THE *WALSER* DECISIONS AND CONSTITUTIONAL CONDEMNATION CONUNDRUMS

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I. INTRODUCTION

On April 18, 2002, and May 23, 2002, the Minnesota Supreme Court disappointed all practitioners in the field of land use and eminent domain with its 3-3 split decisions in *Housing and Redevelopment Authority ex rel. City of Richfield v. Walser Auto Sales, Inc.*[1] and *Walser Auto Sales, Inc. v. City of Richfield*,[2] respectively. The *Walser* decisions have created greater confusion and uncertainty with respect to standards and precedents for governments, property owners, and developers. This article reviews the *Walser* decisions and some of the uncertainties and problems arising from them.

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1. 641 N.W.2d 885 (Minn. 2002) (Lancaster, J., took no part in the consideration or decision of this case).

2. 644 N.W.2d 425 (Minn. 2002) (Lancaster, J., took no part in the consideration or decision of this case).

II. BACKGROUND AND PROCEDURAL HISTORY

There are three lawsuits involving Walser Auto Sales, Inc. ("Walser"), the City of Richfield ("the City"), and Richfield's Housing and Redevelopment Authority ("the HRA").[3] All deal with the City of Richfield's condemnation of Walser's property located along Interstate Highway 494. This article focuses on two of the three lawsuits.

A. Walser I

Housing and Redevelopment Authority ex rel. City of Richfield v. Walser Auto Sales, Inc.,[4] (*Walser I*) involves the HRA's condemnation of Walser's property as well as other adjacent private property for the construction of Best Buy Co., Inc.'s (Best Buy) corporate headquarters.[5] Walser argued that taking its private property for another private party to develop does not meet the constitutional public purpose requirement.[6] Walser also argued that the City's motion to dismiss Walser's public purpose challenge as moot should be denied.[7] The Hennepin County District Court held that the constitutional public purpose requirement was met.[8] The Minnesota Court of Appeals deferred to the district court's findings of fact supporting a legal conclusion that public purpose had been met.[9] The court of appeals also held that the issue of public purpose was not mooted by the quick take[10] condemnation

3. The HRA was the condemning authority and also the financing arm of the redevelopment project. This article frequently uses the terms "the City" and "the HRA" interchangeably. However, the author does attempt to ensure that he has referenced the correct entity involved in the referenced subject matter.

4. 630 N.W.2d 662 (Minn. Ct. App. 2001), *aff'd* 641 N.W.2d 885 (Minn. 2002) (affirming mootness issue and 3-3 split decision on remaining issues).

5. *Walser I*, 641 N.W.2d at 887 (Minn. 1987).

6. *Id.*

7. *Walser I*, 630 N.W.2d at 668 (Minn. Ct. App. 2001).

8. *Id.* at 668-69.

9. *Id.* at 665.

10. *See* MINN. STAT. § 117.042. Under a quick take, the condemning authority obtains leave from the district court to obtain title to the property immediately upon the condemning authority depositing with the district court the condemning authority's appraised value of the property to be condemned. The purpose is to obtain title to the property within a given time period so that the condemning authority can proceed with its project. Otherwise, the condemning authority does not know when to send out a project to bid, when to begin construction, or when to budget for a project. Sometimes grant monies or matching funds are available for a short or definite period of time and a quick take ensures that those monies can be used for a project. If a quick take is not used to acquire the necessary

resulting in the immediate transfer of title to the City.[11] The Minnesota Supreme Court affirmed with regards to the mootness issue.[12] But the court was equally divided as to the issues dealing with public purpose, and therefore the decision of the court of appeals stands.[13] Walser's Petition for Writ of Certiorari with the United States Supreme Court was denied on October 21, 2002.[14]

B. Walser II

In *Walser Auto Sales, Inc. v. City of Richfield*,[15] (hereinafter "*Walser II*") Walser challenged the City's use of tax-increment financing to fund the redevelopment project of the new Best Buy headquarters.[16] The district court dismissed Walser's complaint in full and awarded the City of Richfield and the HRA attorneys' fees and costs as the prevailing parties.[17] The Minnesota Court of Appeals reversed and remanded to the district court for a determination of reasonable attorneys' fees to Walser as the prevailing party.[18] The Minnesota Supreme Court accepted review, but on May 23, 2002, added to the disappointment of the *Walser I* decision, by affirming the lower court's decision without opinion.[19] The court's lack of opinion left many issues undecided.

The Minnesota Court of Appeals addressed four issues in *Walser II*.[20] This article focuses on the court of appeals' decision on

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property, the project may not occur until after grant or matching funds are no longer available.

11. *Walser I*, 630 N.W.2d at 671 (Minn. Ct. App. 2001).

12. *Walser I*, 641 N.W.2d at 891 (Minn. 2002).

13. *Id.*

14. Walser v. Housing & Redev. Authority, ___ S.Ct. ___ (Mem) (No. 02-278), 2002 WL 1969300 (Oct. 21, 2002).

15. 635 N.W.2d 391 (Minn. Ct. App. 2001), *aff'd* 644 N.W.2d 425 (Minn. 2002) (3-3 split decision).

16. 635 N.W.2d at 393.

17. *Id.* at 392-93 (citing Minnesota Statutes section 469.1771, subdivision 1(a)).

18. *Id.* at 404.

19. *Walser II*, 644 N.W.2d 425 (Minn. 2002).

20. 635 N.W.2d at 399 (Minn. Ct. App. 2001). The first issue was whether a citizen-taxpayer has standing to challenge the inclusion of property within a tax-increment-financing (TIF) district formed before May 15, 2000. The trial court held that a citizen does not have standing and the court of appeals affirmed the decision. *Id.* at 396-98.

