

NO. A07-2206

State of Minnesota
In Court of Appeals

Port Authority of the City of St. Paul, petitioner,
Respondent,

vs.

RLR, Inc., et al.,
Defendants,
Insurance Auto Auctions, Inc.,
Appellant.

APPELLANT'S BRIEF AND APPENDIX

PARKER ROSEN, LLC
Daniel N. Rosen (#250909)
Mark J. Kiperstin (#143108)
300 First Avenue North, Suite 200
Minneapolis, MN 55401
(612) 767-3000

Attorneys for Appellant
Insurance Auto Auctions, Inc.

BRIGGS AND MORGAN, P.A.
Marc J. Manderscheid (#15166X)
Daniel J. Supalla (#0387064)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

Attorneys for Respondent
Port Authority of the City of St. Paul

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES	1
STATEMENT OF CASE.....	2
STATEMENT OF FACTS.....	5
ARGUMENT.....	9
I. STANDARD OF REVIEW.....	9
II. THE DISTRICT COURT ERRED IN FINDING THAT THE PORT AUTHORITY SATISFIED THE REQUIREMENTS OF MINN.STAT.§ 117.041	9
A. The Prospective Taking For Which The Port Authority Requires Prior Entry is Unlawful Under The Reformed Definition of “Public Use” and “Public Purpose”	10
B. Port Authority May Not Rely on “Environmentally Contaminated Area” Provisions of New Public Purpose Definition.....	13
C. The Port Authority Did Not Establish It Had Reason To Believe The Property May Be Acquired Pursuant To Eminent Domain Proceedings	14
1. Having a public purpose is a condition precedent to entry	14
2. Minn. Stat. § 117.041 may not be used to search for grounds for a public purpose.....	15
III. THE PORT AUTHORITY’S PROPOSED ENTRY AND SEARCH OF IAA’S PROPERTY CONSTITUTES AN UNLAWFUL SEARCH AND SEIZURE	18

IV. ENTRY AND PRESENCE ONTO IAA'S PROPERTY
VIOLATES THE TAKING CLAUSE OF THE STATE AND
FEDERAL CONSTITUTIONS21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases:

<u>Camara v. Municipal Court</u> , 387 U.S. 533, 87 S. Ct. 1727(1967)	19
<u>Hendler v. United States</u> , 952 F.2d 1364 (1991).....	22
<u>Housing & Redevelopment Authority ex rel. City of Richfield v. Adelmann</u> , 590 N.W.2d (Minn. 1999).....	9
<u>Humenansky v. Minnesota Board of Medical Examiners</u> , 525 N.W.2d 559(Minn.App.1998).....	19
<u>In Re Estate of Nordland</u> , 602 N.W.2d 910 (Minn.App.1999)	9
<u>In Re Search Warrant of Columbia Heights v. Rozman</u> , 586 N.W.2d 273 (Minn.App.1998).....	19
<u>Kelo v. City of New London</u> , 545 U.S. 469, 125 S. Ct. 2655 (2005)	2
<u>Kersten v. Minnesota Mutual Life Insurance Co.</u> , 608 N.W.2d 869 (Minn. 2000).....	16
<u>Loretto v. Teleprompter Manhattan CATV Corp.</u> , 458 U.S. 419, 102 S.Ct. 3164 (Minn. App. 1982)	21, 22
<u>State v. Stevenson</u> , 656 N.W.2d 235 (Minn. 2003)	9
<u>State v. Voss</u> , 683 N.W.2d 846(Minn.App. 2004)	18
Rules of Civil Procedure:	
Minn.R.Civ.P. 24.04	18

Minn.R.Civ.App.P. 144 18

Statutes:

Minn. Stat. § 117.012 2, 10

Minn. Stat. § 117.025throughout

Minn. Stat. § 117.041throughout

Minn. Stat. § 469.055 13

Minn. Stat. § 469.058 3, 12

Minn. Stat. § 645.16 16

All Statutes Except § 645.16 Reproduced In Addendum

Other Authorities:

