

NO. A08-767

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State of Minnesota  
**In Court of Appeals**

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Eagan Economic Development Authority,

*Respondent,*

vs.

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

*Appellants.*

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**JOINT BRIEF AND APPENDIX OF APPELLANTS**

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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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## STATEMENT OF THE ISSUES

- 1. Did the district court err in granting the condemnation petition by determining that the EDA established a public purpose for taking Appellants' properties?**

The district court concluded the Redevelopment Plan does not require a binding development agreement before Appellants' properties can be taken. (AA 32) This conclusion contradicts the plain language of the Redevelopment Plan adopted by the Eagan City Council. (AA 62).

### **Apposite Authorities:**

Minn. Stat. §469.105 (2006).

*Housing & Redev. Auth. (HRA) v. Minneapolis Met. 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).

- 2. Did the district court err by concluding that Appellants' properties were reasonably necessary for a public purpose, when the EDA failed to identify how the property would be used and whether, or when, the unidentified project would occur?**

The district court found that the EDA's Resolution Number 01-63 made a prima facie showing that acquisition of the appellants' properties was necessary and that the EDA is neither taking properties for a speculative purpose nor stockpiling properties. Because the EDA has no articulated plan for development of the subject properties, this finding is clearly erroneous.

### **Apposite Authorities:**

*Lino Lakes EDA v. Reiling*, 610 N.W.2d 355 (Minn. Ct. App. 2000).

*Itasca County v. Carpenter*, 602 N.W.2d 887 (Minn. Ct. App. 1999).

*Regents of the Univ. of Minn. v. Chicago and N.W. Transp. Co.*, 552 N.W.2d 578 (Minn. Ct. App. 1996).

3. **Did the district court err in determining Minn. Stat. §117.042 may be used to acquire private property for an unidentified project that may occur, if it occurs at all, at some undefined future point in time?**

In spite of the EDA's admission of no development plan or need of possession, the district court found that use of the quick-take statute was necessary because of an approaching tax increment financing expenditure deadline and because 93 percent of the properties in the district had already been acquired. This finding is clearly erroneous.

**Apposite Authorities:**

Minn. Stat. §117.042 (2004).

*Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376 (Minn. 2006).

*City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980)

*Eagan Economic Development Authority (EDA) v. U-Haul Co., et al.*, No. A08-767 (Minn. Ct. App. July 22, 2008).

## STATEMENT OF THE CASE

Private property is fundamental to our society. No duty of the courts is more important than the strict enforcement of the constitutional and statutory provisions intended to protect private property. This case is about the protection of constitutional rights. The appellant landowners in this case are private citizens, defending their constitutionally protected right to own, use and enjoy their property, against an attempt by a city's economic development authority to take their private property without first binding itself to a public use of that land.

In 1998, the City of Eagan ("City") began considering the redevelopment of the Cedar Grove area. In 2001, the City, through its Board of Commissioners ("Board") of the Eagan Economic Development Authority ("EDA"), established the Cedar Grove Redevelopment Area ("Cedar Grove") and adopted the Redevelopment Plan for Cedar Grove and established Tax Increment Financing District No. 1 ("TIF District") and adopted the TIF Plan (collectively, the "Plans") (AA 44, 49.) In 2003, the TIF District was certified. (AA 56.) Through the years, the EDA has, to put it mildly, had great difficulty locating a development partner. In fact, the EDA did not make an offer to purchase Appellants' properties until September 2007. And it was not until November 2007 that the EDA initiated this condemnation proceeding.

On February 13, 2008, the Honorable Michael J. Mayer held a hearing on the EDA's condemnation petition for Appellants' properties. At the hearing, the EDA's real reason for rushing into condemnation became apparent. (AA 239.) The EDA claimed that unless it acquired Appellants' properties by quick-take by July 22, 2008, the EDA would not be able to recover the funds used for the acquisitions from the TIF District. In the Supplemental Order of April 16, 2008, the district court found public purpose and necessity for the condemnation, and that the use of the quick take statute was appropriate. (AA 17.)