The second issue was whether a citizen-taxpayer has standing to challenge the retention of property within a tax-increment-financing district. Although the trial court held no, the court of appeals held that Minnesota Statutes section 469.1771, subdivision 2 (2000), provides for a taxpayer lawsuit if the city "includes

the public purpose standards for public expenditures and does not address the other issues contained in the courts' decisions.

C. Walser III

In *Walser Auto Sales, Inc. v. Best Buy Co., Inc.*,[21] (*Walser III*) Walser challenged the Minnesota Pollution Control Agency's (MPCA) issuance of an indirect source permit (ISP). Construction plans included 2,000 parking spaces, therefore Best Buy was required to obtain an ISP to "insure that carbon monoxide concentrations [would] not exceed state air quality limits."[22] The Minnesota Court of Appeals affirmed the MPCA's issuance of the ISP.[23] Walser did not appeal.[24]

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or retains a parcel of property in a tax increment financing district that does not qualify for inclusion or retention within the district." *Id.* at 396, 398-99. The City argued that the amendment to section 469.1771, subdivision 2, upon which Walser based its standing to sue, was prospective and should not be applied retroactively so as to confer upon Walser standing to sue for actions that took place prior to the effective date of section 469.1771, subdivision 2, as amended. *Id.* at 399. The court of appeals disagreed, saying that "[a]s the retention of the property continued past the effective date of the 2000 amendment, prospective application grants Walser a right to sue for improper retention of property." *Id.*

The third issue was whether "the district court's conclusion that a particular expenditure was for a 'public purpose' [was] sufficient to satisfy the requirement that all public expenditures be primarily for a public purpose." *Id.* at 396. The Minnesota Court of Appeals held that public monies can only be used if the monies primarily serve a public purpose. *Id.* at 400. The case was remanded to the district court for findings as to whether the TIF monies were serving a primarily public purpose. *Id.*

The fourth issue was whether the redevelopment TIF district was properly established. *Id.* at 396. While the trial court held yes, the court of appeals reversed, holding that the creation of the TIF district was not lawful because "[t]he record shows that several aspects of the TIF-district creation were fundamentally flawed." *Id.* at 400.

The court of appeals was repeatedly critical of the City's work in the establishment of the TIF district:

> Tax-increment financing is a power granted to municipalities by the legislature to be exercised only within the constraints of the legislative fiat. Exhibiting a particular municipal meanness, respondents completely ignored the statutory prerequisites for the exercise of this financing tool. The provisions of Minn. Stat. § 469.1771 (2000) are intended to provide a means to ensure that such a blatant disregard for limits on municipal authority will be answerable.

Id. at 404.

21. No. C6-01-888, 2002 WL 172025 (Minn. Ct. App. Feb. 5, 2002).
22. *Id.* at *1.
23. *Id.* at *3.
24. Telephone Interview with Clerk, Minnesota Court of Appeals (Aug. 1,

III. TAKINGS CONSTITUTIONAL REQUIREMENTS

Great excitement resulted from *Walser I* because the United States Supreme Court has demonstrated a great interest in eminent domain cases in the last ten years. The Court has expressed a willingness to redefine the constitutional standards and precedents in the eminent domain area.[25]

In *Berman v. Parker*,[26] the United States Supreme Court noted that the United States Constitution imposes only two limitations on the government's eminent domain powers: public purpose and just compensation.[27] All other considerations and methods are left to government discretion:

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also

2002) (informing that a petition for review had not been filed). This article does not address the *Walser III* decision.

25. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, ___ U.S. ___, 122 S. Ct. 1465 (2002) (concluding that the agency's temporary moratoria on development did not effect an unconstitutional regulatory takings of property); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (holding that acquisition of title after the effective date of the regulations did not bar a regulatory takings claim); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (deciding that a landowner has a right to jury trial in a takings claim and the *Dolan's* rough proportionality test is inapposite); Eastern Enter. v. Apfel, 524 U.S. 498 (1998) (5-4 decision) (concluding that the Takings Clause does not apply to government actions that simply impose a financial obligation without affecting a specific, identified property interest); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) (considering Suitum's argument that her property was taken by the regulations imposed by the Tahoe Regional Planning Agency); Dolan v. City of Tigard, 512 U.S. 374 (1994) (hearing another dedication case seven years after deciding *Nollan*); Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993) (rejecting a regulatory taking claim relying on the parcel-as-a-whole rule to a challenge to a federal pension plan protections); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (ruling that a per se taking occurs where regulation denies a landowner of all economically beneficial use and value of the land); Yee v. City of Escondido, 503 U.S. 519 (1992) (holding that California zoning law that restricts a mobile home park owner's ability to terminate the tenancy of a mobile home owner does not constitute a taking); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (concluding that a beachfront easement for use by people already on the public beaches constituted a taking because the dedication did not bear a logical nexus to the harm the California Coastal Commission sought to address by the easement condition imposed on the building permit).

26. 348 U.S. 26 (1954).

27. *Id.* at 31-32.

for Congress to determine.[28]

According to *Berman,* the condemning authority must have lawful authority to undertake the action, and the legislative body's public use determination is afforded deference, unless the determination is shown to involve impossibility.[29] *Walser I* raised both the legal authority and the public purpose issues, providing the Minnesota Supreme Court with an opportunity to redefine the constitutional limits of the exercise of eminent domain in much the same manner as the United States Supreme Court.[30]

The Minnesota Supreme Court formerly held that the "public purpose" constitutional standards found in the United States and Minnesota Constitutions are identical.[31] The plain language of the Minnesota Constitution imposes no higher burdens or requirements than the United States Constitution, other than that compensation under the Minnesota Constitution must be "paid or secured" before the taking.[32] The Minnesota Court of Appeals recently declared Minnesota Statutes sections 163.11-.12 unconstitutional because they provided for the condemnation of land without judicial review of the public purpose for the condemnation.[33] In *Walser I*, the Minnesota Supreme Court was presented with a perfect set of facts to define a clear constitutional line between public purpose and non-public purpose.