Minn. Const. Art. I, Sec. 10..... 18

Minn. Const. Art. I, Sec. 13..... 4, 21

U. S. Const. Fourth Amendment 18

U. S. Const. Fifth Amendment 4, 21

Minnesota House of Representatives Audio Tape Recordings 16, 20

Minnesota Senate Audio Tape Recordings 17

STATEMENT OF ISSUES

1. Where a Port Authority may use Minn. Stat. §117.041 to enter onto property only in furtherance of a lawful prospective condemnation and where the prospective taking described in the Port Authority's petition for entry states a purpose that is no longer lawful after the enactment of the 2006 eminent domain reform, did the district court err in granting the petition for entry?

The district court granted the Port Authority's Petition for entry.

See, Minn. Stat. §117.025; Minn. Stat. §117.041

2. Does §117.041 require that a condemning authority already have a reason to believe that a lawful public purpose exists for a taking or may §117.041 be construed to allow its use as a search tool to find the evidence necessary to establish a lawful public purpose for a taking?

The district court granted the Petition without reaching the issue.

See, Minn.Stat §117.041

3. Does entry onto private property by government agents to search for evidence of grounds to take property by eminent domain violate constitutional protections against unlawful search and seizure?

The district court granted the Petition without reaching this issue.

See, U.S. CONST. Amends. IV and XIV, Minn. Const. Article 1, §10; *Humenansky v. Minnesota Board of Medical Examiners*, 525 N.W.2d 559 (Minn.App.1994); *In re Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 275 (Minn.App.1998)

4. Does the government's entry onto private property, continued presence on the property for monitoring, and permanent installation of wells on the property constitute a taking under the Fifth Amendment to the United States Constitution and Article 1, Section 13, of the Minnesota Constitution?

The district court granted the Petition without reaching this issue.

See, U.S. CONST., Amend. V; Minn. Const., Art. 1, §13; *Hendler v. United States*, 952 F. 2d 1364 (1991); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

STATEMENT OF THE CASE

In June, 2005, the United States Supreme Court decided *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), a watershed case in the law of eminent domain. *Kelo* held that the taking of property from one private owner to give to another private owner in furtherance of economic development constitutes a lawful public use under the United States Constitution. The case was the subject of much public debate regarding the scope of the government's power to take private property and led to actions by many states, including Minnesota, to change their respective constitutions or statutes to prevent the use of eminent domain for economic development.

In its first legislative session after *Kelo*, the Minnesota Legislature enacted sweeping eminent domain reform that redefines "public use" and "public purpose." Not only does the new statutory definition of "public use" and "public purpose" omit economic development, it goes so far as to emphasize the point by explicitly stating that economic development is excluded from the definition. Minn. Stat. § 117.025 subd. 11 (b). As importantly for this case, the legislature explicitly repealed all definitions of "public use" and "public purpose" found in other statutes, such as the statute that confers powers upon the Port Authority. Minn. Stat. § 117.012 subd. 1.

On the heels of this reform comes the Port Authority with a petition for entry onto private property that asserts a public purpose that was repealed by the

Legislature. The Port Authority's Petition for entry states that the prospective condemnation—the necessary predicate for any entry—is for the purpose of developing “marginal property” pursuant to Minn.Stat. §469.058, the statute that empowers port authorities. (A. 2.) The Petition does not assert any of the “public use[s]” or “public purpose[s]” that are now allowed under the reformed eminent domain law. See, Minn.Stat. §117.025.

