

No. A08-0767

**State of Minnesota
In Supreme Court**

Eagan Economic Development Authority,

Appellant,

v.

U-Haul Company of Minnesota a/k/a U-Haul Co. of Minnesota, *et al.*,*Respondents.*

**BRIEF AND APPENDIX OF AMICUS CURIAE
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION¹

Apologists for economic development takings and public subsidies for private development overlook both the public's disdain for such activities, as well as the many occasions in which projections of greater tax revenue and more employment are not realized. Instead, city planners, municipal leagues, and corporate beneficiaries of public largesse present pretty drawings of "gateway communities," alluring projections of economic growth, and less-than-fully representative examples of successful projects as justification for the continued use of the "despotic power"² of eminent domain.

Fortunately, the people of Minnesota have seen through the false promises of jargon-filled consulting studies. In response to the takings and corporate welfare on display in *Kelo v. City of New London* and its local equivalents, Minnesotans, through their elected officials, overwhelmingly enacted reforms in 2006 that stopped the type of abusive takings for private development that are at the heart of this case. By votes of 56-9 in the Senate, and 115-17 in the House of Representatives, the Minnesota Legislature enacted reforms to chapter 117 of the Minnesota Statutes that ended takings for private development and require a comparison of repair costs to assessed value before takings-related blight remediation is allowed.³

¹ The Institute for Justice certifies that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity contributed monetarily toward its preparation or submission.

² *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795).

³ Vote recorded in each chamber on SF 2750 available at:

https://www.revisor.leg.state.mn.us/revisor/pages/search_status/status_detail.php?b=Senate&f=SF2750&ssn=0&y=0&ls=84 (last visited Oct. 22, 2009).

The Institute for Justice (IJ) urges this Court to adopt a similar skepticism about the use of eminent domain by public bodies like cities and EDAs. It should not be presumed that the government has the power to condemn, especially given the harshness of losing one's home, farm, or business. This brief justifies the adoption of a rule which will eliminate the wrongful application of such laws, as well as explain how such a rule could apply in this case. This Court should adopt a rule of construction that construes eminent domain statutes strictly in favor of property owners and against condemners.

STATEMENT OF THE CASE AND FACTS

IJ concurs with Respondents' statement of the case and facts.

STANDARD OF REVIEW

IJ concurs with Respondents' statement of the applicable standard of review.

ARGUMENT

I. Statutory Grants of Eminent Domain Power Are Strictly Construed in Favor of the Property Owner and Against the Condemnor.

In general, grants of the power of eminent domain must be found expressly or by necessary implication in legislation. 1A Julius L. Sackman, *Nichols on Eminent Domain* § 3.03 (3d ed. 2004) (citing states and cases).⁴ “[T]he policy has become well established that such grants are strictly interpreted against the condemning party and in favor of the owners of property sought to be condemned. The rule is premised on the view that the power of condemnation is in derogation of common right because it is an interference with traditional and long established common-law or statutory property rights.”

⁴ Cf. *Volden v. Selke*, 87 N.W.2d 696, 702 (Minn. 1958) (holding that grant of eminent domain power may appear by *fair* implication).

3 Sutherland, *Statutes and Statutory Construction* § 64:6 (6th ed. 2000) (footnotes and citations omitted); *see also* Resp. Br. at 10 (highlighting rule). Almost every state has adopted this canon of interpretation. *See id.* at n.2 (citing cases);⁵ *see also* Appendix of *Amicus Curiae* Institute for Justice (listing states and illustrative cases). The canon operates like a presumption in favor of the property owner when an ambiguous statute is present. *See Minn. Canal & Power Co. v. Koochiching Co.*, 107 N.W. 405, 407 (Minn. 1906) (“The power must be clearly granted, and every presumption is in favor of the individual landowner. . . . If it is doubtful whether the statute confers the authority, the doubt must be resolved against the petitioners.”) (quotation and citation omitted).

In *In re Petition of Burnquist* (*Burnquist v. Cook*), this Court concluded that the canon should apply only when there is a delegation of condemnation authority to individuals or private corporations. 19 N.W.2d 394, 400 (Minn. 1945) (“[T]he principle of strict construction has no application insofar as the state or public departments thereof are concerned.”). In *Burnquist*, the Court determined that the state commissioner of highways had the necessary authority by implication to take a property owner’s right of way access to his property in order to complete the construction of Highway 36, even though he was not expressly delegated such authority. *Id.*

But in so holding, the *Burnquist* Court wrongly equated grants by necessary implication with liberal construction of eminent domain statutes. *Id.* at 402 (“Courts

⁵ *See, e.g., State, Through Dept. of Highways v. Jeanerette Lumber & Shingle Co.*, 350 So.2d 847, 855 (La. 1977), *aff’d on reh’g* 350 So. 2d 847, 860-64 (La. 1977); *Roberts v. Miss. State Highway Comm’n*, 309 So.2d 156, 159 (Miss. 1975); *City of Little Rock v. Sawyer*, 309 S.W.2d 30, 36 (Ark. 1958); *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So.2d 483, 485 (Fla. 1947).

have often applied [this] doctrine of liberal construction to achieve and attain the general objectives of the statutory grants of power involved.”). There was no need to adopt a rule of liberal construction for grants of eminent domain power to public bodies because grants of power can be found by *necessary* implication. This Court could have and should have concluded that the commissioner possessed the authority by necessary implication to take the property to complete the highway. Instead, the *Burnquist* Court wrongly applied a rule of liberal construction to grants of eminent domain power to public bodies.⁶ Minnesota is the *only* state to have adopted such a rule.⁷ This Court has not revisited *Burnquist*’s holding to correct this error, but should do so here and apply a rule of strict construction to grants of the takings power to public bodies.