A. HRA's Legal Authority

Walser raised two questions regarding the legal authority of a government to condemn. First, how broadly can the statutory authority conferring condemnation powers be interpreted?[34] Second, how much discretion does the condemning authority possess in determining whether the conditions required by the statute for the exercise of condemnation powers have been met?[35]

28. *Id.* at 33 (internal citations omitted).
29. *Id.* at 32.
30. *Walser I,* 630 N.W.2d 662, 666 (Minn. Ct. App. 2001).
31. City of Duluth v. State, 390 N.W.2d 757, 762 (Minn. 1986).
32. Under the United States Constitution, in relevant part, private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. Similarly, the Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefore, *first paid or secured.*" MINN. CONST. art. I, § 13 (emphasis added).
33. *In re* Rapp, 621 N.W.2d 781, 787 (Minn. Ct. App. 2001).
34. *Walser I,* 630 N.W.2d at 666-67 (Minn. Ct. App. 2001).
35. *Id.* at 668-70.

Walser argued the two issues separately.[36] However, the Minnesota Court of Appeals combined the issues in a single analysis and supported the HRA's discretion as to the extent of its condemnation authority and the appropriateness of its exercise in the situation at hand.[37]

This holding is highly favorable to condemning authorities. The court of appeals deferred to the HRA's determination that the project area needed redevelopment due to incompatible uses, traffic congestion, and obsolete structures.[38] The court concluded that the HRA was authorized to condemn the property, and held that the record compiled by HRA supports the definition of "blight" under the statute; however, the HRA never used the statutory language.[39] The court of appeals, consistent with its deference to the district court's findings, affirmed that the HRA had statutory authority to condemn the property in order to eliminate and prevent blight.[40] The court of appeals concluded that the holding was not clearly erroneous.[41] However, the Minnesota Supreme Court's 3-3 split decision hints at the uncertainty of the presumed result of Walser's appeal of the court of appeals' decision to uphold the HRA's use of discretion. In its Petition for Rehearing to the Minnesota Supreme Court, Walser noted:

> [T]his Court's 3-3 split fails to answer the question of whether the government may without limitation condemn private property if there is any evidence of blight in the neighborhood (e.g., chipped paint around a window), or whether the courts should review and weigh the evidence

36. *See* Brief and Appendix for Appellant at 21, *Walser I*, 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309). In its Petition for Rehearing, Walser argued that the Minnesota Supreme Court failed to address (1) blight and, separately, (2) standard of review. However, with respect to the standard of review issue, Walser's argument addresses both the sufficiency of the record and the appropriate degree of deference to be afforded HRA. Walser argued that HRA's determination of "blight" should have been reviewed with greater scrutiny in order to ensure that HRA's legal authority to condemn is correctly based upon a finding of "blight" as meant by section 469.002(11). Petition for Rehearing, at 2-3, Housing & Redev. Auth. *ex rel.* City of Richfield v. Walser Auto Sales, Inc., 614 N.W.2d 885 (Minn. 2002) (No.C8-01-309).

37. *Walser I*, 630 N.W.2d at 666 (Minn. Ct. App. 2001).

38. *Id.* at 669.

39. *Id.* at 668-69.

40. *Id.*

41. *Id.*

as a whole in making their blight determinations.[42]

The Minnesota Court of Appeals decision in *Walser I* is consistent with previous court decisions granting broad authority and discretion to the government.[43] Walser argued that the record does not support the HRA's public purpose determination because the HRA failed to find that any of the properties in the project area were "blighted."[44] However, this argument failed. The Minnesota Supreme Court has consistently held that the government's determination of public purpose will be upheld as long as there is "some evidence, however informal" supporting the public purpose determination.[45] The Minnesota Court of Appeals' decision was in accordance with such a presumption.

Under Minnesota statutes, an HRA can only exercise eminent domain powers where blighted conditions "exist which cannot be redeveloped without government assistance."[46] Appellant Walser argued that the HRA's eminent domain authority is limited to the authority clearly expressed by the statute: "HRAs take private property from one owner and often convey it to another. The legislature therefore imposed specific limitations on an HRA's authority to condemn, to ensure that an authorized public purpose will be met."[47] Walser sought a narrow definition of "blight" and a high degree of scrutiny as to whether the HRA had presented

42. Walser's Petition for Rehearing, filed April 29, 2002, at 2.

43. *See* Housing & Redev. Auth. v. Minneapolis Metro. Co., 259 Minn. 1, 14-15, 104 N.W.2d 864, 874 (1960) (stating that a condemning authority's determination that a particular area is "blighted" or that the redevelopment serves a "public use" will not be tampered with unless the court determines that the authority's finding was "fraudulent or capricious, or, in some instances, unless the evidence against the finding is overwhelming").

44. *Walser I*, 630 N.W.2d at 666 (Minn. Ct. App. 2001).

45. *Id.* (citing *In re* Minneapolis Cmty. Dev. Agency (MCDA) v. Opus, N.W., LLC, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998), *rev. denied* (Minn. Oct. 29, 1998); City of Duluth v. State, 390 N.W.2d 757, 763 (Minn. 1986); Housing & Redev. Auth. v. Minneapolis Metro. Co., 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960)).

