OAH Docket No. 84-0330-32991

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)	**AMENDED ORDER APPROVING ANNEXATION UPON SATISFACTION OF CONDITION**

On November 9, 2015, the city of Waconia (City) filed with the Office of Administrative Hearings a Joint Resolution for Orderly Annexation Between the Town of Waconia and the City of Waconia, Carver County, Minnesota (Joint Resolution), executed by the City and the Township of Waconia (Township). The Joint Resolution addressed the requested annexation of two parcels of real property consisting of approximately 70 acres (Property) owned by Waconia Public Schools, Independent School District No. 110 (School District), and presently located within the boundaries of the Township. Pursuant to Minn. Stat. § 414.0325 (2014), the City petitioned for an Order from the Chief Administrative Law Judge approving the orderly annexation of the Property, which Order would have the legal effect of detaching the Property from the Township and annexing it into the City.

On December 9, 2015, the Chief Administrative Law Judge issued an Order Approving Annexation upon Satisfaction of Conditions (Annexation Order). The Annexation Order specified that the annexation was granted effective on the date that the parties sufficiently supplemented the record to "establish that the Township has legitimate and lawful authority to charge the City and/or the School District a fee of $500 per acre for tax reimbursement for the loss to the Township of the Property."[1] The Township submitted correspondence dated December 18, 2015, including legal argument and various attachments.[2] The City submitted correspondence on December 22, 2015, addressing an issue related to access to the Property.[3] In correspondence dated December 23, 2015, the Township responded to the City's submissions.[4]

Michael C. Couri, Couri & Ruppe, PLLP, appears on behalf of the Township. The City appears through David P. Hubert, Melchert, Hubert and Sjodin, PLLP.

[1] Annexation Order, at 6.
[2] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[3] December 22, 2015 correspondence from David P. Hubert, counsel for the City.
[4] December 23, 2015 correspondence from Michael C. Couri, counsel for the Township.

Based upon a review of the filings submitted by the parties, the Chief Administrative Law Judge makes the following:

RESTATED AND AMENDED FINDINGS OF FACT

1. The parties to this proceeding include the City[5] and the Township.[6]

2. The Property is located adjacent to the current boundaries of the City and 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.[7]

3. The Property is located immediately adjacent to other properties owned by the School District that are operated as the Clearwater Middle School and the Waconia Senior High School, both of which are located completely within City boundaries.

4. The School District intends to use the Property to renovate and expand the middle school and the high school.[8]

5. 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.[9]

6. For tax year 2015, Parcel 1 generated tax liability to the Township in the

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[5] Minn. Stat. § 414.12, subd. 4(1) (2014).
[6] *Id*., subd. 4(2) (2014).
[7] Ordinance No. 690, Exhibit (Ex.) A (Aug. 15, 2015).
[8] *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.
[9] Carver County Property Report Card (Oct. 12, 2015), *available at* https://gis.carver.mn.us/publicparcel/.

amount of $463.42.[10]

7. 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.[11]

8. 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.[12]

9. In a related matter, filed by the City and the Township on August 24, 2015 pursuant to Minn. Stat. § 414.033, subd. 2(3) (2014), docketed as OAH Docket No. 84-0331-32786, the City sought annexation of the same Property through a petition for approval of a City Ordinance (Ordinance). The following statements of fact relate to the annexation-by-ordinance proceeding:

a. In Section 7 of the Ordinance, the City acknowledged the Ordinance was subject to the provisions of Minn. Stat. § 414.036 (2014), and also acknowledged receipt of a $35,000 payment to the Township labeled as "TAX REIMBURSEMENT" and described as follows:

> 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.

b. In Exhibit C to the Ordinance, the Township memorialized the following statements directed to the School District:

> "70 acres has been purchased by the Waconia Public Schools from the Waconia Township, as for annexation of the new school. **The agreement was made for the school to pay $500.00 per acre**. A check in the amount of $35,000.00 check number #5190040 was paid to the township on July 21, 2015."[13]

[10] Carver County Tax Information, submitted as an attachment to December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[11] Carver County Property Report Card (Oct. 12, 2015), *available at* https://gis.carver/mn/us/publicparcel/.
[12] Carver County Tax Information, submitted as an attachment to December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[13] Emphasis added.

c. On October 13, 2015,[14] the Chief Administrative Law Judge issued Findings of Fact, Conclusions of Law, and Order Regarding Supplementation of Record wherein, in relevant part, the Township was required to furnish "factual and/or legal authority related to its practice of charging the City and/or the School District a fee of $500 per acre for tax reimbursement for the loss to the Township of the Property," given the lack of identified statutory or other legal authority for the Township's apparent practice of charging an "annexation tax reimbursement payment" and in light of the applicable law as noted in the Memorandum made part of the Order.

