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**Case No. A11-644**  
A11-1471  
**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

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Roger Anda, Elizabeth J. Anda and  
James H. Martin, LLC,

Appellants,

vs.

City of Brainerd, a Minnesota  
municipal corporation,

Respondent.

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**APPELLANTS' BRIEF, ADDENDUM  
AND APPENDIX**

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

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## ISSUES PRESENTED

Is State land, which cannot be subject to special assessment, counted in determining whether a petition has been signed by owners of 35% of the property abutting a proposed special assessment project?

Minn. Stat. §429.031 (2010); Op. Att’y Gen. 209-a-11 (Oct. 28, 1954)

Did the District Court err in barring landowners from challenging the taking of their property by eminent domain on the grounds that the City had not lawfully commenced the Chapter 429 special assessment project for which their property is being taken?

Minn. Stat. §117.055, subd. 2 (2010); Minn. Stat. §117.075, subd. 1(a)(2010)

### I. STATEMENT OF THE CASE

This case seeks review of the District Court's finding that a condemnee may not challenge a taking by eminent domain on the grounds that the municipality conducting the take has not properly authorized the project under law. We rest our assertion that the municipality must establish proper authority upon the language of Minnesota Statutes. Section 117.055 Subdivision and Minnesota Statutes section 117.075 subdivision 1(a), both of which clearly place proper authorization in issue at the public purpose and necessity hearing. A necessary adjunct to presentation of this issue is a determination whether the City properly commenced a Chapter 429 special assessment project using a petition by the State of Minnesota. Appellants Anda and Martin own apartment buildings on West College Drive across from Central Lakes College just west of the Mississippi River in Brainerd, Minnesota. Using state and federal funds, the City of

Brainerd (“City”) is proceeding to convert College Drive into a four-lane regional transportation artery. Despite the fact that the City Engineer recommended that the project does not provide a special benefit and should be funded by general revenues, the City has decided instead to attempt to fund its local funding share out of special assessments imposed on Anda and Martin’s apartments.

Anda and Martin asserted that the City unlawfully accepted the petition of the State of Minnesota as representing 35% of the property to be assessed, thus evading the requirement that special assessment projects must be approved by a super-majority of the Council. Minn. Stat. § 429.031, subd. 1(f); Op. Att’y Gen. 408-c (Oct. 28, 1954). They challenged the sufficiency of the petition by review pursuant to Minnesota Statutes Section 429.036.

While their challenge to the sufficiency of the petition was under review by the District Court, the City commenced this eminent domain action before a different District Judge and sought a quick-take of Appellants’ property. In the eminent domain action, Anda and Martin challenged the quick-take on the grounds that compliance with Chapter 429 is required for projects funded by special assessments, but the District Court ruled that their property could be taken by the City even if the project for which it was being taken was unlawfully authorized. The eminent domain Court barred the appellants from subpoenaing witnesses or offering evidence in support of their claim that the project was

unlawfully authorized<sup>1</sup>. We appeal the Court's finding that illegal authorization of a project cannot be raised at the public-purpose.

The procedural posture of this case is complicated by the fact that the City commenced the taking before the sufficiency of the petition was resolved, and the two cases have been proceeding in parallel before different Judges. On July 21, 2011, the District Court hearing Anda and Martin's challenge to the petition found that the Attorney General's opinion barring the State from submitting a Chapter 429 petition was incorrect and denied their appeal, a decision which we are also appealing.

Resolution of this case depends, in part, upon the outcome of the core question whether the State can serve as a petitioner, and accordingly we have moved the Court to consolidate those two cases. This brief is written to preserve the Court's ability to hear both cases on a single set of briefs. Nonetheless if the Court declines that motion, we argue here that Anda and Martin were entitled to a determination by the eminent domain court as to whether a 4/5 majority was required.

## **II. FACTS AND PROCEDURAL HISTORY**

Appellants Anda and Martin own apartment buildings on West College Drive across from Central Lakes College ("College") just west of the Mississippi River in

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<sup>1</sup> About a week before our brief was due, a second District Court sitting in Brainerd ruled in Anda and Martin's challenge to the State's 35-percent petition. The District Court held that the State can serve as the sole petitioner on a special assessment project, despite three Attorney Generals' opinions to the contrary, and we have appealed that decision and will be seeking by motion to consolidate the appeals.

Brainerd, Minnesota. In the 1970's, the neighborhood was a quiet college residential neighborhood with a number of unpaved side-streets. In those days, the City's engineering department projected that, in 2006, College Drive would be serving about 1300 cars per day. In 1973, to service the local traffic, the City constructed a two-lane bridge across the Mississippi River and paved Southwest 6th Street to provide access to Appellants' apartments. Because the pavement project was deemed primarily of local benefit, the City imposed special assessments to pay for the project on surrounding properties, including the Anda and Martin properties. See Exhibit K.<sup>2</sup>

However, in the 1990's, city traffic planners began to envision College Drive as a regional artery servicing cross-Mississippi river traffic. Describing College Drive as a "regional hub, [serving] employment, education and commercial connections," the City and its engineering staff redesignated College Drive as a regional arterial. See Exhibit K.<sup>3</sup>

As a result, by 2005, the average daily traffic count traveling on College Drive had exploded to 13,000 vehicles and is projected to rise to as high as 30,000 cars. For this reason, the City's engineering staff began to plan for a major road and bridge expansion.

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<sup>2</sup>See Exhibit K (Document No. 141-144), Affidavit of Jerry Von Korff, filed on March 3, 2011, in support of Respondents' Response to Petitioner's Motion in Limine and Protective Order.

<sup>3</sup>See Exhibit K (Document No. 141-144), Affidavit of Jerry Von Korff, filed on March 3, 2011, in support of Respondents' Response to Petitioner's Motion in Limine and Protective Order.

To achieve this objective, the City would need state and federal funding support. As the City's staff explained:

In 2005, recognizing we have an explosive increase in traffic, city asked for funds to expand College Drive from Region 5 of [MnDot]. They [the City] proposed to construct a four lane with intersection traffic control. Secured \$1.7mm in federal money to reconstruct and improve capacity.” Id.

