-State*, 290 N.W.2d at 777; *Nyquist*, 312 Minn. at 269, 251 N.W.2d at 697.

Nowhere does the case law create a standard where the value of the Property must be valued at the moment the removal is ordered and valued again the moment the removal is complete. This creates an impossible legal standard for property owners to meet, which simply is not contemplated by the applicable case law. Yet this is the legal standard that was employed by the District Court.

The District Court failed to weigh the substantial evidence that American introduced, which evidence was not contradicted by any testimony or evidence presented by the City. The uncontradicted evidence presented by American showed that the value of the Property was dropping precipitously from 2007, the time that the Areaway was ordered removed through the time of trial. American introduced the Hennepin County property tax records that are, in part, created by the City's "expert" Patrick Todd. There was absolutely no evidence introduced by the City to contradict the testimony of American's expert appraiser, Anthony Ruzek, who considered the value of the Property after the Areaway removal was complete. Similarly, the City did not contradict Hennepin County's own property tax records, nor the Sale Amount that American bid at the foreclosure sale of the Property.

At the very least, American introduced competent evidence that the amount of the Assessment was actually greater than the amount of the benefit to the Property. *Carlson-Lang*, 307 Minn. at 369-70, 240 N.W.2d at 519. Given that American satisfied this burden, the burden shifted to the City to provide evidence that the amount of the Assessment was equal to or less than the increase in the market value of the property. *Id.* at 370, 240 N.W.2d at 519-520 (emphasis added).

The City, in turn, offered absolutely no evidence to meet this shifted burden. The only testimony offered by the City related to the cost of the Assessment, which was stipulated to before trial. Neither Ms. Loritz nor Mr. Elwood provided any evidence regarding the value of the removal of the Areaway to the Property. Ms. Loritz specifically admitted that she “cannot testify to market value” because she does not “have experience in that area”. *District Court Transcript* at pp. 117-118. Similarly, Elwood, as a civil engineer for the City, provided testimony related to the work the Department of Public Works performs for the City. *Id.* at 1201-124. Elwood provided no testimony as to the value the removal of the Areaway allegedly provided to the Property.

Finally, the City’s “expert” Patrick Todd did nothing more than provide hypothetical testimony about how a hypothetical assessment might affect the value of a hypothetical property. *Id.* at 133-139. Todd did not even refer to the Property or the Assessment at issue and, rather, acknowledged that he did not prepare an appraisal for the Property for trial of this matter. *Id.* at 130.

American satisfied its burden to introduce competent evidence with respect the value, or lack thereof, of the removal of the Areaway. The City, despite the District Court’s great reliance on the hypothetical testimony of Patrick Todd, provided no actual evidence of the value of this Assessment to this Property. Thus the District Court erred in concluding that the Assessment exceeded the value of the removal of the Areaway to the Property.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT APPELLANT DID NOT INTRODUCE COMPETENT EVIDENCE THAT THE ASSESSMENT WAS ACTUALLY GREATER THAN THE BENEFIT.

The District Court erred when it concluded “The valuations that the Plaintiff relies upon, the 2007 tax value, the purchase price at the Sheriff’s Sale, and the 2009 appraisal, are not competent evidence of the value of the Areaway removal.” *Order* at ¶ 33. The only evidence that the District Court heard during the course of the trial was that proffered by American, and all of it went uncontradicted throughout the trial.

There is no dispute that the Areaway removal work commenced in July 2007. American offered into evidence, which was received, the tax assessed value for the Property (which would have been calculated by Hennepin County for taxes payable in 2007) as being \$3,850,000.00. This figure was never challenged, nor contradicted by the City. Over the objection of the City, the tax assessed value was received by the District Court as evidence of at least one articulable and objective value for the Property, prior to the work to abandon the Areaway. *Trial Transcript* at pp. 45-48. Therefore, the District Court had competent evidence of the value of the Property based upon the County’s own tax assessed value.

As further proof that the value of the assessment did not increase the value of the Property in an amount equal to the amount of the City’s Assessment, Anthony Ruzek, a qualified expert and appraiser, opined that the value of the Property had deteriorated even further by September 28, 2009, at which time he believed the Property to have a value of \$3,030,000.00. *Id.* at pp. 68-74 and *Order* at ¶ 27. The City introduced no evidence to dispute the valuation provided to the District Court by Mr. Ruzek.

