

A06-2324

**State of Minnesota
In Court of Appeals**

Alec G. Olson and
Butterworth Limited Partnership,

Appellants,

v.

State of Minnesota, Matthew Kramer,
Commissioner of the Minnesota Department
of Employment and Economic Development,
and Daniel A. Salomone, Commissioner of
the Minnesota Department of Revenue,

Respondents.

**BRIEF AND APPENDIX OF APPELLANTS
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LIMITED PARTNERSHIP**

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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).

TABLE OF CONTENTS

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

 A. JOBZ and Bioscience Zone Provide Selected Businesses With
 Exemption From Taxes 2

 1. The Legislature has delegated to local officials the discretion
 to provide tax exemptions 2

 2. The Programs also offer jobs credit 4

 3. Businesses selected need not contribute to or benefit the
 general public 5

 B. The Parties 5

 C. Plaintiffs’ Lawsuit Challenges the Constitutionality of the Programs 6

 D. Trial Court Dismisses Case on Standing 7

ARGUMENT

 PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS 8

 A. Standing Is Reviewed *De Novo* 8

 B. Plaintiffs, as Taxpayers, Have Standing 9

 1. A taxpayer has standing to challenge exemption from taxation 9

 2. Plaintiffs have standing because they pay property tax 10

 3. Taxpayers have standing to challenge a program that exempts
 property and businesses within their community’s borders 11

 C. The Trial Court’s Dismissal Premised on Purported Lack of
 Evidence of Actual Injury Is Contrary to the Very Premise of
 Taxation and the Record Before the Court 13

 1. Tax exemptions to some mean higher taxes for Plaintiffs 13

2.	Parties did not stipulate that exemption does not mean higher taxes	15
D.	Plaintiffs Have as Much Personal Stake as Did Plaintiffs in Other Minnesota Cases Which Granted Standing to Taxpayers	16
1.	<u>Arens v. Vill. of Rogers</u> , 240 Minn. 386, 61 N.W.2d 508 (1953), supports standing in this case	17
2.	<u>McKee v. Likins</u> , 261 N.W.2d 566 (Minn. 1977), supports standing in this case	19
3.	If there is standing in <u>Arens</u> and <u>McKee</u> , there must be standing here	21
E.	Finding Standing Here Is in Accord With the Purpose of Standing	22
	CONCLUSION	23
	CERTIFICATION OF BRIEF LENGTH	24

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 15.0416	19
Minn. Stat. § 469.310	2
Minn. Stat. § 469.311	3
Minn. Stat. § 469.312, subd. 5	3
Minn. Stat. § 469.313	3
Minn. Stat. § 469.315	3
Minn. Stat. § 469.315, subd. 1-6	2
Minn. Stat. § 469.315, subd. 7	4
Minn. Stat. § 469.318	4
Minn. Stat. § 469.320	2
Minn. Stat. § 469.330	2
Minn. Stat. § 469.336, subd. 1-3	2
Minn. Stat. § 469.336, subd. 4	4
Minn. Stat. § 469.336, subd. 5	4
Minn. Stat. § 469.338, subd. 4	4
Minn. Stat. § 469.339	4
Minn. Stat. § 469.339, subd. 3	4
Minn. Stat. § 469.341	2

Cases:

Arens v. Vill. of Rogers, 240 Minn. 386, 61 N.W.2d 508 (1953)	1, 17, 18, 21, 22
Ball v. Vill. of Streamwood, 665 N.E.2d 311 (Ill. App. Ct. 1996), <i>reh'g denied</i>	12, 13
Channel 10, Inc. v. Indep. School Dist. No. 709, 298 Minn. 306, 215 N.W.2d 814 (Minn. 1974)	8, 22
Conant v. Robins, Kaplan, Miller & Ciresi, LLP, 603 N.W.2d 143 (Minn. Ct. App. 1997), <i>rev. denied</i>	17, 19
DaimlerChrysler Serv. N. Am., LLC v. Comm'r of Revenue Serv., 875 A.2d 28 (Conn. 2005)	14
Dudley v. Kerwick, 421 N.E.2d 797 (N.Y. 1981)	23

Fetzer v. Town Bd. of Town of Aurora, 705 N.Y.S.2d 147 (N.Y. App. Div. 2000)	12
Flast v. Cohen, 392 U.S. 83 (1968)	8
Joint Hosp. Serv., Inc. v. Lindley, 370 N.E.2d 474 (Ohio 1977)	14
McKee v. Likins, 261 N.W.2d 566 (Minn. 1977)	1, 19-22
McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990)	9
Metro. Sports Facilities Comm'n v. County of Hennepin, 451 N.W.2d 319 (Minn. 1990)	1, 11, 12, 22
Paul v. Blake, 376 So. 2d 256 (Fla. Dist. Ct. App. 1979)	23
Reed v. Bjornson, 191 Minn. 254, 253 N.W. 102 (Minn. 1934)	9
Richards v. Iowa Dept. of Revenue and Finance, 454 N.W.2d 573 (Iowa 1990)	12
Schiff v. Griffin, 639 N.W.2d 56 (Minn. Ct. App. 2002)	8
Sebring Airport Auth. v. McIntyre, 783 So. 2d 238 (Fla. 2001)	13
St. Joseph's Health Center Prop., Inc. v. Srogi, 412 N.E.2d 921 (N.Y. 1980)	14
State v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996)	8
Sundberg v. Abbott, 423 N.W.2d 686 (Minn. Ct. App. 1988), <i>rev. denied</i>	8

