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A Survey Of Recent Developments In The Law: Property Law

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I. PROPERTY LAW

A. *Limitation of Evidence in Partial Takings*

In *County of Anoka v. Blaine Building Corp.*,[1] the Minnesota Supreme Court limited the rights of private property owners through its interpretation of allowable damages evidence in a condemnation context.[2]

In 1991, the Anoka County Commissioners approved a plan to widen a road and install a median strip to in an effort to ease congestion along the roadway.[3] The construction affected four land parcels on the east side of University Avenue, between the blocks of 101st Avenue and 102nd Lane.[4] The County of Anoka intended to acquire a twenty-seven foot strip of land from three of the parcels, and an eighteen-point-seven(18.7) foot strip of land from the remaining parcel.[5] The median itself was taken solely from an existing right of way.[6]

In mid-1993, Anoka County petitioned for, and received, an order transferring the titles of the affected property to the County in accordance with chapter 117 of the Minnesota Statutes,[7] which provides for the public acquisition of private property by eminent domain.[8] Simultaneously, the trial court appointed commissioners to determine the amount of damages due to the property owners for the partial takings from the parcels.[9] The court-appointed commissioners recommended that severance damages be paid to the property owners; those damages were partially based on the loss

1. 566 N.W.2d 331 (Minn. 1997).
2. *See id.* at 336. For the constitutional justification for condemnation powers, see U.S. CONST. amend. V., providing that: "[N]or shall private property be taken for public use, without just compensation." *Id. See also* MINN. CONST. art. 1, § 13, which states: "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation." *Id.*
3. *See Blaine Bldg. Corp.*, 566 N.W.2d at 332.
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id., see also* MINN. STAT. ch. 117 (1998).
8. *See generally* MINN. STAT. ch. 117 (1998).
9. *See id.*

of traffic access caused by the introduction of the roadway median.[10]

Two separate actions were brought, one by Anoka County and another by the owners of the parcels.[11] Both actions were appealed to the Anoka County District Court, where the County sought partial summary judgment.[12] Anoka County argued that, as a matter of law, "the property owners were not entitled to introduce evidence of a partial loss of traffic access into the damages assessment."[13] The Minnesota Court of Appeals affirmed the district court's grant of partial summary judgment against both of the landowners.[14]

The Minnesota Supreme Court affirmed the decision of the court of appeals, holding that a landowner who (1) is subject to the partial taking of their property, (2) while simultaneously losing access to their property in one direction, but (3) retaining access in another direction, may not be able to recover severance damages as a result of the diminished access.[15]

Relying on *State v. Strom*,[16] the court determined that the evidence allowed in a condemnation claim for severance damages was much narrower than evidence of losing access.[17] The court asserted that evidence of damages resulting from loss of access should not be allowed, as these type of damages did not arise from any change in the land actually taken.[18] The court relied on the general rule of *City of Crookston v. Erickson*,[19] which holds that an owner is not entitled to damages where the land is affected by the use of an adjoining piece of property and all of the properties are used for the same project.[20]

The court chose not to use an exception to the rule of *Crook-*

10. *See* County of Anoka v. Maego, Inc., 541 N.W.2d 375, 376 (Minn. Ct. App. 1996). The court appointed commissioners awarded direct damages as a result of the property actually taken, and also severance damages for the reduction in the value of the parcels in their remaining condition. *See id.*

11. *See Blaine Bldg. Corp.*, 566 N.W.2d at 333. One action involved parcels 18 and 19, the other involved parcels 20 and 21. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*; *see also Maego*, 541 N.W.2d at 376.

15. *See Blaine Bldg. Corp.*, 566 N.W.2d at 336.

16. 493 N.W.2d 554 (Minn. 1992).

17. *See Blaine Bldg. Corp.*, 566 N.W.2d at 334 (stating that partial damages are not permitted).

18. *See id.*

19. 244 Minn. 321, 69 N.W.2d 909 (1955).

