OAH Docket No. 84-0330-32991
OAH Docket No. 84-0331-32786

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Orderly Annexation of Certain Real Property to the City of Waconia from Waconia Township (MBAU Docket OA-1625/OA-1625-1)

In the Matter of the Annexation of Certain Real Property to the City of Waconia from Waconia Township (MBAU Docket A-7945)

SECOND AMENDED ORDER APPROVING ANNEXATION UPON SATISFACTION OF CONDITION

Michael C. Couri, Couri & Ruppe, PLLP, appears in these consolidated matters on behalf of the Township of Waconia (Township). The City of Waconia (City) appears through J. Michael Melchert, Melchert, Hubert and Sjodin, PLLP.

Based upon a review of the filings submitted by the parties, together with all proceedings herein including the City's Request to Amend Amended Order Approving Annexation Upon Satisfaction of Condition filed on January 25, 2016, the Chief Administrative Law Judge makes the following:

FINDINGS OF FACT

Factual Background

1. The matter involves property owned by the Waconia Public Schools, Independent School District No. 110 (School District). The subject property (Property) is legally described as follows:

Parcel 1

The South Half of the Southwest Quarter of Section 22, Township 116, Range 25, Carver County, Minnesota, EXCEPTING THEREFROM the following described parcel:

The East 659.44 feet of the Southeast Quarter of the Southwest Quarter of Section 22, Township 116, Range 25.

Parcel 2

That part of the East 659.44 feet of the Southeast Quarter of the Southwest

Quarter which lies South of the North 894.89 feet thereof; together with that part of the West 10.00 acres of the Southwest Quarter of the Southeast Quarter which lies South of the North 894.86 feet thereof; all in Section 22, Township 116, Range 25, Carver County, Minnesota.[1]

2. Parcel 1, identified for tax purposes as Property ID Number 090220820 and Property ID Number 090220900 and made up of approximately 58.5 acres, was purchased by the School District on February 23, 2015.[2] For tax year 2015, Parcel 1 generated tax liability to the Township in the amount of $463.42.[3]

3. Parcel 2, identified for tax purposes as Property ID Number 090220800 and made up of approximately nine acres, was purchased by the School District on March 31, 2006.[4] For tax year 2015, Parcel 2 generated no tax liability to the Township. Parcel 2 has not generated any tax liability to the Township since tax year 2010.[5]

4. The Property is located within the Township and adjacent to the current boundaries of the City.

5. The Property is located immediately adjacent to other properties owned by the School District and operated as public schools. The School District intends to use the Property to renovate and expand those public schools, and so desires to have the Property annexed into the City rather than remain within the Township boundaries.[6]

Procedural Background

Annexation-by-Ordinance Action

6. On August 17, 2015, the City adopted Ordinance Number 690 (Ordinance) whereby the City sought to annex the Property into the City's boundaries.

7. In Section 7 of the Ordinance, the City acknowledged that the Ordinance

[1] Ordinance No. 690 (Ordinance), Exhibit (Ex.) A (Aug. 15, 2015), submitted in OAH Docket No. 84-0331-32786.
[2] Carver County Property Report Card (Oct. 12, 2015), *available at* https://gis.carver.mn.us/publicparcel/, of which the Chief Administrative Law Judge takes judicial notice pursuant to Rule 1400.7300, subp. 4 (2015).
[3] Carver County Tax Information, submitted as an attachment to December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[4] Carver County Property Report Card (Oct. 12, 2015), *available at* https://gis.carver/mn/us/publicparcel/, of which the Chief Administrative Law Judge takes judicial notice pursuant to Rule 1400.7300, subp. 4 (2015).
[5] Carver County Tax Information, submitted as an attachment to December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[6] *See* Superintendent's Report, Waconia Board of Education (Apr.13, 2015), *available at* https://v3.boardbook.org/Public/PublicItemDownload.aspx?ik=36815707); *see also* Roadway Planning, Waconia Board of Education (May 8, 2015), *available at* https://sites.google.com/a/isd110.org/update/roadways, of which the Chief Administrative Law Judge takes judicial notice pursuant to Rule 1400.7300, subp. 4 (2015).

was subject to the tax reimbursement provisions of Minn. Stat. § 414.036 (2014), and provided as follows:

