

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.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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STATEMENT OF ISSUES

1. Did the District Court err in granting the Port Authority access for environmental testing under Minn. Stat. § 117.041, Subd. 2? The District Court made detailed findings of fact after an evidentiary hearing, and found that the Port Authority had satisfied the statutory criteria.

Apposite Authority

Minn. Stat. § 117.041, Subd. 2

2. Did the District Court err in concluding that Section 117.041, Subd. 2 is constitutional and does not violate the prohibition on takings of property without compensation? The District Court concluded that the access authorized by Minn. Stat. § 117.041, Subd. 2, and sought by the Port Authority, was temporary and more in the nature of a license than a permanent physical occupation, and therefore constitutional.

Apposite Authority

U.S. Constitution, Amendment V

Minnesota Constitution, Article I, Section 13

Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982)

Spaeth v. City of Plymouth, 344 N.W.2d 815 (Minn. 1984)

STATEMENT OF THE CASE AND FACTS

In the mid-1990s, the Port Authority of the City of Saint Paul (the “Port Authority”) established the Arlington-Jackson Industrial Development District (the “District”). The Port Authority remediated and redeveloped the eastern twenty-two acres of the District, but could not fund the remediation and redevelopment on the western forty acres. Now, with the funds available, the Port Authority filed a Petition seeking access to conduct environmental testing under Minn. Stat. § 117.041, Subd. 2, as a first step toward completing the remediation of the entire District. Several property owners challenged the Port Authority’s Petition. After an evidentiary hearing, the District Court granted the Port Authority’s Petition. Only one property owner, Insurance Auto Auctions, Inc. (“IAA”) now challenges the District Court’s determination.

A. THE PORT AUTHORITY ESTABLISHED THE ARLINGTON-JACKSON INDUSTRIAL DEVELOPMENT DISTRICT IN 1993 AND DEVELOPED THE EASTERN TWENTY-TWO ACRES

On September 28, 1993, pursuant to Resolution No. 3443, the Board of Commissioners (the “Board”) of the Port Authority established the District, which consisted of approximately sixty-two acres and was bounded by Interstate 35-E on the east, Maryland Avenue on the south, Jackson Street on the west, and Arlington Avenue on the north. (AA.20, FOF ¶¶1-2.)¹ The District was established under Minn. Stat.

¹ References to Appellant’s Appendix are cited as “AA. __.” Findings of Fact, Conclusions of Law, and Order Authorizing Access for Environmental Testing, dated October 30, 2007 can be found at AA.9-38, and references to the findings, conclusions, and order include the Appellant’s Appendix page(s) as well as the appropriate paragraph(s). References to Respondent’s Appendix are cited as “RA. __.”

§ 469.058, which specifically provides: “It is state policy in the public interest to have a port authority exercise the power of eminent domain, and advance and spend public money for the purposes in §§ 469.048 to 469.068, and to provide the means to develop marginal property” The Port Authority thereafter conducted environmental testing on many of the properties in the District. (AA.21, FOF ¶5.) The Port Authority hired American Environmental Testing, Inc. (“AET”) to prepare Phase I and Phase II environmental analyses of the properties within the District. (*Id.*) AET found several contaminants, including lead, diesel-range organics, petroleum, petroleum by-products, and other buried items like construction and demolition waste. (AA.25, FOF ¶25.)

From 1994 through 1997, the eastern twenty-two acres of the District were developed as Phase I. (AA.7; AA.21, FOF ¶4.) When finished in 1997, 271,400 square feet of new buildings had been constructed at a cost of \$10,626,000, and 559 new jobs created. (*Id.*) The rest of the District (the subject of the current Petition) was not redeveloped along with Phase I because the Port Authority did not have the funding to acquire and remediate the contamination that the Port Authority discovered on the properties in the western forty acres. (AA.21, FOF ¶4.)