Although not found in its Petition or in its underlying resolutions, the Port Authority asserted at the hearing on its Petition that there may be another purpose to the entry it seeks. Counsel advised the district court that the Port Authority is “trying to get the data so that we can determine whether we can meet this new standard.” (T.95-96.)¹ The “new standard” to which he was referring was the new statutory definition of “public use” which permits taking of a contaminated property if that property is so contaminated that the cost of cleanup of that property exceeds the value of the property.²

Minn.Stat. §117.041, however, does not allow the government to enter for the purpose of gathering evidence to use against the owner to acquire that owner's property against his/her will. Rather, entry under §117.041 carries the condition

¹ The district court reporter prepared two separate transcripts, one from a August 29, 2007, scheduling hearing, and a second from the motion hearing held September 10th and 11th, 2007. All references herein are to the transcript of the September hearing.

² The purpose for such a provision is easily imagined: a property owner is not likely to spend money to cleanup the property if the value of the cleaned property is less than the cost of cleaning. Such an owner would sooner abandon the property. Not even the Port Authority asserts that is the situation in this case.

precedent that the government already have reason to believe that it will need to condemn the property for a lawful public purpose. Entry to gather evidence to take against an owner's will is contrary to the language of §117.041, inconsistent with the purpose for which §117.041 was enacted, inconsistent with the intention of the reforming legislature to restrict government use of eminent domain, and in violation of a private property owner's constitutional right to be free from unreasonable search and seizure.

On top of all else, this case presents the question of whether the government's entry onto private property, continued but temporary presence on the private property for monitoring, and permanent modification of that property as proposed in this case constitutes an unlawful taking of private property without just compensation first paid, as required under Minn.Const. Article 1, §13 and U.S. CONST., Amend. V.

The parties agree that this case presents questions of first impression regarding the interpretation and effect of the new statutes.

The proceedings below were truncated. The Port Authority served and filed its Petition on June 29, 2007. The district court, Honorable Kathleen Gearin, held an evidentiary hearing (the only substantive proceeding held in the case) on September 10 and 11, 2007, and granted the Port Authority's Petition in its Findings of Fact, Conclusions of Law and Order dated October 30, 2007.

STATEMENT OF FACTS

In 1993, the Port Authority targeted over sixty acres of real property in the city of St. Paul for redevelopment. (A.2.) Identified as the Arlington-Jackson Development District, the area is home to many ongoing businesses, including IAA's automobile auction business, which operates over approximately twenty acres. (T.23.) The Port Authority condemned and developed a portion of the Development District in the mid-1990's, but did not seek to acquire the portion in this case until now. (A.2.) During the hiatus, the Minnesota legislature enacted sweeping eminent domain reform, restricting the powers of condemning authorities and limiting the uses for which private property may be taken.

On June 29, 2007, the Port Authority filed a petition in Ramsey County District Court seeking an order to enter IAA's property to conduct environmental testing pursuant to Minn. Stat. §117.041. §117.041 allows entry onto property for environmental testing if certain requirements are met, including that the condemning authority has reason to believe that the property will be acquired for a lawful public purpose. (A.1-5.) IAA and neighboring owners filed objections to the petition, asserting that the Port Authority failed to satisfy the requirements for entry under Minn. Stat. § 117.041, and that entry onto IAA's property violated its constitutional protections against search and seizure, its right to be free from a taking without due process and from a taking without just compensation first paid or secured. (A.12-17.)

The Port Authority's Petition asserted that the entry was necessary in furtherance of a prospective use of eminent domain for development of "marginal property." (A. 1-5.)

On September 10, 2007, a hearing was held before the district court, the Honorable Kathleen Gearin. §117.041 requires, among other things, that the condemning authority have reason to believe (a) that the property will be condemned for a lawful public purpose and (b) that the property is contaminated. At the hearing, the Port Authority only offered evidence to support its "reason to believe" that the property is contaminated. The Port Authority offered no witnesses regarding anything else.

