

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Orderly Annexation
of Certain Real Property to the City of
Carver from Dahlgren Township
(MBAU Docket OA-1428-7)

**ORDER VACATING
ANNEXATION ORDER PENDING
SUPPLEMENTATION OF RECORD**

Robert T. Ruppe, Couri & Ruppe, PLLP, appears on behalf of Dahlgren Township (Township). R. Lawrence Harris, Melchert Hubert Sjodin, PLLP, appears on behalf of the City of Carver (City).

On March 24, 2016, the City requested that the Office of Administrative Hearings issue an order approving the annexation of certain described real property pursuant to Minn. Stat. § 414.0325 (2014).

On April 5, 2016, the Chief Administrative Law Judge issued Findings of Fact, Conclusions of Law, and Order Regarding Supplementation of Record wherein the parties were required to supplement the record with regard to the Township's legal authority for charging a per acre tax reimbursement charge.

Following supplementation of the record, the Chief Administrative Law Judge issued an Order Approving Annexation on April 25, 2016.

On May 2, 2016, the City filed a Request to Amend Order Approving Annexation pursuant to Minn. R. 6000.3100 (2015). The Township joined in support of the City's request in correspondence dated May 3, 2016.

Based upon a review of the filings submitted by the parties, specifically including the City's Request to Amend Order Approving Annexation, together with all proceedings herein, the Chief Administrative Law Judge makes the following:

ORDER

1. The Order Approving Annexation issued on April 25, 2016 is hereby vacated pending consideration of the submitted Request to Amend Order Approving Annexation.

2. By 4:30 p.m. on May 20, 2016, the parties are required to supplement the record to establish the following relevant facts:

A. The identity of the record owner(s) of the Property which is the subject of this proceeding;

B. The identities of all members of Community Asset Development Group, LLC, a Minnesota limited liability company organized pursuant to Minnesota Statutes chapter 322B.

C. The relationship(s), both professional and personal, between the record owner(s) of the Property and the members of Community Asset Development Group, LLC.

3. Upon receipt and consideration of the supplemented record, the Chief Administrative Law Judge will issue a further order in response to the originally requested annexation and the filed Request to Amend Order Approving Annexation.

A handwritten signature in black ink, appearing to read 'TLP', is positioned above a horizontal line.

TAMMY L. PUST
Chief Administrative Law Judge

Dated: May 14, 2016

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Orderly Annexation
of Certain Real Property to the City of
Carver from Dahlgren Township
(MBAU Docket OA-1428-7)

ORDER APPROVING ANNEXATION

Robert T. Ruppe, Couri & Ruppe, PLLP, appears on behalf of Dahlgren Township (Township). The City of Carver (City) appears through Brent Mareck, City Administrator.

Based upon a review of the filings submitted by the parties, together with all proceedings herein, the Chief Administrative Law Judge makes the following:

FINDINGS OF FACT

Factual Background

1. This matter involves the efforts of the City and the Township to adjust the boundaries of certain real property (Property) by detaching the Property from the Township and annexing the Property into the City pursuant to the orderly annexation process provided in Minn. Stat. § 414.0325 (2014).

2. The Property consists of approximately 8.18 acres and is presently located within the boundaries of the Township and adjacent to the current boundaries of the City. The Property is legally described as follows:

Chicago, Milwaukee, St. Paul & Pacific Railroad Company's abandoned 66 feet wide right-of-way in, over and across the East 515 feet of the Northeast Quarter of the Northeast Quarter of Section 24, Township 115 North, Range 24 West, Carver County, Minnesota.

AND

The North 12.22 chains of the East 7.8 chains of the Northeast Quarter of Section 24, Township 115, Range 24, except for railroad right of way, Carver County, Minnesota.

EXCEPTING THEREFROM:

That part of the North 12.22 chains of the East 7.8 chains of the Northeast Quarter of the Northeast Quarter of Section 24, Township 115, Range 24, Carver County, Minnesota, described as follows:

Beginning at the Southeast corner of said North 12.22 chains of the East 7.8 chains of the Northeast Quarter of the Northeast Quarter; thence Westerly along the South line of said North 12.22 chains, a distance of 515.30 feet to the West line of said East 7.8 chains of the Northeast Quarter of the Northeast Quarter; thence Northerly along said West line a distance of 210.31 feet; thence Southeasterly 541.27 feet to a point on the East line of said Northeast Quarter of the Northeast Quarter distant 20.37 feet from the point of beginning; thence Southerly along said East line of the Northeast Quarter of the Northeast Quarter, 20.37 feet to the point of beginning.¹

3. The Property, identified for tax purposes as Property ID Number 04.0240900, generates a total of \$247.61 in property taxes to the Township for the applicable tax year.² For the most recent past tax years, the Property has generated tax revenue to the Township in the following amounts: 2012 - \$440.14; 2013 – \$400.35; 2014 – \$282.94; and 2015 – \$295.86.