B. THE PORT AUTHORITY RESOLVES TO INVESTIGATE CONTAMINANTS AND PERFORM ENVIRONMENTAL TESTING ON THE WESTERN FORTY ACRES OF THE DISTRICT

On April 24, 2007, the Port Authority Board adopted Resolution No. 4212, which authorized entry onto the western forty acres of the District (“Arlington Jackson West”) to investigate and perform environmental testing in connection with possible eminent domain proceedings under Minn. Stat. Chapter 117. (AA.7-8; AA.23, FOF ¶15.)

Prior and present uses of the Arlington-Jackson West properties included automobile-salvage operations, storage and repair of construction equipment, and an asphalt plant; moreover, a large area within the District had been filled with constructions and demolition debris. (AA.21-22, FOF ¶¶7, 12.)

The Resolution starts by noting the substantial investment in those areas redeveloped during Arlington-Jackson Phase I, which is then contrasted with the lack of investment in recent years in the western section of the District. (AA.7, FOF ¶16.) The Board also noted how “[i]nitial investigation conducted during the development of Phase I in 1994 and 1995 identified that various parts of the western section of the District were heavily contaminated with lead, petroleum and other hazardous materials.” (*Id.*)

The Port Authority Board stated that it had recently acquired grant funds from the United States Environmental Protection Agency to use in the testing and remediation of the contamination believed to be present in Arlington-Jackson West. (*Id.*) The Port Authority also noted that it had issued bonds in February 2007 that will provide funds for the acquisition and cleanup of Brownfields, and could be used to complete Arlington-Jackson West Project. (AA.7.)

Resolution No. 4212 specifically set forth the Board’s “resolution,” which corresponded with the prerequisites for environmental testing as stated in Minn. Stat. § 117.041, Subd. 2(a):

Section 1. Because of the marginal condition of the western section of the District, the minimal jobs located there presently, and the lack of investment over recent years, the Board of Commissioners determines that it has reason to believe that acquisition of those properties located in the

western section of the District may be required pursuant to eminent domain proceedings.

Section 2. Because of the prior and ongoing uses of the properties which constitute the western section of the District, and because of the results of environmental analyses done during Phase I of the Arlington Jackson Development Project, the Port Authority hereby determines that pursuant to Minnesota Statutes Section 117.041, it has good reason to believe that one or more hazardous substances, pollutants, and/or contaminants are present in the western section of the District and the release of one or more hazardous substances, pollutants, and/or contaminants (as defined in Minn. Stat. Chapter 115B) may have occurred in the western section of the district.

Section 3. The Board of Commissioners hereby determines that early entry onto the western section of the District is rationally related to the health, safety, or welfare concerns of the citizens of the City of Saint Paul

(AA.8.) The Port Authority Board then authorized its staff and legal counsel, contractors, or agents to “promptly obtain the consent of the owners and occupiers of those properties constituting the western section of the District or to proceed to obtain a court order pursuant to Minn. Stat. § 117.041 to allow for the Port Authority to conduct all necessary environmental testing and inspection of the western section of the District” (*Id.*)

C. THE PORT AUTHORITY FILES A PETITION TO SECURE COURT APPROVAL TO CONDUCT ENVIRONMENTAL TESTING

The current legal proceeding began on June 29, 2007, when the Port Authority filed a Petition for an Order for Environmental Testing Pursuant to Minn. Stat. § 117.041 (the “Petition”) with the Ramsey County District Court. (AA.1.) The Petition, Notice of Motion and Motion for an Order Under Minn. Stat. § 117.041, the Port Authority’s Memorandum of Law, and (proposed) Findings of Fact, Conclusions of Law, and Order Authorizing Access for Environmental Testing were served upon all 21 Respondents. (*See Affs. of Service.*)

In its Petition, the Port Authority sought judicial authorization to enter onto sixteen properties located in Arlington-Jackson West, Parcels 1-8, 10-14, and 16-18, “for purposes of monitoring, testing, surveying, boring or other similar activities necessary or appropriate to identify the existence and extent of a release or threat of a release of a hazardous substance, pollutant or contaminant.” (AA.5.)²