No one asserted below that IAA's property is a site that requires "clean-up." The only evidence of involvement by an environmental regulatory authority was that the MPCA had a file and that after investigation the file was closed. The Port Authority's only witness was Eric Hesse, an environmental consultant. Mr. Hesse testified that while his company prepared a plan to discover whether contamination exists in the Arlington-Jackson West district, he did not provide any evidence that contaminants have been released that would require remediation or enforcement action, or that the Minnesota Pollution Control Agency ("MPCA") has ordered any further investigation of the property. (T.105-106.) IAA presented the testimony of Robert Kaiser, an environmental consultant employed by American Engineering Testing, which performed environmental assessments for

the Port Authority in 1993 and 1994. (T.67-68.) Mr. Kaiser stated that while there might be some contaminants over the forty acre site (T.70-71.), like Mr. Hesse, he offered no evidence that during the past fourteen years there has been a release or threatened release of a contaminant. IAA also presented the testimony of Scott Tracy, an environmental consultant who reviewed the environmental reports commissioned by the Port Authority and IAA. Mr. Tracy testified that the reports indicate a minimal amount of contamination present, which is typical of industrial parcels such as IAA's, and that the level of contamination identified was below MPCA cleanup standards. (T.76-78.) The MPCA was aware of all of the findings of the reports and after investigating, the MPCA issued a "closure letter" for its file on the property. (T.81.) Mr. Tracy testified that the MPCA issues a closure letter when the agency believes that an assessment has been performed adequate to determine if a release poses an ongoing source of concern for human health and safety or environmental impact. (Id.)

The Port Authority also offered testimony that there was "potentially" 350 cubic yards of impacted soil at the site of a car compactor used by IAA's predecessor. (T.92.) The Port Authority placed considerable emphasis on that fact and argued that the 350-yard potential shows the "order of magnitude" of the contaminated material on the IAA property. (T.185.) No party asserts that the cost of cleaning contamination on that "order of magnitude" can even approach 100% of the value of the property involved.

On October 30, 2007, Judge Gearin issued her order granting the petition, finding that the Port Authority had satisfied the requirements of Minn. Stat. §117.041. (A.19-38.) IAA filed this appeal on November 20, 2007, seeking review of the district court's order. (A.39-44.) IAA sought a stay of the district court order, and on January 4, 2008, its motion was denied by the district court without making findings or conclusions of law, and without comment. (A.49-50) IAA appealed the district court's denial of the stay on January 14, 2008. (A.51.) On February 5, 2008, this Court remanded the stay issue to the district court to readdress the question of a stay and make findings supporting whatever decision it makes. (A.52-54.) The district court has not yet ruled on the stay.

ARGUMENT

I. STANDARD OF REVIEW

A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. *In Re Estate of Nordlund*, 602 N.W.2d 910, 913 (Minn.App.1999). Questions of statutory construction and interpretation are clearly questions of law and are reviewed by appellate courts de novo. *State v. Stevenson*, 656 N.W.2d 235, 238 (Minn.2003); *Housing & Redevelopment Authority ex rel. City of Richfield v. Adelman*, 590 N.W.2d 327, 330 (Minn.1999).

II. THE DISTRICT COURT ERRED IN FINDING THAT THE PORT AUTHORITY SATISFIED THE REQUIREMENTS OF MINN. STAT. § 117.041

Minn.Stat. §117.041 is part of the eminent domain statute and is used in furtherance of the exercise of the power of eminent domain. Entry may only occur if the condemning authority has "reason to believe" that it will be condemning the property its seeks to enter. Minn.Stat. §117.041, subd. 2(a)(1). Accordingly, the lawfulness of an entry under §117.041 is dependent upon the lawfulness of the underlying eminent-domain taking the condemning authority "has reason to believe" it will pursue.

Here, the condemning authority asserts that it has a reason to believe it will take for the purpose of developing "marginal property" in furtherance of the Arlington-Jackson Development District, created in the mid-1990s, at which time

much of the district was taken and redeveloped. (A. 2.) But since that district was established, the Legislature changed the law that governs when a Port Authority may take by eminent domain.