46. MINN. STAT. § 469.003 (2000). Walser also argued that the taking violated the Minnesota Environmental Policy Act (MEPA), under chapter 116D. *Walser I*, 630 N.W.2d at 667 (Minn. Ct. App. 2001). The court of appeals quickly disposed of this argument noting that under Minnesota Rule 4410.3100, subdivision 2, the government may take property prior to the completion of any environmental review unless the taking "will prejudice the ultimate decision on the project" and that Walser had not presented any evidence of prejudice. *Id.* at 667.

47. Brief and Appendix for Appellant at 21, *Walser I*, 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309).

sufficient evidence of the existence of "blight."[48] Walser conceded that "[t]he issues on this appeal relate largely to the question of 'blight.'"[49]

Walser raised several questions centered on the definition of "blight." First, Walser questioned questioned whether the property being condemned had to meet the definition of blight, or whether it was sufficient for the property to be located within a blighted area.[50] Next, Walser asked if a property or project area could meet the definition of blight if the properties themselves were in good condition, but the condemning unit determined that (a) the mix of uses was incompatible; (b) there were traffic problems; and (c) the buildings and property use were "obsolete."[51] Finally, Walser's brief posed the question of whether the record could support a public purpose finding when the HRA had never made a specific finding that Walser's property or the project area was blighted.[52]

Alternatively, the HRA sought a very expansive definition of blight, arguing that if non-blighted property is located in a redevelopment project area that is blighted, public purpose is met.[53] The HRA also asserted that it was empowered under Minnesota statutes "to acquire blight areas and other real property for the purpose of removing, preventing, or reducing blight, blighting factors, or the causes of blight."[54] Under this definition, the project area does not presently have to be in a blight condition. It is sufficient if acquisition of the real property will further the removal, prevention, or reduction of blight in the project area.[55]

The HRA also argued that the definition of "blight" includes the need to increase the tax base and job development.[56] It claimed that the law does not specifically require a blight finding, and regardless, the HRA's finding that many of the structures in

48. *Walser I*, 630 N.W.2d at 669 (Minn.Ct. App. 2001).

49. Brief and Appendix for Appellants at 10, *Walser I*, 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309).

50. *Id.* at 10-11.

51. *Id.*

52. *Id.* at 6, 13-14.

53. Brief and Appendix for Respondent at 35-39, *Walser I*, 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309).

54. *Id.* at 39.

55. *Id.* (arguing that "[t]he City has no choice but to redevelop existing underutilized areas, and the consequence of failure to do so could be severe stagnation").

56. *Id.* at 42 (citing City of Duluth v. State, 390 N.W.2d 757, 763 (Minn. 1986)).

the project area were "structurally substandard" constitutes a blight finding because building deficiency is an element of "blight."[57]

The City presented evidence of the project area's deteriorated condition. Although Walser's buildings were "not necessarily obsolete for their present or continued uses . . . [they] are functionally obsolete for commercial spaces serving the public patron and lack certain life safety factors, elements with the Americans with Disabilities Act (ADA) and . . . mechanical systems essential for quality tenant space."[58] The City also submitted evidence that Walser's automobile dealership constituted an incompatible use. The "hazardous traffic patterns, merging and 'jockeying' vehicles on narrow streets, the existence of diverter barriers and . . . [the lack of] adequate parking facilities . . . imped[ed] the smooth flow of traffic in an area lacking adequate infrastructure."[59]

The Minnesota appellate courts were unlikely to, and did not, hold that the condemned property itself had to be blighted. HRAs can clearly acquire "blighted areas and other real property" to address the blight issues.[60] Nevertheless, the Minnesota Court of Appeals could have explicitly indicated that condemned property itself did not have to be blighted as long as the record indicated the acquisition addressed blight issues. However, the court described its role as "narrow."[61] It refrained from straying beyond determining whether the district court clearly erred in accepting the HRA's public purpose application. The court of appeals thus held that the district court had not clearly erred in its finding that the taking was for a public purpose; and that the HRA had the authority to condemn Walser's property "to eliminate and prevent blight."[62]

The Minnesota Supreme Court's 3-3 decision left the court of appeals decision intact. Government and private property owners are left to speculate as to the problems with the court of appeals' decision discerned by three justices of the Minnesota Supreme Court. For instance, these justices believed the court should have subjected the HRA's discretion as to what constitutes "blighted" to

57. *Id.* at 37.

58. *Walser I*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001).

59. *Id.*

60. MINN. STAT. § 469.002(14)(1) (2000).

61. *Walser I*, 630 N.W.2d at 666 (Minn. Ct. App. 2001) (quoting County of Dakota v. City of Lakeville, 559 N.W.2d 716, 719 (Minn. Ct. App. 1997)).

62. *Id.* at 669.

greater scrutiny. Furthermore, other requirements imposed by statute as a condition to exercising eminent domain power should be subject to a narrower construction or stricter review. Walser characterized current deference to the HRA:

> [Under the] trial court's approach, if an HRA can find a consultant or staff person who, innocently or otherwise, will say that 'black is white,' the trial court must likewise find that black is white because according to the court, it is not arbitrary and capricious for an HRA to rely on its staff or consultants.[63]

The 3-3 split at the Minnesota Supreme Court indicates that some of the justices sympathized with Walser's view.

B. Primary Public Purpose

A condemning authority must meet the constitutional requirement that the condemnation serve a public purpose.[64] Walser argued that the constitutional standard in its case was one of "primary public purpose."[65] Walser claimed that public purpose was not met here under the application of a "primary" public purpose or any other articulated public purpose standard.[66] Walser raised the same argument in *Walser II*, arguing that monies expended by the HRA must first be for a primary public purpose.[67] In *Walser I*, public purpose was met; and the court did not directly address Walser's argument that "primary" public purpose is the preferred constitutional standard.[68] In *Walser II*, the Minnesota Court of Appeals reversed the district court's determination that public purpose was met and applied the "primary public purpose" standard.[69] The result of these decisions is that the government may lawfully take a landowner's property if public monies are not expended and the taking serves a public purpose. However, the public purpose being served does not have to be primary.