A. Many States Apply the Rule of Strict Construction

As noted above, other states since *Burnquist* have not made a distinction between public and private condemners when applying the strict construction canon. *See supra*,

⁶ *See Kelmar Corp. v. Dist. Ct. of Fourth Judicial Dist., Hennepin County*, 130 N.W.2d 228, 232 (Minn. 1964) (“It is ordinarily true that the power of eminent domain can be exercised only as authorized by the legislature. This court, however, since *Burnquist* ... is committed to a rule of construction which recognizes implied powers in addition to those expressly conferred upon the commissioner.”) (citation omitted).

⁷ The *Burnquist* decision is not entirely clear as to whether it is adopting a rule construing grants of eminent domain power to public bodies liberally, or whether it is construing them strictly, but “less strictly” than to grants to private entities like railroads. The language of the opinion indicates the former, while the headnotes indicate the latter. A few states have adopted the “less strictly rule,” but a review of the cases that apply the “less strictly” canon indicate that it has little teeth in restraining condemners, and is simply one factor among many considerations in the interpretive process. *See* Appx. of Am. Curiae Institute for Justice at II (listing states and illustrative cases that apply the rule of “less strict” construction). Either way, the Institute for Justice asks this Court to adopt a “strict” rule of construction in favor of property rights and against grantees, like the majority of other states.

note 3. They have not done so because eminent domain, no matter the identity of the condemnor, threatens property rights. When the sovereign state delegates the condemnation power, it is necessary to construe it strictly against the agency or municipal body so that the cherished rights of the individual may be properly safeguarded. *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483, 485 (Fla. 1947). And as this case illustrates, no distinction between public and private condemnors should be made because the activities of public bodies like EDAs are often heavily intertwined with and dependent upon private corporations and developers.

B. How the Rule Works

The rule of strict construction is essentially a policy canon that resolves ambiguities in statutes concerning whether a taking is permissible. It can speak broadly to the who, what, when, where, why, and how much of takings, and resolve any statutory ambiguities related thereto. For example: (1) *who* is taking property—takings by public entities not *explicitly* delegated eminent domain power should be disfavored,⁸ as should takings by individual public officers where the delegation has been explicitly made to a more representative body (e.g., a city council);⁹ (2) *what* kind of property is being

⁸ See, e.g., *State v. Core Banks Club Prop., Inc.*, 167 S.E.2d 385, 390 (N.C. 1969) (applying strict construction principle to find that no grant of eminent domain power was made to the state's administrative department where statute merely allocated the responsibility of purchasing land and a specific set of procedures for doing this); *City of Little Rock v. Sawyer*, 309 S.W.2d 30, 36 (Ark. 1958) (finding under strict construction that a statute empowering cities to create commissioners' boards to run water works did not also implicitly grant eminent domain power to these boards).

⁹ See, e.g., *Ruddock v. City of Richmond*, 178 S.E. 44, 47 (Va. 1935) (holding that a city attorney was not authorized to pursue takings beyond those explicitly permitted by the city council), *adhered to*, 183 S.E. 513 (Va. 1935).

taken—takings by public entities of property that is still being gainfully used should be disfavored,¹⁰ as should takings of property formerly leased or relied upon by public entities;¹¹ (3) *where* the property being taken is located—takings by public entities that exceed their territorial and/or political jurisdiction should be disfavored;¹² (4) *when* the property is being taken—takings by public entities in anticipation of future needs (as opposed to present ones) should be disfavored;¹³ (5) *why* the property is being taken—takings by public entities that fail to clearly fit under explicit statutory purposes should be

¹⁰ See, e.g., *Peavy-Wilson Lumber Co. v. Brevard County*, 31 So. 2d 483, 487 (Fla. 1947) (finding under strict construction that a statute permitting takings for public parks did not permit a county to seize a “vast, uninhabited and remote area . . . from the owner, who is gainfully using it”).

¹¹ See, e.g., *Orsett/Columbia L.P. v. Superior Court ex rel. Maricopa County*, 83 P.3d 608, 613 (Ariz. Ct. App. 2004) (finding under strict construction that eminent domain statute did not permit county “to condemn a mere leasehold interest in a privately-owned commercial building”); *City of Mullens v. Union Power Co.*, 7 S.E.2d 870, 871-72 (W. Va. 1940) (finding under strict construction that eminent domain statute granting cities the power to “purchase the franchises and properties of a privately owned public utility which the city would have the authority to acquire and construct as an original undertaking” *did not* authorize cities to obtain ownership of private utilities through the use of eminent domain).