Walker v. Zuehlke,
642 N.W.2d 745 (Minn. 2002) 1, 10, 11, 22

World Plan Executive Council - U.S. v. County of Ramsey,
1996 WL 392526 (Minn. Tax Ct. 1996) 13

Yang v. Voyagaire Houseboats, Inc.,
701 N.W.2d 783 (Minn. 2005) 9

Other Authorities:

Minnesota Constitution, Article I, Section 7 7

Minnesota Constitution, Article X, Section 1 2, 7

Minnesota Constitution, Article XII, Section 1 7

United States Constitution, 14th Amendment 7

STATEMENT OF THE ISSUES

DO PLAINTIFFS, WHO ARE TAXPAYERS THAT PAY MINNESOTA STATE AND LOCAL TAXES, HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A PROGRAM WHICH EXEMPTS SELECT BUSINESSES FROM STATE AND LOCAL TAXES?

The trial court ruled in the negative.

Walker v. Zuehlke, 642 N.W.2d 745 (Minn. 2002).

Metro. Sports Facilities Comm'n v. County of Hennepin, 451 N.W.2d 319 (Minn. 1990).

Arens v. Vill. of Rogers, 240 Minn. 386, 61 N.W.2d 508 (1953).

McKee v. Likins, 261 N.W.2d 566 (Minn. 1977).

STATEMENT OF THE CASE AND FACTS

Appellants/Plaintiffs Alec G. Olson and Butterworth Limited Partnership (Plaintiffs) are taxpayers who challenge the constitutionality of the Job Opportunity Building Zones Program (JOBZ) and the Biotechnology and Health Sciences Industry Zone Program (Bioscience Zone) enacted by the 2003 Minnesota Legislature (jointly referred to as Programs). *See* Minn. Stat. §§ 469.310-469.320 and 469.330-469.341. (A. 69.) Minnesota Constitution, Article X, Section 1, declares that “[t]he power of taxation shall never be surrendered, suspended or contracted away.” Plaintiffs assert that the Minnesota Legislature defied this constitutional provision and others when it delegated to others the discretion to exempt select businesses from taxation under the Programs. (A. 69.) The trial court, the Honorable Marybeth Dorn, dismissed Plaintiffs’ Complaint with prejudice, holding Plaintiffs lack standing to so challenge. (A. 1.) It is from that judgment of dismissal that Appellants seek reversal by this Court. (A. 117.)

A. JOBZ and Bioscience Zone Provide Selected Businesses With Exemption From Taxes.

1. The Legislature has delegated to local officials the discretion to provide tax exemptions.

The Programs at issue have no features other than tax benefits to a select few. (Stipulation 7-8; A. 15.) These selected businesses are exempt from all major Minnesota taxes. (Stipulation 1-2, 21-27; A. 13, 18-21.) *See* Minn. Stat. § 469.315(1)-(6) (listing tax exemptions available in JOBZ); Minn. Stat. § 469.336(1)-(3) (listing tax exemptions available in Bioscience Zone).

The business beneficiaries of the Programs are nowhere defined in the legislation. Under the Programs, the Legislature delegates to local officials the discretion to provide up to 12-year exemptions from state and local taxes to selected businesses operating in geographic areas also determined at the discretion of local officials and the Department of Employment and Economic Development (DEED). *See* Minn. Stat. § 469.312, subd. 5 (Stipulation 15-16, 28, 39, 72-80, 82, 125; A. 17, 22, 27, 36-41, 55); Minn. Stat. § 469.311; Minn. Stat. § 469.313. The businesses are simply selected by local officials and local officials decide who will enjoy the tax benefits of the Programs. (Id.) Long-term tax exemptions are then granted to these businesses by private contract. The exemptions granted apply to corporate franchise tax, state individual and corporate income tax, state and local sales and use taxes, and state and local property taxes. Minn. Stat. § 469.315. (Stipulation 21-27, 38, 79-80, 121, 123; A. 18-21, 26-27, 39-40, 54-55; Exhibits to Stipulation S, T, DD, EE.)

