

Nos. A07-1918 and A07-1930

State of Minnesota  
In Supreme Court

Moorhead Economic Development Authority,  
*Respondent,*

vs.

Roger W. Anda, et al.,  
*Appellant,*

and

Kjos Investments,  
*Respondents-Below.*

**BRIEF OF AMICI CURIAE  
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## STATEMENT OF THE ISSUES

1. What is the date of the taking and valuation in a “quick take” condemnation case?

The Courts below: Held or indicated that the date of taking is the date on which the condemnation commissioners file their award, rather than the date of the “quick take.”

Authorities: Minn. Stat. § 117.042; *Iowa Electric Light & Power Co. v. City of Fairmont*, 243 Minn. 176, 67 N.W.2d 41 (1954).

2. Is evidence regarding environmental contamination and cleanup costs admissible for the purpose of reducing a property owner’s damages in a condemnation case.

The Courts below: Held in the affirmative.

Authorities: *Olson v. United States*, 292 U.S. 246, 78 L. Ed. 1236 (1934); Minn. Stat. § 117.012, Subd. 1; *Department of Transportation v. Parr*, 633 N.E.2d 19 (Ill. Ct. App. 1994), *appeal denied* 642 N.E.2d 1276 (Ill. 1994); *Aladdin v. Black Hawk County*, 562 N.W.2d 608 (Iowa 1997).

## STATEMENT OF THE CASE AND FACTS

*Amici* Howard A. Roston and Bradley J. Gunn (“*Amici*”) are attorneys who have practiced primarily in the area of eminent domain or condemnation law for a combined total of over 40 years. They represent both property owners and condemning authorities, with a greater emphasis on representing property owners. This brief is submitted in support of Appellants Roger W. Anda and Bette Anda (“*Anda*”), because the decisions below appear to be contrary to law in several respects, and because these are important and recurring issues that require definitive determinations by this Court. The brief will address only the condemnation aspects of the appeal, and not those relating to the tort issues.<sup>1</sup>

This appeal involves two separate legal actions and three properties. The first action, in a chronological sense, was the condemnation action in which the Moorhead Economic Development Authority (“MEDA”) acquired the Holiday Office Park property (“HOP Property”) from Anda. The second action was a tort claim under which MEDA sought to recover environmental clean-up costs from Anda for contaminants found on two adjacent properties that Anda did not own and which MEDA had acquired for a redevelopment project.

In the condemnation case, MEDA determined that the fair market value of the property was \$500,000 and it made its “quick take” deposit in that amount, pursuant to Minn. Stat. § 117.042, in April 2001. On June 29, 2001, the district court granted

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<sup>1</sup> *Amici* will be paid a fee by Appellant Anda for their work on this brief. Counsel for Anda did not participate in the preparation or submission of this brief in any way.

MEDA's petition for condemnation and its motion for a "quick take," and the court ordered that MEDA would obtain title to, and possession of the HOP Property on July 2, 2001. On March 10, 2003, the condemnation commissioners filed their award finding the damages from the taking (*i.e.*, the fair market value of the property) to be \$488,750. Anda appealed the award to district court and MEDA cross-appealed.

In or about February 2006, MEDA brought its tort claim against Anda for the recovery of environmental clean-up costs of two adjacent parcels that it had acquired. The two cases were subsequently consolidated for trial.

The cases came on for a jury trial commencing on April 27, 2007. On May 7, 2007, the jury returned two special verdicts. In the condemnation case, the jury found that the fair market value of the HOP Property "had it not been impaired by fuel oil contamination" was \$455,000, and that the fair market value of the HOP Property "taking into account the fuel oil contamination" was \$0. In the environmental case, the jury found negligence on the part of Anda and damages incurred by MEDA "as a result of the contamination" of the two other parcels in the amount of \$454,277 for Parcel I and \$20,235 for Parcel II.