Relying on *City of Duluth v. State*,[70] Walser argued in *Walser I* that when the government transfers private property via eminent

63. Brief for Appellant at 14, *Walser I*, 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309).
64. *Id.* at 6.
65. *Id.* at 23.
66. *Id.* at 24-28.
67. *Walser II*, 635 N.W.2d 391, 399 (Minn. 2002).
68. *Walser I*, 630 N.W.2d 662, 668-69 (Minn. Ct. App. 2001).
69. *Walser II*, 635 N.W.2d at 399-400 (Minn. 2002).
70. 390 N.W.2d 757 (Minn. 1986).

domain from one private landowner to another private landowner, the government must show that the public purpose being served is primary or predominant as compared to the private purpose being served:[71]

> The revitalization of deteriorating urban areas and the alleviation of unemployment are certainly public goals. There is little doubt, however, that the exercise of the city's eminent domain powers in this case will also benefit the *private* interests of the owners of the paper mill. In light of this court's decision in *Wurtele*, however, this fact alone does not make the use of such eminent domain powers unconstitutional. As long as the **predominant** purpose being furthered is a public one, the condemnation is constitutional under Minn. Const. art. 1, § 13 and, in light of the *Hawaii Housing Authority* case, is valid under the United States Constitution as well in meeting the federal requirement of public use.[72]

A public purpose is easily demonstrated if the government retains ownership of the property. If the condemning authority is merely acting as the straw person, then the public purpose is more obscure. Walser unsuccessfully argued that in instances such as *City of Duluth,* the courts recognized a stricter standard for condemning authorities by articulating the "predominant" public purpose standard. Walser's argument that the constitutional standard should be primary public purpose when the condemning authority transfers property from one private entity to another was consistent with Minnesota's prior use of terms for condemnation.[73] In sum,

71. Appellants' Brief at 6, *Walser I*, 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309).

72. *City of Duluth*, 390 N.W.2d at 763-64 (bold emphasis added) (internal citations omitted).

73. In *Lieser v. Town of St. Martin*, 255 Minn. 153, 96 N.W.2d 1 (1959), the Minnesota Supreme Court held:

> [A]ll questions in respect to the propriety and necessity of the particular improvement are legislative in character and the determination thereof by the local tribunal is final and will be set aside by the court on statutory appeal only when it appears that *the evidence is practically conclusive against it, or that the local board proceeded on an erroneous theory of law, or that it acted arbitrarily and capriciously against the best interests of the public.*

255 Minn. at 158-59, 96 N.W.2d at 5-6 (emphasis added). In *Housing & Redev. Auth. v. Minneapolis Metro. Co.*, 259 Minn. 1, 104 N.W.2d 864 (1960), the Minnesota Supreme Court defined its role regarding the issue of public use as follows:

> While it may be conceded that courts have generally disclaimed the

the court inconsistently applied the evidentiary standard. The court has stated that the evidentiary standard is "some evidence, however, informal,"[74] and also as "utter disregard of the public necessity of its use,"[75] "practically conclusive against it,"[76] and "showing of bad faith or tainted motive."[77]

In *Walser I*, the Minnesota Court of Appeals did not expressly address Walser's argument that the correct review standard under the constitution is primary purpose. However, the court of appeals rejected Walser's argument that the evidence did not support the finding that the taking served a public purpose.[78] The court noted that a district court must give "[g]reat weight" to a condemning authority's public purpose determination.[79] As long as "the record contains some evidence, however informal, that the taking serves a public purpose, there is nothing left for the courts . . . ."[80] The court stated that "public purpose and necessity are questions of fact, and the district court's decisions on these matters will not be reversed on appeal unless clearly erroneous."[81]

In contrast, the Minnesota Court of Appeals applied the

> power of supervising the selection of a site for public improvements, nevertheless they are reluctant to surrender their right to prevent an abuse of the discretion delegated by the legislature by an attempted appropriation of land in *utter disregard of the public necessity of its use.*

259 Minn. at 15, 104 N.W.2d at 874 (emphasis added). The court further stated, "[i]f it appears that the record contains *some evidence, however, informal*, that the taking serves a public purpose, there is nothing left for the courts to pass upon." *Id.* (emphasis added). The court articulated the judicial review standard as abuse of discretion standard determined by whether there has been an "utter disregard of the public necessity." However, if the government can show "some evidence" even if informally presented, then the public purpose requirement is met. Eight years later, the court decided *Metropolitan Sewer Board v. Thiss*, 294 Minn. 228, 200 N.W.2d 396 (1972), and found that "[t]his court has always held that the propriety of the exercise of eminent domain is a legislative question." *Id.* at 230, 200 N.W.2d at 397 (citing City of Austin v. Wright, 262 Minn. 301, 114 N.W.2d 584 (1962)). Here, the Minnesota Supreme Court imposes the practically conclusive standard against the public purpose evidentiary standard. *See* City of Minneapolis v. Wurtele, 291 N.W.2d 386, 390 (Minn. 1980) (acknowledging that "[w]e have said a municipality's finding of public purpose can be negated by a showing of bad faith or tainted motive").

