

August 21, 2019

Everyone,

It occurred to me at our hearing this evening that the council and key staff may not have heard about or seen Judge Millenacker's written decision of two weeks ago (reflecting her oral decision of earlier in the summer). As I indicated, she ruled against the city's argument that it can collect Street Maintenance Services fees/assessments without a showing of special benefit. This is the confirmation I mentioned of the Supreme Court ruling in First Baptist Church of which you are all aware. This is why I suggested that the council is naked legally and politically without the cover of a formal opinion by the City Attorney or the Attorney General should you choose to proceed as proposed.

If I or Simon can be of any more help before the meeting next week, please feel free to call.

Jack Hoeschler

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

First Baptist Church of St. Paul, et al.,

Plaintiff,

Case Type: Assessment Appeal  
Court File No. 62-CV-18-7686  
Honorable Robyn A. Millenacker

vs.

City of Saint Paul,

Defendants.

**ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT**

On May 17, 2019, the above-entitled matter came before the Honorable Robyn A. Millenacker, Judge of Ramsey County District Court, on Defendant's Motion for Summary Judgment.

Based on the foregoing and all files, pleadings, records, and proceedings herein, and for the reasons stated on the record, the court issues the following:

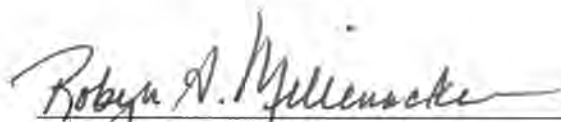
**ORDER**

1. Defendant's Motion for Summary Judgment is DENIED.
2. The attached Memorandum is incorporated into this Order.
3. The Parties shall submit a proposed scheduling order.

**IT IS SO ORDERED.**

BY THE COURT:

Dated: August 9, 2019

  
Robyn A. Millenacker  
District Court Judge

## MEMORANDUM

### **I. Overview: Are Charges Special Assessments Pursuant to St. Paul's Taxing Power or Regulatory Fees Under Its Police Power?**

This matter is an appeal to district court by various property owners of charges<sup>1</sup> (“2018 Charges”) that were assessed to their properties by the City of St. Paul (the “City”) in order to pay for street lighting and street sweeping.

The property owners argue that the 2018 Charges constitute a tax because the funds are used for the general benefit, and as a tax, the charges are subject to certain constitutional requirements that the City is unable to demonstrate. The City's position is that the 2018 Charges are properly instituted pursuant to the City Charter and Minnesota Statutes as a valid exercise of its broad police powers to regulate health, safety, and welfare (which includes the City's roads). Moreover, these fees (when instituted pursuant to its police power) only need be reasonable and not meet the stricter “special benefit” requirements that apply to special assessments instituted pursuant to the City's taxing power.

The City brings a motion for summary judgment upholding the 2018 Charges arguing that the undisputed material facts indicate that the charges have been legally imposed and are reasonable.

### **II. General Factual Background**

This matter has essentially resurrected protracted litigation challenging the validity of similar charges imposed by the City in 2011. *See First Baptist Church of*

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<sup>1</sup> For clarity and consistency in this discussion, the Court uses “charge” as a generic term, and a “charge” can be either a “tax” or a “fee.”

*St. Paul v. City of St. Paul*, 884 N.W.2d 355 (Minn. 2016). In *First Baptist*, certain property owners challenged the City's Right of Way ("ROW") assessment process bringing similar arguments as are presented here, that the charges assessed constituted a tax and failed to comply with the constitutional benefit requirements.

The 2011 ROW assessment funded the vast majority of the costs of myriad services provided by the City to maintain its roads. The services paid for by the ROW assessment were: "(1) sweeping, flushing, patching, and chip-sealing streets and alleys; (2) patching, blading, and placing crushed rock on unimproved rights-of-way; (3) overlaying streets (meaning placing a new layer of asphalt on an existing street); (4) snow plowing and removal; (5) sanding and salting streets to control ice; (6) tagging and towing vehicles during snow emergencies; (7) trimming and removing trees between the curb and the sidewalk; (8) repairing, replacing, painting, and operating street lighting systems; (9) installing, repairing, and replacing traffic signs; (10) painting pavement markings; (11) picking up litter; (12) ordinance enforcement; and (13) emergency maintenance services." *Id.* at 357.

