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NO. A08-767

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State of Minnesota  
**In Court of Appeals**

Eagan Economic Development Authority,

*Respondent,*

vs.

Larson Training Services, Inc.  
 d/b/a Larson's Automotive Repair Services;  
 Randall J. and Sandra K. Quam, husband and wife, and  
 Competitive Engines, Inc.; and U-Haul Co. of Minnesota and  
 Amerco Real Estate Company,

*Appellants.*

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**JOINT REPLY BRIEF OF APPELLANTS**

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Respondent EDA's brief demonstrates that this case is about the use and abuse of power. When an economic development authority exceeds its lawful authority, it upsets the delicate constitutional balance between the power of the state and the rights of private land owners. Here, EDA exceeded its lawful authority. First, EDA is bound by the Cedar Grove Redevelopment Plan, which it breached. Second, EDA's condemnation of Appellants' land was speculative and unnecessary. And finally, EDA's use of the quick-take statute was improper.

Appellants respectfully request that this Court enforce the constitutional balance by reversing the April 16, 2008 Order of District Court.

## **ARGUMENT**

### **I. BECAUSE THE CONDEMNATION IS ILLEGAL AND EXCEEDS EDA'S AUTHORITY, THE FACTUAL FINDING OF PUBLIC PURPOSE IS CLEARLY ERRONEOUS.**

Respondent EDA's condemnation of Appellants' properties was arbitrary and capricious because it violated the authority granted to EDA by statute and by the Eagan City Council. The district court erred in its interpretation of the Cedar Grove Redevelopment Plan, and in its holding that EDA did not exceed its authority.

EDA asserts that (1) it is not bound by the Redevelopment Plan; (2) even if it were, it has not violated the Redevelopment Plan; and (3) it has not violated any statutes. As discussed herein, Respondent's arguments fail on all counts.

“The acts of an authority vested with legislative determination in a particular area are manifestly arbitrary or unreasonable where they are taken capriciously, irrationally, and without basis in law or under conditions which do not authorize or permit the exercise of the asserted power.” *Housing & Redev Auth. (HRA) v. Minneapolis Met. Co.*, 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960). Because EDA “acted under conditions which [did] not authorize or permit the exercise of the asserted power,” this Court should reverse the district court’s decision.

**A. Standard of Review**

In condemnation cases, this Court reviews district court factual findings under a clearly erroneous standard. *Lundell v. Coop. Power Ass’n*, 707 N.W.2d 376, 380-81 (Minn. 2006). But, this Court reviews the district court’s legal interpretation of the Redevelopment Plan *de novo*. *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986). This Court also reviews the district court’s interpretation of statutes *de novo*. *State v. Al-Nasser*, 734 N.W.2d 679, 683 (Minn. 2007).

**B. EDA is Bound by the Redevelopment Plan.**

Resolution 01-63 gave EDA the statutory authority to acquire real property. (See AA 44-48; Minn. Stat. §§ 469.003, 469.012, subdiv. 1(g)(a)(1)-(2); Resp’t Br. at 10.) The Eagan City Council incorporated the Redevelopment Plan into its Resolution Number 01-63. (AA-44, Section 2.01.) Minn. Stat. § 469.094 binds EDA to the terms of the resolution. Thus, if EDA is in violation of the

Redevelopment Plan, it is in violation of Resolution 01-63, and it has no statutory authority to acquire real property.

In addition, the same statutes that EDA cites, arguing that it does not need to follow the Redevelopment Plan, actually require compliance. (*See Resp't Br.* at 14.) The sale, lease, or retention of land in a redevelopment project must be done “[i]n accordance with a redevelopment plan.” Minn. Stat. § 469.029, subdiv. 1.

EDA claims that it is free to disregard the terms of the Redevelopment Plan because it may be modified at any time. That argument is not supported by a plain language reading of the statute and is contrary to public policy.

A Redevelopment Plan may be changed by the EDA without City approval when said modification will not “alter or affect the exterior boundaries, and do[es] not substantially alter or affect the general land uses established in the plan.” Minn. Stat. § 469.029, subdiv. 6. This statute does *not* allow EDA to disregard the Redevelopment Plan entirely or alter its granting authority. The statute’s language may permit needed modifications to the Plan, but it cannot override limitations on EDA authority that are clear in the Plan.

