

NO. A08-1814

State of Minnesota
In Court of Appeals

American National Bank of Minnesota,

Appellant,

vs.

Housing and Redevelopment Authority
for the City of Brainerd,

Respondent.

RESPONDENT'S BRIEF

Stephen F. Rufer (#94286)
Chad R. Festul (#345684)
PEMBERTON, SORLIE, RUFER &
KERSHNER, P.L.L.P.
110 North Mill Street, P.O. Box 866
Fergus Falls, MN 56538-0866
(218) 736-5493

Attorneys for Appellant

Wallace G. Hilke (#175857)
Christopher R. Smith (#340157)
LINDQUIST & VENNUM P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS 3

 A. The HRA..... 3

 B. Brainerd Oaks Project..... 4

 C. ANB and the Bond Transcript 4

 D. Performance of Brainerd Oaks Project 7

 E. The District Court Action..... 8

SUMMARY OF THE ARGUMENT 8

STANDARD OF REVIEW 10

ARGUMENT..... 11

 A. The District Court’s Order Must Be Affirmed Because the
 HRA’s Repayment Obligation is Limited to Enumerated
 Sources as a Matter of Law. 11

 1. The HRA’s Limited Statutory Authority Prevented It
 From Offering a General Repayment Obligation..... 11

 2. The Bond Transcript Expressly, Unambiguously, and
 Uniformly Limits the Repayment to an Enumerated
 List of Sources. 16

 B. The District Court’s Order is Supported by ANB’s
 Acknowledgment of the Expressly Limited Repayment
 Sources..... 22

 C. The Minnesota Foreclosure Statute Does Not Support
 ANB’s Claim For a Deficiency Judgment..... 24

CONCLUSION..... 27

TABLE OF AUTHORITIES

CASES

<u>Anderson v. Kammeier</u> , 262 N.W.2d 366 (Minn. 1977)	16
<u>Art Goebel, Inc. v. N. Suburban Agencies, Inc.</u> , 567 N.W.2d 511 (Minn. 1997)	21
<u>Bebo v. Delander</u> , 632 N.W.2d 732 (Minn. Ct. App. 2001).....	10
<u>Bell v. Kirkland</u> , 113 N.W. 271 (Minn. 1907).....	15
<u>Carlson v. Estes</u> , 458 N.W.2d 123 (Minn. Ct. App. 1990).....	16, 21
<u>Denelsbeck v. Wells Fargo & Co.</u> , 666 N.W.2d 339 (Minn. 2003)	10
<u>Erickson v. Stearns County</u> , 252 N.W. 219, 220 (Minn. 1934).....	15
<u>In re Common Sch. Dist. No. 1317</u> , 117 N.W.2d 390 (Minn. 1962)	20
<u>Litfeau v. Metropolitan Sports Facilities Commission</u> , 270 N.W.2d 749 (Minn. 1978)	12
<u>Maher v. All Nation Ins. Co.</u> , 340 N.W.2d 675 (Minn. Ct. App. 1983).....	20
<u>Maytag Co. v. Comm'r of Taxation</u> , 17 N.W.2d 37 (Minn. 1944).....	13
<u>Meritt v. Mendel</u> , 690 N.W.2d 570 (Minn. Ct. App. 2005)	10
<u>Poser v. Abel</u> , 510 N.W.2d 224 (Minn. Ct. App. 1994).....	16
<u>Rhoden v. Fed. Deposit. Ins. Corp.</u> , 619 So.2d 480 (Fla. Ct. App. 1993)	25
<u>Roering v. Grinnell Mut. Reinsurance Co.</u> , 444 N.W.2d 829 (Minn. 1989)	15
<u>S O Designs USA, Inc. v. Rollerblade, Inc.</u> , 620 N.W.2d 48 (Minn. Ct. App. 2000)	16
<u>STAR Centers, Inc. v. Faegre Benson, L.L.P.</u> , 644 N.W.2d 72 (Minn. 2002)	10

<u>United Realty Trust v. Property Dev. And Research Co., 269 N.W.2d</u> 737 (Minn. 1978)	25
--	----

<u>ZIRP-IC, LLC v. Hennepin Cty., Nos. 31282, 04-02759, 2005 WL</u> 937432 (Minn. Tax Court, Fourth Jud. Dist., Apr. 21, 2005)	25
---	----

STATUTES

Minn. Stat. § 469.002.....	12
Minn. Stat. § 469.003.....	3
Minn. Stat. § 469.034.....	5, 13, 14
Minn. Stat. § 581.09.....	26
Minn. Stat. § 582.30.....	25, 26
Minn. Stat. §§ 469.01-47	4
Minn. Stat. §§ 581.09.....	24, 26

STATEMENT OF THE ISSUE

Did the district court err in applying the plain language of the Bond Transcript or in applying Minnesota law to grant summary judgment in favor of the HRA and against ANB on ANB's claim for a deficiency judgment?

The district court correctly applied the plain language of the Bond Transcript and Minnesota law to determine ANB is not entitled to a deficiency judgment and to grant summary judgment in favor of the HRA and against ANB. In re Common Sch. Dist. No. 1317, 117 N.W.2d 390 (Minn. 1962).