Appellants promptly appealed and petitioned for a stay of the condemnation order during appeal. The EDA objected, and requested that Appellants post a supersedeas bond with a value nearly twice the estimated value of their properties. The district court found that potential TIF revenues were too speculative for a bond, but that a bond for the EDA's appraised property values was appropriate because the City would allegedly lose that amount if the July 22, 2008, TIF deadline passed. On appeal, a three judge panel in this Court found that the district court's interpretation of the tax increment expenditures was incorrect. (Order #A08-767, July 22, 2008.) The stay and bond issues were remanded to the district court.

In its rush to condemn Appellants' properties before this TIF deadline, the EDA has nullified its own findings of public purpose by violating its

Redevelopment Plan; it has nullified its findings of necessity by condemning land for a speculative purpose; and it has based its use of the quick-take condemnation statute on faulty grounds.

#### STATEMENT OF FACTS

The Appellants are private citizen landowners whose Eagan, Minnesota properties<sup>1</sup> have been condemned under the appealed order. (AA 17-43.) The EDA and City are different entities but are made up of exact same members. (AA 245:5-8.) The names are used interchangeably throughout this brief, as they appear interchangeably in City documents.

##### **A. Eagan Envisions Redevelopment Ten Years Ago.**

In 1998 the City of Eagan formed the Cedar/13 Redevelopment Task Force. (AA 280:5-7.) The Task Force commissioned a study of the area surrounding the Cedarvale Shopping Center, and submitted its findings to the City Council in November 1999. In 2001, at the City's request, the firm of Short Elliott Hendrickson, Inc. ("SEH") performed a survey and evaluation of Cedar Grove to ascertain whether the area met the eligibility for tax increment financing ("TIF").

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<sup>1</sup> Larson Training Services, Inc. a Minnesota corporation d/b/a Larson's Automotive Repair Services ("Larson Appellants") own the property at 3955 Cedarview Drive; Randall J. and Sandra K. Quam, husband and wife, and Competition Engines, Inc., a Minnesota corporation ("Quam Appellants") own the property at 3925 Sibley Memorial Highway; and U-Haul Co. of Minnesota, a Minnesota corporation and AMERCO REAL ESTATE COMPANY, a Nevada corporation ("U-Haul Appellants") own the property at 3890 Nicols Road. (AA 20-21, 39-43, 211.)

(AA 176-193.) The study determined that 68 of the 88 properties met the coverage test with a 72 percent area coverage, which exceeded the statutorily required 70 percent area coverage requirement; and that 36 of the 63 buildings (57 percent) were found to be structurally substandard, which exceeded the 50 percent requirement in the statute. (*Id.*)

In October 2001, the City Council passed Resolution 01-63, establishing the Cedar Grove Redevelopment Area and adopting a "Redevelopment Plan" for the area. (AA 44-48; 49-55.) The same Resolution established the Cedar Grove Area as a Tax Increment Financing District and adopted the TIF Plan. (*Id.*) The City did not submit the TIF District to the Dakota County Auditor for certification until late in 2002, and the TIF District was eventually certified by the County in July 2003. (AA 56.)

**B. The Redevelopment Plan.**

The City's "Redevelopment Plan," adopted by the City Council, 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." (AA 57, 63-Subsection 1-12.) But the City itself placed limitations on its ability to take property pursuant to the Redevelopment Plan. (AA 62-Subsection 1-8.) Prior to any acquisition, the Redevelopment Plan

requires a binding development agreement, to avoid improper transfer to a private party:

**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** and evidence that 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.

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

At first, the City was able to acquire much of the property in the district through negotiation. (AA 273:17-23.) Several businesses undertook renovations, but at their own expense. (AA 284:11-25; 285:1-17.) The McDonald's was torn down and reconstructed, the Silver Bell Shopping Center "had a face lift," River Ridge Condos were constructed, a Schwan's Food Distribution Center was built, and an Opus office showroom was built as well. All this development occurred without contracts and without any expenditure of TIF funds by the City. *(Id.)*

**C. Development in the Cedar Grove Area Stalls.**

The City has worked with several developers since 2001, but no binding development agreement – a clear precondition for exercising any taking powers – for Appellants' properties has materialized:

