NO. A13-2044

State of Minnesota

In Court of Appeals

Webb Golden Valley, LLC,

Appellant,

v.

State of Minnesota, et al.,

Respondents.

BRIEF, ADDENDUM AND APPENDIX OF APPELLANT WEBB GOLDEN VALLEY, LLC

PARKER ROSEN, L.L.C.
Daniel N. Rosen (#250909
Mark J. Kiperstin (#143108)
888 Colwell Building
123 North Third Street
Minneapolis, MN 55401
Tel: (612) 767-3000
Fax: (612) 767-3001

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
Eric J. Magnuson (#066412)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
Tel: (612) 349-8548
Fax: (612) 339-4181

Attorneys for Appellant Webb Golden Valley, LLC

STINSON LEONARD STREET
James R. Dorsey (#23772)
Marc D. Simpson (#183301)
Ryan M. Sugden (#393436)
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Tel: (612) 335-1504
Fax: (612) 335-1657

Attorneys for Respondent Global One Golden Valley, LLC

OFFICE OF THE ATTORNEY GENERAL
Natasha Karn (#0331144)
445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
Tel: (651) 757-1492
Fax: (651) 282-5801

Attorneys for Respondent Minnesota Department of Transportation, by its Commissioner of Transportation Charles A. Zelle

(Additional Counsel listed on following page)

2014 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

BEST & FLANAGAN L.L.P.
Allen D. Barnard (#4741)
John T. Sullivan (#390975)
225 South Sixth Street, Suite 4000
Minneapolis, MN 55402-4331
Tel: (612) 339-7121
Fax: (612) 339-5897

Attorneys for Respondent Golden Valley Housing and Redevelopment Authority

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STATEMENT OF ISSUES

1. **Did the district court err in ruling that Appellant lacked standing to assert claims under Minn. Stat. § 161.44 regarding the disposition of Tract N and Lot 18?**

   Although neither party briefed or argued standing, the district court dismissed Appellant's claims as to Tract N and Lot 18 for lack of standing on July 22, 2013. (Add. 1-2, 6-8[1]). After briefing from the parties on Appellant's request to file a motion for reconsideration, the district court judge refused to change his conclusion. (Add. 15).

   Apposite Authorities:

   Minn. Stat. § 161.44

   Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health, 257 N.W.2d 343 (Minn. 1977)

2. **Did the district court err in ordering the posting of a $3.2 million surety bond pursuant to Minn. Stat. §§ 469.044 and 469.045?**

   After finding that this lawsuit drew into "question the right, power, or authority" of the HRA to perform a contract, the district court found that the pendency of the action was likely to result in injury to the public and ordered a $3,200,000.00 surety bond. (Add. 21-22, 28-33).

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[1] Cites to "Add." are to Appellant's Addendum; cites to "A." are to Appellant's Appendix; cites to "June 26 Tr." are to the transcript dated June 26, 2013; cites to "Oct. 2 Tr." are to the transcript dated October 2, 2013; and cites to "Oct. 8 Tr." are to the transcript dated October 8, 2013.

Apposite Authorities:

Minn. Stat. § 469.044

U.S. Const. amend. XIV, § 1

Minn. Const. art. I, § 7

STATEMENT OF CASE

This litigation involves three parcels of land owned by the Minnesota Department of Transportation ("MnDOT"). (A. 1, 9). MnDOT acquired the parcels as part of the right-of-way for construction of highway I-394. (A. 1, 9).

MnDOT determined it no longer needs the parcels of land for the highway and plans to convey them through the Golden Valley HRA (the "HRA"), which will serve merely as a conduit, to a private developer, Respondent Global One Golden Valley, LLC ("Global One"). (A. 1, 9). Indeed, the development agreement between Global One and the HRA describes the HRA as "pass-through in this transaction." (A. 28). The transaction will be made without any opportunity for the prior owners of the land, their successors in interest, or any other members of the public to bid on the land as provided for by Minn. Stat. § 161.44. (A. 1, 9).

Appellant Webb Golden Valley, LLC ("Webb") sued MnDOT, seeking to require compliance with Minn. Stat. § 161.44,which requires in circumstances such as these that MnDOT first offer the land for sale to prior owners and the public before entering into a private sale. Webb asked for declaratory and injunctive relief to prevent MnDOT from selling the land to Global One through the HRA conduit without first offering the land for sale to others as required by law. (A. 1). Global One intervened as a defendant and, joined by MnDOT, moved to dismiss the Complaint. (Add. 1–2, 4).

The district court found that Minn. Stat. § 161.44 applied, but dismissed Webb's claims as to two of the parcels, ruling that Webb did not have standing to challenge the disposition of those properties (the "Dismissal Order"). (Add. 1–2, 6–8). The court's ruling was based on standing despite the fact that no party raised standing as an issue and notwithstanding the fact that as a member of the public and neighboring property owner Webb sought only to enforce rights under the statute that directly affected it. (Add. 1–2, 6–8). The court allowed Webb's claims as to the third parcel to proceed.

