

Case No. A11-644
A11-1471
STATE OF MINNESOTA
IN COURT OF APPEALS

Roger Anda, Elizabeth J. Anda and
James H. Martin, LLC,

Appellants,

vs.

City of Brainerd, a Minnesota
municipal corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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We confine our comments in this reply to that portion of the City of Brainerd's brief that addresses the question whether the District court erred in barring landowners from challenging the taking of their property by eminent domain on the grounds that the City had not lawfully commenced the Chapter 429 special assessment project for which their property is being taken.

Brainerd argues that it can take property to expand College Drive under Chapter 429, even if the project was not properly authorized under Chapter 429. It correctly points out that expanding a municipal street into a regional arterial represents a permissible power allocated to cities, and we concede that taking land to facilitate the construction of roads is in the abstract a power that Cities may exercise. Unquestionably, had the City properly approved this project, the taking would have been an exercise of a municipal power allocated to Brainerd.

But that does not mean that Brainerd can take property to build a bridge or road without proper approval in the proper manner by its legislative body. Chapter 117 and both State and Federal Constitutions, allocate a judicial supervisory function in connection with takings, and our eminent domain code specifically provides that one portion of the reviewing function is to determine proper authorization. If the City administrator, or city attorney, attempted to commence an eminent domain proceeding without City Council approval, Brainerd could not evade judicial review by contending that cities can build bridges and roads in the abstract. The issue is not whether Brainerd

could hypothetically justify the expansion of College Drive with the proposed configuration, the issue is whether Brainerd actually obtained proper authorization for the construction in fact.

It was our position that a majority of the City Council would not approve the College Drive project as a public project funded by general revenues. The District Court would not allow us to prove this, or to explore the implications of that fact, because the District Court regarded that as irrelevant. We contended that the only majority available to make a public purpose finding was a bare majority that demanded that the City's local share come, unlawfully, from a special assessment. Again, the District Court barred Anda and Martin from attempting to prove that contention by quashing our subpoena, granting a protective order preventing acquisition of evidence by deposition; and by barring submission of testimony on this issue. This isn't a case where Brainerd proved that it had obtained City authorization to spend city money on this project, no matter what. On the contrary, Brainerd sidetracked that issue by convincing the District Court that Brainerd could take Anda and Martin's property even if the Council did not properly authorize the project. Brainerd did not win this issue based on evidence: Brainerd prevailed because the District Court found that a City could take private property for the project without being forced to prove at trial that the proper majority of Council persons approved the public purpose in the manner required by law.

Brainerd argues that the sole function of the District Court is to determine public

purpose and necessity and that the great sweep of Minnesota decisions supports that contention. In the first place, this contention ignores the fact that the project's purpose was approved with insufficient votes to commence the project under Chapter 429. In the second place, this position is completely contradicted by the plain language of Minnesota Statutes section 117.055, subd. 2 which states that party wishing to challenge the public use or public purpose, necessity, or authority for a taking must appear at the court hearing and state the objection and by Minnesota Statutes section 117.075 subdivision 1(a), which states that a court approves the public use or public purpose, necessity, and authority for the taking. Brainerd is essentially reading the phrase "authority for the taking" out of the statutory language.

A City acquires authority for taking by complying with the substantive and procedural legal requirements imposed by law. In Matter of Condemnation by Minneapolis Cmty. Dev. Agency, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998) the District and appellate courts both carefully examined whether those requirements had been met, and found that they were. Similarly, in and City of Duluth v. State of Minnesota, 390 N.W.2d 757 (Minn. 1986) the District and appellate courts carefully examined whether Duluth followed the procedures necessary to authorize the economic development project and found that those procedures had been followed.

More recently in the Eagan Economic Development Authority v. U-Haul chain of cases, again the District and appellate courts carefully examined whether the EDA had

followed the specific steps which were a precondition to acquire authority to conduct the taking in question. Eagan Economic Development Authority v. U-Haul Co., 765 N.W.2d 403 (Minn. App. 2009); reversed, Eagan Economic Development Authority vs. U-Haul Co., 787 N.W.2d 523 (Minn. 2010), on remand 2010 Minn. App. Unpub. LEXIS 1234. None of the Courts dismissed U-Haul's case on the grounds that, since the EDA had the power to condemn property for economic development in the abstract, it made no difference whether the EDA exercised its powers in accordance with law in the specific case. The decision of each court hung on whether the Court agreed that the EDA did, or did not, exercise its powers consistent with the authorizing statute and ordinances.

Thus, in Eagan Economic Development Authority v. U-Haul Co., 765 N.W.2d 403 (Minn. App. 2009), this Court wrote:

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." Housing & Redev. Auth. v. Minneapolis Metro. Co., 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960) 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); see also 11 McQuillin Mun. Corp. § 32.25 (3d ed. 2000) (distinguishing legislative and judicial questions in the context of eminent domain and stating that "it is generally the function of the judicial department to determine the existence and limits of the power").

This quotation makes no sense, if eminent domain review is limited only to public purpose and necessity as Brainerd contends. Plainly, the authority to take depends upon following the legal requirements necessary to exercise of the taking power. In the Eagan

Economic Development Authority case, the question was whether the EDA had been delegated the power to proceed with an economic development project without first obtaining a development agreement. The Court of Appeals and Supreme Court differed on that question, but both recognized that the authority to take depended upon proper exercise of the EDA's powers.

In Reilly Tar & Chemical Corp. v. St. Louis Park, 265 Minn. 295, 300-301 (Minn. 1963) The Court stated:

Certain well-established principles are applicable here. Any authority which a municipal corporation may exercise, either with reference to zoning or condemnation of property under eminent domain proceedings (both of which appear to be embodied in Minn. St. c. 462), must have its origin in a grant of right from the state. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N.W. 561; 6 Dunnell, Dig. (3 ed.) §§ 3018, 3019, and cases cited. A municipality in exercising such a delegation of power cannot exceed the limitations thereof, State ex rel. Ford Motor Co. v. District Court, 133 Minn. 221, 158 N.W. 240; Independent School Dist. v. State, 124 Minn. 271, 274, 144 N.W. 960; 6 Dunnell, Dig. (3 ed.) §§ 3018, 3019; and where it enacts an ordinance or a resolution having the effect of an ordinance which is in excess of the specific grant of right under which it is authorized to act, such action may be challenged in the courts.

Anda and Martin's property will suffer a grave insult from this project. The expansion of the right of way significantly impairs the use of their land for residential purposes. The scope of the project was in controversy at the City Council. Some council persons strongly believed that the widening of this road was not necessary. If those council members had prevailed, this taking would not have occurred, because there would have been no legislative finding justifying the need for the land. It is our position that, in

fact, those dissenting council members did prevail, because the expansion project required more votes than actually cast in favor of the project. The District Court's decision essentially says that proof of that fact is irrelevant, because even if the required majority did not authorize the project, the City can still take the land. But, the City didn't come to court and justify doing that damage for some abstract future project, and indeed, the Court's ruling doesn't find that the City needs the property in the abstract: it ordered a quick-take so that the City could immediately take the property for the College Drive highway expansion property, a project that was not properly approved. This Court should decisively reject the suggestion that District Courts may approve the taking of their land, apart from an actual proper authorization of the project that furnishes the need for that project.

Date: September 23, 2011

Respectfully Submitted,

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