

NO. A08-0767

State of Minnesota
In Supreme Court

Eagan Economic Development Authority,

Appellant,

v.

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

Respondents.

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STATEMENT OF ISSUE

Did the EDA, by failing to comply with the terms of the Redevelopment Plan, exceed the scope of its condemnation authority and/or act in an arbitrary and unreasonable manner?

The court of appeals concluded the EDA exceeded its condemnation authority because it did not execute a binding development agreement concerning the landowners' properties.

Apposite Authority:

Minn. Stat. §469.094 (2006).

Housing & Redev. Auth. (HRA) v. Minneapolis Metro. Co., 259 Minn. 1, 104 N.W.2d 864 (1960).

Matter of Minneapolis Cmty. Dev. Agency (MCDA) v. Opus Northwest, LLC, 582 N.W.2d 596 (Minn. Ct. App. 1998).

STATEMENT OF CASE

In the 1990s, before Appellant Eagan Economic Development Authority (“EDA”) was even created, the City of Eagan (“City”) began taking steps to establish a 250-acre “new urban” redevelopment in the Cedar Grove Area. The City intended to “reawaken the spirit and vitality” of an area that, in the City’s view, was primarily challenged by a “tired look”.

In 2001, the City and EDA adopted the Cedar Grove Redevelopment Plan, established the Cedar Grove Tax Increment Financing District No. 1, and established the Tax Increment Financing Plan (collectively, “the Plans”) for the Cedar Grove Redevelopment Area (“Cedar Grove”).

Together, the City and EDA resolved to implement the Plans. On July 22, 2003, the Cedar Grove TIF district was certified, thereby triggering the 5-year TIF expenditure rule. Using the threat of condemnation, the City and EDA began asking landowners to hand over their properties. Many property owners acquiesced, some through negotiations and others through voluntary condemnation court proceedings. The EDA took title to the land. The cost was financed by the City.

Respondent landowners did not give in; instead, they kept running their businesses. They also questioned, given the project status and several already-failed development attempts, whether the City or EDA could use the power of eminent domain to acquire their properties. In November 2007, faced with the expiration of the critical 5-year TIF expenditure rule, and faced with the loss of its

exemption from the 2006 amendments to Chapter 117 of the Minnesota Statutes, the EDA filed the condemnation petition in this matter. At the time it filed its petition, the EDA did not have a binding development agreement with a developer. Thus, the EDA did something both it and the City explicitly resolved that they would not do, that is, forcibly take land from citizens without first executing a binding development agreement with a third-party developer.

At the February 13, 2008, district court hearing on the EDA's petition, EDA misleadingly testified taxpayers would lose 3 million dollars unless it took Respondents' properties and expended TIF funds before July 2008. Despite the EDA's admission it had only a concept and nothing further, the district court granted the EDA's petition in its April 16, 2008 Supplemental Order. The district court ruled the EDA could condemn without an executed binding development agreement, in disregard of the EDA's own Redevelopment Plan predicate.

On May 2, 2008, the landowners perfected an appeal and sought a stay. EDA objected, and demanded a multi-million dollar supersedeas bond. The district court found the EDA's prospective damages claim purely speculative and not grounded in fact, but, based on its Minn. Stat. § 469.1763 interpretation, ordered posting of more security.¹ On the landowners' motion for review, a three-

¹ In addition to its speculative filings, the EDA, sensing advantage, took incompatible positions on Minn. Stat. §469.1763, to the landowners' detriment and expense, by arguing depositing funds in court satisfies expenditure rule (as reflected in pre-appeal court deposits), does not satisfy expenditure rule (as EDA asserted in attempting to maximize a huge supersedeas bond order) and satisfies expenditure rule (as reflected in post-appeal court deposits).

judge appellate panel found the district court's §469.1763 interpretation erroneous. (*Order #A08-767, July 22, 2008.*) Thereafter, the district court ruled further security bonding was unnecessary.

At the Court of Appeals, the landowners challenged the district court's Redevelopment Plan interpretation and contended the eminent domain taking was not authorized by law; that the taking was not supported by findings of public purpose or necessity; and that the EDA's use of statutory "quick-take" was improper. On May 19, 2009, the appellate court ruled the EDA exceeded its eminent domain powers, and that it failed to honor its own unequivocal and unambiguous requirement that it would not condemn property absent a binding development agreement.