> **TAX REIMBURSEMENT.** Pursuant to Minnesota Statutes § 414.036, the City and Waconia Township have agreed that a single payment of $35,000 is payable to the Township as reimbursement for all or part of the taxable property annexed by this Ordinance. The payment has already been made and a copy of the Township's receipt acknowledging payment has been attached as Exhibit C (the "Receipt"). There are no special assessments assigned by the Township to the annexed property and no debt incurred by the Township prior to the annexation and attributable to the property annexed.[7]

8. The School District paid the Township the required tax reimbursement payment, totaling $35,000, on July 21, 2015,[8] but did so under protest.[9]

9. On August 24, 2015, the City petitioned for an Order from the Office of Administrative Hearings approving the Ordinance and granting the annexation pursuant to Minn. Stat. § 414.033, subd. 2(3) (2014). The action (hereinafter the "annexation-by-ordinance action") was docketed as OAH Docket No. 84-0331-32786.

10. On October 13, 2015,[10] 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, *inter alia*, the Township's legal authority for charging the School District a $35,000 tax reimbursement payment.

11. On November 9, 2015, the City withdrew the annexation-by-ordinance action.[11]

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[7] Ordinance, Section 7, submitted in OAH Docket No. 84-0331-32786, now part of the joint record of these consolidated proceedings pursuant to this Second Amended Order.
[8] Ordinance, Ex. C, submitted in OAH Docket No. 84-0331-32786.
[9] October 27, 2015 correspondence from ISD #110, Waconia Public Schools filed in the orderly annexation action ("We have been working with the city and the township since June to get the land annexed into the city. As part of that process we paid a fee of $35,000, $500 per acre times 70 acres, to the township for the right to move the property from the township to the city. We did not agree with that assessment and asked to have the assessment waived. We were told no that we would have to pay the assessment and that they would not waive it. When we asked for a justification for the assessment they told us that they did not have to justify the assessment.")
[10] This filing was re-served on the Waconia Town Board on October 20, 2015 due to the original's return by the U.S. Postal Service related to an incorrect address. The Chief Administrative Law Judge amended and reissued her Findings of Fact, Conclusions of Law, and Order Regarding Supplementation of Record on November 3, 2015 to include a November 10, 2015 deadline for the required supplementation.
[11] November 9, 2015 correspondence signed by Lane Braaten, Community Development Director for the City.

12. The Chief Administrative Law Judge's subsequently issued Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice, which dismissed with prejudice the City's annexation-by-ordinance action and apportioned the Office of Administrative Hearings' costs between the parties as required by Minn. Stat. § 414.12, subd. 3 (2014).[12]

Orderly Annexation Action

13. On the same day that it withdrew the annexation-by-ordinance action, on November 9, 2015 the City filed a second action with the Office of Administrative Hearings, this time seeking annexation of the Property pursuant to an orderly annexation agreement under Minn. Stat. § 414.0325 (2014) (hereinafter the "orderly annexation action").[13] The orderly annexation action was docketed as OAH Docket No. 84-0330-32991.

14. As part of their required filings in the orderly annexation action, the parties submitted their orderly annexation agreement in the form of a Joint Resolution for Orderly Annexation Between the Town of Waconia and the City of Waconia, Carver County, Minnesota (Joint Resolution).[14] In pertinent part, the Joint Resolution contains the following terms:

> **No Alterations of Boundaries; Review and Comment Only.** The Town and City mutually agree and state that this Agreement sets forth all the conditions for annexation of the Property and that no consideration by the MBA [Office of Administrative Hearings, Municipal Boundary Adjustments] is necessary. The MBA may review and comment, but may not alter the boundaries of the Property to be annexed, and shall, within 30 days, order the annexation in accordance with the terms of this Agreement.
>
> **Taxation Reimbursement.** The Township acknowledges that, by agreement of the parties, all tax reimbursement payments required by Minnesota Statues §414.036 have been satisfied.
>
> **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.

15. On December 9, 2015, the Chief Administrative Law Judge issued an Order Approving Annexation upon Satisfaction of Conditions (Annexation Order), requesting supplementation of the record with respect to the Township's legal authority to impose the $35,000 tax reimbursement charge.[15]

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[12] Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice filed November 20, 2015.
[13] *See* Joint Resolution for Orderly Annexation Between the Town of Waconia and the City of Waconia, Carver County, Minnesota (Joint Resolution), filed on November 9, 2016.
[14] City of Waconia Resolution No. 2015-249.
[15] Annexation Order, at 6.

