

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.;  
 Randall J. Quam, et al.; and Larson Training Services, Inc.  
 d/b/a Larson's Automotive Repair Services,

*Respondents.*

**REPLY BRIEF OF APPELLANT,  
 EAGAN ECONOMIC DEVELOPMENT AUTHORITY**

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## INTRODUCTION

“Ironic” is the only word that aptly describes Respondents’ argument in their brief to this Court. How else can one describe the incongruity of Respondents’ statement that Appellant has shifted its theory of the case when (i) Respondents shifted their theory in arguments to the Court of Appeals and (ii) the Court of Appeals devised its own theory when rendering its decision?

It is clear that the Court of Appeals based its decision on its interpretation of MINN. STAT. § 469.094, Subd. 2, and MINN. STAT. § 469.092, Subd. 2. What is also clear is that neither statute was identified or raised by Respondents in their arguments to the trial court. Additionally, in their briefs to the Court of Appeals, neither MINN. STAT. § 469.092 nor § 469.094 was listed as an apposite statute with respect to the issues raised by Respondents, as appellants. In fact, the Court of Appeals’ decision makes more reference to MINN. STAT. § 469.094 in one paragraph than Respondents do in their entire brief to the Court of Appeals (which was once).

Furthermore, it takes a lot of audacity for Respondents to state that they explicitly argued the applicability of MINN. STAT. § 469.094 to the Court of Appeals by noting “(see, e.g. Joint Brief of Appellants P.15.)”. (See Resp. Br. at 13 n.5) (Emphasis added.) At best, Respondents do injustice to *exempli gratia*, for Respondents’ reference to Page 15 of its brief is not an example of an argument regarding the application of MINN. STAT. § 469.094, but rather is its only reference to the statute in their brief. Moreover, the reference when read in context is not an argument but a declaration of what the statute permits. The suggestion that Respondents argued the applicability of MINN. STAT.

§ 469.094 is further belied by the fact that not only was it not identified as an apposite statute, but Respondents failed to list the statute in the Table of Authorities for their brief to the Court of Appeals.<sup>1</sup>

The truth of the matter is that the decision of the Court of Appeals was made out of whole cloth. It is Respondents who benefitted from the Court of Appeals' decision, which was based on theories other than those argued by Respondents to the trial court, and moreover, based on arguments that Respondents failed to make to the Court of Appeals.

Finally, contrary to Respondents' assertions, the EDA does not argue that it has limitless, carte blanche eminent domain powers. Rather, the EDA possesses eminent domain powers granted to it by statute. Its eminent domain powers must be exercised in accordance with applicable statutes. The Court of Appeals' decision altered the statutory framework from which the EDA obtains its powers and altered the statutory framework for changing the EDA's eminent domain powers.

#### **CLARIFICATION OF FACTS**

The EDA disagrees with the characterization of a number of the facts as described by Respondents. Yet most of those facts are not relevant to the issues before this Court. However, of particular concern is Respondents' failure to properly quote Section 1-12 of the Redevelopment Plan on page 7 of their Response brief. Respondents substitute the

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<sup>1</sup> Respondents reference to page 18 for Statutes §§ 469.090 to 469.1081 in that Table of Authorities does not refer to any argument regarding Section 469.094. In fact, there is no statute cited on page 18.

EDA as the subject of the sentence, when the Redevelopment Plan actually states “City”.  
(APP. 69, Subs. 1-12.)