On June 17 and June 30, 2009, EDA petitioned this Court for further review, arguing the Court of Appeals improperly altered the statutory framework of the relationship between a municipality and an economic development authority.² On August 26, 2009, this Court granted EDA further review, and the League of Minnesota Cities *amicus curiae* briefing. On September 17, 2009, this Court also granted the Institute for Justice *amicus curiae* briefing.

At the Supreme Court, the EDA presents new evidence, new theories and a new case built upon a disregard of the record. In attacking the appellate court's

² Because EDA's petition violated Minn.R.Civ.App.P. 132.02, this Court returned it on June 23, 2009, extending the EDA an opportunity to remedy font and spacing defects. On June 30, 2009, the EDA filed a rewritten, amended petition that consisted of deleted, added and changed statutory citations; restated legal issues; and deleted "[i]mportant facts."

decision, EDA argues that (1) EDA answers to no one in exercising its eminent domain power, and certainly not the City; (2) a purported “enabling” resolution not part of the record evidence trumps all Cedar Grove-specific resolutions and Plans; (3) the Minnesota Court of Appeals cobbled, rewrote and misinterpreted Minn. Stat. § 469.094, subd. 2 and, in any event, that statute is not applicable; and (4) the Redevelopment Plan is irrelevant to the entire Cedar Grove development and court proceeding.

The landowners in this ordeal are hard-working private citizens that are trying with all of their might to defend their constitutionally-protected right to own, use and enjoy property. For over a decade they have labored under the EDA’s scheme. Private property is fundamental to our society. No duty of this Court is more important than a robust enforcement of constitutional and statutory provisions protecting private property. This case is about protecting rights, and bringing restraint, humility and integrity to this eminent domain matter.

STATEMENT OF FACTS

A. The City Envisions Redevelopment.

In the 1990s, the City began envisioning a 250-acre “new urban” redevelopment of Cedar Grove intended to “reawaken the spirit and vitality” of an area that, in the City’s view, was primarily challenged by a “tired look”. (EDA district court Exhibit 30.)

On October 2, 2001, the Cedar Grove project, TIF district, TIF Plan and Redevelopment Plan (collectively, “the Plans”) were approved, established and

adopted by the City. (APP 36-38.) Specifically, through Resolution 01-63 (APP 36-38), the Redevelopment Plan (APP 63-88) and TIF Plan (APP 89-110) were “approved, ratified, established, and adopted.” (APP 37, § 5.01.) City staff, advisors and legal counsel were authorized and directed to implement the Plans, and “to negotiate, draft, prepare and present to this [City] Council for its consideration all further plans, resolutions, documents and contracts necessary for this purpose.” (APP 37, § 5.02.) The Redevelopment Plans also recognized that the City established the Redevelopment Project, meaning all the property within Cedar Grove. (APP 65-66, Subsection 1-2.)

The EDA also approved and adopted the Plans, on August 7, 2001; its approval was, however, explicitly conditioned upon the City’s approval following its public hearing. (APP 34, ¶ 3.) Upon approval of the Plans by the City, the EDA further resolved that its staff, advisors and legal counsel were authorized and directed to implement the Plans, and “to negotiate, draft, prepare and present to this Board for its consideration all further plans, resolutions, documents and contracts necessary for this purpose.” (APP 34, ¶ 4.)

The Redevelopment Plan adopted by the City and EDA are identical. Likewise, the authority and direction of the City and EDA to implement the Redevelopment Plan are identical. Together, the City and EDA resolved to implement the Plans. (APP 37, § 5.02; APP 35, ¶ 4.)

B. The Cedar Grove Redevelopment Plan.

The Redevelopment Plan, adopted by both the City and EDA, grants the EDA the power to “acquire such property” within the Project Area, “as the EDA may deem to be necessary or desirable to assist in the implementation of the Redevelopment Plan.” (APP 69, Subsection 1-12.) But the Redevelopment Plan placed explicit limitations on the ability to take property pursuant to the Redevelopment Plan. (APP 68-69, Subsection 1-8.) The Redevelopment Plan required a binding development agreement with a third-party developer prior to the acquisition of any private property:

Subsection 1-8. Proposed Reuse of Property

The Redevelopment Plan contemplates that the City may acquire property and reconvey the same to another entity. *Prior to formal consideration of the acquisition of any property, the City will require the execution of a binding development agreement with respect thereto....* It is the intent of the City to negotiate the acquisition of property whenever possible. Appropriate restrictions regarding the reuse and redevelopment of property shall be incorporated into any development agreement to which the City is a party.