Project proponents hoped to seize some federal stimulus funding as well as state aid funding. But the project would also require local cost sharing, and the City Council had been opposed to use of general tax revenues for this purpose. Consequently, the City began to explore the potential use of special assessments against local property owners as a source of the local match. In the Spring of 2008, the engineering staff recommended against the use of special assessments for the new project, because the purpose of the project was regional in nature and there was not a local special benefit. On April 30, 2008, City Engineer Jeff Hulsether wrote:

I[n] my view the proposed project is being driven by increasing regional traffic demand in the corridor, not the adjacent land uses, therefore, my recommendation will be no special assessments. See Exhibit P.<sup>4</sup>

All aspects of the project were controversial –financing, use of special assessments, cost, and configuration. Some Council members opposed the project as configured and advocated for a greatly stripped down project that would reduce the public's funding burden and drastically reduce the City's local funding obligation. A

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<sup>4</sup>See Exhibit P (Document No. 251), Affidavit of Jerry Von Korff, filed on March 3, 2011, in support of Respondents' Response to Petitioner's Motion in Limine and Protective Order.

majority of the Council proved unwilling to use local tax revenues to support the \$600,000 to \$800,000 in local revenues to make the project go. Despite the City Engineer's caution that the project was regional in nature, the lack of support for use of general revenues caused the City to revisit the idea of making local property owners carry the City's local share as special assessments. The problem was that Council-initiated projects funded in part by special assessments require a petition from property owners within the assessment area or a super-majority of the Council to approve the project, and neither was forthcoming. See Minn. Stat. Sec. 429.031.

In 2009, the City wrote College Vice-President Christianson inviting comment on whether the College would be willing to make a contribution to the project. The letter acknowledged that the City's staff believed that applicable statutes left contribution "somewhat optional for the State." See Exhibit D, Appendix (A-40). It asked the College to consider whether it might be willing to pay an assessment in the amount of \$90,000, and how the statutory limitation regarding payment out of available funds would operate. On December 17, 2009, the College responded that "the college – like the city – is facing serious budgetary pressures." It suggested that possibly the College's contribution might come in the form of some form of offset against the taking of easements. See Exhibit E, A- 42.

By November of 2010, controversy over the cost, financing and configuration of the project had prevented the City from initiating the project with the required super-

majority. Unable to convince the few private landowners like Anda and Martin to petition for a special assessment project, the City devised a plan to move forward with special assessments by treating the State of Minnesota itself as a special assessment petitioner. As part of this plan, the City would treat the Community College lands as if it were in the special assessment area and accept the College President's petition for a Chapter 429 special assessment project as if the State of Minnesota were an assessed landowner. Since the State owned more than 35% of the land adjoining the project, the City decided that it would approve the project using special assessments for its local share with only a bare majority of the Council approving.

On November 15, 2010, the President of the College presented the City with a petition. Although the City and College were still negotiating their possible agreement for a voluntary payment towards the project, as of November 15, 2010, the City and the College had no binding agreement assuring that the College would make a payment. The College and City had not yet agreed on the configuration of the improvements themselves, and the College insisted that no agreement would be forthcoming unless its conditions were met. There was also no meeting of the minds on the amount that would be paid, nor was there an agreement on the netting out of the payments against amounts due the State for acquisition of its land. At the time, the President had not acquired authority to bind the State of Minnesota in any event. In short, as of the date that the Council accepted the petition, the Council had no power to make the State pay anything at

all towards this project. Nonetheless, the Council decided to treat the College lands as within the special assessment area, approved the petition, and commenced the College Drive project as a special assessment project under Minnesota Statutes Chapter 429.

Anda and Martin objected to the suggestion that the State of Minnesota can be a petitioner on a local assessment project. They contended that the owners entitled to petition for an assessment are owners who are within the area that will actually be subject to the City's special assessment jurisdiction. See Op. Att'y. Gen., No. 56, 133 (June 30, 1936); Op. Att'y. Gen., 408-c (Oct. 28, 1954); Op. Att'y Gen., 387-B-10 (June 29, 1954); League of Minnesota Cities, Special Assessment Guide, page 16 (May 2010), A-35 - A-39. They contended that the purpose of the petition requirement is to make a showing that property owners who can be assessed are willing to have their lands subjected to the City's special assessment jurisdiction. They argued that the City has no power to impose special assessments against the State, so that counting the State as a petitioner evades both the language and the central purpose of the petition requirement. Anda and Martin exercised their rights to challenge the lawfulness of the petition under Section 429.036, because it lacks the signature of any owner of property subject to assessment. The City's answered, claiming that the City could treat the State of Minnesota as a special assessment petitioner because it had an agreement with the State to pay an assessment. A-5. When Anda and Martin made a formal data request to the State for a copy of that agreement, however, it turned out that no such agreement existed.

Minnesota Statutes Section 429.036 grants landowners within the proposed assessment area the opportunity to challenge the sufficiency of the special assessment petition in a special appeal to the District Court. Cf. Nastrom v. City of Blaine, 498 N.W.2d 49 (Minn. App. 1993). Anda and Martin immediately challenged the lawfulness of the petition and their appeal was assigned to District Judge Askegaard. Because section 429.021 subdivision 3 requires strict compliance with Chapter 429 for special assessment projects, see Metro. Airports Comm'ns v. Bearman, 716 N.W.2d 403, 405 (Minn. Ct. App. 2006), Anda and Martin urged the District Court to advance consideration of their appeal on the calendar, so that the issue could be promptly resolved before takings occurred. The City, however, opposed advancing the case on the calendar, commenced eminent domain proceedings, and scheduled a quick-take hearing.

Anda and Martin objected to the quick-take and sought to present testimony in support of their position that the City could not take their property for an improperly authorized project<sup>5</sup>. They contended that section 429.031 subdivision 1(f) prohibits authorization of a special assessment project without an appropriate petition or super majority vote. They further argued that when the legislative body has not approved a special assessment by either method, then the taking may not proceed. They sought to

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<sup>5</sup> See Minn. Stat. §117.055, subd. 2 (party wishing to challenge the public use or public purpose, necessity, or authority for a taking must appear at the court hearing and state the objection); Minn. Stat. Ann. § 117.075 subdivision 1(a) (court approves the public use or public purpose, necessity, and authority for the taking).

bring forward testimony, by deposition or testimony in Court from City witnesses, the elements of their claim that proper authorization had not been obtained.

The City moved to bar Anda and Martin's claim that proper authority had not been obtained, arguing that it could take the property even if it had failed to comply with Chapter 429, that is, even if the special assessment project authorization was illegal. Brainerd relied on two cases, Matter of Condemnation by Minneapolis Cmty. Dev. Agency, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998) and City of Duluth v. State of Minnesota, 390 N.W.2d 757 (Minn. 1986), which they contended establish the principle that a municipality can take property for an illegally authorized project. On the strength of these two cases, the District Court granted the City's motion and ruled that Anda and Martin could not offer evidence to show that the City had violated mandatory requirements of Chapter 429. Anda and Martin take this interlocutory appeal from the quick-take order.