In the instant case, the City decided to limit the power of EDA to take land, which goes directly to the use of the land:

Prior to formal consideration of the acquisition of any property, the City *will* require the execution of a binding development agreement. . . . Appropriate restrictions regarding the reuse and redevelopment of property shall be incorporated into any development agreement to which the City is a party.

(AA 62, Subsection 1-8 (emphasis added).) This clause makes clear that the “general land uses established in the Plan” would be determined by the City during the contract approval process. The mandatory language, “will require,” implies that the EDA has no discretion in this area to modify the Plan without City approval. EDA’s assertion that it can “freely change this part of the Redevelopment Plan” (Resp’t Br. at 16) is manifestly unreasonable.

**C. The District Court Erred in Finding that EDA Did Not Violate the Redevelopment Plan**

EDA violated Section 1-8 of the Redevelopment Plan. The plain language of this section requires the execution of a binding development agreement **before formal consideration of the acquisition of any property.**<sup>1</sup> (AA 62.) EDA alleges that it has not violated Section 1-8 of the Redevelopment Plan because the district court found that Section 1-12 of the Plan gave it the authority to acquire land without a binding development agreement. (Resp’t Br. at 15.) The district court’s interpretation of the Redevelopment Plan was clear error. The plain language of the Plan presents the restrictions in Section 1-8 as conditions precedent to the power granted in Section 1-12. Respondent has offered no valid reason to read the Plan otherwise.

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<sup>1</sup> EDA alleges in a footnote that it is not bound by Section 1-8 because that Section references the “City” and not the EDA. (*See* Resp’t Br. at 15 n.6.) EDA’s statement on the same page that “The EDA is clearly authorized by Section 1-12 of the plan” undermines its argument, however, as Section 1-12 also refers only to the “City.” (*See Id.*; AA 63.)

In violating the Redevelopment Plan, EDA's actions were arbitrary and capricious, and in affirming that violation, the district court's ruling was clearly erroneous. EDA's attempts to create public purpose through statutes and case law misses the point: they cannot have a public purpose when they are acting without the authority given to them by the public.

EDA further argues in error that Appellants raise the application of Minn. Stat. §469.105 for the first time on appeal. Yet, EDA itself raised the issue before the district court and before this court by premising its authority on Minn. Stat. §§ 469.090-469.108. (*See, e.g.*, Resp't Br. at 9; Order CS-07-30126, 2/6/08, ¶ 4; Pet'rs Mem. in Support of Condemnation, 2/28/08, at 7-8.)

While this statutory section may apply to a subsequent step of the takings process, it helps explain why the City of Eagan would require a binding development agreement before the purchase of land. The statutes, like the City, contemplate that land in a redevelopment area will be sold to private owners for redevelopment. (*See* AA 62.) The Minnesota Statutes imply the connection between the initial acquisition of land, and its eventual sale to private parties, by making the power of condemnation subject to the terms of Minn. Stat. § 469.105, which requires a "specified intended use" for the property before its sale to a private party. *See* Minn. Stat. § 469.101 (restricting an EDA's acquisition and use of property to the conditions of sections 469.090-469.108). EDA's assertion that it condemn first and decide use later completely misses the mark.

**II. WITHOUT A SPECIFIC PROJECT OR IDENTIFIED USE, THE FACTUAL FINDING OF “NECESSITY” IS CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE RECORD.**

The appeal also presents the Court with a fundamental question regarding the necessity component of a condemnation analysis. On one hand, Appellants contend that the necessity component is a critical component of an analysis regarding a taking authority’s ability to exercise its power of eminent domain. A speculative use – a use that will not occur in the near future – cannot support the taking of private property. On the other hand, EDA implies in its brief that the necessity component of the analysis is essentially meaningless. According to EDA, the necessity requirement is supplanted by the creation of a redevelopment district. Once a redevelopment district is formed, it is the district itself, and not the proposed use for the subject property, that resolves the necessity question. Common sense, public policy, and the relevant law support Appellants’ position.