20. *See id.* at 325, 69 N.W.2d. at 913.

ston.[21] This exception allows evidence of damage where the part taken is integral and inseparable from the project as a whole.[22] The majority also noted that because the loss of traffic access in one direction is not a compensable taking under its prior ruling in *Hendrickson v. State*,[23] the evidence of loss was irrelevant and could not be taken into consideration in determining severance damages.[24] Finally, the court held that because the damages evidence was ruled irrelevant and inadmissible, the rulings of the district court and the court of appeals should not be overturned without evidence of clear error.[25]

Justice Anderson, joined by Chief Justice Keith, dissented, reasoning that when there is a partial taking in an eminent domain proceeding, evidence of lowered access caused by the construction of a roadway median should be admissible in determining the before and after fair market value of property.[26] Justice Anderson gave three reasons for his belief that the majority was incorrect:[27] (1) the majority's reading of *Strom* was unduly narrow;[28] (2) the case law dictating that evidence of the loss of access in one direction was not compensable in an inverse condemnation context did not dictate the same result in a partial takings context;[29] and (3) the court's decision in *Crookston* supported submitting evidence of the loss of traffic to the fact finder in order to determine whether the partial taking of the landowner's property was an "integral and inseparable" part of the street improvement plan.[30]

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21. *See id.* at 327, 69 N.W.2d at 914.

22. *See Blaine Bldg. Corp.*, 566 N.W.2d at 335; *Crookston*, 244 Minn. at 327, 69 N.W.2d at 914.

23. 267 Minn. 436, 442, 127 N.W.2d 165, 170 (1964) (stating that property owners have no vested interest in the continued flow of traffic past the property). *But see* State v. Gannons, Inc., 275 Minn. 14, 19, 145 N.W.2d 321, 326 (1966) (holding that a property owner suffers compensable damage when a road is changed so that the owner is denied reasonably convenient and suitable access in at least one direction to the main thoroughfare).

24. *See Blaine Bldg. Corp.*, 566 N.W.2d at 334; *see also Gannons*, 275 Minn. at 20, 145 N.W.2d at 327; MINN. R. EVID. 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); MINN. R. EVID. 402 ("[A]ll relevant evidence is admissible, . . . [e]vidence which is not relevant is not admissible.").

25. *See Blaine Bldg. Corp.*, 566 N.W.2d at 336-37.

26. *See id.* at 337 (Anderson, J., dissenting, joined by Keith, C.J.).

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.* at 336.

B. *Projected Highway Construction Fails to Satisfy MERA Claim*

In *Schaller v. County of Blue Earth*,[31] the Minnesota Supreme Court held that in reviewing an action under the Minnesota Environmental Rights Act ("MERA"),[32] five specific factors may be considered to determine whether conduct materially and adversely affects the environment.[33] Additionally, the court noted that projected future noise violations are too speculative, premature and minimal to establish a prima facie case under MERA.[34]

Douglas Schaller challenged the construction of a new highway ("CSAH 90")[35] in Blue Earth County, south of Mankato, Minnesota.[36] Schaller sought injunctive relief through the use of MERA to stop that part of the highway project that would cross a ravine near the Schaller family homestead.[37] Schaller alleged two separate violations under MERA.[38] Count I alleged that projected traffic volumes for the project in the year 2010 would be in excess of state standards.[39] Count II alleged that the destruction of natural re-

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31. 563 N.W.2d 260 (Minn. 1997).

32. 1976 Minn. Laws, ch. 952, § 1, codified as amended at MINN. STAT. ch. 116B (1998).

33. *See Schaller*, 563 N.W.2d at 267.

34. *See id.*

35. *See id.* The construction involved the development of a portion of a "new two-lane highway, County State Aid Highway 90, south of Mankato in Blue Earth County." *Id.* at 261.

36. *See id.* at 261.

37. *See id.*

38. *See id.* The applicable provision of the statute, MINN. STAT. § 116B.02, subd. 5 (1998), provides:

> "Pollution, impairment or destruction" is any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred or is likely to occur or any conduct which materially adversely affects or is likely to materially adversely affect the environment; provided that "pollution, impairment or destruction" shall not include conduct which violates, or is likely to violate, any such standard, limitation, rules, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air.