Another objective valuation provided to the District Court consisted of the amount bid in at the Sheriff's Sale by American. The amount bid at the Sheriff's sale was \$3,452,017.44. *Id* at ¶ 19. The value of a piece of property is no greater than the amount a ready, willing, and able buyer might offer. As of March 26, 2009, there were no ready, willing, or able buyer willing to bid in a penny more than the \$3,452,017.44. Therefore, American proffered yet one more objective valuation associated with the Property that was uncontradicted and stood for the proposition that the benefit of the Areaway removal did not equal the amount associated with the cost of the Areaway removal.

As additional competent evidence to show that the Property did not receive a value equal to the amount of the cost of the Assessment for the Areaway removal, American introduced uncontradicted testimony that Fred Lehmann listed the Property for sale for \$4,000,000.00, in February 2009. *Id* at ¶ 17. Mr. Lehmann received no offers for \$4,000,000.00, which once again afforded the District Court with competent evidence to support American's contention that there was no ready, willing, or able buyer that would even offer \$4,000,000.00, for the Property and that, therefore, the costs associated with the Areaway removal did not benefit the Property in an amount equal to, or greater than, the costs associated with the Areaway removal.

In the Summary Judgment Order denying the City's motion, the District Court concluded that "when evidence is also received that the assessment is equal to or less than the increased market value, the district court must make a factual determination." In support of American's response to the City's motion for Summary Judgment, American submitted precisely the same evidence that was presented at the trial of this matter: the

tax assessed value of the Property; the appraised value; and the amount American bid at the Sheriff's sale. *App. Appendix* at pp. 186-193.

Based on this evidence, in its Summary Judgment Order denying the City's motion, the District Court specifically concluded that:

In the instant case, the Plaintiff has introduced such "competent evidence." American paid \$3,452,017.44 for the Property at the Sheriff's Sale on March 26, 2009. On March 27, 2009, the City Council levied the full assessment amount of \$409,358.46 against the Property. According to an appraisal, the Property's market value was \$3,030,000.00 as of September 28, 2009; this is \$422,017.44 less than the price American paid in March of that year. In other words, the Property's value decreased significantly within six months of the purchase and assessment. The evidence submitted by the Plaintiff suggests that the Property after the abatement is worth less than it was before the City's work.

Summary Judgment Order p. 7; *App. Appendix* at pp. 192-193.

The Summary Judgment Order denying the City's motion was issued by the District Court on March 22, 2010. However, based upon the very same evidence proffered by American in March of 2010, the District Court rendered a Finding of Fact, a scant four (4) months later, taking a totally opposite view of the very same evidence, and found that it was "not competent evidence of the value of the Areaway removal." Order, Findings of Fact ¶ 33; *App. Appendix* at pp. 192-193.

As evidenced from the foregoing, the District Court issued the Summary Judgment Order, which provided a "blue print" for American to legitimately challenge the value of the Areaway removal. At trial, American used the "blue print" provided by the District Court in its March 22, 2010, order and presented the very same evidence to satisfy the burden established by the District Court in the Summary Judgment Order wherein the District Court set forth:

In actions contesting special assessments, there is a presumption that the City's assessment is valid until proven otherwise. *Tri-State Land Co. v. Shoreview*, 290 N.W.2d 775, 777 (Minn. 1980). However, this presumption can be overcome "by introducing competent evidence that the assessment is greater than the increase in market value of the property due to the improvement." *Carlson-Lang Realty Co. v. Windom*, 240 N.W.2d 517, 519 (Minn. 1976).

Thus, not only did the District Court incorrectly find that American had failed to introduce any competent evidence to rebut the presumption of the value of the Areaway removal being equal to the costs associated with such removal at trial, but this conclusion specifically contradicts an earlier order issued by the very same Judge.

It should also be noted that the City provided absolutely no evidence whatsoever on the issue of the value conveyed on the Property by virtue of the Areaway removal. Specifically, Jennifer Loritz, the City's first witness, denied that she had any ability to provide testimony regarding the market value of the Property. More specifically, on page 117, Lines 15-18 of the trial transcript, the following exchange occurred on cross examination:

Q. And as you sit here today did you provide any testimony about the effect of the market value of the \$409,000 assessment of 2700 East Lake Street?

A. I cannot testify to market value.

The City's second witness, Donald Richard Elwood, provided no testimony whatsoever regarding the impact, one way or the other, the Areaway removal had on the value of the subject Property. *See Transcript, Addendum II* at pp. 119-125.

Lastly, the City called Patrick Joseph Todd to the stand. Mr. Todd specifically testified that he never provided a number to the City regarding his opinion about the effect the Areaway removal may have had, with respect to the Property. In pertinent part,

during the course of Mr. Todd's examination, the following exchange occurred:

Q. As you sit here today, do you have an opinion regarding the effect that this areaway work had on the value either positively or negatively of 2700 East Lake Street after the areaway work was completed?