In its Memorandum, the Port Authority stated that the nature of the substances it already knew to be present in Arlington-Jackson West, specifically lead and a former landfill, were “clearly of a kind that adversely affect the health, safety, and welfare of the residents of the City of Saint Paul.” (Port Authority Memo. of 7/10/07 at 6.) As explained by the Port Authority:

The necessity of securing accurate information concerning the full extent of pollutants and contaminants is underscored by the 2006 amendments to the Eminent Domain Statute.

Minn. Stat. § 117.025, Subd. 8 (2006), provides a new definition of “Environmentally contaminated area” and sets forth a formula which requires a potential condemnor to have complete and accurate data concerning “the estimated costs of investigation, monitoring and testing, and remedial action or removal, which costs can only be determined if there is complete data concerning the location and quantity of polluted areas or contaminated materials.”

(*Id.*)

IAA owns Parcel No. 14 and occupies Parcels Nos. 11, 12, and 13, which together comprise an area of approximately 19 acres. (AA.41; Petition, Ex. C.) IAA was served

² The Port Authority has not filed a petition seeking condemnation of real property; only access for environmental testing. IAA acknowledged that this case involves only issues raised under Minn. Stat. § 117.041, Subd. 2, and that “[t]he Port Authority has not, however, commenced a condemnation action.” (AA.41-42.)

with the Port Authority's pleadings on July 13, 2007. (Aff. of Service.) IAA served and filed an Answer and Third Party Claim on August 14, 2007. (AA.12-17.) In its Answer, IAA claimed that it needed more time to prepare a response to the Port Authority's Petition, that it wanted time to investigate MPCA files and to review evidence, and that it needed more "time to conduct [its] own preliminary environmental testing." (AA.12-13.) A number of the Respondents, including IAA, filed memoranda opposing the Port Authority's Petition.

The Port Authority's Petition was presented to the Honorable Kathleen Gearin at an initial hearing held on August 21, 2007. IAA asked the court for a six-week continuance. (8/29 T.21:19-22:12.)³ Several Respondents requested an opportunity to present evidence. (See 8/29 T.22:13-23:16.) The District Court granted IAA's request in part, allowing a two-and-one-half week continuance. (8/29 T.28:17-29:13.) The District Court scheduled an evidentiary hearing to be held on September 10, 2007. (8/29 T.30:1-25.)

D. THE DISTRICT COURT HELD AN EVIDENTIARY HEARING, AT WHICH THE WITNESSES CONFIRMED THE CONTAMINATED CONDITION OF ARLINGTON-JACKSON WEST

At the evidentiary hearing on September 10, IAA presented the testimony of three witnesses, Mr. Jeffrey Huttner, Mr. Robert Kaiser, and Mr. Scott Tracy. The Port

³ Cites to "8/29 T. __: __" are to the transcript of the August 29, 2007 motion hearing. Cites to "T. __: __" are to the transcript of the motion hearing held on September 10 and 11, 2007.

Authority called Mr. Eric Hesse to testify about the testing that the Port Authority proposed to conduct on the western forty acres of the District.

1. Testimony By Mr. Huttner Focused On IAA's Concern About Potential Interruption Of Business Operations

Mr. Huttner is the branch manager at IAA. (AA.24, FOF ¶20.) IAA called him to testify about the impact that IAA believed the Port Authority's testing would have on IAA's business. (T.25:16-26:12.) Mr. Huttner testified that IAA's employees used large front-end loaders to move cars around, and that test pits or other equipment would interfere with IAA's ability to move cars around. (AA.24, FOF ¶21; T.25:18-25.) In between the aisles of cars on IAA's lot, there was approximately 12 to 18 feet of space for the front-end loaders to move around. (AA.24, FOF ¶21; T.27:10-11.) On cross examination, however, Mr. Huttner testified that "If [the Port Authority] were, say, to come in and dig them up and then two hours later fill them, probably we will be able to work around that, but it sounds like they are not going to be filled for a period of time." (T.28:20-24; AA.24-25, FOF ¶22.) Mr. Huttner also testified that part of the site that IAA currently occupies was previously occupied by Brac's Auto Parts, which business had used a car crusher in its operations. (T.34:24-35:6.)

