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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 REPLY BRIEF

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I. PORT AUTHORITY ABANDONS THE FOUNDATIONS OF ITS PETITION AND ARGUES THAT §117.041 CREATES A POWER TO ENTER AND SEARCH THAT IS INDEPENDENT OF THE EMINENT DOMAIN CHAPTER IN WHICH IT IS FOUND

The central objective of the 2006 eminent domain reform act was to reduce the scope of allowable use of the power of eminent domain in the aftermath of the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London.* To accomplish that, the legislature explicitly pre-empted all other statutes that defined "public use" or "public purpose" and enacted a new, exclusive definition of public use. The legislature did not mince words:

> Notwithstanding any other provision of law, including any charter provisions, ordinance, statute, or special law, all condemning authorities 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. "This chapter," to which the foregoing provision refers, is Chapter 117, entitled "Eminent Domain."

This case involves section 117.041 of the eminent domain chapter, which provides for circumstances where, "before eminent domain proceedings," a condemning authority may enter private property before title and possession is actually taken. We now see from the Brief of Respondent that the Port Authority seeks to divorce §117.041 from its relationship with the Port Authority's power of eminent domain. The Port Authority maintains that it does not need to have a

lawful public purpose for a taking in mind in order to use the power of entry and search conferred upon it by this section of the eminent domain chapter.

The gravamen of this appeal is that the power conferred by the eminent domain statute to search "before eminent domain proceedings," only where there is "reason to believe" that acquisition "pursuant to eminent domain proceedings" is required, is not a stand-alone power to enter and search property. See, Minn.Stat. §117.041, Subd. 2. Rather, because it may only be used in support of a contemplated (although not certain) eminent domain taking, the condemning authority must be able to show that it contemplates a taking supported by a lawful public purpose. If not, then §117.041 confers a fearsome stand-alone power of the government to enter and search.

The Port Authority does not, of course, disagree that its "reason to believe" it may take by eminent domain must include a "reason to believe" that its taking will be for a lawful public purpose. Its essential submission to the district court in this case, its "Petition for an Order," implicitly so agrees by stating a public purpose:

> "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 <u>provided reason to believe that the acquisition</u> of properties located in Arlington-Jackson West <u>may be required pursuant to eminent domain proceedings</u>."

(Appellant's Appendix, p. 3, para. 15. Emphasis added to show precise parallel with the language of condition contained in §117.041.)

But now the Port Authority is faced with the fact that addressing "marginal condition," "minimal jobs," and "lack of private sector investment," which used to be lawful public purposes for takings under Minn.Stat. §469.058, are no longer lawful purposes for condemnation under the 2006 pre-emption statute, §117.012, and the new public-purpose definition statute, §117.025, Subd. 11. So the Port Authority now argues that §117.012 did not, in fact, pre-empt §469.058, despite the explicit, unequivocal words of pre-emption, and that the power to take because of "marginal condition," etc., is "saved" by a cannon of interpretation that prohibits interpreting a statute of pre-emption to actually pre-empt.

The district court, which adopted the Port-Authority-drafted findings of fact and conclusions of law, repeated the error, ignoring the pre-emption statute and finding that a port authority may exercise the power of eminent domain "for the purposes in sections 469.048 to 469.068, and to provide the means to develop marginal property...." (A. 31.) The district court's findings and conclusions went on to declare repeatedly that "The Minnesota Legislature has determined...," followed by lengthy quotations from old statutes declaring public purposes that have been pre-empted by §117.012 and §117.025.

Now, although the Port Authority used these pre-empted statutes as the foundation for its petition, its briefs to the district court, its oral arguments to the district court (e.g., Transcript pp. 180-181), and its proposed findings of fact and conclusions of law, the Port Authority now abandons all of that to argue waiver,

savings, and that §117.041 does not require a reason to believe there is a lawful public purpose for the taking it must have reason to believe is necessary.

II. RULES OF CONSTRUCTION AND "SAVINGS CLAUSE" DO NOT PERMIT UNDOING LEGISLATURE'S MANIFEST INTENT TO PREEMPT.

A. Interpreting a pre-emption statute so as not to pre-empt is not required by a rule of construction and is prohibited by the cases.

The Port Authority argues that this Court must construe the public purpose provisions of §117.025 and §469.058 together, so as to give effect to both. Where, however, the legislature has demonstrated a clear intent to have one statute pre-empt the other, the rule of construction cited by the Port Authority does not apply. "There is no basis for reconciling two conflicting enactments when to give effect to both of them contravenes the legislative intent." *Gale v. Commissioner of Taxation*, 228 Minn. 345, 350, 37 N.W.2d 711, 715 (Minn.1949) But we do not need a case to tell us that it would be illogical to give effect to the definition-of-public-purpose provisions of Chapter 469 where Chapter 117 provides that its definitions control "notwithstanding any other ... statute," Minn.Stat. §117.012, particularly where preserving the public purpose definitions of Chapter 469 would have the effect of contravening the entire purpose of the 2006 eminent domain reform—restricting the purposes for which eminent domain may be used.

B. Port Authority turns "savings clause" of §117.012 on its head.

The Port Authority seeks refuge in the following "savings clause": "Additional procedures, remedies or limitations 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 charter." §117.012, Subd. 1. (emphasis added) By its terms, the savings clause only saves protections for owners, not condemning authorities. To argue that another statute's more expansive power to take an owner's property is a right or protection of an *owner* is illogical.