4. The owner of the Property, currently listed on public tax records as Diedrich Lenzen,³ proposes to sell the property to a developer for commercial purposes which require the extension of City utilities.⁴

5. On or about February 11, 2009, the City and the Township executed a “Joint Resolution for Orderly Annexation Between the Town of Dahlgren and the City of Carver, Carver County, Minnesota” (Joint Resolution).⁵

6. The Property is included within the area designated for orderly annexation pursuant to the Joint Resolution.

7. In pertinent part, the Joint Resolution contains the following terms:

No Alterations of Boundaries. The Township and City mutually agree and state that the MBA may review and comment, but no alterations by the MBA of the stated boundaries of the area designated for orderly annexation is appropriate absent the MBA taking action following a petition for annexation and a hearing pursuant to Chapter 414.⁶

Review and Comment by Municipal Boundary Adjustments. The Township and City mutually agree and state that this Agreement sets forth all the conditions for annexation of the areas designated on **Exhibit 1** and

¹ City Resolution No. 109-16 (Annexation Resolution), Exhibit (Ex.) A (March 21, 2016).

² Carver County 2016 Property Tax Statement (available at <http://mn-carver.manatron.com/Tabs/TaxSearch/ParcelDetail.aspx?p=04.0240900&a=1208>).

³ *Id.*

⁴ Annexation Resolution, at 1, 6th ¶.

⁵ Joint Resolution No. 102-09/61-09 at 9.

⁶ Joint Resolution, § 3, emphasis in original.

that no consideration by the MBA is necessary. At such time as the conditions for annexation of the areas set forth on **Exhibit 1** or a portion thereof as described in this Agreement have been met, upon receipt of a Resolution for Annexation from the City of Carver, the Office of Administrative Hearings, Municipal Boundary Adjustments, may review and comment, but shall, within 30 days, order the annexation in accordance with the terms of the Resolution.⁷

Taxation Reimbursement. Tax Reimbursement. Unless otherwise agreed, to allow the Township to be reimbursed for the permanent loss of taxable property (determined by Carver County's GIS system net of existing roads) from Township tax rolls for property in the Orderly Annexation Area, the City agrees that it will not initiate annexation or forward a resolution for annexation of any portion of the property described on **Exhibit 1** to the Office of Administrative Hearings, or its successor agency, until such time as the Township has received reimbursement for the loss of such taxable property in the amount of \$500 for each acre described in the City resolution to be annexed to the City. Tax exempt property at time of annexation is not subject to tax reimbursement.⁸

Conditions for Orderly Annexation. The City and the Town mutually state and agree that properties in the Orderly Annexation Area described on **Exhibit 1** and as shown on **Exhibit 2**, or any portion thereof, shall be annexed to the City by the MBA upon receipt of a resolution from the City requesting such annexation. The City may submit such resolution to the MBA not sooner than 31 days after submitting notice to the Township (the Township may waive the 31 day period) and only when all of the following conditions are met:

D. The Township has received tax reimbursement as provided by paragraph 6A above for the acres described in the notice.⁹

Severability and Repealer. A determination that a provision of this Agreement is unlawful or unenforceable shall not affect the validity or enforceability of the other provisions herein. However, should any element of paragraph 6 relating to "Tax Reimbursement" be deemed unlawful or unenforceable, the Township at its discretion may terminate this Agreement. Any prior agreement or joint resolution existing between the parties and affecting the property described in the attached Exhibits shall be considered repealed upon the effective date of this Agreement.¹⁰

⁷ Joint Resolution, § 4, emphasis in original.

⁸ Joint Resolution, § 6.A., emphasis in original.

⁹ Joint Resolution, § 8, emphasis in original.

¹⁰ Joint Resolution, § 15.

8. On or about February 9, 2016, the property owner petitioned the City for immediate orderly annexation of the Property.¹¹

Procedural Background

9. Pursuant to Resolution Number 109-16 adopted on March 21, 2016 and filed with the Office of Administrative Hearings on March 24, 2016, the City requests annexation of the Property under Minn. Stat. § 414.0325.

10. In the Annexation Resolution, the City makes the following findings:

The Petitioner¹² has paid the reimbursement to the Township required under Sections 6 and 8 of the Joint Agreement and Dahlgren Township has provided evidence to the City to document the payment.¹³

11. On April 5, 2016, the Chief Administrative Law Judge issued Findings of Fact, Conclusions of Law, and Order Regarding Supplementation of Record wherein the parties were required to supplement the record with regard to the Township's legal authority for charging a tax reimbursement payment.

12. The Township submitted correspondence dated April 12, 2016, including legal argument and various attachments indicating that it: (1) considers the \$500 per acre payment "to be a contracted payment pursuant to the terms of Section 6.A (Tax Reimbursement) of the Joint Resolution for Orderly Annexation Between the Town of Dahlgren and the City of Carver, County, Minnesota ("Joint Resolution") in exchange for the Township's consent" to the requested annexation of the Property; and (2) cites to Minn. Stat. § 365.025 (2014) and Minn. Stat. § 414.0325, subd. 6, as its legal authority to demand and collect the "contracted payment."¹⁴

13. The Township acknowledged on the record that it has "not adopted a written levy, assessment, ordinance, or administrative fee schedule memorializing an annexation reimbursement policy."¹⁵

Based upon these Findings of Fact, the Chief Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Orderly annexations are governed by the provisions of Minnesota Statutes, chapter 414 (2014) and Minn. R. 6000 (2015).

2. The Municipal Boundary Adjustment Act authorizes the Chief Administrative Law Judge to scrutinize proposed municipal boundary changes "to protect the integrity of

¹¹ Annexation Resolution, at 1, 4th ¶.

¹² The Petitioner is defined as the property owner. See Annexation Resolution, at 1, 4th ¶.