STATEMENT OF THE CASE

This appeal arises from a summary judgment order of the Honorable Earl E. Maus, District Court Judge, Crow Wing County, Minnesota. In October 2003, the board governing Respondent Housing and Redevelopment Authority for the City of Brainerd ("HRA") approved a housing program to acquire a large number of lots for residential and commercial development. To finance a portion of the development, the HRA issued taxable revenue bonds. In 2005, the HRA decided to construct 10 model homes financed by a revenue bond. Appellant American National Bank of Minnesota ("ANB") agreed to purchase the bond. The terms of the revenue bond were set forth in a series of integrated documents that comprised the Bond Transcript. Under the express terms of that agreement, the repayment of the bond's revenue note was to be made only from a finite list of enumerated sources relating to revenue generated from the project. ANB expressly acknowledged this repayment limitation in a July 12, 2005 Investment Letter incorporated into the parties' bond agreement.

Unfortunately, the development project did not perform as planned. Several houses in the development were sold and approximately \$539,855.23 was transferred to ANB under the terms of the bond. Notwithstanding these payments, the bond went into default, and ANB commenced an action in district court seeking to foreclose its mortgage on the remaining lots and improvements. The HRA stipulated to the foreclosure and the sale of the properties. In the same action, ANB sought a deficiency judgment against the HRA for the difference between the proceeds from the requested sale and the amount of the revenue note. The HRA opposed ANB's attempt to obtain a

deficiency judgment because it constituted an attempt by ANB to reach beyond the agreed-upon sources of repayment enumerated in the parties' agreement and convert the revenue bond into a general obligation bond. On cross-motions for summary judgment, the district court held that the plain language of the parties' agreement and the operation of Minnesota law mandated that the HRA's repayment on the bond is limited to the sources expressly listed within the Bond Transcript. ANB now appeals the district court's decision.

STATEMENT OF THE FACTS

ANB has presented this Court with a highly selective statement of facts underlying the district court order. Accordingly, a more complete statement is presented below. The parties and the district court agree that the language of the parties' agreement is unambiguous, and ANB's opening brief identifies no genuine issues of material fact affecting the district court's decision on summary judgment. The district court's decision, and its review in this appeal, depends instead upon the application of the terms of the parties' agreement and the relevant statutory law. The facts essential to the determination of this appeal are not in dispute.

A. The HRA.

The HRA was founded by the City of Brainerd in 1966 for the purpose of providing housing and redevelopment programs. (AA. 34.) The HRA is authorized by, and operates under, the provisions of Minnesota Statutes Chapter 469. By law, the HRA's Commissioners are appointed by the Mayor of Brainerd and approved by the City Council. Minn. Stat. § 469.003, subd. 6. Over the past 15 years the HRA has

actively developed a number of programs and projects to increase the availability of both affordable and market-rate housing for Brainerd residents. (AA. 34.) The HRA's authority is limited only to that provided by statute. See Minn. Stat. §§ 469.01-47.

B. Brainerd Oaks Project.

In October 2003, the HRA Board approved a housing program to acquire and develop approximately 96 lots for single family homes, known as the Brainerd Oaks Development. (AA. 34.) The Brainerd Oaks Development was also to include two commercial lots and four parks. (AA. 34-35.) To finance a portion of the Brainerd Oaks Development, the HRA issued Taxable Revenue Bonds, Series 2003, in the amount of \$3,300,000 (the "2003 Bond"). (AA. 35.)

In order to advance the Brainerd Oaks Development, the HRA decided to construct 10 model homes that it ultimately financed by issuing a Series 2005 Taxable Revenue Bond ("Revenue Note"). (Id.) The proceeds from the Revenue Note were to be used to release 10 lots from the mortgage securing the 2003 Bond and to construct 10 houses on the released lots and fund a \$141,000 interest reserve fund. (Id.; AA. 127.)

C. ANB and the Bond Transcript.

In early 2005, the HRA approached ANB about purchasing the Revenue Note to finance the model home portion of the project. (AA. 35.) ANB agreed in principle and the parties commenced the preparation of the documents required for the issuance of this type of security. (Id.)

A revenue note issued by a Minnesota housing and redevelopment authority is a type of bond. Minn. Stat. § 469.002, subd. 19. In the municipal finance industry, the term “note” is frequently used to identify a debt security with a short term or sold to a small number of qualified investors, whereas the term “bond” is more typically used to describe debt securities that are of a longer term and offered to the general public. (AA. 162-63.) Housing and redevelopment authority revenue notes and revenue bonds, in particular, are controlled by Minn. Stat. § 469.034. The documentation of either a revenue note or a revenue bond is typically compiled in a folio called a “bond transcript.” (AA. 163.) The bond transcript in present case consisted of 13 documents that authorized, detailed, and confirmed the terms and issuance of the Revenue Note (“Bond Transcript”). (AA. 160-61; see AA. 39-159.)

The HRA has few discretionary assets, with most of its funding coming from earmarked federal funds provided by the United States Department of Housing and Urban Development (“HUD”). (AA. 35.) The HRA receives only a small operating levy of approximately \$80,000 per year that must be approved annually by the Brainerd City Council. (Id.) The HRA’s only other substantial asset consists of public housing units that are held in trust by HUD. (Id.)

