

NO. A06-2400

State of Minnesota
 In Supreme Court

Metropolitan Airports Commission,

Respondent,

v.

Thomas W. Noble,

Respondent,

Speedway SuperAmerica LLC,

Appellant,

Northern States Power Company, n/k/a Xcel Energy;

State of Minnesota; County of Hennepin;

City of Bloomington,

Respondents.

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INTRODUCTION

Respondent Thomas W. Noble (“Noble”) constructs all of his arguments on the same flawed foundation: appellant Speedway SuperAmerica, LLC’s (“SA”) constitutional right to compensation upon condemnation is determined simply as a result of what Noble repeatedly characterizes as the “automatic termination” provision in Section 18(a) of the Lease. This eviscerates the constitutional right to just compensation because every holder of sticks in the real property bundle loses its sticks upon the taking. Noble as fee owner lost his property interest when SA did—at the moment respondent Metropolitan Airports Commission (“MAC”) took title to and possession of the property. Would Noble concede the absurdity that since he no longer held a property interest upon the taking, he was not entitled to just compensation in the face of clear intent to the contrary? Surely not. Yet this is the premise upon which Noble asks this Court to affirm the majority decision below, depriving SA of its contractually-preserved right to recover a separate fixtures award of \$360,000.00.

Noble does not dispute that SA acquired and installed the fixtures that were separately valued by the commissioners. Despite having not paid for the fixtures and having the benefit of a highly favorable rent rate¹, Noble claims that the “automatic termination” provision entitles him not only to all compensation for land and improvements, but also to the \$360,000.00 awarded for SA’s immovable fixtures. Noble

¹ Noble benefited from both rent escalators and percentage rent under the long-term Lease. A27-A28. *Cf. City of Rochester v. Northwestern Bell Tel. Co.*, 431 N.W.2d 874, 878 (Minn. App. 1988) (fixed rent lease equitably justified denial of taking award to tenants).

makes this claim notwithstanding that the parties specified how damages for the multiple property interests would be allocated. Even if a termination provision such as Section 18(a) were sufficient to work a forfeiture of the right of tenant to recover just compensation, it could only be for tenant's *leasehold interest*; termination of the Lease would not and could not automatically terminate tenant's right to just compensation for immovable fixtures, which are a wholly separate property interest from the leasehold. This is especially true when the Lease contains an express reservation by tenant of its right to compensation for the taking of its immovable fixtures.

Because tenant's constitutional right to just compensation for a taking is at stake, lease language intending to deprive tenant of this right must be clear and explicit. This is why a lease condemnation clause must include in addition to automatic termination language, benefits disclaimer language to ensure the intent of the parties that tenant forfeit its right to just compensation for the loss of its leasehold. Absent benefits disclaimer language, bare automatic lease termination language leaves uncertainty over whether it was the parties' intent merely to ensure that upon a taking, neither party owed the other any further duties under the lease, or whether it was the parties' further intent that tenant's right to just compensation for loss of the leasehold also be forfeited.²

Noble also claims that the "best reading" of Section 18(c) is that the parties intended this language to provide Noble with any damages awarded for SA's immovable

² A lease relationship implicates both property and contract rights. *See* 7A Nichols § G11.01[1][a]. Automatic termination without benefits disclaimer leaves in doubt which rights—property or contractual or both—were intended to be terminated.

fixtures, while granting SA a right that both state and federal law already secure to SA—relocation benefits. Noble’s suggested reading renders portions of 18(c)’s language superfluous and fails to account for other language. Relocation benefits have been statutorily recognized as a mandatory obligation of a condemning authority since at least 1973. The statutes recognize that relocation reimbursement is a right that cannot be waived absent specific language. No court has suggested that landlord would ever be entitled to tenant’s relocation benefits. Further, relocation benefits are not even determined in the condemnation action, but through a separate administrative procedure, making them by their very nature a separate award that would be paid directly to the moving party. Fatally for Noble’s argument, relocation benefits are not designed to pay for the “fair value” of fixtures—only their relocation.

The touchstone for deciding this case is the Lease language itself, as authorities cited by both parties recognize. The rationale and result that properly avoids forfeiture and that effectuates both (a) the constitutional mandate of just compensation and (b) the legal mandate that the intent of the parties to a contract as manifested by its unambiguous words must be enforced, is to reverse the majority decision of the court of appeals and allow SA to recover just compensation for its fixtures as the plain language of the Lease provides, a reading which both the district court and the dissent below recognized.

