STATE OF MICHIGAN
IN THE COURT OF APPEALS
(ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND)

SANDSTONE ASSOCIATES LIMITED PARTNERSHIP-A, a Michigan limited partnership,

Plaintiff-Appellee, Cross-Appellant,

v.

CITY OF NOVI, a Michigan municipal corporation,

Defendant-Appellant, Cross-Appellee,

and

EDWARD F. KRIEWALL, ANTHONY W. NOWICKI, and LES GIBSON, jointly and severally,

Defendants, Cross-Appellees.

Court of Appeals No. 221161

Lower Court No. 95-501532-CK

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AMICUS CURIAE BRIEF OF MICHIGAN MUNICIPAL LEAGUE

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Amicus Curiae Michigan Municipal League adopts the statement of appellate jurisdiction contained in the Brief on Appeal of Defendant-Appellant City of Novi.

STATEMENT OF QUESTIONS INVOLVED

DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT CITY OF NOVI BREACHED ITS SPECIAL ASSESSMENT AGREEMENT WITH APPELLEE BY NOT COMPLETING CONSTRUCTION OF DECKER ROAD WITHIN TWO YEARS?

Plaintiff-Appellee Sandstone answers "No."

Defendant-Appellant City of Novi answers "Yes."

Amicus Curiae Michigan Municipal League answers "Yes."

DID THE TRIAL COURT ERR IN AWARDING DAMAGES BASED ON THE VALUE OF SANDSTONE'S COMPLETED DEVELOPMENT FOR ALLEGED VIOLATION OF CONTRACTUAL AGREEMENTS?

Plaintiff-Appellee Sandstone answers "No."

Defendant-Appellant City of Novi answers "Yes."

Amicus Curiae Michigan Municipal League answers "Yes."

STATEMENT OF FACTS

Amicus Curiae Michigan Municipal League adopts the statement of facts contained in the Brief on Appeal of Defendant-Appellant City of Novi.

ARGUMENT

I. INTRODUCTION: CONTRARY TO THE DEVELOPER'S SUGGESTION, SUSTAINING A $33,000,000 JUDGMENT AGAINST THE CITY WOULD NOT ENHANCE THE ABILITY OF MUNICIPALITIES TO CONSTRUCT PUBLIC IMPROVEMENTS.

Plaintiff-Appellee Sandstone commences the statement of facts in its Brief on Appeal (dated 1/6/00) with the argumentative assertion that "[t]he City is asking this Court to determine that municipalities have no obligation to effect the improvements to real property which were the contractual consideration for the levy of special tax assessments on the real property supposedly benefitted," (Brief, p. 2) and contend that adoption of this position would have "profound negative impact on municipalities," including, inter alia the end of special assessments as a useful device for financing public improvements and the inability of municipalities to secure goods and services or make improvements other than on an immediate payment basis. Presumably, it is Sandstone's position that only by sustaining its $33,000,000 judgment against Novi can such dire consequences for municipalities be avoided.

While Amicus Curiae Michigan Municipal League, which is comprised of some 516 Michigan cities and villages, is intensely interested in maintaining the ability of its members to finance public improvements in a reasonable manner, through special assessments and otherwise, it is the view of the League that Sandstone has entirely misstated the position of Appellant Novi,

and that if this case has any "profound negative impact on municipalities," it will be as a result of sustaining the trial court's erroneous judgment.

It is not the position of the City of Novi, nor is it the position of the other municipalities represented by the Michigan Municipal League, that cities have no obligation to complete improvements which are the subject of special assessment agreements between cities and developers. Rather, cities necessarily retain a reasonable degree of discretion with regard to the timing of those improvements so that legitimate public objectives relating to such matters as fiscal responsibility and public safety may be accommodated. Moreover, even if it were determined in a particular case that a city had not exercised that discretion appropriately, it would not be lawful for a court to calculate damages, as it did in this case, in a manner which renders the city the virtual guarantor of a development's success.

Appellant Novi has addressed several issues in its brief, and the Amicus Curiae brief of the Michigan Department of Transportation specifically addresses the trial court's erroneous conclusion that a taking of property occurred. The Michigan Municipal League, in its allotted ten pages, will focus on the trial court's erroneous conclusions with regard to the special assessment agreement and the appropriate measure of damages, but urges the court's careful attention to the arguments advanced by the city and the Department of Transportation as well. The trial court's erroneous conclusions are reviewable de novo. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 487 NW2d 21 (1991).

II. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT CITY BREACHED ITS SPECIAL ASSESSMENT AGREEMENT WITH APPELLEE BY NOT COMPLETING CONSTRUCTION OF DECKER ROAD WITHIN TWO YEARS.