The Programs reduce tax revenues that would otherwise be payable to state and local government. The Legislature intended that the Programs would involve millions of dollars. (Stipulation 6; A. 14-15; Exhibits A, B.) The tax exemptions under the JOBZ program have no caps. (Stipulation 22; A. 19.) Caps on the Bioscience Zone tax exemptions came from budgetary necessity. (Stipulation 24-27; A. 20-21.)

When a business enters into either program, the business must sign an agreement with the local officials who administer the program. DEED urges, but does not require, that the parties use its form, called the Model JOBZ Business Subsidy Agreement.

(Stipulation 79-80; A. 39-40; Exhibits S, T.) The agreement specifies the tax benefits and exemptions which the business receives in consideration of its promises to achieve certain employment goals. The agreement concludes with the following language:

This agreement shall be binding upon any successors or assignees of the parties

[T]he subzone administrator and the qualified business have acknowledged their assent to this agreement and agree to be bound by its terms through the signatures entered below.

(Exhibit S; A. 67.)

2. The Programs also offer jobs credit.

Each of the programs also offer a “jobs credit.” *See* Minn. Stat. § 469.315(7) and Minn. Stat. § 469.318 (jobs credit for JOBZ); Minn. Stat. § 469.336(5) (jobs credit for Bioscience Zone). The Bioscience Zone program also offers a research and development credit. *See* Minn. Stat. § 469.336(4) and Minn. Stat. § 469.339. All of these job credits are refundable, which means that if a taxpayer cannot use them to offset an existing Minnesota income tax liability, the taxpayer receives from the State a check for the unused amount of the credit. *See* Minn. Stat. § 469.318, subd. 4 (“[C]ommissioner of Revenue shall refund the excess to the qualified business.”); Minn. Stat. § 469.338, subd. 4 (Bioscience Zone program jobs credit is refundable); Minn. Stat. § 469.339, subd. 3 (Bioscience Zone program research credit is refundable).

3. Businesses selected need not contribute to or benefit the general public.

The businesses selected to benefit under the Programs do not have to be engaged in producing a product that will contribute to the public infrastructure and provide benefit to the general public, such as cars for light rail. (Stipulation 36; A. 25-26.) Their product could be fur coats or sparklers.

The principal criteria of business qualifications for the JOBZ program are the willingness to operate in a tax-free zone and an interest in starting a new business, expanding an existing business or relocating a business by moving into a new facility. (Stipulation 36-39; A. 25-27.) The Bioscience Zone program is premised on the alleged advantage to the bioscience industry businesses of locating near either the University of Minnesota or Mayo Clinic research facilities. (Stipulation 5, 94-96; A. 14, 45-46.)

B. The Parties.

Plaintiff Alec G. Olson (Olson) is a Minnesota resident and homeowner, with his principal place of residence in Spicer, Minnesota. Olson pays local property taxes, state sales taxes and individual income tax in Minnesota. (Stipulation 9; A. 16.) A Job Zone has been designated in Spicer, Minnesota, which is located in Kandiyohi County.¹ (State's Memo. in Supp. of Defs.' Mtn. for Summ. J., p. 6; Stipulation Exhibit M, Job

¹ The Stipulation states Spicer, Minnesota is not within a Job Zone, but the State has conceded Spicer is within a Job Zone. (State's Memo. in Supp. of Defs.' Mtn. for Summ. J., p. 6, dated July 11, 2006.) The trial court's ruling is premised on a "job zone" having been designated in Spicer, Minnesota. (A. 4.)

Zone Program Subzones, p. 45.) Olson's city and county do not include a Bioscience Zone. (Stipulation 112; A. 50.)

Plaintiff Butterworth Limited Partnership (Butterworth) is a Minnesota limited partnership, which owns and operates a mobile home park in Bloomington, Minnesota. Butterworth pays local property taxes and state sales tax in Minnesota. (Stipulation 10; A. 16.) Halverstadt & Associates, Inc., a Minnesota S corporation, and William D. Halverstadt (hereinafter Halverstadt), a resident of Corcoran, Minnesota, are Butterworth's partners. (Stipulation 11; A. 16.) The S corporation pays Minnesota sales tax and Halverstadt pays individual income tax on his distributive share of income from Butterworth and the S corporation in Minnesota. (Id.) Bloomington, Minnesota is not a city in which a job zone could be designated, but a Bioscience Zone has been designated in Butterworth's county. (Stipulation 28; *see* Stipulation 112; A. 22, 50.)

The Respondents/Defendants are the State of Minnesota, the Commissioner of the Minnesota Department of Employment and Economic Development (DEED), and Daniel A. Salomone, Commissioner of the Minnesota Department of Revenue (collectively referred to as the State). (Complaint ¶¶ 6, 7, 8, 9; A. 71-72; Stipulation 13, 14, 17; A. 16-17.)