On July 21, District Judge Askegaard granted the City's motion for summary judgment in Anda and Martin's challenge to the sufficiency of the petition for public improvements, finding that the State of Minnesota may petition for local special assessments. The District Court recognized that the Attorney General had three times interpreted Chapter 429 and its predecessor statute as excluding the State of Minnesota or other non-assessable public entities as assessed landowner for petition purposes. However, the District Court found that the statute unambiguously refers to the State as an

owner and consequently those opinions would not be entitled to weight in construing the statute. Anda and Martin have appealed from this decision as well.

### **III. SUMMARY OF THE ARGUMENT**

The District Court wrongly concluded that a challenge to improper project authorization is not germane to the taking of property. Actually, Minnesota Statutes section 117.055, subdivision 2 allows a party wishing to challenge the public use or public purpose, necessity, or authority for a taking to appear at the court hearing and state the objection. Similarly, section 117.075, subdivision 1(a) establishes the right to judicial review of public use or public purpose, necessity, and authority for the taking. It is hornbook law that if the condemnor's proposed project violates state or federal law, the court will not grant the petition to condemn. 25 Minnesota Practice § 10:7 (2011). Adherence to the proper procedure to establish public purpose, necessity, and authority for the taking is critical to the legislative deference afforded in judicial review. The Council's decision to approve a taking is legislative, but the legislative decision is valid only if the minimum requirements of law are observed. The deference afforded by the District Court to the legislative determination of the City cannot be justified if the City failed to observe the jurisdictional requirements which the legislature requires. Here, the legislative decision that justifies the taking requires a 4/5 majority of the Council, and the Council has failed to approve the project by that 4/5 majority.

Under Chapter 429, "When any portion of the cost of an improvement is defrayed by special assessments, the procedure prescribed in this chapter shall be followed." Minn. Stat. §429.021, subd. 3. Because this project is funded in part by special assessments, the Council could not authorize the project by some other means. A valid petition or authorization by super majority was a prerequisite to obtaining the legislative authority and determination of public purpose. The City convinced the District Court that it had condemnation authority even in light of the illegally authorized project by citing two cases, Reilly Tar & Chemical Corp. v. St. Louis Park, 265 Minn. 295, 300 (Minn. 1963) and Matter of Condemnation by Minneapolis Cmty. Dev. Agency, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998). But neither of these cases support the contention that Court's will refuse to take evidence establishing that a project was illegally authorized at the quick-take hearing. In fact, in both cases, the Courts afforded the property owner full trials on proper authorization, and approved the takings, in each instance, because the condemnor convinced the District Court that the projects had been properly authorized.

Since the District Court found that proper authorization is irrelevant to the public purpose and necessity hearing, the District Court neither received nor considered evidence and argument that the project required approval by a 4/5 majority. However, clearly, our presentation of that issue necessarily rests upon our contention that the State cannot serve as a local improvement project petitioner. For this reason, we begin the body of our argument in Part A and B by challenging the City's position that the State can

be a petitioner for a special assessment project. Under Chapter 429, the State, as superior sovereign is not subject to assessment liens against its lands, nor is it subject to the City's Chapter 429 jurisdiction to determine the amount of its contribution. Minn. Stat. §435.19. Rather, the State reserves to itself the right to decide whether the project confers a benefit on the state. Any amount it agrees to pay is subject to the appropriation process, and Section 435.19 provides the City with no compulsory process to force the State to pay.

Our current local improvements chapter derives from an effort in 1953 by a distinguished panel of legal and financial experts familiar with municipal improvement practice. Their goal was to combine the numerous special assessment authorities in different statutes for individual classes of political subdivisions (townships, and cities of varying classes) into one comprehensive Chapter 429. When they conducted the drafting process, they would have known that the Attorney General had interpreted the existing special assessment statutes to exclude the State as an owner in the petition process. When the drafters presented Chapter 429 to the legislature, they incorporated into Chapter 429 the precise statutory language that the Attorney General had interpreted as excluding public non-assessable lands from being counted in the petition process. This is compelling evidence, then, that the authors of Chapter 429 believed that the language that they were using had been authoritatively construed to exclude non-assessable lands.

Shortly after the legislature adopted Chapter 429, the Attorney General again ruled that neither State nor City lands could be counted in computing the 35%

requirement under Chapter 429. Since that time, the League of Minnesota Cities, a participant in the original drafting process, has instructed its member cities that Chapter 429 does not count towards the petition requirement. League of Minnesota Cities, Special Assessment Guide, page 16, A-39. Moreover, when the legislature amended Chapter 429 to assure notice to impacted landowners, the notice requirement was targeted to owners of property within the area proposed to be assessed. Minn. Stat. § 429.031, subd. 1(a).

The City has contended that the Attorney General's opinions should be disregarded because allegedly the statutory language is clear. That contention flies in the face of the fact that each time the Attorney General has faced this precise issue, he has read the statute exactly the opposite way the City does. This statute has never been interpreted in the way that the City proposes, not by the Attorney General, not by the Courts, and not by the primary legal advisor to Minnesota cities, the League of Minnesota Cities. The City's interpretation is a results-oriented reversal of a time-honored application of this statute, designed to facilitate a project that a bare majority of the Council wants to facilitate, but does not want to fund with general municipal revenues.

#### IV. ARGUMENT

**A. State Land, Which Cannot Be Subject to Special Assessment, May Not Be Counted in Determining Whether a Petition Has Been Signed by Owners of 35% of the Property Abutting a Proposed Special Assessment Project.**

As set forth in the Statement of the Case, on July 21, 2011, the District Court ruled that State land may be counted in determining whether owners of 35% of the property abutting the College Drive project signed the petition. In the event the Court grants our motion to consolidate, we argue here that the District Court erred as a matter of law. In the event this Court denies our motion to consolidate, our arguments here serve to explain and illuminate why the District Court in the eminent domain proceeding erred in refusing to allow evidence on the illegal approval procedure, and why it ultimately lacked the authority to proceed with the taking.