Id.

39. *See Schaller*, 563 N.W.2d at 261. State standards for analysis of future noise pollution are found in section 116B.02, subdivision 5 and section 116B.03, subdivision 1 of the Minnesota Statutes. *See* MINN. STAT. § 116B.02, subd. 5; MINN. STAT. § 116B.03, subd. 1.

sources in the ravine would materially adversely affect the environment under MERA.[40]

The district court granted Blue Earth County's motion for summary judgment on Count I, holding that Schaller "failed to prove that construction of CSAH 90 was 'likely' to violate MPCA noise standards as required to establish a prima facie case under MERA."[41] The district court denied the County's summary judgment motion for Count II, but after a hearing the district court granted a motion to dismiss on Count II based on the use of a four-factor test adopted in *State ex rel. Wacouta Township v. Brunkow Hardwood Corp.*[42] Applying the four-factor *Wacouta* test, the district court determined that "while there would be some adverse effect on the environment from the construction of CSAH 90, the effect would not be material."[43]

The Minnesota Court of Appeals upheld the rulings of the *Schaller* district court in an unpublished opinion.[44] Schaller then appealed to the Minnesota Supreme Court, claiming that the application of the *Wacouta* factors was contrary to the express legislative intent of MERA: furtherance of the "state's paramount concern for the protection of its air, water, land and other natural resources."[45] Additionally, Schaller argued that the *Wacouta* factors "unduly restrict the scope of MERA."[46] Finally, Schaller asserted that the district court erred in granting summary judgment on the noise complaint, "because the EIS [environmental impact statement] projects that a noise violation will result if CSAH 90 is completed."[47]

The Minnesota Supreme Court determined that the use of the four-part *Wacouta* test[48] was appropriate in light of prior case law

40. *See Schaller*, 563 N.W.2d at 261.

41. *Id.* at 262.

42. 510 N.W.2d 27, 30 (Minn. Ct. App. 1993). *See also infra* note 48 (setting out the four factors in detail).

43. *Schaller*, 563 N.W.2d at 263.

44. Schaller v. County of Blue Earth, No. C2-96-1004, 1996 WL 438845, at *3 (Minn. Ct. App. Aug. 6, 1996).

45. *Schaller*, 563 N.W.2d at 264.

46. *Id.*

47. *Id.*

48. The test weighs the following factors:

> (1) whether the natural resource involved is rare, unique, endangered, or has historical significance; (2) whether the resource is easily replaceable, (for example, by replanting trees or restocking fish); (3) whether the proposed action will have any significant consequential effect on

and was harmonious with the objectives underlying MERA.[49] As a result, the court found that allegations of future noise violations were not sufficient to sustain a prima facie case under MERA.[50]

While the supreme court approved the district court's use of the four *Wacouta* factors to analyze claims brought under MERA,[51] it further modified the analysis, creating a test of five factors "as a guideline for future determinations of whether or not conduct materially adversely affects or is likely to materially adversely affect the environment under Minnesota Statutes section 116B.02, subdivision 5."[52] The new factors analyze:

> 1. The quality and severity of any adverse effects of the proposed action on the natural resources affected;
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> 2. Whether the natural resources affected are rare, unique, endangered, or have historical significance;
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> 3. Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
>
> 4. Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed);
>
> 5. Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.[53]

The court emphasized that each factor is not exclusive and need not be met in order to find a materially adverse effect.[54]

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other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number considering the nature and location of the wildlife affected.

Schaller, 563 N.W.2d at 265.