C. Plaintiffs' Lawsuit Challenges the Constitutionality of the Programs.

Plaintiffs brought this lawsuit seeking declaratory and injunctive relief, requesting that the court declare that the grant by private contract of long-term tax exemptions in connection with the business location decisions is unconstitutional. (A. 69.) Specifically,

Plaintiffs assert the Programs violate Article X, Section 1 of the Constitution by granting to DEED the authority to designate zones and by authorizing local officers to select businesses to participate in the Programs. (Complaint ¶¶ 62-68; A. 88-90; Complaint ¶¶ 69-75; A. 91-92.) The Programs also violate Plaintiffs' rights to due process of law under Article I, Section 7 of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution. (Complaint ¶¶ 76-83; A. 92-93.)

In addition, the legislation constitutes the enactment of local or special laws in violation of Article XII, Section 1 of the Minnesota Constitution (Complaint ¶¶ 84-88; A. 94); and it violates Article X, Section 1 (Uniformity Clause) of the Minnesota Constitution and the Fourteenth Amendment (Equal Protection Clause) of the United States Constitution (Complaint ¶¶ 89-104; A. 95-98).

D. Trial Court Dismisses Case on Standing.

After the parties had stipulated to the relevant facts, Plaintiffs and the State each moved for summary judgment. While Plaintiffs' motion for summary judgment addressed squarely the constitutional issues, the State's motion for summary judgment raised the additional issue that Plaintiffs lacked standing to challenge the constitutionality of these programs. By Order dated October 9, 2006, the trial court granted the State's motion for summary judgment on the issue of standing and did not address the constitutional arguments on the merits. (A. 1.) The trial court concluded:

Plaintiffs have cited no case that is similar to this one. I have not been able to find such a case. Plaintiffs have provided no evidence that the Programs have or are likely to increase their overall tax burden, the overall tax burden of the general

public, or that the Programs are likely to decrease the general tax revenue of local governments or the state. Their arguments do reflect their strong disagreements with legislative policy, but their claims are not the concrete, specific types of controversies that meet the threshold for standing.

(A. 10.)

Plaintiffs challenge that standing ruling on appeal. (A. 117.)

ARGUMENT

PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS.

A. Standing Is Reviewed *De Novo*.

“Standing has been called one of the most amorphous [concepts] in the entire domain of public law.” Sundberg v. Abbott, 423 N.W.2d 686, 688 (Minn. Ct. App. 1988), *rev. denied*, quoting Flast v. Cohen, 392 U.S. 83, 99 (1968). And the concept of standing is filled with “complexities and uncertainties.” Id. Standing requires “that a party have a sufficient stake in a justiciable controversy to seek relief from a court.” State v. Philip Morris, Inc., 551 N.W.2d 490, 493 (Minn. 1996). The goal of the standing requirement is to ensure that the issues before the court will be “vigorously and adequately presented.” Channel 10, Inc. v. Indep. School Dist. No. 709, 298 Minn. 306, 215 N.W.2d 814, 821 (Minn. 1974).

Whether a party has standing to sue is a question of law which this Court reviews *de novo*. Schiff v. Griffin, 639 N.W.2d 56, 59 (Minn. Ct. App. 2002). In addition, this case comes before the Court on a grant of summary judgment to the State. The facts and

all inferences from the facts must be viewed in a light most favorable to Plaintiffs. Yang v. Voyageaire Houseboats, Inc., 701 N.W.2d 783, 788 (Minn. 2005).

B. Plaintiffs, as Taxpayers, Have Standing.

1. A taxpayer has standing to challenge exemption from taxation.

As the Minnesota Supreme Court declared in Reed v. Bjornson, 191 Minn. 254, 253 N.W. 102, 109 (Minn. 1934), “[t]he power to fairly exempt is inherent in the power to tax.” And “[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the due process clause.” McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990).

Local property taxes, local and state sales taxes, and state individual income taxes are all exacted from Plaintiffs. The programs being challenged here involve exemptions from such taxes. These exemptions were created in a fashion that Plaintiffs contend violate the constitutional exercise of the power of taxation.

The question before the Court is who has standing to challenge the constitutionality of these tax exemption programs. The Legislature, which enacted the exemption, would have no interest in challenging them. The cities, which hand out the exemptions, would have no interest in challenging them. The businesses, which receive the exemptions, would also have no interest in challenging them. The only conceivable persons with an interest in challenging exemptions are other taxpayers, who do not

benefit from the exemption, and whose taxes either are or are at risk of being increased. Plaintiffs are those taxpayers.

2. Plaintiffs have standing because they pay property tax.

Plaintiffs have standing because they pay property tax. That Plaintiffs have standing is demonstrated by Walker v. Zuehlke, 642 N.W.2d 745 (Minn. 2002). Walker was a challenge to the constitutionality of the Range Fiscal Disparities Act, under which a portion of the property taxes on business property in Cohasset was distributed to other cities. Id. at 749. To have standing, there was no demonstration that the Walker plaintiffs' taxes were increased; it sufficed that they were taxpayers that paid real estate taxes. There, all the Minnesota Supreme Court said about the Walker plaintiffs' qualifications to bring suit was that "both appellants pay taxes on their respective properties." Id. at 747. In contrast, the "City of Cohasset had been 'dismissed' [as a plaintiff] for lack of standing." Id.