(*Id.* at Subsection 1-8.) (Emphasis added.)

C. Cedar Grove Stalls.

A significant portion of the Cedar Grove property was acquired through negotiations and voluntary condemnation court proceedings. (Transcript,³ 155-56.) Some businesses, not scheduled for acquisition, undertook renovations, but at their own expense. (T. 182-83.) Those efforts occurred without TIF expenditures.

³ Transcript, hereafter “T”, references February 13, 2008 district court hearing.

(*Id.*) With the notable exception of the current action, all condemnations in the Cedar Grove Redevelopment project have been “friendly condemnations,” or condemnations with the consent of the landowners. (T. 183-85.) Nearly a full decade after first envisioning a renewed awakening and spirit in Cedar Grove, the EDA began pursuing forceful condemnation as an option. (APP 115-23, 168.) By then, development had stalled. No binding development agreement concerning Respondent landowners’ property existed when condemnation was started, despite efforts with several developers since 2001. The documented failed efforts include:

- 2001: Delta Development – luxury town homes (T. 177-78)
- 2001: U. S. Homes/Lennar – luxury town homes (T. 177-78)
- 2001: Shelter Corporation – hotel/water park (T. 178-79)
- 2001: Ryan Companies – multi-tenant office building (T. 178-79)
- 2004: Schafer Richardson – housing units (T. 178-80, 186-88)
- 2006: Cedar Grove Development Corp. (T. 157-59)
- 2007: Doran Pratt – “concept” agreement (T. 188-90)

In 2006, the Cedar Grove Development Corp. cited the downturn in the condo market as the reason for terminating its contract. (T. 162.) The City and EDA’s own studies even showed a decline in demand for public uses in Cedar Grove, including no, limited and/or delayed demand for hotel rooms, retail and office space beyond 2010. (T. 206-09.)

As of February 2008, there was still no binding development agreement. (T. 98, 102-04, 119-20.) There was no master development agreement in place. (T. 205.) There was no timetable. (T. 189.) There were no details “anywhere close” to the specificity of Cedar Grove Development plans, which failed. (T.

188.) The EDA speculated that, upon acquisition of all Cedar Grove property, it would simply work out a real estate developer “land deal,” “rather than a complex development agreement.” (T. 244.)

D. Facing “Sudden” TIF Deadline, EDA Sues.

The deadline for TIF expenditures in Cedar Grove expired July 22, 2008. (ADD 25, ¶22.) On the same date, the EDA’s exemption from the 2006 amendments to Chapter 117 of the Minnesota Statutes also expired. At the February 13, 2008 petition hearing, EDA testified that if it did not expend TIF funds by July 2008, taxpayers would lose access to \$3 million that could not be captured through TIF. (*Id.*)

STANDARD OF REVIEW

“Courts may interfere only when the [condemning] authority’s actions are manifestly arbitrary or unreasonable.” *Housing Redev. Auth. v. Minneapolis Metro. Co.*, 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960). An authority acts in an arbitrary or unreasonable manner when it acts “without basis in law or under conditions which do not authorize or permit the exercise of the asserted power.” *Id.* Whether a condemning authority has the power to condemn property is a question of law. *See Minn. Canal & Power Co. v. Fall Lake Boom Co.*, 127 Minn. 23, 28, 148 N.W. 561, 562 (1914) (whether a taking is authorized by law is a question for the courts).

ARGUMENT

In these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and where the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of those constitutional provisions intended to protect every man in the possession of his own.⁴

True in 1906 and even more compelling in 2009. As Justice Elliott wrote in *Minnesota Canal*, op. cit., “every presumption is in favor of the individual landowner. . . . [The power of eminent domain] can be exercised only within the strict terms of the grant and subject to the constitutional restrictions.”

In this case, the City and the EDA adopted a Redevelopment Plan for the Cedar Grove Redevelopment. In the Redevelopment Plan, the City and the EDA both established a rule for their subsequent conduct, and made a promise to the residents of the City. The rule and promise is simply put: “[p]rior to formal consideration of the acquisition of any property, the City will require the execution of a binding development agreement with respect thereto...” (APP 68.)

