

CASE 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 OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE LEGAL ISSUE	1
STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS CURIAE	2
STATEMENT OF THE CASE AND FACTS	2
STANDARD OF REVIEW	2
INTRODUCTION AND SUMMARY OF LEGAL ARGUMENT	2
LEGAL ARGUMENT	5
I. This court’s decision will have a significant, statewide impact.	5
A. This court’s decision will affect all Minnesota cities.	5
B. The legislative grant of authority at Minn. Stat. § 429.101 will be meaningless in most situations if the special-benefit test applies to the special assessments it authorizes.	6
II. The allowable amount of a special assessment for a public-nuisance abatement— whether under a city charter or under Minn. Stat. § 429.101—should be based on the reasonable cost of providing the abatement services and should not depend on the market value of the affected property.	8
A. The special-benefit test does not apply to special assessments for public- nuisance abatements under the plain language of either the Minnesota Constitution or state statute.....	8
B. The special-benefit test was adopted to enforce the constitutional limitation on municipal taxing power. It does not apply to public-nuisance abatements because they are not authorized under municipal taxing power, but instead, are authorized under municipal police power.	10
C. The fact that special assessments for public-nuisance abatements are collected like a tax doesn’t transform them from a regulatory fee into a tax.	13

III. The amount of a special assessment for a public-nuisance abatement is entitled to a presumption of validity and should be affirmed as long as the cost of the abatement services is reasonable as determined by the city council and as reviewed by a court under a deferential standard of review..... 15

CONCLUSION..... 17

TABLE OF AUTHORITIES

	Page
Minnesota Constitution	
Minn. Const. Art. X, § 1	4, 8, 17
Minnesota Statutes	
Minn. Stat. § 89.56	14
Minn. Stat. § 366.011	14
Minn. Stat. § 366.012	14
Minn. Stat. § 410.01	14
Minn. Stat. § 412.221	9
Minn. Stat. § 415.01	14
Minn. Stat. § 429.011	4, 8-9, 12, 17
Minn. Stat. § 429.021	4, 6, 8, 12
Minn. Stat. § 429.051	4, 8, 17
Minn. Stat. § 429.101	<i>passim</i>
Minn. Stat. § 429.111	6
Minn. Stat. § 443.015	14
Minn. Stat. § 444.075	14
Other Statutes	
Wis. Stat. § 66.073	12
Minneapolis Ordinances	
Minneapolis Code of Ordinances, Chapter 95.90	3

Minnesota Cases

Buettner v. City of St. Cloud, 277 N.W.2d 199 (Minn. 1979) 11, 15

Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (Minn. 1997).....14

In re Assessment for Improving Superior Street in Duluth, 172 Minn. 554,
216 N.W. 318 (Minn. 1927)..... 15

In re Condemnation by the State Fire Marshal, 142 Minn. 219, 171 N.W. 773
(Minn. 1919).....9

Lyons v. City of Minneapolis, 63 N.W.2d 585 (Minn. 1954) 16

State v. Chicago, Milwaukee & St. Paul Railway Co., 114 Minn. 122, 130 N.W. 545
(Minn. 1911).....9

Other Cases

CIT Group/Equipment Financing, Inc. v. Village of Germantown, 471 N.W.2d 610 (Wis.
Ct. App. 1991)..... 12

Other Authorities

Special Assessments, Information Brief, Minnesota House of Representatives, Research
Department (updated September 2008)
<http://www.house.leg.state.mn.us/hrd/pubs/specasmt.pdf>..... 14

STATEMENT OF THE LEGAL ISSUE

- I. Minnesota law provides that the amount of a special assessment for a local improvement may not exceed the special benefit to the assessed property measured by the property's increased market value due to the local improvement. Does the special-benefit test also apply to a special assessment for recovering the cost of city services needed to abate a public nuisance on private property?

After a bench trial, the district court upheld the amount of the City's special assessment concluding that the "traditional special benefit test" that applies to special assessments for local improvements like new streets or new utility lines "does not readily apply for the removal of an illegal condition like an areaway."

STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS CURIAE

The League of Minnesota Cities (“League”) has a voluntary membership of 830 out of 854 Minnesota cities including the city of Minneapolis (“City”).¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League’s mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities. The League has a public interest in this case as a representative of hundreds of cities throughout the state that are authorized to abate public nuisances on private property and to collect fees for their abatement services as special assessments that attach as a charge on the property receiving the abatement services and are collected with property taxes.