The law firm of Kennedy & Graven, Chartered served as bond counsel for the issuance of the Revenue Note and prepared the first draft of all of the documents in the Bond Transcript, with the exception of the Construction Loan Agreement, which was prepared by ANB’s outside counsel, Corenia Walz. (AA. 161.) Kennedy & Graven shared a copy of the documents it prepared for the Bond Transcript with Ms. Walz,

who in turn commented on many of those documents, including the HRA resolutions, the Mortgage, the Revenue Note, the Investment Letter, and the Opinion of Bond Counsel. (Id.)

The Bond Transcript, which constitutes the agreement between the parties in this matter, consists of the following documents:

1. Transcript Index (AA. 39-40);
2. Note Resolution No. 469, adopted by the Board of Commissioners of the Authority on July 8, 2005 (AA. 41);
3. The Taxable Housing Revenue Note, Series 2005 (AA. 49);
4. Resolution No. 471, adopted by the Board of Commissioners of the Authority on July 8, 2005 (AA. 59);
5. Combination Mortgage, Assignment of Rents, Security Agreement, and Fixture Financing Statement, dated as of July 1, 2005, from the Authority to ANB (AA. 61);
6. Amended and Restated Housing Finance Program (AA. 87);
7. Specimen Copy of the Taxable Housing Revenue Note, Series 2005 (AA. 89);
8. Construction Loan Agreement, dated as of July 12, 2005, between ANB and the Authority (AA. 98);
9. General Certificate of Authority, dated July 12, 2005 (AA. 121);
10. Certificate of the County Auditor of Crow County, Minnesota as to Registration and Filing of the Note Resolution (AA. 145);
11. Receipt and Delivery Certificate, dated July 12, 2005 (AA. 146);
12. Continuing Disclosure Certificate, dated July 12, 2005 (AA. 148);
13. ANB's Investment Letter, dated July 12, 2005 (AA. 154);

14. Opinion of Bond Counsel (AA. 156); and
15. Partial Release of Combination Mortgage, Assignment of Rents, Security Agreement, and Fixture Financing Statement, dated as of November 1, 2003, from the Authority to the U.S. Bank National Association, as trustee for the Series 2003 Bonds (AA. 158).

On July 8, 2005, the HRA Board approved the two resolutions referenced above authorizing issuance of the Revenue Note and its sale to ANB. (AA. 36; 41; 59.) The sale of the Revenue Note closed on July 12, 2005 with the execution and exchange of the Bond Transcript documents. (AA. 36.)

The express language of the Bond Transcript uniformly provides in multiple sections that repayment of the Revenue Note would be made only from a finite list of enumerated sources: (1) the “proceeds of the sales of ten (10) homes to be constructed with the proceeds of the Note”; (2) “an interest reserve fund in the amount of \$141,000, to be deposited with the Purchaser for the payment of interest payments during the construction period”; and (3) “a pledge from the Authority to place all net proceeds from the sale of two commercial properties within the Brainerd Oaks Development, when sold, in trust for the security of the Note.” (AA. 45; 50-51; 88; 157.) ANB expressly acknowledged this limitation on repayment to these enumerated sources in its Investment Letter dated July 12, 2005. (AA. 154.)

D. Performance of Brainerd Oaks Project.

Following the closing on the sale of the Revenue Note, the HRA secured the release of ten lots from its previous financing and constructed houses on each of the lots. (AA. 37.) The houses on Lots 3, 7 and 8 were sold in June and July 2007, and a

total of \$539,855.23 was transferred to ANB in accordance with the terms of the Bond Transcript. (Complaint ¶¶ X-XII.) Notwithstanding these payments, the Revenue Note is currently in default and approximately \$1,900,000 in principal and interest is presently due and owing to ANB. (Complaint ¶ XIV.)

E. The District Court Action.

ANB commenced an action in district court to foreclose its mortgage on the remaining lots and improvements and, in addition, to obtain a deficiency judgment against the HRA for the difference between the proceeds from the requested sale and the amount under the Revenue Note. (Complaint, Prayer for Relief, Nos. 1, 9(d), and 12.) The HRA stipulated to the foreclosure and sale of the properties. The HRA, however, opposed ANB's attempt to reach beyond the enumerated sources of repayment listed in the Bond Transcript to seek additional sources through a deficiency judgment. On cross-motions for summary judgment on the issue of a deficiency judgment, the district court held that the plain language of the Bond Transcript and the operation of Minnesota law mandated that the HRA's repayment of the bond was limited to the sources expressly enumerated within the Bond Transcript. Consequently, the district court granted the HRA's motion for summary judgment and denied ANB's cross-motion for summary judgment.

SUMMARY OF THE ARGUMENT

The district court correctly applied Minnesota law to hold that the repayment of the Revenue Note is limited to the enumerated sources agreed upon by the parties and that ANB could not reach beyond those sources through a deficiency judgment.

First, ANB's claim for a deficiency judgment would have constituted an end run around the Minnesota law governing housing and redevelopment authorities by converting the Revenue Note into a general obligation bond, which was outside the HRA's statutory authority to issue.

Second, the plain language of the parties' agreement bars a deficiency judgment because it expressly provides that repayment was to be made from a limited list of revenue sources. ANB expressly acknowledged this limitation and made its acknowledgement part of the bond agreement.