I. APPELLANT DID NOT GIVE UP ITS RIGHT TO COMPENSATION FOR FIXTURES UNDER THE LEASE.

As Noble acknowledges, this case like any condemnation matter, begins with the basic constitutional right to compensation for the governmental taking of private

property. See U.S. Const., 5th Amend.; Minn. Const., Art. I, § 13. For a tenant, “property” includes not just the right in the unexpired leasehold but also its right in the improvements including any immovable fixtures. See *National R.R. Passenger Corp. v. Faber Enter.*, 931 F.2d 438, 441 (7th Cir. 1991) (“A tenant ordinarily has a right to compensation for any increase in the market value of condemned property attributable to a permanent fixture or improvement.”); *Sykes v. United States*, 392 F.2d 735, 741 (8th Cir. 1968) (“The law of eminent domain clearly recognizes compensation for the taking of fixtures attached to the land even though severance from the land would render them worthless.”); 7A Nichols, Law of Eminent Domain, § 11.02 (Rev. 3d ed. 1990) (“Tenant’s Compensable Interests” include leasehold interest (Section [1]), trade fixtures and tenant improvements (Section [2])).

There is little dispute that when the taking includes tenant’s property interests, courts must also look to the terms of the lease because landlord and tenant may contractually agree to alter tenant’s constitutional right to just compensation. As with any question of contractual rights, resolution of this matter necessarily turns on a review of the agreed-upon terms of the lease to determine the parties’ intent. See *City of St. Paul v. Lambrecht*, 663 N.W.2d 541, 546 (Minn. 2003) (question of whether lessee entitled to compensation for taking of leasehold “requires interpretation of contractual provisions”) (emphasis added); *County of Hennepin v. Holt*, 296 Minn. 164, 172, 207 N.W.2d 723, 728 (1973) (concluding lease clause “disclosed a clear intent that the tenant should not share in the award made on account of the condemnation of the leased premises either for the termination of his leasehold estate or for improvements, if any, made by him to the

premises”) (emphasis added) (quoting *State Highway Comm. v. Oregon Investment Co.*, 227 Or. 106, 361 P.2d 71, 96 A.L.R.2d 1137 (1961)); *Korengold v. City of Minneapolis*, 254 Minn. 358, 95 N.W.2d 112 (1959) (applying prior case law interpreting “practically identical” lease term); *In re Widening Third Street, Buckbee-Meers Co. v. City of St. Paul*, 178 Minn. 552, 555, 228 N.W. 162, 163 (1929) (stating “[a]s we construe the quoted clause of the lease, its meaning was that in the event of the city’s appropriating the whole of the demised premises the lessee’s share in the damages was gone”) (emphasis added). It must never be discounted, however, that the starting principle as required by the United States and Minnesota Constitutions is tenant’s entitlement to compensation for the governmental taking of its property interests. It is only when the intent of the contracting parties clearly reveals otherwise that tenant can be held to have relinquished its right to compensation.

Unlike any prior decision of this Court, the question here is what were the parties’ intentions in the Lease with respect to SA’s right to compensation—not just for the taking of its leasehold, but also for the taking of its property interest in the immovable fixtures—where the Lease contains an explicit reservation of rights to compensation for the fair value of the fixtures? See *Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003) (“The primary goal of contract interpretation is to determine and enforce the intent of the contracting parties.”). This is not only the first time this Court has been asked to squarely address the question of tenant’s right to compensation for immovable fixtures, it is also the first time that it is faced with a lease that contains both a provision specifying that the lease terminates upon condemnation,

and a “damages” provision in which tenant has expressly reserved the right to receive the compensation at issue.³

Here, the Lease does not contain an unconditioned termination provision similar to what this court relied upon in *Third Street*. 178 Minn. At 553, 228 N.W. at 163. Nor is this a case where the Lease only contains a termination provision, plus a disclaimer of all right to compensation as was true in *Petty* and *Lambrecht*. *Petty*, 372 U.S. at 376; 66 S.Ct. at 599 (“[T]he Lessee shall not be entitled to any part of any award . . .”); *Lambrecht*, 663 N.W.2d at 546 (“[T]his lease shall terminate as of the date of such appropriation and all condemnation proceeds shall be the sole property of Lessor . . .”). Nor is this a case “where neither owner nor condemnor has appropriated any part of the tenant’s equipment or trade fixtures” as was the case in *Korengold*. 254 Minn. at 358, 95 N.W.2d at 113. Nor is this a case like *Holt* where tenant received compensation for the “use” of fixtures but was not entitled to the “value” of fixtures based on uncontested evidence that “the fee owners and Tenant concede that upon such termination (i.e., expiration of the lease) fee owners would be entitled to all leasehold improvements.” 296 Minn. at 172-73, 207 N.W.2d at 728. This is a case where the Lease contains a specific provision (Section 18(c)) outlining the rights of Noble and SA to receive compensation:

(c) Damages. In any event all damages awarded for such taking under the power of eminent domain whether for the whole or a part of the leased premises shall belong to and be the property of Landlord whether such damages shall be

³ The lease in *Holt* contained language by which tenant sought to reserve its right to compensation for the taking of fixtures and landlord did not challenge the fixtures award to tenant. 296 Minn. at 172-73, 207 N.W.2d at 728.

awarded as compensation for diminution in value to the leasehold or to the fee of the premises; **provided, however, that Landlord shall not be entitled to any award made to Tenant for the fair value of, and cost of removal of stock and fixtures.**

A36 (emphasis added).