Subsequently, the HRA appeared specially and moved to require Webb to post a surety bond under Minn. Stat. § 469.045 for the damages the HRA claimed it would incur during the pendency of the litigation. (Add. 21–22). Webb responded that the bonding statute was not applicable, as Webb did not challenge the HRA's authority in any way; Webb's claim was directed solely at the actions of MnDOT. (Add. 28–29). In addition, Webb pointed out that the claimed harm to the HRA—loss of increased tax revenue alone—was exactly what controlling statutory provisions declared could *not* be considered as an independent public purpose under statutory amendments enacted by the Minnesota legislature in the aftermath of *Kelo v. City of New London*, 545 U.S. 469 (2005). (Add. 8–13).

The HRA submitted its motion on affidavits, and the court denied Webb's request to question the affiants. (Add. 32); (Oct. 8 Tr. 49). The district court granted the HRA's motion on October 12, 2013, and

conditioned the continuance of the litigation on Webb's posting of a $3.2 million bond by noon of the first day on which banks would be open after the order was issued (the "Bond Order"). (Add. 21–22, 33).

On October 14, 2013, Webb filed an appeal (A13–1940) from the Dismissal Order and the Bond Order. On October 15, 2013, the district court dismissed Webb's remaining claims with prejudice for failing to post the bond, and on October 16, 2013, entered final judgment. (Add. 34–35, 36). On October 25, 2013, Webb filed this appeal from the final judgment, seeking review of all prior orders and decisions affecting the judgment.

The Court dismissed Webb's first appeal, but denied Respondents' motion to dismiss this appeal. (Order dated Nov. 19, 2013). The Court accelerated briefing and oral argument at the request of Respondents. (Order dated Dec. 17, 2013).

STATEMENT OF FACTS

MnDOT owns approximately 4.6 acres of land in Golden Valley, Minnesota, that it has determined it no longer needs for trunk highway purposes (the "Land"). (A. 1). MnDOT intends to convey the Land to the HRA, which will, via a pass-through conveyance, simultaneously transfer the Land to Global One, a private developer. (A. 1-2, 9-10). Appellant Webb challenged the proposed transfer of the Land by MnDOT as contrary to Minn. Stat. § 161.44. (A. 1, 3). Webb made no challenge to the authority of the HRA to enter into any agreement with Global One.

Webb owns the property immediately west of the Land and a public alley running across Webb's property provides the sole access to the Land. (Oct. 8 Tr. at 7, 44-45). Webb is a successor in interest to the parties who owned a portion of the Land (approximately 0.2 acres, known as the "Alley Parcel"), which MnDOT acquired by threat of eminent domain. (Add. 3-4); (A. 7-8). Evelyn Thomson was the owner of another portion of the Land (approximately 1 acre, known as "Lot 18"), which MnDOT also acquired by threat of eminent domain. (Add. 3); (A. 9-10). The previous owner(s) of the largest portion of the Land (approximately 3.5 acres, known as "Tract N") are persons no longer living or entities no longer in existence. (Add. 3). The court included this diagram of the parcels in its order of October 12, 2013[2]:

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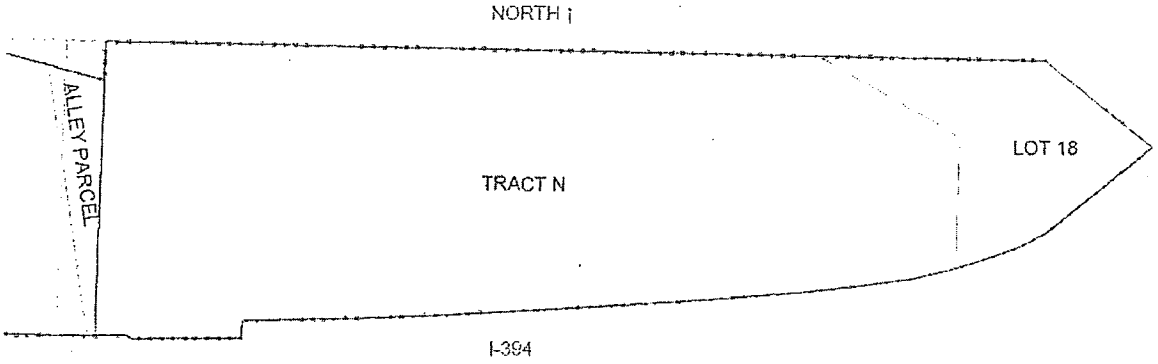
[2] In the diagram below, Webb's property is located between the horizontal lines on the left and continues beyond the area shown in the diagram.



(Add. 24).

Webb sued MnDOT claiming that, pursuant to Minn. Stat. § 161.44, before MnDOT could convey the Land to a third party, it was required to first offer the property for sale to prior owners or their successors in interest, and if they did not purchase the land offered, MnDOT must then put the Land up for public sale to the highest bidder. (A. 1, 4–5). Webb sought a declaratory judgment, permanent and temporary injunctive relief to prohibit MnDOT from selling the Land without complying with the statute. (A. 3–5). MnDOT argued that it intended to convey all of the Land to the City of Golden Valley or the HRA (together referred to herein as "Golden Valley") for "public purposes," under Minn. Stat. § 161.44, subd. 1, and did not have to offer the property to anyone else. (Add. 4).