On May 29, 2007, the district court issued two separate Findings of Fact, Conclusions of Law and Orders for Judgment. In the condemnation case, the court ordered entry of judgment in favor of Anda in the amount of zero. In the environmental case, the court ordered entry of judgment in favor of MEDA, and against Anda, in the amount of \$474,512 (plus costs and disbursements). Anda subsequently brought motions for new trials in both cases. On August 8, 2007 the district court denied both motions.

Anda thereafter appealed both cases to the Minnesota Court of Appeals. On October 28, 2008 the Court of Appeals filed a decision affirming the orders of the district court. This Court subsequently granted Anda's petition for further review.

### **STANDARD OF REVIEW**

The issues raised by *Amici* in this brief are issues of law and as such are entitled to *de novo* review.

## ARGUMENT

This brief addresses two separate issues: (1) what is the proper date of valuation in so-called “quick take” condemnation cases, and (2) when the government condemns and acquires private property that has alleged or real environmental contamination, should issues relating to the clean-up costs and liability be determined in the condemnation action or in a separate proceeding? The answer to the first issue is clear to virtually all condemnation attorneys, on both sides of the aisle, but the lower courts in this case either muddled the issue or simply got it wrong. The second issue has not been decided by this Court, but the decisions below are poor public policy, fundamentally unfair to property owners whose property is condemned and contrary to basic principles of condemnation law.

*Amici* wish to emphasize at the outset that if Anda, or any other property owner, is responsible for environmental contamination than he should be responsible for such contamination in the same manner and to the same extent as any other property owner. The position urged by *Amici* in this brief would not diminish a property owner’s environmental responsibility or liability in any way. Rather, it would simply ensure that the issues of environmental responsibility and liability are resolved outside of the scope of the condemnation process, which is neither intended nor suited to resolve such matters.

**I. IN SO-CALLED "QUICK TAKE" CONDEMNATIONS, THE DATE OF THE TAKING IS THE DATE OF THE QUICK TAKE.**

It is fundamental that, in condemnation cases, the government must pay "just compensation" for the property that it acquires. U.S. Const., Fifth Amend.; Minn. Const. Art. I, Sec. 13. In the vast majority of cases, just compensation is measured by the "fair market value" of the property that is acquired. *See*, CIVJIG 52.65 and cases cited therein. In determining the fair market value of the property, it is equally fundamental that the property must be valued as of the date that the government "takes" the property, which is known as the date of the taking.

Historically, the date of the taking --which is the date that the government obtains title to and possession of the property -- was the date on which the court-appointed condemnation commissioners filed their award of damages. Accordingly, there are numerous appellate decisions stating that the date of the taking is the date of the commissioners' award. By the early 1970s, however, the government found that it sometimes needed to acquire property more quickly and more consistently than the date on which the condemnation commissioners managed to complete their hearings and to file their awards. Thus, the Minnesota legislature adopted the so-called "quick take" statute, Minn. Stat. § 117.042, which provided a procedure by which the government could obtain title to, and possession of, private property on as little as 90 days notice. The statute requires the government to pay the property owner, or to deposit with the district court, its estimate of the damages, and the court may then order the property to be transferred to the government. In such cases, the property owner loses the property as of

the date of the “quick take,” but he or she retains the right to challenge the final determination of damages. Over the past 10 or 20 years, *Amici* believe that over 95% of condemnation actions have been “quick take” condemnations.

In this case, it is undisputed that MEDA proceeded under the quick take statute. It is undisputed that MEDA made its quick take deposit with the district court, in the amount of \$500,000, on or about April 29, 2001. It is also undisputed that the district court’s order on June 29, 2001 granted MEDA the right to title and possession of the HOP Property on July 2, 2001. MEDA did in fact take possession of the property soon after July 2, 2001. In short, the date of the taking in this case was July 2, 2001, and not the date that the commissioners filed their award in March 2003.