### ARGUMENT

According to The Minnesota Rules of Appellate Procedure, an appellate court “may review any order involving the merits or affecting the judgment” and “may review any other matter as the interest of justice may require.” MINN. R. CIV. APP. P. 103.04. “A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matters before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)(quotation omitted)<sup>2</sup>. A “well-established” exception to the general rule provides that:

An appellate court may base its decision upon a theory not presented to or considered by the trial court *where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where, as in [a case] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question.*

*Watson v. United Services Auto. Assoc.*, 566 N.W.2d 683, 687 (Minn. 1997)(emphasis in original)(quotation omitted). “Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was ‘implicit in’ or ‘closely akin to’ the arguments below; and the issue is not dependent on

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<sup>2</sup> The issues of strict construction and ambiguity raised by amicus Institute of Justice were not issues raised below or by either party.

any new or controverted facts.” *Id.* at 688. While parties cannot raise new arguments to the appellate courts, they may refine the arguments that were made to the district court. *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 523 (Minn. 2007). Such “refined” arguments are properly before the appellate court when they can be evaluated on the facts already present in the record. *Id.*

The factors favoring the Court of Appeals’ review of MINN. STAT. § 469.094 simply did not exist. First, the question regarding the applicability of MINN. STAT. § 469.094 to this case was not raised to the Court of Appeals. Section 469.094 was not raised as an issue in Respondents’ brief to the Court of Appeals, and its applicability to the issues actually raised was not briefed.

The matters argued extensively at the trial court in this case were the necessity and public purpose of the proposed taking of Respondents’ properties by the EDA. (See EDA’s Memorandum of Law in Support of Petition; *See also* Respondents’ Joint Memorandum of Law in Opposition to Petition and Notice of Intent to Take Possession.) Respondents’ argument regarding the Redevelopment Plan to the trial court was limited to one paragraph in its post-hearing Memorandum of Law and contained no citation to any statute or case law. (Respondents’ Memorandum of Law in Opposition to Petition and Notice of Intent to Take Possession at 14.)<sup>3</sup> Neither did Respondents make any mention of Resolution 01-63 in their arguments. (*Id.*)

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<sup>3</sup> The Quam Respondents’ Jan. 21, 2008 Memorandum in Support of their Objection to the Condemnation Petition also devotes one paragraph to the Redevelopment Agreement without any citation to statutes or case law and without any mention of the EDA’s powers, the transfer or powers, or Resolution 01-63. (See pages 9-10.)

**I. SECTIONS 469.094 AND 469.092 OF THE MINNESOTA STATUTES WERE NOT RAISED AT THE TRIAL COURT LEVEL.**

Respondents accuse the EDA of raising new arguments to this Court. However, as the EDA noted in its prior brief, the Court of Appeals based its decision on new arguments that were not argued to the Court of Appeals. In fact, neither MINN. STAT. §§ 469.094 or 469.092 were argued to the trial court.<sup>4</sup> (See Respondents' Feb. 28, 2008 Memo. of Law in Opp. to Petition and Notice of Intent to take Possession. A review of the Feb. 13, 2008 transcript also reveals no such argument.) No facts regarding the transfer of any project were presented to the trial court. (*See id.*) In their Appellants' Brief to the Court of Appeals, Respondents cite to MINN. STAT. § 469.094 in two sentences out of their 29-page brief without any extensive analysis, discussion, or application. (App. Br. at 15.) Again, there is no discussion of a transfer of the project beyond these two sentences.

However, the power of the EDA, and the "transfer" to it, comprise the rationale and authority seized upon by the Court of Appeals to reverse the decision of the trial court. Further, the facts necessary to analyze the appropriateness of the application of sections 469.094 and 469.092 were not discussed by the Court of Appeals. The Court of Appeals' decision, which is based on its interpretation of MINN. STAT. § 469.094, must be reversed.

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<sup>4</sup> Respondents also did not make *any* arguments to the district court regarding the consequences of the adoption and incorporation of the redevelopment agreement into Resolution 01-63 to the trial court. However, the Court of Appeals devoted significant attention to this issue. (ADD 8, 10, 14.)

To date, the Court of Appeals' interpretation of MINN. STAT. § 469.094 is the only published decision discussing and applying that statute. As demonstrated in the EDA's previous brief, the Court of Appeals' interpretation of MINN. STAT. § 469.094 was flawed. Its inaccurate interpretation of MINN. STAT. § 469.094 not only affects the proceedings in this case, but also affects the relationship, authority, and effectiveness of the EDA and the City of Eagan proceeding into the future and of all cities and economic development authorities throughout this state.<sup>5</sup> Regardless of whether this Court should choose to analyze the merits of this case under that statute—the EDA believes that such an analysis will ultimately demonstrate that the statute simply does not apply to this case—the EDA believes that a clarification of the statute is necessary and respectfully asks that this Court provide its interpretation of MINN. STAT. § 469.094.