The District Court granted Summary Judgment in favor of the City, and the Minnesota Court of Appeals affirmed, accepting the City's argument that the ROW assessments were properly classified as regulatory "fees" that were imposed under valid exercise of its police power. See *First Baptist Church of St. Paul v. City of St. Paul*, No. A15-0015, 2015 WL 5089063, at \*3 (Minn. Ct. App. Aug. 31, 2015), rev'd, 884 N.W.2d 355 (Minn. 2016) ("The services improve the city's health and safety by removing debris and snow from city streets, repairing streetlights and signs, and

patching potholes in the streets, alleys, and sidewalks. Therefore, we conclude that the district court correctly concluded that the ROW assessment is a regulatory service fee and that all of the services relate to the regulatory exercise of the city's police power.”).

The Minnesota Supreme Court ultimately rejected the lower courts' classification of the ROW charges as a police-power fee and concluded it was actually a tax. The Court stated, “The City's ROW assessment functions as a revenue measure, benefiting the public in general, rather than as a purely regulatory or license fee.” *First Baptist*, 884 N.W.2d 355, 361 (Minn. 2016).

In response to the Minnesota Supreme Court's 2016 holding in *First Baptist*, the City implemented changes to the mechanisms by which it funds street maintenance. Approximately two-thirds of the street maintenance budget formerly funded by the ROW assessment is now paid for through property taxes, while approximately one-third is funded by charges to property owners. If unpaid, the charges become special assessments, which are added onto the property tax bill. Currently, the City only directly charges property owners for street sweeping and street lighting, through charge/special assessment.

Property owners are charged via invoice for the actual cost of providing street sweeping and street lighting services as calculated based on a property's street frontage. Property owners have thirty days to pay the invoice, and if they fail to do so, the charge is assessed to their property tax bill. At public hearing on November 7, 2018, the St. Paul City Council ratified the assessments for the 2018 Charges. The

assessment roll for the assessment was part of the City Council's record along with letters of objection from various property owners.<sup>2</sup>

### **III. Procedural Background**

Plaintiffs are appealing the fees assessed by the City to pay for street sweeping and street lighting services. Under Chapter 14 of the St. Paul City Charter, property owners may appeal special assessments for review of the district court on the bases that it is 1) fraudulent, 2) based on mistake of fact of law, or 3) that the assessment is in an amount in excess of the actual benefits to the property.

Defendant has moved for summary judgment alleging that Plaintiffs have no legal basis for their appeal of the special assessment charges, and that the undisputed material facts entitle it to judgment affirming the assessment of the 2018 Charges.

### **IV. Discussion**

Summary judgment is appropriate if “there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. The mere existence of a factual dispute by itself does not make summary judgment inappropriate. The fact in dispute must be material and “of such nature as will affect the result or outcome of the case.” *Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. Ct. App. 1986) (citing *Rathbun v. W. T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974)).

The City now reprises the arguments it presented in support of the 2011 ROW assessment and attempts to distinguish its current funding mechanism from the

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<sup>2</sup> This general process summarized in this paragraph can be found in Chapter 62 of the St. Paul City Code. See Hoeschler Aff. Ex. C.



program the Minnesota Supreme Court rejected in 2016; however, while the current scope of services funded is reduced, and the 2018 Charges are more targeted to local services, there are material fact issues in dispute as to whether the properties charged are uniquely benefited by the street sweeping and street lighting services.

Special assessments for local improvements are levied under a municipality's taxing power. *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 201 (Minn.1979) (“A special assessment is a tax, intended to offset the cost of local improvements ... which is selectively imposed on the beneficiaries of” the improvements).<sup>3</sup> As an exercise of the taxing power, a special assessment is subject to constitutional restrictions. *Carlson–Lang Realty Co. v. City of Windom*, 307 Minn. 368, 369, 240 N.W.2d 517, 519 (1976). Special assessments are valid only if they are imposed in an amount that does not exceed the “special benefit” conferred on the assessed property by the improvement. *Id.* In this context, the amount of the “special benefit” is determined by the increase in the market value of the property attributable to the improvement. *Id.*

But if a charge is imposed under a municipality's regulatory police power, it is a “fee” and not a “tax,” and the constitutional restrictions do not apply. *First Baptist*

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<sup>3</sup> A special assessment for a local improvement is an exercise of a municipality's taxing power that offsets costs of providing some general public benefit by charging property owners who receive benefit above and beyond that which the general public receives. *See* ASSESSMENT, Black's Law Dictionary (11th ed. 2019) (“There is a distinction between public improvements, which benefit the entire community, and local improvements, which benefit particular real estate or limited areas of land. The latter improvements are usually financed by means of special, or local, assessments. These assessments are, in a certain sense, taxes. But an assessment differs from a general tax in that an assessment is levied only on property in the immediate vicinity of some local municipal improvement and is valid only where the property assessed receives some special benefit differing from the benefit that the general public enjoys.” (citing Robert Kratovil, *Real Estate Law* 465 (6th ed. 1974)).

at 359. Although broad, a municipality's police power does not “extend [ ] to permit revenue raising measures.” *Id.* (citing *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn.1997)). Determining whether a particular charge imposed by a city government is an exercise of the taxing power or the police power requires a reviewing 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)).