This is significant because in condemnation cases market value is determined with respect to the value and the condition of the property as of the date of the taking. *Iowa Electric Light & Power Co. v. City of Fairmont*, 243 Minn. 176, 67 N.W.2d 41 (1954). *See also, Twin Cities Metro. Pub. Transit Area v. Twin City Lines, Inc.*, 301 Minn.386, 224 N.W.2d 121, 128 (1974).

In the present case, the district court erroneously concluded that “[t]hus, if the date of the taking is deemed to be March 17, 2003, the date on which the Commissioners made their award, the value of the property was zero, as the jury found.” (App. Br. at App. 20) The district court reasoned that since the environmental contamination on the HOP Property was discovered shortly after MEDA took possession in July 2001, then it was a factor that was known and which must be considered as of the supposed date of the taking in 2003. The Court of Appeals’ decision on this point is not entirely clear, but it appears that the

Court also believed that “damages in a condemnation action are determined as of the time the commissioners file their award.” (App. Br. at App. 2.)

As a matter of law, the date of the taking in this case was July 2, 200, since that was the date on which MEDA obtained title to and possession of the property. *Amici* are not aware of any evidence in the record indicating that there were any environmental concerns regarding the HOP Property as of that date. Accordingly, there should be no offset for potential environmental problems when those problems were not even known on the date of the taking.

*Amici* therefore request the Court to clarify that the date of the taking in “quick take” condemnations is the date of the quick take, and not the date of the commissioners’ award.

**II. ISSUES RELATING TO ENVIRONMENTAL LIABILITY SHOULD NOT BE DECIDED IN THE CONTEXT OF CONDEMNATION ACTIONS.**

Beyond the question of whether environmental issues are discovered before or after the date of the taking, the condemnation arena is simply the wrong forum for deciding questions of environmental responsibility and liability, for all of the following reasons:

**A. The Constitutional Mandate of “Just Compensation” Does Not Support the Concept of an Environmental Offset in the Context of a Condemnation Action.**

As noted above, when the government condemns private property it has a Constitutional obligation to pay the owner just compensation. Indeed, this Court has stated that once the government's petition for condemnation is granted, the sole remaining

issue in a condemnation case is the determination of the owner's just compensation. *City of Maplewood v. Kavanagh*, 333 N.W.2d 857, 859 (Minn. 1983).

In determining the owner's just compensation, several fundamental principles are applicable to the issues raised on this appeal:

- The requirement of just compensation means that the government must "put the owners in as good a position pecuniarily as if the use of their property had not been taken." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 37 L. Ed. 463 (1893); *Olson v. United States*, 292 U.S. 246, 78 L. Ed. 1236 (1934).
- The requirement of just compensation means that the property owner must be "made whole" for his or her losses. *Olson, supra*, 292 U.S. at 255.
- The right to "just compensation" must be liberally construed in favor of the property owner. *Adams v. Chicago, B. & N.R. Co.*, 39 Minn. 286, 39 N.W. 629, 631 (1888).

In the present case, the record reflects the fact that Anda owned a successful office property which MEDA decided to condemn for a redevelopment project. MEDA's own appraiser valued the property at \$500,000 for purposes of the quick take deposit. If just compensation means making the owner whole, and restoring the owner to the financial position that he or she occupied before the taking – as it does – then the environmental offset in this case defeats those purposes and frustrates the goal of just compensation.

Again, if there are issues of environmental contamination on a property then they should be resolved through the normal environmental procedures, and not in the context

of a condemnation action where they are inconsistent with the principles of just compensation.