- In 2001, the City had an agreement with Delta Development to build 269 owner-occupied luxury town homes. After gaining preliminary approvals for the project, Delta requested that the City assign the project to another developer, U.S. Homes. U.S. Homes has not completed the original agreement for 269 luxury town homes. (AA 281:16-282:6.)
- Later that year, the City pursued preliminary development agreements with Shelter Corporation, for a hotel and water park, and with Ryan Companies, for a seventy-five thousand, multi-tenant office building. Neither project materialized. (AA 282:7-283:3.)
- In 2004, the City issued a request for proposals (“RFP”), subsequent to which it entered into a development agreement with Schafer Richardson. This agreement detailed specific numbers of housing units to be built, times of development, and requirements that development be completed within certain time frames. The Shafer Richardson development agreement was cancelled. (AA 283-284; 288-290.)
- In 2006, the City entered into a detailed development agreement with the Cedar Grove Development Corp. This Developer later withdrew because of financial difficulties. (AA 275:12-277:4.)
- In 2007, the City issued another RFP, subsequent to which it entered into a preliminary development agreement with Doran Pratt development group. This agreement contains a “concept” for redevelopment, but no specific numbers or dates. Doran Pratt is not required to do anything under the agreement. (AA 194; 290-292.)

The Cedar Grove Development Corp. cited the downturn in the condo market as the reason for terminating its contract. (AA 278:5-14.) The City’s studies show a decline in demand for the public uses which it hoped to develop in the Cedar Grove area: there will only be limited demand for new hotel rooms in Eagan until 2012; and the majority of demand for retail and office space will come after 2010. (AA 300-303.) In sum, despite continuing efforts, the City has been unable to

formalize its precondition to exercise any takings powers under the Redevelopment Plan, as no binding development agreement has been executed with respect to Appellants' properties.

**D. The City Faces the TIF Deadline for Expenditures.**

It was not until October 2007 (almost ten years after the redevelopment was first envisioned) that the City began to pursue condemnation as an option. (AA 216-224; 279:17-23.) With the notable exception of the current action, all "condemnations" in the Cedar Grove area have been "friendly condemnations," or condemnations with the consent of the landowners. (AA 285-287.)

As of February 2008, there was still no binding development agreement in place with respect to the Appellants' property. (AA 246, 250, 252, 259-260.) The City has "a concept and nothing further." (AA 303:4.) No master development agreement is in place. (AA 299.) There are no timetables. (AA 291.) There is no agreement that a transit station will be actually constructed. (AA 291:18-292:6.) There are no details "anywhere close" to the specificity of plans worked out with Cedar Grove Development, who backed out. (AA 290:2-8.) Upon acquisition of all the property, the City plans to work out a "land deal" with the Developer, Doran-Pratt, "rather than a complex development agreement." (AA 308:1-4.)

The deadline for TIF expenditures in the Cedar Grove redevelopment area expired on July 22, 2008. (AA 25, ¶ 22.) At the February 13 hearing, the City

emphasized that if it did not expend the TIF funds by July 2008, taxpayers would lose access to the \$3 million that could not be captured through the TIF.

- Q: So if the city does not expend these dollars prior to July of 2008 it could not recover these dollars, could it?

A. Correct. (AA 253:23-254:1.)

- Q: So if the city's unable to make its deposit, taxpayers would lose 3 million dollars, in excess, that could not be recaptured through the TIF?

A: That's correct. (AA 261:3-7.)

A: [I]f the money's not spent, you don't need money; but if the money's going to be spent, the taxpayers have to pay for it somehow. (AA 268:10-12.)

The City also claimed that it needs title to Appellants' lands before it can move forward on "all other aspects that lead up to development." (AA 303.)

## STANDARD OF REVIEW

Generally, appellate courts give great deference to a district court's findings of fact, and that the district court, in turn, gives great deference to a city's findings of public purpose. *See, e.g., HRA in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. Ct. App. 2001), *aff'd* 641 N.W.2d 885 (Minn. 2002). Nevertheless, the Minnesota Supreme Court held in *Co-op Power Ass'n v. Eaton* that individual land owners should be able to litigate whether specific interests in a particular piece of property were necessary to accomplish the general project and whether a quick take was required under the statute. 284 N.W.2d 395 (Minn. 1979). "On appeal, this court may reverse the decision of the agency if its decision is in excess of the statutory authority or jurisdiction of the agency. Public purpose and necessity are treated as questions of fact for the trial court and will not be reversed unless clearly erroneous." *State by Humphrey v. Byers*, 545 N.W.2d 669 (Minn. Ct. App. 1996).

