

A11-644

Case No. A11-1471

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Betty Anda, Roger Anda, Kathleen Martin and  
James Martin,

Appellants,

vs.

City of Brainerd, Minnesota,

Respondent.

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**APPELLANTS' REPLY BRIEF**

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**I. ATTORNEY GENERAL’S OPINIONS ARE ENTITLED TO DEFERENCE BECAUSE OF THE ROLE THEY PLAY IN ASSISTING WITH MUNICIPAL GOVERNANCE.**

It is perhaps understandable that the City chooses blithely to dismiss Attorney General’s opinions that offer interpretations of Chapter 429 with which the City disagrees. The City cites a few cases in which our appellate courts have disagreed strongly with a particular Attorney General’s opinion, and have emphasized the truism that these opinions are “not binding” on the Courts in specific circumstances that make them unpersuasive. The City’s cited cases do not undercut at all the sweeping importance that Attorney General’s opinions have on the practice of governmental law in this state and are completely distinguishable. When this Court states that Attorney General’s opinions are not “binding” it is merely stating the obvious – that the Judicial branch has superior authority to interpret the law.

Attorney General’s opinions permeate the annotations to Chapter 429, because the procedures regarding municipal improvements are permeated with interstitial questions that require interpretative practical solutions, yet other than the Attorney General’s opinions, there exists no administrative body with authority to issue those interpretations in a body of regulations to supply a body of interpretive law that is available in state administrative law. In the day to day practice of local government law, these opinions are regularly relied upon and followed by the municipal bar as the sole reliable source of interpretation, short of litigation, available uniformly to all municipalities. The three

Attorney General's opinions owners eligible to sign petitions are powerful demonstrations of legislative intent, because:

- The first opinion pre-dates the comprehensive restructuring of municipal improvement legislation, and the legislature incorporated the same language in the legislative rewrite, thus confirming the Attorney General's interpretation. State v. Hartmann, 700 N.W.2d 449 (Minn. 2005); State v. Loge, 608 N.W.2d 152, 157 (Minn. 2000).
- Unlike the opinion in Billigmeier v. County of Hennepin, 428 N.W.2d 79 (Minn. 1988), the three Attorney General's opinions construe the exact language at issue here.
- Despite continued issuance of confirmatory opinions, when the legislature has amended Chapter 429, it has never acted to disavow these opinions.
- The Attorney General is counsel to the State of Minnesota, and the opinions thus disclaim the State's own ability to sign these petitions.
- Municipalities are creatures of the state, and for this reason, Attorney General's opinions play an elevated role in the administration of municipal law.

In this regard, examination of the cases cited by Brainerd as undercutting the persuasive power of the Attorney General's opinions, fall short of the proposition for which they are cited. In Billigmeier v. County of Hennepin, 428 N.W.2d 79 (Minn. 1988), the Supreme Court rejected an attempt to apply Attorney General's opinions regarding a different statute under different circumstances. The opinion dealt with the calculation of fees to be charged by the Sheriff upon a levy. The Court did not articulate a dismissive standard as to Attorney General's opinions at all. Rather, the Court began by

acknowledging “historical practice by which this court has traditionally afforded careful consideration and weight to such rulings”. See, e.g., Governmental Research Bureau, Inc. v. St. Louis County, 258 Minn. 350, 357, 104 N.W.2d 411, 416 (1960); Mankato Citizens Tel. Co. v. Comm'r of Taxation, 275 Minn. 107, 112, 145 N.W.2d 313, 317 (1966). The problem with the particular opinions advanced by the sheriff in the case before the Court, the Court stated, was that they did not speak to the issue before the Court:

We agree with respondents' assertion that the facts in each of the attorney general letter rulings are sufficiently dissimilar to those in the instant case as to afford little direct authority supporting the appellant's position. So far as ascertainable, the predicate fact generating the inquiry addressed in each letter was a valid sheriff's levy upon nonexempt property. In none of them had a sale or settlement followed a levy on property which was the subject of an unresolved claim of exemption, nor had the sale or settlement occurred during the pendency of post trial motions or appeals.

In Star Tribune Co. v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274, 288-289 (Minn. 2004), cited by Brainerd, the Court refused to follow an Attorney General's opinion stating that applying the open meeting law to the University of Minnesota might unconstitutionally interfere with the independence of the University. The Court noted that there was no record of the Attorney General's opinion being followed since that time, because the University had actually incorporated the open meeting law's provisions into its bylaws. Moreover, the issue confronted related to interpretation of the Minnesota Constitution.