**A. The “Concept” Underlying the Taking is Speculative.**

Minnesota law is clear – speculative purposes will not support the assertion of necessity. *Regents of Univ. of Minn. v. Chi. & Nw. Transp. Co.*, 552 N.W.2d 578, 580 (Minn. Ct. App. 1996). For purpose of eminent domain, “necessity” means “now or in the near future.” *Id.* But “public purpose and necessity cannot be thwarted . . . by alleging that the purpose for condemning the property is too speculative if in fact the project is officially supported by the governmental entity and ordinary agreements are in place to realize the project.” *In re MCDA v. Opus*, 582 N.W.2d 596, 597 (Minn. Ct. App. 1998).

For the purposes of this case, and as discussed above, the critical question for this Court is whether the ordinary agreements are in place to realize the project. In *In re MCDA v. Opus*, there was a written contract in place between the city and the developer, and the evidence indicated that the end-user was committed to the project. 582 N.W.2d at 601. Further, the evidence indicated that funding for the project was in place through a tax increment financing plan and an arrangement with the developer. *Id.* In *HRA for City of Richfield v. Walser Auto*, 630 N.W.2d 662, 670 (Minn. Ct. App. 2001), the taking authority similarly had an agreement with the developer regarding the project.

In this case, EDA does not have a binding agreement with a developer. Moreover, although a tax increment financing plan is in place, it only applies to funds expended by July 22, 2008. The record does not establish that there is a plan in place to provide funding for amounts expended after July 22, 2008. In this case, not only are the ordinary agreements to realize the project in place, no substantive agreements are in place at all. In short, the record does not contain evidence that the project will occur in the near future, if at all.

**B. The Cases Cited by EDA Are Distinguishable.**

EDA cites two cases to support its position – *Economic Devel. Auth v. Hmong-American Shopping Center, LLC* 2006 Minn. App. Unpub LEXIS 438 (Minn. Ct. App. May 9, 2006) and *Lino Lakes EDA v. Reiling*, 610 N.W.2d 355 (Minn. Ct. App. 2000). Both cases are distinguishable.

In *Hmong-American Shopping Center*, the Brooklyn Center EDA's immediate plan was to demolish the building and engage in environmental remediation. *EDA v. Hmong-Am Shopping Ctr., LLC*, A05-1239, 2006 Minn. App. Unpub. LEXIS 438 at \*14 (Minn. Ct. App. May 9, 2006). In addition, the Brooklyn Center EDA had a plan and a timeline of less than a year for completion of the demolition and remediation. *Id.* The record demonstrated that the Shopping Center had "a blighting influence on the surrounding properties." *Id.* at \*17.<sup>2</sup> This Court's holding in that case was limited: "We conclude that the EDA's immediate use of the property – removing a blighting influence and environmental remediation to prepare the site for private redevelopment – was not speculative." *Id.* at \*17-\*18. The Brooklyn Center EDA had an "immediate" plan in place, making its condemnation not speculative.

In the instant case, EDA's own brief demonstrates that it has no immediate plan. At one point, EDA claims it has "hired a developer" and that it has "a plan for redevelopment." (Resp't Br. at 25.) EDA refutes that statement at other points. For example, it claims that Minn. Stat. § 469.105 will become relevant only "[w]hen the EDA reaches the point at which it is ready to sell the land to a

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<sup>2</sup> In *Hmong-American Shopping Center*, the property owner initially requested that the subject property be redeveloped. When the EDA considered whether it should acquire the subject property by condemnation, the landowner indicated that the subject property was "challenged," and supported the use of condemnation. A condemnation action was then commenced. During a hearing relating to the condemnation proceeding, the co-owners of the subject property testified that the property was in need of redevelopment, and that one of the owners was willing to compete to be the developer of the redevelopment parcels.

developer.” (*Id.* at 13.) In addition, EDA claims it will not be able to enter into a binding agreement until it acquires Appellants’ parcels.<sup>3</sup> (*Id.* at 16.) With this statement, EDA admits that it plans only to hold onto the parcels, for an unknown period of time for some unknown future use, until it reaches a binding development agreement with an unknown developer, which it has not been able to do in the five-year TIF period. Thus, EDA’s condemnation of Appellant’s land was speculative and should be overturned by this Court.