The trial court in this case concluded that the Walker plaintiffs, in order to have standing, must have alleged an actual injury in the form of "greater tax contribution to the pool and less by way of redistribution." (A. 9-10.) To the contrary, the contribution to the pool in Walker was by the city, not by any particular taxpayer. Id. at 749. No showing was made, and there was no speculation as to whether the Walker plaintiffs actually were paying higher property taxes as a result of the challenged law. It sufficed for standing that the Walker plaintiffs were property taxpayers in a city that was affected by an allegedly unconstitutional exercise of the taxing power involving forced disposition

of proceeds from taxes of the type they were paying. Plaintiffs, like the Walker plaintiffs, have standing.

3. Taxpayers have standing to challenge a program that exempts property and businesses within their community's borders.

Likewise, Plaintiffs, as taxpayers, have standing to challenge a Program that exempts business property within their community borders from taxation. In Metro. Sports Facilities Comm'n v. County of Hennepin, 451 N.W.2d 319, 322 (Minn. 1990), the Minnesota Supreme Court addressed standing involving a contest to a tax exemption.

Taxpayer Minnesota Twins, Inc. and the Commission (pursuant to an earlier settlement under which it agreed to be liable for property taxes of Minnesota Vikings Football Club) brought a Chapter 278 proceeding to challenge property taxes on leased space in the Metrodome, alleging that the property was exempt by statute. Hennepin County contended that the statute providing the exemption was invalid because, among other things, it violated the equal protection guarantees of the state and federal Constitutions.

In the standing decision, the Minnesota Supreme Court found an adverse effect from the exemption on the political subdivision: "The removal of a substantial piece of property from the County's tax rolls implicates the rights of the public at large, rights which the County, as a political subdivision, is in a better position to vindicate than some individual taxpayer from whom the remedy of a lawsuit would be largely symbolic." Id. at 322.

The Supreme Court, in Metro. Sports Facilities Comm'n, plainly assumed that Hennepin County taxpayers would have standing to challenge the exemption. Id. at 321. And the Supreme Court found standing for the County even though its tax revenues were in no sense threatened by the exemption, and its duties were “essentially ministerial.” Id.

Plaintiffs certainly have as much interest in the JOBZ program’s allegedly unconstitutional tax exemptions as either individual Hennepin County property owners or the County itself had in the allegedly unconstitutional tax exemptions at issue in Metro. Sports Facilities Comm’n. It follows from standing being found there that the Plaintiffs have standing here.

Other jurisdictions likewise have recognized that taxpayers have standing to challenge a program likely to increase their overall tax burden by exempting from the tax rolls property and businesses within their community’s borders. *See* Richards v. Iowa Dept. of Revenue and Finance, 454 N.W.2d 573, 576 (Iowa 1990) (finding property taxpayer had standing to challenge parsonage exemption from tax). As the New York Appellate Court in Fetzer v. Town Bd. of Town of Aurora, 705 N.Y.S.2d 147, 148 (N.Y. App. Div. 2000), succinctly explained:

Taxpayers in a community have standing to challenge a determination that a property within the community’s borders is exempted from the tax rolls. The decrease in the tax base that occurs when a property is improperly exempted from taxation has been found to constitute a cognizable injury to such taxpayers. (Internal citations omitted.)

In Ball v. Vill. of Streamwood, 665 N.E.2d 311, 317 (Ill. App. Ct. 1996), *reh’g denied*, the Village argued, as the State has here, that plaintiffs lacked standing to

challenge a tax exemption because they do not qualify for the exemption and thus suffered no injury. The Illinois Court of Appeals rejected this argument, stating:

Were we to accept the Village's argument, only those residents who qualify for the exemption would be capable of challenging it. Can any rational person expect the beneficiaries of the exemption to seek a declaration of its invalidity?

Id.

What is being challenged in this case is the violation of the procedural norms for the exercise of the power of taxation, which norms are explicitly expressed in the Minnesota Constitution. When the Minnesota Legislature defies constitutionally prescribed rules for taxation by allowing local officials to grant property tax exemptions, Plaintiffs, who are paying that property tax, have a pecuniary interest – and standing.

C. The Trial Court's Dismissal Premised on Purported Lack of Evidence of Actual Injury Is Contrary to the Very Premise of Taxation and the Record Before the Court.

