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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

First Baptist Church of St. Paul, Krinkie Company, J. James Walsh, 475 Cleveland Assoc. LLC, Dart Transit et. al.

Plaintiffs/Appellants,

vs.

City of St. Paul,

Defendants/Respondents.

Court File No. 62-CV-18-7686
Honorable Robert A. Awsumb

ORDER GRANTING JUDGMENT IN FAVOR OF PLAINTIFFS

Christina Anderson and Simon Taghioff, et al.,

Plaintiffs/Appellants,

vs.

City of St. Paul,

Defendants/Respondents.

Court File No. 62-CV-19-4884
Honorable Robert A. Awsumb

ORDER GRANTING JUDGMENT IN FAVOR OF PLAINTIFFS

The above-entitled matters came on for a bench trial based on stipulated facts before the Honorable Robert A. Awsumb, Judge of Ramsey County District Court, on March 2, 2022. Ben Loetscher, *Esq*., appeared on behalf of Plaintiffs. Anissa Mediger, *Esq*., appeared on behalf of Defendants. This is an appeal of a special assessment under Chapter 14 of the Saint Paul City Charter. The matter was submitted on the basis of Joint Stipulation(s) of Facts for Trial, along with written briefs and oral argument. The parties have stipulated that the only issue before the Court is whether Minnesota Statute §429.101, the City's charter and

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ordinances, and/or Laws of Minnesota 1967 Chapter 442 ¶¶ 1-2 ("1967 Special Law") authorize the City to charge Plaintiffs' properties for sweeping, lighting, and milling and overlay work as a fee, or whether the charges assessed are a tax requiring proof of special benefit to Plaintiffs.

Based on all the files, pleadings, records, and proceedings herein, and on the arguments and submissions of the parties, the Court issues the following:

ORDER

The Court hereby orders that the charges at issue are a tax requiring proof of special benefit to Plaintiffs. The Court therefore rules in favor of Plaintiffs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: May 2, 2022

May 2 2022 2:04 PM
Robert A. Awsumb
District Court Judge

JUDGMENT
I hereby certify the foregoing order constitutes the Judgment of the Court.
Court Administrator
Derek Reichstadt, Deputy Clerk

Reichstadt, Derek
May 3 2022 2:30 PM

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MEMORANDUM

This is an appeal of a special assessment under Chapter 14 of the Saint Paul City Charter. Plaintiffs are various property owners who are appealing the City of St. Paul's ("City") special assessments charged for sweeping, lighting, and mill and overlay ("M&O") maintenance services performed on the streets abutting their property. Plaintiffs contend that the charges constitute a non-uniform tax, and because the services do not confer a special benefit on the property, the charges do not have a legal basis. Case law has held that non-uniform taxes, unlike fees charged under a municipality's police powers, require a showing of special benefit to the properties charged. *See First Baptist Church of St. Paul, et. al., v. City of St. Paul,* 884 N.W.2d 355 (Minn. 2016). *See also Carlson–Lang Realty Co. v. City of Windom,* 307 Minn. 368, 369, 240 N.W.2d 517, 519 (1976).

The City contends that Plaintiffs' arguments fail as a matter of law because the state legislature passed a Special Law in 1967 specifically allowing the City of St. Paul to impose special charges for certain services, including sweeping, lighting, and M&O work as fees. The City also argues that Minnesota Statute § 429.101 authorizes special charges for those specific services, and because the costs associated with the services are a fee and not a tax, the City need not demonstrate a special benefit. They ask that Plaintiffs' appeals be dismissed with prejudice.