Furthermore, EDA’s implied claim that its immediate purpose is to eliminate the blighting influence of Appellants’ parcels falls flat. In addition, EDA’s statement that Appellants’ parcels were found to be blighted is flatly wrong. (*Id.* at 5.) Despite EDA’s claims, a simple review of the cited study reveals that **none** of the Appellants’ properties were found to be “substandard” or “blighted.” (AA 162.)<sup>4</sup> This case is not parallel to *Hmong-American Shopping Center*, in which the Brooklyn Center EDA had immediate plans for environmental remediation and wanted to curtail the negative influence of the blighted parcel on the properties around it. EDA’s general statements that it is eliminating blight does not reach this standard nor are they applicable to this case. (*See, e.g.*, Resp’t Br. at 19.)

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<sup>3</sup> EDA’s difficulties in finding a developer should not allow it to violate Appellants’ constitutional rights.

<sup>4</sup> Larson Automotive is ID-18; U-Haul is ID-22; and Quam Competition Engines is ID-15. (*See* AA 129-131.) An “N” designation means the parcel was found not substandard; a “-” designation means either that the buildings are not substandard or that there is no building on the property. (*See* AA 248:2-249:6.)

In *Reiling*, as the result of changes to and the realignment of an intersection, many parcels adjoining the intersection were small, oddly shaped, and encumbered by right-of-way and access restrictions. 610 N.W.2d at 360. The EDA deemed it necessary to condemn four parcels for the purpose of assembling them into a parcel that was suitable for economic development. The property at issue in *Reiling* had not been developed. This Court held, given the record, that EDA had a specific plan for the property it was seeking to condemn, and that there was no evidence of any problems that would interfere with that plan. Accordingly, the trial court's decision granting the condemnation petition was affirmed.

In this case, the project is far more complex. It involves, according to the RFP sent out by the EDA, the redevelopment of the "Core Area with a mixture of retail, housing types, and/or restaurant and hospitality uses." (AA 197.) Given the nature of the project, the question then becomes whether there is evidence of any problems that would interfere with the proposed redevelopment. Again, the record is clear. A proposed redevelopment like the one in question cannot go forward without a development agreement. In this case, the absence of a binding development agreement establishes that there are substantial problems that might interfere with the plan. The history of the project and the inability of the EDA's failed efforts to move forward strongly indicate that this project faces substantial hurdles that make the redevelopment unlikely to occur in the near future.

**C. Public Policy Supports Appellants' Position.**

Appellants have operated their businesses on the property at issue in this appeal for years. The businesses provide employment, provide services, and generate taxes for the City of Eagan and Dakota County. Appellants are an asset to the community.

If Appellants' property is to be taken, it should be taken for a real project. To provide landowners with some assurance that the taking of their property is necessary, the Court should require the EDA to have a binding development agreement in place. After all, that is exactly what the City of Eagan promised its citizens when it adopted its Redevelopment Plan. Moreover, EDA would not be harmed by such a requirement. If and when EDA has a real use for Appellants' property, EDA may be able to file a second condemnation petition. To do otherwise is to encourage taking authorities like the EDA to condemn first and identify a use later. The ultimate use for the private property may be unknown at the time of taking, and may never occur at all. The practice urged by EDA and approved by the district court eviscerates the necessity component of an eminent domain analysis. Private property owners like Appellants -- and Article I, Section 13 of the Minnesota Constitution -- deserve much more.

**III. QUICK-TAKE CONDEMNATION WAS NOT AUTHORIZED BECAUSE THERE IS NO SHOWING THAT ACCELERATED ACQUISITION WAS REASONABLY NECESSARY.**

Even if this Court holds that the district court committed no error in its findings of public purpose and necessity, the decision below should be reversed on the grounds that the use of the quick-take statute was in error. Minn. Stat. § 117.042 only grants the use of quick-take condemnation when the condemning authority “could reasonably determine that it needs the property before the commissioners’ award could be filed.” *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 396 (Minn. 1980).