¹² See, e.g., *City of Springfield ex rel. Bd. of Pub. Utils. of Springfield, Mo. v. Brechbuhler*, 895 S.W.2d 583, 584 (Mo. 1995) (finding under strict construction that statutes granting eminent domain power in general to “home rule cities” *did not* also permit these cities to condemn the property *outside* the counties they were located); *Bertagnoli v. Baker*, 215 P.2d 626, 627-28 (Utah 1950) (finding under strict construction that statute granting eminent domain power to counties for the purpose of acquiring land within their borders *did not* also permit—either expressly or by implication—counties to obtain land located *outside* their borders).

¹³ *Krauter v. Lower Big Blue Natural Res. Dist.*, 259 N.W.2d 472, 475 (Neb. 1977) (finding under strict construction that a state-created conservation district *could not* use the eminent domain power granted to it by statute to take property it did not need in the present but might probably need in the future).

disfavored;¹⁴ and (6) *how much* of the property is being taken—takings of “fee simple” interests in property (versus easements) absent explicit statutory authorization should be disfavored,¹⁵ as should takings that destroy an owner’s control over any leftover property that he rightfully retains after a taking.¹⁶

¹⁴ See, e.g., *State Highway Dept. v. Hatcher*, 127 S.E.2d 803, 806 (Ga. 1962) (finding under strict construction that statute enabling any state department to use eminent domain power to help either build or maintain “State-aid public roads” *did not* also permit the state highway department to take land in order to build a federal, limited access, interstate highway); *Dept. of Pub. Works and Bldgs. v. Ryan*, 191 N.E. 259, 264 (Ill. 1934) (holding under strict construction that an eminent domain statute authorizing departmental use of eminent domain to expand roads existing at the time of its passage *did not* also permit use of eminent domain in building of new roads); *Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd.*, 899 N.E.2d 829, 835-36 (Mass. 2009) (finding under strict construction that statute granting eminent domain power to state energy facilities board for *new* pipeline construction *did not* also authorize eminent domain takings to benefit preexisting pipelines); *Lorenz v. Campbell*, 3 A.2d 548, 550-51 (Vt. 1939) (finding under strict construction that a statute granting eminent domain power to towns “for the erection of a soldiers’ monument or for other public purpose” *did not* permit takings for the general purpose of building a public park).

¹⁵ *Wallentinson v. Williams County*, 101 N.W.2d 571, 575-76 (N.D. 1960) (finding under strict construction that that eminent domain statute providing for condemnation of land *did not* convey a “fee simple absolute title” in the property—only a determinable fee, since state still could “vacate” the taken land, thus allowing it to revert to its original owner); *McMechan v. Bd. of Educ. Of Richland Tp., Belmont County*, 105 N.E.2d 270, 274-75 (Ohio 1952) (finding under strict construction that statutory grant of eminent domain power enabling education boards to appropriate land for schoolhouses did not convey full rights to ownership of land, but only the right to use the land for a specific purpose—and once the education board stopped using the appropriated land as a school-house site, legal ownership of the land reverted back to its original owners); *City of Cushing v. Gillespie*, 256 P.2d 418, 420-21 (Okla. 1953) (“Since the condemnation proceedings do not show a clear intent to take a fee simple title; and since the applicable statute does not require the taking of a fee simple title; and since it was not shown that the public need required the taking of a fee simple title . . . we hold that title to the mineral interests herein involved did not pass to the City of Cushing . . .”).

¹⁶ *Vallone v. City of Cranston, Dept. of Pub. Works*, 197 A.2d 310, 317 (R.I. 1964) (finding under strict construction that landowners were entitled to recover damages where city had authorized the taking of an “easement” in their property that was the virtual equivalent of a “fee simple”-taking insofar as it deprived the landowners of the right to

At least 40 states employ the rule of strict construction. *See* Appendix of *Amicus Curiae* Institute for Justice at 1 (listing cases and states). The inexorable force of this principle is especially visible in Massachusetts, where the state supreme court has adopted consistently greater levels of interpretive rigor in construing statutory delegations of eminent domain power to public entities. Indeed, in 1917, the state supreme court first adopted a standard of “reasonable strictness” in finding that a municipality did not have the authority to take privately owned land in order to electrify a water pumping station where the statute involved only allowed takings for pipeline construction. *Comiskey v. City of Lynn*, 115 N.E. 312, 312 (Mass. 1917). Then, less than 25 years later in *Inhabitants of Town of Holliston v. Holliston Water Co.*, the court opted to apply “considerable strictness” in holding that a publicly owned water company could not take water from underground sources where the company was only authorized by statute to take surface springs or streams. 27 N.E.2d 194, 195-96 (Mass. 1940). Finally, this year in *Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd.*, the court shed all interpretive qualifiers and held that a state energy facilities board could not take land to benefit preexisting pipelines since it was only authorized by statute to take land for new pipelines and “eminent domain statutes must be strictly construed because they concern the power to condemn land in derogation of private property rights.” 899 N.E.2d 829, 835 (Mass. 2009) (emphasis added). To this end, while Massachusetts has clearly undergone

access vital parts of their remaining property); *Ellis v. Ohio Tpk. Comm’n*, 120 N.E.2d 719, 723 (Ohio 1954) (finding under strict construction that statutes that granted eminent domain power to state turnpike commission did not grant express authority to the commission enabling it to take some land from an owner and deny owner’s right to erect billboards or other signs on his remaining lands).

a significant evolution from “reasonable” strictness to “considerable” strictness to “strict” strictness when evaluating eminent domain statutes, one thing has remained the same: Under all three standards, the court has affirmed the danger of overreaching condemnors and its concomitant duty to protect landowners from this threat.