## ARGUMENT

The Minnesota Constitution guarantees citizens that the government will not take their property without public purpose, necessity and just compensation. *See* U.S. Const. Amnds. V, XIV § 1; Minn. Const. Art. I, § 13; Minn. Stat. § 117.075; *City of Duluth*, 390 N.W.2d at 764 (“[I]t is the intent of our constitution and statutes that, in all eminent domain cases in this state, necessity, as well as public purpose must be shown.”). Taking land from one private citizen and selling it to another is constitutional only with a showing of public purpose and necessity. Because the City and EDA do not have a binding agreement in place with a developer, their assurance that the condemnation of Appellants’ properties is “necessary” to achieve a public purpose rings hollow. As the City has violated both statutory requirements and its own precondition for a taking, requiring a binding development agreement, its findings of public purpose and necessity are no longer valid, and the City’s rush to use the quick-take statute becomes inappropriate.

### **I. NO PUBLIC PURPOSE SUPPORTS EDA’S CONDEMNATION OF APPELLANTS’ PROPERTIES BECAUSE THE CONDEMNATION IS ILLEGAL AND EXCEEDS EDA’S AUTHORITY.**

Governing statutes require that a city have a “specific intended use” for a private property before a taking. Here, there was none sufficient to meet this requirement, and therefore, there was no public purpose. Regardless, the City itself

requires that a binding development agreement be executed before a taking; the City has failed to meet its own restrictions.

**A. The Condemnation Violates Minn. Stat. §469.105.**

“[A] condemning authority cannot undertake a public project if the project itself is not permitted by law.” *Matter of Minneapolis Cmty. Dev. Agency (MCDA) v. Opus Northwest, LLC*, 582 N.W.2d 596, 600 (Minn. Ct. App. 1998). The public purposes of increasing retail and housing development are admittedly legal purposes. *Id.* However, the City admits that it has no intention of pursuing a detailed development plan that would require that sort of development. (AA 308.) Instead, the City’s witness testified, “[u]pon Acquisition of all of the property it’s our expectation that we will be focused on a land deal rather than a complex development agreement.” (AA 308:1-4.) Instead of a complex agreement, the City plans to “focus on the value of the land.” (*Id.* at 17.)

A land deal, wherein the City acquires land and conveys it to a developer without a detailed plan, does not meet the statutory requirement for a taking. Minn. Stat. § 469.105 requires the sale of property by an EDA to include a “specified intended use” of that property. A blanket land deal without a detailed agreement as to the use of the land is illegal.

A condemning authority cannot condemn land if the project is not permitted by law. *MCDA*, 582 N.W.2d at 600. If the City contends that its future

plans are sufficient to establish public purpose, then the City is in violation of Minn. Stat. §469.105 because its current plans do not include a detailed, “specified intended use” of the property.

**B. The Condemnation Exceeded EDA’s Authority Under the City’s Redevelopment Plan.**

Even if the condemnation met the statutory requirements, it does not meet the preconditions established by the City itself. The City specifically stated that it would not proceed with a taking unless it had a binding development agreement in place. Its condemnation of Appellants’ properties, therefore, still lacks public purpose. Moreover, the condemnation sets a bad precedent wherein an EDA may openly violate its enabling resolutions and resort to strained legalistic readings in justifying itself to the public.

**1. The City has Acted Arbitrarily and Capriciously by Violating the Redevelopment Plan.**

“Courts may interfere only when the Authority’s actions are manifestly arbitrary or unreasonable. The acts of an authority vested with legislative determination in a particular area are manifestly arbitrary or unreasonable where they are taken capriciously, irrationally, and without basis in law or under conditions which do not authorize or permit the exercise of the asserted power.”

*Housing & Redev. Auth. (HRA) v. Minneapolis Met. Co.*, 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960).

In its resolution adopting the Redevelopment Plan and TIF district, the City placed limitations on its ability to proceed with a taking of private property. The City Council adopted Resolution 01-63 in October 2001. (AA 44.) This resolution adopted both the “TIF Plan” (AA 83) and the “Redevelopment Plan” (AA 57). The Resolution 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 Council to transfer the control, authority and operation of any economic development project to an EDA. Minn. Stat. § 469.094 (2006). The EDA is then bound by the terms of the resolution effecting the transfer. *Id.* Because City Council Resolution 01-63 incorporated the Redevelopment Plan, the EDA is bound by its terms.