Third, contrary to ANB's contentions, the Minnesota Foreclosure Statutes do not provide an automatic deficiency judgment remedy, but rather merely provide a procedural mechanism for such a judgment where contractual or statutory provisions do not override the statutes' operation. Here, the statutes controlling the HRA's issuance of the bond and the terms of the parties' agreement both barred ANB from obtaining a deficiency judgment.

For these reasons, and the reasons argued before the district court,¹ the district court correctly applied the terms of the parties' agreement and Minnesota law to deny ANB's claim for a deficiency judgment, and the district court's order must therefore be affirmed.

¹ The HRA incorporates by reference its arguments before district court in this matter to the extent those arguments are not presented here.

STANDARD OF REVIEW

On review of summary judgment, the Court of Appeals determines de novo whether any genuine issue of material fact exists and whether the district court erred as a matter of law. STAR Centers, Inc. v. Faegre Benson, L.L.P., 644 N.W.2d 72, 76 (Minn. 2002); Minn. R. Civ. P. 56.03. The parties agree that no genuine issue of material fact exists regarding the district court's decision and the only issue on appeal is whether the district court erred in its application of the law.² (App. Br. 3.) The construction and effect of an unambiguous contract present questions of law, which are to be reviewed de novo. Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003). Similarly, the construction and applicability of a statute also present a question of law to be reviewed de novo. Meritt v. Mendel, 690 N.W.2d 570, 572 (Minn. Ct. App. 2005). Finally, "summary judgment is mandatory against a party who fails to establish an essential element of the claim, if that party has the burden of proof, because this failure renders all other facts immaterial." Bebo v. Delander, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001).

² To the extent Appellant attempts to assert arguments regarding factual issues for the first time in its reply brief, it is barred from doing so by the Minnesota Civil Appellate Rules. Minn. R. Civ. App. P. 128.02, subd. 3 ("The reply brief must be confined to new matter raised in the brief of the respondent.")

ARGUMENT

A. The District Court's Order Must Be Affirmed Because the HRA's Repayment Obligation is Limited to Enumerated Sources as a Matter of Law.

1. The HRA's Limited Statutory Authority Prevented It From Offering a General Repayment Obligation.

In making its decision, the district court correctly applied Minnesota law to deny ANB's claim for a deficiency judgment because the statute that provides bonding authority to the HRA does not permit the HRA to issue recourse or general obligation bonds. ANB's attempt to reach beyond the enumerated sources of repayment within the Bond Transcript would constitute an end run around Minnesota statutory law governing housing and redevelopment authorities and their issuance of bonds. ANB's demand for a deficiency judgment sought to transform the parties' non-recourse revenue bond into a general obligation bond that would allow ANB to attach assets of the HRA beyond those expressly pledged in the Bond Transcript. Such avenues of repayment are simply not available under Minnesota law.

The Revenue Note at issue in this appeal is not a stand alone promissory note as ANB contends. Indeed, ANB readily admits that the Revenue Note is in fact a bond issue controlled by Minnesota law. (AA. 189.) According to the documents in the Bond Transcript, the HRA "issued" the Revenue Note which was "purchased" by

ANB, rather than ANB “lending” funds to the HRA.³ ANB is identified as the “Registered Owner” of the Revenue Note, rather than as the lender. (AA. 49, 57.) Similarly, in its Investment Letter, ANB assured the HRA that it would comply with Federal Securities Laws in the event of any resale of the Revenue Note. (AA. 154.) Therefore, the instrument issued by the HRA is by definition a regulated security and not merely a private, commercial promissory note. See Minn. Stat. § 469.002, subd. 19.

Municipal bonds generally fall into two categories: general obligation bonds and revenue bonds, which are distinguished by what sources are made available to repay the outstanding principal and interest. (See AA. 246-49 (Robert S. Amdursky, Municipal Debt Finance Law § 1.3.1 at 25).) “General obligation bonds” are bonds that represent the general obligation of the issuing entity and are backed by the “full faith and credit” of the issuer. (See id. § 1.3.1 at 26.); see also Litfeau v. Metropolitan Sports Facilities Commission, 270 N.W.2d 749, 756-57 (Minn. 1978) (discussing distinction between general obligation and revenue bonds). “Full faith and credit” is a term that means “the issuer will, in good faith, use any and all available revenue-producing powers to pay the obligation as it becomes due.” (See AA. 246-49 (Municipal Debt Finance Law § 1.3.1 at 26); AA. 255.) “Revenue bonds,” on the

³ The HRA’s “issuance” of the Note is referenced throughout the Bond Transcript. (AA. 41-47, §§ 1.03, 2.02, 3.02, 5.05, 7; AA. 59; AA. 62; AA. 87-88; AA. 89; AA. 122; and AA. 145.) ANB’s “purchase” (and the HRA’s “sale”) of the Revenue Note is referenced throughout the Bond Transcript. (AA. 41-47, §§ 2.01, 5.05, 9.03; AA. 59; AA. 62; AA. 88; and AA. 146.)

other hand, by definition are payable through the revenues generated from the operation or sale of the projects financed by the bonds. (See AA. 246-49 (Municipal Debt Finance Law § 1.3.2 at 29).) It is not unusual for a mortgage on one or more properties to be designated as security for a revenue bond. (AA. 255.)