74. *Hous. & Redev. Auth.*, 259 Minn. at 15, 104 N.W.2d at 874.
75. *Id.* at 14, 104 N.W.2d at 874.
76. *Lieser*, 255 Minn. at 159, 96 N.W.2d at 5-6.
77. *Wurtele*, 291 N.W.2d at 390.
78. *Walser I*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001).
79. *Id.* at 666.
80. *Id.* at 668-69.
81. *Id.* at 666.

primary public purpose standard in *Walser II*. The court of appeals held that "the existence of almost any evidence will support a finding of a public purpose" in condemnation cases.[82] However, with respect to public expenditures, the public purpose must be shown to be "primary," requiring a "more stringent evidentiary standard."[83] "[N]ot only must the quantity of the evidence considered be greater, but the quality of the analysis must be different."[84] The expenditure of funds requires a comparative approach; that is to say, analysis of which purpose (public or private) is the primary purpose."[85]

The term "primary purpose" originated in *Visina v. Freeman*.[86] There the court held that the mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature if its *primary purpose* is public.[87] As evidenced by the *Walser I* and *II* decisions, the Minnesota Court of Appeals has adopted the reasoning articulated in *Visina*.

82. *Walser II,* 635 N.W.2d 391, 400, n.5 (Minn. Ct. App. 2001).

83. *Id.*

84. *Id.*

85. *Id.* The Minnesota Court of Appeals cited *Port Authority of St. Paul v. Fisher*, 269 Minn. 276, 288, 132 N.W.2d 183, 192 (1964) and *Visina v. Freeman*, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958) to support its decision.

86. *Id.*

87. *Id.* (emphasis added). The Minnesota Supreme Court reasoned:

> "Public use," as required for the exercise of the power of eminent domain, is not necessarily synonymous with "public purpose" required for the expenditure of public money. It may be safe to assume that, if the activity constitutes a public purpose which will justify the expenditure of public money, it also constitutes a public purpose which will permit the exercise of the power of eminent domain, but it does not necessarily follow that, if the use to be made of the property is a public use within the meaning of our eminent domain statutes and laws, it also constitutes a public purpose for which public money may be spent. We have, for instance, frequently granted railroads and other public utilities, and even private persons, the right to condemn private property for a use declared to be public, but it does not follow that public money may be spent to assist such condemnors in carrying out the purpose for which the condemnation is permitted. However, the cases relied on here, involving the rights of ports or port authorities of one kind or another to condemn property, are of such a nature that the use of the term "public use" or "public purpose" authorizing condemnation is broad enough to encompass a public purpose permitting the expenditure of public money, not because it is a public use which will justify an exercise of the power of public eminent domain but, in a broader sense, because it is such a public purpose as includes, as well, the right to spend public money.

The *Port Authority of St. Paul v. Fisher* case provides little instruction. Nowhere in *Fisher* does the Minnesota Supreme Court use the term "primary public purpose." The omission is unfortunate because *Fisher* addressed both public expenditure and condemnation.[88]

In *Fisher*, the Saint Paul Port Authority proposed to lease certain property to American Hoist & Derrick Company.[89] Buildings and other structures were to be constructed on the property to be used as office buildings, an engineering research center, a manufacturing facility, a restaurant, and an automobile parking lot, connected by a tunnel which was to lead to other property owned or leased by American Hoist on an adjacent block.[90] The costs of construction were to be paid from the sale of Port Authority revenue bonds in the amount of $1.2 million.[91] Fred W. Fisher, one of the six Port Authority Commissioners and the president of the Saint Paul Port Authority, refused to sign the necessary documents on the grounds that in violation of the Constitution and Minnesota Chapter 458, the deal was serving private purposes and not public purposes.[92] The Port Authority initiated a declaratory judgment action, seeking a determination that a public purpose was being served by the deal and therefore met statutory and constitutional requirements.[93]

In *Fisher*, the Minnesota Supreme Court framed the issue before it as follows: "The issue presented is whether the proposed lease and revenue bond issuance are unconstitutional because violative of either Minn. Const. Art. 9, § 1, which provides: 'Taxes . . . shall be levied and collected for public purposes,' or the often stated principle that public money can only be expended for public purposes."[94] The Minnesota Supreme Court refused to consider the constitutionality of the Port Authority's acquisition of the property because the Port Authority had already acquired the property.[95] Having decided that the public purpose constitutional question was moot, the *Fisher* court did not provide a comparative "public purpose" analysis to discern what differences exist, if any, in

88. *Fisher*, 132 N.W.2d at 195-96.
89. *Id.* at 186-87.
90. *Id.* at 187.
91. *Id.*
92. *Id.* at 186.
93. *Id.*
94. *Id.* at 195.
95. *Id.*

the constitutional standards or the application of these standards for condemnation versus public expenditure. The single reference to the term "primary" is contained earlier in the *Fisher* decision with no further analysis:

> The mere fact that some private interests may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public. On the other hand, [*i*]*f the primary object is to promote some private end, the expenditure is illegal, although it may incidentally also serve some public purpose.*[96]

By highlighting the last sentence in italics, the Minnesota Supreme Court clearly believed that the last sentence was important and deserved great weight, especially since the case was reversed and remanded to the district court for a reevaluation of public purpose.[97]

What the *Walser I* and *II* decisions leave uncertain is whether the Minnesota Supreme Court will apply the principle articulated in *Fisher* to condemnations. If the court were to apply the *Fisher* principle, condemnation would not be allowed if the primary object was to promote some private purpose, despite the incidental public purpose that resulted. The Minnesota Court of Appeals failed to apply this principle in *Walser I*. Alternatively, if the Minnesota Supreme Court overrules *Visina* and *Fisher* as to public expenditures for condemnations, then if public purpose is met for the condemnation, it naturally follows that public purpose is met for the public expenditure for the acquisition of the property. The 3-3 split decision leaves these issues unresolved.