Global One intervened as a defendant in the action. (Add. 4, 26). As noted, pursuant to the terms of an agreement between Global One and the HRA, the HRA would act solely as "a pass through," receiving the Land from MnDOT and instantaneously conveying it to Global One. (Add. 4, 23); (A. 2, 6, 18). Global One would then privately develop the Land for its own benefit. (Add. 25); (A. 18). Notably, MnDOT had no contract or obligation to convey the Land to the HRA.

MnDOT and Global One moved to dismiss the Webb complaint for failure to state a claim. (Add. 1). They argued that the HRA's actions were statutorily defined under Minn. Stat. Chapter 469 as a "public purpose" and, therefore, the sale to Golden Valley was permitted under Minn. Stat. § 161.44, subd. 1. (Add. 11). The district court, agreeing with Webb, held that because the statute on which the HRA and MnDOT relied to establish their "public purpose" was a statute that authorized the use of eminent domain, the term "public purpose" must be defined in accordance with Minn. Stat. § 117.025.[3] (Add. 11).

The district court nonetheless dismissed Webb's claims relating to Tract N and Lot 18. (Add. 1). Although neither MnDOT nor Global One briefed or argued standing as a basis for their motion, the district court

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[3] Minn. Stat. § 117.025, subd. 11 states:

(a) "Public use" or "public purpose" means, exclusively:

(1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies;

(2) the creation or functioning of a public service corporation; or

(3) mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.

(b) The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.

Minn. Stat. § 117.025, subd. 11.

based its decision on that issue, and that issue alone. (Add. 6–8). It concluded that Webb lacked standing to bring the suit because Webb had no legal interest or right in Tract N or Lot 18. (Add. 8). The district court reasoned that Webb and its predecessors in ownership never owned any portion of Tract N or Lot 18; therefore, the court explained, the injury Webb would suffer due to Webb's lost opportunity to purchase the parcels was "hypothetical." (Add. 8). Accordingly, the court held that Webb did not have an interest implicated by Minn. Stat. § 161.44 and its claims did not present a justiciable controversy. (Add. 8).

The district court effectively ruled that no citizen without a prior ownership interest in the land possesses standing to enforce the statutory requirement of putting public land up for public sale. In light of dismissal on grounds that were not briefed or argued Webb filed a letter seeking permission to move for reconsideration. (Add. 15). After directing the parties to submit briefing on the issue, the court denied Webb's request for reconsideration. (Add. 15–20).

The same week the court filed its order, Thomson, the surviving seller of Lot 18, commenced an action against MnDOT, seeking to compel MnDOT to (1) first offer Lot 18 to her and (2) offer Tract N for public sale to the highest bidder. (A. 9, 11–13). The district court consolidated the Thomson's case with Webb's case on its remaining claims over the Alley Parcel. (Add. 26).

MnDOT and Global One again moved to dismiss Webb's remaining claims over the Alley Parcel, and to dismiss the Thomson complaint.

(Add. 26, 30). They asserted that, like Webb, Thompson lacked standing to challenge the conveyance of Tract N because she had no legally cognizable interest in the parcel as a prior owner or successor to a prior owner. (Oct. 2 Tr. at 11). Regarding Thomson's Lot 18 claims, Global One argued that the land would be used for a "public purpose" because it would be conveyed to Golden Valley for "public right-of-way," rather than as a part of the Global development.[4] (Oct. 2 Tr. at 11–15). The district court announced from the bench that the same standing reasoning it asserted to dismiss Webb's claims would apply to dismiss Thomson's claims for public sale of Tract N, but did not issue a formal order on the motion. (Add. 30); (Oct. 2 Tr. 19–20).

Shortly before the district court issued its oral order, the HRA specially appeared in the case to seek a surety bond pursuant to Minn. Stat. § 469.045. (Add. 23). The HRA asked the court to require that Webb and Thomson post a multi-million dollar bond, and if the bond was not filed, that the Webb and Thomson claims be dismissed on grounds that

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[4] Global One advanced this argument despite the fact that Lot 18 is not connected to any other part of the public right-of-way system. (Oct. 2 Tr. 26–27). After this dispute arose, the HRA passed self-serving resolutions changing some of the proposed use of the property. (Oct. 2 Tr. 10–12, 26–27). Copies of those resolutions were attached to affidavits and submitted to the district court as "public records" in support of the motion for judgment on the pleadings. (Oct. 2 Tr. 9, 10–12, 18). Webb claimed a right to a trial on whether the proposed changes in the use of the property were genuine. (Oct. 2 Tr. 13, 29–30, 31–33). The district court refused those arguments, instead relying on the face of the HRA's resolutions, notwithstanding the fact that the plans for the development were inconsistent with those resolutions.

they "draw into question" the HRA's "right, power and authority" to make or perform on a contract. (Add. 26, 28). The motion was submitted on affidavits; the district court denied Webb's request to make inquiry of the affiants. (Add. 32); (Oct. 2 Tr. 9–10, 13–15).

In response to the HRA's request for a surety bond, Webb and Thomson asserted several defenses: (1) an order for a bond would be inappropriate because their claims did not fall within the circumstances implicated by Minn. Stat. § 469.044; (2) the HRA had not met its burden of proof of prospective damage in any amount, much less the multi-million dollar amount sought; and (3) the bond motion violated their constitutional rights, including due process. (Add. 30, 32, 33).