Although not officially consolidated, Plaintiffs and Defendant have agreed to submit these cases for judicial determination jointly before this Court. The parties have stipulated that the only issue before the Court is whether Minnesota Statute

§429.101, the City's charter and ordinances, and/or Laws of Minnesota 1967 Chapter 442 ¶¶ 1-2 ("1967 Special Law") authorize the City to charge Plaintiffs' properties for sweeping, lighting, and M&O work as a fee, or whether such charges are actually a tax requiring proof of special benefit to Plaintiffs. Anderson Joint Stipulation of Facts for Trial at 9. First Baptist 2018 Joint Stipulation of Facts for Trial 7-8. Plaintiffs in both of these cases ("*Anderson*") ("*First Baptist 2018*") are seeking a judgment from this Court that the charges at issue are taxes, not fees.

The City has conceded for the purpose of these cases that it does not seek to show any special benefit to Plaintiffs' property as would be required for a lawful exercise of the taxing power. The City seeks only to uphold the charges as an exercise of its police power to collect fees as specially authorized by statute. Anderson Stip. 7, 9. First Baptist 2018 Stip. 5, 7.

FACTUAL AND PROCEDURAL BACKGROUND

The record in this case is extensive, but the parties have filed Joint Stipulation(s) of Facts for Trial, dated February 9, 2022, with respect to each of these cases. Those Stipulations need not be fully restated here. In summary, the Plaintiffs are appealing from the City's efforts to assess Plaintiffs' properties for three categories of work conducted pursuant to the City's Street Maintenance Services Program ("SMSP") – M&O work in *Anderson* and sweeping and lighting in *First Baptist 2018*. Anderson Stip. at 3. First Baptist Stip. at 3. Plaintiffs and the City have agreed that both cases present the same issue of law and there is no difference between the two cases for purposes of this trial. The Stipulations are

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incorporated herein, and in the interest of brevity the background of the case will only be summarized here in rudimentary form.

1. Prior to this trial, the City's Right of Way Maintenance Program ("ROW") was the subject matter of a prior lawsuit captioned *First Baptist Church of St. Paul, et. al., v. City of St. Paul,* 884 N.W.2d 355 (Minn. 2016) (hereinafter "*First Baptist 2016*"). The plaintiffs in that case were property owners whose property was adjacent to the streets upon which ROW services were performed. Those property owners were challenging ROW charges against them, and the Minnesota Supreme Court sided with them in holding that the charges were a tax and not a fee.
2. As a result of the supreme court's ruling in *First Baptist 2016*, the City replaced the ROW program with the SMSP. The ROW had charged for approximately 27 different types of services, four of which included sweeping, lighting, seal coating, and mill and overlay work ("M&O"). Anderson Stip. at 1. The SMSP is different from the ROW in that the SMSP only imposes charges for sweeping, lighting, seal coating, and M&O, and not the other 23 services which were a part of the ROW. *Id.* at 2. The SMSP is also different from the ROW in that it charges property owners for work already performed rather than charging an estimate for work to be completed. *Id.* 2, 4. The SMSP is the program currently at issue before this Court.
3. The Plaintiffs in *First Baptist 2018* are property owners in St. Paul who are challenging the validity of SMSP charges against them for sweeping and

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lighting. The Plaintiffs in *Anderson* are property owners in St. Paul who are challenging the validity of SMSP charges against them for M&O work.

4. The parties have agreed to present these matters together for a bench trial. *Id*. at 1. First Baptist 2018 Stip. at 1.

DISCUSSION

This case presents a legal question: whether the special charges are a fee authorized under the City's police powers or whether they are a tax under the City's taxing powers. Taxes which are not uniform to all property owners in a municipality are only legal where there is a showing of special benefit to the property owners charged. *First Baptist (2016),* 884 N.W.2d at 358. *See also Carlson-Lang Realty Co. v. City of Windom*, 307 Minn. 368, 369, 240 N.W.2d 517, 519 (1976). The City has chosen not to pursue a showing of special benefit, so the issue before the Court is relatively narrow in scope. The parties agree that the previous case *First Baptist 2016* is highly relevant to the current one, as the facts are substantially analogous, though the programs at issue are different.