Yet, EDA presented no record evidence to support a reasonable “quick-take” determination. Instead, the evidence EDA points to – the then approaching TIF deadline and the need for clear title – is not sound. EDA’s determination that it needed Appellants’ properties before the commissioners’ award could be filed was both arbitrary and unreasonable because it was based on an erroneous reading of statute and case law. The district court’s grant of quick-take condemnation was clear error for the same reason.

**A. The TIF Deadline Did Not Create Necessity for the Use of Quick-Take Condemnation.**

Both EDA and the district court relied on the approaching TIF deadline as a basis for the use of quick-take condemnation. The district court stated, for example:

In order to [be] eligible for TIF reimbursement, expenditures in the Cedar Grove TIF District must be made by July 22, 2008. If this action does not move forward and the City does not undertake a quick take and make a deposit of \$2,813,660.00, the City would not be able to claim these as eligible costs that could be paid from the tax increment generated by the redevelopment. The use of the quick-take provision is therefore necessary. The loss of those funds would certainly be detrimental to the City and its residents.

(AA 25.) This interpretation of the TIF statute, Minn. Stat. § 469.1763, was overturned by earlier review of this Court. (Order #A08-767, July 22, 2008.) Thus, the district court's finding was clear error. In its brief to this Court, however, EDA repeats the same argument and fails to acknowledge this Court's July Order:

If the EDA did not move forward in its condemnation action and deposit the money, the EDA could not claim the money as eligible costs to be paid from the tax increment generated by the redevelopment.

(Resp't Br. at 27.) This assertion does not support the use of the quick-take statute. EDA would have been able to deposit the funds into the district court, which it did, once the condemnation action had started under a traditional condemnation action as well.

EDA also puts forward *Hmong-American Shopping Center's* statement that the approaching expiration of the TIF deadline supports a finding of necessity. (Resp't Br. at 24.) This assertion again fails to acknowledge that this Court's July Order forms the law of this case; an unpublished 2006 decision does not.

**B. The Alleged Need for Clear Title Does Not Support the Use of Quick-Take Condemnation.**

EDA's assertion that it needs clear title before development can go forward is manifestly unreasonable because it is based on a misreading of case law. Appellants explained in their opening brief that EDA's assertion and the district court's corresponding finding on this matter omitted critical reference to an existing contract with a developer: "[T]he city needed to assure itself and Oxford [the developer] of clear title before further investments were made." *City of Minneapolis v. Wurtele*, 291 N.W.2d at 396; see also *Lundell v. Coop. Power Ass'n*, 707 N.W.2d at 383 (quoting *Wurtele*; replacing the reference to the developer with ellipses because the power company contracted with the public, not a developer).

Instead of responding to Appellants' interpretation of the case law in its brief, EDA reasserts its position and misquotes the same passage again:

Minnesota courts have determined that a quick take is proper where, 'even though parts of the condemned property would not be developed until a much later date, the city needed to assure itself of clear title before further investments were made.'

(Resp't Br. at 26 (quoting *Lundell*, 707 N.W.2d at 383).) EDA omits the ellipses from the passage in *Lundell*, which would indicate the presence of a developer in the original version of the quotation. The developing authorities in *Lundell* and *Wurtele* had existing contracts that they needed to fulfill. These existing contracts necessitated clear title. A desire to enter into a contract does not.

EDA also asserts that because it has invested a lot of money and controls most of the property in the district that somehow the use of quick take becomes necessary. How much property an EDA controls or how much money it spends, however, is not rationally related to how fast it must purportedly need to gain additional property. More importantly, simply demonstrating the power to take and possess land does not demonstrate the power or necessity to take more. To stand against that power, Appellants rely on this Court to protect their constitutional rights.

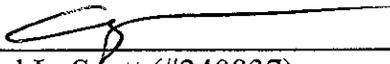
### **CONCLUSION**

The district court erred in finding that there was public purpose and necessity for a quick take condemnation of Appellants' properties. EDA had arbitrarily and capriciously exceeded its statutory authority; it is stockpiling land in the hopes of eventually completing a binding development agreement; and it had no reasonable basis to believe that it needed the land immediately. For all these reasons, Appellants respectfully request that this Court reverse the April 16, 2008 Order of the District Court.

Dated: September 23, 2008.

Respectfully submitted,

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