

ECONOMIC DEVELOPMENT AUTHORITIES

Responding to the requests of many Minnesota cities for broader powers in the area of economic development, in 1986 the Minnesota Legislature passed a law authorizing home rule charter or statutory cities to establish economic development authorities. In 1987, the Legislature recodified the statutes pertaining to economic development into one large chapter, Chapter 469. Economic Development Authorities may draw on the purposes and powers contained in several different sections of Chapter 469. Sections 469.091 to 469.108 constitute the principal body of legislation pertinent to EDA's.

This memo addresses many of the questions cities have raised concerning the formation, uses, and powers of economic development authorities (referred to herein as an "EDA" or an "Authority"). The statutes concerning EDAs are complicated and somewhat ambiguous, and the various "cross-fertilization" provisions used in the EDA sections of Chapter 469, allowing the EDA to exercise powers granted to other entities for a wide variety of purposes, lead to further confusion and uncertainty. Nevertheless, we believe the underlying purpose of the law - the promotion of economic development - is clear and that reasoned conclusions can be drawn about the scope and intent of the law. The following is an effort to outline the steps that must be taken to form and operate an EDA, the powers that an EDA may exercise once formed, and the constitutional concerns that may arise in connection with the use of EDA powers.

A. FORMATION AND OPERATION OF AN EDA

1. **Reasons for Forming an EDA.** Forming an economic development authority (the "Authority" or "EDA") will provide a great deal of flexibility to a City to pursue economic development. Economic development authorities may exercise their own powers, the powers of housing and redevelopment authorities, the powers of cities in connection with city development districts and the powers of municipalities or redevelopment agencies in connection with municipal industrial development. The purpose for which these powers may be exercised is expanded to embrace economic development throughout a City and not just in areas which may be deemed to be blighted. The concentration of various economic development powers and purposes in one Authority therefore provides a valuable tool to a City for the promotion and financing of economic development.

Procedure for Establishing an EDA.

The City Council creates an Economic Development Authority by passing a written resolution called an enabling resolution. Before adopting an enabling resolution, the City Council must conduct a public hearing. Notice of the time and place of hearing, a statement of the purpose of the hearing and a summary of the resolution must be published in a newspaper of general circulation within the city once a week for two consecutive weeks, with the first publication appearing less than thirty days from the date of the public hearing. Minn. Stat. §469.093.

Each year, prior to the anniversary of the passing of the enabling resolution, the EDA must submit a report to the City Council stating whether and in what respects the enabling resolution should be modified. Within thirty days of receipt of the report, the City Council must

consider the recommendations and make any modifications it deems appropriate. Minn. Stat. §469.092, Subd. 3. Modifications to the enabling resolution must be by written resolution and may be adopted only after notice and public hearing as required for the adoption of the original enabling resolution. Minn. Stat. §469.093, Subd 2.

Once established, an EDA is a public body corporate and politic and a political subdivision of the State. It may sue or be sued in its own right. Section 469.091, Subd. 2 characterizes an EDA as a body which "carries out an essential governmental function when it exercises its power...." Nevertheless, sovereign immunity does not apply — an EDA is not immune from liability because of its function.

2. Limiting the Powers of the Authority.

(a) The City, through the enabling resolution, may impose the following limits upon the actions of the Authority:

1. The enabling resolution may provide that the EDA may not exercise any specified power contained in the EDA law or that the EDA may not exercise a specified power without the prior approval of the City Council;
2. The City Council may require that any unpledged reserves generated by activities of the EDA and not needed for its successful operation be transferred to the Debt Service Fund of the City and be used to reduce tax levies for bonded indebtedness;
3. The City Council may require that the EDA obtain City approval before selling any bonds or obligations issued by the EDA (and prior approval is required in any case for general obligation bonds);
4. The City may impose other limitations on an EDA's budget process, administration and management, and other activities, and may require an EDA to comply with the City's comprehensive plan, and may impose any other limitation the City Council deems appropriate.

Minn. Stat. §469.092

(b) There are, in addition to the above limitations, other means by which a City Council may limit the powers of the Authority:

A. City Council as Commissioners of Authority. The authorizing legislation states that at least one (and in some cases, two) city council members must be included among the EDA commissioners. A City Council can provide in the enabling resolution, however, that the members of the City Council shall serve as all the commissioners of the Authority. This approach would ensure absolute City Council control over EDA activities. If a City elected to take this route, it could establish a separate advisory committee to assist it with economic development matters. As an alternative, a City Council could provide (as is provided in the proposed enabling resolution) that some but not all (in this case two) commissioners be city council members.

B. Limitations on EDA Powers. If a City Council chooses not to act as the governing body of the Authority, it may, in the enabling resolution, place specific restrictions on the exercise of powers by the EDA. These restrictions could take several forms.

(i) Restrictions on Exercise of Powers. The enabling resolution may provide that the Authority may not exercise certain specified powers without the prior approval of the City Council. Such a restriction might be placed on the power to issue general obligation or revenue bonds on the power to grant or loan EDA funds, on the power to enter into limited partnerships, or any other specific power over which the City Council wishes to exercise control.

