

Case No. A11-644
Case No. A11-1471

STATE OF MINNESOTA
IN SUPREME COURT

Roger Anda, Elizabeth J. Anda and
James H. Martin, LLC; Betty Anda,
Roger Anda, Kathleen Martin and
James Martin,

Appellants,

vs.

City of Brainerd,

Respondent.

APPELLANTS' REPLY BRIEF

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RULES/STATUTES/LAWS:

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I. THE COURTS HAVE AFFORDED DEFERENCE TO ATTORNEY GENERAL OPINIONS.

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.

The three Attorney General's opinions holding that public entities are ineligible 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, the cases cited by Brainerd simply do not undercut this Court's traditional reliance on the persuasive power of the Attorney General's opinions. 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 the statutory validity of Sheriff's levies on nonexempt property to interpret a different statute under fundamentally different circumstances. This 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 rejected the claim that the prior Attorney Generals' opinions on the constitutionality of the statute had been followed in practice, because the University had voluntarily incorporated the open meeting law's provisions into its bylaws. Thus the University's adherence to open meeting practice did not constitute recognition of the Constitutionality of the statute. Moreover, the Court pointed out that a significantly reduced level of deference must be applied to issues involving 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). Adherence to Attorney General opinions on the rules of governance protects public confidence that we have a government of law that applies procedural rules consistently, not situationally.

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. SECTION 429.031 DOES NOT PLAINLY AUTHORIZE THE GOVERNMENT TO PETITION ITSELF.

Brainerd argues that the persuasive power of the Attorney Generals opinions can be ignored because the dictionary definition of the word "owner" is decisive on legislative intent and the State's ownership of the abutting property is thus decisive, regardless of the consequences. We acknowledge that statutory construction requires an initial inquiry as to whether the language of the statute admits of more than one construction, but we have argued instead that intent must be derived from the language

of the statute taken in its entirety. We have argued, as well, that the authors of Chapter 429 inserted the exact language previously interpreted by the Attorney General, and thus they must have intended to preserve existing interpretation.

While we oppose the single-word-extraction approach to statutory construction, if we were going to extract any one word out of the statutory language, then, it would be the word “petition,” not the word “owner”. The Attorney General’s opinions don’t rest not on a holding that the State doesn’t own its property. They rest instead on the Attorney General’s opinion that the legislature could not have contemplated a petition by the government to itself, because such a petition was against public policy when used to defeat a statutory protection designed to protect citizens against unequal taxation. When the State University System signs a petition to treat a transportation project as a special assessment project, it is not standing as a citizen proposing to carry a special burden. At most, it is indicating its believe that general revenues, derived from all of the citizens of the State, might profitably be contributed (in amounts determined by the State), towards that project. The logic of the Attorney General is that such petition from the government to itself, is not really a petition in the sense that section 429.031 intended.

It is true that the Attorney General’s opinion states that the legislature didn’t intend that a City or State should be counted as an owner.¹ But a careful review of the

¹ It would seem, therefore, that the answers to your questions devolve on whether the city of New Ulm is the "owner"the city is not an "owner" of such abutting park property within the meaning of the above quoted statutory provisions

Attorney General's opinion discloses that the statement that the public is not an owner for purpose of the petition requirement is not the beginning of the analysis, but rather the ultimate conclusion of an exercise of in statutory construction based upon public policy considerations and the conviction that the legislature could not have intended that the government should be allowed to petition itself to authorize a Chapter 429 project. The first Attorney General's Opinion, upon which the other two rest, states 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." Op. Atty. Gen., No. 56, 133 (June 30, 1936) (Citing Herman v. City of Omaha, 106 N. W. 693 (Nebr. 1906)). While the Attorney General's opinion concludes that the legislature did not intend to count the public as an owner, the conclusion derives from the Attorney General's determination that a petition by the public to the public is not a proper petition.

The premise of the panel's decision is that none of the factors considered in connection with statutory interpretation may be considered because the only question that need be answered is whether the State owns its property. The consequence of this approach is that the panel made no attempt to consider those factors. The panel's interpretation 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 discards Attorney General opinions and contravenes the contemporaneous legislative history; and legislative and administrative interpretations of the statute.