d. 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.

e. On November 9, 2015, the City filed correspondence with the Office of Administrative Hearings wherein it stated as follows: "The City hereby withdraws its request to annex the Subject Property by ordinance."[15] The City further stated that "this withdrawal renders Judge Pust's order for information from the City moot…."[16]

f. The Township joined in the City's request for approval of the joint resolution and noted that it too "believe[d] that this previous request to annex by ordinance is now moot."[17]

g. Also attached to its November 9, 2015 filing, the City filed correspondence from the School District, dated October 27, 2015, wherein the School District states as follows:

> We are writing this letter to explain the Waconia Public School District outlook on the issues surrounding the annexation of school district property out of Waconia Township and into the City of Waconia. 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

[14] This filing was re-served on October 20, 2015 due to the original's return by the U.S. Postal Service related to an incorrect address.
[15] November 9, 2015 correspondence signed by Lane Braaten, Community Development Director for the City.
[16] *Id.*
[17] November 9, 2015 correspondence from Michael C. Couri, counsel for the Township.

> justification for the assessment they told us that they did not have to justify the assessment. We paid the fee to move the annexation process along.
>
> We are now in a position that we cannot get a permit to proceed with our project. With winter coming soon it is very important that this matter gets settled quickly. Failure to resolve this matter quickly will result in increased construction costs due to the extra costs to put foundations into frozen ground and inflation adjusted construction costs. This will potentially cost the district hundreds of thousands of additional construction dollars. All of this we were hoping to avoid by paying the $35,000 to the township. We have asked the township to give zoning authority of the property to the county who would then turn it over to the city of Waconia who would oversee the project and give final permit authority. The township will not agree to do this. Please help us!
>
> A timely resolution to this matter would be greatly appreciated.[18]

h. The last attachment to the City's November 9, 2015 filing was the Joint Resolution for Orderly Annexation executed between the City and the Township, filed in support of the City's and Township's "respectful[] request that an order approving the annexation be entered within 30 days," pursuant to Minn. Stat. § 414.0325 (2014).[19]

i. The Chief Administrative Law Judge's issued her Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice on November 20, 2015, and thereby dismissed with prejudice the City's annexation-by-ordinance proceeding.

10. As evidenced in the Joint Resolution filed on November 9, 2015, the City and the Township continue to seek the Property's detachment from the Township and annexation to the City, as requested by the School District in furtherance of its efforts to meet the community's needs for expanded public school facilities.

11. The Township: (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 and Minn. Stat. § 414.0325, subd. 6 (2014) as its legal authority to demand and collect the

[18] October 27, 2015 correspondence from ISD #110, Waconia Public Schools.
[19] November 9, 2015 correspondence signed by Lane Braaten, Community Development Director for the City.

"contracted payment."[20]

12. The Township has "not adopted a written levy, assessment, ordinance, or administrative fee schedule memorializing an annexation reimbursement policy."[21]

13. The Township has for years implemented a policy or practice of collecting tax reimbursement payments from other municipalities, as set forth below:

a. On June 11, 2007, the Township executed an Orderly Annexation Agreement with the City of Mayer, filed in OAH Docket No. OA-1341, which includes the following provision:

> Unless otherwise agreed, to allow the Township to be reimbursed for the permanent loss of taxable property from township tax rolls for property in the OAA, the City agrees that it will not initiate annexation or forward a resolution for annexation of property described in Exhibit 1 to the Office of Administrative Hearings, or its successor agency, until such time as that City receives written confirmation from the Township that the Township has received reimbursement for the loss of such taxable property in accordance with then existing **Township's Annexation Taxation Reimbursement Policy** from the person or party requesting such annexation. However, it is agreed that as to any residential developed parcel less than 10 acres, the City will pay a one time reimbursement to the Township of $500.00 per acre at the time of annexation of the parcel.[22]

b. On or about December 22, 2004, the Township executed an Orderly Annexation Agreement with the City of Waconia and filed in OAH Docket No. OA-1115, which includes the following provision:

> Each time any portion of the OA Area is annexed to the City pursuant to this Joint Resolution, the City shall pay the Township a sum equal to the Per Acre Reimbursement Amount (as defined below) multiplied by the acreage of the parcel then annexed. Such sum shall be paid in two equal installments, the first which shall be paid within thirty days of the day the property is annexed and the second which shall be paid on the first anniversary of the initial payment. The City shall determine the acreage of each parcel annexed and such determination shall be binding upon the Township absent manifest error. For purposes of this section:
>
> The **"Per Acre Reimbursement Amount"** means $250.00 until

[20] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township.
[21] *Id.*
[22] Orderly Annexation Agreement between the Township and the City of Mayer dated June 11, 2007 and filed in OAH Docket No. OA-1341. (Emphasis added.)