(ii) Budgetary Control. The EDA law already requires that the EDA annually submit to the City its budget. Apart from the obvious control the City Council has in appropriating city money to help fund the budget, the enabling resolution may require City Council approval of the Authority budget, and compliance with the budget as approved (as provided in the proposed enabling resolution).

(iii) Other Monetary Restrictions. A City may place monetary limits on exercise of EDA powers. Monetary limitations could be imposed on a per-project basis, or may be placed on aggregate spending on projects by the EDA. Project based limitations would require approval by the City Council of expenditures on any proposed project over a certain monetary amount. An aggregate restriction would provide for City Council approval once the Authority had expended its aggregate approved amount in a fiscal year.

(iv) Other Controls. In addition to the foregoing controls, an enabling resolution may also provide for City Council control of EDA activity by the following means:

(a) All official actions of the Authority must be consistent with the adopted Comprehensive Plan of the City and any official controls (e.g., zoning ordinances) implementing the Comprehensive Plan.

(b) The Authority shall submit all planned activities for influencing the action of other governmental agencies, subdivisions, or bodies to the City Council for approval.

(c) The Authority shall submit its administrative structure and management practices to the City Council for approval.

3. Commissioners.

The Economic Development Authority governing body may consist of 3, 5 or 7 commissioners. The enabling resolution must state the number of commissioners. The mayor appoints the commissioners with the approval of the City Council. A 3 member authority must include at least one member of the City Council, and a five or seven member authority must

include at least two members of the City Council. Members of the City Council in numbers greater than those mentioned above may serve as the commissioners of the EDA. The enabling resolution may provide that the members of the City Council shall serve as the commissioners. Further, an EDA may be increased from three to five or seven or from five to seven members by resolution of the City Council following the same notice and hearing procedures required for adoption of the enabling resolution.

Original appointees to the EDA serve for terms varying from one to five years, and subsequent commissioners serve six year terms. Commissioners may be paid for attending meetings of the EDA in an amount determined by the City Council. Commissioners may be removed for cause following written notice and hearing on the matter. Minn. Stat. § 469.095.

4. Officers.

The EDA may adopt bylaws and rules of procedure and must adopt an official seal. The EDA must elect a President, a Vice President, a Treasurer, a Secretary, and an Assistant Treasurer. The Authority must elect the President, Treasurer, and Secretary annually. Although a commissioner can not serve as President and Vice President at the same time, the other offices may be held by the same commissioner. Further, the offices of Secretary and Assistant Treasurer need not be held by a commissioner. Minn. Stat. §469.096.

5. Employees.

The Authority may employ an Executive Director, a Chief Engineer, other technical experts and agents, and other employees as it requires, and it may determine their duties, qualifications, and compensation. Further, the Authority may contract for the services of consultants, agents, public accountants, and other persons needed to perform its duties and exercise its powers. The Authority may use the services of the City Attorney or hire a general counsel for its legal needs. Minn. Stat. § 469.097.

6. City Facilities, Services.

The City may furnish offices, structures, space, clerical, engineering, or other assistance to the Authority. The Authority may use the City's purchasing department in connection with construction work and to purchase equipment, supplies or materials. Minn. Stat. § 469.097.

7. Existing Development Agencies and Projects.

The City may divide any economic, housing or redevelopment powers granted under the HRA and EDA sections of Chapter 469 between the Authority and any other authority or commission established under statutes or City Charter for economic development, housing, or redevelopment. Minn. Stat. § 469.094. The City may also, by resolution, transfer the control, authority and operation of any project as defined in the Municipal Industrial Development sections of Chapter 469 or program authorized by the HRA or Municipal Development District sections of Chapter 469 from the agency that established the project to the Authority.

8. Budgets and Reports.

The Authority must submit an annual budget to the City including a detailed written estimate of the amount of money the Authority expects to need from the City during the next fiscal year. The Authority must also submit to the City a detailed account of its activities, and its receipts and expenditures during the preceding calendar year. The Authority's financial statements must be audited annually, and the audits must be filed with the State Auditor. Minn. Stat. § 469.100.

9. Conflict of Interest.

An independent anti-conflict-of-interest provision applies to EDA. It prohibits any commissioner, employee or agent of an EDA from having any direct or indirect financial interest in any project (or property included in a project) or in any contract for materials or supplier in connection with a project.

B. POWERS OF AN EDA

The Authority is granted several different types of powers in the EDA statutes. First, it is granted powers that it may exercise only within or in conjunction with an economic development district. Second, the EDA sections of Ch. 469 grant directly powers that the Authority may exercise outside an economic development district. Finally, the statutes grant the Authority by cross-reference the powers that may be exercised by housing and redevelopment authorities ("HRAs"), cities in connection with Development Districts, or municipalities or redevelopment agencies in connection with Municipal Industrial Development. The broadest of these powers are those contained in the HRA and the Industrial Development sections of Chapter 469, making the "crossfertilization" in Chapter 469 invaluable to Economic Development Authorities.