**B. Minnesota's Condemnation Laws Do Not Support the Concept of an Environmental Offset in the Context of a Condemnation Action.**

The power to condemn property is legislative, and the legislature has enacted specific statutes regulating the procedure for effectuating that power. This Court has recognized that such proceedings are not civil actions, but are "special proceedings," which are administrative and quasi-judicial in nature, whether conducted by judicial or nonjudicial officers. *Antl v. State*, 19 N.W.2d 77, 79 (Minn. 1945), citing *State ex rel. Simpson v. Rapp*, 39 Minn. 65, 67, 38 N.W. 926, 928 (1888). The Court in *Simpson* further observed:

The propriety of the exercise of the right of eminent domain is a political or legislative and not a judicial question. The manner of the exercise of this right is, except as to compensation, unrestricted by the constitution, and addresses itself to the legislature as a question of policy, propriety, or fitness, rather than of power.

39 Minn. at 67, 38 N.W. at 927.

Minnesota Statutes Chap. 117 sets forth the exclusive process and procedures established by the Legislature for the exercise of the power of eminent domain in Minnesota. Indeed, the Chapter provides that "Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, all condemning authorities, including home rule charter cities and all other political subdivisions of the state, must exercise the power of eminent domain in accordance with the provisions of

this chapter, including all procedures, definitions, remedies, and limitations.” Minn. Stat. § 117.012, Subd. 1.

Simply put, Minn. Stat. Chap. 117 does not contemplate or provide for the determination of questions of environmental responsibility, which are the subject of numerous other statutes, in the context of condemnation actions. The attempt to interject complex environmental issues into the procedures set forth in Chapter 117 is a proverbial square peg in a round hole.

**C. Introducing Environmental Issues Into Condemnation Cases May Be Very Unfair and Prejudicial to the Property Owner.**

This case appears to be the poster child for another reason that environmental issues should be resolved outside the scope of a condemnation case. The record in this case indicates that MEDA spent over \$1.2 million to remediate the HOP Property. It appears to be undisputed that MEDA was contractually obligated to convey the property to Moorhead Hospitality Limited Partnership by August 1, 2001 (the deadline was extended and the property was actually conveyed on August 9, 2001), and that MEDA was further obligated to provide Moorhead Hospitality Limited Partnership with an environmentally clean site by that date.

After discovering the contamination on the HOP Property in early August 2001, MEDA and Moorhead Hospitality Limited Partnership were on an extraordinarily tight schedule to clean up the site and to meet the contractual deadlines. Anda maintains that, because of this timetable, the clean up efforts were rushed and mismanaged. (App. Br. at 11-12) Anda further maintains that if MEDA had not condemned the property and Anda

had learned of the contamination, his clean up costs would have been in the range of \$100,000 to \$150,000, and that 90 percent of those costs would have been covered by the Minnesota Petroleum Fund. (App. Br. at 12)

It is not unreasonable to assume that the clean up costs were significantly increased because of the redevelopment contracts that had nothing to do with Anda (other than the fact that they caused his property to be condemned in the first place). Under such circumstances, it would be fundamentally unfair and prejudicial to Anda, or any other property owner, to face exposure for inflated clean up costs that were caused by the actions, commitments and timetables of the condemning authority, over which the property owner had no control.

In determining the fair market value of property in condemnation cases, it is said that the needs of the condemning authority are irrelevant. The question to be decided is what the owner has lost, not what the taker has gained. *Minneapolis-St. Paul Sanitary District v. Fitzpatrick*, 201 Minn. 442, 277 N.W. 394 (1937). In the present case, it appears that this principle has been turned upside down, and that the needs of MEDA were allowed to “trump” the legitimate rights and expectations of Anda.

In addition, the “project influence rule” is a principle of eminent domain valuation that prohibits consideration of the effect of the project that led to the taking on the value of the property. As stated in *Minneapolis HRA v. Minneapolis Metropolitan Co.*, 273 Minn. 256, 41 N.W.2d 130 (1966), “any increase or decrease in market value due to the proposed improvement may not be considered in determining market value.” *Id.* at 135, citing *Olson, supra*, 292 U.S. at 256. Similarly, this Court has explained that “[n]either

an owner nor a condemnor is permitted to gain by any increase or decrease in value of the land taken due to the impact upon land values generated by an area redevelopment project for which the tracts included are acquired.” *Regents of University of Minnesota v. Hibbing*, 302 Minn. 481, 225 N.W.2d 810, 813 (1975).