STATEMENT OF THE CASE AND FACTS

The League concurs with the City’s statement of the case and facts.

STANDARD OF REVIEW

The League concurs with the City’s statement of the standard of review.

INTRODUCTION AND SUMMARY OF LEGAL ARGUMENT

In this case, a property owner is challenging the amount of a special assessment that the City charged against its property to recover the City’s abatement costs for

¹ The League certifies pursuant to Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

removing a condition on the property that was illegal under the City's ordinance—a below-grade areaway that extended into the right-of-way for a public street and interfered with a street-reconstruction project. Minneapolis Code of Ordinances, Ch. 95.90(c) (requiring the removal of areaways that are in conflict with projects for the “public good” including street projects). After a bench trial, the district court upheld the amount of the City's special assessment concluding that the “traditional special benefit test” that applies to special assessments for local improvements like new streets or new utility lines “does not readily apply for the removal of an illegal condition like an areaway.” Appellant's Addendum I at 10.

Instead, the district court held 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 that illegal condition is remedied.” Appellant's Addendum I at p. 7. The district court found that the resulting difference in property value should be based on the cost of the abatement services. “Here, once the City lawfully ordered that the Areaway be removed to make way for the Lake Street reconstruction project, the property owned by Plaintiff dropped in value in an amount equal to the cost of removing the Areaway...Once the illegal Areaway was removed, the value of the property went back up to the pre-removal-order value.” Appellant's Addendum I at p. 8.

The City's Brief demonstrates why the district court's decision should be affirmed. The League concurs with the City's legal arguments and will not repeat them here.

Instead, this brief focuses on the statewide significance of this case and on why the district court's market-value analysis was unnecessary. This brief will demonstrate that the allowable amount of a special assessment for a public-nuisance abatement—whether under a city charter or under Minn. Stat. § 429.101—should be based on the reasonable cost of providing the abatement services and should not depend on the market value of the affected property.

In summary, the special-benefit test only applies to local “improvements” under the plain language of Minn. Const. Art. X, § 1 and Minn. Stat. § 429.051. Chapter 429 of the Minnesota Statutes defines an “improvement” as “any type of improvement made under the authority granted by section 429.021.” Minn. Stat. § 429.011, subd. 5. Therefore, the special-benefit test does not apply to special assessments for public-nuisance abatements authorized under a city charter or under Minn. Stat. § 429.101.

In addition, the purpose of the special-benefit test is to enforce the constitutional limitation on municipal taxing power in connection with the construction of local improvements. “The legislature may authorize municipal corporations to levy and collect assessments for *local improvements* upon property *benefited* thereby without regard to cash valuation.” Minn. Const. Art. X, § 1 (emphasis added). Again, public-nuisance abatements are not “improvements.” They are also not an exercise of municipal taxing power, but instead, are an exercise of municipal police power. As a result, the special-benefit test does not apply to them.

Public-nuisance abatements are different in function and purpose from a local improvement. Special assessments for public-nuisance abatements are imposed to

recover the cost of city services needed to abate a public nuisance from one private property in order to eliminate a public health or safety hazard. They are regulatory fees designed to ensure that property owners comply with health and safety regulations. In contrast, special assessments for local improvements are considered a “tax” because they are imposed to raise revenue to help pay for the construction of local improvements like new streets or new utility lines that will provide new public infrastructure that will benefit a class of properties.

In short, the allowable amount of a special assessment for a public-nuisance abatement should be based on the cost of providing the abatement services and should not depend on the market value of the affected property. Special assessments for public-nuisance abatements are entitled to a presumption of validity and should be affirmed if the cost of the abatement services is reasonable as determined by the city council and as reviewed by a court under a deferential standard of review.

LEGAL ARGUMENT

I. THIS COURT’S DECISION WILL HAVE A SIGNIFICANT, STATEWIDE IMPACT.

A. This court’s decision will affect all Minnesota cities.

This court’s decision will affect all Minnesota cities. The Legislature has authorized all Minnesota cities to provide by ordinance for the recovery of the cost of public-nuisance abatements as special assessments that attach as a charge on the affected property and are collected with property taxes. State law authorizes “any municipality” to “provide for the collection of unpaid special charges as a special assessment” for the

abatement of several specific public nuisances like weeds and diseased trees and also provides broad authorization for the “removal or elimination of public health or safety hazards from private property.” Minn. Stat. § 429.101, subd. 1(2), (3), and (6).² Charter cities like Minneapolis are authorized to proceed under chapter 429 or under their charter when imposing and collecting special assessments. Minn. Stat. § 429.111.

