

NO. A08-0767

State of Minnesota
In Supreme Court

OFFICE OF
APPELLATE COURTS

AUG 12 2010

FILED

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.

PETITION FOR REHEARING AND RECONSIDERATION
 BY RESPONDENT LANDOWNERS

Robert B. Bauer (#227365)
 Michael G. Dougherty (#134570)
 Jessica L. Sanborn (#339532)
 SEVERSON, SHELDON, DOUGHERTY
 & MOLENDIA, P.A.
 7300 West 147th Street, Suite 600
 Apple Valley, MN 55124
 (952) 432-3136

Attorneys for Appellant

Gary G. Fuchs (#0032566)
 Elizabeth E. Rein (#034980X)
 HELLMUTH & JOHNSON PLLC
 10400 Viking Drive, Suite 500
 Eden Prairie, MN 55344
 (952) 941-4005

Attorneys for Respondent
 Larson Training Services, Inc., d/b/a
 Larson's Automotive Repair Services

Daniel L. Scott (#0240837)
 LEONARD, STREET AND DEINARD
 A Professional Association
 150 South Fifth Street
 Suite 2300
 Minneapolis, MN 55402
 (612) 335-1500

Attorneys for Petitioners
 U-Haul Company of Minnesota and
 AMERCO Real Estate Company

Steven J. Quam (#0250673)
 FREDRIKSON & BYRON, P.A.
 200 South Sixth Street, Suite 4000
 Minneapolis, MN 55402
 (612) 492-7000

Attorneys for Respondents
 Randall J. Quam and Sandra K. Quam and
 Competition Engines, Inc.

(Counsel for Amici on following page)

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

*Attorneys for Amicus Curiae
League of Minnesota Cities*

Lee U. McGrath (#0341502)
Jason A. Adkins (#0387145)
INSTITUTE FOR JUSTICE –
MINNESOTA CHAPTER
527 Marquette Avenue, #1600
Minneapolis, MN 55402-1330
(612) 435-3451

*Attorneys for Amicus Curiae
Institute for Justice – Minnesota Chapter*

INTRODUCTION

Petitioners Randal J. and Sandra K. Quam/Competition Engines, Jerry Larson/Larson's Training Services, Inc. and U-Haul Company of Minnesota/AMERCO Real Estate Company ("property owners"), respectfully petition this Court and pray for rehearing, reconsideration, reversal or modification of this Court's decision released July 29, 2010 ("*Decision*"), pursuant to Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure (2010).

ARGUMENT

Property owners request rehearing for two fundamental reasons. First, the Court erred in its conclusions regarding Subsection 1-8 and Minn. Stat. § 469.094, subd. 2. When faced with a series of ambiguous and poorly drafted documents, the Court sorted and pursued a "construction that will in practice most nearly accomplish the object intended." It is inconceivable, and against every notion of law, equity and fairness that the property owners – and not EDA – suffer as a result of the Court's interpretation process. Second, after construing the EDA documents, the Court did not apply the Subsection 1-8 limit to the EDA because it limited it "to instances where the EDA acquires the property with the intent to convey the property to a specific developer, rather than with general intent to convey the property to an unknown developer sometime in the future." (*Decision*, p. 29.) The fundamental assumption supporting this conclusion – that the EDA was acquiring property with general intent to convey property to an unknown developer sometime in the future is inconsistent with its position below and inconsistent with the appellate record. Both reasons justify *en banc* review.

I. LONGSTANDING CANONS OF CONSTRUCTION AND FUNDAMENTAL PRINCIPLES OF LAW SUPPORT THIS PETITION.

A. The EDA's Redevelopment Plan and documents were poorly drafted, inconsistent, and ambiguous.

The Court recognizes the EDA's documents are problematic, stating that they were: "poorly drafted, challenging, imperfectly drafted, poor drafting, inconsistent, lack of any consistent reference, puzzling, language is imprecise, lack of reference." (*Decision, pp. 21-32.*)

B. Because the EDA's Documents Are Ambiguous, They Must Be Construed Against the Drafter.

The EDA drafted all of the relevant documents in this case. Those documents are, at the very least, ambiguous. Minnesota law is clear – a court is required to resolve an ambiguous provision against the drafter of the document. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn.1995) (requiring court to resolve ambiguity against drafter of contract) This Court has held, "[s]ince all instruments in question here were prepared by defendant, all doubts or ambiguities must be resolved against defendant" *Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 115, 153 N.W.2d 281, 289 (1967).

Because the ambiguous documents in question in this case were drafted by the EDA, they must be construed against the EDA. Subsection 1-8, when construed against EDA, limits the scope of the EDA's power to acquire property.

