

STATE OF MINNESOTA  
IN COURT OF APPEALS

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No. A05-1419  
A05-1418

**The Housing and Redevelopment Authority  
for the City of St. Anthony, Minnesota,**

**Petitioner/Respondent,**

**vs.**

**Ronald Rasmussen, et al.,**

**Appellants.**

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No. A05-1418

**Ronald and Judith Rasmussen,**

**Appellants,**

**vs.**

**The Housing and Redevelopment Authority  
for the City of St. Anthony, Minnesota**

**Respondent.**

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**REPLY BRIEF OF APPELLANTS RONALD AND JUDITH RASMUSSEN**

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## INTRODUCTION

This case is about a broken promise. The Housing and Redevelopment Authority for the City of St. Anthony (the “HRA”) promised Ronald and Judith Rasmussen (“the Rasmussens”) that the Rasmussens could possess the subject property, without hindrance on the part of the HRA, until 2021. The HRA did not permit the Rasmussens to possess the property through 2021. Instead, the HRA terminated the Rasmussens’ Lease in 2004. The Rasmussens seek to hold the HRA accountable for breaking that promise. This case is that simple.

In its brief, the HRA does not address the simple. Rather, the HRA argues that it was free to break its promise to the Rasmussens because: (1) the HRA is really two separate and distinct entities; consequently, the HRA (the contractor) is not responsible for the conduct of the HRA (the sovereign); (2) the law permits the HRA to ignore its obligations under the Lease and, at the same time, enforce the condemnation provision of the Lease to deprive the Rasmussens of just compensation; and (3) public policy favors the construction of a technical loop-hole that permits a government landlord, and only a government landlord, to breach the terms of an otherwise enforceable lease with impunity.

As is stated in the Rasmussens’ principal brief, and as will be shown below, the HRA’s argument is not supported by Minnesota law. Nor is it supported by common sense. The Rasmussens respectfully request that the trial court orders granting the HRA summary judgment be reversed.

## ARGUMENT

### **I. THE HRA BREACHED THE LEASE.**

The critical facts underlying this case are undisputed. In 1997, the HRA made a contractual promise: so long as the Rasmussens did not default under the terms of the Lease, the Rasmussens would have possession of the property, without hindrance on the part of the HRA, until 2021. Under general principles of contract law, the HRA broke this promise and, thus, breached the Lease.

#### **A. The HRA is a single entity.**

Because it does not want to pay the Rasmussens for breaking its promise, the HRA takes the position that the HRA is not a single entity, but two.<sup>1</sup> According to the HRA, one part of the HRA is permitted to enter contracts. The other part has the power to exercise sovereign authority. The conduct of the HRA as sovereign, under this theory, is entirely divorced from the conduct of the HRA as contractor. Accordingly, if the HRA as sovereign interferes with a contract involving the HRA as contractor, the HRA as contractor is not in any way responsible for the conduct of the HRA as sovereign.<sup>2</sup>

Contrary to the HRA's assertion, the HRA is a single entity. Although it has the power of eminent domain and other sovereign powers, it is naïve to assume that the

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<sup>1</sup> The Rasmussens contend that the terms of their Lease were below market. By losing their advantageous Lease, the Rasmussens have been suffered damages in the hundreds of thousands dollars. The HRA, by constructing this fiction, is attempting to avoid paying the Rasmussens for their loss.

<sup>2</sup> The Rasmussens concede that the changing references between the HRA as sovereign and the HRA as contractor are confusing. The confusion caused by the alternating references underscores the hollowness of the fiction the HRA is attempting to construct.

exercise of one arm of the HRA's power is entirely separate from the other. The HRA as sovereign and the HRA as contractor work hand in hand. For the reasons set forth in the Rasmussens principal brief<sup>3</sup>, the HRA's attempt to split itself into two independent bodies to avoid liability should be rejected. In short, a broken promise by the HRA should be treated as a broken promise by the HRA.