**(1) The Super-Majority Requirement Represents an Important Substantive Protection Against Shifting the Cost of Regional Public Projects to Individual Citizens.**

Minnesota Statutes Chapter 429 provides a mechanism for initiating special assessment improvement projects that is mandatory for any municipal project that will be financed in whole or in part by special assessments. Chapter 429 states, "When any portion of the cost of an improvement is defrayed by special assessments, the procedure prescribed in this chapter shall be followed." Minn. Stat. § 429.021, subd. 3<sup>6</sup>. See

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<sup>6</sup> An exception applies in the event that a home rule charter city elects to utilize special assessment procedures found in the City Charter, but that exception does not apply here, for Brainerd chose to utilize Chapter 429 procedures.

Metro. Airports Comm'ns v. Bearman, 716 N.W.2d at 405. Chapter 429 contains procedures designed to prevent local government from being tempted to shift the costs of a project of general public benefit onto individual landowners who happen to live near the public improvement. Since 1929, local improvements provisions have recognized this danger by imposing a petition or super-majority requirement. As the League of Minnesota Cities Manual explains, “The availability of special assessment financing often tempts city officials to underwrite the cost of governmental programs that should be an obligation of the entire city.” League of Minnesota Cities, Special Assessment Guide, 10 (May 2010), A-37. To this end, Chapter 429 prohibits approval of a special assessment project unless the project is proposed by owners of at least 35 percent of the property abutting the improvement, Minn. Stat. 429.031, subd. 1(f) and after notice to the to the owner of “each parcel within the area proposed to be assessed.”

Strict compliance with the procedures found in Chapter 429 is essential to authorization of the assessments. In Nastrom v. City of Blaine, 515 N.W.2d 374 (Minn. 1994), the Supreme Court wrote:

It has been observed that courts generally enforce the rule that in making local improvements for the cost of which special assessments are to be levied, the procedure prescribed must be strictly observed in good faith and in all material respects. 14 Eugene McQuillin, Municipal Corporations § 38.177 (1987). Although this court has not in modern times had occasion to construe the statutes in issue here, historically we have strictly construed statutes affecting property rights. Cf. Bowen v. City of Minneapolis, 47 Minn. 115, 49 N.W. 683 (Minn. 1891).

Failure to comply with the notification requirement is jurisdictional and results in dismissal of the assessment. Sykes v. City of Rochester, 787 N.W.2d 192 (Minn. Ct. App. 2010); Klapmeier v. Center, 346 N.W.2d 133 (Minn. 1984). Citing the Minnesota Attorney General’s opinions, the League of Minnesota Cities itself has recognized that: “The state is not an owner in this context and cities need not consider state-owned land when determining the 35 percent petition requirement. League of Minnesota Cities, Special Assessment Guide, 16 (May 2010), A-39. In Part B of our Argument, we discuss these Attorney General’s opinions and argue that they represent a logical and persuasive interpretation of the statutory language, and that this interpretation was intentionally carried forward when Chapter 429 was rewritten by a panel of municipal experts, including the League of Minnesota Cities.

The rationale for excluding the State or the City authorizing the improvements begins with the fact that the entire purpose of the petition requirement is to obtain a level of support from property owners who are subject to special assessment. When they sign the petition, they are not merely signifying their interest in the project; they are subjecting themselves to the statutory jurisdiction of the City, as assessing authority, to force the petitioning landowners to pay an assessment as adjudicated by the City, subject only to judicial review. Neither the State nor the City authorizing the improvements fit that description. Both have reasons to support the project apart from receiving a special benefit. Neither can be forced to pay anything other than what they choose to pay as a

matter of their own discretion. Minnesota Statute Section 435.19, subdivision 1 grants to municipalities the authority to impose special assessments upon certain local government units, but specifically excepts state instrumentalities:

Any city, however organized, or any town having authority to levy special assessments may levy special assessments against the property of a governmental unit benefitted by an improvement to the same extent as if such property were privately owned, but no such assessments, except for storm sewers and drain systems, shall be levied against a governmental unit for properties used or to be used for highway rights-of-way. A "governmental unit" means a county, city, town, public corporation, a school district and any other political subdivision, except a city of the first class operating under a home rule charter and the school district, park board or other board or department of such city operating under such charter. If the amount of any such assessment, except one against property of the state, is not paid when due, it may be recovered in a civil action brought by the city or such town against the governmental unit owning the property so assessed.(emphasis added).

Even when the property of a governmental unit is subject to assessment, assessments may not be levied against governmental property for properties “used or to be used for highway rights-of-way.” In short, a City’s special assessment powers may run to a county, a school district, or township for example (except for highway projects), but not to the State or its instrumentalities. If the City properly imposes a special assessment on another local government unit, then the City has the right to recover the unpaid assessment against the governmental unit in question, but that collection right is barred against the State and its lands.

Subdivision 2 of section 435.19 does contain a procedure to seek voluntary payment in lieu of an assessment, but again, as of the time that the petition was signed,

the City had not even begun that procedure. The ability to make a voluntary payment in lieu of assessment has never been construed to convert the State into a special assessment petitioner, and in fact, Attorney General opinions construing the statute have specifically rejected the potential for voluntary payment as a basis for counting the State as a petitioner. Subdivision 2 of section 435.19 provides as follows:

In the case of property owned by the state or any instrumentality thereof, the governing body of the city or town may determine the amount that would have been assessed had the land been privately owned. Such determination shall be made only after the governing body has held a hearing on the proposed assessment after at least two weeks' notice of the hearing has been given by registered or certified mail to the head of the instrumentality, department or agency having jurisdiction over the property. The amount thus determined may be paid by the instrumentality, department or agency from available funds. If no funds are available and such instrumentality, department or agency is supported in whole or in part by appropriations from the general fund, then it shall include in its next budget request the amount thus determined. No instrumentality, department or agency shall be bound by the determination of the governing body and may pay from available funds or recommend payment in such lesser amount as it determines is the measure of the benefit received by the land from the improvement.

The City lacks jurisdiction to impose its determination upon the State or one of its instrumentalities. Payment of the amount determined at that public hearing is discretionary with the State instrumentality, even if it consents to the determination. The amount determined "may be paid" from available funds. The State or instrumentality may pay from available funds or recommend payment in such lesser amount as it determines is the measure of the benefit received by the land from the improvement. In the event that the instrumentality wants to pay some amount and does not have the available funds, then

the instrumentality must go to the legislature and seek a legislative appropriation for that purpose<sup>7</sup>.