16. The Township submitted correspondence dated December 18, 2015, including legal argument and various attachments indicating that it: (1) considers the $500 per acre payment made by the School District "to be a contracted payment 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."[16]

17. The Township acknowledged on the record that is has "not adopted a written levy, assessment, ordinance, or administrative fee schedule memorializing an annexation reimbursement policy."[17]

18. On January 16, 2016, the Chief Administrative Law Judge amended and reissued the Annexation Order (Amended Annexation Order) and granted the orderly annexation effective on the date that the Township reimbursed the School District's $35,000 tax reimbursement payment for which no lawful basis had been identified, and again apportioned the Office of Administrative Hearings' costs between the parties as required by Minn. Stat. § 414.12, subd. 3.

19. On January 25, 2016, the City filed a Request to Amend Amended Order Approving Annexation Upon Satisfaction of Condition (Motion for Reconsideration) pursuant to Minn. R. 6000.3100 (2015).

District Court Review

20. On December 18, 2015, the Township appealed the Chief Administrative Law Judge's Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice, issued in the annexation-by-ordinance action on November 20, 2015, with respect only to the issue of apportionment of costs.[18] The City opposed the appeal.[19] The matter was docketed as First Judicial District Court File No. Court File No. 10-CV-15-1249.

21. On February 9, 2016, the Township and the City appealed the Annexation Order and the Amended Annexation Order in the orderly annexation action with respect to two issues: (1) the orders' being conditioned upon return of the $35,000 tax reimbursement charge; and (2) the apportionment of costs.[20] The matter was docketed

[16] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[17] *Id.*
[18] December 18, 2015 Application for Review and Appeal of Findings of Fact, Conclusions of Law, and Order of Dismissal With Prejudice, filed as District Court File No. 10-CV-15-1249, First Judicial District.
[19] Response and Objection to Application for Review and Appeal of Findings of Fact, Conclusions of Law, and Order of Dismissal With Prejudice, filed on December 29, 2015 in Court File No. 10-CV-15-1249.
[20] Application for Review and Appeal of Amended Order Approving Annexation Upon Satisfaction of Condition, filed by the Township on November 9, 2016; Response and Cross Appeal to Application for Review and Appeal of Amended Order Approving Annexation Upon Satisfaction of Condition, filed by the City on February 16, 2016.

as First Judicial District Court File No. Court File No. 10-CV-16-128.

22. On February 17, 2016, the Honorable Kevin W. Eide, Judge of District Court for the First Judicial District, sitting as a court of review pursuant to Minn. Stat. § 414.07, subd. 2(b) (2014),[21] issued an Order Consolidating Files and Setting Briefing Schedule, filed on February 19, 2016.

23. On February 24, 2016, the Honorable Judge Eide issued Findings of Fact, Conclusions of Law and Order which vacated "[t]he portions of OAH's December 9th Conditional Order and its January 19th Conditional Order that place conditions on the effectiveness of the subject annexation" and remanded "these matters, in part, to the OAH and hereby orders OAH and the Chief Administrative Law Judge to issue an order annexing the School Property, without condition, within ten (10) days of the date of this Order."[22]

24. On March 7, 2016, the Office of Administrative Hearings requested permission to file a motion for reconsideration of the District Court's February 24, 2016 order.

25. On March 8, 2016, the Office of Administrative Hearings sought review in the Minnesota Court of Appeals of the District Court's February 24, 2016 Order pursuant to the authority of Minn. Stat. § 414.07 (2014) and Rule 103.03 (e), Minn. R. Civ. App. P.[23]

Rewind of Review

26. By stipulation of the parties effective pursuant to Minn. Stat. § 414.12, subd. 5 (2014):

a. The appeal to the Minnesota Court of Appeals was dismissed on March 28, 2016.[24]

b. On March 30, 2016, the District Court vacated its February 24, 2016 Order, and ordered the Township to "deposit the $35,000 it received from the Waconia Public Schools with the District Court until such time as this appeal is terminated or this Court otherwise determines the proper disposition of such funds."[25]