Application of the *Walser I* and *II* decisions illustrates the problem posed by two different constitutional public purpose standards, one for condemnation and the other for public expenditures. In *Walser I*, the court determined that the public purpose constitutional requirement had been met.[98] Accordingly, the City's condemnation was lawful.[99] In *Walser II*, the Minnesota Court of Appeals remanded for a determination as to whether the public purpose constitutional requirement had been met to finance the project.[100] The rule of reciprocal vesting was triggered

96. *Id.* at 192 (emphasis added) (citing Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958)).
97. *Id.*
98. *Walser I*, 641 N.W.2d 885, 891 (Minn. 2002).
99. *Id.*
100. *Walser II*, 635 N.W.2d 391, 400 (Minn. Ct. App. 2001).

when the Minnesota Supreme Court issued its decision in *Walser I,* which left undisturbed the Minnesota Court of Appeals' decision that the public purpose requirement was met. It is conceivable that the district court could determine on remand that the TIF financing is unlawful, resulting in an odd circumstance where the condemnation is constitutional, but the City would not have the money to complete it. Under such a circumstance, Walser would be entitled to "just compensation" from the condemning authority (the HRA), but the HRA could not expend public monies for the acquisition via TIF district financing.[101] Furthermore, if the district court determined that primary public purpose was *not* met and if *Walser I* and *II* are strictly applied, the City may be precluded from using its staff or attorneys to condemn the property, because such use could constitute an unlawful expenditure of public resources. It is ironic that one of the powers of government, taking private property, could be exercised by a private person with government serving as a mere straw person. A better policy would be to create a single public purpose standard for both the acquisition of and the condemnation of private property.

In the Minnesota Supreme Court's split decision, three justices were troubled either by the public purpose standards articulated by the Minnesota Court of Appeals in *Walser I* and *II* or by the application of those standards. Unfortunately, the lack of a written opinion leads only to speculation over the public purpose standard and its application.

IV. MOOTNESS

On the issue of mootness, the Minnesota Supreme Court and the Minnesota Court of Appeals were clear. Walser's appeal was not mooted by the quick take transfer of property to Richfield HRA.[102]

In its Amicus Brief to the Minnesota Supreme Court, the League of Minnesota Cities said: "If this Court does not reverse the [c]ourt of [a]ppeals' decision on this issue, title to condemned property will become uncertain because of the risk that condemned property could be returned to its original owner even

101. Whether Best Buy and the City of Richfield have negotiated alternative financing contingencies to address such financing issues is unknown.

102. *See Walser I,* 641 N.W.2d 885, 891 (Minn. 2002); *Walser I,* 630 N.W.2d. 662, 665 (Minn. Ct. App. 2001).

after title has been transferred."[103] The Minnesota County Attorney's Association wrote in its Amicus Curiae Brief to the Court: "Because of the chilling effect on public use of the land pending the outcome of final appeals, the result is devastating to condemning authorities. It certainly places private interests over the public interest and proven public need."[104] In *Walser I*, the supreme court placed private interest over public interest and affirmed the court of appeals' rejection of the affirmative mootness defense. The court held that "if transfer of title were held to moot any challenge to the public purpose, all condemning authorities could insulate the public purpose requirement from judicial review by utilizing the quick-take procedures. This is a rigid rule that does not always satisfy our test for mootness."[105]

The court's ruling creates problems for government units engaged in development projects. This ruling provides assurance to private property owners that their property will be returned to them, even if the appellate process lasts for years.[106]

The HRA argued that Walser's public purpose challenge was moot because either (1) transfer of title had been made so that the rights of both parties were reciprocally vested; or (2) events subsequent to the transfer of title had rendered Walser's public purpose challenge moot.[107]

The court in *State ex rel. McFarland v. Erskine*[108] explained that according to the reciprocal vesting doctrine, the government's right to the property and the landowner's right to compensation simultaneously vest upon final termination of the proceedings.[109] In *Walser I,* the Minnesota Supreme Court held that reciprocal vesting does not occur until a final, nonappealable determination is made on the public purpose issue.[110] Since the issue of "public

103. Amicus Brief of the League of Minnesota Cities, at 4, *Walser I,* 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309).

104. Amicus Brief of the Minnesota County Attorney's Ass'n, at 6, *Walser I,* 641 N.W.2d 885 (Minn. 2002) (No. C8-01-309).

105. *Walser I,* 641 N.W.2d 885, 890 (Minn. 2002).

106. The author does not know when the quick take condemnation action was initiated by the HRA. The appeal process from the district court to the Minnesota Supreme Court took more than a year. The Minnesota Court of Appeals decided *Walser I* on July 3, 2001, and the Minnesota Supreme Court decided the case on April 18, 2002.

107. *Walser I,* 641 N.W.2d at 888-89 (Minn. 2002).

108. 165 Minn. 303, 306, 206 N.W. 447, 448 (1925).

109. *Id.* at 306, 206 N.W. at 449.

110. *Walser I,* 641 N.W.2d at 889 (Minn. 2002). "As for the public purpose

purpose" was part of Walser's appeal, a final, nonappealable determination had not been obtained. Accordingly, to reject the HRA's mootness argument, the supreme court's analysis needed only to note that the reciprocal vesting doctrine was not triggered. Curiously, the court also suggested that the adjective "reciprocal" in the reciprocal vesting doctrine was a misnomer in that "the reciprocal vesting doctrine was invoked to enforce an owner's right to payment when the condemning authority, without the consent of the landowner, sought to abandon, dismiss, or discontinue the condemnation proceedings."[111]

More noteworthy is that both the court of appeals and the supreme court ignored the due process arguments raised by the HRA. Traditionally, the appellant, to retain its appellate rights, which may be mooted by future conduct, must obtain a stay by applying for and posting a supersedeas bond with the district court.[112] Walser had failed to obtain a stay or post the necessary supersedeas bond, and therefore, the HRA argued that Walser should only be entitled to monetary damages.[113]

The expected outcome under these circumstances is that failure to obtain a stay or post a bond, title to property becomes irrevocably transferred to HRA and Walser lost its remedy of the return of property.[114] Similarly, Walser could have sought an

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challenge, we refused to 'close the door' to a landowner's raising the question of whether the taking was for a public purpose and instead considered the appropriateness of summary judgment in light of the facts in the case." *Id.* at 890 (discussing Hennepin County v. Mikulay, 292 Minn. 200, 209, 194 N.W.2d 259, 265 (1972)).