Under basic contractual precepts and the clear rationale this Court has consistently articulated since 1929, SA could be held to have contractually agreed to alter its constitutional right to just compensation for the taking of its property interest in immovable fixtures, only if it can be concluded that the parties clearly and unambiguously expressed this intent in the Lease. In making such a determination, basic contract law requires considering the Lease as a whole, its purpose and in a manner that harmonizes all of its parts. *See Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (consider as a whole and harmonize all parts); *Advantage Consulting Group, Ltd. v. ADT Sec. Sys., Inc.*, 306 F.3d 582, 585 (8th Cir. 2002) (consider overall purpose). As both the court of appeals dissent and the district court concluded, the intent of these parties under the plain and unambiguous language of Section 18(c) providing that “Landlord shall not be entitled to any award made to Tenant for the fair value of, and cost of removal of stock and fixtures” (emphasis added), is that SA is entitled to the immovable fixture award in this case.

Not only is such a reading the only reasonable interpretation of the language, but it is also consistent with the purpose of the Lease to establish terms by which SA would possess the Property, operate a gasoline and convenience store, and protect its investment in substantial improvements SA would be making to the Property, including the addition

of fixtures whose cost new today would exceed \$500,000. *See* Immovable Fixture Appraisal, p. 2b-5 (valuing “Replacement Cost New” of immovable fixtures at \$577,237.00). SA’s immovable fixtures investment was protected in two ways under the Lease. First, the Lease was for an initial 10-year term, with two five-year options to renew, allowing SA sufficient time to amortize its more than half-million dollar investment in immovable fixtures. A27 and A43 (Lease term and options). Second, a specific damages provision in the Eminent Domain Clause of the Lease ensured that if a taking terminated SA’s expectancy in a 20-year lease term, then it could recover for the loss of its investment—which is precisely what the immovable fixtures award does. It values the fixtures at their replacement cost, reduced by depreciation. A61. Given the extensive investment that SA was making in immovable fixtures, it is only logical that SA desired that the Lease contain more than a standard disclaimer of damages for a governmental taking, or even the tentative language used in *Holt*.⁴ Rather, the parties

⁴ The lease in *Holt* provided that:

Lessee’s rights as against the condemner shall be limited to damages, if any, to its leasehold estate by reason of such taking and to damages, if any, to leasehold improvements and trade fixtures belonging to and installed by Lessee at its expense. All other items of damages are, as between Lessors and Lessee, hereby assigned by Lessee to Lessors.

296 Minn. at 172, 207 N.W.2d at 728 (emphasis added).

inserted clear language entitling SA to recover compensation for its investment in immovable fixtures in the event of condemnation.⁵

Since “it is generally held that condemnation terminates the lease as to the property condemned” regardless of the existence of a termination provision, the rule of law should be, and generally is, that the mere termination of the lease does not deprive the tenant of the right to compensation. 7A Nichols, Law of Eminent Domain, § 11.05[2]. But certainly, as this Court has long recognized, it is the parties’ intent that controls and when language of the lease clearly and unambiguously demonstrates that the tenant intended to retain its right to compensation for the government taking of its immovable fixtures, courts must honor that provision. *See Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974) (discussing obligation to honor parties’ intent as written). Honoring the parties’ Lease language here means awarding damages for SA’s immovable fixtures to SA.

II. RESPONDENT’S SURRENDER CLAUSE ARGUMENTS SHOULD BE REJECTED, BOTH BECAUSE RESPONDENT FAILED TO PRESERVE THIS ISSUE AND BECAUSE THE LEASE’S MORE SPECIFIC EMINENT DOMAIN CLAUSE CONTROLS.

Noble turns the rules of contract construction on their head by arguing that general provisions in the Lease’s Surrender Clause (Section 20) trump the more specific Eminent Domain Clause of Section 18. Even the court of appeals majority summarily rejected this argument: “Because Article 18 dealt specifically with eminent domain, we disagree with

⁵ *See infra*, Section III.C., concerning defects in Noble claim that 18(c) is “most likely” intended to preserve relocation benefits.