1. Tax exemptions to some mean higher taxes for Plaintiffs.

The trial court was wrong when it asserted that “[Plaintiffs] claim constitutional violations without evidence of injury.” (A. 10.) Wholesale exemption of some from tax inevitably causes other taxpayers to pay more. This is unquestionably true in the area of local property taxes and constitutes injury. World Plan Executive Council - U.S. v. County of Ramsey, 1996 WL 392526 (Minn. Tax Ct. 1996) (recognizing “that exemptions cause a shift of the tax burden to other taxpayers”) (A. 122); Sebring Airport Auth. v. McIntyre, 783 So. 2d 238, 250 (Fla. 2001) (“In tax exemption cases . . . any newly created tax exemption necessarily involves a direct shift in tax burden from the

exempt property to other, non-exempt properties.”); Joint Hosp. Serv., Inc. v. Lindley, 370 N.E.2d 474 (Ohio 1977) (“Tax exemption is in derogation of the rights of all taxpayers and necessarily shifts a heavier tax burden upon the non-exempt.”); DaimlerChrysler Serv. N. Am., LLC v. Comm’r of Revenue Serv., 875 A.2d 28, 32 (Conn. 2005) (court strictly construes tax exemptions because “exemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who was exempted and shifted to the backs of [other taxpayers].”); St. Joseph’s Health Center Prop., Inc. v. Srogi, 412 N.E.2d 921, 927 (N.Y. 1980) (C.J. Cooke, dissenting) (“Property tax exemptions have the direct effect of shifting the burden of who must pay for municipal services. Simple arithmetic dictates that when one parcel is removed from the tax rolls, all other taxpayers – business, non-exempt non-profit organizations, homeowners – must pay an increased share.”).

Plaintiffs both pay local property taxes and the nature of the property tax in Minnesota means that if some properties are exempt from tax, other properties pay more in tax. The levies set by the local governments are spread across the value of the taxable property – the more taxable value, the less tax per dollar of value, and the less taxable value, the more tax per dollar of value. (See Stipulation 136; A. 58-59.) This is exactly what happened with the JOBZ program. (Stipulation ¶ 21e; A. 19.) It was what was initially intended with the Bioscience Zone program, but did not ultimately occur due to repeal of the property tax exemption. (Stipulation ¶ 23e, 24; A. 20-21.)

While Plaintiff Butterworth cannot definitely be said to be paying more in local property taxes as a result of the Bioscience Zone program, such an increase plainly was a reasonable expectation when suit was filed. And Plaintiff Olson does pay higher property tax on his property due to the combination of the exemptions for JOBZ zone property in Kandiyohi County and the above-described nature of the property tax. Contrary to the trial court's analysis, property tax exemptions to some do increase the property tax obligation of others. This is a concrete, not a theoretical, injury, as the courts have recognized. Plaintiffs have suffered an injury in fact and have a sufficient stake in this justiciable controversy to seek relief from the court.

2. Parties did not stipulate that exemption does not mean higher taxes.

The trial court states that "Plaintiffs agree that the fact some taxpayers are exempt from paying tax(es) does not automatically cause any taxpayer's income, corporate franchise, or state and local sales taxes to increase." (A. 8.) The trial court was referring to the parties' Stipulation 138, which states:

The individual income tax, corporate franchise tax and state and local sales taxes all depend in amount on taxpayer actions and the rates set by existing law. Accordingly, the mere fact that some taxpayers are exempt does not automatically cause any taxpayer's taxes of these types to increase.

(A. 59.)

The key words in this Stipulation are "taxes of these types" and "automatically." (Id.) "Taxes of these types" do not include property tax. Property tax is covered in the three immediately preceding stipulations in the stipulation of facts and, as explained

above, is levied in amounts set by governments and spread over the estimated market value of taxable property. (See Stipulation of Facts ¶¶ 135, 136, 137; A. 58-59.) Property tax exemptions do result in a shift and placement of a heavier burden on the non-exempt property taxpayer. This is an injury in fact and Plaintiffs have standing to sue.

The trial court also erred in reasoning that the fact an income or sales tax exemption “does not automatically cause” an increase in any other taxpayer’s taxes of such types means there is no evidence for the proposition that Plaintiffs would suffer higher taxes as a result of the program. (A. 8.) The trial court itself opined that “[t]axpayers have a real and definite interest in preventing an illegal expenditure of tax money and have standing to challenge projects likely to increase their overall tax burden.” (A. 7; emphasis in the original.) The Stipulation, with the inclusion of the word “automatically,” is meaningless on the issue of standing. Automatically in the context of the Stipulation means “self-executing” or “without outside forces being applied.” It refers to mechanics. The reality is that Plaintiffs’ taxes will, in some measurable amount, ultimately increase. The standard of likely increase in tax burden clearly is met in this case with respect to the property tax, the income tax and the sales tax, all of which are paid by each of the Plaintiffs.

D. Plaintiffs Have as Much Personal Stake as Did Plaintiffs in Other Minnesota Cases Which Granted Standing to Taxpayers.