1. Powers that must be exercised within or in Conjunction with an Economic Development District.

The following is a list of the specific powers granted to the Authority which must be exercised within or in conjunction with an economic development district. These powers allow the Authority to create an economic development district, acquire land by various means within that district, improve the land to make it suitable for development, sell the land so acquired (with development stipulations) or develop the land itself as a public facility.

(a) Creation of Economic Development District.

The Authority may create, following notice and hearing, an economic development district at any place within the city. Under Minn. Stat. § 469.101 Subd. 1, the district must satisfy the requirements of section 469.174 Subd. 10 (a provision which is part of the Tax Increment Financing Law), except that district boundaries must be contiguous. Section 469.175, Subd. 10 defines a "redevelopment project" and, in general, requires structurally substandard buildings, health or safety hazards, deficient soil conditions, underutilized air rights, vacant or underutilized railroad property or an industrial park with a contaminated sewage lagoon.

(b) Acquisition of Property.

In order to create an economic development district, the Authority may acquire by lease, purchase, gift, demise or condemnation proceedings any necessary right, title or interest in property. Property acquired for this purpose is exempt from taxation by the state or political subdivisions, except to the extent that the property is subject to sales and use tax, but only while the Authority holds the property for its own use. Minn. Stat. §469.101, Subd. 2.

(c) Acquisition of Rights and Easements.

The Authority may acquire rights and easements for development of an economic development district. Minn. Stat. § 469.101 Subd. 7.

(d) Receipt of Assistance.

The Authority may accept land, money or other assistance from the federal or state government or an agency of either to acquire and develop an economic development district. Minn. Stat. § 469.101 Subd. 9.

(e) Sale or Lease of Land.

The Authority may sell or lease land held by the Authority in economic development districts. Minn. Stat. § 469.101, Subd. 10.

The Authority may, after notice of hearing, sell property owned by it if the sale or conveyance is in the best interest of the City and furthers the Authority's general plan of economic development. The sale may be by private or public sale. The terms of the sale of property must include the intended use of the land and may not be consummated until the purchaser delivers the plans and specifications covering the development of the property to the Authority for approval. If the purchaser fails to devote the property to its intended use or fails to begin work on improvements in one year from the date of the purchase, the Authority may cancel the sale, and title to the property will revert to the Authority. The Authority may extend the one year deadline for good cause. The purchaser of the land may not transfer title within one year after the sale without the consent of the Authority. Minn. Stat. § 469.105.

(f) Public Facilities.

The Authority may maintain and operate a public parking facility or other public facilities to promote development in an economic development district. Minn. Stat. § 469.101, Subd. 13.

(g) Government Agent.

The Authority may cooperate with or act as an agent for the federal or state government in the area of economic development district improvement. Minn. Stat. § 469.101, Subd. 14.

(h) Acceptance of Public Land.

The Authority may accept conveyances of land from all other public agencies, commissions, or other units of government if the land can be properly used by the Authority in an economic development district. Minn. Stat. § 469.101, Subd. 17.

(i) Development and Improvement.

The Authority may carry out EDA law to develop and improve land in an economic development district. The Authority may fill, grade and protect property and do anything necessary and expedient after acquiring property in an economic development district to make it suitable and attractive for development. Minn. Stat. § 469.102 Subd. 18.

**2. Powers that need not be exercised within or
in conjunction with an Economic Development District.**

The Act also grants to Authorities various powers that need not be exercised within or in conjunction with an economic development district. These powers are a great deal broader than those outlined above, and they represent the true value of an economic development authority to a City. These powers include not only those granted directly by the EDA sections of Chapter 469, but also those granted to an Authority by cross-reference to other sections of Chapter 469. The Authority also has the power to issue various types of obligations.

(a) Eminent Domain.

The Authority may exercise the power of Eminent Domain. Minn. Stat. § 469.101 Subd. 4.

(b) Power to Contract.

The Authority may enter into contracts for the purpose of economic development and may contract to purchase and sell real and personal property. Any obligation or expense of the Authority may not be incurred unless there is an existing appropriation and reasonably expected revenue of the Authority from other sources sufficient to discharge the obligation or pay the expense when due. Minn. Stat. § 469.101 Subd. 5

(c) Limited Partner.

The Authority may act as a limited partner in a partnership whose purpose is consistent with the Authority's purposes. Thus, the Authority may invest directly in a business and will be protected from liability because of the form of the investment. The Authority's liability will be limited to the amount of contributions it has made to the partnership. Limited partner status, however will prevent the Authority from taking an active role in the operation and management of the business. Minn. Stat. § 469.101, Subd. 6.

(d) Supplies and Materials.

The Authority may buy the supplies and materials it needs to carry out economic development. Minn. Stat. § 469.101 Subd. 8.

(e) Foreign Trade Zone.

The Authority may apply for Foreign Trade Zone powers alone or with another Authority. Minn. Stat. §469.101, Subd. 11.

(f) Studies, Analysis, Research.