The district court granted the HRA's motion on the Saturday following the hearing and ordered Webb and Thomson to post a $3.2 million bond by noon of the first day on which banks would be open after the order was issued. (Add. 22, 33). The district court dismissed Webb's and Thomson's claims with prejudice for failing to post the bond on October 15, 2013 and entered final judgment the following day. (Add. 36–37). This appeal followed.

ARGUMENT

The district court agreed that Webb's complaint stated a legal claim that MnDOT had not complied with Minn. Stat. § 161.44. Despite that conclusion, the court dismissed Webb's suit as to two of the three parcels of land at issue, concluding that Webb did not have standing to pursue that properly stated claim. And as to the third parcel, the court ordered Webb to post a multi-million dollar bond as a condition of continuing to pursue its claim.

The district court correctly construed the scope of Minn. Stat. § 161.44, but erred in determining that Webb had no standing to enforce the statute. The court also erred in requiring a bond.

I. Standard of Review

A district court's conclusions of law are reviewed *de novo. In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008); *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003) ("No deference is given to a lower court on questions of law.").

This appeal challenges three legal determinations made by the district court. First, the district court ruled as a matter of law that Webb lacked standing as to two of the three parcels of the Land and dismissed Webb's claims under Minn. R. Civ. P. 12. Second, the court ruled that the HRA was entitled to an order requiring a bond as a condition of the further prosecution of the remaining claim. Third, the court refused

Webb's request for an evidentiary hearing into both the need for and amount of the bond.

Whether a complaint states a legal claim, and whether a party has standing to pursue that claim are questions of law, subject to *de novo* review. *In re Estate of Barg*, 752 N.W.2d at 63; *Schiff v. Griffin*, 639 N.W.2d 56, 59 (Minn. Ct. App. 2002). While factual decisions of the trial court as to the necessity for and amount of a statutory bond are reviewed for abuse of discretion, where the legal question of the applicability of the statute is at issue, the district court's decision on the law is also subject to *de novo* review. *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2007); *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 5 (Minn. 2008). Finally, whether a party has a right to an evidentiary hearing under the statute at issue is also a question of law, subject to *de novo* review. *Swenson v. Nickaboine*, 793 N.W.2d 738, 741 (Minn. 2011).

II. Webb Has Standing to Compel MnDOT's Compliance with Minn. Stat. § 161.44.

A. Public Purpose

Webb argued to the district court that MnDOT may not convey the Land to the HRA as a "pass through" to Global One because Minn. Stat. § 161.44 only allows MnDOT to convey to a government agency where there is a "public purpose" and Global One's private development is not a public purpose. (June 26 Tr. 31–32). Webb asserted that where the public purpose requirement is not satisfied and no prior owner of the

land remains, MnDOT must offer the land at public sale. (June 26 Tr. 31–32).

Respondents did not dispute the statutory "public purpose" requirement; their argument went solely to the definition of what constitutes a public purpose. Global One and MnDOT claimed that Chapter 469 of the Minnesota Statutes (the chapter that creates and empowers HRAs) provided the relevant definition.[5] Webb argued that the definition provided in Minn. Stat. § 117.025 applied, and because the proposed conveyance to the HRA did not satisfy the public purpose definition contained in § 117.025, the conveyance was prohibited.

The district court agreed that the public purpose definition of § 117.025 applied because the HRA relied on Minn. Stat. § 469.012—which authorizes the HRA's use of eminent domain—for the authority to acquire the land. Section 117.025 classifies a limited number of things as "public purposes," essentially limiting it to ownership of the land by a public agency and the use of the land for the general public.

The Respondents have not challenged that portion of the district court's ruling by a notice of related appeal, and the district court's ruling is thus the law of the case for this appeal.

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[5] Specifically, the Respondents assert that Minn. Stat. § 469.012 authorizes the HRA to acquire the Land and § 469.001 provides that such acquisition is a "public purpose." The very same sentence that authorizes the HRA to purchase property also authorizes the HRA to take property by eminent domain. Accordingly, the statute "authorizes the use of eminent domain," triggering the "public purpose" definition of § 117.025.

B. Standing

1. The Statute

Although agreeing with Webb's argument on the construction of the statute, the district court dismissed Webb's claims with regard to the majority of the property—Tract N (approximately 80% of the Land) and Lot 18 (approximately 19% of the land)—based only on its conclusion that Webb lacked standing to invoke the statute. To understand Webb's basis for standing, it is necessary to examine the priorities found in Minn. Stat. § 161.44 for disposition of land MnDOT determines it no longer needs.

Section 161.44 contains six relevant subdivisions. Subdivision 1 permits, but does not require, MnDOT to convey the excess land to a "political subdivision" for a public purpose. Minn. Stat. § 161.44, subd. 1. There is no dispute that if there is a "public purpose" for the conveyance, MnDOT may elect to convey to a political subdivision regardless of the provisions of subdivisions 2 through 6. If, however, there is no public purpose or if, in its discretion, MnDOT elects not to convey to a political subdivision for such a public purpose, MnDOT must follow subdivisions 2 through 6, which dictate an order of priority.