The Programs “provide potential tax benefits of millions of dollars, both state and local, to qualifying businesses.” (Stipulation 133; A. 58.) Plaintiffs have as much of a personal stake in this dispute as the plaintiffs in past Minnesota cases where the

Minnesota Supreme Court has found standing by the taxpayers to challenge an alleged illegal expenditure.

1. **Arens v. Vill. of Rogers, 240 Minn. 386, 61 N.W.2d 508 (1953), supports standing in this case.**

As this Court has recognized, “taxpayers have a ‘real and definite interest in preventing an illegal expenditure of tax money’” and have standing to challenge projects “likely to increase their overall tax burden.” Conant v. Robins, Kaplan, Miller & Ciresi, LLP, 603 N.W.2d 143, 147 (Minn. Ct. App. 1997), *rev. denied*, quoting Arens v. Vill. of Rogers, 240 Minn. 386, 61 N.W.2d 508, 514 (1953). In Arens, the Minnesota Supreme Court characterized the plaintiffs’ suit challenging the constitutionality of the municipal liquor law statute as “essentially a taxpayers’ class action seeking a declaratory judgment” 61 N.W.2d at 512.

The plaintiffs’ complaint in Arens was not really about spending or taxing; it was about the City’s entry into the retail liquor business. Id. at 512. In Arens, the Minnesota Supreme Court was faced with the choice of analyzing standing from the perspective of plaintiffs as private citizens with an obvious economic interest in preventing the City from operating a municipal liquor store, since it was putting them out of business, or from the perspective of plaintiffs as taxpayers. The Supreme Court chose to look at standing from the perspective of plaintiffs as taxpayers and refer to the spending of public money. The Supreme Court, in finding standing, concluded:

Taxpayers have a real and definite interest in preventing an illegal expenditure of tax money by a municipality. This is

particularly true where, as here, the project being financed is a money losing venture which will likely have the effect of increasing the overall tax burden of the community.

Id. at 514.

The Arens plaintiffs had not shown an actual increase in their taxes and there was no need for them to do so. As quoted above, the Supreme Court emphasized the illegal expenditure point. The Court went on to say that this is “particularly true where . . . the project will likely have the effect of increasing the overall tax burden of the community.”

Id. Plaintiffs in this case easily comply with the standard of a likely tax increase, for themselves and for the community.

The purpose of the JOBZ and Bioscience Zone programs is to increase the number of jobs. (Stipulation 4; A. 14.) That would tend to increase the number of people and the scope and cost of the public infrastructure and services needed to serve them. The businesses creating the jobs are not paying any of the public costs that come along with job growth because they are exempted; those burdens simply must be laid off on other taxpayers through one or more of the property, sales or income taxes, which are the three main sources of revenue. Thus, the more successful the programs, the higher the overall tax burden of the community and the more tax revenue that will have to be raised from taxpayers – like Plaintiffs. It sufficed in Arens that an increase in the tax burden was merely likely. The trial court’s refusal to find standing here based on the purported lack of evidence of injury is contrary to Arens.

2. **McKee v. Likins, 261 N.W.2d 566 (Minn. 1977), supports standing in this case.**

In Conant, 603 N.W.2d at 146, this Court also cited to and quoted McKee v. Likins, 261 N.W.2d 566, 571 (Minn. 1977), for the proposition that taxpayers have the right “to maintain an action in the courts to restrain the unlawful use of public funds.” In McKee, the standing issue was whether the plaintiff taxpayer, in an action “brought principally as a taxpayer’s suit,” had standing to sue under Minn. Stat. § 15.0416, the Minnesota Administrative Procedures Act section dealing with challenges to the validity of rules. 261 N.W.2d at 568.

The McKee plaintiff asserted a right as a taxpayer to prevent the spending of public funds on abortions pursuant to a rule that had not been properly adopted under the Administrative Procedures Act. Id. That statute provided in pertinent part that:

The validity of any rule may be determined . . . when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.

Id. at 570.

The McKee plaintiff had suffered no tax increase. There was no indication that the McKee plaintiff would suffer a tax increase. What the McKee plaintiff unquestionably had suffered was an affront to his religious and moral convictions.

Plaintiff’s religious and moral convictions are deeply offended by the knowledge that the general revenue of Ramsey County, which include plaintiff’s property tax dollars, are used to pay for abortions of eligible medical assistance recipients residing in Ramsey County.

Id. at 569.

In McKee, the Supreme Court posed the issue as:

[W]hether expenditure of tax monies under a rule which the plaintiff taxpayer alleges was adopted by a state official without compliance with the statutory rulemaking procedures, is “injury in fact” within the meaning of the Minnesota Administrative Procedures Act.

Id. at 570. In finding the taxpayer had standing, the Minnesota Supreme Court in McKee contrasted the general rule in Minnesota that a state or local taxpayer has sufficient interest and standing to challenge illegal expenditures with the more restrictive rules of standing to challenge federal expenditures. Id. at 570-71. After reciting the applicable law in Minnesota, the Minnesota Supreme Court stated:

Thus, while activities of governmental agencies engaged in public service ought not to be hindered merely because a citizen does not agree with the policy or discretion of those charged with the responsibility of executing the law, the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied.