¹³ Annexation Resolution, at 1, 8th ¶.

¹⁴ April 12, 2016 correspondence from Robert T. Ruppe, counsel for the Township.

¹⁵ *Id.*

land use planning in municipalities and unincorporated areas so that the public interest in efficient local government will be properly recognized and served.”¹⁶

3. A municipality’s attempt to annex property by orderly annexation is final on the effective date specified in the Order of Annexation approved by the Chief Administrative Law Judge.¹⁷

4. The orderly annexation statute provides:

If a joint resolution designates an area as in need of orderly annexation, provides for the conditions for its annexation, and states that no consideration by the chief administrative law judge is necessary, the chief administrative law judge may review and comment, but shall, within 30 days, order the annexation in accordance with the terms of the resolution.¹⁸

5. In orderly annexation proceedings, the Office of Administrative Hearings has authority to require compliance with Minn. Stat. § 414.036 (2014) notwithstanding the provisions of Minn. Stat. § 414.0325, subd. 1(h).

6. Although Minn. Stat. § 414.0325 authorizes municipalities to execute a joint resolution and thereby contractually agree to negotiated terms and conditions regulating the orderly annexation of property, the statute does not authorize the parties to contractually agree to tax reimbursement terms that violate the criteria set forth in Minn. Stat. § 414.036.

7. Minn. Stat. § 414.036 sets forth the following with regard to the legislatively-approved reimbursement of townships for the lost value of property annexed into an adjoining municipality:

Unless otherwise agreed to by the annexing municipality and the affected town, when an order or other approval under this chapter annexes part of a town to a municipality, the order or other approval must provide a reimbursement from the municipality to the town for all or part of the taxable property annexed as part of the order. The reimbursement shall be completed in substantially equal payments over not less than two nor more than eight years from the time of annexation. The municipality must reimburse the township for all special assessments assigned by the township to the annexed property, and any portion of debt incurred by the town prior to the annexation and attributable to the property to be annexed but for which no special assessments are outstanding, in substantially equal payments over a period of not less than two or no more than eight years.

8. Minn. Stat. § 414.036 does not provide legal authority for the Township to impose a \$500 per acre tax reimbursement charge in order to obtain the Township’s

¹⁶ Minn. Stat. § 414.01, subd. 1b(3).

¹⁷ Minn. Stat. § 414.0325, subd. 4.

¹⁸ Minn. Stat. § 414.0325, subd. 1(h).

support for the requested annexation.

9. Minn. Stat. § 365.02(b)(3) (2014) provides that a Minnesota township may “enter into any contract that is necessary for the town to use any of its powers...”, while Minn. Stat. § 365.025 states as follows: “Notwithstanding other law, a town board may enter into any contract it considers necessary or desirable to use any town power.”

10. Neither Minn. Stat. § 365.02(b)(3) nor Minn. Stat. § 365.025 provide the Township with any legal authority to impose upon the Property owner a \$500 per acre tax reimbursement charge in order to obtain the Township’s support for the requested annexation.

11. The Property generates only a small amount of tax revenue for the Township, currently measured in total at \$247.61 per tax year.

12. The Township has not levied any tax levy or assessment, or enacted any ordinance or administrative fee schedule, related to the procurement of its consent to annexation proceedings at a chargeable rate of \$500 per acre.¹⁹

13. Absent a tax levy or assessment, or properly adopted ordinance or administrative fee schedule, the Township has no legal authority to support its practice or policy of imposing a tax reimbursement charge in annexation matters.

14. The Township’s practice of charging landowners a tax reimbursement payment, via contract or in any manner other than a tax levy or assessment or properly adopted ordinance or administrative fee schedule, is inimical to public policy and does not serve the public’s interest in efficient local government.²⁰

15. As the record is silent as to whether the City and the Township have agreed that they prefer not to have the issue of reimbursement addressed in this Order of Annexation, the order must reflect the requirements of Minn. Stat. § 414.036 with respect to the provision for reimbursement from the City to the Township.

16. Pursuant to Minn. Stat. § 414.12, subd. 3, the Chief Administrative Law Judge must apportion the Office of Administrative Hearings’ costs of contested case proceedings in boundary adjustment matters to the parties in an equitable manner if the parties have not otherwise agreed to a division of the costs.

Based upon these Findings of Fact and Conclusions of Law, and for the reasons set forth in the Memorandum below, the Chief Administrative Law Judge issues the following:

¹⁹ April 12, 2016 correspondence from Robert T. Ruppe, counsel for the Township.

²⁰ Minn. Stat. § 414.01, subd. 1b(3).

ORDER

1. The Property's annexation into the City is ordered effective on the date that the Township's return of the \$500 per acre tax reimbursement charge paid by the property owner and/or payment of same into the District Court as part of any request for review of this Order by the District Court as provided for in Minn. Stat. § 414.07.

2. Pursuant to Minn. Stat. § 414.036, the Township is authorized to collect a tax reimbursement charge of \$247.61 from the City, that being the amount that represents the taxes lost by the Township upon annexation of the Property and therefore the amount that represents "all or part of the taxable property annexed as part of the order" as required by the statute.

3. The costs of this matter, billed as required by law at the approved hourly rates of the Office of Administrative Hearings, shall be borne by the parties as follows: to the Township – 50%; and to the City – 50%. An itemized invoice for costs will be sent under separate cover.