Plaintiffs argue that *First Baptist 2016* is essentially the same as the current case, controlling, and requires a finding that the special charges at issue here are taxes. The City argues that the present case is distinguishable from *First Baptist 2016* because the ROW program at issue in that case was far more comprehensive than the SMSP at issue in this case – which was purposefully crafted to conform and comply with the supreme court's ruling in *First Baptist 2016* so as to be a lawful exercise of the City's police powers.

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Courts utilize a two-part analysis when considering whether a charge is a fee or a tax. *First Baptist (2016)* 884 N.W.2d at 359.

(1) Consider the language used to authorize the charge; then

(2) Look to the substance of the charge to determine its primary purpose. *Id*.

"The city's characterization of the nature of the charge is relevant, but not conclusive." *Id.* (citing *Country Joe v. City of Eagan*, 560 N.W.2d at 686; and *Hendricks v. City of Minneapolis*, 207 Minn. 151, 155, 290 N.W. 428, 430 (1940)). "Determining whether a particular charge imposed by a city is an exercise of the taxing power or the police power requires a court to examine the charge's 'primary purpose.'" *Id.* (citing *Farmers Ins. Grp. V. Comm'r of Taxation*, 278 Minn. 169, 174, 153 N.W.2d 236, 240 (1967). "If 'a city's true motivation was to raise revenue—and not merely to recover the costs of regulation,' the charge is a tax." *Id.* (citing *Country Joe,* 560 N.W.2d at 686).

As already mentioned, the ROW program involved charges for 27 kinds of services, while the SMSP program only includes special charges for sweeping, lighting, seal coating, and M&O. The City makes several arguments to distinguish this case from *First Baptist 2016*:

(1) The City argues that the language of the laws relied upon to authorize the SMSP and the mechanisms by which the SMSP operates indicate it is a fee and not a tax. The City points out several key terms and mechanisms which it believes are indicators of police powers rather than taxation powers.

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a. One reason why the 2016 court found the ROW to be a tax rather than a fee is that the ROW program involved charging via an invoice with an estimate for services to be performed, which created a potential for assessments in excess of the benefits provided. *See id. at* 361. The City believes it has eliminated this factor with the SMSP, which instead charges for services already performed. Another mechanism which indicates fees rather than taxes under is if the funds collected are held in a segregated account. *Id*. at 364. Like the ROW funds in *First Baptist 2016*, the SMSP funds are held in a segregated account. First Baptist 2018 Defendant's Trial Brief at 16. Anderson Defendant's Trial Brief at 15.

b. The City asserts that the terms it uses in the City ordinances authorizing the SMSP and the language of Minnesota Statute § 429.101 and the 1967 Special Law are all indicative of police powers and not tax powers under the reasoning of *First Baptist 2016*. The City points out that the use of terms such as "charge" and "service" tend towards an interpretation that the special assessments are fees and not taxes. *See First Baptist (2016)* 884 N.W.2d at 360.

c. The scope of the SMSP is narrower than the ROW and it has been specifically tailored to come into conformity with the ruling of *First Baptist 2016*. Unlike the ROW, the City created the SMSP to only include services specifically authorized by the Legislature. The City argues that the 1967 Special Law authorizes the City to collect special charges for street related

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services such as street surfacing, street oiling, street flushing, and street cleaning. In addition, they argue that Minn. Stat. § 429.101 allows the City to assess for street sprinkling or other dust treatment of streets, trimming and care of trees, repair of sidewalks and alleys, and the operation of a street light system. Defendant's Responsive Trial Brief at 7. The SMSP is tailored to only include those kinds of services. Anderson Stip. at 2. First Baptist 2018 Stip. at 2.

(2) The City also argues that although charges under § 429.021 have been held to fall under the taxing power and require a showing of special benefit, no court has ever held that special charges under § 429.101 fall under the taxing power. In this case, the City is not relying on § 429.021 as it did in *First Baptist 2016*. Anderson Stip. at 2. First Baptist Stip. at 2. First Baptist 2018 Def.'s Br. at 10. Anderson Def.'s Br. at 9. Def.'s Resp. Br. at 7.