Id. at 571. The Supreme Court then held: “Taxpayers are legitimately concerned with the performance by public officers of their public duties. Accordingly, we hold that a taxpayer suing as a taxpayer has standing to challenge an administrative action which allegedly is rulemaking adopted without compliance with the statutory notice requirements.” Id. The equivalent statement in this case is that: “A taxpayer suing as a taxpayer has standing to challenge legislative action with respect to specific types of taxes being paid by the taxpayer which allegedly is legislation adopted without compliance with explicit constitutional requirements for exercise of the taxing power.”

3. If there is standing in Arens and McKee, there must be standing here.

If a citizen, whose obvious real complaint is with governmental support for abortions, has standing as a taxpayer to challenge a rule that allows for spending money on abortions, it is inconceivable that a taxpayer challenging the exercise of the taxing power, with respect to a taxing statute dealing with a type of tax paid by the taxpayer would not have standing. If what counts is spending public money, it is present in the Programs here as it was in McKee with abortion funding. If what counts is a direct personal stake in the governmental action, it is much more present here, for Plaintiffs are subject to the very taxes they are complaining about and potentially greatly affected by the unconstitutional procedures with respect to those taxes, whereas the plaintiff in McKee was unaffected by abortions. If what really counts is that there was a clear problem in McKee with a procedural mistake having been made, the same is true here, where Plaintiffs assert the Legislature acted in defiance of constitutional mandate.

The Plaintiffs before the Court are taxpayers suing as taxpayers to challenge legislative and administrative action affecting the very taxes which they pay and which they assert have been exercised without compliance with the constitutional requirements for the exercise of the power of taxation. Plaintiffs plainly have as significant a direct personal interest here as did those in Arens and McKee, whether the comparison is to the spending of public funds in illegal fashion or to the specific interests of the plaintiffs in the subjects of the challenged actions.

Standing here to raise the constitutional infirmities of the Programs at issue, which are unique in Minnesota's history, will pose no risk to the courts of being stuck with handling a flood of litigation over tax exemptions, deductions or other tax provisions. Arens, McKee, Walker and Metro. Sports Facilities Comm'n have not opened the doors to a flood of litigation. As stated above, this case fits within the ambit of each of them.

E. Finding Standing Here Is in Accord With the Purpose of Standing.

Ultimately, in finding no standing here, the trial court lost sight of the very purpose of the standing requirement. Its purpose is to ensure that the issues before the court will be vigorously and adequately presented. Channel 10, Inc., 215 N.W.2d at 821. Here, the parties met and agreed on a detailed and extensive stipulation of facts on which the constitutionality of the JOBZ and Bioscience Zone Programs was to be presented to the court on cross-motions for summary judgment. The Plaintiffs are represented by counsel that includes the former Commissioner of the Department of Revenue for the State of Minnesota. The State is represented by Minnesota's Attorney General. In this case, the basic concern of effective advocacy is met.

As stated above, Plaintiffs have a personal stake in the controversy and there is a substantial public interest at stake. What is at issue here is certainly not speculative, conjectural or hypothetical, as the trial court has ruled. Plaintiffs' complaints are about the fact that exemptions were created in a fashion that violates constitutional norms. "[A]n unconstitutional exercise of the taxing . . . power is intolerable in our system of government and . . . the courts should be readily available to immediately restrain such

excesses of authority.” Paul v. Blake, 376 So. 2d 256, 259 (Fla. Dist. Ct. App. 1979) (holding that taxpayer has standing to challenge the constitutionality of certain property tax exemptions); *see also* Dudley v. Kerwick, 421 N.E.2d 797, 799 (N.Y. 1981) (finding standing where the gist of the challenge is the broad perversion of the entire process of granting exemptions, with the resulting deterioration of the tax base and placement on petitioners of disproportionate share of municipal expenses). Plaintiffs have standing.

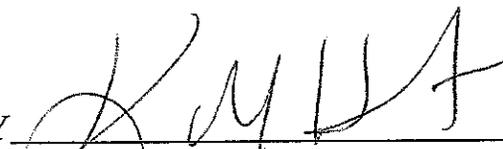
CONCLUSION

Appellants respectfully request that the trial court’s denial of standing be reversed and the trial court be directed to address the cross-motions for summary judgment regarding the constitutionality of the Programs.

Dated: February 2, 2007

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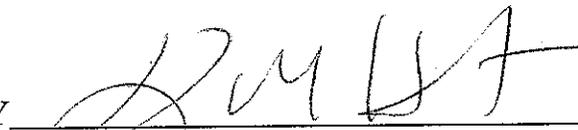
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,595 words. This brief was prepared using Word Perfect 10.

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