[Noble's] alternative argument that this matter is controlled by the 'surrender clause' found in Article 20 of the lease." A8. If Noble sought to challenge this ruling in this Court, he should have included the issue in his response to SA's Petition for Review as directed by Minn. R. App. P. 117, subd. 4: "Any responding party may, in its response, also conditionally seek review of additional designated issues not raised by the petition." Noble's failure to do so results in waiver of the issue on appeal. *See Anderly v. City of Minneapolis*, 552 N.W.2d 236, 239-40 (Minn. 1996) ("this court may decline to hear an issue if it is not raised in either a petition for further review or a conditional petition for further review").

Separate and apart from Noble's failure to preserve this issue, it fails on the merits. As the court of appeals correctly recognized, the Lease's Surrender Clause was never triggered in the condemnation action because the express and more specific language in the Lease's Eminent Domain provision (Section 18) is the operative language for purposes of determining the parties' respective rights to compensation for fixtures upon condemnation. Moreover, even if it could apply, the Surrender Clause cannot under the circumstances of this case provide Noble with any interest in the Immovable Fixtures.

A. The More Specific Eminent Domain Clause in Section 18 Controls.

Noble argues that the terms of Section 20 provide that the fixtures of the Property become landlord's upon termination of the Lease, and therefore became Noble's upon condemnation of the Property. A surrender provision should not apply in the context of a condemnation action where tenant does not surrender the property to landlord, but rather *the property's ownership transfers involuntarily to a third party—the condemning*

authority. But clearly a claim that Section 20 was intended to entitle the landlord to the a condemnation award for SA's fixtures cannot stand in the face of the specific "damages" provision of the eminent domain section that "Landlord *shall not* be entitled to any award made to Tenant for the fair value of, and cost of removal of stock and fixtures[.]" A36.

It is well established in the law of contract interpretation, to which the Lease is subject, that the specific controls over the general. *Burgi v. Eckes*, 354 N.W.2d 514, 519 (Minn. App. 1984). Here, Section 18 specifically and expressly addresses eminent domain and provides that SA is entitled to the award for the loss of immovable fixtures. This is the specific provision governing the disbursement of the court deposit for immovable fixtures. There is no language in the Surrender Clause indicating any application to a taking; Noble's attempt to rely on the less specific surrender provision here is inappropriate and should be rejected.

B. Neither *Holt* Nor *Faber* Is Applicable to the Lease Language Here.

Noble claims, "In *Holt*, this Court interpreted lease provisions similar to Article 20 [and] held that upon expiration of the lease, the leasehold improvements installed by lessee became the property of the lessor . . ." Noble Br. 19. This Court did no such thing. This discussion in *Holt* refers to tenant's challenge to the district court's determination that it was "entitled to only that portion of the gross award representing the reasonable value of the use of the leasehold improvements installed by it, rather than the value of the improvements themselves." *Holt*, 296 Minn. at 172, 207 N.W.2d at 728. This Court disposed of this issue not by interpreting the lease language but concluding that,

This issue is readily disposed of by the unchallenged statement in the affidavit of one of the fee owners, made in support of summary judgment, that '(t)he fee owners and Tenant concede that upon such termination (i.e., expiration of the lease) fee owners would be entitled to all leasehold improvements.

Id. at 172-73, 207 N.W.2d at 728 (emphasis added). Thus, the Court affirmed because there was no issue of fact that landlord owned the fixtures. To suggest that *Holt* interpreted any lease language, let alone language similar to the present Lease, in reaching this conclusion only further demonstrates the error of Noble's analysis.

Noble relies on *Faber*, claiming there were "similar circumstances to the present matter." Noble Br. 20. Again Noble's argument is based on isolated sentences of the opinion rather than an application of the court's plenary analysis. Applying *Faber's* reasoning to the present Lease results in SA receiving the immovable fixtures award.

With respect to the tenant's claim for compensation of immovable fixtures, *Faber* recognized the well-established law that a "tenant ordinarily has a right to compensation for any increase in the market value of condemned property attributable to a permanent fixture or improvement." *Faber*, 931 F.2d at 441 (emphasis added) (quoting 7A Nichols, Law of Eminent Domain, § 11.07 (Rev. 3d ed. 1990); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 476-477, 93 S.Ct. 791, 795-796 (1973)). The court concluded, however, that this general rule did not apply because the lease contained a specific provision that:

All alterations, decorations, installations, additions or improvements upon the demised premises, made by either party . . . *except movable trade fixtures, shall become the property of the landlord.*

Faber, 931 F.2d at 440-41 (emphasis in original).