Subdivision 2 applies where the owner of property acquired by eminent domain (or threat thereof) is still alive or, in the case of a business entity, still in existence. *Id.* § 161.44, subd. 2. In those circumstances, the land is first offered to that previous owner. *Id.* Subdivision 3 applies where the state has acquired a partial tract and the original owner is no longer alive or in existence, but the remainder of the

tract is owned by a new person or entity. *Id.* § 161.44, subd. 3. In such a case, the land must first be offered to that successor in interest. *Id.* (There is no dispute that Webb is a successor in interest with regard to the Alley Parcel.) Subdivision 4 applies to subdivided tracts, a circumstance that does not apply to this case. Subdivision 5, which applies where there is no conveyance by any of the previous subdivisions, provides that MnDOT must then sell the excess land by public sale. Subdivision 6 simply permits MnDOT to use an auction as the form of public sale.

Here, no dispute exists that (1) there is no surviving owner of Tract N; (2) Thomson is the surviving owner for Lot 18; and (3) Webb is a successor in interest to the Alley Parcel under subdivision 3. Because there was no public purpose for conveyance under subdivision 1, and no surviving owner or successor in interest of Tract N for conveyance by subdivisions 2 or 3, Webb's action sought to compel MnDOT's compliance with § 161.44 if it was going to convey Tract N.[6] The district court agreed that Webb's complaint stated a valid claim under the statute.

2. The District Court's *Sua Sponte* Decision on Standing

Despite recognizing the validity of Webb's legal claim, and although § 161.44 contains no requirement that a bidder at a public sale be a former owner or successor in interest, the district court nonetheless

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[6] Webb's action also asserted Webb's own priority as a successor in interest to the Alley Parcel. Thomson's action sought the same with respect to Lot 18.

ruled that because Webb was not a prior owner or a successor in interest to Tract N, Webb had no standing to compel MnDOT to follow §161.44. As noted above, the standing issue was not briefed or argued by the parties before the district court dismissed Webb's claims on standing grounds. After the order for dismissal, Webb sought permission to move for reconsideration in light of the fact that the central grounds for dismissal had not been briefed or argued. The district court requested letters on the issue within three days and then denied the request for a motion for reconsideration the following day. (Add. 19).

3. The District Court Erred in Concluding that Webb Had No Standing.

For a party to have standing to assert a claim based on violation of a statute, it must show injury in fact and an interest arguably among those sought to be protected by the statute in question. *Dufresne v. Am. Nat'l Bank*, 374 N.W.2d 763, 767 (Minn. Ct. App. 1985); *Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health*, 257 N.W.2d 343, 346 (Minn. 1977). Webb satisfies this standard.

In *Twin Ports Convalescent*, an ambulance operator sued the state board of health, alleging that the agency failed to follow the statutory requirement for a public hearing before granting a license to a competing operator. 257 N.W.2d at 344–45. The supreme court held that Twin Ports had standing to bring the claim, finding both injury in fact—lower profits due to the competition—and that operating a profitable business was

"arguably" within those interests sought to be protected by the statute. *Id.* at 346.

Like the plaintiff in *Twin Ports Convalescent* who claimed that a statutory provision enacted for the benefit of the public should be followed , Webb seeks to require MnDOT to comply with the requirements of Minn. Stat. § 161.44 so that public land will be disposed of in accordance with the statutory framework. Webb can show the requisite injury in fact. As an eligible member of the public, Webb will be precluded from bidding at a public sale, a right expressly conferred by the statute. This is prima facie injury.

Also, as in *Twin Ports Convalescent*, issues of business competition arise. In *Twin Ports*, the plaintiff had standing to seek to prevent licensing of a competing ambulance operator; here, Webb seeks to prevent sale of land to a competing, adjoining landowner. While real estate development and ambulance operations are different businesses, both are competitive. (Global One affirmed the heavily competitive nature of real estate development in the area when it submitted its affidavit that asserted that the Global One development is in competition with other nearby developments.)

Webb also suffers injury in fact by the proposed sale because the Land that the Global One Tract N development requires for its access is the very Alley Parcel over which Webb has a successor-in-interest right under Section 161.44, subd. 3. The Tract N development also relies for access upon the small alley that runs right through the Webb property.

No party disputes that the owner of Tract N would likely assemble that parcel with contiguous property. Indeed, that is precisely what Global One proposes to do with a parcel it owns to the north of Tract N. Just as Global One is the owner of neighboring property with an interest in acquiring the MnDOT land, so is Webb. In fact, Webb and Global One are the two most likely parties to have an interest in acquiring the MnDOT land. Moreover, Webb's particular interest in acquiring Tract N is established in the HRA's own development plan for the area. That development plan calls specifically for Tract N to be "incorporated" with the Webb property. (A. 77).