An Authority may study and analyze economic development needs in the City and ways to meet the needs and may engage in research and disseminate information on economic development within the City. Minn. Stat. § 469.101, subd. 15.

(g) Cross-Fertilization.

An Authority may exercise the powers and duties of a redevelopment agency under sections 469.152 to 469.165 (Municipal Industrial Development) for a purpose in sections 469.001 to 469.047 (Housing and Redevelopment Authorities) or 469.090 to 469.108 (Economic Development Authorities). The Authority may also use the powers and duties in sections 469.001 to 469.047 (Housing and Redevelopment Authorities) and 469.090 to 469.108 (Economic Development Authorities) for a purpose in sections 469.152 to 469.165 (Municipal Industrial Development). The Authority also has the powers of a City under sections 469.124 to 469.134 (City Development Districts). Minn. Stat. §§ 469.091, 469.101, subd. 12. A summary of the purposes and powers of Housing and Redevelopment Authorities, City Development Districts and Municipal Industrial Development will follow.

(h) Levy of Taxes for Economic Development Authority.

The City may, at the request of the Authority, levy a tax in any year for the benefit of the Authority in an amount not more than 0.01813 percent of taxable market value. An increase in the levy is allowed if the City follows certain procedures and subject to reverse referendum. The levy may be increased by resolution of the City Council after published notice. The resolution is not effective if a petition requesting a referendum is filed with the City Clerk within 30 days after publication of the resolution. The petition must be signed by voters equalling at least 5% of the vote cast in the last general election. The election called for by the referendum must be held as specified in section 275.58. Minn. Stat. § 469.107.

(i) Advances.

An Authority may advance (loan) its general fund money or credit without interest, for the objects and purposes of the Act. The advances must be repaid from the sale or lease of land. If the money advanced for the development or redevelopment was obtained from the sale of the Authority's general obligation bonds, then the advances

must have not less than the average annual interest rate on the Authority's general obligation bonds that are outstanding at the time the advances are made. Advances made to acquire land and to construct liabilities for recreation purposes, if authorized by law, need not be reimbursed. Minn. Stat. § 469.106. The repayment provisions of this section imply that advances can only be made by way of an installment sale or financing lease, which necessarily limits the type of costs which can be financed under this provision to property susceptible of being leased or sold.

3. Issuance of obligations.

(a) Issuance of General Obligation Bonds.

The Authority may issue general obligation bonds in anticipation of income from any source, in the principal amount authorized by a two thirds vote of the City Council, for the purpose of acquiring property or for any other purpose set forth in the Act. The form of the bonds and interest rate must be set by the City Council. The issuance of the bonds is governed by the Act, except for matters that are-not covered in the Act, which are governed by Chapter 475 (Public Indebtedness). An election is required for the issuance of the general obligation bonds unless the bonds otherwise qualify for an exception from the election requirement under the provisions of Chapter 475. The election requirement may only be avoided for general obligation bonds if at least 20% of the debt service will be paid from tax increments, in which case the procedures of the Tax Increment Financing Law must be followed. The bonds must mature within 30 years from the date of issuance. The City Council must, by ordinance, give specific consent to the pledge of its full faith and credit to the bonds. The bonds are payable from taxes levied by the Authority on all taxable property in the city, which taxes must be in an annual amount at least 5% in excess of the annual principal and interest on the bonds. Minn. Stat. § 469.102.

(b) Issuance of Revenue Bonds.

Revenue Bonds may be issued by the Authority to acquire land, to purchase or construct facilities, to purchase, install or furnish capital equipment, or to extend, improve, or enlarge a project under its control. The bonds issue may also include a reserve to secure the payment of principal and interest on the bonds. The bonds must mature within 20 years from the date of issuance, may be sold at public or private sale and may be secured by any revenue from the facility financed by the bonds. Revenue bonds are not a debt of the Authority or the City but are payable only from the revenues pledged to their payment. If the revenue bonds are taxable bonds, the project financed with them does not have to be approved by the Energy and Economic Development Authority and certain public hearing and reporting requirements under the industrial development bond provision of Ch. 469 do not apply. In addition, the industrial development bond provisions of Chapter 469 which prohibit the financing of property to be sold for housing facilities to be rented or used as permanent residence do not apply. Minn. Stat. § 469.103. However, the bonds will be subject to the limitations set forth in Sections 462C.01-462C.07.

(c) Tax Increment Bonds.

Under Minn. Stat. § 469.103, Subd. 8, the Authority may issue tax increment bonds payable from tax increment revenues. The issuance of tax increment bonds are subject to the provisions of the Minnesota Tax Increment Financing Act. Minn. Stat. § 469.174 to 469.179. The proceeds of tax increment bonds are subject to the same use limitations as tax increments. Minn. Stat. § 469.176, subd. 4.

(d) Pledge of Revenues.

The Authority may pledge and grant a lien on revenues of the Authority to secure the payment of its general obligation or revenue bonds. The revenue must come from the facility to be acquired, constructed or improved with bond proceeds or from other facilities named in the resolution authorizing the bonds. Minn. Stat. § 469.103, Subd. 5.