In the present case, the parties agree that the revenue bond was issued pursuant to Minn. Stat. § 469.034, subd. 1, entitled “Authority and Revenue Obligations,” which authorizes a Minnesota Housing and Redevelopment Authority to issue revenue bonds. The Revenue Note completely satisfies the requirements of § 469.034, subd. 1. Although ANB points to language in this statute stating the “bonds may be the type the authority determines,” this language does not grant an HRA authority to issue general obligation bonds. (App. Br. 15.) Contrary to ANB’s contentions, Minn. Stat. § 469.034, subd. 1, provides only four authorized sources for the repayment for HRA revenue bonds: (1) the “income and revenue from the project financed” or “certain designated projects,” (2) a “pledge of any grant or contributions from the federal government or other source,” (3) a “pledge of any income or revenues of the authority from the project for which the proceeds of the bonds are to be used,” or (4) a “mortgage of any project or other property of the authority.” In Minnesota, “[w]here a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others.” Maytag Co. v. Comm’r of Taxation, 17 N.W.2d 37, 40 (Minn. 1944). Under Maytag, by expressly identifying these sources of repayments for revenue obligations in this Section, the Minnesota Legislature excluded all others, including the HRA’s general revenues and assets. Therefore, by the terms of the

authorizing statute itself, the HRA was barred from pledging as security any assets or revenues outside of this list.

According to the terms of the revenue bond issued under Minn. Stat. § 469.034, subd. 1, the bond is repayable only from the sale of the homes in the financed project, an interest reserve funded by the Revenue Note, and a pledge of proceeds from the sale of commercial properties in the project. (AA. 45; 50-51; 88; 157.) The Revenue Note does not pledge any other assets. These enumerated repayment sources—repeated throughout the Bond Transcript—fall squarely within these categories authorized under Minn. Stat. § 469.034, subd. 1, and in no way reference either a general obligation or the full faith and credit of the HRA.

In fact, general obligation bonds cannot be issued pursuant to § 469.034, subd. 1. General obligation bonds are instead controlled by § 469.034, subd. 2, which permits an authority to issue a “general obligation revenue bond” backed by the general jurisdiction governmental unit (in this case the City of Brainerd). The issuance of such a general obligation bond would have required by statute to have been approved by the City following public hearings. Minn. Stat § 469.034, subd. 2(b). The Revenue Note in the present case was not issued pursuant to § 469.034, subd. 2. ANB has never alleged or argued that the Revenue Note is a general obligation bond approved by the City of Brainerd or that the City ever held any public hearings necessary for the approval of such a bond. The HRA did not, in fact, seek or receive any such approval from the City. (AA. 38.) Thus, the Revenue Note does not qualify nor operate as a general obligation bond.

Moreover, without following these statutory requirements, the issuance of a general obligation bond by the HRA would have been beyond the HRA's statutory authority and therefore void as ultra vires. See Bell v. Kirkland, 113 N.W. 271, 273-74 (Minn. 1907) (stating that contracts outside the scope of an entity's powers are ultra vires and therefore void); Erickson v. Stearns County, 252 N.W. 219 (Minn. 1934) (holding a defendant county was not liable for damages arising from its participation in building a dam because the act was outside the county's statutory authority and therefore ultra vires). Therefore, the parties' agreement cannot possibly be construed as a general obligation bond under Minnesota law.

By urging this Court to construe the bond as a typical commercial loan, ANB completely ignores—and urges this Court to ignore—the clear statutory provisions governing issuance and operation of the bond. Even if ANB were correct in its assertion that the language of the Bond Transcript somehow allows ANB to tap non-enumerated repayment sources, such an interpretation would directly conflict with the requirements of the authorizing statute and would therefore be unenforceable. See Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829, 833 (Minn. 1989) (holding “contract provisions which conflict with statutory law will not be enforced”) (citing AMCO Ins. Co. v. Lang, 420 N.W.2d 895, 900 (Minn. 1988)). The HRA did not have the statutory authority to issue a general obligation bond to ANB, and ANB cannot now create a back-door general obligation bond simply because a mortgage was offered as security. Even if the Bond Transcript language was somehow deemed to be

ambiguous, Minnesota law bars ANB's attempt to obtain a deficiency judgment that would necessarily draw upon the general obligation of the HRA.

2. The Bond Transcript Expressly, Unambiguously, and Uniformly Limits the Repayment to an Enumerated List of Sources.

ANB argues that the district court erred in its interpretation of the parties' agreement because "[n]othing in the Revenue Note or the Loan Documents limits the HRA's obligation to repay ANB." (App. Br. 13.) This is simply incorrect. Even if the HRA had statutory authorization to issue a general obligation bond—which it did not—the Bond Transcript clearly and expressly provides for limited list of repayment sources that fall within the authorized categories of the controlling statute. The district court correctly applied the plain language of the parties' agreement to hold that ANB is not entitled to a deficiency judgment that would reach repayment sources outside the express terms of that agreement.