A. The prospective taking for which the Port Authority requires prior entry is unlawful under the reformed definition of “public use” and “public purpose”

In the eminent domain reform of 2006, the Minnesota legislature established the supremacy of Minn. Stat. Chapter 117 over all other statutes relating to the power of eminent domain.

Preemption. 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. Additional procedures that do not deny or diminish the substantive and procedural rights and protections of owners under this chapter may be provided by other law, ordinance, or chapter.

Minn.Stat. §117.012, subd. 1.

§117.025 further emphasizes Chapter 117’s preemption of all other eminent-domain-related statutes:

Words, terms and phrases. For the purposes of this chapter and *any other general or special law authorizing the exercise of the power of eminent domain*, the words, terms, and phrases defined in this section have the meanings given them.

Minn.Stat. §117.025, subd. 1 (emphasis added). § 117.025 goes on to define “public use” and “public purpose” in subdivision 11. Accordingly, the only place

one may find an allowed public use or public purpose, which must exist in order for there to be a reason to believe that property may be taken, is in § 117.025, subd. 11, which defines a “public use” or “public purpose” as follows:

Public use or public purpose means, exclusively:

- (1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies;
- (2) the creation or functioning of a public service corporation;
or
- (3) mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.

Minn. Stat. § 117.025, Subd. 11.

The Port Authority’s Petition, however, does not include any of the purposes found in §117.025. In its Petition seeking entry, rather, the Port Authority tells us,

The Port Authority found that the marginal condition of the western section of the District, the minimal jobs located there presently, and the lack of private-sector investment over recent years provided reason to believe that acquisition of properties located in Arlington-Jackson West may be required pursuant to eminent domain proceedings. (A.3.)

The Petition coincides with the purposes of the Arlington-Jackson Development District. But while satisfying the purpose of a development district may have been a lawful public use before the 2006 eminent-domain reform, it is no longer so. The Port Authority has never passed a resolution or amended its

Petition to provide a lawful, §117.025-allowed public use for the prospective taking for which prior entry is required.

The district court, for its conclusion that there is a public purpose for the prospective taking, quotes the very portions of §469.058 that have been repealed by the preemption provisions of Chapter 117: “The Minnesota Legislature has determined that ‘...[t]he development of land acquired under §469.048 to §469.068 is a public necessity and use and a government function.’” The district court went on to quote from another repealed public-purpose section: “The Minnesota Legislature has further determined, ‘The development of marginal property and its continuing use are public uses, public purposes, and government functions that justify...acquiring private property.’” (A. 30-31.)

Not only does §117.025 omit such economic development from its enumerated public purposes, it explicitly excludes “the public benefits of economic development” from the definition of public purpose. Minn.Stat. §117.025, subd. 11(b).

Although clear error is not required in this *de novo* review, basing conclusions of law on repealed statutes constitutes clear error and the Court need not address any further issues to reach a decision reversing the district court.

B. Port Authority May Not Rely on “Environmentally Contaminated Area” Provisions of New Public Purpose Definition

Because the reason for the prospective taking alleged in the Petition was for a use that is no longer lawful, the Port Authority went outside its Petition and told the district court that the 2006 reform allows a taking for the purpose of remediation of an “environmentally contaminated area.” (T.94-96.) Minn.Stat. §117.025, subd. 8, defines an “environmentally contaminated area” as an area in which the costs of investigation, testing, monitoring, and remedial or removal action required by the MPCA, exceeds one hundred percent of the assessor’s estimated market value for the contaminated parcel. But the Port Authority will find no shelter in the “environmentally contaminated area” provisions of §117.025.

Firstly, Minn.Stat. §469.055, subd. 8, provides:

The port authority shall adopt a resolution describing the property and *stating its intended use and the necessity of the taking.* (emphasis added)
(Addendum, 11-12.)