(3) The services provided under the SMSP regulate matters of public health and safety, and the City has wide discretion to use its police powers to regulate such matters. Anderson Def.'s Br. at 10. First Baptist 2018 Def.'s Br. 11, 17. Def.'s Resp. Br. at 11.

(4) The primary purpose of the SMSP assessments is not to raise revenue, but to recoup the cost of exercising the City's police powers. First Baptist 2018 Def.'s Br. at 16. Anderson Def.'s Br. at 15.

Plaintiffs argue that none of these changes meaningfully distinguish the present cases from *First Baptist 2016*, and that in essence, the SMSP is simply an

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attempt by the City to maneuver around the ruling of the previous case by characterizing what were already held to be taxes as fees through manipulative language and legal rhetoric. Plaintiffs' Consolidated Responsive Brief at 11. They contend that an application of the legal test used to determine whether a charge is a fee or a tax will yield the same result as it did in *First Baptist 2016*. *Id*. at 7.

The language of the laws relied upon

The first prong of the two-part test involves analyzing the legal language which the City relies upon to authorize the special charges. In *First Baptist 2016*, the City largely relied on its Charter to justify its characterization of the charges as fees under the police power. Even so, the supreme court did not agree with the City's characterization of its own Charter. *First Baptist (2016)* 884 N.W.2d at 361. In the present matter, the City relies on its Charter, the 1967 Special Law, Minnesota Statute § 429.101, and Chapter 62 of the St. Paul Administrative Code ("the City ordinance").

The City points out that the use of terms like "charge" and "service" in its ordinance were mentioned by the 2016 court as terms which indicate a fee rather than a tax. *Id.* at 360. However, the 2016 court looked beyond such characterizations in determining that "as a whole… the charge is a tax." *Id*. In the 1967 Special Law, the legislature specifically authorized the City of St. Paul to "provide for the collection of special charges for all or any part of the cost of the following service to streets or other public property: street surfacing, street oiling, street flushing, and street cleaning as a special assessment against the property

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benefitted." 1967 Special Law, Chpt. 422, section 2. The City also points out that in § 429.101, the legislature authorized municipalities to "provide for the collection of unpaid special charges as a special assessment against the property benefitted" for various types of enumerated services. Minn. Stat. § 429.101, subd. 1 and subd. 3(b)(3). The City argues that this type of language indicates that the legislature intended to allow the City to charge property owners for these services under its police powers.

The Court notes that under *First Baptist 2016* uses of the terms "charges" and "services" are indicative of a police power fee, but also notes the presence of the phrase "property benefitted" in both the 1967 Special Law and Minn. Stat. § 429.101. It would be inappropriate to read only some of the terms but not all of them. A statute should be interpreted to give effect to all of its provisions. Minn. Stat. §§ 645.16, 645.17 (2020). "No word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Amaral v. Saint Cloud Hospital*, 598 N.W.2d 379, 384 (Minn. 1999).

The City asserts that the phrase "property benefitted" used in § 429.101, the 1967 Special Law, and the City ordinances bears no relation to the requirement of a special benefit.

> Although Minnesota Statute § 429.101, the 1967 Special Law and the current City Ordinances all include language such as "property benefitted" or "benefitted property," this does not mean that there is a requirement of showing a "special benefit" like there is for a "special assessment" for a local improvement. Instead, reference to "property benefitted" is language used to designate which properties can be billed for "special charges" for the services provided.

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First Baptist 2018 Def.'s Br. at 14.

> While not done city-wide, street surfacing is a multi-property (and even multi-street) process, not one directed at an individual property. While street surfacing provides benefit to the properties served, the services are unlikely to increase the market value of the property benefited. As a result, the special charges were intended by the legislature as a fee – one not tied to the "special benefit" to the property.