Again, this Court should follow Massachusetts and other states by rejecting the public/private distinction of *Burnquist* and hold that eminent domain statutes should be construed strictly in favor of the property owner and against the condemnor. Strict construction of eminent domain statutes requires that absent explicit delegation, all statutory claims of government power to take property must be read in favor of the landowner. *See Koochiching Co.*, 107 N.W. at 407 (“The right to take the private property of a citizen against his will is justifiable only on grounds of high public policy... It can be exercised only within strict terms of the grant and subject to [] constitutional restrictions.”).

C. Changed Circumstances Require This Court to Adopt the Rule of Strict Construction.

The landscape of eminent domain policy and jurisprudence has changed significantly since 1945, especially in Minnesota, and these changed circumstances warrant a different rule.¹⁷ In particular, the rampant abuse of eminent domain, as well as

¹⁷ *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992) (asking “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”); *see also F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct 1800, 1822 (2009) (“In cases involving constitutional issues’ that turn on a particular set of factual assumptions, ‘this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained.”) (Thomas, J., concurring) (quoting *Burnet v.*

Minnesotans' overwhelming backlash against *Kelo* and its state counterparts that culminated in the 2006 reforms of chapter 117, indicate it is time to narrowly construe grants of eminent domain power against condemnors and in favor of property owners.

When *Burnquist* was decided in 1945, the "public use" requirement for eminent domain literally meant "use by the public." *Burnquist*'s facts themselves illustrate this principle. But in *Berman v. Parker*, decided roughly ten years later, the U.S. Supreme Court concluded that the Fifth Amendment's "public use" requirement could also mean any "public purpose." *Berman* held that the District of Columbia could take even non-blighted properties in order to remove large areas of what it considered to be slums. 348 U.S. 26, 31-34 (1954). The Court thus gave constitutional legitimacy to now-discredited "urban renewal" programs that bulldozed slums and other "blighted" areas for redevelopment. Many commentators have described the true legacy of slum removal as "Negro removal."¹⁸

The *Berman* decision can be understood as part of the Court's desire to help cities solve seemingly intractable problems like decaying urban slums. But naturally, and not unsurprisingly, cities were quick to expand their new "tool" of redevelopment takings for use in non-blighted areas. The Michigan case of *Poletown Neighborhood Council v. City*

Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)); *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 302 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate ...").

¹⁸ See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting); see also Wendell E. Pritchett, *The Public Menace of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 47 (2003).

of Detroit,¹⁹ later overturned, which involved the condemnation of a huge section of Detroit for a new General Motors plant,²⁰ lent added fuel to the use of private-to-private takings for their purported “economic benefits.” See, e.g., *City of Duluth v. State*, 390 N.W.2d 757, 763 n.2 (Minn. 1986) (citing *Poletown* as support for its decision to allow economic-development takings for non-blighted areas). What was conceived as a tool for cities to fight urban problems quickly became an instrument of abuse that used public power for private gain.

This phenomenon culminated in the now-infamous U.S. Supreme Court decision of *Kelo v. New London*.²¹ In *Kelo*, the New London Development Corporation (“NLDC”) sought to redevelop the city’s Fort Trumbull neighborhood in order to lure pharmaceutical giant Pfizer to the area and have it build a multimillion dollar research and development center. As a result, the NLDC needed to acquire approximately 90 acres adjacent to the proposed project site to build a conference center, a hotel, upscale condominiums and retail shopping—necessary amenities, Pfizer believed—for

¹⁹ 304 N.W.2d 455 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

²⁰ The GM plant—which destroyed the homes of 4200 people, 1500 homes, 144, businesses, and 16 churches—today employs only half of the envisioned 6,500 employees, and operates on only 14 of the 650 acres that were condemned. See Brian McKenna, “Reflections on the 25th Anniversary of General Motors’ Notorious Eminent Domain Battle in Michigan: We All Live in Poletown Now,” *available at* <http://www.counterpunch.org/mckenna03092006.html> (last visited Oct. 30, 2009). It may have resulted in a net job loss for the City of Detroit. See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1006 (2004).

²¹ 545 U.S. 469 (2005).

employees and clients who would visit the new Pfizer complex. *Kelo*, 545 U.S. at 473.

The area consisted largely of businesses and Victorian homes. *Id.* at 475.

At the NLDC's command, the Fort Trumbull neighborhood began to be bulldozed and numerous homes and businesses were destroyed. *Id.* Susette Kelo and a few of her neighbors decided to take a stand against the NLDC and launched a legal battle and property rights movement that will certainly go down in history as one of the great American stories of citizen activism. *Id.* at 475-76. Ultimately, their fight landed them at the U.S. Supreme Court.