A. Yes.

Q. And your testimony is based on what?

A. My testimony is based on theory, appraisal theory.

Q. And have you provided that number to the City at any time?

A. No.

Q. Did you work up any report regarding that number?

A. No.

Q. As you sit here today, there's nothing in writing to verify that number on way or the other?

A. And I never had a number per say (sic).

See Transcript, Addendum II at p. 141, Lines 3-16.

Therefore, it cannot be disputed that the City provided the District Court with no evidence whatsoever regarding the impact the Areaway removal may have had with respect to the market value of the Property. On the other hand, American provided compelling and competent evidence to the contrary and showed that the Assessment imposed as a result of the Areaway removal was not equal to the costs associated with the same.

IV. THE DISTRICT COURT ERRED IN ALLOWING RESPONDENT TO INTRODUCE THE TESTIMONY OF UNDISCLOSED WITNESSES AND EVIDENCE.

A. The District Court erred in allowing Respondent to call witnesses and, in particular, an expert witness, who was not previously disclosed to Appellant.

The general rule in Minnesota is expert testimony should be suppressed for failure to make a timely disclosure of the expert's identity only where "counsel's dereliction [in failing to make the disclosure] is inexcusable and results in disadvantage to his opponent." *Krech v. Erdman*, 305 Minn. 215, 218, 233 N.W.2d 555, 557 (1975). "In situations where the failure to disclose is inadvertent but harmful, the court should be quick to grant a continuance and assess costs against the party who has been at fault." *Id.* The crucial question is whether defendant has been prejudiced to any appreciable degree by the late disclosure. *See Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390, 394 (Minn.1977).

Here, the City blatantly failed to disclose that it intended to introduce evidence and testimony from the City's expert, Patrick Todd. American made specific request for the City to, among other things, disclose any expert the City intended to call at trial, to provide the qualifications of the expert, and to provide a copy of the expert's report to American. *See* Statement of Facts, ¶¶ 29-31.

The District Court, instead of weighing whether the disclosure was "inadvertent" and whether the City's failure resulted in a "disadvantage" to American, employed a "tit-for-tat" analysis, concluding that both parties failed to properly respond to discovery. *See* Statement of Facts, ¶¶ 44-49.

What is clear from the Order is that the District Court's failure to exclude the testimony of Patrick Todd was a significant disadvantage to American, as the District Court relied exclusively on Mr. Todd's "credible, competent, and compelling" testimony. *See* Statement of Facts, ¶ 69(e).

The District Court should have conducted an analysis of whether the City's failure to disclose was inadvertent or purposeful, and whether or not allowing Mr. Todd to testify was to American's disadvantage. The District Court abused its discretion by allowing the City's expert to testify, which decision was extremely prejudicial to American.

B. The District Court erred in allowing Respondent to call witnesses and, in particular, an expert witness, despite Respondent's failure to provide meaningful responses to Appellant's Discovery Requests, including expert interrogatories.

1. Respondent wholly failed to provide responses to Appellant's Discovery Requests, with respect to the alleged value of the benefit and/or improvement to the Property derived from the abandonment of the Areaway.

As detailed in the Statement of Facts above, American directed American's Discovery Requests to the City to learn what, if any, evidence the City intended to offer to support the alleged value of the benefit and/or improvement to the Property derived from the abandonment of the Areaway. The City failed and refused to provide any meaningful responses:

17. Set forth in detail, and not in summary fashion, all facts, evidence, information, and the like to support the City's claim that the benefit and/or improvement to the property owned by Plaintiff, its successors, or assigns, derived from the subject assessment has a value equal to \$409,358.46.

ANSWER: The duty to remove the areaway in the public interest was the property owner's. The property owner had the option of financing the areaway abandonment privately but opted instead to have the City remove the areaway as allowed by ordinance and to have the city assess the cost to the property to be paid over 20 years at an interest rate equal to that at which the bonds were sold. The basis of the assessment is set forth in the attached documents.

19. Set forth in detail, and not in summary fashion, all facts, evidence, information, and the like to support the City's claim that the value of the property owned by Plaintiff, its successors, or assigns, has increased by \$409,358.46, due to the abatement of the areaway.

ANSWER: See Answer to Interrogatory No. 17.

As American has repeatedly indicated herein and at trial, the City did not provide any response that reflected the value of the Areaway abandonment to the Property, which is the legal standard to determine if the Assessment is valid. The City did not provide any evidence of value to American in the City's Discovery Responses. But again, the District Court did not consider whether this failure was prejudicial to American.