The parties do not dispute that the Bond Transcript constitutes a single contract to which both parties are bound. Under Minnesota law, where an agreement consists of several writings executed together in relation to the same transaction, the writings constitute a single agreement that must be construed as a whole. Anderson v. Kammeier, 262 N.W.2d 366, 370 n.2 (Minn. 1977); S O Designs USA, Inc. v. Rollerblade, Inc., 620 N.W.2d 48, 54 (Minn. Ct. App. 2000) (construing multiple settlement documents and releases as a single contract); Poser v. Abel, 510 N.W.2d 224, 227 (Minn. Ct. App. 1994) (construing commission agreement and counter-offer as single contract); Carlson v. Estes, 458 N.W.2d 123, 127 (Minn. Ct. App. 1990)

(construing mortgage, note, and collateral agreement as a single contract and stating that “documents executed at the same time pertaining to the same transaction are to be considered together”). In the present case, the documents comprising the Bond Transcript were executed in connection with the July 12, 2005 closing and all relate to the issuance of the Revenue Bond. (See AA. 39-159.) The Bond Transcript in its entirety constitutes the agreement between the parties and therefore must be read and construed as a single contract.

Moreover, ANB admits that the Bond Transcript documents are “clear and unambiguous.” (AA. 193.) Yet, ANB’s position appears to hinge not upon the actual language of the agreement, but upon the absence of the word “exclusively” within the enumerated list of repayment sources plainly and repeatedly disclosed within the parties’ agreement. (App. Br. 16.) Whether or not ANB may obtain repayment on the bond from non-enumerated sources, however, cannot reasonably be premised upon language that does not appear in the parties’ agreement. Rather, this Court must look to the language that does appear in the parties’ agreement.⁴

⁴ Significantly, there is no language in the Bond Transcript that corresponds to ANB’s contention that the Revenue Note is somehow a general obligation of the HRA. Indeed, the only references to “general obligation” and “general credit” in the entire Bond Transcript is the Opinion of Bond Counsel, which states that these qualities do not attach to the Revenue Note. (AA. 156-57.) None of the documents in the Bond Transcript state that the Revenue Note is a “recourse” instrument. Similarly, none of the Bond Transcript documents, not even the Mortgage, state that ANB may obtain a deficiency judgment against ANB. Thus, if the HRA’s obligations are to be judged by the absence of language, the Revenue Note cannot be construed as a recourse or general obligation.

The Bond Transcript's plain language shows that the parties agreed to limit the bond repayment to specific items of security rather than to commit the general credit or taxing authority of the HRA as a source of repayment. As a general matter, the documents comprising the Bond Transcript consistently describe and identify the obligation as a "revenue" note or bond. (See, e.g., AA. 41, 49, 59, 88, 89, 98, 121, 145, 146, 148, 154, and 156.)

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

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

(AA. 45 (emphasis added).) The Opinion of Bond Counsel, provided to both ANB and the HRA and made part of the Bond Transcript, also states the bond will issue with the same finite list of repayment sources:

The principal of and interest payments due on the Note are secured by and payable from (i) the proceeds of the

sales of ten (10) homes to be constructed and financed with the proceeds of the Note; (ii) an interest reserve fund in the amount of \$141,000, to be deposited with the Purchaser for the payment of interest payments due on the Note during the construction period; and (iii) a pledge from the Authority to place all net proceeds from the sale of two commercial properties within the Brainerd Oaks Development, when sold, in trust to secure the principal and interest payments on the Note. The Series 2005 Mortgage also secures the principal and interest payments due on the Note.

(AA. 157 (emphasis added).) Section G of the Amended and Restated Housing Finance Program document within the Bond Transcript similarly identifies the same list of approved sources:

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

(AA. 88 (emphasis added).) The Revenue Note itself unambiguously identifies the same agreed-upon list of limited repayment sources:

Payment of principal and interest due on the Note will be secured by (i) a Combination Mortgage, Security Agreement, and Fixture Financing Statement, dated as of July 1, 2005 . . . made by the Authority in favor of [ANB] . . . (ii) proceeds of the sales of ten (10) homes to be constructed with the proceeds of the Note; (iii) an interest reserve fund in the amount of \$141,000, to be deposited with the Purchaser for the payment of interest payments

during the construction period; and (iv) a pledge from the Authority to place all net proceeds from the sale of two commercial properties within the Brainerd Oaks Development, when sold, in trust for the security of the Note.

(AA. 50-51 (emphasis added).) Although ANB selectively quotes the Revenue Note as stating the principal and interest are “payable primarily” from the revenues resulting from the sale of the ten homes to be constructed from its proceeds, ANB fails to point out that the word “primarily” is used only because it immediately precedes the sentence providing the complete list repayment sources quoted above. (App. Br. 7; AA. 50.)

These identical provisions—each setting out the narrow list of approved repayment sources and repeated throughout the Bond Transcript—undeniably evidence the parties’ agreement to limit the repayment sources available to ANB to recoup its investment to this finite list of revenues and assets. No other revenues or assets of the HRA are included within this list. Under Minnesota law, it is well-settled that “the expression of specific things in a contract implies the exclusion of all not expressed.” Maher v. All Nation Ins. Co., 340 N.W.2d 675, 680 (Minn. Ct. App. 1983), rev. denied (Minn. Apr. 25, 1984); see In re Common Sch. Dist. No. 1317, 117 N.W.2d 390, 391 (Minn. 1962).⁵

⁵ Therefore, although ANB argues that the HRA is liable in contract and tort as any private corporation, this assertion utterly fails to support ANB’s claim that additional sources of repayment are available to ANB under the express terms of the parties’ agreement. To the contrary, sources beyond those enumerated are not referenced and not available to ANB under the Bond Transcript.