**B. Even if the Court adopts the position that the HRA is really two separate entities, the HRA as contractor, breached the Lease.**

Even if the HRA's fiction is adopted, the HRA's position fails. At its heart, the HRA bases its argument on the premise that the HRA as contractor cannot be held liable for the actions of the HRA as sovereign. According to the HRA, because it was the HRA as sovereign that condemned the Rasmussens' interest in the property, the HRA as contractor cannot be held liable for breaching the Lease.

The analysis is not so simple. On December 19, 2003, the HRA and Apache Redevelopment, LLC, entered into a Redevelopment Agreement for the redevelopment of the former Apache Plaza shopping center. App. 122. As a party to the contract, the HRA was acting as a contractor. In the Redevelopment Agreement, the HRA as contractor agreed to terminate the Rasmussens' leasehold interest and to transfer the property to the developer. App. 130, 132.

At the time the HRA as contractor was negotiating with Apache Redevelopment, the HRA as contractor was still a party to its Lease with the Rasmussens. As a party to the Lease with the Rasmussens, the HRA owed the Rasmussens a duty of good faith and fair

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<sup>3</sup> For the purposes of this Reply Brief, references to the Rasmussens' principal brief are to the brief filed in Court File No. A05-1419.

dealing. *Enviro-Fab Inc. v. Blandin Paper Co.*, 349 N.W.2d 842, 848 (Minn. Ct. App. 1984). In addition, under the clear terms of the Lease, the HRA as contractor owed the Rasmussens a duty not to hinder the Rasmussens' use and possession of the premises. App. 110.

The moment the HRA as contractor agreed to terminate the Rasmussens' interest in the Lease, the HRA as contractor breached its Lease with the Rasmussens. The HRA as contractor, not the HRA as sovereign, set in motion the events that resulted in the early termination of the Rasmussens' interest in the property. Even under the HRA's theory, the HRA as contractor breached the Lease. Accordingly, the HRA must be held accountable for its breach.

**C. The sovereign acts doctrine does not save the HRA.**

Not surprisingly, no Minnesota law directly addresses whether a condemnor/landlord may terminate a lease with impunity. Minnesota jurisprudence is not prone, however, to the construct of fictions that are designed to permit the government to break its promises without consequence.

Minnesota is alone. As is noted in the Rasmussens' principal brief, federal courts have established the sovereign acts doctrine to address attempts by the state to use its sovereign power to avoid contractual liability. *See* Rasmussen Principal Brief, Court File No. A05-1419, pp. 17-18. As is also noted in the Rasmussens' principal brief, the HRA's actions do not fall within conduct protected by the doctrine. *Id.* The circumstances underlying the condemnation action, the magnitude of the HRA's self-interest in the condemnation, and the fact that the HRA specifically targeted its obligation to the

Rasmussens, demonstrate that the sovereign acts doctrine does not apply. *Id.* Contrary to the HRA's argument, the mere fact that the exercise of the power of eminent domain is considered to be a sovereign power does not, by itself, save the HRA from contractual liability. Even sovereign powers must be wielded in accordance with the law.

**D. The parties included the phrase "without hindrance" for a reason.**

The HRA cites law regarding the relationship between the covenant of quiet use and enjoyment (mainly the implied covenant) and a sovereign's exercise of the power of eminent domain. Most of the general law cited by the HRA addresses whether a landlord may be held liable when a third party condemns the property. *See, e.g., 1 American Law of Property*, § 3.54 (1952); *15 Williston on Contracts*, § 48:10 (4<sup>th</sup> ed 2000).

The theory underlying the general law cited by the HRA actually supports the Rasmussens' position. *American Law of Property* states that when property is condemned "[t]he interference with the tenant's possession is not due to any defect in the lessor's title and **cannot be prevented by him.**" *1 American Law of Property*, § 3.54, p. 288 (1952)(emphasis added). In this case, the landlord actively interfered with the Rasmussens' possession of the premises. It cannot be disputed that the HRA could have prevented the interference in this case.