Here, the Lease contains no such explicit provision. Instead, Section 20 states that as part of surrendering the leased premises “fixtures (other than Tenant’s trade fixtures, signs and carpeting) which shall have been made or installed by either Landlord or Tenant . . . shall remain upon and be surrendered with the leased premises as a part thereof . . . at the expiration or termination of this Lease.” A37 (emphasis added).

The most notable distinction from *Faber* is that Section 20 does not state that the fixtures “become the property of the landlord”. Rather, it provides that fixtures other than SA’s trade fixtures, signs and carpeting become a part of the real property at the expiration or termination of the Lease. Since the “leased premises” was being condemned and not surrendered to landlord, the immovable fixtures were “surrendered” to the MAC as part of the taking.

The other problem with Noble’s argument is that Section 20 excludes “Tenant’s trade fixtures, signs and carpeting”. The list of immovable fixtures that justifies the \$360,000.00 award clearly includes numerous signs. A54-55. Further, Noble’s own counsel characterized the fixtures underlying the award as immovable “trade fixtures.” A75, line 16. Thus, even if this Court were to conclude (a) that Noble’s Section 20 argument is properly before it, (b) that the more specific Section 18 does not control, and (c) that the language of Section 20 somehow allows Noble to claim title to the fixtures “other than Tenant’s trade fixtures, signs and carpeting,” it is readily apparent that Section 20 does not address all the actual fixtures that underlie the award.

Faber must also be distinguished based on differences in the “reservation” language. The parallel lease provision in *Faber* significantly differs from Section 18(c) and states, “The provisions of this Article . . . shall not prohibit Tenant from filing and proving *any claim it may have with respect to its fixtures . . .*” 931 F.2d at 441 (emphasis added). The Seventh Circuit concluded that “any claim it may have” did not confer any substantive right to the fixtures and the lease explicitly provided that the fixtures became the property of landlord.

This contrasts with Section 18(c), which does not attenuate tenant’s right like *Faber* (“any claims it *may have*”), but affirmatively states, “Landlord *shall not* be entitled to any award made to Tenant for the fair value of, and cost of removal of stock and fixtures” provided that the condemning authority permits a separate award to tenant. Since SA had a constitutional right to compensation for the fixtures unless it contracted to relinquish this right, the only reasonable reading of Section 18(c) is that SA is entitled to the \$360,000.00 award for its fixtures.

C. Under Respondent’s Perverse Logic, Not Even Respondent Would Be Entitled to the Immovable Fixtures Award Because Upon the Taking, Appellant Had No Interest in the Property Either.

Section 18 expressly provides “the term of this Lease shall cease as of the day possession shall be taken by such public authority.” Under Noble’s view, upon the taking, the immovable fixtures became part of the realty owned by the fee owner, which Noble claims is Noble. Here, in routine quick-take fashion, the district court ordered that upon deposit of the proper amount with the court, the taking occurs and “*title to* and possession of the Property shall immediately vest in the [MAC].” (Emphasis added).

A52. Thus, at the moment the Lease term ceased, MAC supplanted Noble as fee owner. Even if Section 20 were to apply, the fixtures would become the property of MAC. Therefore, under Noble's own theory, he is not entitled to receive the \$360,000.00. Since the MAC, as the owner of the Property, has not contested the payment to SA, this court should affirm the district court's award even if it were to conclude that Section 20 had some application to the present appeal. *See Bloom v. Hydro Therm*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating appellant must not only demonstrate error but also that the error resulted in prejudice).

III. SECTION 18(C) OF THE LEASE EXPRESSLY RESERVED TO APPELLANT THE RIGHT TO RECOVER FOR IMMOVABLE FIXTURES.

A. 18(c) Did Reserve to Appellant a Right of Recovery for Fixtures.

Noble argues that Section 18(c) "did not reserve or recreate any property right in SA in the immovable fixtures", claiming that what the automatic termination in Section 18(a) took away, the express entitlement of SA to any award "for the fair value of, and cost of removal of stock and fixtures" in Section 18(c) did not "restore". Noble Br. 23. Noble claims that "this Court rejected such an argument for an implied reservation in a similar situation in *Holt*." *Id.* There is nothing "implied" about the Lease's memorialization of SA's right to compensation for loss of its own fixtures; express language defines the right. Moreover, the Court's upholding of an award in *Holt* to tenant for the value of the use of leasehold improvements actually supports SA's position.