In the face of these unambiguous terms, ANB points to a carefully selected quotation from the Revenue Note stating that repayment “shall continue as an obligation . . . until . . . [it has] been fully paid.” (App. Br. 18; AA. 51.) This language, taken out of its proper context within the agreement as a whole, does not authorize ANB to reach outside the enumerated and agreed-upon sources of repayment. For the reasons stated above, Minnesota law requires that this language not be read in isolation; the parties’ agreement instead must be read as a whole with the purpose of the entire agreement in mind. Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997); Carlson v. Estes, 458 N.W.2d 123, 127 (Minn. Ct. App. 1990). Although the HRA does not dispute that the Revenue Note is in default and that an amount remains due and owing, allowing ANB to obtain a deficiency judgment based upon this isolated language would permit ANB to perpetrate an end run around the express terms of the revenue bond, turning it into a general obligation instrument, and would directly violate the clear terms of the parties’ agreement and conflict with the HRA’s limited bonding authority under Minnesota law. Therefore, this cited language does nothing to support ANB’s position that it is entitled to a deficiency judgment beyond the enumerated sources of repayment repeatedly referenced in the Bond Transcript.

Considering the Bond Transcript in its entirety, the district court properly interpreted its plain language to hold that the parties expressly limited the sources of repayment, therefore preventing the applicability of the deficiency judgment statute.

B. The District Court's Order is Supported by ANB's Acknowledgment of the Expressly Limited Repayment Sources.

Even if the meaning of the Bond Transcript is somehow deemed ambiguous, the parties' intent to limit the sources from which ANB could seek repayment is clear. The record shows not only that the Bond Transcript expressly limits repayment to an enumerated list of sources, but it also shows ANB expressly agreed to exclude as sources of repayment any assets or revenues other than those specifically enumerated in the Bond Transcript.

First, ANB, through its counsel Ms. Walz, participated in the preparation of the documents that constitute the Bond Transcript. (AA. 161.) Each and every one of the documents in the Bond Transcript identifies the security as a "revenue" note. (See AA. 39-159.) In its Investment Letter, ANB represented to the HRA that it has "sufficient knowledge and experience" to evaluate the risks involved in purchasing the Note and that it has performed its own due diligence. (AA. 154.) ANB stated that "as a reasonable investor we have been able to make our decision to purchase the above stated principal amount of the Note." (Id.)

Second, the Opinion of Bond Counsel—provided to both ANB and the HRA and constituting a key component of the Bond Transcript—plainly states that "[t]he Bonds are not general obligations of the Issuer and do not constitute a charge against the general credit or taxing powers of the Issuer." (AA. 156.) This language clearly establishes that the Revenue Note creates only a limited obligation, preventing ANB from collecting by (1) pursuing or attaching the HRA's assets, (2) pursuing or attaching

the HRA's general credit, or (3) by causing the HRA to levy taxes. Had the HRA issued the bond as a general obligation or recourse instrument, ANB would have been able to reach any and all assets and revenues available to the HRA. The parties' agreement, however, expressly excludes such general sources of repayment.⁶ The opinion of Bond Counsel again repeats the same finite list of enumerated sources:

The principal of and interest payments due on the Note are secured by and payable from (i) the proceeds of the sales of ten (10) homes to be constructed and financed with the proceeds of the Note; (ii) an interest reserve fund in the amount of \$141,000, to be deposited with the Purchaser for the payment of interest payments due on the Note during the construction period; and (iii) a pledge from the Authority to place all net proceeds from the sale of two commercial properties within the Brainerd Oaks Development, when sold, in trust to secure the principal and interest payments on the Note. The Series 2005 Mortgage also secures the principal and interest payments due on the Note.

(AA. 157.) Having approved and even participated in the drafting of this opinion of Bond Counsel and the other Bond Transcript documents, ANB cannot now claim that the Revenue Note authorizes a charge against the general credit or taxing powers of the HRA or that it is payable from some source other than those enumerated.

Third, the Construction Loan Agreement, which was prepared by ANB's own outside counsel, Corenia Walz, and was incorporated into the Bond Transcript, was

⁶ In it is brief, ANB attempts to avoid these express terms by claiming "ANB is not asking for a tax to be levied." (App. Br. 21.) This position, however, ignores ANB's agreement that the Revenue Note also prevents ANB from recourse to the general assets or general credit of the HRA. (AA. 156.)

prepared for the same amount as the Revenue Note and did not provide for any additional sources of repayment. (AA. 161; AA. 98-120.)