## **II. THE EDA'S REFINEMENT OF ITS ARGUMENT REGARDING THE REDEVELOPMENT PLAN IS REVIEWABLE BY THIS COURT.**

It has been the EDA's consistent position that the Redevelopment Plan does not limit the EDA's authority to exercise eminent domain in furtherance of the Redevelopment Plan or the TIF District. (See T. at 111-12; Ct. App. Resp. Br. at 14-17, App. Br. at 37.) The EDA's arguments have expanded on the rationale for this position. As noted above, a party is allowed to refine the arguments that it made to the trial court when it is possible to evaluate the arguments based on the facts already present in the record.

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<sup>5</sup> It is interesting that Respondents and amicus Institute for Justice largely ignore the interpretation of Minn. Stat. § 469.094 in their response briefs, even though the Court of Appeals relied so heavily on the statute in its decision.

Respondents take issue with the EDA's attempts to distinguish itself from the City in the arguments made to this Court and to the Court of Appeals.<sup>6</sup> However, whether a city and an economic development authority are distinct entities is a legal question, not a factual question—they are both creatures of statute and statutory interpretation is a question of law. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). Likewise, the question regarding the source of a city's powers and an economic development authority's powers is also one of statutory interpretation, not a factual one. Because Subsection 1-8 of the Redevelopment Plan can be interpreted without reference to the powers listed in the Enabling Resolution and based on all of the other evidence in the record, the EDA's refined and alternative arguments regarding its interpretation that Subsection 1-8 does not limit the EDA's authority are also rightly before this Court.

**III. RESOLUTION 01-63 WAS NOT A MODIFICATION OF THE EDA ENABLING RESOLUTION.**

The EDA's arguments regarding the source of its powers—which include the enabling resolution—are in response to the Court of Appeals' analysis of the EDA's powers under MINN. STAT. § 469.094 and the effect of MINN. STAT. § 469.092. The Court of Appeals' decision made the enabling resolution relevant here, and as the EDA

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<sup>6</sup> The EDA argued to the Court of Appeals that the EDA and City are separate and distinct entities and that the EDA has statutory authority to exercise the power of eminent domain. (EDA's Resp. Br. at 10, 10 n. 3.) The EDA also argued that Subsection 1-8 of the Redevelopment plan referred to the City, not to the EDA. (EDA's Resp. Br. at 15, n.6.)

argued in its Petition for Review and Appellant's brief, as a matter of public record, this Court can take judicial notice of the enabling resolution if it so chooses.

As noted in our prior brief, limitations on an economic development authority's powers must be set out in the enabling resolution, which may be modified in accordance with the procedural requirements of § 469.093. Respondents argue that Resolution 01-63 effectively modified the enabling resolution and placed limits on the EDA's authority. (Resp. Br. at 21-22.) This claim is incredulous. In fact, the resolution, notice, and hearing concerning Resolution 01-63 had nothing to do with the EDA's enabling resolution or its powers under that resolution. Resolution 01-63 is completely void of the words "enabling resolution;" "eminent domain;" "transfer;" or "restriction of EDA action;" and of any explicit or implied reference to "MINN. STAT. §§469.091; 469.092 or 469.093." (App. 36-62.) Had the City intended to modify the EDA's powers under the Enabling Resolution, in keeping with the spirit and intent of the statutory framework, it surely would have made such an intention explicit.