American was entitled to evidence the City may have in its possession, with respect to value. This evidence is essential to American's appeal. Yet the District Court allowed the City to argue that American was somehow not entitled to this evidence because 2700 LLC failed to fully respond to discovery from the City, prior to American taking ownership of the Property.

The City did not argue that any of the evidence American intended to introduce should have been, similarly excluded. Rather, the City argued that both sides were somehow equally prejudiced, which is simply not the case and which is simply not the legal standard the District Court must apply when considering American's Motion in

Limine. The District Court abused its discretion by allowing the City to proceed with trial, given the City's failure to respond to American's Discovery Requests, which decision was extremely prejudicial to American.

2. Respondent wholly failed to provide responses to Appellant's Discovery Requests, with respect to the witnesses and any expert witnesses Respondent intended to call at the trial of this matter.

As set forth above, American's Discovery Requests included an interrogatory asking the City to identify all persons, including experts, who the City intended to introduce. American's Discovery Requests also requested that the City produce "[c]opies of any and all documents used, consulted, reviewed, identified or which otherwise relate to your response to" each of the foregoing interrogatories. The City did not disclose any documents relating to its expert, Patrick Todd, nor any of its other witnesses.

Expert interrogatories are controlled by Minn.R.Civ.P. 26.02(4)(A)(i), which provides:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. A party thus has an absolute right to a summary of the grounds for each opinion held by an opponent's expert.

Dennie v. Metropolitan Medical Center, 387 N.W.2d 401, 404 (Minn.1986) (citing 4 J. Moore, Moore's Federal Practice ¶ 26.66[3] (1984)). Inadequate answers may warrant sanctions by the District Court.

American acknowledges that the suppression of expert testimony is a serious sanction and should be imposed only in the most compelling circumstances and then only

after careful consideration of the following factors:

1. the extent of preparation required by an opposing party in preparing for cross-examination or rebuttal of expert witnesses;
2. when the expert agreed to testify;
3. when the party calling the expert notified the opposing party of the expert's availability;
4. when the attorney calling the expert assumed control of the case;
5. whether a party intentionally and willfully failed to disclose the existence of a trial expert; and
6. whether the opposing party sought a continuance or other remedy.

Id. citing 2 D. Herr & R. Haydock, Minnesota Practice, § 26.20 (1985) (internal citations omitted).

Here, the factors weighed heavily in favor of the exclusion of Mr. Todd's testimony. American had no ability to develop its cross-examination or rebuttal to Mr. Todd's testimony, as American had no idea what Mr. Todd was going to testify to. American, further, has no idea when the City obtained Mr. Todd's opinion or when he was secured to testify. Instead, American was provide with notice of Mr. Todd being called as a witness on March 29, 2010, the day that the District Court set as the deadline for any motions in limine. Despite American's objection to the City's intentions, the City provided no additional information regarding Mr. Todd at any time prior to trial on April 20, 2010. The City's attorneys' office controlled the litigation of this matter at all times and has no excuse for its failure to disclose its intention to call Mr. Todd and provide the necessary expert disclosures. And the City failed to even provide an excuse as to its

failure to disclose, except t somehow argue that American failed to disclose its expert, who the City knew about since at least January 19, 2010. Finally, American raised its objection to Mr. Todd's testimony on March 29, 2010, in its Motion in Limine, and again at trial. Despite these objections, the District Court proceeded with trial.

The suppression of testimony from the City's expert was appropriate under these circumstances. Further, the admission of Mr. Todd's testimony was unquestionably prejudicial to American, as the District Court relied almost solely on Mr. Todd's "hypothetical" testimony in making its Order. The District Court thus abused its discretion and this matter must be remanded and set on for a new trial.

CONCLUSION

In light of the foregoing, Appellant respectfully requests that this Court reverse the decision of the District Court, set forth in that certain Findings of Fact, Conclusions of Law and Order, dated July 30, 2010, including, but not limited to finding that the District Court erred in applying the incorrect legal standard to determine if the abandonment of the Areaway increased the market value of the Property in at least the amount of the Assessment, that the District Court erred in finding that the Assessment did not exceed the special benefit to the Property, that the District Court erred in concluding that Appellant did not introduce competent evidence that the Assessment was actually greater than the benefit to the Property, and that the District Court erred in allowing the City to introduce undisclosed witnesses and evidence. Based on the foregoing, this matter should be reversed and remanded to the District Court.

Respectfully submitted,

ANASTASI & ASSOCIATES, P.A.

Dated: January 31, 2011.



Garth G. Gavenda, #310918

T. Chris Stewart, #152316

14985 60th Street North

Stillwater, MN 55082

(651) 439-2951

ATTORNEYS FOR APPELLANT