One of the reasons why the State is not counted as a petitioner, then, is that the State's lands, belonging to a superior sovereign, simply are not subject to assessment nor are payments subject to compulsory process. When notice is sent to landowners for Chapter 429, notice need only be sent to owners of parcels "within the area proposed to be assessed," and failure to send that notice deprives the City of jurisdiction even to levy assessments. It seems clear, then, that when the legislature crafted Chapter 429, it was crafting understanding that the parcels involved were owned by persons subject to the City's mandatory special assessment jurisdiction. That interpretation is borne out by the legislative history of Chapter.

**(2) The District Court's Decision Fails To Honor the Eighty Years of Consistent Interpretation of Chapter 429.**

The District Court rejected three opinions of the Attorney General issued over a twenty-five year period on the grounds that the judiciary may disregard opinions of the Attorney General when the statute is clear and unambiguous, and that Chapter 429

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<sup>7</sup> Minn. Stat. §3.754 (2010) creates a process by which state instrumentalities can seek an appropriation for assessments. It provides as follows: All state departments and agencies including the Board of Trustees of the Minnesota State Colleges and Universities shall include in their budget requests the amounts necessary to reimburse counties and municipalities for claims involving assessments for improvements benefitting state-owned property in their communities. Each department and agency shall pay the assessments when due or, if a department or agency feels that it was not fairly assessed, notify the chairs of the Committee on Finance of the senate and the Committee on Ways and Means of the house of representatives for a review of the assessment.

unambiguously includes the State as an owner of abutting property. Appellants respectfully disagree. The word “owner” is meaningless unless we know what it is that the owner must own. That question is answered by the context of the statute, by its evident purpose, by its historic and consistent usage, and by the fact that the statute specifically speaks to owners of property within the area to be assessed. The Attorney General’s opinions are especially important, because they bracket in time the comprehensive consolidation of Minnesota’s special assessment statutes into new Chapter 429 in 1953. As we explain below, the drafters of Chapter 429 included a task force of experienced municipal practitioners, including representatives of the League of Cities. They surely knew, when they transplanted the language regarding the petition process directly from pre-1953 special assessment statutes, that the owners who could petition did not include the State or the City itself. If they had wanted to change that rule they surely would not have left the pre-1953 language unamended. And, as we show, the Attorney General reaffirmed the interpretation shortly after passage of the new Chapter 429 in 1953, showing that the drafters of Chapter 429 did not intend to alter the existing rule.

Minnesota statutes have had provisions requiring a property-owner petition for special assessments since at least 1929. Prior to 1953, multiple similarly structured statutes with petition requirements existed for different classes of cities and townships. See Spencer, *THE NEW MINNESOTA IMPROVEMENT-ASSESSMENT PROCEDURE*, 38 MINN. L. REV 582 (1954), and in 1953 these laws were unified into Chapter 429. Chapter 398,

Minnesota Session Laws of 1953. The Attorney General first interpreted the property-owner petition requirement in 1936 under then Attorney General, later Supreme Court Justice, Harry H. Peterson. Two statutes were addressed by the Attorney General in his opinion. One stated:

"In any city of the fourth class \* \* \* the council shall have power to improve any street, \* \* when petitioned for by the owners of not less than thirty-five per cent (35%) in frontage of the real property abutting on such street . . . . Mason's Minnesota Statutes of 1927, Section 1815 (1927).

The second stated:

Before the council shall take any proceedings in reference to the making of any such improvement, a petition that an improvement be made shall be signed by the owners of at least 51 % in frontage of the real property abutting the parts of the street or streets named in the petition<sup>8</sup> \* \* \*. Mason's Minnesota Statutes of 1927, Section 1918-17 (1927).

The 1936 opinion involved the City of New Ulm, which had a park fronting on a dedicated street with six blocks of residential land on the other side. Op.Atty.Gen., No. 56, 133 (June 30, 1936), A-25; Op.Atty.Gen. 408-c (Oct. 28, 1954), A-33. Sixty percent of the property owners on the residential side of the park had presented a petition. The question presented was whether the City of New Ulm counted as owning 50% of the property fronting on the street or whether the City's land did not count. The Attorney General had to interpret the word "owner" in the existing statutes governing cities.

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<sup>8</sup> See also Minnesota Statutes §429.03 (1949) ("Before the council shall take any proceedings in reference to the making of these improvements, a petition that an improvement be made shall be signed by the owners of at least 51 per cent in frontage of the real property abutting on the parts of the street or streets named in the petition as the location of an improvement petitioned for.")

It would seem, therefore, that the answers to your questions devolve on whether the city of New Ulm is the "owner" of such abutting property within the contemplation of the above referred to statutory provisions. In other words, if the city is to be deemed an "owner" of such abutting property within the meaning of said statutory provisions, it necessarily follows that the city is entitled to sign and join in said petition-otherwise not. It would seem to also follow that if the city is an "owner" within the language above quoted that the property owned by the city and used for such park purposes should be considered a part of the frontage of the real property abutting on the street named in the petition.

The Attorney General's opinion recognized that New Ulm had the authority to make a payment towards the project in such amounts as it deemed appropriate to cover the portion not paid for by assessments, or in recognition of the benefit received by its own property, but that right did alter the conclusion.

We also assume that the tract of land owned by the city and used for park purposes will not be subject to special assessments levied for the purpose of paying a portion of the cost of such improvement, but that the city will pay its proportionate share of such cost from city funds provided for such purpose as contemplated by the provisions of Sections 1816 and 1918-22 of the statutes.

Citing cases from other jurisdictions, the Attorney General pointed out that:

there is considerable force in the contention of appellant that public policy should deny the city the right to petition itself to carry on the work of public improvement; that the right to petition should be confined to the individual taxpayer who bears the greater part of the burden imposed by the special assessment. Herman v. City of Omaha, 106 N. W. 693 (Nebr. 1906)

The Attorney General quoted as well an opinion issued by the Utah Supreme Court, which stated:

So far as proceeding with the improvement or assisting in acquiring jurisdiction are concerned, we have been unable to find any case where

public property situated within the confines of a local improvement district has been permitted to affect the result, either one way or the other; and we think that the establishment of such a rule would not only be wrong in principle and wrong in theory, but it would also be contrary to the spirit and intention of the statutes providing for special improvement assessments." Armstrong v. Ogden, 12 Utah 476, 43 Pac. 119.

The fact that a public body not subject to assessment could make a contribution to the cost of the improvement did not change the result. The Minnesota Attorney General ruled:

Applying the rules of law laid down in the above referred to cases to the questions submitted in your inquiry, we are impelled to the conclusion that both of your questions should be answered in the negative. In other words, the city is not an "owner" of such abutting park property within the meaning of the above quoted statutory provisions and such park property should be excluded by the city authorities in determining the sufficiency of the petition.