B. The legislative grant of authority at Minn. Stat. § 429.101 will be meaningless in most situations if the special-benefit test applies to the special assessments it authorizes.

The legislative grant of authority at Minn. Stat. § 429.101 will be meaningless in most situations if the special-benefit test applies to the special assessments it authorizes. Indeed, it will be difficult—if not impossible—to show that that the abatement of a public nuisance has increased the market value of the affected property under a special-benefit test that uses traditional appraisal evidence.

First, consider a special assessment to recover the abatement costs of towing junk cars from private property or consider a special assessment to recover the abatement costs of removing noxious weeds and garbage from private property. It is unlikely that traditional appraisal data—which generally estimates the market value of property by comparing it to sales or income data from similar properties—will show that that the market value for either of these properties was increased by the nuisance-abatement services. For example, the City’s expert testified that the City Assessor’s tax-statement

² There is separate authority for the abatement of nuisances as an “improvement” under Minn. Stat. § 429.021, subd. 1(8).

valuations generally do not take into account the existence of illegal conditions on the property and do not include a search for orders to abate illegal conditions. T-133.

Second, consider some of the other “unpaid special charges” that the legislature has authorized cities to collect as special assessments under Minn. Stat. § 429.101. How can a city possibly show that “inspections relating to a municipal housing maintenance code violation” or the existence of a “program designed to identify and register vacant buildings” has increased the market value of the affected properties? Minn. Stat. § 429.101, subd. 1 (9) and (12).

In short, if the special-benefit test applies to special assessments for public-
nuisance abatements and the other “unpaid special charges” that are authorized under Minn. Stat. § 429.101 or under a city charter, it is unlikely that they will withstand legal challenges. This will result in one of two negative consequences. First, cities will stop providing the services authorized under Minn. Stat. § 429.101 and the public will be deprived of the important health and safety benefits the statute authorizes. Or second, the few cities that can afford to continue providing these services without being reimbursed may choose to do so, and property owners that are violating the law will receive these municipal services—that are funded by the taxes of their law-abiding neighbors—for free.

II. THE ALLOWABLE AMOUNT OF A SPECIAL ASSESSMENT FOR A PUBLIC-NUISANCE ABATEMENT—WHETHER UNDER A CITY CHARTER OR UNDER MINN. STAT. § 429.101—SHOULD BE BASED ON THE REASONABLE COST OF PROVIDING THE ABATEMENT SERVICES AND SHOULD NOT DEPEND ON THE MARKET VALUE OF THE AFFECTED PROPERTY.

A. The special-benefit test does not apply to special assessments for public-nuisance abatements under the plain language of either the Minnesota Constitution or state statute.

The special-benefit test does not apply to special assessments for public-nuisance abatements under the plain language of either the Minnesota Constitution or state statute. Municipal taxing authority is limited under the Minnesota Constitution, and when cities impose special assessments for “local improvements,” the assessed property must be “benefited” by them.

The legislature may authorize municipal corporations to levy and collect assessments for *local improvements* upon property *benefited* thereby without regard to cash valuation.

Minn. Const. Art. X, § 1 (emphasis added). State statute likewise requires that special assessments for an “improvement” must be based on the “benefits received” by the property.

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 (emphasis added). But because public-nuisance abatements do not meet the definition of a local “improvement,” the special-benefit test does not apply to them.

First, chapter 429 of the Minnesota Statutes defines an “improvement” as “any type of improvement made under authority granted by section 429.021.” Minn. Stat. §

429.011, subd. 5. Therefore, public-nuisance abatements and the other “unpaid special charges” that are authorized under Minn. Stat. § 429.101 or under a city charter are simply not included in the statutory definition of an “improvement.”