The Court concluded, in a 5-4 decision, that a taking solely for the speculative benefits of economic development was permissible under the Fifth Amendment's Takings Clause. *Id.* at 483-84. "Public use" now included takings where any conceivable "public benefit" would accrue. *Id.* at 484. Again, the Court saw it fit to ignore the plain language of the Constitution so it could give cities the "tools" they needed for the "vital" government task of redevelopment.

The implications of the case were not lost on Justice Sandra Day O'Connor, who prophetically declared: "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Justice Clarence Thomas stated in his dissent that "[a]llowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees

that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.” *Id.* at 522 (Thomas, J., dissenting).

Ten years have passed since the bulldozers moved into Fort Trumbull, and another four have passed since the *Kelo* decision. Today, the 90 acres sit empty because the NLDC has been unable to attract any developers to the site.²² The barren fields where a neighborhood once stood have become a favorite spot for local bird watchers.²³

Minnesota has not been spared the tragedy of *Kelo*-style redevelopment-taking boondoggles. This Court needs to look no further than the feral fields in New Brighton and Brooklyn Park to see that the redevelopment projects in second-ring suburbs like Eagan may over-promise and under-deliver.

In a colossal and undisputed failure,²⁴ the City of New Brighton paid over \$19 million in a settlement agreement in 2005 to take 26 acres of contaminated land formerly owned by Midwest Asphalt Company as part of the City’s acquisition and redevelopment of over 100 acres in the “Northwest Quadrant” that it began in 2000.²⁵ Nine years later,

²² Part of the land was eventually converted into a state park. See Katie Nelson, *Conn. land taken from homeowners still undeveloped*, Associated Press, Sept. 26, 2009, available at http://www.breitbart.com/article.php?id=D9AU92VG0&show_article=1 (last visited Oct. 16, 2009).

²³ Gideon Kanner, *The New London Disaster*, National Journal, Sept. 1, 2009, available at http://www.nationaljournal.com/njonline/no_20090901_5271.php (last visited Oct. 23, 2009).

²⁴ Eric Hanson, *New Brighton looks at ways to solve Quadrant mess*, Star Tribune, Feb. 20, 2008, available at <http://www.startribune.com/local/north/15824722.html> (last visited Oct. 14, 2009).

²⁵ “Northwest Quadrant Redevelopment FAQs,” available at http://ci.new-brighton.mn.us/index.asp?Type=B_LIST&SEC={D3D8722B-4783-42FA-8F39-

no redevelopment has occurred on either Midwest Asphalt's former property or on the vast majority of the 100 acres that were condemned or purchased under the threat of eminent domain. Instead, the City faces the stark possibility of tens of millions of dollars in remediation costs that the City itself now describes as "prohibitive."

Similarly, 8.9 acres remain barren today in the City of Brooklyn Center. There, the City's EDA condemned the land in late 2004 where Mr. Chao Fong Lee and his family owned and operated the Hmong-American Shopping Center.²⁶ To add insult to injury, after two years of Mr. Lee trying to work with the EDA to redevelop the property into a "Little Asia" consistent with the City's plans, the City awarded the project to another developer.²⁷ Sadly, the City's plans failed. Nearly five years later, the City has realized no progress in redeveloping a property that now is just a grassy field east of Highway 100 at 57th Street. In fact, the City has now decided that its 2009 goals include starting over and "[r]evisit[ing] the development options for the [site]."²⁸

Fortunately, the *Kelo* saga brought the issue of eminent domain abuse to the public's attention. In the aftermath of *Kelo*, polls indicated that between 80-90% of the public was opposed to redevelopment takings.²⁹ Minnesota is one of 43 states to have

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²⁶ See *Econ. Dev. Auth. In and For the City of Brooklyn Center v. Hmong-American Shopping Center, LLC*, 2006 WL 1229521 at *1 (Minn. App. May 9, 2006).

²⁷ See *id.*

²⁸ City of Brooklyn Center Special Revenue Fund, available at <http://www.ci.brooklyn-center.mn.us/index.asp?Type=SEARCH&searchSection=&SEC={609417B4-1DDB-4C4B-9EA0-42D40141A103}&keyword=57th logan&DocPage=1> (last visited Oct. 20, 2009)

²⁹ Kanner, *supra*, note 23.

statutorily restricted the use of eminent domain since the *Kelo* decision.³⁰ The public will no longer accept the injustice of the government taking one person's home, farm, or business, and then turning it over to a developer. The State's legal regime should support and reflect this consensus in favor of property rights.

The days of courts simply rubberstamping a taking should come to a close. Despite the presence of the 2006 statutory reforms, Minnesota has not yet revisited its eminent domain precedents and accorded further constitutional protections to property owners by putting in place limitations on what constitutes a public use and when a taking is really necessary. See *City of Duluth*, 390 N.W.2d at 764 (adopting *Poletown* and concluding construction of private paper mill was for a public purpose); but cf. *Hous. and Redevelopment Auth. ex rel. City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885, 891 (Minn. 2002) (court evenly divided concerning whether taking for new Best Buy headquarters was for a "public purpose"). The interpretation and construction of eminent-domain-related statutes thus takes on a key importance as the primary battleground between property owners and condemnors.