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[21] *Twp. of Franklin v. City of Delano*, A03-1751, 2004 WL 1327641, at *1 (Minn. Ct. App. June 15, 2004) (unpublished) (noting that district court "act[s] as an appellate tribunal").
[22] Findings of Fact, Conclusions of Law and Order issued by the Honorable Kevin W. Eide, Judge of First Judicial District Court, on February 24, 2016 and filed on February 26, 2016.
[23] Petition for Review, filed March 8, 2016.
[24] Minnesota Court of Appeals Order A16-388, dated March 28, 2016.
[25] Order Vacating February 24, 2016 Order Pursuant to the Stipulation of the Parties, filed March 30, 2016.

c. On March 30, 2016, the Township deposited the $35,000 tax reimbursement payment into the District Court pursuant to the terms of the District Court's March 30, 2016 Order which specifies that "[n]either the Township nor any other party to this case shall be deemed to have waived its right to appeal or otherwise challenge any aspect of an Office of Administrative Hearings order that has been issued or may issue in the future in this matter by virtue of the fact of the Township depositing the above-described $35,000 with this Court."[26]

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

CONCLUSIONS OF LAW

1. The annexation-by-ordinance action and the orderly annexation action present substantially the same issues of fact and law, orders in each case affect the rights of parties in the other case, and consolidation of the two actions would not prejudice any party given that the actions have already been consolidated at the District Court for purposes of review.[27]

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

3. The Municipal Boundary Adjustment Act authorizes the Chief Administrative Law Judge to scrutinize proposed municipal boundary changes "to protect the integrity of land use planning in municipalities and unincorporated areas so that the public interest in efficient local government will be properly recognized and served."[28]

4. 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.[29]

5. 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.[30]

6. In orderly annexation proceedings, the Office of Administrative Hearings

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[26] *Id.*
[27] Minn. Stat. § 414.01, subd. 5, and Rule 1400.6350, subp. 1 (2015),
[28] Minn. Stat. § 414.01, subd. 1b(3).
[29] Minn. Stat. § 414.0325, subd. 4.
[30] Minn. Stat. § 414.0325, subd. 1(h).

has authority to require compliance with Minn. Stat. § 414.036 notwithstanding the provisions of Minn. Stat. § 414.0325, subd. 1(h).

7. 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.

8. 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.

9. Minn. Stat. § 414.036 does not provide legal authority for the Township to impose upon the School District a $500 per acre tax reimbursement charge in order to obtain the Township's support for the requested annexation.

10. 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."

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

12. As property used for school and other public purposes is exempt from property taxes under Minn. Stat. § 272.02 (2014), after the point in time when the Property is fully dedicated to use for public purposes the Property will generate no tax revenue for the Township. Until that point in time, Parcel 1 will continue to generate a small amount of tax revenue for the Township, currently measured in total at $463.42 per tax year.

13. The Township has not levied any tax 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.[31]

14. 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 n tax reimbursement charge in annexation matters.

15. 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.[32]

16. 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 Second Amended 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.

17. 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:

[31] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[32] Minn. Stat. § 414.01, subd. 1b(3).

ORDER

1. OAH Docket No. 84-0330-32991 and OAH Docket No. 84-0331-32786 are consolidated for all purposes pursuant to Minn. Stat. § 414.01, subd. 5, and Rule 1400.6350, subp. 1 (2015).

2. The Property's annexation into the City is ordered conditional upon the Township's deposit of the $35,000 tax reimbursement charge into the District Court pending the resolution of the pending appeal in District Court File No. 10-CV-16-128 and/or the timely appeal resulting from review of this Second Amended Order Approving Annexation Upon Satisfaction of Condition.

3. Given that the Township has anticipatorily deposited the $35,000 tax reimbursement charge into the District Court in satisfaction of the condition identified in the District Court's March 30, 2015 Order and this Second Amended Order Approving Annexation Upon Satisfaction of Condition, the Chief Administrative Law Judge orders the Property **ANNEXED** to the City effective as of the date of this Second Amended Order Approving Annexation Upon Satisfaction of Condition.

4. Pursuant to Minn. Stat. § 414.036, the Township is authorized to collect a tax reimbursement charge of $463.42 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.

5. The costs of the annexation-by-ordinance matter, billed as required by law at $120 per hour, the approved hourly rate of the Office of Administrative Hearings, shall be borne by the parties as follows: to the Township – 99%; and to the City – 1%. An itemized invoice for costs will be sent under separate cover.