The Redevelopment Plan specifies that

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

(AA 62, Subsec. 1-8.)

The plain language of this subsection requires the execution of a binding development agreement **before formal consideration of the acquisition of any property.** The reason given for this restriction is that “[t]he Redevelopment Plan contemplates that the City may acquire property and reconvey the same to another

entity.” *Id.* Because reuse is a possibility for any parcel, a development plan must be in place before acquisition to determine whether reuse will occur. Otherwise the City risks infringing on its citizens constitutional rights by taking property from one private citizen and conveying it to another without proper safeguards. *See City of Duluth*, 390 N.W.2d at 763 (stating that a public entity may turn over property acquired through eminent domain to a private entity only if a public purpose is furthered by that transfer of land).

The City admits that it has no binding development in place. (AA 246, 250, 252, 259-260.) The current agreement with Doran-Pratt is a “preliminary agreement.” (AA 212-215.) The agreement contains a “concept” for redevelopment, but no concrete ideas. (AA 303:14.) In essence, Doran-Pratt paid the City \$25,000 for exclusive rights to make a proposal for redevelopment for a period of one year. (AA 212, ¶ 2.) The agreement does not require any additional performance on the part of Doran-Pratt or the City. (*Id.*) Therefore, the City has violated the plain language of the Redevelopment Plan under which it is required to operate.

The condemnation of, and even the “formal consideration of acquisition of” Appellants’ properties were undertaken “under conditions which do not authorize or permit the exercise of the asserted power,” and the actions of the City and EDA are therefore arbitrary and capricious. *HRA v. Minneapolis Met. Co.*, 259 Minn. at

15, 104 N.W.2d at 874.

**2. The District Court's Legal Interpretation of the Redevelopment Plan was In Error.**

The district court, however, concluded that the EDA had not exceeded its authority. Notably, and correctly, the district court placed these provisions in the "Conclusions of Law" section of the Supplemental Order, as neither conclusion requires factual findings or deference. The court looked to "other provisions" of the Redevelopment Plan, notably Section 1-12, which is the only potentially applicable section. Section 1-12 reads,

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.

(AA 63, Subsec. 1-12.) The court then concluded,

The language in Section 1-8 of the Redevelopment Plan, when read in conjunction with other provisions of the Plan, does not preclude the taking of property absent a binding development agreement. Section 1-12, for example, allows the EDA, when it is necessary and desirable, as it is here, to acquire Respondent's property to assist in the implementation of the Redevelopment Plan.

(AA 25, ¶ 20.)

The plain language of the document contradicts the district court's finding. As the court noted, Sections 1-8 and 1-12 must be read together. However, doing so does not permit the conclusion that the EDA may acquire property without a binding development agreement.

Section 1-12 grants a general power to the City to acquire property for the redevelopment area. Section 1-8 qualifies that power: before the City acquires property, it must have a binding development in place. The specific statement qualifies the general statement.

The district court's reading of the Redevelopment Plan is untenable in that it makes section 1-8 ineffective. Reading Section 1-12 to allow the City to acquire property at any time renders the language of 1-8, requiring a binding development agreement "[p]rior to the formal consideration of the acquisition of any property," a nullity. We must assume that the City of Eagan and the City Council intended every element of the Redevelopment Plan to have its full effect and meaning. The district court's ruling is in error. Because the EDA violated its own redevelopment plan, it cannot show that the condemnation has public purpose.

**II. WITHOUT A SPECIFIC PROJECT OR IDENTIFIED USE, THE FACTUAL FINDING OF "NECESSITY" IS CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE RECORD.**

The EDA, as the condemning authority, must demonstrate "necessity" prior to condemnation. *City of Duluth*, 390 N.W.2d at 764. While a resolution by a city council that a taking is necessary to accomplish a proper purpose is prima facie evidence of necessity, this finding can be overcome where overwhelming evidence shows that the taking is not necessary. *Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 381 (Minn. 2006 (citing *City of Duluth*, 390 N.W.2d at 764)). Here, there is overwhelming evidence that this taking is not necessary.