Second, the purpose of the special-benefit test is to enforce the constitutional limitation on the use of municipal taxing power in connection with the construction of local “improvements.” Again, public-nuisance abatements are not “improvements.” In addition, they are not an exercise of municipal taxing power, but instead, are an exercise of municipal police power. *See, e.g.*, Minn. Stat. § 412.221, subd. 23 (authorizing city councils by ordinance to define nuisances and provide for their prevention or abatement); *State v. Chicago, Milwaukee & St. Paul Railway Co.*, 114 Minn. 122, 130 N.W. 545 (Minn. 1911) (upholding a city ordinance regulating smoke emission reasoning that the “regulation and abatement of nuisances is one of the ordinary functions of the police power of the state”); *In re Condemnation by the State Fire Marshal*, 142 Minn. 219, 171 N.W.773 (Minn. 1919) (upholding an order condemning and authorizing the demolition of a nuisance building reasoning that “[r]egulating or compelling the repair or alteration of buildings that have become a nuisance to persons or surrounding property” is “a proper exercise of the police power of the state” and that “no valid objection to legislation enacted for that purpose can be made on the ground that the owner of the nuisance is deprived of property by the abatement”).

Public-nuisance abatements are different in function and purpose from a local improvement. Special assessments for public-nuisance abatements are imposed to recover the cost of city services needed to abate public nuisances from one private

property in order to eliminate public health or safety hazards. They are regulatory fees designed to ensure that property owners comply with health and safety regulations. In contrast, special assessments for local improvements are considered a “tax” because they are imposed to raise revenue to help pay for the construction of a local improvement like a new street or new utility lines that provide permanent public infrastructure that benefits a class of properties.

Special assessments for local improvements are imposed at the discretion of a city council that determines whether the local improvement is needed, whether it will be paid for with special assessments, and which properties will be assessed. In contrast, individual property owners ultimately determine whether special assessments for public- nuisance abatements will be charged against their property. If property owners want to avoid these special assessments, they can simply comply with the law. In addition, it is important to note that a city’s authority to abate a public-nuisance on private property will generally only be triggered when a property owner fails to voluntarily eliminate the public nuisance from his or her property. *See* Minn. Stat. §429.101, subd. 1(b).

B. The special-benefit test was adopted to enforce the constitutional limitation on municipal taxing power. It does not apply to public-nuisance abatements because they are not authorized under municipal taxing power, but instead, are authorized under municipal police power.

The special-benefit test does not apply to public-nuisance abatements because they are not authorized under municipal taxing power, but instead, are authorized under municipal police power. The purpose of the special-benefit test is to enforce the constitutional limitation on municipal taxing powers. For example, in a case involving a

local improvement for the installation of new utility lines, the Minnesota Supreme Court concluded that: “[a] special assessment is a tax, intended to offset the cost of local improvements such as sewer, water and streets, which is selectively imposed on the beneficiaries of such products.” *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 201 (Minn. 1979). Based on this conclusion, the Minnesota Supreme Court applied the special-benefit test to enforce the constitutional limitation on municipal taxing power noting that “a special assessment which exceeds the special benefits to the property, measured by the difference in market value before and after the improvements, is a taking of property without fair compensation in violation of the Fourteenth Amendment.” *Id.*

Essentially, the theory behind the special-benefit test is that when a special assessment is made for a local improvement, the property owner is merely paying for the benefit that he or she has received (as measured by the property’s increased market value), but if the amount of the special assessment exceeds the amount of the benefit, there has been an unconstitutional taking of private property without due process of law. This concern is simply not present in the case of a special assessment for a public-nuisance abatement. First, there is no local “improvement” being constructed. Instead, an illegal public nuisance is being removed. Second, the special assessment is imposed under the municipal police power to remove a public health and safety hazard and not under municipal taxing power to raise revenue to fund an improvement.

The state of Wisconsin has expressly recognized this distinction between special assessments under municipal police power and special assessments under municipal taxing power. In Wisconsin, if a special assessment is authorized under the “police

power,” the amount of the assessment must simply be made on a “reasonable basis as determined by the governing body of the city, town or village.” Wis. Stat. § 66.073(1)(b). In contrast, if a special assessment is authorized under the taxing power, the amount of the assessment “may not exceed the value of the benefits accruing to the property.” *Id.* This statutory distinction makes logical sense, and Wisconsin courts have found it to be constitutional. For example, the Wisconsin Court of Appeals upheld the constitutionality of special assessments that the Village of Germantown adopted under its police power holding that: “[b]ecause the assessments were reasonable and fulfill the statutory requirements for an assessment where a municipality proceeds under its police power, there was no taking of property in violation of the Wisconsin Constitution. *CIT Group/Equipment Financing, Inc. v. Village of Germantown*, 471 N.W.2d 610, 614 (Wis. Ct. App. 1991).