In the present case, it appears that MEDA’s redevelopment project and its accompanying timetables and contractual obligations was the reason for the rushed cleanup efforts and the allegedly excessive costs. In addition to being fundamentally unfair to Anda, this would also be prohibited by the project influence rule, which requires the property to be valued as though the project had never been contemplated.

**D. Resolving Environmental Contamination Issues in the Condemnation Arena Is Likely to Deprive the Property Owner of Rights and Defenses Available in Normal Environmental Actions.**

*Amici* do not claim to possess any particular expertise with respect to environmental law and environmental issues. Nonetheless, they understand that state and federal laws provide a comprehensive framework of environmental laws and regulations that address issues of environmental responsibility and liability, as well as specific procedures for resolving those issues. Such matters are far outside of the scope of Minn. Stat. Chap. 117, the eminent domain chapter, and are also beyond the scope of the expertise of most professionals (attorneys, appraisers, condemnation commissioners, etc.) who work in the area of eminent domain.

One can also imagine situations in which the government would condemn a person’s property and pay little or nothing for it because of alleged environmental contamination, and then a year or two later when the property was cleaned up under the

normal environmental procedures the property owner could be found separately liable for the cleanup costs, and end up having to effectively pay for the remediation twice. After all, the discount in the condemnation case would reflect the “market value” of the property, while liability under environmental laws would be an entirely separate matter. This would be fundamentally unfair, and it again emphasizes why condemnation issues should be resolved in the condemnation context, and environmental issues should be resolved in the environmental context.

**E. While the Case Law on this Issue Is Mixed, A Number of Courts have Recognized that There Are Strong Public Policy Reasons for Keeping Condemnation and Environmental Cases Separate.**

Appellant’s brief properly cites *Department of Transportation v. Parr*, 633 N.E.2d 19 (Ill. Ct. App. 1994), *appeal denied* 642 N.E.2d 1276 (Ill. 1994) and *Aladdin v. Black Hawk County*, 562 N.W.2d 608 (Iowa 1997) as two cases supporting the view that issues relating to environmental contamination should be resolved outside of the condemnation arena and that evidence as to such contamination should not be admissible in a condemnation case. In *Parr*, the Court held in part that the admission of environmental cleanup costs in a condemnation case would allow the government to circumvent the procedures established by the legislature and the Environmental Protection Agency for recovering environmental remediation costs. In *Aladdin*, the Court held that a condemnation award that deducted estimated cleanup costs from the value of the property would deprive the owner of just compensation, and that the environmental issues should be determined in a separate environmental action that would provide the owner with procedural safeguards that are not available in a condemnation action.

Similarly, several other courts have reviewed this issue and concluded that evidence of environmental contamination and remediation costs are not admissible in condemnation cases, because the condemning authority can seek to have environmental issues determined in a separate action in which the property owner's liability can be established. *See, Housing Auth. of City of New Brunswick v. Suydam Invs.*, 177 N.J. 2, 826 A.2d 673, 686-87 (N.J. 2003); *Matter of City of New York v. Mobil Oil Corp.*, 12 A.D.3d 77, 83-85, 783 N.Y.S.2d 75 (2004); *Matter of City of Syracuse Industrial Development Agency v. Alterm, Inc.*, 20 A.D.3d 168, 171-72, 796 N.Y.S. 503, 506 (2005).

The policies underlying the decisions in these cases are sound, and a similar decision in this matter would best and most fairly serve the interests of condemning authorities and property owners alike.

**CONCLUSION**

For all of the reasons set forth herein, *Amici* respectfully request the Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,229 words. This brief was prepared using Microsoft® Word 2000.

Respectfully submitted,

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