City of Granite Falls v. Soo Line R.R., 742 N.W.2d 690, 699 (Minn. Ct. App. 2007), cited by Brainerd, also does not disclaim the importance of Attorney General's opinions relative to municipal governance. In that case, a landowner challenged the City's attempt to use its eminent domain powers to facilitate economic development. The property owner relied upon a 1958 opinion of the Attorney General regarding the use of condemnation power to acquire property for a park that would be owned and operated by the State of Minnesota. The Court found that the law regarding public purpose had fundamentally changed since issuance of that opinion:

Although the attorney general's opinion may have been correct in 1958, the law of eminent domain has changed to such a degree that the conclusion no longer appears tenable. Under City of Duluth, Wurtele, Walser, and Kelo, municipalities currently have the authority to acquire property and transfer it to a private entity for redevelopment. Thus, the district court did not err in concluding that the taking satisfies the constitutional public-use requirement.

In fact, our appellate courts regularly cite and rely upon the opinions of the Attorney General on disputed matters, especially where the issue relates to establishing the procedural ground-rules as to how state and local government should conduct its business and administer procedural and substantive statutes governing the administration of state and local government. Examples are Weiler v. Ritchie, 788 N.W.2d 879, 885 (Minn. 2010) (In addition, we acknowledged a fourth circumstance, not found in statute, based on opinions issued by the Minnesota Attorney General advising election officials"); Coleman v. Ritchie, 762 N.W.2d 218 (Minn. 2009) (counting of ballots);

Isles Wellness, Inc. v. Progressive Northern Ins. Co., 703 N.W.2d 513, 523 (Minn. 2005) (reference to Attorney General opinions from other states); Star Tribune Co. v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274 (Minn. 2004) (weight given to opinions which upon which government then relies); Independent School Dist. v. Kenyon, 411 N.W.2d 545, 549 (Minn. Ct. App. 1987) (Reliance on Attorney General's opinion interpreting Chapter 429).

A review of the annotations to individual statutory sections of Chapter 429 shows that attorney general opinions represent in many cases 3/4 or more of the interpretative material available to attorneys who practice municipal law. The Attorney General serves as a neutral arbiter of disputes regarding implementation of municipal statutes, and the Attorney General has long maintained a tradition of carefully considering and vetting local government law questions. For this reason, the municipal bar relies upon Attorney General opinions to provide a neutral answer to interpretive questions, and the ability to utilize those opinions is essential to maintaining confidence in the administration of local government and to confidence in the neutral accuracy of the opinions of city attorneys. Changing the established rules governing municipal government situationally creates the impression that governance is not based on consistent application of these neutral principles, but rather that the rules are bent to develop the outcome that particular interests favor. Adherence to Attorney General

opinions on the rules of governance protects public confidence that we have a government of law.

The City's argument that the Attorney General's opinions must be ignored because they are "stale" fails to recognize that actually, contemporaneous construction of statutes by the Attorney General makes that construction more persuasive, not less, because statutory construction involves determining what the legislature meant at the time that the statute was passed. See State v. Hartmann, 700 N.W.2d 449 (Minn. 2005). In State v. Loge, 608 N.W.2d 152, 157 (Minn. 2000), the Supreme Court noted that:

One year after the original open bottle statute was enacted, the Attorney General for the State of Minnesota issued an opinion construing the "keep or allow to be kept" language not to require proof of knowledge. See Op. Att'y Gen. No. 54, at 103-05 (Jan. 5, 1960). Attorney general opinions are entitled to "careful consideration" by this court particularly when the opinion is long-standing. See Billigmeier v. County of Hennepin, 428 N.W.2d 79, 82 (Minn. 1988). Furthermore, this court has held that where the legislature amends a statute after it has been construed by an attorney general opinion without changing that construction, it is evidence of legislative intent to adopt the meaning attributed to the statute by the attorney general. See Stoecker v. Moeglein, 269 Minn. 19, 22-23, 129 N.W.2d 793, 796 (1964). (Emphasis added).