C. The Court's Interpretation of Subsection 1-8 Is Inconsistent with Established Canons of Construction.

By incorporating the Redevelopment Plan into Resolution 01-63, the EDA is explicitly bound by its terms, as both the Ross court and this Court recognize. *Eagan Economic Development Authority v. U-Haul Company of Minnesota*, 765 N.W.2d 403 (Minn.App. 2009). “[A] resolution is a formal expression of the will or settled decision of a deliberative assembly.” *Lindahl v. Indep. Sch. Dist. No. 306*, 270 Minn. 164, 168, 133 N.W.2d 23, 26 (1965). Because a city may not violate its own enactments, neither can a subordinate entity. And because the redevelopment plan was incorporated by Resolution 01-63, the law requires this Court hold that the EDA intended every provision in the Redevelopment Plan, including Subsection 1-8, to have its full effect.

1. Subsection 1-8.

A critical review of the operative language concerning property acquisition in the Redevelopment Plan, Subsection 1-8, reflects clear, plain and sensible language. It is appropriate to commence the review at the most precise, relevant section of subsection 1-8 as it relates to the provision which the property owners have been attempting to focus the EDA and courts' attention upon, and which EDA has violated. The starting point is the second sentence, which provides:

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 of Tax Increments or other funds will be available to repay the Public Costs associated with the proposed acquisition.

(*APP. 68; emphasis supplied.*) This sentence establishes in plain, understandable language a clear predicate to the EDA's power at the heart of this appeal. Thus, it must

be given full effect. *Munger v. State*, 749 N.W.2d 335 (Minn. 2008) (when statute language is clear, supreme court bound to give effect); *Independent School Dist. No. 281 v. Minnesota Dept. of Educ.*, 743 N.W.2d 315 (Minn. App. 2008) (if statute construed according to ordinary rules of grammar is unambiguous, court may not engage in further statutory construction and must apply plain meaning).

In furtherance of a comprehensive review, however, all of the surrounding parts to sentence two (*binding development agreement requirement*), consisting of four total sentences, may be reviewed. *State v. Wagner*, 555 N.W.2d 752 (Minn. App. 1996) (statute to be construed giving effect to all its provisions, and construction that would give no effect to statute must be avoided). Thus, Subsection 1-8, titled "Proposed Reuse of Property," in its entirety, provides:

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 and evidence of Tax Increments or other funds will be available to repay the Public Costs associated with the proposed acquisition. 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.

(APP. 68-69.)

Read together, the entire section reflects logic, transparency and plain-spoken, laudable intent. The first sentence signals to the public, including property owners within the redevelopment district, and potential developers, the fact that the EDA may acquire property and reconvey that same property to another private entity (e.g., a developer). The third sentence expresses the intent that it will seek to negotiate the acquisition of

property whenever possible. The fourth, and final, sentence makes clear that when a development agreement is necessary, consistent with the prior three sentences, appropriate restrictions regarding reuse and redevelopment must be incorporated. Again, the language – separately or collectively – is ordinary, plain, clear and unambiguous.

2. Subsection 1-12.

Consideration and review of the related subsection 1-12, also dealing property acquisition, addresses more broadly the EDA’s general acquisition powers within the Redevelopment Project Area. It is titled “Property Acquisition,” and provides, in its entirety:

The City may acquire such property, or appropriate interest therein, within the Redevelopment Project Area as the City may deem to be necessary or desirable to assist in the implementation of the Redevelopment Plan.

(APP. 69.)

Clearly, Subsection 1-12 relates to the EDA’s general power to acquire property in the project area it deems “necessary or desirable” in its implementation. It is a general statement concerning the obvious, which is that properly established authorities have the power of eminent domain general.

To the extent statutory interpretation is necessary due to ambiguity, a statute should be interpreted to give effect to all of its provisions. And to the extent two provisions cannot be reconciled, the more specific provision should prevail over the general. *Custom Ag Service of Montevideo, Inc. v Commissioner of Revenue*, 728 N.W.2d 910 (Minn. 2007) (when construing statute with specific and general provisions, canons dictate that the specific provision prevails); *Rosenquist v. O’Neil & Preston*, 187

Minn. 375, 380, 245 N.W.2d 621, 623-24 (1932); *cf.* Minn. Stat. § 645.26 (2008) (statutes should give effect to all provisions but in the event of irreconcilable provisions, specific prevails over general). In addition, general words are construed to be restricted in their meaning by preceding particular words. *See, e.g.*, Minn. Stat. § 645.08 (2008).

Thus, Subsection 1-12, the general provision, is restricted in its meaning by Subsection 1-8, the preceding particular section of words. Again, this statutory construct is unnecessary due to the fact both provisions are plain, clear and unambiguous. And yet, the Court fail entirely in giving effect to the plain language of Subsection 1-8.