In 1953, the legislature consolidated all of the various local improvement sections into one comprehensive Chapter 429, repealing old Chapter 429 which dealt only with villages, boroughs and cities of the fourth class. Laws Minnesota 1953 Chapter 398. The process of consolidation required a comprehensive review of the various provisions. This was not happenstance casual draftsmanship. The legislation was

drafted by a committee of experts in municipal law and finance, and endorsed for passage by the League of Minnesota Municipalities, [and] provides a simpler procedure and answers more questions than any of the previous improvement-assessment statutes, with the exception of the local improvement sections of the Village Code, from which the new law mainly derives. It is also an advantage to have but one uniform procedure for all city and village improvements. To municipal officers and attorneys, it means having to be familiar with only one statute instead of several; and to bond dealers and investors, it means absence of doubt as to the nature of the

obligation of municipal improvement bonds. 38 Minn. L. Rev 582, supra at 583.

The committee of experts surely would have been aware of the Attorney General's interpretation, for it would have appeared in annotated versions of the statute and the rule would have been embodied in existing practice. The Minnesota League of Cities was involved in the drafting, and if it regarded the Attorney General's opinion as inappropriate, the statutory language could have been changed in a way that signified clearly that the legislature was overriding existing practice. Instead, new Chapter 429, section 429.031 incorporated the very language interpreted by the Attorney General's opinion. Laws Minnesota 1953 Chapter 398 Section 3.

Perhaps because of the comprehensive consolidation of these provisions, shortly after passage of the new local improvements code, the legal representatives of two municipalities sought the Attorney General's opinions regarding whether the previous opinion would still be reaffirmed. In 1954, the City of Hastings wrote the Attorney General to find out if the same interpretation would be imposed on substantially the same language in Chapter 429. Minn. Att'y Gen. Op., No. 387-B-10 (June 29, 1954); A-28. Hastings wanted to construct a sanitary sewer abutting a municipal park. If the city were considered an owner abutting the improvement, then the city could sign the petition, a 4/5 vote would not be necessary to authorize the improvement, and the improvement could proceed on the city's petition. The Attorney General ruled that new Chapter 429 was

intended to preserve the previous Attorney General's opinion. The legislative language was the same as in 1936, the Attorney General explained:

The pertinent portion of MSA 429.031 is this: Subdivision 1.... a resolution ordering the improvement may be adopted...by vote of a majority of all members of the council when the improvement has been petitioned for by owners of not less than 35 percent in frontage of the real property abutting on each street named in the petition as the location of the improvement. When there has been no such petition, the resolution may be adopted only by vote of four-fifths of all members of the council.” Op. Att’y Gen., 387-B-10 (June 29, 1954).

The issue was whether the new statute should be read to preserve the same meaning as the old, and the Attorney General ruled that it did.

The portions of M.S. 1949 Section 429.03 involved in the opinions mentioned read that “a petition that an improvement be made shall be signed by the owners of at least 51 per cent in frontage of the real property abutting on the parts of the street or streets named in the petition as the location of an improvement for.” In his [1936] opinion, the then Attorney General ruled that a city owning a city park property abutting upon the street named as the location for the improvement was not an “owner” within the requirements of section 3...and that, accordingly, such city park property should be excluded in determining the sufficiency of the petition thereunder. ....Upon its authority, your first question is answered in the negative.

As in the previous opinion, the Attorney General specifically noted that the City had authority to voluntarily make contributions towards the cost of the improvement from ad valorem tax levies towards the improvement, but he opined nonetheless that the 4/5 provision applied.

On October 28, 1954, the City of Hutchinson directly queried whether a voluntary agreement by a state instrumentality towards a special assessment project would allow

Hutchinson to count state lands towards the petition requirement. The Attorney General opined that it could not be counted, even if the State were willing to make voluntary payments in lieu of assessment. Op. Att’y. Gen., 408-c (Oct. 28, 1954). The Hutchinson opinion confirmed that prior Attorney Generals’ opinions were applicable to the State of Minnesota, stating “it is my opinion that it [the State] is not an “owner” within the requirements of 429.031 supra and that neither it as an owner nor its property could be considered in determining the ‘owners of not less than 35 percent in frontage of the real property abutting’ petitioning for or in favor of the improvement.” Op. Att’y. Gen., 387-B-10 (June 29, 1954), A-28.

A review of the legislative history shows that periodically the special assessment provisions have experienced modest amendments. These amendments, of course, are heavily influenced by the legislative priorities of the League of Minnesota Cities, which regularly seeks to guide the course of legislation, but never has the legislature sought to unravel the previous Attorney Generals’ opinions. In this context, the need for certainty and consistency of application plays an important part. If the State can petition for a local special assessment project, it can also prevent a special assessment project where it owns sufficient land adjoining a project, and it can do so even if it intends to exercise its right to refuse to make a contribution in lieu of special assessment. Cities should not be able to count State lands, or fail to count State lands, depending on whether it assists the City in avoiding the super-majority requirement.

The District Court's decision is also out of harmony with the 1961 amendment to section 429.031. In 1961, the legislature amended Chapter 429 to provide written notice to property owners in connection with special assessment proceedings. The amendment requires notice of public hearings to owners "within the area proposed to be assessed." Minn. Stat. §429.031, subd. 1; Laws 1961 Chapter 525, Section 1.

**(3) Sound Principles of Statutory Construction Counsel that the Consistent Interpretation of the Local Improvements Petition Requirement be Maintained.**

When a Court construes statutory language, it seeks to give effect to clear and unambiguous language, but that determination is not to be conducted in a vacuum, devoid of the application of reason. A statute is ambiguous when the language therein is subject to more than one reasonable interpretation. Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000) (citation and quotation omitted). A statute should be interpreted, whenever possible, to give effect to all of its provisions; "no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Id.* (quoting Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999)). And the Courts have said, "[w]e are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." *Id.*; see also Minn. Stat. §§ 645.01-.51; Harris v. County of Hennepin, 679 N.W.2d 728 (Minn. 2004). In other words, the interpretation is done in context. The Court will look to other sections of the law and our canons of statutory construction to determine the intent of the legislature. The Court may examine, among other considerations, the "occasion and necessity for the

law" and "the circumstances under which it was enacted." Minn. Stat. § 645.16 (2002). The Court may also look to the state of the law before a statute was enacted. Id. In doing so, the Court must attempt to read statutes in a way that gives effect to all their provisions. Id. Statutes should be read as a whole with other statutes that address the same subject. See State v. Chambers, 589 N.W.2d 466, 480 (Minn.1999).