(e) Borrowing Money.

After authorizing general obligation or revenue bonds, the Authority may borrow money for the purpose for which the bonds are to be issued in an amount not to exceed the amount of the bonds to be issued. The loans must be evidenced by negotiable notes due not more than 12 months after the date of the loan, which notes are to be repaid from the proceeds of the bonds. Minn. Stat. § 469.101, Subd. 19.

4. Optional Use by Existing Port Authorities.

Any city that has established a port authority by special law or that has been granted the power to establish a port authority by special law may elect to use any of the powers granted in the Act, however, the provisions of the Act must be used exclusively and, upon an election to use the power set forth in the Act, any powers granted in the special law may no longer be used.

5. Cross-Fertilization Powers.

As noted previously, the Authority may exercise Industrial Development powers (contained in §§ 469.152 to 469.165) for HRA or EDA purposes, and it may also use HRA or EDA powers for Industrial Development purposes. The Authority may also exercise the powers of a City contained in §§ 469.124 to 469.134 (City Development Districts). This "cross-fertilization" gives Authorities great latitude in using the various powers contained in the statutes for various purposes within the statutes.

A. Purposes

1. HRA Purposes

The purposes of HRAs are to provide adequate housing and to clear and redevelop blighted areas. Minn. Stat. § 469.001 et seq. A "blighted area" means an area with buildings or improvements which are detrimental to the safety, health, morals or welfare of the community. Minn. Stat. § 469.002, subd. 11.

2. EDA Purposes

The purposes of EDAs are not made altogether clear by the statutes. Although the statutes make frequent references to EDA purposes, the statutes do not specify those purposes; in fact, the Legislature entangled, almost inextricably, the concept of purposes with the concept of powers. However, it does appear that one purpose of an EDA is to make land suitable and available for economic development uses and purposes and to encourage the location or expansion of economic development facilities.

3. Industrial Development Purposes

The broadest purposes are those which underlie municipal industrial development. Those purposes are the active promotion, attraction, encouragement and development of economically sound industry and commerce through governmental action for the purpose of preventing the emergence of blighted and marginal lands and areas of chronic unemployment. In essence, industrial development purposes are those necessary to encourage economic development.

B. Powers

Because the list of powers that may be exercised by a given Authority is so long, only those powers which seem most suited to economic development will be listed below.

1. HRA Powers

The HRA statutes give powers to both the HRA and the City to exercise in connection with redevelopment.

(a) HRA Powers as to Projects.

The schedule of powers contained in the HRA law states that an authority shall have all the powers necessary or convenient to carry out the purposes of the HRA law. Those powers include the power:

(1) To establish a redevelopment project under Minn. Stat. § 469.002, subd. 14, which may be to conduct an "urban renewal project" for elimination or prevention of blighted or deteriorated areas. The term project may be applied to all real and personal property, assets, cash, or other funds, held or used in connection with the development or operation of the project.

To establish a redevelopment project, the Authority must prepare a redevelopment plan, which the City must then approve. Minn. Stat. § 469.028. The City may approve the redevelopment plan after a public hearing for which at least ten (10) but not more than thirty (30) days published notice was given. The City must make the following findings in connection with its approval of the plan:

(i) the land in the project area would not be made available for redevelopment without the financial aid to be sought;

(ii) the redevelopment plans for the redevelopment areas in the locality will afford maximum opportunity, consistent with the needs of the locality as a whole, for the redevelopment of the areas by private enterprise; and

(iii) the redevelopment plan conforms to a general plan for the development of the locality as a whole.

Minn. Stat. § 469.028, subd.2

(2) To undertake, prepare, carry out, and operate projects and to provide for the construction, reconstruction, improvement, extension, alteration, or repair of any project or any part thereof; Minn. Stat. § 469.012, Subd. 1(4);

(3) To give, sell, transfer, convey or otherwise dispose of real or personal property or any interest therein and to execute leases, deeds, conveyances, negotiable instruments, purchase agreements, and other contracts or instruments and take action that is necessary or convenient to carry out the purposes in the HRA law; Minn. Stat. § 469.012, Subd. 1(5);

(4) To acquire real or personal property or any interest therein by gifts, grants, purchase, exchange, lease, transfer, bequest, or otherwise, and by the exercise of the power of eminent domain; Minn. Stat. § 469.012, Subd. 1(6);

(5) To borrow money or other property and accept contributions, grants, gifts, services or other assistance from the federal government, the state government, state public bodies, or from any other public or private sources; Minn. Stat. § 469.012, Subd. 1(13);

(6) To issue bonds of a type determined by the Authority for any of its corporate purposes. The Authority may secure the bonds by mortgages upon property held or to be held by the Authority or by pledge of its revenues, or a pledge of grants or contributions from the federal government or any other source; Minn. Stat. § 469.012, Subd. 1(15), § 469.034;

(7) To develop and administer an interest reduction program to assist the financing of the construction, rehabilitation, and purchase of housing units which are intended primarily for occupancy by individuals of low or moderate income and related and subordinate facilities. Minn. Stat. § 469.012, Subd. 7. The authority to authorize payment of interest reduction assistance expires on January 1, 1989; Minn. Stat. § 469.012, Subd. 10;