> July 1, 2008. On July 1, 2008 and on July 1 of each year thereafter the Per Acre Reimbursement Amount shall increase by three percent over the amount paid during the preceding twelve month period.
>
> Property shall be deemed "annexed" on the day the MBA orders annexation.[23]

14. The Chief Administrative Law Judge makes no findings related to Property access from or involving 94th Street or responsibility for the maintenance thereof, those issues not being properly before this administrative court for determination.

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

RESTATED AND AMENDED CONCLUSIONS OF LAW

1. Orderly annexations are governed by the provisions of Minnesota Statutes, chapter 414 (2014) (Municipal Boundary Adjustment Act) and, most specifically, by Minn. Stat. § 414.0325.

2. The Chief Administrative Law Judge is authorized to review and approve an orderly annexation pursuant to Minnesota Statutes, chapter 414, and Minn. R. 6000 (2015).

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.[24]

4. 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."[25]

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.[26]

6. Although Minn. Stat. § 414.0325 authorizes municipalities to execute a joint

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[23] Orderly Annexation Agreement between the Township and the City of Waconia dated December 22, 2004 and filed in OAH Docket No. OA-1115. (Emphasis in original.)
[24] Minn. Stat. § 414.0325, subd. 4.
[25] Minn. Stat. § 414.01, subd. 1b(3).
[26] Minn. Stat. § 414.0325, subd. 1(h).

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 any reimbursement payment terms that violate the criteria set forth in Minn. Stat. § 414.036.

7. Given Minnesota's rules of statutory construction which provide that a more specific statute prevails over a more general provision in the same or another statute,[27] the more specific reimbursement criteria of Minn. Stat. § 414.036 prevails over the more general language of Minn. Stat. § 414.0325. Section .0325 merely authorizes municipalities to agree to "negotiated terms and conditions" but does not specifically identify approved criteria for reimbursement for the loss of property through annexation.

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 charge the School District a $500 per acre fee 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 (2014) 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 charge the School District a $500 per acre fee 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

[27] Minn. Stat. § 645.26, subd. 1 (2014).

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.[28]

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 charging an annexation tax reimbursement fee.

15. The Township's practice of charging landowners, 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 cannot be enforced or allowed to continue in that it does not serve the public interest in efficient local government.[29]

Based upon these Restated and Amended 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:

RESTATED AND AMENDED ORDER

1. Pursuant to Minn. Stat. § 414.0325, the Joint Resolution properly supports this Order.

2. Pursuant to the terms of the Joint Resolution and this Restated and Amended Order, the Property is **ANNEXED** to the City **effective as of the date that the Township surrenders to the School District the legally unauthorized tax reimbursement charge of $35,000,** calculated at the rate of $500 per acre with respect to the annexed Property.

3. 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" under the statute.

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

4. 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: January 19, 2016

s/Tammy L. Pust

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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.

RESTATED AND AMENDED MEMORANDUM

This is the second filed proceeding whereby the parties seek to detach certain Property from the Township and annex it to the City. Although continued delay of the planned expansion of the community's public schools causes financial hardship to the community, the Township and the City have chosen to delay the proceedings by voluntarily withdrawing their prior annexation-by-ordinance filing and refiling the present action under the orderly annexation statute. Apparently, they initially did so in an attempt to avoid this administrative court's ordered identification of their legal authority to charge a $500 per acre "tax reimbursement fee" to a property owner wishing to avail itself of statutorily-allowed annexation processes.

When that attempt proved unsuccessful, the Township eventually asserted 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 that is what it does - 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.

I. Chapter 414 Does Not Authorize the $500 Per Acre Fee.

Minnesota Statutes, chapter 414, governs municipal boundary adjustments, including annexations. The Township claims that it has a contractual right to collect the fee and cites to two sections of Chapter 414 in support of its claimed authority for the alleged contractual right: Minn. Stat. § 414.0325 and Minn. Stat. § 414.036. Neither of these provisions support the Township's claim of authority.