The heading to Subsection 1-8 of the Redevelopment Agreement (which purportedly contains the restriction on the EDA's authority) gives no notice that any modifications are being made to the EDA's powers under the enabling resolution. It merely refers to the "Proposed Reuse of Property." (APP 68-69.) The terms "EDA" and "eminent domain" are absent from Subsection 1-8. There is no evidence that it was intended to cover the EDA's actions. A determination that Resolution 01-63 modified the EDA's powers under the enabling resolution ignores the statutory requirements of

MINN. STAT. §§ 469.092 and 469.093 and deprives the residents of Eagan of their statutory right to notice and public hearing regarding any proposed modification.

Respondents essentially argue that Resolution 01-63's adoption of the Redevelopment Plan changes the Redevelopment Plan, from an outline for the redevelopment of the area, into a law binding on all actions of the City and the EDA. (Resp. Br. at 12.) However, the act of adopting or ratifying a redevelopment plan does not change its essence: a redevelopment plan is a plan which "provides an outline for the development or redevelopment of the area and is sufficiently complete (1) to indicate its relationship to definite local objectives as to appropriate land uses; and (2) to indicate general land uses and general standards of development or redevelopment." MINN. STAT. § 469.002, subd. 16. In fact the only changes to a redevelopment plan that qualify as modifications and require notice, hearing, and the approval of the governing body are changes that alter or affect the exterior boundaries or substantially alter or affect the general land uses established in the plan. MINN. STAT. § 469.029, subd. 6. Subsection 1-8 of the Redevelopment Plan does not affect the exterior boundary of the Cedar Grove Redevelopment Area, neither does it alter or affect the general land uses established in the plan. Therefore, any change regarding this subsection does not even qualify as a modification of the Redevelopment Plan under the statute. The City's adoption of the Redevelopment Plan into Resolution 01-63 was an adoption of an outline of its redevelopment goals for the Cedar Grove Area. It did not elevate the Redevelopment Plan from its statutory purpose. The Redevelopment Plan is neither a statute nor an ordinance. It is a plan and nothing more.

The EDA also takes issue with Respondents' interpretation of the Enabling Resolution on pages 20-21 of their Respondents' brief. Contrary to the implications of Respondents' arguments, the Enabling Resolution does not limit the EDA's statutory eminent domain powers. If the City had wished to limit the EDA's statutory eminent domain powers in the enabling resolution, it could have explicitly said so.

Contrary to Respondents' assertions, the fact that the EDA is required to comply with the City's comprehensive plan or obtain approval from the city for development and redevelopment actions does not mean that the EDA's eminent domain authority is derived from or subordinate to the City. Section 2.03(c) of the Enabling Resolution places the following limit on the EDA: "Development and redevelopment actions of the EDA must be in conformance with the City comprehensive plan and official controls implementing the comprehensive plan." A comprehensive plan is a "compilation of policy statements, goals, standards, and maps for guiding the physical, social and economic development" of a municipality. MINN. STAT. § 462.352, subd. 5. It "represents the planning agency's recommendation for the future development of the community." *Id.* The fact that an EDA's actions must conform to the City comprehensive plan does not implicate its statutory eminent domain powers.

Section 2.03(d) of the Enabling Resolution places another limit on the EDA's powers: "The EDA must submit its plans for development and redevelopment to the City Council for approval in accordance with City planning procedures and laws." Such approval is required by the statutory scheme governing the relationship between a municipal governing body and an authority exercising redevelopment powers pursuant to

MINN. STAT. § 469.028—which, as argued in our prior brief, distinguishes the powers of the city and authorities to commence eminent domain powers in pursuit of redevelopment and economic development projects. Section 2.03(d)'s limitation simply does not implicate the EDA's eminent domain powers.

Further, in this case, the City approved the Redevelopment Plan and the Tax Increment Financing Plan. The Redevelopment Plan does not refer to the actions of the EDA. The City's role in financing the acquisitions in the Cedar Grove Redevelopment area demonstrates its approval of the EDA's exercise of eminent domain for this project. Section 2.03(d) of the Enabling Resolution is not implicated in this case.

### CONCLUSION

Based on the arguments made above and in their initial brief, the EDA respectfully requests that this Court reverse the decision of the Court of Appeals.

Dated: 11/12, 2009

Respectfully submitted,

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