## **II. CHAPTER 429 DOES NOT CLEARLY AUTHORIZE THE CITY AND STATE TO SIGN A CHAPTER 429 IMPROVEMENT PETITION.**

We have advocated adherence to the longstanding interpretation of Chapter 429 to the effect that neither City itself nor the State can sign an improvement petition, because neither are subject to mandatory assessment, and because the purpose of the petition is to assure local support from locally benefited property owners for special assessments. The

City argues instead that Chapter 429 unambiguously evinces an intent that the State of Minnesota is entitled to sign a petition to authorize local improvements, and that argument also leads inevitably, then, to the conclusion that Cities that own abutting property can evade the super-majority by signing their own petitions. If a City could sign the petition, it will sign the petition not because it wants its own property to pay for the assessment, but because a majority of council members want to use the assessment revenue instead of general revenues, but a super majority opposes the use of special assessments. If the State can sign the petition, it will sign the petition, because it determines that the State's interests, as opposed to local interests, are furthered by the project.

The contention that the statute clearly allows State and City to sign petitions is contradicted by 80 years of interpretation and 80 years of actual municipal practice to the contrary. The municipal attorneys who posed their questions to the Attorney General obviously did not think the language was all that clear. If the statute is so clear, why then, have municipal attorneys repeatedly posed questions to the Attorney General seeking an interpretation? If the statute seemed so clear, the City attorneys might have instead advised their councils to act in accord with the supposedly clear language without bothering the Attorney General to go to the considerable work of authoring and carefully vetting a formal opinion. The posing of the question itself to the attorney general on repeated occasions is pretty strong evidence that the municipal bar believed

that the statute was unclear. If the statute is so clear, why then did the answer of attorney generals repeatedly come back with an answer contrary to the Brainerd's interpretation? If the statute is so clear, why has the League of Minnesota Cities warned its constituent members in its Special Assessment Guide, that the State is not to be counted for, or against, an assessment petition?

The issue that has bothered municipal lawyers and the Attorney General for at least 80 years is whether the legislature intended to count towards the petition requirement property not within the area subject to mandatory assessment. Municipal lawyers recognized that Chapter 429 affords a city with an exemption from the prohibition of issuing municipal bonds without a vote of the people. Minn. Stat. §429.091. The special assessments create a guaranteed future revenue source that can be pledged to fund those bonds. At the time that the petition is presented, neither the State nor City provide the guaranteed revenue source that will stand behind those bonds. Moreover, the longstanding interpretation of this statute is virtually forced by the recognition that allowing the State to sign the petition directly undercuts the fundamental purpose of the petition requirement in the first place, which is to demonstrate that owners of specially benefited properties are willing to have their properties assessed, subjecting them to such assessments subsequently determined.

**III. THE STATE'S SUBSEQUENT SIGNING OF AN AGREEMENT TO CONTRIBUTE CANNOT RETROACTIVELY AUTHENTICATE THE PETITION.**

The City argues that an agreement signed by the State to make a contribution should be held retroactively to validate the original petition. We've tried to address this contention in our original brief, and so we only briefly respond to that contention here. As we pointed out in our original brief, the petition-counting rules articulated by the Attorney General do not depend upon whether the State (or City) choose voluntarily to make a contribution towards the improvement. Both City and State have always had the power to make these voluntary contributions, and the Attorney Generals' opinions specifically reject the contention that a voluntary agreement could change the counting rule. In fact, if the City's position were correct, then the State (or City, for that matter) would be counted towards the petition requirement if it agrees to pay, but its failure to sign would not be counted against the required 35%, if the State refuses to pay. Consequently, the City and public would never finally know how many signatures are required. If the State signed a petition, and then later failed to arrive at an agreement to pay, evidently that would retroactively invalidate the petition? The counting rules have to be applied at the time of counting, not at some later date. As the District Court's decision acknowledges, at the time that the City approved the State's petition, it had not even held the required public hearing to determine the amount that it could request as a voluntary payment in lieu of assessment.

#### IV. CONCLUSION

All of the factors considered in connection with statutory interpretation argue against Brainerd's interpretation. It undercuts the occasion and necessity for the law. It ignores the circumstances under which Chapter 429 was enacted. It fails to address the mischief to be remedied and the object to be attained. It disregards incorporation of language in the former law which was interpreted in the way that we advocate. It contravenes the contemporaneous legislative history; and legislative and administrative interpretations of the statute. It is hard to imagine that the legislature would knowingly craft this legislation to allow the State or City itself to override the super majority requirement. After 80 years of settled interpretation, if municipalities want this change, they should go to the legislature and get it explicitly.

Date: October 25, 2011

Respectfully Submitted,

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