Dated: April 25, 2016

TAMMY L. PUST
Chief Administrative Law Judge

NOTICE

This Order is the final administrative order in this case under Minn. Stat. §§ 414.0325, .07, .09, .12 (2014). Pursuant to Minn. Stat. § 414.07, subd. 2, any person aggrieved by this Order may appeal to Carver County District Court by filing an Application for Review with the Court Administrator within 30 days of this Order. An appeal does not stay the effect of this Order.

Any party may submit a written request for an amendment of this Order within seven days from the date of the mailing of the Order pursuant to Minn. R. 6000.3100 (2015). However, no request for amendment shall extend the time of appeal from this Order.

For questions concerning this Order, please contact Star Holman at the Office of Administrative Hearings at star.holman@state.mn.us or 651-361-7909.

MEMORANDUM

The Property currently generates less than \$500 per year in property taxes to the Township. Nevertheless, the landowner has been required to “reimburse” the Township for lost taxes at the rate of \$500 per acre. If the \$500 per acre charge has been paid in full as referenced in the record, that payment would total \$4,090.²¹ It will take 16.5 years for the Property to generate \$4,090 in taxes payable to the Township or the City, yet this is the amount the Property owner apparently has been required to pay to the Township in order to obtain the Township’s support for the requested annexation. For the reasons and upon the authorities cited below, the Chief Judge finds that the Township has no legal authority to impose the tax reimbursement charge in the present case and so orders the annexation effective upon repayment or return of same.

I. The Township’s Tax Reimbursement Charge is Unlawful and Unenforceable.

The Township asserts that it has a right to oppose annexation proceedings as allowed by various statutes in Chapter 414, and also has a right to enter into contracts for various purposes. Based on the fact that it can oppose annexations and it can enter into contracts, the Township argues that it can contract away its “right to oppose” an annexation. In essence, the Township argues that it is lawful for it to enter into a contract to sell, for value, its ability to take a particular position (opposition) in a pending legal action (annexation), and so it does just that - in exchange for a \$500 per acre fee from an affected landowner.

As analyzed below, the Township’s position is as outside the parameters of Minnesota law as it is inimical to public policy. As such, it cannot stand.

A. Chapter 414 Does Not Authorize the \$500 Per Acre Charge.

Minnesota Statutes, chapter 414, governs municipal boundary adjustments, including annexations. The Township claims that it has a contractual right to collect the tax reimbursement charge based on two sections of Chapter 414: Minn. Stat. § 414.0325 and Minn. Stat. § 414.036. Neither of these provisions support the Township’s claim of authority.

1. Minn. Stat. § 414.0325

According to the Township, Minn. Stat. § 414.0325, subd. 6, authorizes it to contract via orderly annexation agreement.²² Noting that the statute directs that the terms of an orderly annexation agreement “shall be binding upon the parties” and not preempted by Chapter 414 unless the contract so specifies, the Township asserts that section 414.0325 authorizes its \$500 per acre charge because the Joint Resolution referenced

²¹ The record does not indicate the total amount paid. The Chief Judge takes judicial notice that a per acre charge of \$500 per acre multiplied by 8.18 acres equals \$4,090.

²² April 12, 2016 correspondence from Robert T. Ruppe, counsel for the Township.

the agreement for the charge as between the City and the Township.²³ Essentially, the Township's argument breaks down as follows: (1) section 414.0325 authorizes contracts and makes them enforceable as between the parties thereto; (2) Minn. Stat. § 414.036 authorizes tax reimbursement charges; (3) therefore all types of contracts, even tax reimbursement-related contracts, are authorized by Section 414.0325 and are enforceable as between the City and the Township.

The Township is correct that Minn. Stat. § 414.0325, subd. 6, authorizes municipalities to enter into orderly annexation agreements, which are "binding contract[s] upon all the parties to the agreement." It is also correct in noting that Minn. Stat. § 414.036 authorizes municipalities to collect certain tax reimbursement charges, specifically those tied to "all or part of the taxable property annexed as part of the order." However, nothing in the existence of those two facts leads to the legal conclusion that the ability to contract found in the first cited statute operates to nullify the second statute's identified criteria for valuing tax reimbursement payments in annexation matters.

In fact, Minnesota's rules of statutory construction mandate the opposite result. Minnesota law provides that a more specific statute prevails over a more general provision in the same or another statute.²⁴ As such, with respect to determining a municipality's ability to impose annexation reimbursement charges, the more specific reimbursement criteria of Minn. Stat. § 414.036 prevails over the more general language of Minn. Stat. § 414.0325. Section 414.0325 merely authorizes municipalities to agree to "negotiated terms and conditions" in an orderly annexation agreement; it does not identify approved criteria for measuring reimbursement for the loss of property through annexation. Those specific criteria are found in Minn. Stat. § 414.036, which requires "reimbursement from the municipality to the town for all or part of the taxable property annexed as part of the order." Nothing in section 414.0325 allows a municipality to deviate from the statutory directive of section 414.036. And nothing in either statute allows a municipality to charge a landowner for the privilege of having his or her local government stand silent on a proposed change in municipal boundaries, an arrangement wholly unrelated to the value of taxable property lost through annexation. Therefore, the Township's reliance on section 414.0325 is misplaced.