By breaking its own rule, the EDA exceeded its eminent domain authority. This case is that simple. As the Court of Appeals recognized, the EDA’s attempt to ignore its own limitations is manifestly arbitrary and unreasonable. Accordingly, this Court should affirm the decision of the Court of Appeals.

⁴ *Minnesota Canal & Power Co. v. Koochiching Co.*, 107 N.W. 405, 407 (Minn. 1906) (quoting *McElroy v. Kansas City*, 21 Fed. 257 (C.C.W.D.Mo. 1884) (Brewer, J.)).

For good reason, the EDA does everything it can to shift this Court's focus away from the fact that the EDA and City broke their own rule. Rather than address its own arbitrary and unreasonable conduct, the EDA wants to make this case about the intricacies of Chapter 469 of the Minnesota Statutes. The Court should not be deceived by the EDA's attempt at sleight of hand, and the EDA's position should be rejected.

I. EDA BROKE RULE IT MADE BY NOT EXECUTING A BINDING DEVELOPMENT AGREEMENT BEFORE TAKING.

A. The Court of Appeals Properly Recognized that the EDA, by Breaking its Own Rule, Acted Arbitrarily and Unreasonably.

In a precise application of Minnesota law, the Court of Appeals correctly determined the EDA exceeded its eminent domain powers under Resolution 01-63 and the Redevelopment Plan, which plainly required a binding development agreement. (ADD 1-16.) Specifically, the court found "no support for the district court's order condoning the EDA's condemnation of the property owners' parcels." (ADD 11.) "Initiating condemnation proceedings before executing a development agreement for the project was something the city resolved not to do, and something it never granted the EDA the authority to do in its place." (ADD 15.) The court also concluded that, "[b]ecause the city's resolution incorporating the redevelopment plan voluntarily limited its power of eminent domain and unambiguously requires a binding development agreement before the acquisition of any property in Cedar Grove, the EDA had no power under the resolution to

condemn the property owners' parcels before the city executed a binding development agreement." (ADD 10; 12.)

"Courts may interfere only when the [condemning] authority's actions are manifestly arbitrary or unreasonable." *Housing Redev. Auth. v. Minneapolis Metro. Co.*, 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960). An authority acts in an arbitrary or unreasonable manner when it acts "without basis in law or under conditions which do not authorize or permit the exercise of the asserted power." *Id.* Because a municipality may not violate its own enactments, *see* 5 McQuillin *Mun. Corp.* § 15.12 (discussing ordinances and resolutions and explaining that a city may not violate its own legislative decision), neither can a subordinate.

Because the EDA resolved to adopt and implement the Plans the City "approved, ratified, established, and adopted" in Resolution 01-63 on October 2, 2001 (APP 37, § 5.01), including Subsection 1-8 of the Redevelopment Plan requiring executed binding development agreement before taking (APP 68-69), and because the EDA conditioned its approval upon the approval of the City (APP 34), there can be no question about the scope of the EDA's taking authority and limits pertaining thereto. The appellate court took painstaking care at scrutinizing the record evidence and analyzing this precise issue. "By *incorporating* the actual redevelopment plan into resolution 01-63, the city adopted restrictions on the project as stated in the redevelopment plan and evidenced its intent to be bound by its terms." (ADD 8.)

B. The EDA's New Legal Arguments Do Not Change the Analysis.

The EDA's new legal arguments on appeal are unavailing. And the EDA's confounding citations to various sections of Chapter 469 do not change the critical facts, as described further below. The EDA adopted the Redevelopment Plan with the limitation in the Plan. (APP 34-35.) The City, through Resolution 01-63 (APP 36-38), established and adopted the Redevelopment Plan (APP 63-71). It is not in dispute that the Plan clearly placed limitations on its ability to proceed with a taking of private property. Resolution 01-63 cites Minn. Stat., § 469.090 through § 469.1081 and § 469.174 through § 469.179 as its statutory authority. Minn. Stat., §469.094, included by reference in the resolution, permits the City to transfer the control, authority and operation of any economic development project to an economic development authority. Minn. Stat. § 469.094 (2006).⁵ An EDA is then bound by the terms of the resolution affecting the transfer. *Id.* Here, the EDA is bound by Resolution 01-63 and the Redevelopment Plan.

II. EDA INVENTS NEW ARGUMENTS AT SUPREME COURT: ONCE ENABLED, IT HAS NO EMINENT DOMAIN LIMITS; EDA'S APPEAL SHOULD BE DISMISSED.