6. 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 1, 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. Once it is fully put to a public use by the School District, it will generate no property tax revenue to either the Township or the City.[33] Nevertheless, the landowner – a public school district – has been required to "reimburse" the Township for lost taxes at the rate of $500 per acre. It will take 70 years for the Property to generate $35,000 in taxes payable to the Township or the City, yet this is the amount it has been required to pay to the Township in order to obtain the Township's support for the requested annexation.

In the face of the Chief Administrative Law Judge's issuance of the Annexation Order and the Amended Annexation Order invalidating the Township's practice of imposing a tax reimbursement charge as a condition of support for the orderly annexation, the City moves for reconsideration and reversal. Relying exclusively on Minn. Stat. § 414.0325, both the City and the Township assert that the Chief Administrative Law Judge lacks authority to condition the order of annexation upon repayment of the $35,000 paid by the School District. In addition and in support of the City's motion, the Township continues to assert that it has the legal authority to impose the tax reimbursement charge in the present case. For the reasons and upon the authorities cited below, the Chief Judge disagrees in all respects.

I. The Orderly Annexation Statute Authorizes the Ordered Repayment.

The City and the Township assert that the Chief Administrative Law Judge has no authority to condition the requested annexation upon the repayment of the $35,000 tax reimbursement charge. They cite to the following statutory language in support of their

[33] Minn. Stat. § 272.02.

position:

> 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,[34] but shall, within 30 days, order the annexation in accordance with the terms of the resolution.[35]

The Joint Resolution in question contains a sufficient recitation of this statutory language.[36] Relying upon this language and an unpublished decision[37] of the Minnesota Court of Appeals,[38] the parties argue that the Chief Administrative Law Judge has no authority to examine the Township's legal authority to impose the $500 per acre tax reimbursement charge or condition the annexation order upon repayment of the charge, but must instead turn a blind eye to any obvious statutory nonconformities.

The parties' read the Joint Resolution too narrowly and the statute too broadly. The "review and comment" language contained in paragraph 4 of the Joint Resolution must be read in conjunction with the rest of the agreement's terms. In paragraph 7, 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." 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

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[34] The parties may argue that the "review and comment" provision of the statute provides an effective substitute for a direct judicial examination and identification of the lawful basis for the Township's fee-charging practice, in that the comments contained in an annexation order are publicly available for review and discussion. Experience has proven otherwise. At least as far back as 2004, the Office of Administrative Hearings and its predecessor agencies in municipal boundary adjustment matters, including the Department of Administration, Office of Strategic and Long-Range Planning and the Minnesota Municipal Board, have been issuing written comments on the legally unauthorized practice of townships charging fees outside the terms of Chapter 414.[34] *See In the Matter of the Orderly Annexation Agreement Between the City of Belle Plaine and the Town of Belle Plaine Pursuant to Minnesota Statutes 414*, OA-1042-1 (Nov. 10, 2004). As evidenced in the present matter, these "review and comment" admonitions have had no effect on the continuation of the Township's practices.

[35] Minn. Stat. § 414.0325, subd. 1(h).

[36] Joint Resolution, ¶ 4, p. 2.

[37] Unpublished decisions of the Minnesota Court of Appeals are not precedential and should not be cited as binding precedent. *Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672, 676 (Minn. 2004); *see* Minn. Stat. § 480A.03, subd. 3(c) (2014).

[38] In *City of Waite Park v. Minnesota Office of Admin. Hearings*, A05-1888, 2006 WL 1985457, at *6 (Minn. Ct. App. July 18, 2006) (unpublished) the Office of Administrative Hearings set a hearing to examine a township's reported desire to renegotiate the terms of an orderly annexation agreement, and so had not issued the annexation order requested by the City of Waite Park within the 30 days specified in Minn. Stat. § 414.0325 (2004). In an appeal stemming from a district court's grant of a writ of mandamus, the Minnesota Court of Appeals found that the Office of Administrative Hearings had failed to exercise its legal duty to order the annexation without a hearing and within the statute's 30-day deadline. This case is not instructive given the facts in the present matter as the Chief Administrative Law Judge did issue the Annexation Order within the 30-day timeframe and without hearing.