**A. EDA Failed to Make Prima Facie Showing of Necessity.**

Typically, a city council resolution that the taking is necessary to accomplish a public purpose establishes a prima facie showing of necessity. *City of Duluth*, 390 N.W.2d at 764. The City relies on Resolution 01-63 for this showing. (AA 24, ¶ 14.) The Resolution, however, does not state that the condemnation of any particular parcels is necessary to accomplish its public purpose. Instead, it incorporates the Redevelopment Plan:

The Council hereby finds that the Plans, are intended and, in the judgment of this Council, the effect of such actions will be, to provide an impetus for development in the public purpose and accomplish certain objectives as specified in the Plans, which are hereby incorporated herein.

(AA 44, Sec. 2.) The Redevelopment Plan is, therefore, an essential part of the City's prima facie showing of necessity.

As demonstrated above in Part I.B.1, condemnation of Appellants' properties is in violation of the plain language of the Redevelopment Plan because there is no binding development agreement in place. When the City violates the resolution on which its prima facie showing of necessity rests, then that showing of necessity cannot stand. The City has not met its burden of demonstrating that the condemnations are necessary to achieve a public purpose.

**B. Speculative Purposes do not Support a Finding of Necessity.**

In addition, speculative purposes will not support a finding of necessity. *Regents of the Univ. of Minn. v. Chicago and N.W. Transp. Co.*, 552 N.W.2d 578, 580 (Minn. Ct. App. 1996). Further, a condemning authority must demonstrate that the properties will be necessary to achieve a public purpose “in the near future.” *Itasca County v. Carpenter*, 602 N.W.2d 887, 889 (Minn. Ct. App. 1999) (citing *Regents*, 552 N.W.2d at 580). Courts also look to whether problems confronting development are within the City’s control. *See Itasca*, 602 N.W.2d at 891 (rejecting a speculative purpose argument on the grounds that the remaining problems were “within the city’s control”); *MCDA*, 582 N.W.2d at 601 (rejecting a speculative purpose argument on the grounds that there was a written contract in place and that “the contingencies that exist appear to be normal for this stage and type of development.”).

Here, the district court looked at three factors to determine that EDA’s taking was not speculative: (1) it had a specific plan for the property it sought to condemn; (2) it was creating a statutorily authorized district; (3) and there was no evidence of any problems that would interfere with that plan. (AA 32) (citing *Lino Lakes EDA v. Reiling*, 610 N.W.2d 355, 361 (Minn. Ct. App. 2000)). The court’s reliance on *Lino Lakes* was, as shown below, clearly erroneous.

Addressing each of these points in turn will demonstrate overwhelming evidence that EDA's condemnation of Appellants' properties is speculative.

**1. EDA Has No Specific Plan.**

First, as in *Regents*, Appellants' properties are not on the development plan. *Regents*, 552 N.W.2d at 580. Though Appellants' properties are included in the "Redevelopment Plan" issued by the City Council, they are not on a binding agreement for development. (AA 246, 250, 252, 259-260.) The City admitted that there is no "master agreement" in place which would define the "size of the project." (AA 299:6-13.)

Further, as discussed in Part I, the condemnation violated the "Redevelopment Plan" issued by the City. The district court cites this redevelopment plan as support for the proposition that "EDA would be able to acquire the necessary properties in order to insure the appropriate implementation of the Redevelopment Plan." (AA 32, ¶ 22.) While the agreement does contemplate that the EDA will acquire property, the agreement also requires a binding development plan in place before the EDA does so. *See supra* Part I.A.

**2. EDA was not Creating a Statutorily Authorized District Because the District Had Already Been Created.**

Second, the "statutorily authorized district" had already been created by the resolution of the City Council. (AA 44-55.) The present case is distinguishable from *Lino Lakes*, on which the court relies. In *Lino Lakes*, the court held that

Minn. Stat. §469.101, Subdivision 2 authorized an EDA “to acquire property by condemnation before creating an economic development district” for the purpose of creating that district. 610 N.W.2d at 358. In the instant case, the City and EDA had established the economic development district by resolution as required by Subdivision 1 of the same statute. Minn. Stat. § 469.101, subdiv. 1. Resolution number 01-63 states that the Board of the EDA “has heretofore established the Cedar Grove Redevelopment Area and adopted the Redevelopment Plan therefor.” (AA 44.) Because the Eagan EDA had established its redevelopment district by resolution, it does not need to condemn land solely for the purpose of creating a redevelopment district. The ruling of *Lino Lakes*, and the need to “create” a statutorily authorized district, does not support a finding of necessity.

