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 *AMICUS CURIAE* LEAGUE OF MINNESOTA CITIES

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LEGAL ISSUE

Minnesota law provides that just compensation for the condemnation of private property is determined by the property's fair market value. Is evidence of environmental contamination and remediation costs admissible when determining the fair market value of condemned property if the environmental contamination existed at the time of the taking and is discovered before just compensation is determined?

The court of appeals upheld the district court's use of a special-verdict form that allowed the jury to consider the effect of environmental contamination and remediation costs on the fair market value of the condemned property.

INTRODUCTION

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 854 Minnesota cities including the city of Moorhead. The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy development, risk management and advocacy services. The League has a public interest in this appeal as a representative of the hundreds of Minnesota cities with the power of eminent domain.[1]

The League was formed by special legislation in 1913 and was originally part of the Extension Division of the University of Minnesota. The League became a separate organization in 1974. The League's mission is to promote excellence in local government through effective advocacy, expert analysis and trusted guidance for all Minnesota cities.

The League's *amicus curiae* program allows the League to submit *amicus curiae* briefs in appellate cases that address significant municipal issues. This allows the League to provide appellate courts with a statewide perspective of the practical and policy implications of the precedent set by their decisions. The League has an eight-member board made up of city attorneys and city officials from cities throughout Minnesota that selects cases for the League's participation as *amicus curiae*.

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[1] Pursuant to Minn. R. Civ. App. P. 129.03, the League certifies that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity made a monetary contribution to its preparation or submission.

The League's *amicus curiae* board selects cases that will have a significant, statewide impact on cities. As a result, when the League participates as *amicus curiae*, it generally does so in support of a city or an instrumentality of a city. However, the League has also filed *amicus curiae* briefs in support of school districts, counties, townships, the state and other governmental instrumentalities.[2]

The League of Minnesota Cities Insurance Trust (LMCIT) is a separate legal entity formed in 1980 as a joint-powers entity under Minn. Stat. § 471.59 to create a self-insurance pool to meet the unique insurance needs of cities. The city of Moorhead is a member of LMCIT. LMCIT is not providing any insurance-related services in connection with this case.

In this case, the Moorhead Economic Development Authority ("MEDA") condemned Mr. Anda's commercial office property in a quick-take proceeding. Environmental contamination was discovered on the property after the district court approved the condemnation petition but before just compensation was determined. The environmental contamination existed on the property before the condemnation petition was filed. The court of appeals upheld the district court's use of a special-verdict form that allowed the jury to consider the effect of environmental contamination and remediation costs on the fair market value of the condemned property.

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[2] *See, e.g., Piche v. Indep. Sch. Dist. No. 621,* 634 N.W.2d 193 (Minn. Ct. App. 2001); *Sletten v. Ramsey County,* 675 N.W.2d 291 (Minn. 2004); *Brown v. Cannon Falls Township,* 723 N.W.2d 31 (Minn. Ct. App. 2006); *In re PERA Police and Fire Plan Line of Duty Disability Benefits of Brittain,* 724 N.W.2d 512 (Minn. 2006).

STATEMENT OF THE CASE AND FACTS

The League concurs with MEDA's statement of the case and facts.

STANDARD OF REVIEW

The League concurs with MEDA's statement of the standard of review.

LEGAL ARGUMENT

I. Evidence of environmental contamination and costs of remediation should be admissible when determining just compensation for condemned property because the evidence is relevant and is necessary to accurately determine the property's fair market value.

MEDA's Brief demonstrates why the court of appeals' decision should be affirmed. The League concurs with MEDA's legal arguments and will not repeat them here. Instead, this brief will focus on why it is good public policy to admit evidence of environmental contamination and remediation costs ("environmental-contamination evidence") when determining just compensation for condemned property if the environmental contamination existed at the time of the taking and is discovered before just compensation is determined.

A. The issue of the admissibility of environmental-contamination evidence is not properly before this Court.

The issue of the admissibility of environmental-contamination evidence is not properly before this Court because Mr. Anda stipulated to its admission and did not brief the issue at the court of appeals. *See* MEDA's Brief at 19-22. If this Court chooses to address this issue, however, the League submits this brief for its consideration because this issue has statewide significance.

This issue has statewide significance because it is likely that there is a substantial amount of land in Minnesota that has been environmentally contaminated due to its industrial and commercial use years before many of our current environmental laws were adopted. As a result, it is also likely that there will be many other redevelopment projects in our state that will involve the condemnation of environmentally contaminated land.

B. This is an issue of first impression for this Court.

The issue of whether environmental-contamination evidence is admissible when valuing property in a condemnation case is an issue of first impression for this Court. And like most issues this Court considers, there are competing public policies at stake. It cannot be disputed that environmental-contamination evidence is relevant to the fair market value of the affected property. The real issue is whether there is a more compelling public policy that would justify excluding this relevant evidence.