invalidate the remaining terms of the Joint Resolution. As such, the parties clearly evidenced their mutual understanding that the "review and comment" provision does not supercede or limit the Chief Administrative Law Judge's authority to examine the lawfulness or enforceability of the terms of the parties' orderly annexation agreement. This authority is grounded in the legislature's finding that while "joint resolutions for orderly annexation … should be encouraged,"[39] 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."[40]

As the parties' reading of the Joint Resolution ignored the severability provision in favor of the "review and comment" provision, so does the parties' reliance on section 414.0325, subd. 1(h), conveniently ignore subpart (c) of the same subdivision. Minn. Stat. § 414.0325, subd. 1(c), 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 5, the Joint Resolution provides: "The Township acknowledges that, by agreement of the parties, all tax reimbursement payments required by Minnesota Statues [sic] § 414.036 have been satisfied."[41] As the Chief Administrative Law Judge has jurisdiction over this provision, she not only has the legal authority to examine its factual and legal accuracy – she has the legal obligation to do so.

The statute cited in the Joint Resolution's provision, 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."[42] The statute does not exclude from its mandate orders issued pursuant to section 414.0325, subd. 1(h). 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."[43]

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, contrary to its stated terms, 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 unenforceable, the Joint Resolution no longer contains all the required "conditions for its annexation." Therefore, the Chief Administrative Law Judge has full authority to refuse to order the annexation until the required conditions are included and met. She has done so in issuing this order subject to the requirement that

[39] Minn. Stat. § 414.01, subd. 1a(5) (2014).
[40] Minn. Stat. § 414.01, subd. 1b(3) (2014).
[41] Joint Resolution, at 2, ¶ 5.
[42] Emphasis added.
[43] Minn. Stat. § 414.036.

the Township tender repayment to the School District of the unlawful $35,000 tax reimbursement charge and instead collect a $463.42 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.

This order is fully in compliance with the requirements of Minn. Stat. § 414.0325, subd. 1(h). The statute does not require that the annexation be ordered without conditions; it merely requires that annexation be ordered "in accordance with the terms of the resolution."[44] The Joint Resolution in the present case contains no terms that are contradicted by or contrary to the repayment requirement imposed by this order. In fact, compliance with the repayment requirement will cure the defect now evident in the Joint Resolution's tax reimbursement provision. It will make factually and legally accurate the parties' averment that "all tax reimbursement payments required by Minnesota Statues [sic] § 414.036 have been satisfied." Therefore, the parties' argument that Minn. Stat. § 414.0325, subd. 1(h), bars judicial examination of the lawfulness of the Township's practice is unpersuasive.

II. 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."[45] Noting that the statute directs that the terms of an orderly annexation agreement "shall be binding upon the parties" and not preempted

[44] Minn. Stat. § 414.0325, subd. 1(h).
[45] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township, at 2.

by Chapter 414 unless the contract so specifies, the Township argues that section 414.0325 authorizes its $500 per acre charge because the Joint Resolution referenced the fact that all required tax reimbursement payments had been made.[46] Essentially, the Township's argument breaks down as follows: (1) section 414.0325 authorizes contracts; (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.

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.[47] 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.

[46] *Id.*
[47] Minn. Stat. § 645.26, subd. 1 (2014).

2. Minn. Stat. § 414.036

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

> Unless otherwise agreed to by the annexing municipality and the affected town,[48] when an order or other approval under this chapter annexes part of

[48] Although no party has explicitly stated such in its filings, the parties' reference to an "agreement of the parties" in the tax reimbursement provision suggests that they believe the dictates of the statute can be avoided by agreement to a tax reimbursement charge measured by a per acre formula, which charge is passed on from the involved municipalities to the affected landowner. That is, they read the statute to require reimbursement based on foregone taxes only in situations in which the parties have not "otherwise agreed" to demand payments from whomever and at whatever amounts they believe to be appropriate. If the Township and the City hold this position, it is not supported by the rules of English grammar or Minnesota's rules of statutory construction.

Grammatically, Minn. Stat. § 414.036 is worded as follows:

> 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 sentence consists of three clauses: an independent clause (highlighted in blue); and two dependent clauses (one highlighted in green; one highlighted in yellow). Because both of the dependent clauses begin with a subordinate conjunction ("unless" and "when") each dependent clause modifies the independent clause. [See, PURDUE OWL ENGAGEMENT, *1.2: Coordination and Subordination*, https://owl.english.purdue.edu/engagement/2/1/37/ (last updated Aug. 7, 2009).]