In addition, the question before the Court does not turn on the application of the general law regarding implied covenants of quiet use and enjoyment. Rather, the question before the Court hinges on the language of Article 29A, which provides:

So long as Tenant shall perform each and every covenant to be performed by Tenant hereunder, **Tenant shall have peaceful and quiet use and possession of the Premises**

**without hindrance on the part of Landlord, and Landlord shall warrant and defend Tenant in such peaceful and quiet use and possession...**

App. 110. None of the law cited by the HRA addresses an express, affirmative promise by the landlord not to hinder the tenant's possession of the property. The language of the Lease, like any other contract, means something. The Court has an obligation to interpret and enforce the Lease as it is written. If the Court adopts the HRA's position, the phrase without hindrance will be rendered meaningless. Such an interpretation of the Lease runs contrary to basic principles of contract law.

By relying on the general law regarding implied covenants, the HRA seeks to rewrite the lease. Under the HRA's theory, Article 29A should be read as follows:

So long as Tenant shall perform each and every covenant to be performed by Tenant hereunder, **and unless and until Landlord decides to condemn or otherwise terminate the Tenant's interest in the premises**, Tenant shall have peaceful and quiet use and possession of the Premises without hindrance on the part of Landlord.

If the parties had intended for the landlord to have the right to terminate the Lease at will, they would have granted the landlord that right. They did not do so. The Rasmussens urge the Court to interpret the Lease as it was written, not as the HRA wishes it were written.

**E. The principal cases cited by the HRA are distinguishable.**

As it has done previously, the HRA cites *Goodyear Shoe Mach. Co. v. Boston Terminal Co.*, 57 N.E. 214 (Mass. 1900), *City of Glendale v. Giovanetto Enterprises*, 18 Cal. App. 4<sup>th</sup> 1768, 23 Cal. Rptr. 2d 305 (1993), and *Friedman on Leases* to support its

position. For the reasons noted in the Rasmussens' principal brief, *Goodyear Shoe* and *Giovanetto* are neither binding nor persuasive. *Friedman on Leases*, which merely cites *Goodyear Shoe* and *Giovanetto*, adds little to the analysis.

The HRA also relies heavily on *Dolman v. U.S. Trust Co. of New York*, 157 N.Y.S.2d 537 (N.Y. 1956). *Dolman* did not involve a condemnor attempting to terminate a lease prior to the expiration of the term without consequence. Rather, it address whether a landlord's cooperation with the City, which ultimately resulted in the City's condemnation of the property, constituted a breach of the covenant of quiet use and enjoyment.

*Dolman* is not entirely without out value for the purposes of this case. In fact, the dissent to *Dolman* is instructive regarding the policy underlying this dispute; it provides:

Under defendant's theory, a landlord could make a lease for a long period, include there in covenant for quiet enjoyment, permit the tenant to enter and establish himself in the property and then turn around and act toward the property as if there were no lease at all. And all this without incurring any obligation to reimburse the tenant for his loss.

*Id.* at 544. The HRA, like the landlord in *Dolman*, should not be permitted to proceed as if the operative Lease simply does not exist.

## **II. THE LEASE DOES NOT BAR THE RASMUSSENS' CLAIM IN THE CONDEMNATION ACTION.**

In the condemnation action, the HRA has sought to enforce the condemnation provision of the Lease to deprive the Rasmussens' of their right to obtain compensation for losing their leasehold interest. For the reasons set forth in the Rasmussens' principal brief, and for the reasons set forth below, the condemnation provision of the Lease should

not be applied. Even if it is considered, the condemnation provision does not bar the Rasmussens' claim.

**A. General principles of contract law and equity prohibit the HRA from enforcing the condemnation provision of the Lease.**

Several general principles of contract law and equity prohibit the HRA from enforcing the condemnation provisions of the Lease to prevent the Rasmussens from recovering just compensation for the taking. The HRA, in its brief, largely ignores those principles.

First, as is stated in the Rasmussens' principal brief, a party to a contract cannot benefit from its own wrongful conduct. *Zobel & Dahl v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984); *see also* Rasmussens' Principal Brief, Court File No. A05-1419, pp. 14-15. Rather than rebut this argument, the HRA contends that it did not act wrongfully. By any common definition, the HRA's decision to terminate the Rasmussens' interest in the subject property was wrongful.