At the Supreme Court level, the EDA completely shifts its theory of the case, relies upon new evidence, new arguments and disputed facts. In order to avoid an unfavorable legal outcome on a very narrow, fact-specific and

⁵ The EDA misled this Court in its PFR (*see* PFR p. 3, n. 3) by claiming the Court of Appeals "eviscerates" Minn. Stat. ch. 469 through a *sua sponte* transformation. The EDA is wrong; the landowners explicitly argued the applicability of Minn. Stat. § 469.094 to this case. (*See, e.g.* Joint Brief of Appellants, p. 15.)

unambiguous limitation (*i.e.*, the application of the subsection 1-8 binding development agreement requirement), the EDA now argues “the EDA possesses the power of eminent domain without limits imposed by the City.” (App’l Brief, p. 23.) Because the EDA was “enabled,” it argues it is answerable to no one in this case. Of course, this argument is necessarily dependent upon the introduction of a purported “enabling” resolution not part of the record. In essence, the EDA argues a document referred to as “00-17” trumps all Cedar Grove resolutions and Plans This Court should reject this attempt by the EDA to shift evidence and reasoning on appeal.

For the first time in this case, the EDA introduces a purported enabling resolution. (APP 1-3.) The EDA’s argument that an analysis of its purported enabling resolution somehow changes the analysis or outcome of this case is simply wrong. First, and setting aside appellate evidentiary concerns, the purported enabling resolution provides “[t]he EDA must submit its plans for development and redevelopment to the City Council for approval in accordance with City planning procedures and laws.” (APP 2.) Resolution 01-63 resulted when the EDA sought the City’s approval. The enabling resolution strengthens, rather than weakens, the Court of Appeals’ analysis, belying the EDA’s claim that the question presented is an important one on which this Court should rule.

For over fifty years, this Court has followed the general rule that on appeal, a case must be determined on the theory upon which it was tried. *State v. Adams*, 251 Minn. 521, 548, 89 N.W.2d 661, 679 (1957) (a party cannot adopt a theory,

and obtain findings in accordance with the theory, and on appeal, complain of the judgment that he sought). The rationale behind this rule is that the reviewing court should only consider issues that the record shows “were presented and considered by the trial court in deciding the matter before it”. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). This is especially true where a party seeking review is asking an appellate court to consider matters that were not produced or received in evidence by the trial court, but are instead extrapolated from a brief. *Thiele*, 425 N.W.2d at 582-83 (refusing to consider a statute of limitations issue which rested on disputed facts not presented or ruled upon by the trial court); *see also Watson v. USAA*, 566 N.W.2d 683, 687-88 (Minn. 1997) (factors favoring review of new theory on appeal include, among other things, that the issue is not dependent “on any new or unconverted facts”).

Throughout this appellate process, the EDA has completely changed its theory of the case, and has supported this shift through the submission of new evidence, through asking this Court to make factual assumptions, and even relying on disputed fact issues. At the district court level, the EDA did not dispute that its actions were governed by the Redevelopment Plan, but argued about the interaction between two provisions (Sections 1-8 and 1-12). The district court considered the evidence and arguments, and found in its Findings of Fact that these two sections, when read together, contemplate that the EDA would be able to acquire property to ensure implementation of the Redevelopment Plan.

At the court of appeals, the EDA changed its theory and added two additional arguments not presented or considered by the trial court, one of which requires consideration of new and disputed evidence. First, the EDA argued that Sections 1-8 and 1-12 have no application to the actions of the EDA, because the language of these provisions refer to “the City.” Second, at the court of appeals level, the EDA also asserted, for the first time, that even if its powers were somehow restricted by the Redevelopment Plan, Minn. Stat. § 469.029 permitted the EDA to modify the Redevelopment Plan at any point in time, with or without the approval of the City. However, when questioned directly by the Court of Appeals, the EDA admitted it had not modified the Redevelopment Plan.

Now, at the Supreme Court level, the EDA makes yet another shift in its theory of the case and its explanation of its limitless powers, which again requires the consideration of evidence outside the record. The EDA now claims that its enabling resolution is the only restriction on its powers, and it asks this Court to consider the wording of its enabling resolution (which was not submitted to the trial court or court of appeals or received into evidence), and further, asks this Court to accept (on faith) that this so-called enabling resolution is actually a valid and legitimate enabling resolution and, moreover, that it was never modified in its nine-year life. However, contrary to the EDA’s arguments, the purported enabling resolution supports the Court of Appeals decision because the resolution includes specific limitations on the EDA’s powers and requires City approval of

redevelopment. This is exactly how the City and EDA acted here and the City and EDA both adopted a Redevelopment Plan with the restriction on acquisition.