Its specific reliance on Subdivision 6 of Minn. Stat. § 414.0325 is even more obviously without merit. That statutory provision allows for the enforcement of orderly annexation agreements as between the parties to the agreement. In this case, the owner of the Property is not a party to the orderly annexation agreement. Therefore, this subdivision has no binding effect as to the necessary legal analysis in this case.

2. Minn. Stat. § 414.036

Similarly, Minn. Stat. § 414.036 provides no legal support for the Township's action. This section defines the parameters of statutorily authorized compensation attributable to the loss of property annexed into an adjoining municipality:

²³ *Id.*

²⁴ Minn. Stat. § 645.26, subd. 1 (2014).

Unless otherwise agreed to by the annexing municipality and the affected town, when an order or other approval under this chapter annexes part of a town to a municipality, the order or other approval must provide a **reimbursement from the municipality to the town for all or part of the taxable property annexed as part of the order**. The reimbursement shall be completed in substantially equal payments over not less than two nor more than eight years from the time of annexation. The municipality must reimburse the township for all special assessments assigned by the township to the annexed property, and any portion of debt incurred by the town prior to the annexation and attributable to the property to be annexed but for which no special assessments are outstanding, in substantially equal payments over a period of not less than two or no more than eight years.²⁵

By its terms, the statute directs that a municipality which loses property through annexation is entitled to “reimbursement ... for all or part of the taxable property annexed.”²⁶ The term “reimbursement” means “to pay back or compensate (another party) for money spent or losses incurred.”²⁷ Thus, to be “reimbursed” a municipality losing property to annexation must have incurred some loss. Because the municipality does not own the property being annexed, it is not losing the monetary value of the subject property; it never owned that value and therefore could not lose it. Instead, and at most, a municipality losing property to annexation loses the real estate taxes it would have collected from the property in the future. Therefore, the Township’s annexation tax reimbursement charge of \$500 per acre, a charge unrelated to the property’s generated real estate tax value, violates the statute’s direction that the municipality be reimbursed merely for “all or part of the taxable property annexed.”²⁸

B. Contract Law Does Not Authorize the Township’s Charge.

As they have failed to identify any authority for the tax reimbursement charge in Chapter 414, neither has the Township identified any other authority in law in support of the charging practice. “[M]unicipalities have no inherent powers and possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred.”²⁹ The Minnesota legislature has

²⁵ Minn. Stat. § 414.036 (emphasis added).

²⁶ *Id.*

²⁷ *American Heritage Dictionary of the English Language, Fifth Edition* (2011).

²⁸ Minn. Stat. § 414.036.

²⁹ *Mangold Midwest Co. v. Vill. of Richfield*, 143 N.W.2d 813, 820 (Minn. 1966); *N. States Power Co. v. City of Granite Falls*, 463 N.W.2d 541, 543 (Minn. Ct. App. 1990). See also *Country Joe, Inc. v. City of Eagan*, 548 N.W.2d 281, 286 (Minn. Ct. App. 1996) *aff’d*, 560 N.W.2d 681, 683-84 (Minn. 1997) (declining to uphold a city’s “road unit connection charge” by finding that such “would set a precedent allowing statutory cities virtually unlimited authority to impose funding measures not otherwise permitted by statute in connection with any service they provide.”)

authorized municipalities to generate revenue by tax assessment or by fee.³⁰ The Township's tax reimbursement charge constitutes neither.

With respect to levying or assessing taxes, municipalities only have the authority "granted to them by Constitution or the statutes."³¹ While "[t]he legislature has broad discretion in selecting subjects for taxation and in granting tax exemptions",³² the fact remains that a tax must be legislatively authorized.³³ Neither the Township's general police powers nor its statutory authority to engage in land use planning activities provide it any authority to generate revenue outside of its existing ability to levy taxes or impose

³⁰ See Minn. Stat. §§ 366.01-.27, 412.251, 462.353, subd. 4(a) (2014). An overview of the general view of municipal revenue generation options is set forth in *SDCO St. Martin, Inc. v. City of Marlborough*, 5 F.Supp.3d 139, 142-43 (D. Mass. 2014), as follows:

"Cities and towns have no independent power of taxation." *Opinion of the Justices*, 378 Mass. 802, 393 N.E.2d 306, 310 (1979). "A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by the Legislature." *Silva v. City of Attleboro*, 454 Mass. 165, 908 N.E.2d 722, 725 (2009).

In addition to general taxes, a municipality may also charge fees for the use of specific municipally provided services or as an exercise of police power. See *Denver St. L.L.C. v. Town of Saugus*, 462 Mass. 651, 970 N.E.2d 273, 274 (2012). "There are two kinds of fees, 'user fees based on the rights of the entity as proprietor of the instrumentalities used' and 'regulatory fees,' 'founded on police power to regulate particular businesses or activities.'" *Id.* (quoting *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1105 (1984)). Sewer charges would be an example of a lawful user fee. See *Town of Winthrop v. Winthrop Housing Authority*, 27 Mass. App. Ct. 645, 541 N.E.2d 582, 583-84 (1989).

Whether a charge is a lawful fee or an unlawful tax "must be determined by its operation rather than its specifically descriptive phrase." *Denver Street*, 970 N.E.2d at 275. In *Emerson College*, the Supreme Judicial Court identified the three traits that distinguish fees from taxes.

Fees "[1.] are charged in exchange for a particular government service which benefits the party paying the fee in a manner 'not shared by other members of society' [...] [2.] are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge" [...] "and" [3.] ... are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.