Anderson Def.'s Br. at 18. The City does not reference any case law to support this argument but rather relies on the canon of statutory construction absurd results doctrine.

This Court does not agree that interpreting the phrase "property benefitted" as a reference to the special-benefit standard creates an absurd result. To the contrary, the Court finds that the phrase indicates that a benefit must be shown to a specific property in order for a special assessment to be legally justified. The phrases are related. In fact, this is exactly in line with what the Minnesota Supreme Court held in *First Baptist 2016*. "The ROW assessment is to be charged against the 'property benefited.' This is the same phrase used when considering whether a special assessment may be imposed under the taxing power." *First Baptist (2016)* 884 N.W.2d at 360. (citation omitted) (citing *Hartle v. City of Glencoe,* 303 Minn. 262, 265, 226 N.W.2d 914, 917 (1975)) (also citing Minn. Const. art. X, § 1). This interpretation also falls in line with the very language of the Minnesota Constitution, which enables municipalities to collect assessments against ***property benefitted*** [emphasis added]. Minn. Const. art. X, § 1. There is no reason to depart from the logic the supreme court used in interpreting the exact same two phrases.

This Court does not find the City's argument persuasive as it relates to the interpretation of the phrase "property benefitted." However, even if the Court were to agree with the City's interpretation of that phrase, there are multiple problems with the City's other arguments on statutory interpretation.

The City asserts that the legislature has authorized it to collect fees for the enumerated services in Minn. Stat. § 429.101 and the 1967 Special law. The Court agrees, but also finds that this authorization is not unlimited. The street maintenance services listed in § 429.101 and the 1967 Special Law are empowered under the police powers sometimes but not always. They may be fees in some situations, but not in every situation. For example, in *American Bank,* the City of Minneapolis charged the plaintiff for services performed to remedy a public nuisance created on the plaintiff's private property. *American Bank of St. Paul v. City of Minneapolis*, 802 N.W.2d 781, 787-88 (Minn.App.2011). The court of appeals ruled that the municipality was exercising its police power when it assessed the plaintiff for the cost of removing the nuisance:

> The property's areaway interfered with Hennepin County's right-of-way and posed a safety hazard during the reconstruction of East Lake Street. This constitutes a nuisance that, under the city ordinance, the property owner is financially responsible for removing. *See* Minn. Stat. § 561.01 (2010) (defining nuisance as "[a]nything which is injurious to health, ... or an obstruction to the free use of property")….

Id. (citations omitted). The *American Bank* court focused on the removal of a nuisance as a reason for finding that the charges at issue in that case related to an exercise of the police power, and thus the charges were fees. The court highlighted nuisances in listing some of the specific services authorized under § 429.101 for

which a city may be empowered to assess specific properties.

> Minnesota statutes permit cities to collect assessments to defray the cost of regulatory services. For example, a city may collect "unpaid special charges" in the form of "a special assessment against the property benefited for all or any part of the cost" of, among other enumerated services, the removal of snow and ice from sidewalks, the removal of weeds and diseased trees, and the inspection of housing code violations. Minn. Stat. § 429.101, subd. 1 (2010) … Under the distinction recognized in *Country Joe* and in other jurisdictions, these assessments are not collected to raise revenue under a city's taxing power; rather, they are collected to recover unpaid regulatory service fees under a city's police power.

Id. All of the above services named by the *American Bank* court are of the kind relating to removal of public nuisance or hazards, and none of them are related to recurring scheduled maintenance of public amenities where there is no hazard created by the actions or omissions of the property owner.

The City asserts that no court has ever held that service charges under section 429.101 are taxes, and argues that Plaintiffs' readings of that provision to include both tax and fee situations runs contrary to the rules of statutory construction because the laws would be irrelevant or redundant.

> Because § 429.021, pertaining to local improvements, is a tax, reading § 429.101 (or the 1967 Special Law), which uses similar property benefitted language to conclude that 'special charges' for services are both taxes AND fees would not be reasonable… it would obviate any need for the Legislature to have enacted both sections § 429.021 and § 429.101 (and the 1967 Special Law) as they would be redundant.