(8) To levy a special tax each year upon all property, both real and personal, within the taxing district (which includes all of the territory included within the area of operation of the Authority). The taxes will be kept in a separate fund known as the "housing and redevelopment project fund". The money in the fund may be used for HRA purposes and no other purpose. The tax may not exceed ten cents on each \$100 of taxable valuation in the area of operation; Minn. Stat. § 469.033, Subd. 6;

(9) An HRA may exercise the powers of a City under Sections 459.31 to 959.33 if the City, by ordinance, authorizes it. Under Sections 459.31 to 459.33, a city may establish and provide for the administration of a commercial building loan program to rehabilitate and preserve small and medium sized commercial buildings within its boundaries.

(b) City Powers as to Projects.

A state public body (which includes cities) may aid and cooperate in the planning, undertaking, construction or operation of projects by doing any of the following things:

(i) Dedicate, sell, convey, or lease any of its interest in any property or grant easements, licenses or other rights or privileges therein to an Authority; Minn. Stat. § 469.041 (1).

(ii) Pay the bonds of or make loans or contributions for redevelopment projects; Minn. Stat. § 469.041(1).

(iii) Do any and all things necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of projects; and

(iv) Furnish funds available to it from any source, including the proceeds of bonds, to an authority to pay all or any part of the cost to the authority of the activities authorized by section 469.012, subd. 1, clause (7) (acquiring real property, demolishing, removing or rehabilitating, or reconstructing the buildings or improvements, constructing new buildings or improvements thereon, or to prepare the site for improvements), Minn. Stat. § 469.041(9).

2. EDA Powers

See Section B, 1-5 of this outline.

3. City Development District Powers

A city may designate development districts within the city boundaries. After consulting with its planning agency and conducting a public hearing within a development district, the city may adopt a development program, acquire land or easements through negotiation or powers of eminent domain, adopt ordinances regulating traffic (pedestrian or automobile) in facilities constructed within the development district, and exercise certain other powers. Minn. Stat. § 469.126.

4. Industrial Development Powers

A municipality or redevelopment agency may:

(a) acquire, construct and hold any lands, buildings, easements, water and air rights, improvements to land and buildings, and capital equipment to be located permanently or used exclusively on a designated site and solid waste disposal or pollution control equipment and inventory, regardless of where located, that are deemed necessary in connection with a project to be situated within the state and construct, reconstruct, improve, better and extend the project (Minn. Stat. § 469.155, Subd. 2);

(b) pay part or all of the cost of an acquisition and construction by a contracting party under a revenue agreement (Minn. Stat. § 469.155, Subd. 2);

(c) enter into revenue agreements with any public or private entity to ensure revenue sufficient to pay principal interest on bonds issued under the statute (Minn. Stat. § 469.155, Subd. 5);

(d) pledge the revenues of one or more projects to payment of bonds, and it may mortgage or permit to be mortgaged a project and its revenues in favor of the city or authority, the bondholders, or a trustee therefor (Minn. Stat. § 469.155, Subd. 6 and Subd. 7);

(e) make contracts, execute instruments, and do all things necessary or convenient in the exercise of powers granted in the Municipal Industrial Development section (Minn. Stat. § 469.155, Subd. 8).

It may not operate a project as a business, and it may not expend funds on a project other than the revenues of the project or the proceeds of revenue bonds and notes or other funds granted to the municipality or authority for industrial development purposes. Since an EDA may exercise HRA powers for the purpose of industrial development, and since an HRA has clear authority to operate a project, this limitation has been overridden by other provisions of the statute.

C. Constitutional Concerns

1. Public Purpose Doctrine

Public funds may be used only for public purposes. Minnesota Constitution, Article X, § 1. ("taxes shall be levied and collected for public purposes"). Minnesota Constitution, Article XII, § 1. ("The Legislature shall pass no local or special law . . . authorizing public taxation for a private purpose.")

The Minnesota Supreme Court has given a broad interpretation to the meaning of public purpose, holding that such meaning "is ever evolving in light of contemporary conditions." Minnesota Energy & Economic Development Authority v. Printy, 351 N.W.2d, 319, 338 (Minn. 1984). Moreover, legislative determinations of public purpose, while not binding on the courts, are entitled to great weight. In fact, the Minnesota Supreme Court has held that "a reviewing court should overrule a legislative determination that a particular expenditure is made for a public purpose only if that determination is manifestly arbitrary and capricious." R.E. Short Co. v. City of Minneapolis, 269 N.W.2d, 331, 337 (Minn. 1978).

In making its determination, the court need not consider "extraneous factors such as the mode of financing", for such factors "have no bearing on the issue of public purpose. Lifteau v. Metropolitan Sports Facilities Commission, 270 N.W.2d 749, 754 n.6. (Minn. 1978) Instead, the court must focus on whether the expenditures will benefit the community as a whole and are related to the functions of government. Visina v. Freeman, 252 Minn. 177, 184-85, 89 N.W.2d 635, 643 (1958).