D. Minnesota Law Requires Strict Enforcement of Constitutional Protections.

For over 100 years, this Court has recognized that the importance of the strict enforcement of the constitutional protections of private property.

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.

Justice Brewer, in *McElroy v. Kansas City* (C.C.), 21 Fed. 257, quoted in *Minnesota Canal & Power Co. v. Koochiching Co.*, 107 N.W. 405, 407 (Minn. 1906). True in 1906 and even more compelling in 2010. 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.”

The Court's decision is entirely inconsistent with the framework provided by the Court in *Minnesota Canal* and law. Justice Sandra Day O'Connor's powerful dissent in the U.S. Supreme Court decision *Kelo v. City of New London* is consistent with this perspective. Justice O'Connor wrote:

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. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*." For the National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983).

Kelo v. City of New London, 545 U.S. 469 (2005) (O'Connor, J, dissenting).

II. THE COURT'S DECISION IS FOUNDED ON ASSUMPTIONS THAT ARE NOT SUPPORTED BY THE RECORD.

After going to great lengths to interpret and apply Subsection 1-8 of the Redevelopment Plan, a document that the Court kindly referenced as "imperfectly drafted," the Court held that the EDA did not need to have a binding development agreement before it condemned the subject property. Decision, p. 31. This Court held:

[I]t appears that the drafters intended the binding development agreement requirement to apply to limited situations; when the EDA acquires property with the intent to convey the property to a known developer. Here, it is undisputed that the EDA is not acquiring property owners' property at the behest of a developer. Though the record suggests that the EDA sought to acquire the property owners' property with the intent that it will eventually the property to a developer, it did not acquire the property with the intent to convey it to a known developer.

Id. In sum, the Court held that because the EDA did not acquire the subject property with intent to convey to a known developer, Subsection 1-8 did not apply.

The Court's fundamental assumption, however, is not consistent with the position taken by the EDA at the Court of Appeals. In response to the property owners argument regarding necessity, the EDA relied heavily on the fact it had selected Doran Pratt as the developer for the redevelopment. The EDA argued:

The Cedar Grove Redevelopment area is not being set aside for some unknown development. Rather, the EDA has selected Doran Pratt as the developer for the redevelopment project. The City and Doran Pratt entered into a preliminary redevelopment agreement. Doran Pratt provided a \$25,000 deposit to the EDA. The City staff and Doran Pratt have met frequently to develop a concept plan for the Cedar Grove area. At the time of the evidentiary hearing, this plan was submitted to the City Council for comment and approval and was expected to go to the Advisory Planning Commission for comment. The EDA and the developer also entered into a lease for a temporary sale center for the development.

Doran Pratt has retained professional engineering services to provide cost estimates for the proposed redevelopment. It has indicated that road reconfiguration may be necessary for its proposed redevelopment. Doran Pratt has expressed its desire to begin constructing an office building, senior housing, and a commercial component during this construction season. There are also federal funds available for the Minnesota Valley Transit Authority to construct a transit facility adjacent to Cedar Avenue. These construction activities will take place within the redevelopment district.

The taking of the properties within this district is necessary in order to allow the EDA and the developer to begin the construction and to move forward with the redevelopment plan.

(EDA Court of Appeals Brief, pp. 24-25.)

The record, through the position taken by the EDA, establishes both the developer was known, and the property was necessary to allow the EDA and the developer (Doran Pratt) to begin construction of the project. If the EDA is to be taken at its word, and if Court's analysis is applied to EDA's representations regarding the developer and the development, Subsection 1-8 clearly applies to this condemnation proceeding.

CONCLUSION

At the heart of the property owners' prayer is the belief that the Minnesota and United States constitutions forbid governmental bodies like the EDA from taking private land owned by its taxpaying citizens, and either stockpiling it for another day, or handing it off for the benefit of another private party. Even more immediate, the property owners respectfully petition this Court and pray for rehearing and an opportunity to revisit this Court's decision of July 29, 2010.

Dated: _____

QUVB

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Daniel L. Scott (#240837)
Leonard, Street and Deinard
150 South Fifth Street
Suite 2300
Minneapolis, MN 55402
(612) 335-1691 (Telephone)
(612) 335-1657 (Fax)
*Attorneys for U-Haul Company
of Minnesota*

Gary A. Fuchs (#32566)
Elizabeth E. Rein (#34980X)
Helmuth & Johnson, PLLC
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(952) 941-4005 (Telephone)
(952) 941-2337 (Fax)
*Attorneys for Larson Training Services,
Inc.
d/b/a Larson's Automotive Repair
Services*

Steven J. Quam (#250673)
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7183 (Telephone)
(612) 492-7077 (Fax)
*Attorneys for Randall J. Quam and
Sandra K. Quam and Competition
Engines, Inc.*