111. *Id.*

112. *See* MINN. R. CIV. APP. P. 108.01. *See also* Kilowatt Org. v. Dep't of Energy, Planning, & Dev., 336 N.W.2d 529, 532-33 (Minn. 1983) (finding that appellant was not denied due process merely because the district court imposed a high monetary bond).

113. *See Walser I*, 641 N.W.2d 885, 888 (Minn. 2002).

114. In a similar case, the Eighth Circuit in Minnesota Humane Society v. Clark, 184 F.3d 795 (8th Cir. 1999), declined to vacate the district court judgment after the case became moot during the pendency of an appeal. The court noted:

> The Humane Society also could have sought an expedited appeal, a remedy which this court has granted in the past. *See, e.g.*, *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 960 (8th Cir. 1995) (per curiam) (appeal heard three days after action filed); *South Dakota v. Hazen*, 914 F.2d 147, 148 (8th Cir. 1990) (appeal heard within seven days of grant of preliminary injunction). When a party has these legal avenue available, but does not utilize them, the action is not one that evades review. *See Missouri ex rel. Nixon v. Craig*, 163 F.3d 482, 485 (8th Cir. 1998) (referring to availability of preliminary injunctions, emergency

expedited appeal including a review of the bond amount, which may have avoided the mootness issue.

The posting of a supersedeas bond or a request for a stay on other grounds is not required for an appeal to be perfected or to proceed. However, if the order or judgment that is the subject of the appeal is not generally stayed automatically, then a matter may, in some circumstances, become moot while the appeal is pending.[115]

On January 19, 2001, the district court authorized a quick take, subject to Walser's right to complete its lease which ended on June 15, 2001.[116] The court also ordered transfer of title to the HRA upon deposit of the approved appraised value of the property with the court and the appropriate recording agency.[117] On February 16, 2001, Walser appealed, but did not move for a stay or a leave to post a supersedeas bond to stay enforcement of the judgment until March 9, 2001.[118] The court denied Walser's request for a stay and set the supersedeas bond in the amount of $15 million dollars.[119] The court stayed effect of its order for 48 hours allowing Walser time to appeal.[120] Walser did not appeal the court's denial of the stay or the supersedeas bond amount.[121] Richfield HRA transferred title to Best Buy on March 16, 2001.[122]

In *Walser I*, the supreme court noted that Walser appealed neither the district court's supersedeas bond amount nor the denial of a stay. Instead, the court focused solely on the legal effect and meaning of reciprocal vesting in terms of Minnesota Statutes Chapter 117 and the constitutional public purpose requirement. The court repeatedly emphasized that the government's right to the property does not vest until a final termination of the

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> stays, and expedited appeals and holding that case was not one evading review when plaintiff did not seek expedited review and relief); *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1173 (8th Cir. 1994) (noting that case was not one evading review when party could have sought, but did not seek, injunction pending review of denial of preliminary inunction).

Id. at 797.

115. MINN. R. CIV. APP. P. 108.01, advisory committee note (1998 Amendments).

116. *Walser I,* 641 N.W.2d at 887-88 (Minn. 2002).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

proceedings on public purpose and "if [the government] took the property in an unconstitutional manner," then the government "may be compelled to return all or part of [the] property."[123] The courts were faced with applying traditional common law outcomes which conflicted with constitutional mandates. However, appellants such as Walser have waived their constitutional appellate issues by failing to preserve them, resulting in the mootness of the appeal.[124]

Under the *Walser I* decision, unlike traditional district court actions, landowners in a condemnation action do not need to seek a stay or supersedeas bond amount to preserve their appellate rights. While the government can still affect immediate transfer of title, it can no longer be certain that the project will proceed uninterrupted by condemnation proceedings. Instead, the condemning authority has to concern itself with the possibility that it may have to return the property to the original landowner in its pre-developed status if the court later determines that no public purpose exists. Thus, the *Walser I* decision holds that the mootness doctrine does not apply in condemnation cases.

V. CONCLUSION

The *Walser I* and *II* decisions raised a number of central condemnation and government redevelopment legal issues. Except for the mootness issue, the decisions have left these issues unresolved. For instance, can the government take a private party's unblighted property merely because it is situated amongst other properties which are blighted? Can the government decide that even though the project area is not currently blighted it is outdated and improperly developed requiring redevelopment to avoid stagnation? Or, can the government determine that one type of business is better for an area than another type of business and meet the public purpose constitutional requirement? *Walser I* and *II* put these issues and related issues squarely before the Minnesota Supreme Court with a compelling fact scenario. The Minnesota Supreme Court failed to resolve any of these issues. Unfortunately, the Minnesota Court of Appeals decision also fails to provide any

123. 641 N.W.2d at 891.

124. *See* Matter of Welfare of B.C.G., 537 N.W.2d 489, 492 (Minn. Ct. App. 1995) (finding that individuals may waive both constitutional and statutory rights unless limited by public policy).

clarity. Perhaps the United States Supreme Court will grant certiorari to provide a clear legal standard and define the constitutional limits of eminent domain.