The Minnesota legislature has likewise recognized the distinction between special assessments under municipal taxing power and special assessments under municipal police power. First, the Minnesota legislature has placed the authority for special assessments for local “improvements” and the authority for special assessments for the collection of “unpaid special charges” into separate statutes. Minn. Stat. § 429.021; Minn. Stat. § 429.101. Second, the Minnesota legislature has excluded special assessments for the collection of “unpaid special charges” under a city charter or under Minn. Stat. § 429.101 from the statutory definition of a local “improvement” at Minn. Stat. § 429.011, subd. 5. Third, the Minnesota legislature has expressly linked the term

“benefited” in Minn. Stat. § 429.101, subd. 1 to the “cost” of providing the particular service at issue.

[T]he governing body of any municipality may provide for the collection of unpaid special charges as a special assessment against the property *benefited* for all or any part of the *cost* of...removal or elimination of public health or safety hazards from private property.

Minn. Stat. § 429.101 (emphasis added). But although the Minnesota legislature has already recognized the distinction between special assessments under municipal police power and special assessments under municipal taxing power, it appears that this Court will be the first to directly address this issue of statewide significance.³

C. The fact that special assessments for public-nuisance abatements are collected like a tax doesn’t transform them from a regulatory fee into a tax.

When cities impose special assessments for public-nuisance abatements, they are simply using the special-assessment procedure as a collection tool to recover the cost of their abatement services. But the fact that these special assessments are collected like a tax doesn’t transform them from a regulatory fee into a tax. Indeed, Minnesota House Research—after discussing the authority for the collection of unpaid special charges as special assessments at Minn. Stat. § 429.101—noted that the Legislature has also

³ The few cases that have addressed special assessments for public-nuisance abatements have been unpublished and have involved procedural challenges to the collection of the special assessments. These cases have not directly addressed the issue of whether the special-benefit test must apply to special assessments for public-nuisance abatements and the other “unpaid special charges” collected under a city charter or under Minn. Stat. § 429.101. *See, e.g.*, Respondent’s Brief at pp. 49-50 (discussing *Singer v. Minneapolis*, 1996 WL 208486 (Minn. Ct. App. 1996)).

authorized the collection of other charges as special assessments simply because it provides a convenient collection method.

Other statutes and some city charters also authorize the collection of a charge using the special assessment process even though there is no increase in the property's market value (the benefit test) because it is a convenient way to collect the charge and if it remains unpaid, becomes a lien against the property.

Special Assessments, Information Brief, Minnesota House of Representatives, Research Department (updated September 2008)

<http://www.house.leg.state.mn.us/hrd/pubs/specasmt.pdf> (last visited March 3, 2011).

Some examples of similar statutory authority for the collection of service fees like a tax includes authorization for the collection of unpaid service fees for tree-pest control as special assessments (Minn. Stat. § 89.56, subd. 3); authorization for the collection of unpaid water and sewer bills as taxes (Minn. Stat. § 444.075, subd. 3e); authorization for the collection of unpaid garbage bills in fourth class cities—cities with a population under 10,000—as special assessments (Minn. Stat. § 443.015; Minn. Stat. § 410.01); and authorization for the collection of unpaid charges for emergency services as taxes (Minn. Stat. § 366.011; Minn. Stat. § 366.012; Minn. Stat. § 415.01, subd. 2).

In short, it is the purpose of a charge and not its method of collection that determines whether the charge is a tax or a fee for service. *See, e.g., Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1997) (noting that it is the purpose of a charge that determines whether it is a tax or a fee and that the purpose of a tax is to raise revenue while the purpose of a fee is to recover the costs of regulation). Again, public-nuisance abatements are an exercise of municipal police power that serves a regulatory

purpose. They are not an exercise of municipal taxing power that serves a revenue-raising purpose. Therefore, as long as the amount of a special assessment for a public- nuisance abatement is reasonably related to the cost of providing the abatement services, it must be considered a fee and not a tax regardless of how it is collected.

III. THE AMOUNT OF A SPECIAL ASSESSMENT FOR A PUBLIC- NUISANCE ABATEMENT IS ENTITLED TO A PRESUMPTION OF VALIDITY AND SHOULD BE AFFIRMED AS LONG AS THE COST OF THE ABATEMENT SERVICES IS REASONABLE AS DETERMINED BY THE CITY COUNCIL AND AS REVIEWED BY A COURT UNDER A DEFERENTIAL STANDARD OF REVIEW.