Def.'s Resp. Br. at 6. But this is exactly the reason why the *American Bank* court distinguished between regulatory situations and revenue raising situations. The *American Bank* court was only analyzing § 429.101 in the context of regulating behavior and remedying nuisances. In that context, legislative authorization to

collect assessments under § 429.101 makes complete sense and does not make the existence of both § 429.101 and § 429.021 irrelevant or redundant.

A review of case law regarding Minn. Stat. § 429.101 reveals only a handful of other cases which have ever addressed that statute directly. Although the City correctly points out that no court has ever ruled that assessments under § 429.101 are taxes, the reverse is also true – no court has ever held that assessments under that statute are exclusively NOT taxes. In fact, there may be no other municipality in Minnesota that assesses costs in the same manner as St. Paul.

In addition to *American Bank*, all of the other cases which address Minn. Stat. § 429.101 are composed entirely of nuisance cases or regulatory matters. *See e.g. DRB No. 24, LLC v. City of Minneapolis*, 976 F. Supp. 2d 1079, 1083 (D. Minn. 2013), aff'd, 774 F.3d 1185 (8th Cir. 2014) (citing Minn. Stat. § 429.101) ("This arrangement is authorized by a Minnesota statute, which permits cities to collect vacant building registration fees as a special assessment against the property."); *Singer v. City of Minneapolis*, 586 N.W.2d 804, 805 (Minn. Ct. App. 1998) (citing Minn. Stat. §§ 429.011, subd. 2, 429.101 (1996)) ("Appellant failed to comply with a notice from the city directing him to abate nuisance conditions of overgrown grass and weeds on the properties. Eventually… the city assessed the costs for the abatement of the nuisance conditions to the properties… Appellant then filed an appeal of the special assessments to the district court… Municipal councils… may make improvements and assess the costs of such improvements on the affected properties. Abatement of nuisances is included in the list of authorized

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improvements."); *Gadey v. City of Minneapolis*, 517 N.W.2d 344, 345 (Minn. Ct. App. 1994) ("Respondents… are representatives of a class composed of owners of real property in Minneapolis on which special assessments were levied between 1983 and 1992 because of their failure to abate nuisances or because of other, similar ordinance violations. Between 1983 and 1989 the city council resolutions authorizing levy of the challenged special assessments expressly stated that they were levied and collected 'as provided in Minnesota Statutes, Section 429.101.'"). No other cases have directly ruled on § 429.101 – the case law history is composed entirely of nuisance and regulatory cases.

The City argues that § 429.021 pertains to tax and § 429.101 pertains to fees and that any other interpretation renders the statutes irrelevant or redundant, but the Court disagrees with this overly simplistic interpretation. Section 429.021 empowers the City to make certain enumerated improvements. Section 429.101 in contrast, enumerates a list of services for which a city ***may*** [emphasis added] provide for the collection of unpaid special charges as a special assessment against a property benefitted. The two statutes are different and are not irrelevant or redundant.

Further, just because § 429.101 says that the City ***may*** collect charges against benefitted properties, does not mean that every time the City decides to collect charges it is per se exercising police powers. The City may seek to categorize the charges at issue in this case as a police power fee enabled by § 429.101, but that characterization is not determinative of what the charges actually are. "The city's

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characterization of the nature of the charge is relevant, but not conclusive." *First Baptist (2016)* 884 N.W.2d at 359 (citations omitted). "If 'a city's true motivation was to raise revenue—and not merely to recover the costs of regulation,' the charge is a tax." *Id.* (citing *Country Joe,* 560 N.W.2d at 686). Where a city collects special charges under § 429.101 to exercise its police powers, it need not show a special benefit, but where a city collects special charges which have nothing to do with police powers, the charges are a tax and special benefit must be shown.