**3. Factors Out of the City’s Control are already Interfering with the Redevelopment Plan.**

Finally, the City is unable to demonstrate that the properties will be necessary to achieve a public purpose “in the near future.” *Itasca*, 602 N.W.2d at 889. Because Doran-Pratt is not bound to pursue development under the “preliminary agreement,” the City cannot cite a time-frame in which development will occur. (AA 291:7-12.) Further, because of the current slowdown in the economic market, demand has evaporated for the types of redevelopment the City has proposed, and its own studies show that demand will not reappear for 3-5

years. (AA 300-303.) In fact, the City has already lost one development agreement because of the decline in the condo market. (AA 278.)

Until the City has a binding agreement with a developer, it will not be able to control the pace of development in the Cedar Grove District. Because the City cannot demonstrate that the land will be used in the near future, and because development has been slowed by factors out of the City's control, the condemnation action is purely speculative. Because the use identified by the EDA is purely speculative, there is no necessity. Without necessity, there is no basis for this condemnation action.

**C. Necessity Cannot be Decided in a Vacuum.**

The question of necessity cannot be decided in a vacuum. The question of whether the subject property is reasonably necessary for an identified public purpose is inherently tied to how the property will be used in connection with that public purpose. Without an identified use, necessity cannot be established. Describing the project as a "future land deal" simply does not provide sufficient context for meaningful judicial review.

The EDA apparently contends that it meets the test of reasonable necessity by simply including the subject parcels in the Cedar Grove Redevelopment District. Using that logic, the EDA could conceivably condemn every parcel in the District without ever explaining to the Court what it was going to do with the

land. This simply cannot be the case. Without some type of link between the subject properties and a specified project, the protection provided to private property owners under the state and federal constitutions, i.e., the “reasonably necessary” requirement, would be rendered meaningless.

**III. QUICK-TAKE CONDEMNATION WAS NOT AUTHORIZED IN THIS SITUATION BECAUSE THE CITY FAILED TO SHOW THAT ACCELERATED ACQUISITION WAS REASONABLY NECESSARY.**

The district court cited two reasons for its finding that the use of the quick-take statute, Minn. Stat. §117.042, was necessary. First, the district court concluded the City had to use its TIF funds prior to July 22, 2008, or it would lose access to those funds. Second, the district court reasoned the City needed to assure itself of clear title to the land to proceed with its development. The district court ruling impermissibly expands the reach of quick-take condemnation such that economic development authorities need never use anything else. Specifically, the district court’s holding on this issue is clearly erroneous because (1) its finding with regard to TIF funds was based on an erroneous statutory reading that was overturned on appeal; and (2) its finding with regard to clear title is based on a misstatement of case law.

**A. The City Did Not Lose Access to the TIF Funds when the July 2008 Deadline Passed.**

In *City of Minneapolis v. Wurtele*, the Minnesota Supreme Court interpreted the quick-take statute, Minn. Stat. §117.042, “to limit the use of “quick take” to cases where a municipality could reasonably determine that it needs the property before the commissioners’ award could be filed.” 291 N.W.2d 386, 396 (Minn. 1980). Where “the legislature itself chooses the limit the municipality’s exercise of eminent domain by requiring some finding of necessity, a court may review that finding to determine it was justified on the facts.” *Id.*

A major factor in the City’s rush to condemn Appellants’ properties was the approaching TIF deadline for expenditures. (AA 353-254, 261.) The City argued that the use of the quick take was necessary to prevent the loss of the tax increment generated by redevelopment. (AA 25, ¶ 22.)

The City’s argument fails for two reasons. First, the City’s failure to spend its TIF funds during the past five years is a situation the City itself created. Not until October 2007 did the City begin to pursue condemnation as an option. (AA 216, 279:17-21.) Even then, Appellants were not served with notice of condemnation of their properties until November 27, 2007, less than eight months before the TIF deadline. If waiting until the last minute creates sufficient “necessity” for the use of the quick-take condemnation provision, then all any EDA in the State of Minnesota would need to do to create necessity is wait until

the last year of its certification and then petition to condemn all the properties in its district. In short, a timing hardship created by the EDA itself cannot support the conversion of Minnesota's quick-take statute into a remedial vehicle for the EDA's self-created problem. See *Peterson v. Holiday Recreational Industries, Inc.*, 726 N.W.2d 499, 505 (Minn. Ct. App. 2007) (party denied relief where his own conduct acted to his own benefit or the injury of others); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 539 (Minn. 1986) (claim for damages barred where plaintiff's own actions created the violations for which he sought redress).