The trial court specifically acknowledged (Opinion and Order, 1/21/00, p. 7) that "[n]either SAD 132 C nor the PUD agreement contain a deadline by which construction of the road was be completed." Nonetheless, the court held that in the absence of a contractually-stated time for performance, "the law ill presume a reasonable time," and went on to conclude that "a reasonable time for completion of the road is two years from the date SAD 132 C was executed." Appellant city has appropriately argued in its brief that matters relating to special assessments are exclusively within the jurisdiction of the Michigan Tax Tribunal, and that, moreover, a governmental agency pursuant to its statutory powers may, under appropriate circumstances, postpone or abandon a road project which it has contracted to construct (see, e.g. Board of County Road Commissioners v State Highway Comm, 79 Mich App 505, 261 NW2d 329 (1977)) and dispose of improvements it has created through special assessment (see, e.g. Ross v Dearborn, 52 Mich App 84, 216 NW2d 419 (1974)). The point the Michigan Municipal League would emphasize here is this: even assuming the trial court had jurisdiction over this matter, and even assuming contractual principles could appropriately be applied in this case to require that the Decker Road project be completed "within a reasonable time," the trial court erred in determining that the city had not proceeded in a timely fashion. The reasons are twofold: inadequate evidence supported the two-year period and, more important, the trial court assessed reasonableness solely from the developer's standpoint and accorded inadequate weight to the city's justification for completing the project at a later date.

The trial court refers to testimony of the city manager to the effect that "roads normally take approximately two years to build" (Opinion and Order, 1/21/99, p. 8); this is hardly equivalent to testimony that two years is necessarily the reasonable time for building any particular road, and, as the city correctly observes in its brief (Brief, 12/3/99, p. 22), the record also indicates the city manager had no specific expectation as to the completion date for the Decker Road project. Moreover if, as all parties suggest, the city concluded that completion of the Decker project should be tied to the subsequent Novi Road project to facilitate the construction and financing of both projects, this would have been an entirely appropriate judgment for the city to make. The testimony of the city's engineers indicates that tying the completion of the Decker project to the Novi Road project would both guard against potential damage to the city's water system (Transcript, Vol XXIII, 7/14/98, pp. 39-41) and would eliminate the expense of having to build the Decker-Novi interchange once and then having to tear it up and build it again at the time of the completion of the Novi Road project. (Transcript of show cause hearing, 9/20/95, pp. 34-37) Engineer Garey Foyt testified as follows:

> Q [by developer's attorney] And I believe you testified that you thought money could be saved by not going ahead with the road, Decker Road that is from Thirteen to Twelve and a Half and intersecting if they didn't build the intersection, is that correct?
>
> A There could be savings, that's correct.
>
> Q Okay. What savings could there be?....
>
> THE WITNESS: The savings would have been in the actual construction of the road that would have had to have been torn out once Novi Road---

> THE COURT: Do you have th dollar amount?
>
> THE WITNESS: The amount that we were estimating I believe and I--I'm going on memory but it was roughly two hundred, three hundred thousand in that range. (Transcript of show cause hearing, 9/20/95, pp. 34-35)

This was not a decision to abandon the Decker Road project; rather, it was a decision to coordinate multiple projects in a manner consistent with the municipality's fiscal responsibilities. In an analogous situation, this court observed in Board of County Road Commissioners v State Highway Comm, supra:

> The fiscal ability to construct needed roads and highways in Michigan is limited ....determination of what needs are critical or require priority treatment is a function within the discretionary authority of the state highway commission, provisions of lawful contracts notwithstanding. 79 Mich App at 511.

This court again recognized the appropriateness of a governmental agency taking the economic interests of the entire community into account in Walter Toebe & Co v Dep't of State Highways, 144 Mich App 21, 373 NW2d 233 (1985): "...because defendant is a public agency, it had both a duty and a right to correct an error which could have cost the public close to $900.000." 144 Mich App at 34.

The trial court suggests (Opinion and Order, 1/21/99, p. 10) that "Defendant Novi was not faced with a choice of complying with its contractual obligations or protecting the interests of its citizens. Defendant Novi was not faced with the loss of governmental funds if it complied with its contractual obligation and it was not forced to stop the building of Decker Road due to lack of

funds." Here, however, the court evidences too restrictive a view both of the city's "contractual obligations" and of "the interests of its citizens." The court takes a contract which all parties -- and the court -- acknowledge to contain no specific time limitation an reads into it a specific time limitation inadequately supported by the evidence and inconsistent with the city's public responsibilities in the administration of a number of related road projects. Taking these factors appropriately into account, the trial court should have concluded that no contractual violation occurred.[1]

III. THE TRIAL COURT ERRED IN AWARDING DAMAGES BASED ON THE VALUE OF APPELLEE'S COMPLETED DEVELOPMENT FOR THE ALLEGED VIOLATION OF ANY CONTRACTUAL AGREEMENT.

The trial court concluded that Appellant city had violated a special assessment agreement, had violated a planned unit development agreement, had unlawfully taken Appellee's property, and had violated Appellee's substantive due process rights, stating further that "the damages for each separate claim are seamlessly interwoven and, with one exception,[2] are calculable as a whole." (Opinion and Order, 1/21/99, pp. 29-30) The court's description of its damage formula is this: "Because the measure of damages for all of the prevailing claims together cover the complete loss of Plaintiff's development, Plaintiff will be compensated in an amount equal to the projected value of the development had it proceeded unhindered." The failure of the trial court to

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[1] Because it is not the city's position that it was under no obligation to complete the Decker Road project, the "imaginary horrible" raised by Appellee Sandstone (Brief, 1/6/00, p. 2) that the city's bonds may be taxable arbitrage bonds is entirely inapplicable here. Nonetheless, it might be noted that the city reviewed its situation and had determined that no arbitrage rules had been violated. (Transcript, Vol. III, 5/11/98, pp. 123-127; Vol. VIII, 5/12/98, pp. 42-43).