Moreover, even the Port Authority states in its brief that "the purpose of a savings clause is to 'preserve all existing rights which were not inconsistent with those created by the statute.'" Brief of Respondent, p. 39 (citation omitted). Where §117.025, Subd. 11, provides that its list of definitions is exclusive and where §117.012 provides for pre-emption of all other statutes that contain definitions relating to the exercise of eminent domain, adding other definitions would not preserve any rights that are consistent with the rights of owners under the new statute.

C. The Port Authority's argument about the word "may" being "permissive" is inapposite.

The Port Authority argues that because §117.041 contains the word "may," the Port Authority need not actually proceed with condemnation. No one here argues that the Port Authority must proceed with condemnation later. But the Port Authority must have "reason to believe" now that eminent domain "may be required" later. Even though the Port Authority may not exercise that power later,

it may not act without the present reason to believe that eminent domain for a lawful purpose may be required.

III. ENTRY AND PRESENCE ONTO IAA'S PROPERTY CONSTITUTES A TAKING.

The Port Authority argues, and the district court found, that there is no taking here, and that the entry is "in the nature of a license." (A. 34.) But a license involves a *consensual* grant to use another's property, and a license is freely revocable. *Chicago & N.W. Transportation Co. v. City of Winthrop*, 257 N.W.2d 302 (Minn. 1977); *Pine Valley Meats Inc. v. Canal Capital Corp.*, 566 N.W.2d 357 (Minn. App. 1997). Even the Port Authority agrees that a licensor gives *permission* to the licensee to enjoy his land. (R. Brief at 43.) Here, the government is imposing its will to forcibly enter private property. Such forced entry is not "in the nature of a license."

The Port Authority tries to distinguish this case from *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Hendler* v. *United States*, 952 F.2d 1364 (1991), where the courts found a taking under circumstances akin to the proposed entry here, and cites *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980), to support its claim that the entry here does not constitute a taking. In *PruneYard*, the court held that the presence of solicitors in a shopping center open to the public to obtain signatures to oppose a United Nations resolution, did not constitute a taking. The intrusion here is nothing like the situation in *PruneYard*. 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.) Under *Loretto* and *Hendler*, this constitutes a taking.

IV. THE ISSUES RAISED IN THIS APPEAL WERE ADDRESSED BY THE DISTRICT COURT.

The Port Authority, in an effort to prevent a complete review of this matter, contends that IAA "waived several issues on appeal." This assertion is not supported by the district court record.

The Port Authority argues that IAA "utterly failed to develop or pursue any argument" concerning the entry and search as an unreasonable search and seizure. But the record is otherwise. In this summary proceeding that included only two written submissions per side and one oral argument, the issue was raised and addressed both in writing and orally. In its Answer to the Port Authority's Petition, IAA specifically asserted that entry would violate "the Fourth Amendment to the United States Constitution and Article 1, Section 10, of the Minnesota Constitution. (A. 13.) At oral argument, IAA argued that the constitution prohibits unreasonable searches. (T. 193.) And during the oral argument, the district court itself acknowledged from the bench that this case implicated important Fourth Amendment issues, stating, "in American history we've had a tradition of...favoring government operating in the least intrusive

way... to individual's rights. The least intrusive way." (T. 135-136.) There was no waiver of the Fourth Amendment issue.

The Port Authority also claims that IAA has raised issues in this appeal concerning the application of §117.041 that were not addressed in the district court. Again, the record is otherwise.

In its Answer, IAA asserted the affirmative defense that "Petitioner's claim must be dismissed because the Petitioner cannot establish any of the conditions required for entry on to private property under Minn. Stat. § 117.041." (A. 16.) The district court made findings regarding whether the Port Authority had satisfied the requirements of §117.041, Subd. 2 (a) (1), i.e., finding that the Port Authority had "reason to believe" that IAA's property may be required, that the "marginal condition" of the property gave the Port Authority reason to believe that a taking may be required pursuant to eminent domain proceedings (A. 23), and that the development of marginal property is a lawful public purpose. (A.31.) The district court also addressed whether the Port Authority had demonstrated a lawful public purpose for the taking it had reason to believe may be required. (A. 31.) In addition, the district court, explicitly acknowledged that the 2006 eminent domain reform adopted "new prerequisites" and enacted new public purpose definitions before property may be taken by eminent domain. (A. 31.) The district court even quotes the entirety of Minn. Stat. §117.025, Subd. 8, which defines an environmentally contaminated area. (A. 32.) We argue in this appeal that the

district court failed to make the required finding that IAA's property is an environmentally contaminated area, i.e., that the cost to clean up any contamination exceeds the value of the property.

Even if the Court were to conclude that the questions the Port Authority does not want reviewed were not raised in the district court, the case law is clear that under the circumstances here, review is appropriate. An appellate court may base its decision upon a theory not presented to or considered by the trial court where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and, in cases involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question. *Roth v. Weir*, 690 N.W.2d 410, 413-414 (Minn.App.2005), citing *Watson v. United Services Automobile Association*, 566 N.W.2d 683 (Minn. 1997).

Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was "implicit in" or "closely akin to" the arguments below; and the issue is not dependent on any new or controverted facts. *Roth*, at 414. All of the factors favor review here. The Port Authority agrees this case raises important issues of first impression (T. 134, 171-172); the issues have been fully briefed by both parties; the central question of whether the government must have reason to believe there is a lawful public purpose for a prospective taking is implicit in the question of whether the

government had reason to believe a taking was required; no facts are in dispute; and, given the recent eminent domain reform, the public interest will be served by appellate review.

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,

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