A. Minn. Stat. § 414.0325

According to the Township, Minn. Stat. § 414.0325, subd. 6, authorizes it "to contract via orderly annexation agreement."[30] 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 argues that the statute authorizes its $500 per acre fee because the orderly annexation agreement referenced the fact that all required tax reimbursement payments had been made.[31] Essentially, the Township's argument breaks down as follows: (1) Section 414.0325 authorizes contracts; (2) Minn. Stat. § 414.036 authorizes tax reimbursement fees; (3) therefore all types contracts, even tax reimbursement fee-related contracts, are authorized by Section 414.0325.

The Township's argument is a false syllogism. It is true that Minn. Stat. § 414.0325, subd. 6, authorizes municipalities to enter into contracts. It is also true that Minn. Stat. § 414.036 authorizes municipalities to collect certain tax reimbursement fees, specifically those tied to "all or part of the taxable property annexed as part of the order." Nothing in the existence of those two facts leads to the conclusion that the first cited statute operates to nullify the specific criteria identified in the second statute's description of the mechanism for valuing tax reimbursement payments.

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.[32] As such, the more specific reimbursement criteria of Minn. Stat. § 414.036 prevails over the more general language of Minn. Stat. § 414.0325. Section .0325 merely authorizes municipalities to agree to "negotiated terms and conditions" but does not specifically identify approved criteria for reimbursement for the loss of property through annexation. Those criteria are found in Minn. Stat. § 414.036,

[30] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township, at 2.
[31] *Id.*
[32] Minn. Stat. § 645.26, subd. 1 (2014).

which requires "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." Nothing in Section .036 allows a municipality to deviate from this statutory scheme and charge a landowner for the privilege of having his or her local government stand silent on a proposed change in municipal boundaries, an arrangement unrelated to the value of taxable property lost. Therefore, the Township's reliance on Minn. Stat. § 414.0325 is misplaced.

B. 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,[33] when an order or other approval under this chapter annexes part of

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[33] Although no party has explicitly stated such in its filings, it may be that the Township believes it can avoid the dictates of this statute entirely because it and the City have "otherwise agreed" to a tax reimbursement fee measured by a per acre charge, which is passed on from the involved municipalities to the affected landowner. That is, they may 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

> 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.[34]

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." The term "reimbursement" means "to pay back or compensate (another party) for money spent or losses incurred."[35] 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."

II. Contract Law Does Not Authorize the Township's Fee.

As they have failed to identify any authority for the fee in Chapter 414, neither have the Township nor the City identified any other authority in law in support of the fee-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

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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 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."

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

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

powers which have been expressly conferred."[36] The Minnesota legislature has authorized municipalities to generate revenue by tax or by fee.[37] The Township's tax reimbursement fee constitutes neither.

With respect to levying or assessing taxes, municipalities only have the authority "granted to them by Constitution or the statutes."[38] While "'[t]he legislature has broad discretion in selecting subjects for taxation and in granting tax exemptions',"[39] the fact remains that a tax must be legislatively authorized. 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 administrative fees.[40] The Township has not identified any tax statute authorizing it to assess a tax in the form of a "tax reimbursement fee" because none exists.

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[36] *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).

[37] *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).
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> 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).

[38] *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)).

[39] *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).

[40] 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).

Neither has the Township attempted to justify the "tax reimbursement fee" 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.[41] The Township has conceded that it "has not adopted a written levy, assessment, ordinance, or administrative fee schedule" related to the tax reimbursement charge.[42] Therefore, the record does not support a finding that the "tax reimbursement fee" 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. 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 charge the School District a $500 per acre fee 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.[43] 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 petition, or choose to oppose the petition, without requiring payment of the tax reimbursement fee. As established in the docket at the Office of Administrative Hearings, municipalities across the state of Minnesota do it every day.

The Township did assert that the $500 per acre fee 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.[44] 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

[41] Minn. Stat. § 462.353, subds. 4; 4a (2014).
[42] December 18, 2015 correspondence from Michael C. Couri, counsel for the Township, at 4.
[43] *Borough of Belle Plaine v. N. Power Co.,* 142 Minn. 361, 172 N.W. 217 (1919).
[44] December 23, 2015 correspondence from Michael C. Couri, counsel for the Township, at 2.

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.

And factually, the Township's attempt to link the $500 per acre charge to a specific expenditure, albeit only a hypothetical one at this point in time, raises questions regarding the coincidence between the instant charge and similar charges identified by the Township. The other OAH dockets identified above do not evidence any road improvement needs justifying a $500 per acre charge, yet that is the amount charged by the Township in every other annexation initiated under those orderly annexation agreements. Given the record, it appears that the Township simply imposes a $500 per acre charge every time it consents to an annexation, and that the condition of needed road improvements is irrelevant to the amount or imposition of the charge in the present case.