D. A Rule of Strict Construction Is Consistent with the Policy of This State.

Adopting this canon of strict construction is consistent with the public policy of this State, chapter 645 of the Minnesota Statutes, and the State's tradition of construing

³⁰ "50 State Report Card: Tracking Eminent Domain Legislation Since *Kelo*," available at http://www.castlecoalition.org/index.php?option=com_content&task=view&id=57 (last visited Oct. 23, 2009).

statutes strictly in favor of the property owner when they interfere with common-law property rights.

1. Minnesota Eminent Domain Policy

The 2006 statutory reforms overwhelmingly adopted by the State legislature banned takings solely for economic development, and required—in certain situations susceptible to pretextual takings—that condemnors show by a preponderance of the evidence that a proposed taking was for a permissible public use and was necessary to achieve that public use. *See* Minn. Stat. §§ 117.025, subd. 11(b); 117.075, subd. 1(b). These rules demonstrate that the public is eager to protect property rights and is not willing to give cities and other public bodies a free pass through the courts for the sake of administrative convenience. A condemnor now must show a real public need for the taking, and that the taking is authorized by law. It logically follows that any ambiguity in those statutes or others related to a condemnor's ability to take property should be construed in favor of the property owner.

For example, despite the fact that the reforms to chapter 117 expressly banned redevelopment takings to increase the tax base,³¹ agencies like EDAs and port authorities were not stripped of their condemnation powers. *See* Minn. Stat. § 469.101, subd. 4 (stating EDAs may acquire property through condemnation); Minn. Stat. § 469.055, subd. 8 (stating port authorities may acquire property through condemnation). A rule of strict construction ensures that their ability to take property is limited consistent with the

³¹ *See* Minn. Stat. § 117.025, subd. 11(b) (“The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.”).

reforms of chapter 117 and the overwhelming opposition by Minnesotans to redevelopment takings. Any doubt about their ability to take property for another redevelopment scheme should be resolved in favor of the property owner.

2. Chapter 645 of the Minnesota Statutes

Minnesota is unique among the states in that it has codified canons and principles of statutory interpretation and construction. *See generally* Minn. Stat. §§ 645.001, *et seq.*; *see also Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 339 n.3 (Minn. 1984) (rules of statutory construction apply when construing municipal ordinances). That list is not exclusive. *See State v. Williams*, 771 N.W.2d 514, 523 (Minn. 2009) (applying “*expressio unius*” canon not enumerated by statute).

According to Minn. Stat. § 645.16, the object of all statutory interpretation is to give effect to the intent of the legislature. The best method, however, of determining the legislature’s intent is to rely on the plain language of the statute. *State v. Iverson*, 664 N.W.2d 346, 350-51 (Minn. 2003). “When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, *among other matters*:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16 (emphasis added).

In certain circumstances, consideration of these factors will be bypassed when a clear policy canon resolves the issue. “Courts . . . look to substantive-policy canons that specifically relate to the subject matter . . . of the legislation. The substantive-policy canons include . . . common law-based canons that include principles strictly interpreting statutes in derogation of the common law” *Occhino v. Grover*, 640 N.W.2d 357, 360 (Minn. App. 2002). The proposed rule of strict construction is one such instance. It applies in the narrow context of ambiguous statutes related to the exercise of eminent domain power.³²

To give a parallel example, the rule of strict construction for eminent domain statutes is the functional equivalent of the rule of lenity for ambiguous criminal statutes, which this Court has recognized and applies. *See State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007) (stating that when a criminal law is ambiguous, the rule of lenity requires this Court to construe the law narrowly); *State v. Zeimet*, 696 N.W.2d 791, 793-94 (Minn. 2005) (same). Neither rule is explicitly spelled out in chapter 645, yet each is applied by courts for the resolution of statutory ambiguities. Both rules are supported by the strong protections courts apply to important rights like free speech and private property. *See, e.g., Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 469 (2007) (“*WRTL IP*”) (stating courts’ construction or application of statutes affecting the freedom

³² The proposed rule of strict construction is still good law for statutory grants of power to *private* authorities that, over a century ago when the rule was formulated, served public purposes. IJ is asking this court to also apply the rule of strict construction to legislative grants to public bodies as well. The point is that the rule is still good law, and not specifically enumerated by statute. Like the rule of lenity, there is no bar to it being adopted by this Court.

of speech “must give the benefit of any doubt to protecting rather than stifling speech”). And both rules are justified by the gravity of the consequences a person faces when subject to a broad reading of either type of statute: jail time or the loss of real property like a home or business. *See, e.g., Dep’t of Transp. v. Stapleton*, 97 P.3d 938, 941 (Colo. 2004) (“This rule of strict construction is premised on the fact that the power of eminent domain is one of the most harsh proceedings known to the law Thus, the right to condemn property must clearly appear either by express grant or necessary implication.”) (Kourlis, J., dissenting) (citations omitted);³³ *see also U.S. v. Bass*, 404 U.S. 336, 347 (1971) (“When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”) (quotation omitted). In a tie between the condemnor and the property owner, the tie should go to property rights. *Cf. WRTL II*, 551 U.S. at 474 (“Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”).