### **A. Is the Primary Purpose of the 2018 Charges a Tax or Fee?**

The Supreme Court in *First Baptist* analyzed several factors in order to determine whether the 2011 ROW assessment constituted a fee or a tax.

#### **1. Enabling Language**

Under Minnesota Statutes and the City's Charter, the City is permitted to enact assessments upon benefited properties for certain unpaid regulatory fees. *See* Minn. Stat. § 429.101; Saint Paul, Minn., City Charter § 14.01 (2019).<sup>4</sup> Section 429.101 states:

In addition to any other method authorized by law or charter, the governing body of any municipality may provide for the collection of unpaid special charges as a special assessment against the property benefited for all or any part of the cost of . . . street sprinkling or other dust treatments of streets . . . [and] the operation of a street lighting system.”

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<sup>4</sup> The Court finds it notable that the City appears unable to describe the precise method by which it is imposing the 2018 Charges. It is unclear if the City is operating through its Charter, Minn. Stat. § 429, or some combination of the two. *See e.g.*, D's Reply Memo. p. 3 (“At page 2 of Appellants' Response Memorandum, Appellants assert that the City Brief at page 4 confirms that the [2018 Charges] are charges being collected under the exclusive terms of the City Charter and Code. That is a misstatement of the City's position. The City at page 4 of its Memorandum in Support of its Motion for Summary Judgment stated that the procedures provided in Chapter 14 of the City Charter [are] the exclusive procedures that a property owner may appeal a special assessment adopted by the City Council. It is not an admission by the City that the Chapter 429 provisions do not apply to this case.”). Additionally, the City's assertion that Chapter 14 is the exclusive procedure for appeal is confusing as Section 62.06 of the Saint Paul Administrative Code states “any property owner . . . may appeal to the district court, as notified by the City, in the manner set forth in Chapter 14 of the Saint Paul City Charter, or Minnesota Statutes Chapter 429.”



Minn. Stat. §429.101, subdiv. 1, (a)(4) & (a)(7) (2018). This statute provides St. Paul with the authority to collect unpaid special charges for street sprinkling or other dust treatment of streets as well as the operation of a street lighting system through special assessments against the property benefited.

Section 14.01.2 of the City Charter allows:

by ordinance, that the cost of any services such as street cleaning, street flushing or oiling . . . on streets, sidewalks, boulevards, or other public or private property undertaken by the city may be charged against the property benefited. Service charges shall be collected and levied like special assessments or in such other manner as the council determines. The council shall have the power to abate nuisances on any particular property and shall have the power to collect the costs of such abatement as a special assessment in the manner provided in this chapter.

Saint Paul, Minn., City Charter § 14.01 (2019). This section enables St. Paul to enact ordinances to assess costs of street cleaning, street flushing or oiling against the property benefited. Its terms are much broader than those authorized by Section 429.101, but it allows the imposition of “service charges,” which invoke regulatory function. However, it additionally provides a separate provision to allow the city to abate nuisances on any particular property and collect the cost of abatement as a special assessment against the property benefited.

*First Baptist* stated, “Especially significant is Chapter 14’s language describing who is subject to the ROW assessment and in what amounts. 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*, at 360–61 (citations omitted). However, this same “against the property

benefitted” language exists in Section 429.101. Section 429.101 is referenced in *American Bank of St. Paul v. City of Minneapolis*, 802 N.W.2d 781 as a valid enabling source of authority for municipalities to collect special charges through assessments to defray the costs of regulatory services. 802 N.W.2d 781, 787 (Minn. Ct. App. 2011). Assessing a charge “against the property benefited” does not mean that it is necessarily a tax.

Chapter 62 of the St. Paul Administrative Code allows “street maintenance” costs to be recovered by “service charges” that if unpaid may be assessed against the property benefited. “Street maintenance” under this section “means and includes, but shall not be limited to, street surfacing, cleaning, flushing, oiling, repairing, as well as the maintenance and servicing of street lights and special ornamental street lighting systems.” Again, the term “service charges” suggests utilization of police powers, but general “street maintenance” appears to be services benefitting road users, rather than abutting property owners.

Overall, the language enabling the 2018 Charges can support both Plaintiffs’ and the City’s positions regarding the nature of the charges, and so we must look to the substance of the charges.