Contrary to the district court's reasoning, the fact that Webb does not have a legal interest in the real estate does not bar Webb from asserting a claim under § 161.44. *See Bensman v. U.S. Forest Serv.*, 408 F.3d 945 (7th Cir. 2005). In *Bensman*, the plaintiff had no real property interest in the subject land, but sought declaratory and injunctive relief requiring the U.S. Forest Service to consider his appeal regarding actions taken by the Forest Service affecting Bensman's use and enjoyment of national forests. *Id.* at 950–51. The court found that Bensman's regular visits to the forest expressed a "concrete" interest in the land, and demonstrated both "sufficient interest" in the forest and "sufficient possibility" of injury to have standing to challenge the Service's decision. *Id.* at 963. Webb's interest here is even more concrete. It owns the property that adjoins the proposed development, and Minn. Stat. § 161.44 affords Webb the right to purchase the land at a public sale.

The district court's ruling effectively means that no person has standing to require MnDOT to follow the requirements of § 161.44 as they relate to offering land for public purchase. The standing requirement exists to ensure that the issue before the court is properly and competently presented. *Twin Ports Convalescent*, 257 N.W.2d at 346 (citing *Minn. State Bd. of Health v. City of Brainerd*, 241 N.W.2d 624, 628 (Minn. 1976)). There can be no dispute that the issues here have been properly and competently presented.

III. Webb's Claims Call into Question Only the Authority of MnDOT; The Claims Do Not Challenge the "Right, Power, or Authority" of the HRA, and the Bonding Statute Does Not Apply.

A. No HRA Right Is Challenged by the Webb Action.

The district court's bond order was based upon its legal conclusion that a "right, power, or authority" of the HRA was challenged by the Webb action. The district court's fundamental error was in mistaking the HRA's *eligibility* to receive title to the property under § 161.44 for a *right* to receive title under § 161.44.

Under § 161.44, subd. 1, the HRA is eligible to receive property that MnDOT elects, in its discretion, to convey. Other political subdivisions are equally eligible under that provision; Hennepin County, the police department, or a school district are all eligible to receive property MnDOT conveys. If, for example, MnDOT chose to change its current plan and to convey the property to the local school district for construction of a school, the HRA would be prevented from fulfilling its

desire to acquire the land, but it would not have a *right* that is thwarted. Likewise, if MnDOT is compelled to sell by public auction, the HRA is an eligible bidder under § 161.44, subd. 5 or 6, and may acquire the land in that manner. It is not, however, by the operation of the statute, denied any right. Nor is its power impaired.

Indeed, if Webb prevails in this action, the HRA continues to be an eligible buyer. The only difference is whether others will be eligible to join in the bidding. In short, the HRA's right of eligibility is unaffected by this action.

The district court asserted that "the statute" (without identifying which statute) confers upon the HRA a "right" to receive the property and that the Webb action calls that right of receipt into question. (Add. 29). The district court based this decision on the conclusion that the Webb action, "[u]nder the logic of cause and effect," challenges the HRA's right, power and authority to perform under its development agreement with Global One. (Add. 29). While it is true that the effect of the success of the Webb action would be to allow other parties to join the HRA in the bidding for the property, the HRA would continue to have the right to try to purchase the property – which is all its development agreement requires it to do. (A. 35). Right now, the HRA has the desire to purchase the Land and the apparent desire of MnDOT is to sell it. Neither desire

gives the HRA a right or a power or an authority beyond its right of eligibility.[7]

This is not merely a matter of semantics. Nothing in § 161.44 gives the HRA the "right, power, or authority" to acquire the property, and a lawsuit challenging the statute *as it applies to MnDOT* does not change that fact.

B. The HRA Did Not Show an Injury to the Public.

The district court's finding that the public would be injured by the Webb action was without support in fact or law.

1. Nothing in the Record Supports a Finding of Injury.

The sole evidence submitted to the district court to support the bond motion were affidavits of the HRA director and of Mark Globus ("Globus"), a principal of Global One. The district court found that:

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[7] Both MnDOT and Global One, when they believed it suited them (months before a bond was requested) vigorously argued that Minn. Stat. § 161.44 confers no rights at all on a prospective property recipient because *any* sale under the statute is at MnDOT's sole discretion. *See* Global One Golden Valley, LLC's Memorandum in Support of Motion to Dismiss dated May 21, 2013, at 18–19; Global One Golden Valley, LLC's Reply Memorandum in Support of Motion to Dismiss dated June 13, 2013, at 13–14; MnDOT's Memorandum of Law in Support of Defendant's Motion to Dismiss dated September 9, 2013, at 7. Their later argument that the HRA has a right under Minn. Stat. § 161.44 that is challenged here is a complete reversal. Webb, on the other hand, has been consistent and has always agreed that MnDOT has complete discretion to choose whether to invoke § 161.44. (But if MnDOT does invoke §161.44, it must follow the priority order contained in § 161.44.)

> According to the Golden Valley HRA, '[i]f the lawsuit is not resolved by October 15, 2013, then the project will abruptly unravel.' . . . Equity investors warned Global One 'in no uncertain terms' that 'they are going to pull out of the project' if ground is not broken by the end of October, 2013. Without the investors, Global One's development 'will crumble under its own weight.'

(Add. 30–31).