The problem with the term "owner" is not that the state doesn't own its property. The Attorney Generals' opinions never suggested that the State or the City itself is not an owner of property in the vicinity of the improvement. The Attorney Generals' rationale has been that the property that the State (or City) owns is not the property that Chapter 429 grants the power to assess, and consequently, neither the State nor the City are owners of the property that is relevant.

The State's local college leadership wants to facilitate this project, and the City cannot muster a 4/5 majority on the Council. Situationally, it seems as though advocating for counting the State or City towards the petition makes sense, if one really favors this project, because it avoids the problem facing this particular project. But applying that interpretation consistently would allow the State of Minnesota and any of its instrumentalities to control the outcome of local decision-making for reasons that are not locally relevant, even though the State instrumentality refuses to be assessed. In this particular case, the State eventually resolved its dispute with the City over how much it would pay, but it is entirely possible that the dispute might not have been resolved. It is illogical to determine the sufficiency of a petition based upon facts that arise after the

petition has been signed. The District Court's interpretation of this statute would allow the State to accommodate the City's request, but then refuse to sign a payment agreement on the grounds that the project doesn't meet its specifications. No other landowner has this privilege.

Under the City's approach, where an instrumentality of the State owns property across from property zoned for development, the State instrumentality could decide to impede that development by refusing to sign a petition for improvements even though the State intends to refuse to make any voluntary payment towards the project. Private property owners who live in areas with large swaths of State owned property could not petition for public improvements without the consent of the State of Minnesota, even if the State is not going to be assessed. Conversely, the State could petition for assessments against private property owners on items where the State's goal is to serve a non-local purpose, while keeping the State's costs at a minimum.

**B. The District Court erred in Concluding that Minnesota Law Allows Local Government to Take Property for an Unlawfully Approved Project.**

Minnesota Statutes Section 429.021 states that, "When any portion of the cost of an improvement is defrayed by special assessments, the procedure prescribed in this chapter shall be followed . . . Minn. Stat. §429.021, subd. 3; Minn. Stat. §429.031. The City claims, and the District Court held, that a landowner cannot challenge a taking to acquire property for a project that has been unlawfully approved. This position is contradicted by the language of the Chapter 117 and by common sense. On review of an

eminent domain petition, the District Court must determine “whether a municipality.....has been given the power to take private property for such purpose....” 25 Minnesota Practice §10. Minnesota Statutes §117.055, subd. 2, grants a landowner the right to “challenge the public use or public purpose, necessity, or authority for a taking” to appear at the court hearing and state the objection. Minnesota Statutes §117.075, subdivision 1(a) requires that the court approve the public use or public purpose, necessity, and authority for the taking.” Thus the initial hearing, Chapter 117 prohibits approval of the taking unless the Court finds that the taking is “authorized by law.” It is not enough merely to prove in the abstract that property may be taken for a road, or that the City might, if it wishes, build this road.

This principle is recognized in Minnesota Practice Series, Volume 25, Chapter 10, West’s Chapter on Eminent Domain. The author there explains:

**In order to approve a condemnation petition, the district court must determine that the taking is authorized by law.** Apart from the question of whether the law authorizes the taking, the court also determines if the taking is legally attainable. **If the condemnor’s proposed project violates state or federal law, the court will not grant the petition to condemn.** 25 Minnesota Practice § 10:7. (Emphasis added). See Minnesota Canal & Power Co. v. Fall Lake Boom Co., 148 N.W. 395 (Minn 1907).

The suggestion that the City can prohibit the submission of evidence on the topic of whether the project is illegal is just not true.

Aside from the plain language of Chapter 117, the suggestion that the Courts may approve a taking for a project not lawfully approved simply makes no sense. Every taking must have a purpose, and a quick take must have an immediate public purpose. That

purpose is not manufactured hypothetically by legal counsel at the Court of Appeals or in the District Court. The determination of the public purpose and the authorization of that public purpose is a legislative act to which the courts defer, but only because the legislative body has acted appropriately. The decision to approve a project's public purpose arises from the crucible of legislative decision-making in a public forum, upon the appropriate public notice, decided by the appropriate authority with power and jurisdiction to make the decision, and of course, that legislative decision cannot be deemed to have passed, if the vote did not pass by the required majority.

In support of its contention that a City can take property for an illegally approved project, Brainerd rested on Matter of Condemnation by Minneapolis Cmty. Dev. Agency, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998), and City of Duluth v. State of Minnesota, 390 N.W.2d 757 (Minn. 1986), but neither of these cases endorse a taking for an illegally approved project. Because these two cases played a central role in Brainerd's position, we examine each in considerable detail. We show that in both cases the District Court afforded the condemnees an ample opportunity to present evidence in support of their claims at the public purpose hearing. Both appellate decisions likewise painstakingly examine whether the City had proceeded lawfully in approving the project for which land was being condemned and both appellate decisions affirm the takings based on a finding that the Cities had proceeded lawfully.

In Matter of Condemnation by Minneapolis Cmty. Dev. Agency, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998), the Opus Northwest, the condemnee, challenged a taking to

bring a Dayton Hudson store to the South Nicollet Mall in downtown Minneapolis. Opus based its challenge on two contentions. Opus first invited the Court of Appeals strictly to scrutinize the City's decision to create a tax increment financing (TIF) district, an invitation that the Court of Appeals rejected, because it found that the City had strictly followed the statutory requirements connected with TIF District formation. The City showed at trial that it had properly designated the area as a redevelopment district and a tax increment financing district, making detailed findings supporting those designations which had not been timely challenged. In 1996, before commencing the Ryan-Dayton Hudson project, the city updated and confirmed its earlier findings, and again, the updated findings were not challenged at anytime as unlawful or improper<sup>9</sup>. On this first contention, the Court of Appeals found that the TIF District was lawfully established, not that the District Courts should approve a taking within an unlawfully established TIF District.

Opus Northwest's primary contention<sup>10</sup> in the Minneapolis Community Development case had nothing to do with an unlawfully authorized project. On the

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<sup>9</sup> The Court's decision distinguished Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227, 228 (Del. 1986), in which the Parking Authority had proceeded in excess of its statutory authority. 582 N.W.2d at 598.