## **2. Substance of the 2018 Charges**

The currently contested charges are now only used to fund city-wide street sweeping and street lighting, which is a significant reduction in scope of services from the invalidated 2011 ROW assessment. However, the record indicates that the primary purpose of street sweeping and street lighting may be to provide benefit to

the public generally, rather than a localized benefit to the properties who actually incur the charges.

Many of the factors discussed in *First Baptist* remain applicable to the current program. Of the 2011 ROW assessment, Justice Lillehaug wrote:

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. *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).

To the contrary, many of the services funded through the ROW assessment *benefit the general public in precisely the same manner as they benefit the properties assessed.* *See* 84 C.J.S. *Taxation* § 3 (2010); 71 Am. Jur. 2d *State and Local Taxation* § 12 (2012) (stating that a true fee “benefits the party paying the fee in a manner not shared by other members of society”); *Nat'l Cable Television Ass'n v. U.S.*, 415 U.S. 336, 340–41, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) (explaining that, by their nature, fees are charged in exchange for services that benefit the payer in a manner “not shared by other members of society”).

*First Baptist*, at 361–62 (emphases added). Here, street lighting and street sweeping make the use of St. Paul's roads easier and safer for all of St. Paul's residents, commuters, and visitors, not just for nearby property owners.<sup>5</sup>

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<sup>5</sup> *See First Baptist* at 362 (“When questioned about whether the assessed properties obtain a special benefit from right-of-way maintenance services, the engineer stated that ‘everyone benefits by having streets plowed, by having streets swept’ and that everyone, including those who do not own property in Saint Paul, ‘benefit [s] by being able to navigate on a well-maintained transportation network.’ The engineer’s testimony is consistent with *Country Joe*, in which we recognized that ‘improvements to public roads benefit the public in general, not only the bordering property owners.’”) (citations omitted).

Plaintiffs' expert opined that while the services charged for street maintenance (street sweeping) provide a general benefit to society, they provide no unique benefit to the properties charged. Hoeschler Aff., Ex. 1.

The City's own website discusses how lighting the streets benefits everyone. "Citywide lighting is provided for the safe operation of roads and sidewalks in the City of Saint Paul." Sisk Aff., Ex. 1, at STP 0040. While some de minimis localized benefit may extend to properties located near street lighting, that benefit is not unique to those properties—the benefit exists for anyone who happens to be traveling through a lighted section of roadway. If the properties assessed fees for these services are not benefited in a unique way that differs from the benefit to the public in general, assessing fees to them is inappropriate as they have not received the requisite benefit necessary under the enabling legislation. *See First Baptist* at FN 9 ("Whether the charge benefits the payer in a manner not shared by the general public presents an analytically distinct question from whether an improvement provides a "special benefit" to the property in the form of a market value increase in determining the validity of a special assessment.") (citing *In re Vill. of Burnsville*, 310 Minn. 32, 36–39, 245 N.W.2d 445, 448–49 (1976)).

The City argues that because it has wide latitude to regulate use of the roadway under its police powers, and both its Charter and state law provide authority to assess benefited properties for fees incurred due to such regulation, the charges at issue here are fees despite providing no unique

benefit to the properties charged. But if this were the state of the law, the Minnesota Supreme Court would have upheld the ROW assessments as valid regulatory fees under the City's police power. As *First Baptist* noted, "The fact that the money collected pays only for police-power services is not dispositive, nor even very probative. 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." *First Baptist* at 361. The City has failed to cite any case law supporting its positions that 1) fees assessed pursuant to police powers need not provide a unique benefit to the properties assessed that exceeds the benefit enjoyed by the general public and 2) that the police power regulatory fees may be assessed against those who do not create the need for the regulatory services.

As noted in *First Baptist*, municipalities may assess fees in order to regulate nuisances under their police power, however, the ROW assessments were invalidated because they "benefit the general public in precisely the same manner as they benefit the properties assessed." *Id.* at 362 (citing 84 C.J.S. *Taxation* § 3 (2010); 71 Am. Jur. 2d *State and Local Taxation* § 12 (2012) (stating that a true fee "benefits the party paying the fee in a manner not shared by other members of society"); *Nat'l Cable Television Ass'n v. U.S.*, 415 U.S. 336, 340–41, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) (explaining that, by their nature, fees are charged in exchange for services that benefit the payer in a manner "not shared by other members of society"))).



The Minnesota Supreme Court determined that the lower courts in *First Baptist* had erroneously relied on *American Bank* in concluding that the ROW assessment was a fee validly imposed through the City's nuisance-abatement police power. *See First Baptist*, at 359. It explained that the nuisance in *American Bank* was indisputably caused by the assessed property owner, and by remedying the nuisance and assessing the property owner the costs of remediation, the city was properly regulating the conduct or condition caused by the property owner. The ROW assessment did not serve a similar purpose of regulating anything directly relating to the property assessed. *First Baptist*, at 363–64.