If the panel had focused on the word petition, instead of owner, it might have recognized that even the individual words are not unambiguous in this context. A petition is a request by a citizen addressed to the government. It stretches the traditional meaning of the word petition to signify a mechanism by which the government asks itself to absolve the general public from paying for a public project, and instead to shift that cost to those disfavored few property owners. We contend that the petition the drafters of Chapter 429 had in mind is not a petition signed by the government, but rather by the potential targets of government action.

To be clear, we oppose any approach to this statute that suggests that its construction should result from pulling any individual word out of the statute, and seeking its definition in the dictionary, whether it is the word petition or owner. Our view is that the entire sentence was correctly construed by the Attorney General to exclude public lands from petitioning for special assessment projects. However, the fact that the statute describes the document as a “petition” is fully consistent with the Attorney General’s opinion that the government is not properly counted as an owner in favor of that petition. Other language in the statute supports the Attorney General’s

construction as well. Section 429.031 subdivision 1 requires notice of proceedings to taxing property owners “to be assessed.” Subdivision 3 allows unanimous action by property owners “and to assess the entire cost against their property.” This language too supports the conclusion that the authors of Chapter 429 recognized that the function of the petition process is to allow property owners subject to assessment to manifest their support for special assessments.

III. BRAINERD’S RELIANCE ON A SUBSEQUENT PAYMENT AGREEMENT IS UNSUSTAINABLE.

Brainerd proposes an alternative reason to save the State’s petition that would allow an agreement signed by the state months after the Council accepts the State’s petition, because allegedly that agreement demonstrates the State’s good faith in signing the original petition. Evidently, this approach envisions a counting rule that would change whether the 35% requirement has been met, after the initial petition is accepted or rejected by the Council. But Brainerd’s suggestion that a petition might be validated by an agreement to contribute a sum-certain is completely out of harmony with the way in which municipal assessments are determined.

Municipal assessments are not determined at the public hearing to determine whether to initiate a Chapter 429 project. While it is common to provide the public with estimates of the possible range of assessments from a contemplated project, in fact, Chapter 429 contemplates that the amount assessed to individual properties will be determined at a public hearing typically held after the project work has been completed,

so that the assessments will reflect the actual project as built and the amount of revenue which must be raised. The City could not summarily determine how much the State would have been assessed, if the land was subject to assessment, at the commencement of the project, nor even four months after the commencement of the project, because the amount of the assessment cannot be determined until after a public hearing, Minn. Stat. § 429.061, and that public hearing had not been held (indeed still has not been held) at the time that Brainerd inked its agreement with the State. It is completely contrary to standard municipal practice to determine the amount of special assessments to be levied against properties before the project design has been approved, before the contract price has been determined, and before the City knows whether there will be cost overruns from change orders and site condition claims. Moreover, the City cannot determine the amount that the owner of the State's property would pay, without holding a public hearing to make that determination, and no such hearing was held. Minn. Stat. § 435.19 subdiv. 2. Indeed, as we have explained, it could not have been held, because at the time, the City had not yet held its public hearing to determine the amount of assessments to be levied against Anda and Martin. This case was decided on summary judgment against Anda and Martin on the assumption that the amount agreed to by the State and the City represented a good faith determination. But for summary judgment purposes, the Courts would have been compelled to conclude, that having defended our appeal on the grounds that the State and Brainerd had an Agreement to pay, Brainerd rushed its

payment agreement with the State, far out of the ordinary course of proceedings customarily observed by municipalities under Chapter 429.

To avoid the problems created by a retroactive application of the State's agreement to a petition accepted four months earlier, Brainerd argues that the agreement represented a confirmation of an agreement consummated by the filing of the petition itself. This contention too defies the summary judgment standard. We supplied the Court with the State's response to a data practices request calling for production of any documents which represented an agreement by the State at the time of the petition, and the State responded that it had no such document. Under sections 429.061 and 435.19, the City could not have requested payment not consummated an agreement, because there was, as yet, no Chapter 429 approval, and hence there could be no public hearing to determine the amount that was going to be assessed even to private properties, let alone, hold the public hearing on the amount that should be requested from the State.

The drafters of Chapter 429 could not possibly have contemplated that the sufficiency of the initiating petition would be determined based upon whether the State's agreement to pay an amount in lieu of assessment is fair and reasonable. Section 429.035 instructs the City Council to determine the sufficiency of the petition based upon "whether or not the petition September 11, 2012 has been signed by the required percentage of owners of property affected thereby," not the amount that the owners have agreed to pay.

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: September 11, 2012

Respectfully Submitted,

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