[2] Presumably the court's separately-calculated damages for "mass grading costs."

discuss the measure of damages applicable to each of Sandstone's claims is in itself an appropriate ground for reversal under MCR 2.517(A)(1), which requires that a trial court "state separately its conclusions of law;" if the Court of Appeals were to determine (as it should) that the trial court erred in sustaining one or more of Appellee's claims, the trial court would have provided no coherent basis for assessing the correctness of its "seamlessly interwoven" damage award. One thing, however, should be clear: none of appellee's contract claims, even if upheld on appeal, would sustain an award based on the presumed value of appellee's completed development.

Appellant city has noted in its brief the speculative nature of the damages awarded by the court. (Brief, 12/3/99, p. 47) Aside from the court's impermissible speculation, several other legal impediments exist to the court's award: (1) in the case of the alleged violation of the special assessment agreement, both statutory and judicial authority--summarized below--restrict damages to refund of the special assessment, or, in appropriate cases, to specific performance, and (2) "the complete loss of Plaintiff's development" cannot appropriately be viewed as damages within the contemplation of the parties at the time either special assessment agreement or the planned unit development agreement were made, and such uncontemplated damages have been unavailable for the alleged violation of contractual agreements since as long ago as Hadley v Baxendale, 9 Exch 341, 156 Eng Rep 145 (1854).

MCLA 205.372, MSA 7.650(32) specifically empowers the Tax Tribunal to refund taxes improperly imposed, but no power is specifically granted to award other monetary relief. The city has argued that the Tax Tribunal would have been the appropriate agency to have considered Appellee's claim relating to the special assessment, but even if the Court of Appeals sustains the

jurisdiction of the trial court over special assessment questions, there is no reason that the remedies available to Appellant should thereby be enhanced. In Board of County Road Commissioners v State Highway Comm, supra, where a county road commission sought mandamus for alleged breach of an agreement to construct a road, this court stated:

> The Board of County Road Commissioners has adequate remedies, both legal and equitable. If plaintiff wants some of the money it raised for the highway returned to it but is satisfied not to have the highway completed, if may sue for damages in the Court of Claims. If plaintiff wishes the highway completed, it may file a suit for specific enforcement of the contract. When there is a plain, direct and adequate alternative remedy, courts will not permit the use of a writ of mandamus. *Coffin v Board of Education of Detroit,* 114 Mich 342; 72 NW 156 (1897). Because plaintiff here has such alternative remedies, the issuance of the writ is inappropriate. 79 Mich App at 509.

A conclusion that, as a matter of law, damages against municipalities for failure to construct specifically-assessed improvements are limited to the amount of the assessment is supported not only by statute and case law, but sound policy: the public cannot reasonably be made an involuntary business partner of every party claiming that its commercial success depends on the completion of the improvement. Even if no such special rule were appropriate for public improvements, common garden-variety contract law is sufficient to demonstrate that the damages awarded by the trial court are unsupportable. This court observed in Held Construction Co v Michigan National Bank, 124 Mich App 472, 335 NW2d 8 (1983):

> Under the rule of *Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854), as reiterated in *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401, 414; 295 NW2d 50 (1980), the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. Accordingly, in a commercial contract situation such as is involved here, application

> of this principle generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it. *Kewin, supra*, pp. 414-415.
>
> ...The financial ruin of a contracting corporation or its officers is plainly not a consequence arising naturally from a breach of contract. Therefore, absent evidence that a risk of insolvency was within the actual contemplation of the parties at the time the contract was made, damages are not recoverable for such a consequence. 124 Mich App at 476-477.

While Appellee argues that the city "was aware of the financing structure and the obligations that Sandstone was incurring," (Brief, 1/6/00, p. 6) Appellee does not suggest that it was within the contemplation of the parties that the project would fail if the city did not complete the Decker Road improvements within a particular time (and under a contract in which no time was specified!), nor that such failure was a natural and foreseeable consequence of the city's decision to coordinate several road projects or to require specific details in the planned unit development. Neither Appellee nor the trial court discusses whether any alternative financial arrangements may have been available or whether any other action or inaction of Appellee might have contributed to the success or failure of its project. Indeed, as the Michigan Department of Transportation makes clear in its Amicus Curiae brief, access to Appellee's project was in fact generally available, albeit in what may have been a less convenient form than Appellee may have wished. Hence, not only were the damages awarded by the trial court inappropriate, but a legitimate question exists as to whether any such damages can be causally related to the city's actions.

RELIEF

For the reasons summarized above, as well as those advanced in the briefs of the City of Novi and the Michigan Department of Transportation, the judgment of the trial court should be reversed.

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