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"[45] with the Township with regard to the fee; 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.[46] 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's interest, as authorized by legislatively-provided authority. [47] 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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[45] *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980).

[46] October 27, 2015 correspondence from the School District, attached to November 9, 2015 filing of the City.

[47] *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.'")

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 citizens 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.[48]

Under the Township's practice, residents 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 delays. 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 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 reduced the offer to writing and Neighborhood A came up with the funds. As a result, the municipality exercised its discretion to protect Neighborhood A and to place the road in Neighborhood B. When challenged as unfair by Neighborhood B, 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 judge how 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 either the City or the School District.[49] 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 meeting, or a contract executed in

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[48] *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.")

[49] It is clear from the record that the School District paid the charge; however, it is not clear whether the School District paid the charge on behalf of the City or on its own behalf.

accordance with the government's obligation to represent and pursue the public interest. Therefore, the record does not support a finding that the charge is authorized by Minnesota law.

III. The Annexation Statute Supports the Ordered Condition.

The filing of the Joint Resolution confers jurisdiction on the Chief Administrative Law Judge over the terms of the Joint Resolution and annexations in the designated area.[50] The parties to a joint resolution can limit that jurisdiction in two ways. First, by including specific language in a joint resolution the parties can foreclose the Chief Administrative Law Judge from altering property boundaries in annexation matters.[51] Second, the parties to a joint resolution can avail themselves of the following statutory provision:

> 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.[52]

The Chief Administrative Law Judge is mindful that the Joint Resolution in question contains a verbatim recitation of the statutory language allowing "review and comment" but noting that "no consideration by the chief administrative law judge is necessary."[53]

Some 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. The Office of Administrative Hearings, and the formerly designated authorities 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 practice of townships, primarily located in Carver County, charging fees outside the terms of the statute at least as far back as 2004,[54] to no avail. Over time, these comments have raised at least two concerns relative to the application of Minn. Stat. § 414.036:(1) the statute allows reimbursement only "for all or part of the taxable property," and yet certain townships charge a standardized per acre

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[50] Minn. Stat. § 414.0325, subd. 1(c).
[51] *Id.*, subd. 1(g).
[52] *Id.*, subd. 1(h). Note: In an unpublished decision of the Minnesota Court of Appeals, this provision has been found to create "a legal duty to order the annexation of the property. OAH [can] review and comment on the resolution for the property at issue, but it [is] required to order the annexation within 30 days." *City of Waite Park v. Minnesota Office of Admin. Hearings*, A05-1888, 2006 WL 1985457, at *6 (Minn. Ct. App. July 18, 2006). Unpublished decisions of the 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).
[53] Minn. Stat. § 414.0325, subd. 1(h).
[54] As one example, s*ee 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).

fee no matter the taxable value of the subject property; and (2) the statute defines reimbursement as "between the municipality and the town," yet many townships directly charge the per acre fee to the property owner. From the fact that these processes continue, it seems reasonable to conclude that the municipalities that engage in this practice, including Waconia Township, have not re-examined it in light of the dictates of Minn. Stat. § 414.036 as identified in the "review and comment" provisions of earlier annexation orders.

While the statute appears to require the Chief Administrative Law Judge to "order the annexation in accordance with the terms of the resolution," the statute also confers jurisdiction on the Chief Administrative Law Judge "over the various provisions in [the joint resolution."][55] In the present case, 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."[56] As the Chief Administrative Law Judge has jurisdiction over this provision of the Joint Resolution, she is required to determine whether the statute's criteria have been met in order to include the appropriate "reimbursement from the municipality to the town for all or part of the taxable property annexed as part of the order" in the annexation order.[57]

The Property currently generates less than $500 per year in property taxes to the Township, and once it is fully put to a public use it will generate no tax revenue to the Township or the City.[58] Therefore, the landowner should not be required to "reimburse" the Township at the rate of $500 per acre for lost taxes, a rate which generates $35,000 - an amount that would take 70 years for the Property to generate in taxes payable to the Township.

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.[59] Accordingly, the Chief Administrative Law Judge has issued this Amended Order Approving Annexation Upon Satisfaction of Condition, which by its terms allows the annexation to go into effect on the date the Township choose to return the unauthorized tax reimbursement charge to the School District.

T. L. P.

[55] Minn. Stat. § 414.0325, subd. 1(c).
[56] Joint Resolution, at 2, ¶ 5.
[57] Minn. Stat. § 414.036.
[58] Minn. Stat. § 272.02.
[59] *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.)