2. "But for" Finding

In addition to finding a public purpose for a project or program, it will be necessary to determine that the proposed project would not go forward within the City "but for" the assistance to be provided by the EDA. The City and/or Authority must demonstrate need for public assistance to the private entity and must make specific findings supporting that need.

The public purpose and "but for" determinations will have to be made on a case by case basis, looking at the particular facts of a proposed project or program.

3. Loan of Credit

Article XI, § 2 of the Minnesota Constitution provides that,
The credit of the state shall not be given or loaned in aid of any individual, association or corporation . . .

The Minnesota Supreme Court has consistently held that this provision applies only to the state, and not to its political subdivisions. Visina v. Freeman, 89 N.W.2d at 649; Davidson v. County Commissioners of Ramsey County, 18 Minn. 482. Accordingly, an Authority need not be concerned that a given project or program will be considered an impermissible loan of the City's or Authority's credit.

D. Availability and Appropriate Utilization of Revenue Sources

An EDA has several options for funding its activities. These include use of excess tax increments, general fund moneys of the City, proceeds of Bonds, proceeds from the levy of taxes and others. Crucial to the use of any of these revenue sources is that the Authority be able to find that "but for" such use, the economic development project the Authority is thereby trying to facilitate would not have occurred.

1. Tax Increments. A city may use excess tax increments to fund its Economic Development Authority. However, the use of such tax increments carries with it limitations that make it somewhat less useful than other sources of funds.

a. Revision of Plan. First, revenues derived from tax increments may be used only in accordance with a tax increment financing plan. This means, at a minimum, that existing development programs and tax increment financing plans may have to be revised to provide for use of tax increment by an Authority for the purposes contemplated by the Authority.

b. Limitation on Use of Tax Increment. Further, revenues derived from such tax increments may only be used by an economic development authority to finance or otherwise pay costs specifically listed in § 469.176, subd. 4, which include:

(i) The "capital and administrative costs" for projects undertaken in a "development district" created pursuant to the City Development District law. Tax increments derived from any existing tax increment districts created by the City would be subject to such a limitation. Unless the EDA could reconstitute the

development district as a "redevelopment project area" under HRA law, limitation of the use of tax increments to the payment of "capital costs" would permit use of tax increments to acquire a limited partnership ("equity") interest in a company only if the money paid for the partnership interest were spent on a "capital cost" of the project. Hence, the tax increments could not be used to fund working capital loans, whether or not funded directly or through an "equity" investment.

(ii) The "cost of redevelopment" for projects undertaken in an "economic development district" pursuant to the EDA law. The EDA law defines "cost of redevelopment" to mean acquiring property, demolishing or removing structures on acquired property, correcting soil deficiencies on acquired property, construction or installing public improvements, providing relocation benefits to occupants of acquired properties, planning, engineering, legal and other services necessary to carry out the above, and the allocated administrative expenses of the authority for the project. Clearly such costs do not include working capital loans, nor, for that matter, the cost of constructing or equipping a building. Furthermore, such costs must be incurred in an economic development district which in turn must satisfy, the stringent "redevelopment district" requirements of the Tax Increment Financing Act.*

(iii) The "public costs of redevelopment" for projects undertaken pursuant to the HRA law in a "project redevelopment area". Unlike the cost the projects discussed above, the HRA restriction does not limit the use of tax increments to capital costs. Thus, if the projects were undertaken pursuant to the HRA laws and were qualified as "any work or undertaking to provide housing for persons of moderate income and their families" or an "undertaking..... for the elimination or for the prevention of the development or spread of slums or blighted or deteriorating areas" and if any underlying land to be acquired as part of the public costs of redevelopment is either a "blighted area" or satisfies the conditions set forth in Minnesota Statutes, Section 469.028, Subdivisions 3 or 4, then there is little statutory restraint on how tax increments could be used to aid such projects so long as appropriate hearings are held and findings as to need are made by the City Council and the EDA.

(iv) The cost of financing or otherwise paying premiums for insurance or other security guaranteeing the payment when due of debt service on housing revenue bonds issued under Chapter 462C or industrial or commercial development revenue bonds issued under the Municipal Industrial Development Act or to fund and maintain a debt reserve for such bonds (not to exceed after five years from date of issuance 20% of the outstanding principal amount of such bonds).

* The "redevelopment district" requirements, which are already stringent, may become even more so if pending amendments to the Tax Increment Financing Act are enacted into law.

C. Transfer of Projects. In order to allow the EDA to use tax increments and other revenues derived from any development districts created under the City Development District law or from projects undertaken by any City or HRA, a City may elect, by resolution of the City Council, to transfer control of such projects and any underlying tax increment financing districts to the EDA. After the transfer, the EDA may exercise all powers the City or HRA had with respect to the project. The EDA must covenant and pledge to perform the terms, conditions and covenants of the bond indenture or other agreements executed for the security of any bonds issued by the City with respect to the program, and the EDA will become obligated on the bonds when the program is transferred. Such transfer, however, will not relieve the City of its full faith and credit pledge and tax levying responsibilities with respect to the bonds issued by the City. If the City should decide to retain jurisdiction over any development district, the City Council could still transfer the tax increments to the EDA pursuant to the annual budget so long as the tax increments are used in a manner consistent with the development district plan and tax increment financing plan adopted by the City.