49. *See id.* at 266.
50. *See id.* at 267.
51. *See id.*
52. *Id.*
53. *Id.*
54. *See id.*

Rather, the factors are intended to be used as a flexible guideline for considering the facts of each particular case.[55]

In sum, the *Schaller* court agreed with the conclusions of the district court and the court of appeals.[56] Both lower courts and the supreme court held that even when viewed in a light most favorable to Schaller the "projected [noise] violations are simply too speculative to present a fact issue for trial."[57]

C. Township Feedlot Ordinance Upheld

The continued expansion and utilization of large-scale animal feedlots in Minnesota has generated litigation that juxtaposes the authority of state law against the authority of local ordinances. The Minnesota Court of Appeals, in *Canadian Connection v. New Prairie Township*,[58] fortified the authority of local governments to control zoning aspects of feedlot regulation.[59] The court addressed the lack of conflict with state statutes and the permit process of the Minnesota Pollution Control Agency ("MPCA").[60]

Canadian Connection is a general partnership that builds hog barns; Solvie Farms, Inc. ("Solvies") is a corporation responsible for the "crop side" of hog farming.[61] In 1993, the two entities applied for and received a permit to build and operate a hog feedlot facility from the MPCA for 450 animal units in New Prairie Township ("Township").[62] They applied for another permit to expand the facility to 640 animal units in September of 1994, but objections were raised by township residents.[63] In March of 1995, the Township (1) noted the concerns of residents about monitoring and controlling the pollution from the large feedlots; (2) passed a resolution containing restrictions on large feedlots; and (3) notified Solvies that they needed a conditional use permit before they would be allowed

55. *See id.*
56. *See id.*
57. *Schaller*, 563 N.W.2d at 268. The court noted that the EIS noise projections on which Schaller relied were not prepared for the purpose of establishing the projected absolute noise level at any particular monitoring site, but were for comparing the noise effects of various alternative routes under construction. *See id.*
58. 581 N.W.2d 391 (Minn. Ct. App. 1998), *review denied*, (Minn. Sept. 30, 1998).
59. *See id.* at 397.
60. *See id.*
61. *See id.* at 393.
62. *See id.*
63. *See id.*

to expand the feedlot.[64]

The Township adopted a new zoning ordinance on January 27, 1996 that imposed setback requirements for feedlots.[65] The ordinance required Solvies to apply for a conditional use permit and a variance to expand existing facilities.[66] Solvies' applications to the township for a conditional use permit and a variance were denied.[67] Solvies filed suit, challenging both the validity of the ordinances and the denial of their applications for variance and conditional use permits.[68]

The district court held that because the township, through its zoning authority, sought to address the odor concerns of its residents, the zoning ordinance was neither preempted by, nor in conflict with, state law.[69] Additionally, the district court found that the township properly exercised its land use authority in adopting the zoning ordinance.[70] On appeal, Solvies argued that the district court erred in its determination.[71] The Minnesota Court of Appeals reviewed the case de novo.[72]

The court used a four-factor test[73] to determine whether the Township ordinance was preempted by state law.[74] Under the test's first factor, Solvies argued that the Township was regulating pollution through the zoning ordinance and subsequently preempting the regulatory power of the MPCA.[75] Solvies attempted to analogize to the Minnesota Court of Appeals' decision in *Board of Super-*

64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.* at 394. "[S]tatutory interpretation presents a question of law that an appellate court reviews de novo." *Id.* at 394 (citing Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985)).
73. *See id.* at 394. The four questions asked by the court were: (1) What is the subject matter being regulated? (2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern? (3) Has the legislature in partially regulating the subject matter indicated that it is a matter of state concern? (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace? *See id.* (citing Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25, 27 (Minn. Ct. App. 1997)).
74. *See Canadian Connection*, 581 N.W.2d at 394.
75. *See id.*

visors v. ValAdCo,[76] which struck down a township ordinance regulating feedlots.[77] The *Canadian Connection* court ruled that the Township's effort to lessen an odor's impact was a valid exercise of its authority.[78]

Under the second and third factors, the court drew a distinction between the Township's setback requirements (minimizing the impact of odor on residents) and the lack of air quality standards for feedlot odor.[79] This distinction allowed the court to hold that the matter was not a solely a matter of state concern.[80] The court refuted the fourth and final factor and held that the actions of the Township to regulate the feedlot odor would not have an unreasonably adverse effect on the general populace.[81]