Here, the Port Authority’s resolution rests on the repealed public-use provisions of Chapter 469. (Port Auth. Res. 4212, attached to the Petition as Exhibit A., A. 6-9.) Even the Port Authority acknowledges in this case that the Port Authority can only act through a resolution. “Political subdivisions act by resolutions and so that’s what we have in ... Port Authority Resolution 4212. That’s how they act.” (T. 182.)

Moreover, as will be shown below, nothing in the record establishes by any objective, reasonable basis that the property is an environmentally contaminated area, and the district court made no such finding. While she found that there was reason to believe there were contaminants on properties involved, the district court made no finding that there was any reason to believe that IAA's property (or any of its neighbors') was an "environmentally contaminated area." Indeed, no one—not even the Port Authority—asserted that IAA's property may be so contaminated that the cost of clean-up exceeds the value of the property. To the contrary, the Port Authority told the district what the "order of magnitude" of the "potential" contamination was: 350 cubic yards of soil (which, as the Port Authority argued to the district court, 30 to 35 truckloads of dirt—far outside the realm of even imagining that the cost can approach the value of the property). (T.185.) Even if the district court had wanted to consider whether there was reason to believe that the cost of remediation could be greater than the value of the property, she could not do so because no evidence was offered regarding either the value of the property or the potential cost of clean-up.

C. The Port Authority Did Not Establish It Had Reason To Believe The Property May Be Acquired Pursuant To Eminent Domain Proceedings

1. Having A Public Purpose Is A Condition Precedent To Entry

As part of its going outside its Petition in its argument to the district court, the Port Authority told the district court that the 2006 eminent domain reform

allows entry onto IAA's property to find evidence that the property is an "environmentally contaminated area," as that term is defined in Minn.Stat. §117.025, subd. 8. But the Port Authority has it backwards. It must have a public purpose *before* it enters property.

Minn. Stat. §117.041, subdivision 2(a)(1), allows entry onto private property for environmental testing if the condemning authority "has reason to believe that acquisition of the property may be required pursuant to eminent domain proceedings." That is, as a condition precedent to entry, there must already be a reason to believe that the property will be taken for a lawful public purpose.

2. Minn. Stat. § 117.041 May Not be Used to Search for Grounds For A Public Purpose

Knowing it did not to establish the elements of an environmentally contaminated area, the Port Authority attempts to use Minn. Stat. § 117.041 as an investigatory search tool to find out if there are grounds for a taking. That is, by coming onto IAA's property and searching for contaminants, only then can the Port Authority begin making its case that the area is an environmentally contaminated area. And the Port Authority told the district court exactly that. (T.95-96.) But the Port Authority cited no authority to the district court that §117.041 allows entry to search for information to establish a public purpose, such power cannot be read into the plain meaning of this statute, and there is no support for the notion that the legislature intended §117.041 to be used for such purposes.

The goal of statutory interpretation is to “ascertain and effectuate the intention of the legislature.” *Kersten v. Minnesota Mutual Life Insurance Co.*, 608 N.W.2d 869, 874 (Minn.2000); Minn. Stat. § 645.16 (1998). When the language of the statute is plain and unambiguous, it manifests the legislative intent and the courts give the statute its plain meaning. (Id, 875.) Here, §117.041 is plain and unambiguous. In order to enter property under § 117.041, there must first be a reason to believe the property may be taken. A reason to believe there will be a taking can only exist if there is a reason to believe there is a lawful public purpose for a taking.

Finding a legislative intent to allow searching for grounds to take away property requires a tortured reading of §117.041. Moreover, if the Court were to look at the legislative history to find intent of § 117.041, it would find no support for such a reading.

§ 117.041, subdivision 2, was enacted in 1991. The impetus for this law was twofold: (1) the concern of condemning authorities that condemnation actions would be started and considerable money expended only to find out that property is contaminated; and (2) the concern by the Minnesota Township Officers Association that its officers would be exposed to a criminal trespass charge if they entered property without permission. (Audio tape recordings, February 26, 1991, meeting of Civil Law Sub-Committee, Minnesota House Judiciary Committee; March 11, 1991, tape 1, meeting of Minnesota House Judiciary Committee.)