Nothing in the record supports that conclusion. First, although attributed to the HRA, the foregoing quotations are not of statements made by the HRA. Rather, they are the self-serving statements from the private developer, Globus, that were made without a shred of supporting testimony or documentation. There was no actual evidence of an October 15 deadline; no testimony from any "equity investor" about "pulling out of the project" if ground is not broken by the end of October; and no documentary or testamentary support offered at all for the Globus's bald assertion that the project will crumble if not commenced by the end of October.

This hyperbole has long since been proven to be just that—an overstatement of the impact of this litigation on the future of Gobal One's development. The HRA's argument that its development plan will be thwarted by this litigation has likewise not proven to be true.

Had further inquiry been allowed, as Webb requested, the strength of those assertions could have been tested. We now know, from the affidavit of the very same Mark Globus submitted to this Court in support of the Respondents' motion to expedite these appeal

proceedings, that in fact October 31 was not a deadline for the development. (A. 122-24). As for the supposed October 15 deadline for HRA approval, the HRA director said nothing about such a deadline in his affidavit. (A. 95-98). It is not surprising that he said nothing about such a supposed deadline: the notion that the HRA would impose a deadline fatal to its own project is difficult to believe.

Moreover, to the extent evidence was presented, it showed that even if the project were canceled completely, there would be no harm to the public. Globus stated in his affidavit that the consequence of delay is not that the public will lose out on apartments being developed; to the contrary, he wrote, the market is being "flooded" and "over-saturated" with housing. (A. 90-91). Globus's complaint was that if his development was delayed, all of the housing needs in the area would be met by others and not by Global One. There was no evidence presented to the district court, however, to support the notion that Global One is uniquely capable of meeting the market housing needs or that the other housing flooding the market was inadequate.

The court arguably had evidence that Global One would be harmed, but no evidence that the public would be harmed. Minn. Stat. § 469.044 does not permit a bond to cover damage to Global One.

2. No Case Law Supports a Finding of Injury.

The district court cited no case law for its finding that the Webb action would cause an injury to the public by effectively preventing the

Global One project from proceeding, and the case-law does not support a finding of injury. In *Anderly v. City of Minneapolis*, 552 N.W.2d 236 (Minn. 1996), the plaintiff specifically sought to invalidate a contract the Minneapolis Community Development Agency (MCDA) entered for the re-development of property it owned (and had owned for a generation), the physical condition of which was an imminent hazard to the public. *Id.* at 238, 241–42. Moreover, the court found that because of the condition of the property, any delay would render the property "incapable of renovation." *Id.* at 238, 242.

Here, there is no public hazard. The HRA does not own any part of the subject land, and the HRA does not even have an agreement to acquire the land. (As noted above, both MnDOT and Global One argued that MnDOT has no obligations at all under Minn. Stat. § 161.44 to convey to anyone.) In *Anderly*, the governing city had already passed its approvals for the particular project; here the governing city has not. *Anderly*, 552 N.W.2d at 238; (A. 88, 123). In *Anderly*, the MCDA would have actually suffered a loss of $500,000 that the buyer contracted to pay the MCDA for its property. *Anderly*, 552 N.W.2d at 238, 242. Here, the HRA does not stand to receive any money, as the HRA is merely a "pass-through" for a transaction where Global pays the HRA precisely what the HRA pays MnDOT. (Importantly, the bond amount in *Anderly* was set at precisely the amount of the $500,000 purchase price that would have been lost.)

In short, the only impact of this litigation might be to delay the Global One development. That fact is not sufficient to show harm to the public, which is the lynchpin of requiring a bond.

C. Amount of the Bond.

Just as the district court lacked support for its finding of injury to the public, the district court also lacked support for the amount of the bond it set.

> The Golden Valley HRA presented affidavit testimony stating that Global One's project will generate an additional $1.6 million annually in real estate taxes for the city. It is reasonable to believe that this litigation 'might' be 'injurious to the public interest' by costing the public two years of real estate taxes before another development project could be formulated for the parcels of land.

(Add. 33).

The "affidavit testimony" to which the court refers is a single sentence in a single affidavit: "The city estimates that the Global One project would generate additional real estate taxes in the estimated amount of $1.6 million per year." (A. 97). Had inquiry of the affiant been allowed, that statement could have been tested. For example, we know from the Globus affidavit that there is a limit to how many apartments in the same area can be financed in the financial markets and that if he did not break ground, his project would have been displaced by others in the market. (A. 90–91). The import of Globus' testimony is that there is a limit to how many tax-paying apartment projects the market will support.

Logic dictates that if other projects would displace Global One's project, then Global One's project proceeding first will displace another project, resulting in the "injury to the public" of the "loss" of the *other* property's taxes, which in the end means no net loss to the city. Despite this inescapable logic, the district court made no such inquiry or analysis and, instead, rushed to compel a near-instantaneous $3.2 million bond.

Finally, in a case where the purpose of the bond is to allow a conveyance for a public purpose to go forward, it is clear error for the district court to order a bond based upon the one thing that Minnesota Statutes explicitly call out as *not* constituting a public purpose. "The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not, by themselves, constitute a public use or public purpose." Minn. Stat. § 117.025, subd. 11(b). Here, district court found

> Based on the evidence before this court, the public is more likely to be injured from a loss of tax revenue from the parcels as a result of the pending actions then if the suits had not been initiated. Thus, the loss or damage contemplated in Minn. Stat. § 469.044 'might' ensue.