The states that have considered this issue have split adopting one of three different approaches.[3] A majority of the states admit environmental-contamination evidence reasoning that this evidence is relevant to determining the fair market value of condemned property.[4] A minority of the states exclude environmental-contamination

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[3] *See* Michael L. Stokes, *Valuing Contaminated Property in Eminent Domain: A Critical Look at Some Recent Developments,* 19 Tul. Envtl. L.J. 221 (Summer 2006); Andrea L. Reed, *Cleaning Up Condemnation Proceedings: Legislative and Judicial Solutions to the Dilemma of Admitting Contamination Evidence,* 93 Iowa L. Rev. 1135 (March 2008).

[4] *See, e.g., Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.,* 5 Cal. Rptr.2d 687 (Cal. Ct. App. 1992); *City of Olathe v. Stott,* 861 P.2d 1287 (Kan. 1993); *Tennessee v. Brandon,* 898 S.W.2d 224 (Tenn. Ct. App. 1994); *Finkelstein v. Dep't of Transp.,* 656 So.2d 921 (Fla. 1995); *Dep't of Transp. v. Hughes,* 986 P.2d 700 (Or. Ct. App. 1999); *Ne. Ct. Econ. Alliance, Inc. v. ATC P'ship,* 776 A.2d 1068 (Conn. 2001); *Silver Creek Drain Dist. v. Extrusions Div., Inc.,* 663 N.W.2d 436 (Mich. 2003).

evidence based primarily on concerns about procedural and substantive due process.[5] And finally, some of the states have adopted a compromise approach, which admits limited environmental-contamination evidence regarding the property's value in a remediated state (acknowledging that contaminated property will have a reduced fair market value due to stigma attached to it even after its remediation), and then allows for a portion of the condemnation award to be escrowed until environmental liability has been determined.[6] The League believes that a balancing of public policies favors the majority approach of fully admitting environmental-contamination evidence when determining just compensation for condemned property.

C. Environmental-contamination evidence is relevant and is necessary to accurately determine the fair market value of condemned property.

The government must pay just compensation when it condemns private property. U.S. Const. Amend. V; Minn. Const. Art. I, § 13. Just compensation is determined by the fair market value of the condemned property. *State v. Pahl,* 100 N.W.2d 724, 728 (Minn. 1960); *Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 9-10 (1984). Fair market value is defined as what a willing buyer would pay in cash to a willing seller at the time of the taking. *City of St. Paul v. Rein Recreation, Inc.,* 298 N.W.2d 46, 49 (Minn. 1980); *Kirby Forest Indus., Inc.,* 467 U.S. at 9-10.

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[5] *See, e.g., Dep't of Transp. v. Parr,* 633 N.E.2d 19 (Ill. App. Ct. 1994); *Aladdin, Inc. v. Black Hawk County,* 562 N.W.2d 608 (Iowa 1997).

[6] *See, e.g., Hous. Auth. of City of New Brunswick v. Suydam Investors, LLC,* 826 A.2d 673 (N.J. 2003); *City of New York v. Mobil Oil Corp.,* 783 N.Y.S.2d 75 (N.Y. App. Div. 2004).

The argument in favor of admitting environmental-contamination evidence is simple. First, the existence of environmental contamination will impact how much a willing buyer would pay for the affected property. As a result, it is relevant to the property's fair market value. Second, if environmental-contamination evidence is admitted, it will result in the most accurate determination of just compensation – compensation paid for with taxpayer dollars. The Connecticut Supreme Court recognized the importance of accurately valuing condemned property when it concluded that environmental-contamination evidence is admissible.

> Excluding contamination evidence, as a matter of law, is likely to result in a fictional property value – a result that is inconsistent with the principles by which just compensation is calculated. It blinks at reality to say that a willing buyer would simply ignore the fact of contamination, and its attendant economic consequences, including specifically the cost of remediation, in deciding how much to pay for property.

N.E. Ct. Econ. Alliance, Inc., 776 A.2d at 1080.

D. The arguments made to justify excluding relevant environmental-contamination evidence are not sufficiently compelling.

The two main arguments made to justify excluding environmental-contamination evidence are based on procedural and substantive due process concerns. These concerns are not sufficiently compelling to justify the exclusion of relevant evidence that is necessary to accurately value condemned property.

1. Procedural due process argument

The procedural due-process argument focuses on the risk of using a condemnation case (an *in rem* proceeding) to decide questions of environmental liability because the landowner does not have the same procedural safeguards that exist in an environmental

cost-recovery proceeding (an *in personam* proceeding). In an environmental cost-recovery proceeding, for example, a defendant can bring third-party claims against other responsible parties.