3. Statutes in Derogation of Common Law Are Strictly Construed

It is precisely the gravity of the loss of common-law liberties by legislation that led Minnesota courts to originally adopt the rule that statutes in derogation of the common law shall be strictly construed. *See, e.g., Lehmicke v. St. Paul, Stillwater & Taylor’s Falls Railroad Co.*, 19 Minn. 464, 1873 WL 3198 at *8 (Minn. 1873) (“[T]his

³³ *Cf. Baycol, Inc. v. Downtown Dev. Auth. of City of Fort Lauderdale*, 315 So. 2d 451, 455 (Fla. 1975) (“The power of eminent domain is one of the most harsh proceedings known to the law. Consequently, when the sovereign delegates this power to a political unity or agency, a strict construction must be given against the agency asserting the power.”).

proceeding to condemn respondent's land is under a statutory power in derogation of common right, and the appellant can only acquire an easement over the premises by a strict compliance with the statute.”). The *Burnquist* Court created an unnecessary distinction between statutory grants of power to public and private bodies, construing the former liberally, or “less strictly,” than the latter. This Court, however, has an opportunity to reinvigorate the traditional rule found in *Koochiching Co.* strictly construing eminent domain statutes in favor of property rights, which is consistent with the longstanding principle in Minnesota that statutes in derogation of the common law are construed strictly. *See, e.g., Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327-28 (Minn. 2004) (holding that statutes in derogation of the common law are strictly construed, and that legislation will not be interpreted to supplant, impair, or restrict equity's normal function as an aid to complete justice); *Howes v. Gillett*, 10 Minn. 397, 1865 WL 986 at *1 (Minn. 1865) (“This statute is in derogation of the common law and common right, and must be strictly construed.”).

II. The Rule of Strict Construction Applies in This Case.

A. How the Rule Applies Here

So what does all this mean for the case here? The Institute for Justice seeks to ensure that grants and delegations of eminent domain power are construed in favor of property owners in the event of any doubt or ambiguity. This brief now proceeds to explain how the rule could apply in this case in order to justify the usefulness of its adoption.

First, it seems plain under chapter 469 that once a city creates an EDA, it limits the EDA's authority through an enabling resolution. Minn. Stat. § 469.092, subd. 1. The issue then becomes—as is the case here—how broadly does one read the limitations contained in the relevant enabling resolution?

Section 2.03(d) of the City of Eagan's EDA Enabling Resolution (00-17) states:

2.03 Pursuant to Minnesota Statutes, Section 469.092, the following limits are placed on the authority of the EDA:

(d) The EDA must submit its plans for development and redevelopment to the City Council for approval in accordance with City planning procedures and laws.

(App. Am. Appx. 2). The EDA and the League of Cities argue for a narrower reading of enabling resolutions because they seek to safeguard broad authority for EDAs. In other words, their proposed rule is that EDAs have the full range of statutory powers available to them under chapter 469 unless the enabling resolution *explicitly* limits them. Therefore, they argue, because the enabling resolution does not explicitly limit the EDA's condemnation authority, the statute is not ambiguous and the EDA had the power to condemn the properties.

Naturally, the property owners seek a broad reading of the particular limitation in the enabling resolution. Their argument can essentially be summarized as follows: there is no presumption that EDAs possess the full range of powers under chapter 469 because they rely on cities for their creation; instead, the enabling resolution limits the EDA's authority to condemn by requiring it to submit its plans and activities to the City Council for approval and ensure that they conform with other city laws, like Eagan's

Redevelopment Plan (App. Am. Appx. at 64-88), which was adopted by resolution. And because section I-8 of the Redevelopment Plan,³⁴ submitted, incorporated, and adopted in accordance with section 2.03(d) of the EDA Enabling Resolution (00-17), specifically required a binding development agreement to be in place before any condemnation could occur, and there was none, there was no authority for the condemnation.

The EDA also makes some secondary arguments in response to the property owners' statutory analysis, *inter alia*, that the redevelopment plan does not apply to the EDA. Based on the contrary interpretations of the parties, there is genuine ambiguity about (1) whether Minn. Stat. § 469.092, subd. 1, requires express limitation of the potential EDA powers contained in Minn. Stat. §§ 469.001-.047; (2) whether section 2.03(d) of the enabling resolution forbade the EDA from condemning property without a binding development agreement in place; and (3) whether the limitation in the redevelopment plan applied to the EDA. *See Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986) (stating the test for ambiguity is whether the statutory language has more than one reasonable interpretation).

The property owners' arguments are supported by logic and common sense. Despite the fact that EDAs are defined, in some measure, by state statute, they are completely dependent upon the city for their existence, and their powers can be limited in any manner by the creating city. Minn. Stat. 469.092, subd. 1(8) (stating cities can limit

³⁴ *See* App. Am. Appx. at 68 (“Prior to formal consideration of the acquisition of any property, the city will require the execution of a binding development agreement with respect thereto and evidence that Tax Increments or other funds will be available to repay the Public Costs associated with the proposed acquisition.”).

the authority of EDAs in any manner they wish). If a city, like Eagan, says that an EDA must “submit its plans for development and redevelopment to the City Council for approval in accordance with City planning procedures and laws,” and then creates rules about condemnation requiring binding development agreements, then those rules should apply. It is even doubtful whether there is any ambiguity in what Eagan did at all. But in the event a statute related to the exercise of the power of eminent domain is ambiguous, how should that ambiguity be resolved?