Second, in response to Appellants' motion for review of the district court's stay order and supersedeas bond conditions, this Court held that depositing the TIF funds with the district court administrator satisfies the TIF statute's requirement of payment to a third party before the five-year deadline. (See Minnesota Court of Appeals, Order #A08-767, July 22, 2008) This Court held that "deposit of the funds at issue here is deemed to satisfy Minn. Stat. §469.1763, subd. 3(a)(1) (2006)."

The ruling by this Court alleviates any urgency the City or district court may have felt with regard to the TIF funds. Concern about the TIF deadline did not present a reasonable determination that the City needed the properties before the Commissioners' award because the City could deposit the funds into court

while awaiting the award without losing access to them. On this record, use of the quick-take condemnation statute was clearly erroneous.

**B. The City Does Not Need Clear Title Until It Has a Binding Development Agreement in Place.**

The other reason given by the City for use of the quick take statute is that it needed to assure itself of clear title before undertaking further investments and in order to engage a developer. (AA 34, ¶ 27.) The City quotes a short passage from *Lundell* and *Wurtele* in support of this proposition. Its reliance on both cases, however, is in error.

In *Wurtele*, the city had a development contract with the development company Oxford, and the court found it appropriate to invoke the quick-take statute where the city needed to assure itself and Oxford of clear title before further investments were made. Oxford had contracted with the City of Minneapolis for construction of the “City Center.” 291 N.W. 2d at 388. As developer, Oxford had been involved from the beginning of the redevelopment project. *Id.* at 388-89. Clear title was reasonably necessary to assure both parties that their contractual obligations could be carried out. *See Id.* at 389 (describing contractual obligations).

In *Lundell*, the defendant was a provider of electricity. *Lundell v. Coop. Power Ass’n*, 707 N.W.2d 376 (Minn. 2006). *Lundell* differs slightly from the present case in that the power company was charged with providing electricity to

the public, not with maintaining a contract with another individual. Nevertheless, the same logic applies. The power company had been threatened with eviction from the land it leased. *Id.* at 380. The court determined that a quick take was reasonably required “to ensure a continued supply of electricity,” in other words, so that the power company could fulfill its contractual obligations to the public. *Id.* at 383.

In the present case, clear title is not immediately necessary to satisfy any contractual obligations. Nor is there a contract with a developer such that clear title is necessary in the near future.

Notably, the district court’s order of April 16 omit reference to the developer when citing these cases:

- Original case quotation: “. . . the city needed to assure itself and Oxford of clear title before further investments were made.” *Wurtele*, 291 N.W.2d at 396.
- District Court Order ¶ 27: “the city needed to assure itself . . . of clear title before further investments were made.” (quoting *Wurtele*, 291 N.W.2d at 396.)

Omitting the reference to the developer hides a foundational element of the rationale behind a quick-take. The Supreme Court has expressly “limited” the use of quick-take to cases where the City can “reasonably” determine that it will need the property before the commissioner’s award. *Wurtele*, 291 N.W.2d at 396. Without a contract in place, the City cannot reasonably make that determination.

If claiming the need to ensure clear title before entering a development contract were permitted, then the use of quick-take condemnation in redevelopment districts would no longer be “limited.” Ensuring clear title before entering a hypothetical contract would be a necessity every City could claim.

### CONCLUSION

The EDA must not be permitted to take Appellants’ properties absent the requisite showing of necessity for a public purpose. In presenting its intentions with respect to Appellants’ properties, the EDA has not met these constitutional requirements. The EDA has failed to present a “specific intended use” for Appellants’ properties and has violated its own Redevelopment Plan. The EDA’s showing of necessity is impermissibly based on speculation, and not on a necessity for a public purpose “in the near future.”

Further, use of statutory “quick take” procedures is not justified. The deadline for expenditure of TIF funds is not a basis for the invocation of the quick take statutes and the City has no need for clear title without a binding development agreement in place.

Appellants respectfully request that this Court reverse the April 16, 2008 Order of the District Court.

Dated: August 11, 2008.

Respectfully submitted,

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