This argument is not persuasive because it compares apples (valuation of contaminated property) to oranges (determination of liability for contamination of property). Stokes, *supra* note 3, at 241-244. The procedural due process argument fails to recognize that a condemnation case is only concerned with determining property value. Evidence regarding liability for environmental contamination does not need to be introduced in a condemnation case because it is not relevant. As a result, the claims and issues litigated in a condemnation case should not have preclusive effect on the property owner's ability to defend against a finding of liability in a subsequent environmental cost-recovery action. *Id.*

In short, the fair market value of contaminated land is the same no matter who is responsible for the contamination. The Connecticut Supreme Court considered and dismissed a property owner's procedural due process argument when it held that environmental-contamination evidence is admissible.

> The condemnor is acquiring property in a given condition, and with a value on that condition. How the property got to be that way and who is responsible has nothing to do with that determination. To deny the condemnor the right to put on evidence [of contamination]... because it may not reflect the owner's degree of responsibility for the condition misses the point of an eminent domain valuation process. If a condemnor sought to acquire a property which had been damaged by the negligence of a third party (e.g., lateral support, landslides), the condemnor would not pay the undamaged value of the property because the condition was not the owner's fault.

Ne. Ct. Econ Alliance, Inc., 776 A.2d at 1083.

2. Substantive due process argument (double-take argument)

The substantive due process argument (also called the double-take argument) focuses on the risk that a condemnor might acquire condemned property (at a discount because of environmental contamination) and also acquire rights as the property's new owner, to sue the condemnee for the cost of cleaning up the contamination resulting in a "double take" of the property. Reed, *supra* note 3, at 1150-1152. The substantive due-process argument raises a legitimate concern, but this concern can be adequately addressed by courts.

Courts have access to statutory provisions and common law principles that would prevent a double take. Stokes, *supra* note 3, at 245-250. The Comprehensive Environmental Response Compensation and Liability Act (CERCLA), for example, contains a provision designed to prevent a double recovery. "Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded for receiving compensation for the same removal costs or damages or claims as provided in this chapter." 42 U.S.C. § 9614(b). Minnesota contains a similar provision in its Environmental Response and Liability Act.

> A person who recovers response costs or damages pursuant to sections 115B.01 to 115B.15 may not recover the same costs or damages pursuant to any other law. A person who recovers response costs or damages pursuant to any other state or federal law may not recover for the same costs or damages pursuant to sections 115B.01 to 115B.15.

Minn. Stat. § 115B.13.

In addition, courts would be free to apply the common law principle against double recovery to prevent a double taking based on a prior condemnation award that was

offset because of environmental-contamination evidence. Stokes, *supra* note 3, at 245-250. Because courts have tools to prevent a double take, the substantive due process argument is not sufficiently compelling to justify excluding relevant environmental-contamination evidence.

If courts do not have a sufficiently compelling reason to exclude relevant evidence, they should not do so without clear legislative direction. It should be up to our Legislature to decide if relevant environmental-contamination evidence should be excluded when valuing condemned property. The Legislature and not the courts should debate and decide whether it is good public policy to use taxpayer dollars to pay inflated condemnation judgments for property that is environmentally contaminated. Indeed, our Legislature has been quite active in amending the eminent-domain laws in the past few years and no doubt would not hesitate to act again if it determined another amendment was necessary.

Trust-escrow approach

The compromise trust-escrow approach was designed to prevent double takings. This approach values contaminated property as if it had been remediated and allows the condemnor to present limited environmental-contamination evidence relating to the contamination's remaining stigma effect on property value after remediation. *See, e.g., Housing Auth. of the City of New Brunswick,* 826 A.2d 673, 676 (N.J. 2003). Evidence relating to remediation costs is excluded because remediation is assumed. *Id.* The condemnor may seek an order to escrow a portion of the condemnation award to satisfy

remediation costs once liability is determined in an environmental cost-recovery action. *Id.*

The compromise trust-escrow approach should be rejected because it – like the minority approach – excludes relevant evidence without a sufficiently compelling reason. Again, the Legislature and not courts should debate and decide whether relevant evidence should be excluded in condemnation cases. In fact, one commentator has suggested that the best solution to this issue is a legislative fix that would prevent double takes by specifying that environmental-contamination evidence is fully admissible in condemnation proceedings and that any reduction in value due to the contamination will offset any future cleanup liability. Reed, *supra* note 3, at 1161.

It may also be tempting to exclude some or all environmental-contamination evidence in order to avoid complicating condemnation proceedings. This is bad public policy, however, because it ignores the actual condition of the land. In order to get the most accurate determination of just compensation for condemned property, and in turn, to protect taxpayer dollars, it is best to let both sides fully litigate all evidence relevant to the property's valuation.