Denver St., 970 N.E.2d at 275 (alteration in original) (quoting *Emerson College*, 462 N.E.2d at 1105).

³¹ *State v. City of Ely*, 151 N.W. 545, 546 (Minn. 1915) (citing *Sewall v. City of St. Paul*, 20 Minn. 511 (Gil. 459); *State v. District Court*, 44 Minn. 244, 46 N. W. 349; 27 Am. & Eng. Enc. (2d Ed.) 869)).

³² *Rio Vista Non-Profit Hous. Corp. v. Ramsey County*, 335 N.W.2d 242, 245 (Minn. 1983) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)).

³³ *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686-87 (Minn. 1997) ("We conclude that the [road unit connection] charge is a revenue measure, benefiting the public in general, and is not an authorized exercise of the city's police powers... Because it is not a purely regulatory or license fee but instead a revenue measure, the road unit connection charge is a tax which must draw its authorization, if at all, from the city's powers of taxation. ...The taxing authority afforded municipalities under state law is delineated in Minn. Stat. § 412.251. ... Although paragraph 11 of Minn. Stat. § 412.251 operates as a catch-all provision, recognizing a city's authority to impose "other special taxes authorized by law," we conclude on the basis of our preceding analysis that the road unit connection charge is not so "authorized by law." Minn.Stat. § 412.251(11). Accordingly, we conclude that the road unit connection charge cannot find validity under the city's power of taxation.")

administrative fees.³⁴ The Township has not identified any tax statute authorizing it to assess a tax in the form of a tax reimbursement charge because none exists.

Neither has the Township attempted to justify the tax reimbursement charge as a statutorily authorized administrative user fee. Administrative user fees must be set in a manner designed to recoup costs of governmental services provided to a specific individual or entity, as opposed to those provided to the public as a whole. This case involves the reverse: the tax reimbursement charge is not a recoupment but is instead a charge for a government not to take a specific action and therefore not to incur any costs. This distinction is critical in an analysis of whether the Township could have adopted the charge as an administrative fee; it could not. And in fact, it did not. Administrative fees must be passed by ordinance after allowing the public to comment at a duly noticed and open hearing.³⁵ The Township has conceded that it “has not adopted a written levy, assessment, ordinance, or administrative fee schedule” related to the tax reimbursement charge.³⁶ Therefore, the record does not support a finding that the tax reimbursement charge was lawfully adopted by the Township as an enforceable administrative fee.

Conceding that the charge is not a lawful tax or fee, the Township asserts that its tax reimbursement charge is authorized as a matter of contract under Minn. Stat. § 365.025.³⁷ This statute provides as follows: “Notwithstanding other law, a town board may enter into any contract it considers necessary or desirable to use any town power.” It is similar to Minn. Stat. § 365.02(b)(3), which authorizes a Minnesota township to “enter into any contract that is necessary for the town to use any of its powers....”

Neither of these statutes provide the Township with any legal authority to impose a \$500 per acre charge in order to obtain the Township’s support for the requested annexation. At least four legal bases sufficiently support this determination. First, exercise of purely governmental functions is to be done by ordinance; it is the “business or proprietary powers of [a] municipality” that lend themselves to contract.³⁸ Exercising discretion to support, or oppose, a proposed annexation is a purely governmental function; it is not the business of a municipality to “sell” to its citizens the right to obtain or avoid the exercise of governmental functions.

Second, the Township has not even attempted to establish that imposition of the charge was “necessary” for it to exercise its discretion under Chapter 414. The Township could support the annexation petition, or choose to oppose the petition, without requiring payment of the tax reimbursement charge. As established in the docket at the Office of Administrative Hearings, municipalities across the state of Minnesota do it every day.

Third, it is clear that the Property’s owner is not a party to the orderly annexation agreement memorialized in the Joint Resolution or any other contract relevant to this

³⁴ See *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 683-84 (Minn. 1997); *Great W. Indus. Park, LLC v. Randolph Twp.*, 853 N.W.2d 155, 157 (Minn. Ct. App. 2014).

³⁵ Minn. Stat. § 462.353, subds. 4, 4a (2014).

³⁶ April 12, 2016 correspondence from Robert T. Ruppe, counsel for the Township.

³⁷ *Id.*

³⁸ *Borough of Belle Plaine v. N. Power Co.*, 142 Minn. 361, 172 N.W. 217 (1919).

proceeding. The Joint Resolution makes no mention of party status being conveyed upon the Property's owner in any manner. While the Township and the City are legally entitled to agree to negotiated terms between themselves as parties to the Joint Resolution contract, they do not have the lawful power to bind a non-contracting party (the Property owner) to compliance with those terms.

Last, and most importantly, it is critical to recognize that the Township has authority to act only for the common good and in the public interest, as authorized by legislatively-provided authority.³⁹ In Minnesota, municipalities are legislatively empowered to "provide for the government and good order of the city" and "the general welfare."⁴⁰ Public officials are elected to and charged with the responsibility to protect and serve the interest of the community as a whole. Governments do not have the authority to pick and choose what services or opportunities to provide to certain groups within the community and to deny those same services or opportunities to others merely as a means of raising revenue.