2. General Fund Moneys of City. The Authority is required to send its budget to the City Council with an estimate of the amount of money the Authority expects to need from the City to do Authority business during the next fiscal year. This is the procedure under which the City may give to the Authority money from the City's general fund for the Authority to use. The benefit of using City general fund moneys lies in the fact that such moneys are not as limited in use as moneys from other sources. In short, general fund moneys may be contributed by the City to the Authority and used for any economic development purpose, so long as appropriate findings are made and safeguards are imposed to show that such use will be made to promote economic development within the City. Such use includes write-downs, grants or loans (including working capital loans) to companies to induce them to locate or expand in the City and the purchase of limited partnership interests.

3. Bonds. An Authority may use the proceeds of various types of bonds to fund its activities.

a. Tax Supported General Obligation Non-Tax Increment Bonds of the City. The City could issue tax supported general obligation ("G.O.") bonds which are not secured by tax increments and give the Authority the proceeds of its G.O. bonds to use in connection with development activity. The bonds would be subject to approval pursuant to an election. The bond proceeds could be used for any purpose for which the City's general fund moneys may be used except the payment of any current expenses of the Authority or the project.

b. Tax Supported General Obligation Bonds Issued by the Authority. An Authority could issue G.O. bonds which pledge the full faith and credit of the City, but only if approved by an ordinance adopted by the City Council. While those bonds would also be subject to the election requirement, the proceeds could be used for any purpose for which the City's general fund moneys may be used, including payment of current expenses, so long as provision is made to reimburse the Authority for such expenditures, plus interest at a rate equal to the average interest rate on the bonds.

c. Revenue Bonds of the Authority. The Authority could issue revenue bonds and use those funds for any purpose for which the City's general fund moneys may be used, without requirement for reimbursement. The revenues of the projects financed (and other revenues of the Authority) would be pledged to the repayment of the bonds. The Authority may also secure payment of the bonds by either a mortgage on certain Authority properties or a pledge of the Authority's, but not the City's, full faith and credit, or both. The Authority could also issue revenue bonds under the Municipal Industrial Development Act or housing revenue bonds under Chapter 462C and use tax increments to pay for any security guaranteeing payment of the bonds or to fund or maintain a reserve therefor. See paragraph lc. above.

d. Tax Increment Bonds. Either a City or its Authority could issue either G.O. bonds or tax increment revenue bonds secured by a pledge of tax increments without an election. Use of the proceeds of tax increment bonds would be subject to the same limitations as tax increment funds. (The Authority could also secure payment of the bonds in the same fashion allowed for revenue bonds discussed above.)

e. Using Credit of Sister Authority. Under the Joint Powers Act, the Authority could enter into a joint powers agreement with some other authority having substantially common power (e.g., the St. Paul Port Authority) under which the other authority could issue bonds and thereby lend its credit to finance a project in the City.

4. Tax Levy. An Authority may have its City levy a tax of 0.01813 percent of taxable market value for the benefit of the Authority. The City may increase this levy by following the "reverse referendum" procedure specified in the statute. In addition, the EDA could exercise its HRA powers and levy a tax of one third of one mill times the assessed valuation of taxable property in the City for the benefit of the Authority. This levy also requires City Council approval. The money obtained from the levy could be used for any purpose for which the City's general fund moneys could be used.

5. Reimbursement Tax Increment Money. Even if excess tax increments are restricted as to use, that restriction is removed once the tax increments are used to reimburse the City for general fund expenditures (including administrative costs) which could have been paid from tax increments.

6. Utility Taxes. We are unaware of any authority under which the City may impose any "utility tax" as a surcharge on rates and charges imposed for sewer and water to help finance economic development projects. Rates and charges may be increased, however, or a surcharge used, to raise the money required to expand the sewer and water system to accommodate economic development. On the other hand there is at least some authority for including a reasonable profit relating to the City's utility system. This "profit" could be transferred to the City's general fund and in turn used in the same manner as other general fund monies. Similarly, any franchise fee charged for the granting of a franchise to an investor owned utility (e.g., NSP) could be contributed in the same manner as other general fund moneys could be used.

7. Miscellaneous Sources of Revenue. The City could use developer payments in lieu of taxes or developer loan repayments for any purpose for which the City's general fund

moneys could be used.

Despite the broad interpretation given the public purpose doctrine, it remains crucial to demonstrate that public funds will be used for a public purpose. Public benefits such as the addition of jobs, the retention of jobs, the addition or retention of tax base, or the prevention or cure of blight will demonstrate that a project has the requisite public purpose. In any given project, providing for penalties if certain job or tax base criteria are not met will bolster a public purpose argument.