Second, every contract in Minnesota contains an implied covenant of good faith and fair dealing, and every party to a contract is bound by that duty of good faith and fair dealing. *Enviro-Fab Inc. v. Blandin Paper Co.*, 349 N.W.2d 842, 848 (Minn. Ct. App. 1984); *Seman v. First State Bank of Eden Prairie*, 394 N.W.2d 557 (Minn. Ct. App. 1986). The early termination of a lease, when the tenant has not breached any of its obligations under the lease, does not constitute fair dealing.

Third, when interpreting and enforcing a contract, a court has the authority to apply equitable principles. *Allum v. MedCenter HealthCare, Inc.*, 371 N.W.2d 557, 560

(Minn. Ct. App. 1985). Equity will not permit a party to enforce a contract by means that were never intended and that are clearly harsh and oppressive. *Mattson v. Griefendorf*, 183 Minn. 580, 237 N.W. 588 (1931). In this case, the HRA broke its promise under the Lease. By ignoring its own duty under the Lease, the HRA provided an equitable basis for the Court to prevent the HRA from using the condemnation provision of the Lease as a sword.

**B. The Lease itself does not bar the Rasmussens' claim.**

The HRA contends that the condemnation provision of the Lease deprives the Rasmussens of the right to make a leasehold advantage claim in this proceeding. A careful analysis of the Lease language, however, reveals that the Rasmussens are not barred from making the claim.

**1. The compensation in this case is not an "Award."**

Article 17 of the Lease provides in part in part that the "[t]he Award for any taking shall be the sole property of Landlord." The term "Award," however, is defined by the Lease as "all compensation, sums or anything of value awarded, paid or received on a total or partial condemnation." App. 104. To determine whether compensation in this matter constitutes an Award, therefore, one must examine whether the compensation is paid on a "total or partial condemnation."

The phrases "Total Taking" and "Partial Taking" are referenced by the Lease. The phrase "Total Taking" is described as "all of the premises being taken in Condemnation." App. 104. In this case, all of the premises are not being taken. To the contrary, only the Rasmussens' leasehold interest in the property is being condemned. There is a critical

distinction between a taking of the entire premises and the taking of a leasehold. One involves the taking of the entire bundle of sticks, one involves a couple of sticks from the bundle. Because the entire premises are not being taken, this condemnation does not constitute a "Total Taking" under the terms of the Lease.

A "Partial Taking" is similarly described by the Lease as follows:

If (a) twenty five percent (25%) or more of the parking area in the Subject Parcel; or (b) twenty five percent (25%) or more of the rentable area of the Subject Parcel shall be taken; or (c) twenty-five percent (25%) or more of the square footage of the Premises shall be taken, then Landlord shall have the option to terminate this Lease by notice in writing to Tenant given within thirty (30) days after the Date of Taking, which notice shall take effect sixty (60) days after the Date of Taking.

App. 104. In this case, neither 25 percent of the premises, 25 percent of the rentable area, nor 25 percent of the parking area are being taken by the condemnor. Instead, the condemnor is only taking the Rasmussens' leasehold interest in the property. Contrary to the HRA's argument, this taking does not constitute a "Partial Taking" as that phrase is defined by the Lease. Because the compensation that is due in this proceeding does not result from a "Partial Taking" or a "Total Taking," it does not constitute an "Award." Because the compensation does not constitute an "Award," Article 17E does not apply to deprive the Rasmussens of compensation for their loss.

## **2. The waiver provision does not apply.**

The HRA also contends that in Article 17E, the Rasmussens waived their right to make a leasehold advantage claim. Article 17E, titled "Award," was clearly designed to

apply to “Awards” as that term is defined by the Lease. Again, because the compensation in this case is not an “Award,” the waiver provision does not apply.

Further, this provision was clearly not intended to apply to a case in which only the leasehold was condemned. Suppose a third party condemned the remaining term of the Rasmussens’ leasehold interest, and that the condemnation petition did not affect the underlying fee. Under the HRA’s theory, the third-party condemnor could take the Rasmussens’ advantageous lease, a lease that is worth hundreds of thousands of dollars, and pay the Rasmussens nothing. Obviously, that could not be the case. A third-party condemnor, condemning only the leasehold, would be required to compensate the Rasmussens’ for the taking.