(Add. 31). Using the claimed lost tax revenues as the sole measure of damages for determining the amount of the bond was erroneous.[8]

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[8] It is more than ironic that while both Webb and the HRA are in the same position with respect to the MnDOT land—that is, they each want to acquire the land but neither has the right to do so—the district court found that Webb lacked standing to assert a claim under § 161.44 but the HRA had standing to request a $3.2 million bond.

IV. The District Court Improperly Denied Webb's Request for an Evidentiary Hearing Regarding the Need for and Amount of the Bond.

The district court's order on the bond deprived Webb of the opportunity to be heard in a meaningful manner. The HRA submitted its bond request solely on affidavits. Webb sought permission to make inquiry of the affiants and/or have an evidentiary hearing on the propriety of a bond and the amount. The district court denied both requests.

Procedural protections exist for situations precisely as presented here. Webb's right to assert a claim under § 161.44 became wholly dependent on whether the district court required a bond. Instead of fashioning a process whereby Webb would have the opportunity to make a meaningful inquiry, the district court dismissed Webb's due process concerns in a footnote. (Add. 32).

The right to due process is guaranteed by the United States and Minnesota Constitutions. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Kleven v. Comm'r of Pub. Safety*, 399 N.W.2d 153, 157 (Minn. Ct. App. 1987) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Moreover, due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The district court relied on *The Kilowatt Organization (TKO), Inc. v. Department of Energy, Planning, and Development*, 336 N.W.2d 529, 533

(Minn. 1983), for the proposition that a high monetary surety bond does not in and of itself deprive a party of due process. (Add. 32). That case, however, says nothing about the due process to which a party is entitled before the court orders a multi-million dollar bond. Here, Webb asserts that its due process rights were violated because it never had an opportunity inquire regarding the propriety of the bond *before the bond was ordered.*

Had Webb been afforded an evidentiary hearing, it would have established that the fundamental reason the district court cited for the necessity of an immediate bond—that that if the lawsuit was not resolved by October 15, 2013, the project would "abruptly unravel"—was a falsehood perpetuated by Global One. As noted above, in his affidavit in support of the bond motion, Globus baldy asserted that that project would fail if ground was not broken by October 15, 2013. (A. 91). Webb would have shown that Mr. Globus made statements contradicting this artificial deadline, proclaiming the project can proceed even if it takes months more. Webb would have also shown that the naked assertion made by HRA Director Tom Burt that the Webb lawsuit was "injurious to the public," was wholly conclusory and without any factual basis. Finally, Webb would have shown that the lawsuit did not draw into question the right, power or authority of the HRA to act and/or make a contract, the threshold factor to trigger the bond statute. By depriving Webb of an evidentiary hearing, Webb was denied the opportunity to challenge whether a bond was appropriate in this case.

CONCLUSION

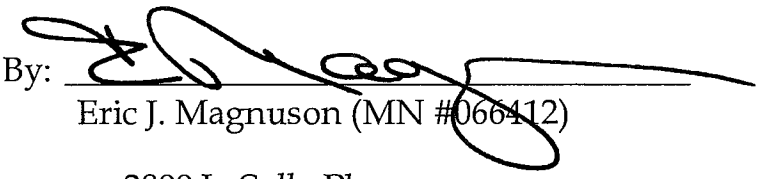
Webb brought this action challenging only the authority of MnDOT to transfer the subject property without first offering it for sale to the prior owners or the public. The district court recognized that the statutory requirements for sale applied in this case, but ruled as a matter of law that Webb did not have standing to invoke the statute as to two of the three parcels in dispute. That decision was clearly wrong. As an adjoining landowner and member of the public for whose benefit the statute was enacted, Webb clearly had standing to demand that MnDOT comply with the statutory mandate.

The district court also erred when it required Webb to post a multi-million dollar bond as a condition of continuing its claim as to the remaining parcel. Webb's lawsuit was directed only at the authority of MnDOT, and did not challenge in any way the right, power or authority of the HRA to act once it acquired the disputed land. The district court's decision inappropriately expanded the scope of bonding statute.

Finally, the district court inappropriately denied Webb the opportunity to litigate the factual issues surrounding the amount of the bond. Despite the fact that the legislature has specifically declared that increased tax base is not, standing alone, a public purpose, the district court used claimed lost tax revenues as the sole measure of damages for determining the amount of the bond. This too was error.

The judgment of the district court should be reversed, and the case should be remanded to the district court for further proceedings.

January 10, 2014 **Robins, Kaplan, Miller & Ciresi L.L.P.**



By: _____
Eric J. Magnuson (MN #066412)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015

T: 612-349-8500
F: 612-339-4181

Attorneys for Appellant Webb Golden Valley, LLC

Certificate of Compliance

The undersigned counsel for Appellant certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13-point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains 7,513 Word Count words, including headings, footnotes, and quotations.

January 10, 2014

Robins, Kaplan, Miller & Ciresi L.L.P.

By: _____
Eric J. Magnuson (MN #066412)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015

T: 612-349-8500
F: 612-339-4181

Attorneys for Appellant Webb Golden Valley, LLC

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