There was no testimony before the committees that related to entering property *in the hope* of finding contamination in order to establish a public purpose for a taking. (Id.) Rather, the concern was when acquiring property for a road or other public purpose, contamination might be discovered that would render the cost of acquisition prohibitive. (Id.) Here, however, the Port Authority *wants* to find contaminants for which the remediation costs exceeds the estimated market value of the property. This is not what the Legislature intended when it enacted §117.041.

Moreover, when the reform was enacted in 2006, no changes were considered or made to § 117.041 to broaden its scope to be utilized to enter private property to search for contaminants to establish a public purpose for a taking. (Audio tape recordings, March 9, 2006, Minnesota Senate Judiciary Committee; March 13, 2006, Minnesota Senate State and Local Government Operations Committee; March 16, 2006, Minnesota Senate Transportation Committee; May 10, 2006, Minnesota House and Senate Conference Committee.) To the contrary, the 2006 reform aimed to reign in the government and protect property owners from overuse of the government's power to take private property. The conduct engaged in here by the Port Authority is an example of overuse the Legislature intended to stop.

It is important to note that IAA is not challenging the authority of the MPCA or any other lawful regulating authority to enter its property to enforce

pollution control laws. But there has been no request by the MPCA (or any other regulatory agency or any arm of government with the police power to enforce environmental laws) to do so, nor has there been any release or threatened release of any hazardous contaminant that would cause the MPCA to conduct any investigation or testing. Nor does the Port Authority even allege that the MPCA made such a request.

What IAA does challenge is entry by a governmental agency to perform acts it has no statutory power to perform, and for which no lawful purpose exists.

III. THE PORT AUTHORITY'S PROPOSED ENTRY AND SEARCH OF IAA'S PROPERTY CONSTITUTES AN UNLAWFUL SEARCH AND SEIZURE

A plain reading of Minn. Stat. §117.041 prohibits use of this provision to enter private property to search for information to establish a public purpose for a taking. But if the statute is applied to allow such a search, such action violates IAA's constitutional rights to be protected from an unreasonable search and seizure.³

The Fourth Amendment to the United States Constitution, and Article I, Section 10, of the Minnesota Constitution, guarantee an individual the right to be secure against unreasonable searches and seizures by the government. *State v. Voss*, 683 N.W.2d 846, 850 (Minn.App.2004). These protections apply to

³ Pursuant to Minn.R.Civ.P. 24.04, and Minn.R.Civ.App.P. 144, IAA notified the Attorney General of its challenge of the constitutionality of Minn. Stat. § 117.041. (A.18, 47-48.)

intrusions that are part of criminal and civil proceedings, including administrative searches. *Id.*, at 850; *Humenansky v. Minnesota Board of Medical Examiners*, 525 N.W.2d 559 (Minn.App.1994). A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. *Voss, supra*, at 849. The basic purpose of these protections is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, (1967). Finally, any search must satisfy the probable cause standard to be considered reasonable. *In re Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 275 (Minn.App.1998).

In a typical administrative search situation, the government is seeking evidence to substantiate a violation of an ordinance, such as a housing, building, or zoning code regulation. In the absence of exigent circumstances, the inspector must apply for a warrant, which will only issue upon the satisfaction of traditional probable cause standards. *Rozman, supra*, at 276. For example, in *Rozman*, the court approved a warrant to search property only after it was shown that code violations had already been identified. *Id.*

In the present case, there is nothing in the record, and nothing is alleged, that IAA is in violation of any environmental law, code or regulation, that there has been a release of a contaminant, or that the MPCA believes some investigation or testing related to contaminants is warranted. Nevertheless, the Port Authority

seeks to use Minn. Stat. §117.041 as an administrative search tool to hopefully “find” contaminants to establish a lawful public purpose to take IAA’s property. But our constitution does not allow the government to enter private property simply to hunt for something it hopes to find, especially where it would do so using a statute that requires such knowledge *before* entry.