The progression of this case illustrates the dangers of permitting a party on appeal to shift its theory and present new evidence. These actions are not respectful of either landowners or the trial or appellate courts. This is not the case which justifies entertaining a new legal theory. The landowners respectfully request that this Court reject the EDA's new arguments, theories and evidence, and dismiss this appeal.

III. EDA EMINENT DOMAIN POWERS ARE LIMITED BY STATUTES, THE CITY AND THE EDA ITSELF; EDA'S NEW ARGUMENTS SHOULD BE REJECTED.

The EDA argues subsection 1-8 of the Redevelopment Plan is inapplicable for various reasons. First, the EDA argues that the City does not possess the requisite authority to limit the EDA's powers as it did in subsection 1-8 of the Redevelopment Plan. Second, the EDA argues that subsection 1-8 by its own terms applies not to the EDA but to the City. Both arguments inaccurately reflect Chapter 469 and the facts in this case.

A. City has Authority to Limit EDA's Eminent Domain Powers.

The EDA goes to great lengths to establish that the legislature, and not the City, is the source of the EDA's powers. Even if this new argument is true, the "source" of the EDA's powers has little significance when the City has properly limited those powers in several different ways.

i. Minn. Stat. § 469.094, Subd. 2 Limits the EDA.

Section 469.094, subd. 2, permits a city to transfer control of a project to an EDA from the agency that established the project. Minn. Stat. § 469.094, subd. 2. If such a transfer occurs, the EDA can only exercise the powers that the governmental entity that established the project could exercise. *Id.* The EDA argues that, because it was the entity that established the project at issue, there is no other governmental entity whose limitations would also apply to the EDA. This argument simply does not apply to the inception of the Cedar Grove project. Moreover, the argument is factually wrong: Resolution 01-63 plainly states that the Plans “are hereby approved, ratified, established, and adopted” (APP 37.)

To the extent the August 7, 2001 EDA resolution states that the EDA “approved, established and adopted” the Plans (APP 34, ¶ 3), it must be observed that EDA did so explicitly conditioned upon the City’s approval of the Plans and with respect to the implementation of the Plans. (APP 34, ¶¶ 3, 4.) That condition was necessary because the City resolution that enabled the EDA specifically required the EDA to obtain City approval of redevelopment plans. (APP 2-3.) The City then considered and approved both plans at a public hearing on October 2, 2001. (APP 37.) Further evidencing the EDA’s subordinated position to the City on matters of eminent domain, the EDA’s resolution of September 4, 2007, provides, “The City must approve the use of eminent domain by the EDA.” (APP 28, ¶ 16.)

It simply strains credulity to assert the EDA's exercise of its eminent domain power was not related to, or influenced by, the City. As the Court of Appeals explained in its opinion, the EDA's conditional approval of the plans shows that the EDA recognized that its authority was subordinate to the City's. (ADD 8.) Because the EDA's asserted establishment of the project was conditioned upon approval by the City, and because the City's approval of the Redevelopment Plan included the terms and conditions set forth therein, subsection 1-8 of the Redevelopment Plan applies to the EDA even without the transfer of limitations expressed in section 469.094.

ii. **The Enabling Resolution Limits the EDA.**

An economic development authority is established when a city adopts an enabling resolution. Minn. Stat. § 469.091, subd. 1. Section 469.091, subd. 1, entitled "Establishment," recognizes that the powers of an EDA are limited by section 469.092:

A city may, by adopting an enabling resolution in compliance with the procedural requirements of section 469.093, establish an economic development authority that, *subject to section 469.092*, has the powers contained in sections 469.090 to 469.108 and the powers of a housing and redevelopment authority under sections 469.001 to 469.047 or other law, and of a city under sections 469.124 to 469.134 or other law.

Id. (emphasis added). Section 469.092 describes seven specific limitations on an authority's powers, and an eighth "catch all" provision for "any other limitation or

control,” that a city may impose in the enabling resolution. Minn. Stat. § 469.092, subd. 1.