<sup>10</sup> The Court of Appeals explained: "The heart of Opus's appeal involves challenges to the legality and attainability of the city's condemnation. Any corporation contracting with the City of Minneapolis must have an affirmative action plan filed with the city. Minneapolis, Minn., Code of Ordinances (hereinafter MCO) § 139.50 (b), (c) (1997)."

contrary, Opus Northwest was alleging that the City would eventually sell the land to Dayton-Hudson using a development agreement and a Minneapolis ordinance would then require Dayton-Hudson to file an affirmative action plan with the City. The project hadn't been illegally approved. An affirmative action plan was not a pre-condition to project authorization, nor was Dayton's in violation of any current requirement. The Northwest Opus merely claimed that an ultimate sale would potentially be unlawful if Dayton's didn't have an affirmative action plan at the time the agreement were signed. On this second challenge to the taking, neither the District Court nor the Court of Appeals found that the City can take land for an unlawful project. Instead, the Court of Appeals said that an affirmative action plan was not a statutory pre-condition of project approval. Indeed, the project had been approved lawfully in every respect. The existence of an affirmative action plan was merely hypothetical and would arise only if the City later proposed to enter into a developer agreement with Dayton's should it still have no approved plan. "Opus's challenge to the legality of Dayton Hudson's occupancy is anticipatory," the Court held. Moreover, it ran to a legal requirement that did not apply to the manner of project approval or the obtaining of project authority. The public purposes for the present condemnation (obtaining a mid-priced retail store, increased public parking and employment, etc.) and the means of accomplishment (through tax increment financing for Ryan) are all legal, the Court held.

The suggestion that the Court of Appeals felt that lawful approval of the project or its tax increment financing district were irrelevant is simply not substantiated by the

decision. On the contrary, most of the decision is devoted to analyzing and establishing that the City had followed all applicable procedural requirements, and as a result, the Court concluded, **“We affirm the trial court's conclusion that Opus failed to establish the existence of a statutory violation”**

Brainerd also relied on City of Duluth v. State of Minnesota, 390 N.W.2d 757 (Minn. 1986), contending that the case holds that a city can take property for an illegally authorized project, but that too is not correct. City of Duluth involved a taking for redevelopment of land in an officially established redevelopment zone, some of which was owned by Jeno Paulucci. Paulucci's challenge to the taking rested on two claims of illegality. The first was an assertion that the City failed to provide proper notice of the redevelopment hearing. The second was an assertion that the City failed to comply with mandatory procedures authorizing redevelopment under Minnesota Statutes Chapters 458 and 472A. The Supreme Court disposed of each of these assertions by finding that Duluth had complied with the statutory provisions. Again, we discuss the Supreme Court's decision in considerable detail to nail down the point that the City of Duluth case does not support the Brainerd's position.

Both the District Court and the Supreme Court carefully considered and rejected Paulucci's contention that the City failed to provide appropriate notice to Paulucci. Paulucci was afforded the opportunity to put on evidence at trial that the City failed to provide proper notice. As the Supreme Court explained:

The case was tried in the District Court of the Sixth Judicial District between May 6 and May 23, 1986. Title to the appellants' property was to transfer on June 10. The decision was immediately appealed. The petition for accelerated review was granted on June 26, 1986.

If Brainerd's position were correct, then the District Court would have granted a protective order and refused to hear the evidence. On review, the Supreme Court likewise carefully considered the merits of the argument that the TIF authorization had been improper. At pages 761-762 of its decision, the Minnesota Supreme Court painstakingly describes each step of the proceedings leading up to project authorization. Paulucci had failed to challenge the City's notification or other procedures leading to establishment of the TIF District, and furthermore had failed to seek timely judicial review of the TIF approval. The Court explained that, on the contrary, Paulucci had affirmatively led the City to believe that he supported creation of the special district:

At some point in December 1985 or January 1986, Jeno Paulucci admitted he was aware that the papermill project would entail the destruction of his Chun King plant. In an interview with the News-Tribune & Herald of December 15, 1985, Paulucci was quoted as saying it was more important that the papermill be built than that the Chun King building be preserved. Id. at 761.

The only explanation for the Supreme Court's analysis on this point is that the Supreme Court recognized that if the City proceeded unlawfully, the taking could not be sustained. The whole point of this discussion was to explain that Paulucci did have proper notice, that he failed properly to notify the City of his objections, and that he actually affirmatively led the City to believe that it had his support, thus inducing it to proceed without making any corrections to the procedure which might have been identified by Paulucci. Both Courts

approach to Paulucci's arguments demonstrate that the District Court and the Supreme Court must carefully scrutinize the lawfulness of any project before authorizing a taking.

Moreover, in City of Duluth, the District Court specifically found that the City had complied with those statutory procedures, a finding that was exhaustively examined and affirmed by the Supreme Court. But the City of Duluth pointed out that it has a second alternative source of authority to proceed with the redevelopment project, and that was the authority found in the City's Charter. Beginning in the middle of page 767, the Supreme Court explains that if the Charter provided the authority to do a redevelopment project independent of Chapter 458 and 472A, why then could the taking be approved as lawful under either the statute or the charter. Again, the Court's careful consideration of Duluth's compliance with statutes and charter would have been pointless if the Court believed that compliance with the procedural pre-requisites to project authorization was irrelevant.

Brainerd's problem here is entirely different. It has decided to conduct this project as a special assessment project. In this regard, it had two lawful choices. It might have proceeded under the City Charter. Under the Brainerd City Charter, the project could not be approved except upon a 2/3 vote. See Charter Sections 84 to 97<sup>11</sup>. The Charter has a variety of mandatory procedures not followed by the City. Instead, the City chose the procedures in Chapter 429. The City's purported approval complied with neither the charter nor Chapter 429, and hence there exists no lawful authorization.

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<sup>11</sup> <http://www.ci.brainerd.mn.us/docs/charter/chapter06.pdf>

**V. CONCLUSION**

Brainerd's position that a City may approve a project in violation of Chapter 429 and then proceed to take property illegally taken would create an unwelcome precedent for the administration of local government. When a City fails to approve a legislative decision by the number of votes required by law, that decision is not entitled to deference; it is void. This Court should reverse the District Court's unprecedented decision that an allegation of unlawful approval may not be heard in the public purpose hearing in an eminent domain case. This Court should instruct the District Court that the State is not a proper petitioner in a local improvement project and that this project thus cannot proceed without a super-majority approval.

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Respectfully Submitted,

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