The Legislature was mindful of the constitutional protections afforded property owners when the statute was enacted in 1991. Committee members discussed what type of showing the government must make before an order authorizing entry will be granted, and agreed that the showing must be akin to the standard for search warrants. (Audio tape recording, Minnesota House Judiciary Committee, February 26, 1991). Here, the Port Authority did not even try to meet such a standard.

Instead, the Port Authority relied on preliminary reports from thirteen years ago, none of which identified contaminants that pose any threat to the health, safety and welfare of the public. Since those reports, there has been no known release of contaminants and the MPCA closed whatever file it had. (T.81.)

Without evidence in the record to meet a probable cause standard, construing §117.041 to allow its use by the government as a tool to search for evidence to take private property violates IAA’s rights under the U.S. and Minnesota Constitutions.

IV. ENTRY AND PRESENCE ONTO IAA'S PROPERTY VIOLATES THE TAKING CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS

The takings clauses of the Fifth Amendment to the United States Constitution, and Article I, Section 13 of the Minnesota Constitution, prohibit the taking of private property without just compensation first paid or secured. The courts have uniformly protected property owners from the type of intrusion proposed here, regardless of the amount of property taken and level of interference.

Here, the Port Authority proposes to enter and be present on IAA's property, search the property for contaminants, maintain its presence for a period of months to years (T. 46, 63), and after it leaves, permanently leave components behind in holes going deep into the ground. (T. 62-66, 116-117.)

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the court held that the installation of cable wires in an apartment building constituted a taking for which compensation was required. Dismissing the argument that a taking of one-eighth of a cubic foot of space is not of constitutional significance, the court stated,

Permanent occupations of land by such installations as telegraph and telephone wires, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.

458 U.S. at 429.

In addition, the Court stated when the character of the governmental action is a permanent physical occupation, a taking has occurred without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Here, the Port Authority's sole witness acknowledged that the installation of the wells on IAA's property will be permanent. (T. 116-117.) And while the Port Authority argued to the district court that it will "try to work" around IAA's business operations, this does not change the fact that a taking has occurred. Moreover, it is unknown what additional intrusion the Port Authority will propose once testing begins.

In a case with a similar context, *Hendler v. United States*, 952 F. 2d 1364 (1991), the U.S. Court of Appeals for the Federal Circuit held that the intrusion of the Environmental Protection Agency onto private property pursuant to an administrative order to install monitoring wells constituted a taking. Summarizing the meaning of the protections underlying the Fifth Amendment, the court stated:

The government does not have the right to declare itself a co-tenant-in-possession with a property owner. Among a citizen's-including a property owner's-cherished rights is the right to be left alone.

952 F.2d at 1374.

In concluding that the installation of the monitoring wells constituted a taking, the court noted that the wells are at least as permanent as the cable equipment in *Loretto, supra*, which comprised only a few cables attached by screws and nails.

Here, the district court found that the Port Authority's entry is "in the nature of a license" and not a taking. This finding is not supported by the evidence or the case law. Allowing the Port Authority's Petition, therefore, first requires that the Port Authority satisfy all of the procedural requirements for takings under Minn.Stat. §117.041, including determining that there is a lawful public purpose for the taking and paying or securing just compensation.

CONCLUSION

Based upon all of the foregoing and the record before this Court, the district court's order authorizing access for environmental testing should be reversed.

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Respectfully submitted,

PARKER ROSEN, LLC

By: 
Daniel N. Rosen (#250909)
Mark J. Kiperstin #143108
300 First Avenue North, Suite 200
Minneapolis, MN 55401
(612) 767-3000

ATTORNEYS FOR APPELLANT