Holt affirmed a district court ruling that tenant's recovery was limited to 30 days of leasehold interest since the lease terminated 30 days after the taking. *Id.* at 171, 207

N.W.2d at 727. *Holt* further affirmed tenant's entitlement to recover the reasonable value of the use of its leasehold improvements—not simply for the 30-day period of the leasehold interest following the taking, but for the balance of tenant's lease term. *Id.* at 167, 207 N.W.2d at 725 (“[tenant] could additionally recover out of the award only the reasonable value of the Use of its leasehold improvements from the taking to ... the expiration of the lease, rather than the Value of the improvements”) and 296 Minn. at 172, 207 N.W.2d at 728. This conclusion undercuts Noble's fundamental premise that termination of the lease upon a taking deprives tenant of any claim for damages, since the Court upheld a damages award for the value of the use of the leasehold improvements for the entire balance of the lease term—precisely the same valuation that was made for SA's immovable fixtures. A50 (MAC appraisal report).⁶

⁶ The appraisal report stated,

In this appraisal analysis, *market* value and *use* value are considered equivalent since the highest and best use of the subject property as improved is for its continued use as a convenience store, car wash and gasoline outlet.

A50 (emphasis in original). In *Holt*, tenant challenged the leasehold improvements award because it was based on “the reasonable value of the Use of the leasehold improvements installed by it, rather than the value of the improvements themselves.” 207 N.W.2d at 728. As the above quote from MAC's appraiser indicates, in this case use value and market value were one and the same.

B. Under the Plain Language and Common Meaning of the Lease, There Was a “Separate Award” for Fixtures that Was “Permitted” by the Taking Authority Directly to Tenant.”(pp. 23-29)

1. Under common meaning and understanding, the commissioners issued a separate award for immovable fixtures.

Contrary to the rules of contract construction, Noble advocates elevating the Lease phrase “separate award” to term of art status and limiting its meaning to that applied in the narrow jurisdictional context discussed in *Holt*. Courts attribute the plain and ordinary meaning to contract language, not obscure technical meanings. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

In the rare instances where this Court has applied a technical meaning to a word or phrase, it was only because that meaning, through frequency of use, had acquired a status worthy of recognizing and applying in the given context. *Cf. King v. Dalton Motors, Inc.*, 260 Minn. 124, 109 N.W.2d 51, 53 (1961) (applying technical meaning to terms “first option” and “right of first refusal”, because “[b]y their continued and repeated use in real estate transactions ... [they] have acquired an established and technical meaning”). This is hardly the case with the phrase “separate award”, which Noble invokes from the 1973 *Holt* decision and which has only been cited by Minnesota appellate courts *six* times—*once* (in the decision below) for its discussion on “separate award.”

The dissent below exemplifies application of the plain and ordinary meaning of the words “separate award”:

The common meaning of “separate” is “distinct.” *The American Heritage College Dictionary* 1264 (4th ed. 2007). ... The award was separate. Both MAC and later court-appointed commissioners distinguished between the

condemnation damages for the property's "land and improvements" and its "immovable fixtures."

A15. The common-usage meaning of "separate award" in the Lease, as the dissent straightforwardly observed, is the value of the fixtures that was separately and distinctly determined, as distinguished from the value of the "underlying land, convenience store building and site paving." A50.

Noble's proffered construction further violates the longstanding contract construction principle that the Court must avoid an interpretation that is absurd or unjust. *Mead v. Seaboard Surety Co.*, 198 Minn. 476, 270 N.W. 563, 565 (1936) ("Another principle always to be remembered is that: 'So far as reasonably possible a construction is to be avoided which would lead to absurd or unjust results ...'"); *cf. Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 884 (Minn. 2002) (citing *Mead* in dissent). Noble's construction in reliance on the technical meaning of "separate award" from *Holt* would mean that tenant could *never* recover an award for immovable fixtures, since *Holt* held in deference to the unit rule that for purposes of court jurisdiction over an appeal from a commissioners' award, the "community of interest" between the fee and leasehold interests of landlord and tenant precludes the issuing of a "separate award" to landlord and tenant. Noble's construction renders the language without any force and effect—clearly an absurd result.⁷ Moreover, it is unjust since it is undisputed that SA bought, paid for and installed the immovable fixtures.

⁷ Noble's argument that the language can only refer to relocation benefits (Noble Br. 29) compounds the absurdity. *See infra*, Section III.C.

2. Under common meaning and understanding, the taking authority “permitted” the fixtures award to go to Appellant.

Again Noble goes beyond plain and ordinary meaning, arguing that the separate award was not “permitted by the taking authority” because MAC has no role in permitting or denying any award for fixtures. Noble Br. 27. This ignores that the condemning authority can surely oppose a claim for fixtures in myriad ways: it can oppose such an award by arguing that the fixtures are without value, or should not be separately valued. *See* 7A Nichols, Law of Eminent Domain § 11.05[4] (“Extremely problematic is the recent trend in which condemnors attempt to circumvent the tenant’s constitutional rights by driving a wedge between the landlord and her tenant.”). MAC could have argued that no separate valuation of fixtures should occur and that a single value should be established for the property and improvements taken. It is undisputed that MAC did not take such a position here; accordingly, it “permitted” the separate award for fixtures to go to SA.