The second issue dealt with the question of whether the Township ordinance conflicted with state law.[82] The court disregarded Solvies' argument that their MPCA permit, which included an odor management plan, allowed for actions prohibited by the Township ordinance and subsequently established a conflict.[83]

The final issue facing the court involved the existence of a rational basis to justify the setback requirements for feedlots located within the township.[84] Solvies claimed that there was no rational basis to justify setback requirements for feedlots.[85] However, the

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76. 504 N.W.2d 267 (Minn. Ct. App. 1993).

77. *See Canadian Connection*, 581 N.W.2d at 394; *see also ValAdCo*, 504 N.W.2d at 270. The ordinance challenged in *ValAdCo* imposed waste application rates, setbacks for sewage lagoons, and required those who built sewage lagoons to post a surety bond or cash. *See Canadian Connection*, 581 N.W.2d at 394 (citing *ValAdCo*, 504 N.W.2d at 270). "In contrast, the ordinance here focuses on land use regulating the location of feedlots and does not attempt to regulate the actual operation of feedlots." *See id.*

78. *See id.*

79. *See id.* at 395.

80. *See id.* The court stated:

> [g]iven the narrow purpose and scope of the ordinance, the lack of specific authority in state law, and the statements by the MPCA recognizing the land use authority of local governments, we cannot say the state has expressly or impliedly occupied the field of addressing concerns regarding odor from feedlots.

Id.

81. *See id.* at 395.

82. *See id.*

83. *See id.*

84. *See id.* at 396.

85. *See id.*

court recognized that the Township addressed feedlot concerns[86] and relied on its own earlier ruling on a similar argument.[87]

This decision ensures the survival of township ordinances not in conflict with state statutes. Rather than limit local authority, the court allowed an even-handed interpretation of the state statutes, agency regulation, and local ordinances.

D. Condemnation and Tax Increment Financing

The combination of eminent domain and tax increment financing for the development of the property taken by the state continues to spark litigation surrounding the interests of those parties holding, or wishing to hold, a stake in the future of downtown development in Minnesota. In *Opus Norwest, LLC v. Minneapolis Community Development Agency*,[88] the Minnesota Court of Appeals affirmed the district court's decision that (1) findings of public purpose and necessity were not clearly erroneous;[89] (2) the failure of a future store owner to be in compliance with the city's affirmative action plan did not render the project illegal;[90] (3) the condemnation was not speculative;[91] and (4) no new findings regarding the city's tax increment financing plan were required.[92]

The circumstances surrounding the case began when the city of Minneapolis ("City"), through the Minneapolis Community Development Agency ("MCDA"), sought to condemn two parcels of property located in downtown Minneapolis.[93] The City did so in an effort to serve their desire to locate a "mid-priced retail store, parking complex, extended skyway access, and an office building in the downtown area."[94] Because of the high cost of the property, the City utilized tax increment financing ("TIF") in order to attract a retailer.[95] The City contracted with Ryan Corporation ("Ryan") for

86. *See id.*
87. *See id.* at 396-97; Holt v. City of Sauk Rapids, 559 N.W.2d 444, 445 (Minn. Ct. App. 1997) (involving a challenge to a local ordinance aimed at problems caused by dog noise and odor).
88. 582 N.W.2d 596 (Minn. Ct. App. 1998), *review denied*, (Minn. Oct. 29, 1998).
89. *See id.* at 601.
90. *See id.*
91. *See id.* at 602-03.
92. *See id.*
93. *See id.* at 598.
94. *Id.* at 599.
95. *See id.*

the development, construction, and ownership of part of the project.[96] Prior to the City's choice of Ryan, Opus Northwest, LLC ("Opus"), in addition to owning two of the parcels to be condemned, also bid on the project.[97] Opus was not chosen because, among other reasons, it could not secure a mid-priced retailer as an anchor tenant.[98] Opus contended it could build a $120 million office building without government subsidies but did not have a mid-priced retailer for the project.[99] Opus objected to the both the condemnation proceedings and the legality of the City's use of TIF for the project and brought separate actions against the City to prohibit further project development.[100]