The Township is correct that it has discretion to decide whether to support or oppose each annexation proceeding affecting property within its boundary. It is incorrect in its implication that it has the discretion to base that decision on whether or not its property owners can pay for the privilege. Governmental discretion is limited by the public interest to be served in each case. In Minnesota, as in every other state in the nation, local government has no legal authority to place a price tag on the exercise of its discretion.⁴¹

Under the Township's practice, landowners who can afford \$500 per acre charges can proceed to exercise their rights under the annexation statute. Those who cannot afford these charges will be treated differently: their annexation petitions will always draw the Township's opposition and correspondingly increased expense and delay. The inequity in this practice is obvious.

The point is perhaps more easily communicated with the following example. Imagine a Minnesota municipality which had, for legitimate governmental reasons, determined that a new community roadway was needed and in the public interest. The roadway could be constructed in either of two locations: one which would disrupt Neighborhood A and one which would disrupt Neighborhood B. Next, imagine that the municipality approached Neighborhood A with the offer that their homes would be spared the disruption that comes with road construction and ensuing traffic if they would just pay a "Not in Our Backyard" charge, measured at \$500 per household. Offering the deal as a

³⁹ See *In re O'Rourke*, 9 Misc. 564, 567, 30 N.Y.S. 375, 377 (Sup. Ct. 1894) ("Under our system of government, public officials may not assume a power not conferred upon them by some law. They are mere agents and servants of the people, with no power which the people have not given them. We enact laws by our representatives assembled in legislative bodies, and then elect officials to execute them, saying to them, as we point to such laws: 'Thus far you may go, and no further. These laws are your power of attorney.'")

⁴⁰ Minn. Stat. § 412.221, subd. 32 (2014).

⁴¹ *Collier v. Town of Harvard*, CIV.A.95-11652-DPW, 1997 WL 33781338, at *8 (D. Mass. Mar. 28, 1997) ("[I]t is not the plaintiffs' right to variances which is at issue, rather it is their right to be free from government coercion that is at stake.")

contract, the municipality then reduced the offer to writing and Neighborhood A executed the contract and tendered the funds. As a result, the municipality exercised its discretion to protect Neighborhood A and placed the road in Neighborhood B. When Neighborhood B challenged the action as unfair, the municipality merely explained that it had the discretion to place the road wherever it wanted, and so it could unabashedly sell the right to determine the location to whomever was willing to pay for it.

It is difficult to imagine that any Minnesota municipality would defend such action as lawful, authorized or in accordance with public policy. And yet, the situation in the present case appears like-minded. The Township insists that it has a right to contract away its discretionary decision to either support or oppose the annexation, and to charge the landowner \$500 per acre in order to obtain governmental support notwithstanding what action may be in the best interest of the community as a whole. It is difficult to conclude that this action represents a good-faith attempt by a local government to act on behalf and in support of the common good of all of its residents.

The Township has very clearly imposed a \$500 per acre charge against the Property owner. There is no evidence in the record substantiating the Township's legal authority to do so, either as a levied tax or assessment, an administrative fee duly imposed by ordinance enacted in a public hearing, or a contract executed in accordance with the government's obligation to represent and pursue the public interest. Therefore, the tax reimbursement charge is unauthorized by and invalid under Minnesota law.

II. The Orderly Annexation Statute Authorizes the Ordered Repayment.

Minn. Stat. § 414.0325, subd. 1(h) provides as follows:

If a joint resolution designates an area as in need of orderly annexation, provides for the conditions for its annexation, and states that no consideration by the chief administrative law judge is necessary, the chief administrative law judge may review and comment, but shall, within 30 days, order the annexation in accordance with the terms of the resolution.⁴²

The Joint Resolution in question contains a sufficient recitation of this statutory language.⁴³

The "review and comment" language contained in paragraph 4 of the Annexation Resolution must be read in conjunction with the rest of the terms of both the Annexation Resolution and the Joint Resolution. In paragraph 15, the Joint Resolution contains a severability provision that states:

A determination that a provision of this Agreement is unlawful or unenforceable shall not affect the validity or enforceability of the other provisions herein. However, should any element of paragraph 6 relating to

⁴² Minn. Stat. § 414.0325, subd. 1(h).

⁴³ Joint Resolution, at 2, 4th ¶.

“Tax Reimbursement” be deemed unlawful or unenforceable, the Township at its discretion may terminate this Agreement.

Clearly, the parties envisioned that judicial scrutiny by the Chief Administrative Law Judge could result in a finding that portions of their agreement were beyond their legal authority, and so agreed in advance that such a finding would not invalidate the remaining terms of the Joint Resolution. As such, the Township clearly evidenced its understanding that the “review and comment” provision does not supersede or limit the Chief Administrative Law Judge’s authority to examine the lawfulness or enforceability of the terms of the Joint Resolution. This authority is grounded in the legislature’s finding that while “joint resolutions for orderly annexation ... should be encouraged,”⁴⁴ the Chief Administrative Law Judge is directed to “promote and regulate [orderly annexations] ... to protect the integrity of land use planning in municipalities ... so that the public interest in efficient local government will be properly recognized and served.”⁴⁵

Minnesota Statutes section 414.0325, subd. 1(h) must also be read in conjunction with section 414.0325, subd. 1(c). This provision of the statute reflects the legislature’s direction that the Chief Administrative Law Judge exercise jurisdiction over all provisions of a filed joint resolution, which would include all provisions related to tax reimbursement. At paragraph 8.D, the Joint Resolution acknowledges that the Township has already received the \$500 per acre tax reimbursement payment, and in the eighth “Whereas” clause of the Annexation Resolution the Township acknowledges that the payment was received from the owner of the Property.⁴⁶ As the Chief Administrative Law Judge has jurisdiction over these provisions, she not only has the legal authority to examine their factual and legal accuracy – she has the legal obligation to do so.