This is further underscored by MAC’s appraisal reports, which separately identified the immovable fixtures and separately valued them from the land, building improvements and paving. A49, A58. MAC’s fixtures appraiser expressly asserted the view that compensation for the taking of the fixtures rightfully belonged to SA, not Noble:

Total Value for the Immovable Fixtures is allocated as:

FEE OWNER:	N/A
LESSEE:	\$357,104.00
TENANT:	<u>N/A</u>
TOTAL:	\$357.104.00

A58. While not a legal determination, this statement reflects the appraiser's common-sense conclusion (in turn proffered by taking authority MAC to the commissioners) that the immovable fixtures were owned by and now lost to SA, and that their value was owed to SA as "LESSEE" and not Noble as "FEE OWNER."

Once again, the dissent demonstrated the application of common sense and common meaning to this issue:

"[P]ermitted" means "[t]o allow the doing of." [*The American Heritage College Dictionary*] at 1037. The taking authority, MAC, has "permitted" the immoveable-fixtures [sic] award to be awarded directly to [SA] because it did not take a side after the commissioners specified that [Noble] *or* [SA] was entitled to its value of \$360,000. By its terms 18(c) does not require the taking authority to order or direct payment to respondent, but merely to allow it.

Proper application of the rules of contract construction requires rejection of the overly-strained and technical interpretations advanced by Noble. The plain and ordinary meaning of 18(c), as applied to the undisputed facts, compels the conclusion that there was a "separate award" of \$360,000.00 for immovable fixtures that the taking authority—MAC—has permitted to go directly to SA as tenant.

C. Respondent's Speculative Argument that Appellant's Right to Recovery Under 18(c) is Limited to Relocation Expenses Defies the Rules of Contract Construction.

Noble argues that Section 18(c) "only makes sense ... in the context of granting relocation payments for the removal of personal and fixtures property." Noble Br. 29. This argument abrogates the rule of contract construction that "[a] contract must be interpreted in a way that gives all of its provisions meaning." *Current Tech.*, 530 N.W.2d

at 543. Limiting 18(c) to relocation reimbursement fails to give meaning to all the language in the provision because relocation payments do not reimburse for the “fair value of ... fixtures,” but only the cost of relocating movable trade fixtures and personal property.⁸ The Lease language recognizes that certain fixtures will be immovable (movable fixtures are not valued—they are moved and become subject to federal and state statutory relocation reimbursement), will remain as part of the real property⁹ and may be separately valued, as they were here.

The dissent below succinctly rejected Noble’s tortured reading of the plain language of the provision:

I am not convinced that because [SA] is entitled to damages “for the fair value of, *and* cost of removal of stock and fixtures” that 18(c) was designed to provide only the lessee’s relocation costs. (Emphasis added.) The “and” does not require that the fixtures be moveable, but rather that the lessee is entitled to an award for the fair value of its fixtures *and* costs related to their removal, if any. **At the time the parties entered into the lease, Minnesota law provided a right to relocation-related damages. Minn. Stat. §117.52, subd. 1 (1992). There was no need for the parties to create a right in the lease that already existed pursuant to statute.**

A14 (emphasis added; footnote omitted). Since 1976, Minnesota’s relocation statutes have further included an express anti-waiver provision that precludes landlord from waiving relocation benefits for eligible tenants, further underscoring the dissent’s point

⁸ See Minn. Stat. §§ 117.50 to 117.56, providing for relocation assistance, services, payments and benefits to displaced persons.

⁹ See A53 (appraisal report defining fixture).

that there “was no need for the parties to create a right in the lease that already existed pursuant to statute.” *Id.*; see Minn. Stat. § 117.521, subd. 2.

Noble’s relocation argument further runs aground because it renders meaningless the phrase “permitted by the taking authority.” Relocation law does not allow a taking authority to deny a displaced person relocation benefits. Minn. Stat. § 117.52 (“acquiring authority ... shall provide all relocation assistance, services, payments and benefits required [by federal law]”); see *In Re Relocation Benefits of Wren*, 699 N.W.2d 758, 762 n. 4 (Minn. 2005) (“MURA incorporates URA standards as to the types of benefits that an acquiring authority must provide.”).

IV. AWARDING APPELLANT JUST COMPENSATION FOR ITS FIXTURES LOST THROUGH CONDEMNATION IS AN OUTCOME CONSISTENT WITH PAST EMINENT DOMAIN CASELAW, THE RULES OF CONTRACT CONSTRUCTION AND THE CONSTITUTION.