Here, street sweeping and street lighting “do not relate to the *regulation* of any assessed payer's activities.” *See id.* The *First Baptist* court additionally discounted the City's claimed regulatory rationale for the ROW assessments by finding it “significant that the City has specific and separate procedures for abating nuisances caused by code violations, and for charging costs of abatement against the offending properties.” *Id.* at 364 (citing *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 683 (Minn. 1997)). The City continues to have these specific and separate procedures for abating nuisances and charging regulatory fees to those who create such nuisances. *See* Saint Paul, Minn., Leg. Code § 45 (2019), available at: [https://library.municode.com/mn/st.\\_paul/codes/code\\_of\\_ordinances?nodeId=PTIILE\\_CO\\_TITVIBUHO\\_CH45NUAB\\_S45.01DEPO](https://library.municode.com/mn/st._paul/codes/code_of_ordinances?nodeId=PTIILE_CO_TITVIBUHO_CH45NUAB_S45.01DEPO) (last visited August 1, 2019).



The City no longer funds snow plowing/ice removal on the streets through fee/special assessment, perhaps recognizing that such services were of a general benefit and neither providing any unique benefit to the properties assessed nor regulating conduct thereon, and thus more properly funded by property taxes. However, when the Court asked the City at the hearing if the spring street sweeping wasn't necessitated largely by the sanding and salting of the winter roads, its attorney replied that actually much of the debris removed through the street sweeping are not dirt or dust (as might be expected by the terms "street sprinkling" and "dust treatment") but rather leaves.<sup>6</sup>

Additionally, without citing to any authority, the City claims that "street sprinkling"<sup>7</sup> is a direct reference to all "street sweeping." While there may be some overlap, it does not appear that the two terms are identical. As noted in

*First Baptist:*

The City has used an assessment to fund right-of-way maintenance services since the early 20th century, when it funded sprinkling of water on dirt streets to control dust. The program has expanded significantly since then. Street and alley cleaning and repair were added in 1974. Added in 2003 were winter maintenance (such as plowing) and maintenance of sidewalks, traffic signs, and trees. Street lighting maintenance was added in 2005."

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<sup>6</sup> The Court did not receive an explanation as to what the difference is between a winter scoop (paid for by property taxes) and a summer brush (paid for by regulatory fee) when each is employed to help make the roads safer for travel, and the Court finds the distinction illogical.

<sup>7</sup> One of the "special charges" that Section 429.101 allows municipalities to collect through special assessment is for "street sprinkling or other dust treatment of streets." Minn. Stat. §429.101, subdiv. 1(4).

*First Baptist*, at 357, n. 1. In the late nineteenth century, the Minnesota Supreme Court recognized the localized benefit of dust abatement through “street sprinkling”:

While the public who travel it are also benefited by having the street sprinkled, yet it requires no argument to show that those who reside or do business on it receive an exceptional and special benefit *from abating the nuisance of dust*, which is a source not only of discomfort to them but also of actual pecuniary injury to their household goods or merchandise.

*State v. Reis*, 38 Minn. 371, 372, 38 N.W. 97, 97 (1888) (emphasis added).

The street sweeping at issue here is different than pure dust abatement necessitated by dirt roads of the past. Street sweeping now provides benefit to the general public by helping to remove debris from the roads that may disrupt vehicle traffic and by removing dirt, sand, leaves, and garbage that may otherwise eventually contaminate local sewers and waters. *Aff. Sisk*, Ex. 1. Abutting property owners who are assessed the charges of these city-wide services are not permitted to throw their waste in the street or boulevard prior to street sweeping, and if they are engaging in such conduct, they will be sanctioned and charged additional fees if they make it necessary for the City to abate that nuisance they have caused. The City even stated in its reply memorandum, “It can be fairly argued that Appellants as property owners whose property abuts City streets derive a direct benefit when the City engages in street sweeping and street lighting services of their streets.” *Dfd. Reply Memo.*, pp. 5–6. But whether or not the assessed properties receive any unique benefit or create the need for regulation are disputed facts. “Fairly arguing”

that a factual determination could be made, is insufficient to sustain a motion for summary judgment. At the very least, the evidence in the record creates questions of material fact as to whether or not the properties charged (1) receive a unique, local benefit (as opposed to only the general public benefit) and (2) create the need for the regulatory services for which they are charged.

The City's Motion for Summary Judgment is denied.

**RAM**