Looking at all the language of the laws and programs relevant to this case, the Court concludes that the first prong of the two-part test weighs in favor of viewing the SMSP as a tax program requiring a showing of special benefit in non-nuisance/regulatory situations. The City's arguments as to the legislative language are conclusory, overbroad, and not fully persuasive – however, the City is partially correct about legislative intent. The legislature intended for the City to have the power to charge property owners for the enumerated services in police power situations, but not every situation related to street sweeping, street lighting, and road maintenance is a police power situation. This Court finds that where there is no public nuisance, hazardous condition, or damage created by a property owner and absent any participation in a regulated activity, the maintenance and provision of SMSP services are an exercise of tax powers and not an exercise of police powers, regardless of what statute the City claims applies.

In the present cases before the Court, the first prong in the two-part test would have more bearing on the result of the analysis had the City of St. Paul's

assessment program not already been before the Minnesota Supreme Court in *First Baptist 2016*. The Court must follow the analytical procedure required by our state's legal precedent, but it seems relatively unnecessary to give too much weight to the language in the City's strategically crafted ordinance considering the recent history of this issue and the context in which the new ordinance was created. It is apparent that the City redrafted its program's parameters in a way to circumvent the ruling in *First Baptist 2016*. The City's primary purpose in creating the SMSP was to raise the same funding that it raised with the ROW, but to use different language and a different process to raise that funding so as not to run afoul of *First Baptist (2016)*. Whether it categorizes the charges as fees or taxes, the primary purpose of charging individual property owners in these cases for four of the same services remains to raise revenue to pay for regularly scheduled maintenance.

Whatever a city's charter may say, the municipality may not violate the state constitution. *First Baptist (2016)* 884 N.W.2d 359-60. The City cannot merely recharacterize the same charges for services using different words to achieve a different result. This brings us to the second prong of the two-part test – the substance and primary purpose of the SMSP charges.

The substance and primary purpose of the SMSP charges

Police powers derive from the City's prerogative to protect the public health, safety, and general welfare. *See e.g. Holden v. Hardy,* 169 U.S. 366, 392, 18 S. Ct. 383, 388, 42 L. Ed. 780 (1898)*; State v. Crabtree Co.*, 218 Minn. 36, 40, 15 N.W.2d 98, 100 (1944); *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn.

492, 494, 162 N.W.2d 206 (1968). In both *First Baptist (2016)* and *Country Joe*, the supreme court made it clear that "regulation" was at the essence of the police power to charge fees under Chapter 429 – and in the absence of regulation, charges must be seen as a tax. *First Baptist (2016)* 884 N.W.2d at 359 (citing *Country Joe,* 560 N.W.2d at 686). "When it has been apparent that a city's true motivation was to raise revenue—and not merely to recover the costs of ***regulation*** [emphasis added]—we have disregarded the fee label attached by a municipality and held that the charge in question was in fact a tax." *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1997).

In *American Bank*, the Court addressed § 429.101 by focusing on prevention and regulation of nuisance. Protecting public health and safety where a private property has created hazardous or inconvenient conditions for the public undoubtedly falls under the police powers. In these situations, the owner of the property is responsible for the condition that gives rise to the need for services, and those property owners can be charged accordingly. In such cases there should be no argument about whether the City would be allowed to charge fees to remedy the situation, as empowered by the 1967 Special Law and Minn. Stat. § 429.101. One can imagine a multitude of such situations – snow removal; removal of junk from a front yard, driveway, or boulevard; damage to city property (for example streetlights, sidewalks, curbs, etc.); fallen tree limbs; or the erosion of a boulevard. These could all be necessary exercises of a police power to remedy situations attributable to a specific property owner that impact public safety or health. And

these were the exact types of situations referenced in *American Bank*. 802 N.W.2d at 787.