The independent clause can stand on its own; it has a subject (*order or other approval*), verb (*must provide*), and direct object (*reimbursement … for all or part of the taxable property*), plus other modifiers of those primary parts of speech. In conformity with the rules of grammar, in essence it commands as follows: *the order must provide a reimbursement for all or part of the taxable property*.

The dependent clauses are exceptions: they limit the independent clause. Under the rules of statutory construction, "provisos," or statutory exceptions, "shall be construed to limit rather than to extend the operation of the clauses to which they refer." [For interpretive guidance see, THE OFFICE OF THE REVISOR OF STATUTES, MINNESOTA REVISOR'S MANUAL (2013), at 290, § 8.18, *available at* https://www.revisor.mn.gov/office/2013-Revisor-Manual.pdf.] Under this authority, the exception in the first independent clause does not provide broad authority for avoiding the directive of the dependent clause altogether. Instead, it changes "*the order must provide a reimbursement for all or part of the taxable property*" into "*unless otherwise agreed, the order must provide a reimbursement for all or part of the taxable property*."

One would have to ignore these rules in order to read the exception ("unless otherwise agreed") to expand the effect of the dependent clause in order to change "a reimbursement for all or part of the taxable property" into "a reimbursement [based on whatever other criteria the parties have] "otherwise agreed." This reading is not in compliance with Minnesota's rules of statutory construction, as it allows the exception ("unless otherwise agreed") to expand the effect of the dependent clause rather than limit it. Nor is it in compliance with prevailing rules of English grammar, as set forth above. [*See* Minn. Stat. § 645.08, subd. 1 (2014) ("In construing the statutes of this state, …(1) words and phrases are construed according to rules of grammar and according to their common and approved usage….")]

Reading the statute within the governing rules, it is clear that the parties can agree that they prefer not to have the issue of reimbursement addressed in the Annexation Order. Choosing not to have the reimbursement provision memorialized in the Annexation Order does not, however, allow the parties to avoid the statute's measurement criteria for reimbursement charges ("all or part of the taxable property

> 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.[49]

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."[50] The term "reimbursement" means "to pay back or compensate (another party) for money spent or losses incurred."[51] 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."[52]

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 have the Township nor the City 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."[53] The Minnesota legislature has

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annexed") and superimpose their own measurement criteria ($500 per acre). Therefore, the Township's annexation tax reimbursement charge violates the statute's direction that the municipality be reimbursed merely for "all or part of the taxable property annexed."

[49] Minn. Stat. § 414.036 (emphasis added).

[50] *Id*.

[51] *American Heritage Dictionary of the English Language, Fifth Edition* (2011).

[52] Minn. Stat. § 414.036.

[53] *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.[54] 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."[55] While "'[t]he legislature has broad discretion in selecting subjects for taxation and in granting tax exemptions',"[56] the fact remains that a tax must be legislatively authorized.[57] Neither the Township's general police powers nor its statutory authority to engage in land use planning activities provide

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[54] *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).
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> 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.
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> > 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.
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> *Denver St.,* 970 N.E.2d at 275 (alteration in original) (quoting *Emerson College,* 462 N.E.2d at 1105).

[55] *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)).

[56] *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).

[57] *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.")

it any authority to generate revenue outside of its existing ability to levy taxes or impose administrative fees.[58] 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.[59] The Township has conceded that it "has not adopted a written levy, assessment, ordinance, or administrative fee schedule" related to the tax reimbursement charge.[60] 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.[61] 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 upon the School District 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.[62] 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.

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[58] *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).
[59] Minn. Stat. § 462.353, subds. 4, 4a (2014).
[60] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township, at 4.
[61] *Id.*
[62] *Borough of Belle Plaine v. N. Power Co.,* 142 Minn. 361, 172 N.W. 217 (1919).