Finally, and most tellingly, ANB's own Investment Letter, signed by ANB's President and made part of the Bond Transcript, unequivocally establishes that ANB intended and affirmatively represented to both the HRA and to Kennedy & Graven that the repayment of the bond would be limited to the enumerated sources:

We understand that the Note is payable as to principal and interest from the (i) the proceeds of the sales of ten (10) homes to be constructed and financed with the proceeds of the Notes; (ii) an interest reserve fund in the amount of \$141,000, to be deposited with the Purchaser for the payment of interest payments due on the Note during the construction period; and (iii) a pledge from the Authority to place all net proceeds from the sale of two commercial properties within the Brainerd Oaks Development, when sold, in trust to secure the principal and interest payments on the Note. We also understand that a Combination Mortgage, Security Agreement, and Fixture Financing Statement . . . also secures the principal and interest payments due on the Note. . . .

(AA. 154.)

Therefore, even if the Bond Transcript is somehow deemed ambiguous, ANB's own acknowledgments clearly demonstrate that both parties intended for the repayment of the revenue bond to be limited only to the enumerated sources and further support the district court's order on summary judgment.

C. The Minnesota Foreclosure Statute Does Not Support ANB's Claim For a Deficiency Judgment.

Finally, ANB's arguments necessarily imply that Minnesota's foreclosure statutes, Minn. Stat. §§ 581.09 and 582.30, should have automatically operated to

provide ANB with a remedy of a deficiency judgment. This, too, is incorrect. ANB confuses the statutory procedure for obtaining a deficiency with the legal right of recourse. ANB attempted improperly to convert a procedural statute into a remedial statute in order to obtain additional avenues of repayment not included within the parties' agreement.

To the contrary, § 582.30 does nothing more than provide a procedure for obtaining a deficiency judgment to which a lender is entitled by virtue of its underlying agreements. The deficiency judgment statute does not inject the remedy of general recourse into every commercial loan and revenue bond secured by a mortgage. Indeed, ANB's argument that Minn. Stat. § 582.30 automatically entitles a mortgage-holder to obtain a deficiency judgment proves far too much. Parties are free to contract around such provisions by entering into non-recourse loans or by using other non-recourse instruments such as the Revenue Note at issue in this appeal.

It is axiomatic that non-recourse debts are not subject to deficiency judgments upon the foreclosure of the related mortgage. See, e.g., United Realty Trust v. Property Dev. And Research Co., 269 N.W.2d 737 (Minn. 1978) (non-recourse loan leaves no deficiency following a sale under a foreclosure by action); ZIRP-IC, LLC v. Hennepin Cty., Nos. 31282, 04-02759, 2005 WL 937432, at_*1 (Minn. Tax Court, Fourth Jud. Dist., Apr. 21, 2005) (lenders recourse is limited to collateral under non-recourse loan);⁷ Rhoden v. Fed. Deposit. Ins. Corp., 619 So.2d 480, 482 (Fla. Ct. App. 1993) (a

⁷ A copy of this unpublished case appears at AA. 250.

mortgagee is not entitled to a deficiency judgment if the underlying note is non-recourse). Consequently, the core issue regarding whether the deficiency judgment statute should operate is not whether ANB has a mortgage, but whether the Revenue Note is backed by the general obligation and full faith and credit of the HRA.

Moreover, the very language of the foreclosure statutes indicate that they do not require a deficiency judgment where the underlying obligation is non-recourse. To the contrary, the language is merely permissive: “Except as provided in this section, a person holding a mortgage may obtain a deficiency judgment against the mortgagor if the amount a person holding a mortgage receives from a foreclosure sale is less than . . . the amount remaining unpaid on the mortgage under chapter 580.” Minn. Stat. § 582.30 (emphasis added); see also Minn. Stat. § 581.09 (“If a deficiency judgment is allowed under section 582.30, the balance of the judgment remaining unpaid may be executed and satisfied in the same manner as a personal judgment against the mortgagor.”) (emphasis added). These statutes, which ANB argues require the entry of a deficiency judgment, instead expressly allow for contrary contractual or statutory provisions to override their operation. This is precisely the situation in the present case. The HRA only had statutory authority to issue a non-recourse, revenue bond, and it contracted with ANB to issue such a bond, expressly limiting the sources of repayment when the bond became due. Both the authorizing statute and the parties’ agreement override the operation of Minn. Stat. §§ 581.09 and 582.30 that would have otherwise permitted a deficiency judgment.

Therefore, nothing in the Minnesota foreclosure statutes compel a deficiency judgment in this matter, and the district court properly applied Minnesota law in granting summary judgment in favor of the HRA and against ANB.

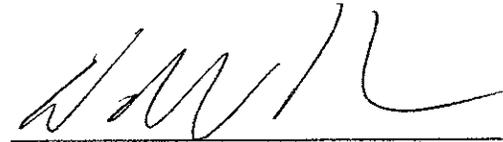
CONCLUSION

For the foregoing reasons, and the reasons argued before the district court, Respondent respectfully requests that the trial court's order granting Respondents' and denying Appellant's motions for summary judgment be affirmed.

Respectfully Submitted,

LINDQUIST & VENNUM P.L.L.P.

DATED: 15 December 2008

By: 

Wallace G. Hilke (No. 175857)

Christopher R. Smith (No. 340157)

4200 IDS Center

80 South 8th Street

Minneapolis, MN 55402

(612) 371-3211

(612) 371-3207 (facsimile)

**ATTORNEYS FOR RESPONDENT
HOUSING AND REDEVELOPMENT
AUTHORITY FOR THE CITY OF
BRAINERD**