Minn. Stat. § 414.036 provides that every annexation order “**must** provide a reimbursement from the municipality to the town for all or part of the taxable property annexed as part of the order.”⁴⁷ The statute does not exclude from its mandate orders issued pursuant to section 414.0325. Therefore, in exercising jurisdiction over the provisions of the Joint Resolution the Chief Administrative Law Judge is required to determine whether the criteria for reimbursement charges dictated by section 414.036 have been met. This determination is necessary in order to include in the annexation order the required “reimbursement from the municipality to the town for all or part of the taxable property annexed.”⁴⁸

For the reasons and upon the legal authorities set forth below, the Chief Administrative Law Judge has invalidated the Joint Resolution’s provision related to tax reimbursement because all tax reimbursement payments required by Minn. Stat. § 414.036 have not been satisfied. As a valid tax reimbursement provision is mandated by statute and as the Joint Resolution’s tax reimbursement provision is invalid and

⁴⁴ Minn. Stat. § 414.01, subd. 1a(5).

⁴⁵ Minn. Stat. § 414.01, subd. 1b(3).

⁴⁶ Joint Resolution, § 8.D; Annexation Resolution, at 1.

⁴⁷ Emphasis added.

⁴⁸ Minn. Stat. § 414.036.

unenforceable, the Joint Resolution no longer contains all the required “conditions for its annexation.” Therefore, the Chief Administrative Law Judge has full authority to order the annexation effective on such date as all statutorily-required conditions are included and met. She has done so in issuing this order subject to the requirement that the Township tender repayment of the unlawful \$500 per acre tax reimbursement charge and instead collect a \$247.61 tax reimbursement charge from the City, that being the amount that represents the taxes that will be lost by the Township upon annexation of the Property.

The orderly annexation statute provides the Chief Administrative Law Judge with the authority to make an annexation order effective at a date later than the date of the Order’s execution.⁴⁹ Accordingly, the Chief Administrative Law Judge has issued this Order Approving Annexation which by its terms allows the annexation to go into effect once the Township has returned the \$500 per acre tax reimbursement charge or tendered it into the District Court upon requesting review by the District Court pursuant to Minn. Stat. § 414.07.

III. Apportionment of Costs is Statutorily-Required.

Minn. Stat. § 414.12, subd. 3, requires the Chief Administrative Law Judge to allocate equitably between the parties the costs of administrative law judge time spent on boundary adjustment matters. This legislative directive is mandated by the fact that the Office of Administrative Hearings operates primarily⁵⁰ as an “enterprise fund” within the executive branch of Minnesota state government. As such, Minn. Stat. §§ 14.53 and 14.55 (2014) direct the Office of Administrative Hearings to assess its costs to the state agencies and other political subdivisions to which it provides the services of administrative law judges. Each fiscal year, Minnesota Management & Budget approves a billable rate for the agency’s services, and the agency then charges for its services pursuant to this approved hourly rate.⁵¹

Some history is instructive.⁵² Legislatively created in 1959, the Municipal Boundary Board operated until 1999 when it was legislatively dissolved. During the Board’s 40-year tenure, the appointed board members issued final decisions and the costs of the agency were legislatively funded. In 1999, the functions of the board were transferred to the Office of Strategic and Long Range Planning, commonly referred to as Minnesota Planning, and in 2003 the functions were again transferred, this time to the Minnesota Department of Administration. Since 1999, administrative law judges at the Office of Administrative Hearings have presided over all contested case proceedings related to municipal boundary adjustment matters. In accord with Minn. Stat. § 14.53 and 14.55, the costs of

⁴⁹ See Minn. Stat. § 414.0325, subd. 4 (“The chief administrative law judge’s order shall be effective upon the issuance of the order **or at such later time as is provided in the order.**” (Emphasis added.)

⁵⁰ The Office of Administrative Hearings receives different funding for the work of its Workers’ Compensation Division and for contested cases related to data privacy matters.

⁵¹ See Minn. Stat. §§ 14.53, 14.54.

⁵² See Office of Administrative Hearings’ website at <http://www.mba.state.mn.us/History.html>.

the services provided by administrative law judges⁵³ have been equitably apportioned to the parties to boundary adjustment matters under the authority of Minn. Stat. § 414.12.

In recognition of the legislature's funding scheme pertinent to the state agency, Chapter 414 specifically provides that the Office of Administrative Hearings "is not liable for [its] costs"⁵⁴ but instead "the costs must be allocated on an equitable basis" by the Chief Administrative Law Judge unless otherwise agreed to by the parties.⁵⁵ In this orderly annexation action, the Chief Administrative Law Judge has allocated the costs equally to the Township and the City.

T. L. P.

⁵³ Parties have not been billed for the costs of the administrative staff in the Municipal Boundary Adjustment Unit, which remain funded through a general fund appropriation from the legislature.

⁵⁴ Minn. Stat. § 414.12, subd. 3(b).

⁵⁵ Minn. Stat. § 414.12, subd. 3(a), (c).