If this Court concludes that there is some ambiguity in chapter 469 of the State statutes or the enabling resolution concerning the EDA’s ability to condemn property, then the rule of strict construction should apply. The Court should then hold that the ambiguous enabling resolution, coupled with the Redevelopment Plan’s limitation on the power of condemnation to instances where a binding development agreement was in place, limited the condemnation power of the EDA due to the presumption created by the substantive policy canon in favor of property rights.

The League claims that siding with the property owners would mean putting a cloud of uncertainty over redevelopment projects conducted by EDAs. Br. of Am. Cur. League of Cities at 6. But under chapter 469, a city council could at any time permit an EDA to exercise condemnation authority if it chose to do so, even without an enabling resolution. It is a grant of power to an EDA, not a limitation, and thus requires no special procedures. If there is any doubt about whether an enabling resolution allows an EDA to condemn land, the city can grant it the power to do so. In the short term, an EDA may have to get projects approved on a case-by-case basis because of an ambiguity in the

resolution, but the city can always clarify the enabling resolution to remove any doubt about the EDA's powers. It is not as though development projects or the overall capabilities of EDAs are being jeopardized.

Further, what of the uncertainty that *property owners* face in a regime where cities create rules and limitations on condemnation and adopt redevelopment plans, only for an EDA to then ignore them through alleged linguistic loopholes? The property owners in this case had the uncertainty of a cloud of condemnation hanging over their heads for four years. Property owners are entitled to expect that EDAs follow the express rules and requirements EDAs themselves adopt and their creating cities make for them, as well as have any ambiguity concerning their property rights construed in their favor.

B. Why the Rule of Strict Construction Matters in This Case

One seemingly odd component of this case is that the League of Cities is weighing in *in favor* of the EDA. The League is essentially arguing that it should be *more difficult* for its member cities to limit an EDA's authority. Put another way, the League is arguing that cities should be allowed to create these creatures, but then be handcuffed in their attempt to control them. Why would the League do that? *Kelo* might illustrate the dynamic at work in this case.

In *Kelo*, the New London city council delegated authority to condemn property to the New London Development Corporation, which was in charge of wooing a Fortune 500 company and redeveloping the Fort Trumbull neighborhood. *Kelo*, 545 U.S. at 475. But after this delegation, little to no oversight of the NLDC's activities was conducted by the city council. The result was that the NLDC concocted the massive Pfizer

redevelopment scheme, which meant bulldozing the entire neighborhood where Susette Kelo lived, with little political or democratic oversight. *See Kelo*, 545 U.S. at 473-74; *see also* Jeff Benedict, *Little Pink House* 17-29 (2008). The city itself was not even a signatory to the development agreement with the designated developer. In other words, the redevelopment project was largely insulated from any mechanism of democratic accountability or oversight. One can immediately see why such a setup is attractive to both politicians and developers.

Here, the City of Eagan created the EDA and made all five of its councilmembers the EDA's commissioners. App. Br. at 5. Presumably, the City stated in the enabling resolution that the EDA would submit all plans to the City, and follow the City's laws and procedures, to imply that there would be some measure of political oversight to the EDA's activities. The redevelopment plan's requirement of a binding development agreement before a condemnation could take place ensured that property owners (and the City's resources) would be protected to a degree from an EDA that gobbled up properties without a plan in place for what it would do with them. In other words, that requirement—along with the others that required the EDA to submit its plans to the City—was an important political safeguard against the abuses of an unelected development agency. Now, the EDA (comprised in this case of the city council) argues in a bait-and-switch that all of those rules and the redevelopment plan that it itself adopted do not apply when they become inconvenient.

The only way the League's participation makes sense is that cities want to be able to create EDAs with broad powers so that the redevelopment initiatives the cities

authorize can be insulated from democratic accountability. The League's code word for this is "flexibility." Br. of Am. Cur. League of Cities at 4. It would be better described as unchecked power. The sheer amount of money and resources at stake in almost any condemnation, as well as the gross incentives for abuse by politicians and private parties, indicate that courts must limit this power whenever reasonably possible.

CONCLUSION

The harshness of the eminent domain power and its devastating effects for many homeowners, farmers, and business owners require that courts should not presume that the State has delegated condemnation power to public bodies like agencies, cities, and EDAs. Therefore, the Institute for Justice asks this Court to follow the lead of many other states and strictly construe ambiguous eminent domain statutes in favor of the property owner.

Dated: November 4, 2009

Respectfully submitted,

INSTITUTE FOR JUSTICE
MINNESOTA CHAPTER



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CERTIFICATE OF COMPLIANCE WITH RULE 132.01, subd. 3

I, Jason A. Adkins, certify that the Brief of Amicus Curiae Institute for Justice complies with the length limitation and font size requirements of Rule 132.01, subd. 3, of the Minnesota Rules of Civil Appellate Procedure. I further certify that, in preparation of this brief, I used Microsoft Word Version 2003 Times New Roman 13-point font. This word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following line count, excluding only the caption, table of contents, table of authorities, signature text, and certificates of counsel. I further certify that the above referenced memorandum contains 650 lines of monospaced text.