Noble presents this Court with a false dichotomy by arguing that Minnesota law mandates in the presence of automatic termination language in a lease condemnation clause that landlord takes everything and tenant takes nothing. Noble urges the court not to “overrule or change” the law. Noble Br. 31. Minnesota eminent domain decisions have long recognized the central precept of SA’s arguments to this court: that in the presence of a lease condemnation clause, the lease language controls the distribution of the condemnation proceeds. SA merely advocates an analysis that does not dichotomize the taking damages outcome, that recognizes the constitutional dimension to a taking award, that honors the law’s longstanding abhorrence of forfeiture by avoiding it, and

that recognizes there are multiple tenant property interests that may be at stake in a taking.

This Court has recognized since at least 1929 that the state and federal constitutions require that every party with an interest in condemned property must receive just compensation for the interest. As noted above, Courts across the country and the most-recognized scholarly treatise on eminent domain recognize that tenants possess property interests in both the unexpired leasehold and tenant-owned immovable fixtures that have been added to the property. While it is clear that tenant can contractually relinquish or limit its right to just compensation, the constitutional dimension of the right demands of the contracting parties specificity for the waiver and demands of the courts close scrutiny of the contract language employed.

The rule of law applied by the majority below and advocated by Noble mandating total deprivation of tenant's right to just compensation in the presence of automatic termination language is at odds with constitutional demands. Before the majority decision below, no court had ever suggested that a tenant had relinquished its constitutional right to compensation for its immovable fixtures in the face of a contractual provision so clearly indicating a contrary intent. Such an application is contrary to the rule of law allowing tenant to define contractually its right to compensation and places tenant in an untenable position. If there is no provision specifying that the lease terminates upon condemnation, tenant may be exposing itself to a claim that its obligations to landlord under the lease continue after the taking. But under the rationale of the majority below, if the lease contains a termination provision, tenant will be charged

with relinquishing all its rights to compensation, regardless of specific language to the contrary.

There is no logical reason why in this limited context a rule of law should exist that flies in the face of the well-recognized principles that the law abhors forfeiture, that courts must consider contract language in its entirety to determine the parties' intent, that waiver of a constitutional right must be clear and knowing, and that the termination of a person's interest in property is the very act that triggers the constitutional right to compensation.

To these ends, SA submits that the better rule of law is to require lease condemnation clauses to be clear and explicit in delineating what property rights are either waived or preserved in the event of a taking. Part and parcel of such a requirement should be the recognition that when courts are confronted with lease provisions that are less than clear, the courts must err on the side of avoiding forfeiture and preserving the constitutional right to just compensation. SA submits that a clause that calls simply for automatic termination without benefits disclaimer language is less than clear and should be insufficient to deprive tenant of its constitutional right to just compensation.¹⁰

¹⁰ Noble correctly observes that in 1988, the court of appeals in *Nw. Bell* recognized that "a small minority of states are currently changing their interpretation of *Petty Motor* to require both termination and benefit disclaimer clauses before forfeiture is imposed", but the court "decline[d] to adopt the emerging doctrine" 431 N.W.2d at 878. In doing so, the court of appeals was merely adhering to its mandate. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). This Court declined review of *Nw. Bell* in 1989, which "do[es] not constitute an endorsement of the reasoning of the court of appeals or the result" *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 245 (Minn. 2005). SA

Similarly, automatic termination does not answer and merely begs the question: what about tenant's other property interests? Absent express lease language effecting clear waiver of any such other interests, again, SA submits that enforcing courts should err on the side of preserving the constitutional right to just compensation. Finally, where, as here, express lease language unambiguously reflects the intent of the parties that tenant receive an award made for immovable fixtures (or any other property interest), it should be unremarkable that such language must be enforced by its terms.

CONCLUSION

For all the above-stated reasons and for all the reasons argued by appellant Speedway SuperAmerica LLC in its principal brief, SA respectfully requests this Court to reverse the decision of the court of appeals and remand this case to the district court for entry of judgment awarding the damages for immovable fixtures in the amount of \$360,000.00, plus accrued interest, to SA.

Dated:

21 July 2008



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respectfully submits that the time has come to recognize the importance of demanding clear lease language before working forfeiture of the constitutional right

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to just compensation.

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the requirements of Rule 132.01 of the MN Rules of Civil Appellate Procedure. Specifically, the brief contains 6958 words in compliance with the word count limitation contained in Rule 132.01 subd. 3 and conforms with all typeface requirements of Rule 132.01 subd. 1. The brief was prepared using Microsoft Word 2003.

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