The HRA appears to equate Article 17E with an assignment of the Rasmussens’ claim to the Landlord. The logic for this approach is obvious. If the provision constituted an assignment, the Landlord would be able to step into the shoes of the Tenant. In the hypothetical noted above, the third-party condemnor would be required to pay just compensation; the compensation would be paid to the assignee. Significantly, Article 17E does not mention, nor does it constitute, an assignment of the leasehold claim.

### **3. The Lease did not terminate automatically.**

Finally, the HRA contends that the Rasumussens are not entitled to make a leasehold advantage claim because the Lease terminated automatically upon the condemnation. It did not. As is noted above, the Lease provides that it will terminate

upon a “Total Taking” of the premises. For the reasons noted above, and for the reasons set forth in the Rasmussens’ principal brief, a “Total Taking” did not occur.

The Lease also defines the circumstances where the Landlord is able to terminate the Lease upon a “Partial Taking.” Again, for the reasons set forth above, and for the reasons set forth in the Rasmussens’ principal brief, a “Partial Taking” did not occur. Because a “Partial Taking” did not occur, the Landlord did not have the right under the Lease to terminate the contract.

**4. The cases cited by the HRA are distinguishable.**

The cases cited by the HRA, *Bradley Facilities, Inc. v. Burns*, 551 A.2d 746, 749 (Conn. 1988) and *Township of Bloomfield v. Rosanna’s Figure Salon, Inc.*, 602 A.2d 751 (N.J.A.D. 1992) are neither binding precedent, nor on point. In *Bradley Facilities*, the State of Connecticut (the governmental entity that later condemned the property) originally leased the property to the tenant. Thus, presumably the tenant was aware or should have been aware at the time of entering into the lease that its landlord had the power to condemn the property and, therefore, the tenant had the opportunity to negotiate the terms of the lease accordingly. In this case, the Rasmussens negotiated with the Ste. Marie Company. The Rasmussens did not have an opportunity to negotiate with the condemning authority (HRA) and, therefore, did not have the opportunity to negotiate provisions in the Lease to protect themselves against an early termination by a landlord with the power of eminent domain.

The facts of *Township of Bloomfield* are far different than the facts of the present case. In *Township of Bloomfield*, the township of Bloomfield purchased the fee interest

in a building occupied by the tenant. The parties agreed that the conveyance was in lieu of condemnation. *Id.* at 753. In this case, the parties agree that the HRA's purchase of Ste. Marie Company's interest in the property in 1997 was not in lieu of condemnation. *Bloomfield* is therefore distinguishable.

### **III. PUBLIC POLICY SUPPORTS THE RASMUSSENS' POSITION.**

Ronald and Judith Rasmussen operated their Tires Plus store in the City of St. Anthony from the early 1980s until 2004. The Rasmussens paid their rent in a timely manner (first to Ste. Marie, then to the HRA), maintained their store, and operated a good business. Nothing in the record suggests that the Rasmussens' property was itself in any way blighted or a detriment to the City of St. Anthony.

Wisely, in discussing the public policy questions underlying this dispute, the HRA does not attack the quality of the Rasmussens' operation. Rather, the HRA focuses on its effort to redevelop the failing Apache Plaza shopping center. Pointing to Chapter 469, the HRA contends that public policy, and indeed, Minnesota Statutes encourage the redevelopment of blighted areas.

The HRA misses the point. The Rasmussens do not dispute that redevelopment authorities, like the HRA, have the authority under certain circumstances to not only condemn blighted areas, but also to condemn surrounding non-blighted property. The question for the purposes of this case is not, however, whether blighted property can or should be developed. Rather, the policy question at issue is whether innocent victims (like the Rasmussens) who happen to own land adjacent to or surrounded by blighted property,

should receive just compensation when their property is taken in connection with a redevelopment.