In the district court, Opus had challenged the legitimacy of the condemnation action.[101] On appeal, Opus attacked the condemnation by arguing that because the taking would benefit private interests, the court should review the condemnation under a standard of "heightened scrutiny."[102] The court rejected the argument, holding that the condemnation fell within the City's prescribed authority.[103] Opus's reliance on foreign case law was inconsistent and conflicted with Minnesota case law.[104] The court also observed that the condemnation met the requirements of a "public use or purpose,"[105] which is consistent with the legislative authority granted by Minnesota Statutes section 469.124.[106] Finally, the court

96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.* at 598.
100. *See id.* The trial court combined the separate condemnation and TIF actions. *See id.*
101. *See id.*
102. *Opus*, 582 N.W.2d at 599. The development was joined by Dayton Hudson Corporation through its placement of the mid-priced retail store. *See id.*
103. *See id.* at 599. The court also stated that it appeared that the application of a heightened level of scrutiny was "out of touch with the national trend." *Id.* (citing 2A NICHOLS ON EMINENT DOMAIN, § 7.06[24][c] (3d ed. 1998) (stating the trend was to sanction "broad legislative discretion to use eminent domain for a variety of economic development purposes")).
104. *See Opus*, 582 N.W.2d at 599. Minnesota courts have not utilized a heightened scrutiny standard involving condemnation benefiting private parties. *See id.* "We reject the invitation to change our well-established and limited standard of review." *Id.*
105. *Id.* at 599. "Public use" or "public purpose" is broadly defined and includes property to be used by a private entity. City of Duluth v. State, 390 N.W.2d 757, 763-64 (Minn. 1986).
106. *See Opus*, 582 N.W.2d at 599. The legislature recognized that actions "taken to foster new development, including the financing thereof, in areas of a

found that absolute necessity was not required for public purpose.[107]

Opus relied on three early Minnesota Supreme Court cases ("Minnesota Canal Trilogy")[108] to support its next argument: that without certain, legal attainability on the part of the condemnor, the action was illegal.[109] In contrast to the illegal actions involved in the Minnesota Canal Trilogy cases, the court found that the condemnation was legal and it had a legitimate public purpose.[110]

The court of appeals saw the main purpose of Opus' appeal as a challenge to the legality and attainability of the City's condemnation.[111] Opus argued that because the anticipated future owner/occupant[112] of the project did not currently have an affirmative action statement filed with the City, the condemnation was illegal.[113] The court rejected the argument as anticipatory.[114] Because

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city that are already built up in order to provide employment opportunities, to improve the tax base, and to improve the general economy of the state . . . are [examples of] a public purpose." *Id.* at 600 (quoting MINN. STAT. § 469.124 (1996)).

107. *See Opus*, 582 N.W.2d at 600-01. The court instead stated that "[i]t is enough to find that 'the proposed taking is reasonably necessary or convenient for the furtherance of a proper purpose.'" *Id.* (quoting City of Duluth v. State, 390 N.W.2d, 757, 764-65 (Minn. 1986)).

108. *See* Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 27, 148 N.W. 561, 565 (1914) (holding that the diversion of stream water by a public service corporation, to the impairment of other bodies of water, is unauthorized); Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 200, 112 N.W. 395, 398 (1907) (holding that a public service corporation may not condemn private property when such condemnation interferes with the navigable waters of the state); Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 433, 107 N.W. 405, 409 (1906) (holding that the purposes for the condemnation of land must be entirely public). The three cases are known as the Minnesota Canal Trilogy. *See Opus*, 582 N.W.2d at 600.