The Township did assert that the $500 per acre charge was necessary to defer the costs of improving a one-mile, graveled stretch of 94th Street which will host an increased amount of traffic once the School District expands its school facilities.[63] The Chief Administrative Law Judge finds this explanation for the charge to be suspect as a matter of both law and fact. Generally speaking, municipalities fund road improvements through their tax and special assessment authorities, as all members of the community benefit from the upgraded infrastructure. In this case, the road would be used by students attending the high school and their families attending community events, many of which undoubtedly reside within the Township. Thus, the Township could have simply increased its tax levy to pay for the road upgrade. The fact that it may have preferred to spare its citizens a tax increase does not lead to the conclusion that the charge to the School District is necessary, as that term is used in Minnesota Statutes, Chapter 365.

Third, it is clear that the School District is not a party to the Orderly Annexation Agreement or any other contract relevant to this proceeding. The Orderly Annexation Agreement makes no mention of party status being conveyed upon the School District in any manner. In fact, the record indicates that the School District did not reach a "meeting of the minds"[64] with the Township with regard to the charge; it appears that it was merely forced to hand over $35,000 in public funds in order to purchase the Township's acquiescence to the initial annexation-by-ordinance proceeding.[65] While the Township and the City are legally entitled to agree to negotiated terms between themselves as parties to the Orderly Annexation Agreement contract, they do not have the lawful power to bind a non-contracting party (the School District) to compliance with those terms.

Last, and most importantly, it is critical to recognize that the Township and the City have authority to act only for the common good and in the public interest, as authorized by legislatively-provided authority.[66] In Minnesota, municipalities are legislatively empowered to "provide for the government and good order of the city" and "the general welfare."[67] 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.

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[63] December 23, 2015 correspondence from Michael C. Couri, counsel for the Township, at 2.
[64] *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980).
[65] October 27, 2015 correspondence from the School District, attached to November 9, 2015 filing of the City.
[66] *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.'")
[67] Minn. Stat. § 412.221, subd. 32 (2014).

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.[68]

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 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 School District. 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

[68] *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.")

government's obligation to represent and pursue the public interest. Therefore, the tax reimbursement charge is unauthorized by and invalid under Minnesota law.

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.[69] Accordingly, the Chief Administrative Law Judge has issued this Second Amended Order Approving Annexation Upon Satisfaction of Condition, which by its terms allows the annexation to go into effect once the Township has tendered the $35,000 repayment into the District Court as required by the Chief Administrative Law Judge and by the District Court's March 30, 2016 Order.

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 primarily[70] 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.[71]

Some history is instructive.[72] 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 the services provided by administrative law judges[73] have been equitably apportioned to the parties to boundary adjustment matters under the authority of Minn. Stat. § 414.12.

In the present consolidated matter, various relevant orders issued in both the

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[69] *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.)

[70] 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.

[71] See Minn. Stat. §§ 14.53, 14.54.

[72] *See* Office of Administrative Hearings' website at http://www.mba.state.mn.us/History.html.

[73] 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.

annexation-by-ordinance action and the orderly annexation action contained provisions that apportioned costs to the parties, all issued in accordance with the agency's standard billings practices. These practices include a provision within the order defining the allocation proportions, accompanied by a reference to an amount to be invoiced in the future upon the final conclusion of the matter.

These provisions, together with the similar provisions contained in the present Order, are required by Minn. Stat. §§ 14.53,14.55 and 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"[74] but instead "the costs must be allocated on an equitable basis" by the Chief Administrative Law Judge unless otherwise agreed to by the parties.[75]

In the annexation-by-ordinance action, the Chief Administrative Law Judge allocated 99% of the costs to the Township, and 1% to the City. This allocation was based upon the Chief Administrative Law Judge's determination that the Township was responsible for the tax reimbursement charge practices at issue. Therefore it is equitable for the Township to bear the contested case proceeding costs related to that practice.

In the orderly annexation action, the Chief Administrative Law Judge allocated the costs equally to the Township and the City. This allocation was based upon the determination that both parties had equally acted to: withdraw the annexation-by-ordinance action; and execute the orderly annexation agreement within which they recited that the tax reimbursement provisions of Minn. Stat. § 414.036 had been satisfied notwithstanding their shared knowledge of the nonconformity of the $500 tax reimbursement charge with the precise language of the statute.

Upon consideration of the City's Motion for Reconsideration, the Chief Administrative Law Judge has reviewed the allocation of costs in light of the statutory directives cited above. Having found no statutory error, the apportionment provisions stand.

T. L. P.

[74] Minn. Stat. § 414.12, subd. 3(b).
[75] Minn. Stat. § 414.12, subd. 3(a), (c).