Assuming, *arguendo*, the purported “Enabling Resolution” of March 6, 2000 submitted by the EDA were valid and legitimate, and further assuming this Court allowed its introduction at this stage of the action, the City, in describing the powers of the EDA to include those set forth in section 469.091, subd. 1, recognized that it has the ability to limit those powers:

2.01 *Except as otherwise provided herein*, the EDA shall have the powers of economic development authorities contained in the Act and the powers of a housing and redevelopment authority under Minnesota Statutes, Sections 469.001 to 469.047 or other law and the powers of a city under Minnesota Statutes, Section 469.124 to 469.134.

(APP 2 (emphasis added)).

The City went on to impose the following six limitations on the EDA’s authority:

- (a) The sale of bonds or other obligations of the EDA must be approved by the City Council.
- (b) The EDA must follow the budget process for City departments in accordance with City policies, ordinances, and resolutions, and state law.
- (c) Development and redevelopment actions of the EDA must be in conformance with the City comprehensive plan and official controls implementing the comprehensive plan.
- (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.

- (e) The EDA shall not hire permanent or temporary employees without prior approval by the City Council.
- (f) The administrative structure and management practices and policies of the EDA must be approved by the City Council.

(APP 2-3.)

Limitation (c) requires the EDA to ensure that its actions comply with the City's comprehensive plan and official controls. Limitation (d) requires the EDA to submit its plans for development and redevelopment to the City for approval. Both limitations recognize the City's ongoing ability to limit the EDA's actions, such as by adopting and requiring compliance with the Redevelopment Plan and subsection 1-8 therein.

iii. Modifying Resolution 01-63 Limits the EDA.

Even if the limitations in Enabling Resolution 00-17 were not sufficient to subject the EDA to the limitations of the Redevelopment Plan, the City's adoption of the Redevelopment Plan was a modification of the limitations in the enabling resolution. Section 469.092, subd. 2 permits the modification of an enabling resolution at any time, so long as certain procedural requirements are met. Minn. Stat. § 469.02, subd. 2. Specifically, a modification of the enabling resolution must be made by written resolution, notice must be given, and a public hearing must be conducted. Minn. Stat. § 469.093, subd. 2.

The City adopted the Redevelopment Plan by written resolution No. 01-63, dated October 2, 2001. (APP 36.) Resolution 01-63 states that notice was

published and a public hearing was held. (*Id.*) Further, the Redevelopment Plan itself states that a public hearing was held on October 2, 2001. (APP 63.) The City thus met the three requirements of section 469.03, subd. 2, when it adopted the Redevelopment Plan.⁶

On appeal, for the first time, the EDA suddenly attempts to characterize the EDA and the City as distinctly separate entities, with separate statutory authority and limitations. While Chapter 469 does permit authorities and cities to operate in such a manner, the statutory provisions also permit cities to impose limitations that force authorities and cities to work together more closely. The City imposed limitations pursuant to Chapter 469 and, in addition, the EDA subjected itself to City oversight when it conditioned its own approval of the project and Plans on the City's approval. The EDA's argument that the City lacked the authority to require a binding development agreement before property acquisition must be rejected.

B. Redevelopment Plan Limits EDA's Eminent Domain Powers.

The EDA focuses much attention on subsection 1-8's lack of a specific reference to the EDA. The relevant portion of subsection 1-8 states as follows:

"Prior to formal consideration of the acquisition of any property, the City will

⁶ The EDA contends that the courts have no authority to determine the EDA's compliance with limitations imposed by the enabling resolution, pursuant to section 469.092, subd. 4. The EDA has produced no facts to show that the City was ever presented with the question of whether the acquisition of properties without a binding development agreement violated the limitations in the enabling resolution. Thus, there has been no conclusive determination by the City. *See* Minn. Stat. §469.092, subd. 4. Furthermore, the statute does not appear to contemplate the type of self-policing its application would require here. The City should not be permitted to determine conclusively whether the City and the EDA have violated a requirement of the Redevelopment Plan applicable to both the City and the EDA.

require the execution of a binding development agreement with respect thereto” (APP 68.) However, the EDA/City’s own interpretation of the Redevelopment Plan in the TIF Plan indicates that both the EDA and the City believe the Redevelopment Plan applies to both entities.