109. *See Opus*, 582 N.W.2d at 600. "In sum, the Minnesota Canal trilogy stands for the proposition that a condemning authority cannot undertake a public project if the project itself is not permitted by law." *Id.*

110. *See id.* The court recognized:

> [The] proposed project will have the following benefits: a mid-priced retail store, increased parking, increased employment, increased tax base, extension of the skyway system, unification of the multiple-ownership/parcelization of the area, modernization of outdated and incompatible buildings . . . .

Id.

111. *See id.* at 600.

112. The future owner/occupant is Dayton Hudson Corporation. *See id.*

113. *See id.* A corporation contracting with the City must have an affirmative action plan filed in order to make use of TIF development. *See id*; MINNEAPOLIS,

there existed no current violation of the City's ordinance requiring an affirmative action plan, the court would not speculate on the likelihood of a future violation of a city ordinance.[115]

Lastly, Opus suggested that the lack of finality regarding the development agreement between the City and Ryan rendered the project too speculative to justify condemnation.[116] In rejecting that argument, the court pointed to factors differentiating Opus' proposed case law from the facts involved with the development,[117] concluding that there was "no evidence to suggest that the project would not be completed once the cloud of litigation was removed."[118]

The court of appeals next considered Opus' challenge to the use of TIF monies, under Minnesota Statutes section 469.1771, subdivision 1(a), to finance the project.[119] The issue for the court to review de novo[120] was whether the TIF statute mandated the City's 1996 findings and whether those findings were sufficiently

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MINN., CODE OF ORDINANCES §§ 139.50(b),(c),(d) (1997).

114. *See Opus*, 582 N.W.2d at 600.

115. *See id.* A prerequisite to adjudication is the existence of a justiciable controversy and the judicial function does not comprehend the giving of advisory opinions. *See id.* (citing Izaak Walton League of Am. Endowment, Inc. v. State Dep't of Natural Resources, 252 N.W.2d 852, 854 (1977)).

116. *See Opus*, 582 N.W.2d at 600. Opus relied on the Wisconsin case *Schumm v. Milwaukee County*, 45 N.W.2d 673 (Wis. 1951), which held that a private owner was entitled to evidence that the taking was for a definite and certain of attainment public use. *See Schumm*, 45 N.W.2d at 676.

117. *See Opus*, 582 N.W.2d at 601. The differences between the facts of *Schumm* and those actually found in the project were: (1) the city supported and had passed resolutions directing the project to proceed; (2) there was a written contract between the City, Ryan, and the future occupant; (3) funding was in place via tax increment financing and the developer; (4) negotiations for other necessary properties were within the city's control; and (5) the contingencies exiting appeared normal for the stage and type of development, in addition to no contrary evidence being presented by Opus. *See id.*; *see also Schumm*, 45 N.W.2d at 676.

118. *Opus*, 582 N.W.2d at 601.

119. *See id.* at 601-02. The statute provides:

> The owner of taxable property located in the city, town, school district, or county in which the tax increment financing district is located may bring suit for equitable relief or for damages, as provided in subdivisions 3 and 4, arising out of a failure of a municipality or authority to comply with the provisions of sections 469.174 to 469.179, or related provisions of this chapter.

MINN. STAT. § 469.1771, subd. 1(a) (1998).

120. *See Opus*, 582 N.W.2d at 601-02.

detailed.[121] The court of appeals concluded that Opus failed to establish the existence of a statutory violation concerning the use of TIF for the development.[122]

In summary, the Opus court further refined and substantiated prior caselaw by clarifying condemnation and TIF standards through detailed factual analysis. In doing so, the court has given guidance to all parties involved with the intricacies of redevelopment in a metropolitan setting.

Gregory Brooks Davis

121. *See id.* at 602. The findings were:

> (1) "that the proposed tax increment financing district is a redevelopment district," and (2) that the redevelopment, in the opinion of the municipality, would not reasonably be expected to occur solely through private means within the near future and that the increase in market value through the use of tax increment financing funds will exceed the increase in market value for the district if no tax increment financing funds were invested.

Id. at 602 n.4 (citing MINN. STAT. § 469.175, subd. 3 (1996)).

122. *See Opus*, 582 N.W.2d at 602.0