II. Environmental-contamination evidence should be admissible if the environmental contamination existed at the time of the taking and is discovered before just compensation is determined.

In this case, it is undisputed that the environmental contamination was not discovered until after the court approved the condemnation petition. It is also undisputed, however, that the environmental contamination existed on the property before the

condemnation petition was filed, and as a result, was present on the date of the taking regardless of how that date is determined.

An Oregon appellate court considered a similar issue where petroleum contamination was discovered on condemned property during highway construction that occurred after the condemnation petition was filed but before damages were assessed. *Dep't of Transp. v. Hughes,* 986 P.2d 700 (Or. Ct. App. 1999). The Oregon appellate court reversed the trial court's decision to exclude the environmental-contamination evidence holding that it was relevant to the fair market value of the property and the state should have been allowed to present evidence that a reasonable buyer would have done testing that would have revealed the contamination. *Id.*

The Oregon appellate court reasoned that the valuation of condemned property is not based on the expectations or information known to the parties at the time of the condemnation, but rather, valuation is determined based on what a hypothetical but willing buyer would pay for the property. *Id.* at 704.

> Consequently, the fact that the specific parties here did not have information regarding contamination that existed on the property at the time of the filing of the condemnation action should not, as a matter of law, preclude the introduction of evidence about the contamination that could fairly have been brought forward at that time by a potential buyer of the property.
>
> Further, although it would be inequitable to allow evidence of a change in the condition of the property that occurred after the filing of the condemnation action, or to allow evidence of changes in value resulting from the filing of the condemnation action, we find nothing inequitable about allowing evidence about the condition of the property *on the date of valuation* that happened to be discovered between that time and trial, if the information could have been brought forward and considered on the date of valuation.

Id. (Emphasis in original).[7]

Likewise in this case, the environmental contamination was discovered before just compensation was determined and existed on the property before the condemnation petition was filed. The court of appeals noted in its decision that "according to the record, contamination of the property began years earlier and continued until its discovery in August 2001." *Moorhead Economic Dev. Auth. v. Anda,* 2008 WL 4705663 (Minn. Ct. App. 2008) (unpublished) (Respondent's Appendix at 106).

In addition, the contamination would have been discovered by a willing buyer. After MEDA gained access to the property, a simple walk-through inspection revealed a fuel oil furnace and what appeared to be a fuel port and a filler pipe for an underground storage tank. *See* MEDA's Brief at 7. A willing buyer would have likewise inspected the property, discovered evidence of an underground storage tank and performed testing to reveal the contamination. In fact, inspection and testing likely would have been required before any institution would provide financing for the purchase of this type of property in a voluntary transfer.

And finally, like the Oregon case, this is not a situation where the value of the condemned property has been affected by a change to the property that occurred after the condemnation action was initiated of by the fact that the condemnation petition was filed. Instead, the environmental contamination was present when the condemnation petition

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[7] In Oregon, fair market value is measured "as of the date the condemnation is commenced or the date the condemnor enters on and appropriates the property, whichever first occurs." *Dep't of Transp. v. Lundberg,* 825 P.2d 641, 644 n. 6 (Or. 1992).

was filed, and as a result, was also present on the date of the taking regardless of how that date is determined. In short, the environmental-contamination evidence should be admitted because it: is relevant to the property's fair market value; existed at the time of the taking; was discovered before just compensation was determined and would have been discovered by a willing buyer in a voluntary transfer.

CONCLUSION

This Court's holding will affect condemnation proceedings across our state. Environmental-contamination evidence should be admissible when determining just compensation for condemned property because this evidence is relevant to the property's fair market value and will result in the most accurate determination of just compensation – compensation paid for with taxpayer dollars.

There is no sufficiently compelling reason to exclude this relevant evidence. There is no need to determine liability for environmental contamination in a condemnation case, and courts have access to statutory provisions and common law principles that will prevent double takings. In addition, the Legislature is best suited to debate and decide whether it is good public policy to amend our eminent domain laws to exclude relevant evidence.

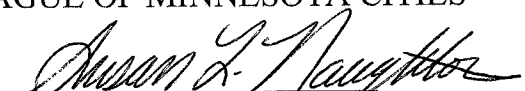
And finally, relevant environmental-contamination evidence should be admitted if it existed at the time of the taking, was discovered before just compensation was determined and would have been discovered by a willing buyer in a voluntary transfer.

For all of these reasons, the League respectfully requests that this Court affirm the court of appeals' decision.

Dated: May 21, 2009

Respectfully submitted,

LEAGUE OF MINNESOTA CITIES

By: 

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