As Justice Stevens noted in his opinion in *Kelo v. New London*, 125 S. Ct. 2655 (2005), the “Takings Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.” *Id.* at 2667, FN. 19. In this case, the HRA is doing everything it can to avoid paying its charge. Good public policy demands that the HRA pay its freight and that the Rasmussens be treated fairly.

Ironically, the HRA contends that the public policy favoring the enforcement of contracts supports its position. Taking the next step, the HRA argues that the Rasmussens knew exactly what the lease said when they entered it and they knew that they could not expect to receive an award for the loss of their leasehold interest. The HRA’s argument is incomplete.

In short, the HRA contends that the Rasmussens accepted the risk that their lease might be condemned, and that they waived any right to compensation for the loss of their leasehold advantage in the event the property was condemned. The HRA’s argument is deceptive. By focusing on the Lease terms that affect the Rasmussens, and the Rasmussens alone, the HRA ignores the undisputed facts surrounding the execution of the Lease.

In 1996, the Rasmussens negotiated their lease with the Ste. Marie Company. At that time the Lease was negotiated, the Ste. Marie Company did not have the power of eminent domain. Further, under the terms of the Lease, the landlord was required to provide the Rasmussens with the quiet use and possession of the property until 2021. If

the parties had intended that the landlord could terminate the Lease at will, with impunity, the Lease would have contained a termination provision addressing that intent. The Lease does not contain such a provision. In short, nothing in the Lease suggests that the Rasmussens accepted the risk that their landlord could terminate the Lease, without consequence, prior to the expiration of the Lease term.

The fact that the original parties to the Lease did not consider the possibility that the landlord and condemnor would be one and the same is evident from the definition of condemnation provided in the Lease. The Lease states that condemnation includes either:

- a) an exercise of any governmental power, whether by legal proceedings or otherwise, by a Condemnor, **OR** b) a voluntary sale or transfer **by the Landlord to any Condemnor**, either under threat of condemnation or while legal proceedings for the condemnation are pending.

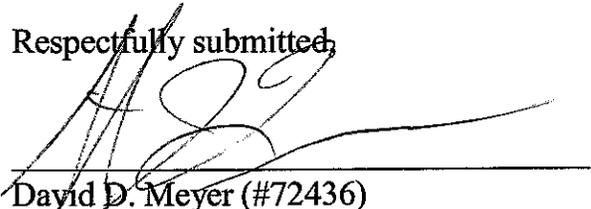
App. 104 (emphasis added). The definition not only contemplates the landlord and condemnor being separate entities, but that the landlord and condemnor are adversaries, *i.e.*, the condemnation is to be an involuntary condemnation or a voluntary sale due to the threat of condemnation. If the Rasmussens had had the opportunity to negotiate directly with the HRA, they would have undoubtedly negotiated provisions that specifically addressed the HRA's power to terminate the lease before the expiration of the Lease term.

Ultimately, this Court must decide whether the HRA, after enjoying the benefits of the Lease for seven years, may terminate the Rasmussens' leasehold interest 17 years before the expiration of the Lease term without consequence. Public policy, as well as the law, demand that the HRA be held accountable.

**CONCLUSION**

For the foregoing reasons, Appellants Ron and Judith Rasmussen respectfully request that trial court decision granting the HRA summary judgment be reversed, and that both matters be remanded for further proceedings.

Respectfully submitted,



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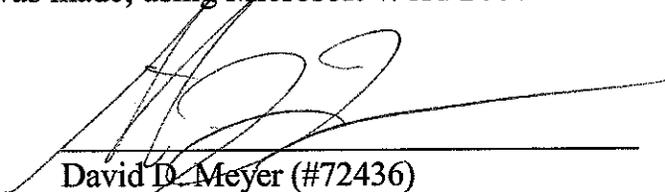
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**CERTIFICATE OF COMPLIANCE**

The undersigned, Steven J. Quam, hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(a), that the word count of the attached Brief of Appellants Ronald and Judith Rasmussen, exclusive of pages containing the Table of Contents and the Table of Authorities, is 4,114 words. The Brief complies with the typeface requirements of the rule and was prepared, and the word count was made, using Microsoft Word 2000.

Dated: September 30, 2005



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