Regularly scheduled run-of-the-mill street maintenance and cleaning does not fall under the same powers. Raising money to pay for regularly scheduled maintenance that benefits the entire city equally is a function that falls under the tax powers. The *First Baptist 2016* court joined the *American Bank* and *Country Joe* courts in delineating between maintenance which benefits all members of the City and police power services to remedy a nuisance or regulate certain activities.

> Here, no argument can be made, and the City makes none, that the services funded by the ROW assessment are needed because the property owners cause the potential nuisances or engage in any regulated activity. In Saint Paul, nearly every property owner pays the annual assessment without regard to whether the owner has violated any ordinance or undertaken any activity requiring regulation. Rather, maintenance funded by the ROW assessment addresses standard wear and tear on the streets, caused largely by Minnesota weather and use by the general public. Services necessitated entirely by natural conditions—such as snow plowing and ice control—do not relate to the *regulation* of any assessed payer's activities. *See Farmers Ins. Grp.,* 278 Minn. at 174, 153 N.W.2d at 240 ("Only those cases where regulation is the primary purpose [of a revenue-raising law] can be specially referred to the police power.") (citation omitted) (internal quotation marks omitted).

First Baptist (2016), 884 N.W.2d at 364. Finally, the name of the program itself is telling. The program is called Street ***Maintenance*** Services Program [emphasis added]. The use of the word "maintenance" bears more relation to the upkeep of city amenities than it does to regulation and protection of public health, safety, and welfare.

In *First Baptist 2016*, the supreme court analyzed the substance of the City's characterization of the ROW charges by asking what power a city exercises when it

collects the funds at issue – and distinguished this from the question of what power a city exercises when it *uses* the funds. "The crucial question is not what power a city exercises when it uses the funds collected, but rather what power a city exercises when it collects the funds." *Id.* at 361. For example, the City could not fund the Saint Paul Police Department by charging property owners per incident for calls to a particular block without a show of special benefit to those property owners. Policing crime undoubtedly falls under the police powers, but paying for the police department's existence falls under the tax powers. The *First Baptist 2016* court determined that the ROW did not function as a regulatory program, it was imposed city-wide, and was not proportional to the need for services attributable solely to the charged property owners.

> The City's ROW assessment functions as "a revenue measure, benefiting the public in general," rather than as a "purely regulatory or license fee." *Id.* at 686. We consider it significant that, unlike typical police-power fees, the ROW assessment is not imposed on a limited group of payers; rather, the charge is assessed to, and raises revenue from, the owners of almost all properties within the city limits. Moreover, the City has not shown that the charge is necessitated by the cost of regulating any of the charged properties in the manner of a true regulatory or license fee. *362 *See State v. Labo's Direct Serv.,* 232 Minn. 175, 182, 44 N.W.2d 823, 826–27 (1950). Nor has the City shown that the particular properties charged use or consume specific types and amounts of services, as in the case of utility fees, or that the need for right-of-way maintenance services is generated by the properties themselves. *See Country Joe,* 560 N.W.2d at 685–86 (concluding a charge was not a valid "impact fee" because there was no showing that it was imposed in proportion to costs necessitated by the payers of the charge).

First Baptist Church of St. Paul v. City of St. Paul, 884 N.W.2d 355, 361–62 (Minn. 2016). This Court comes to the same conclusion here regarding the SMSP.

The City's argument that it eliminated a tax program in the ROW and created a fee program with the SMSP by reversing the order of invoicing property owners (invoicing for services already performed rather than an estimate for services to be performed) is unpersuasive. In substance, the argument is that the City is not raising revenue to cover the cost of street maintenance, but rather covering the cost of street maintenance by raising revenue. Reversing the order of billing does not affect the primary purpose of the SMSP. In looking to the second prong of the test this Court finds that the substance and primary purpose of the SMSP is to raise revenue, and as such it is a tax and not a fee.

CONCLUSION

The Court finds that the SMSP is an exercise of the City's tax powers. Accordingly, the SMSP charges at issue are not valid without a showing of special benefit to the Plaintiffs assessed.

RAA