The Minnesota Supreme Court first recognized that special assessments are entitled to a presumption of validity in 1927. “Where an assessment is expressly authorized by law and is regularly made, we start with the foundation that it is prima facie valid, and the burden rests upon the objector to show its invalidity.” *In re Assessment for Improving Superior Street in Duluth*, 172 Minn. 554, 560, 216 N.W. 318, 320 (Minn. 1927). And in 1979, the Minnesota Supreme Court analyzed the appropriate scope of review in special-assessment appeals and noted that the levying of special assessments is a legislative function that is generally subject to a deferential standard of review.

The levying of special assessments is a legislative function. The city council possesses the discretion ordinarily afforded a legislative body in adopting one among a number of reasonable alternatives. Therefore, in cases where the issue presented to the trial court is the regularity of the assessment process or determination made within the range of the municipality’s legislative discretion, such as what property is benefitted and a prorated division of the cost, the city’s conclusions may not be upset unless clearly erroneous.

Buettner v. City of St. Cloud, 277 N.W.2d 199, 203 (Minn. 1979). The *Buettner* Court went on to note that it is only when a special assessment is being challenged on a constitutional basis that the amount of a special assessment will be subject to a court's "independent consideration of all the evidence." *Id.* But again, because special assessments for public-nuisance abatements are an exercise of municipal police power, they do not raise constitutional concerns, and they are entitled to a deferential standard of review.

In addition, it is well-settled law that a deferential standard of review applies to a city council's legislative determination of the appropriate amount of a regulatory fee. For example, when the Minnesota Supreme Court considered a challenge to the amount of a license fee imposed by the city of Minneapolis on gas-station operators, it noted that it is "well settled" that the amount of a regulatory fee is presumed to be valid and is largely "within the council's sound discretion." *Lyons v. City of Minneapolis*, 63 N.W.2d 585, 588 (Minn. 1954). The Supreme Court held that regulatory fees must be reasonable, but noted that the person challenging the fee bears the "burden of proof of showing that the fees are excessive" and that a court will not declare regulatory fees unreasonable unless they are "palpably" so. *Id.* at 589. In short, the amount of a special assessment for the abatement of public nuisance—whether under a city charter or under Minn. Stat. § 429.101—is entitled to a presumption of validity and should be affirmed as long as the cost of the abatement services is reasonable as determined by the city council and as reviewed by a court under the deferential standard of review.

CONCLUSION

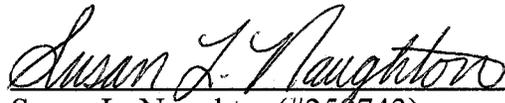
The special-benefit test only applies to special assessments for local “improvements” under the plain language of Minn. Const. Art. X, § 1 and Minn. Stat. § 429.051. The special-benefit test does not apply to special assessments for public- nuisance abatements under Minn. Stat. § 429.101 or under a city charter because these special assessments are not included in the statutory definition of a local “improvement” at Minn. Stat. § 429.011, subd. 5. In addition, the purpose of the special-benefit test is to enforce the constitutional limitation on municipal taxing power in connection with the construction of local “improvements.” The special-benefit test does not apply to public- nuisance abatements because these abatements are not “improvements” and because they are not authorized under municipal taxing power, but instead, are authorized under municipal police power.

Public-nuisance abatements are different in function and purpose from local improvements. Special assessments for public-nuisance abatements are imposed to recover the cost of city services needed to abate a public nuisance from one private property in order to eliminate a public health or safety hazard. They are regulatory fees designed to ensure that property owners comply with health and safety regulations. In contrast, special assessments for local improvements are considered a “tax” because they are imposed to raise revenue to help pay for the construction of a local improvement like a new street or new utility lines that provides public infrastructure that benefits a class of properties.

For all of these reasons, the League respectfully requests that this Court affirm the district court's decision upholding the amount of the City's special assessment. The League also requests that this Court hold that the allowable amount for a public-nuisance abatement—whether under a city charter or under Minn. Stat. § 429.101—is based on the reasonable cost of providing the abatement services, does not depend on the market value of the affected property, is entitled to a presumption of validity, and should be affirmed if the cost of the abatement services is reasonable as determined by the city council and as reviewed by a court under a deferential standard of review.

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