Subsections 2-2 and 2-3 of the TIF Plan describe the Redevelopment Plan as a document containing “[o]ther relevant information” and a document containing objectives that the TIF Plan is expected to achieve. (APP 91.) Subsection 2-4 of the TIF Plan is entitled “Redevelopment Plan Overview,” and appears to describe highlights of the Redevelopment Plan. (Id.) Of the four points of the overview, three refer to both the EDA and the City:

1. Property to be Acquired – Selected property located within the District may be acquired *by the EDA or City* and is further described in this Plan.
...
3. Upon approval of a developer’s plan relating to the project and completion of the necessary legal requirements, *the EDA or City* may sell to a developer selected properties that they may acquire within the District or may lease land or facilities to a developer.
4. *The EDA or City* may perform or provide for some or all necessary acquisition, construction, relocation, demolition, and required utilities and public streets work within the District.

(APP 91-92 (emphasis added).)

As the EDA points out, the EDA is only mentioned one time in the Redevelopment Plan, in the definition of Tax Increment Bond. Points 1, 3, and 4 above are clearly not limited to tax increment bonds, but all three points are applicable to both the EDA and the City. By preparing subsection 2-4 of the TIF

Plan, both the City and the EDA admitted that subsection 1-8 of the Redevelopment Plan applies to both entities.

The EDA also attempts to justify applying subsection 1-8 to the City's acquisitions of property, rather than the EDA's, on the basis that subsection 1-8 "safeguards" the limitations set forth in subsection 2-22 of the TIF Plan. This argument has no basis in fact and is nothing more than pure conjecture. Furthermore, subsection 2-22 limits the amount of property to be acquired with the proceeds of bonds. (APP 103.) Subsection 1-8 is not limited by the method of acquiring the property and indeed limits the EDA's actions even earlier in the process, requiring a binding development agreement prior to "formal *consideration*" of the acquisition of property. (APP 68 (emphasis added).)⁷

As described above, both the City and the EDA have conducted themselves as closely interrelated, if not interchangeable, entities. Even in this proceeding, counsel for the EDA has described the City Council and the EDA as "one in the same." (T. 174.) The EDA's Memorandum of Law in Support of Its Petition similarly uses the terms "City" and "EDA" without precision. (EDA Memorandum of Law in Support of Its Petition.) No party appears to have raised any formal objection to the fluid nature of the relationship between the City and

⁷ The EDA also argues that section 1-8 applies only to the reuse of property. This contradicts the plain language of the section, which expressly applies to the "consideration of *acquisition* of any property." (APP 68 (emphasis added).) Although section 1-8 discusses reconveying property to other entities, the limitation at issue here applies instead at the time the EDA and/or the City acquires the property. There is no basis to support the assertion that section 1-8 applies only to reconveying the property.

the EDA, and perhaps rightly so. But for the EDA to now switch positions and attempt to distinguish itself so completely from the City, almost with an air of elitist indignation, is insincere and unconvincing. The City and EDA adopted a rule that requires them to have entered into a binding development agreement before formally considering the acquisition of property for the Cedar Grove project. Both entities should be held to this limitation.

CONCLUSION

Q: There's a lot about this project that suggests the project's not going to happen in the near future, isn't there?

A: You'd have to describe what you're – define what you mean by "project."

Q: Well, we don't know because there's no development agreement, Mr. Hohenstein, do we?

...

Q: We don't know, because there's no development agreement, what the project is, do we?

A: We have a concept and nothing further. (T. 209.)

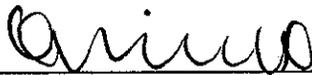
We know that the EDA and the City expressly approved, ratified, established and adopted a Redevelopment Plan with an unambiguous and unequivocal requirement: "[p]rior to formal consideration of the acquisition of any property, the City will require the execution of a binding development agreement with respect thereto..." We also know with certainty that the EDA never did execute a binding development agreement. By ignoring this requirement, the EDA acted arbitrarily, unreasonably and exceeded the scope of

its eminent domain authority. The Court of Appeals decision at issue is supported by sound analysis of existing law, thorough consideration of the fact-specific history of the Cedar Grove redevelopment area, thoughtful review of the operative resolution, and a sensible interpretation of the governing Redevelopment Plan. Respondent landowners respectfully request the Court reject the EDA's appeal and affirm *Eagan Economic Development Authority vs. U-Haul Company of Minnesota, et al.*, 765 N.W.2d 403 (Minn.Ct.App. 2009).

Dated this 27 day of October, 2009.

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