2. Testimony By Mr. Robert Kaiser Focused On The Contamination Found When AET Prepared Phase I and Phase II Reports In The Mid-1990s

Mr. Robert Kaiser was called as a witness pursuant to a subpoena issued by IAA. (T.36:6-7, 20-24.) Mr. Kaiser, a Lead Consultant at American Engineering and Testing, Inc., testified about his involvement in the environmental testing of Arlington-Jackson

West that occurred in the mid-1990s. (T.37:22-38:11.) He testified that a Phase I Environmental Assessment Report was prepared in 1993, and contained an analysis of the contamination present in the District. (AA.25, FOF ¶23.) The initial Phase II Environment Assessment Report was completed on December 19, 1994, but it only covered those areas that were north and east of the railroad tracks located in the southwest corner of the District. (*Id.*)

Mr. Kaiser described how the Phase I was prepared in accordance with the American Society of Testing and Materials (ASTM) guidelines, which AET uses in its work. (AA.25, FOF ¶24; T.38:12-23, 39:8-17.) As part of the Phase I assessment, Mr. Kaiser testified that AET had “researched the historical uses of the properties based on historical maps, records of addresses, aerial photographs, interviews, Sanborn Fire Maps” (AA.25, FOF ¶24), on-site walk-throughs, and city directories (T.39:13-17). The reason that AET engaged in the research was to determine whether there were any “Recognized Environmental Conditions,” an ASTM term, which would help AET discover areas of concern with environmental contamination on the properties. (AA.25, FOF ¶24, T.39:21-25.)

After AET completed the Phase I report, it moved on to conducting a Phase II analysis, where AET “made 51 soil borings and used 12 geoprobes to gain an understanding of the subsurface soil conditions.” (AA.25, FOF ¶25.) Mr. Kaiser testified that AET found “a lot of construction debris, a lot of wood, asphalt, [and] a lot of swamp deposits.” (T.50:15-17.) He also testified that petroleum is often found on

industrial sites, and even if there were small amount of petroleum found in the samples, that additional investigation would be required. (T.53:4-11.)

Mr. Kaiser read a paragraph of the Phase II report into the record:

Additional soil borings should be conducted near SB-23 to determine the extent of lead and DRO [diesel-range organics] contamination on the parcel. Additional soil borings should be conducted near SB-31 to determine the extent of DRO contamination. Further subsurface exploration activity does not appear warranted in the area of SB-24.

(AA.26, FOF ¶28; T.69:16-21.) Mr. Kaiser then testified that both lead and DRO are considered contaminants. (AA.25, FOF ¶25; T.69:22-25.)

Mr. Kaiser testified that in his professional opinion, “based upon knowledge gained by AET of the former uses of the parcels in Arlington-Jackson West, there was good reason to believe that a hazardous substance, pollutant, or contaminant is present on the properties or that the release of a hazardous substance, pollutant or contaminant may have occurred.” (AA.27, FOF ¶29; T.70:20-25.) Mr. Kaiser also stated, that in his professional opinion, and “based upon the information gathered from the subsurface testing done by AET in 1994, there was good reason to believe that a hazardous substance, pollutant, or contaminant is present on the Arlington-Jackson West properties or that the release of a hazardous substance, pollutant, or contaminant may have occurred.” (AA.27, FOF ¶30; *see* T.70:20-71:5.)

Mr. Kaiser next testified about the procedures that AET had used, and that the Port Authority proposed to use, in its current proposed testing in the District. (AA.26, FOF ¶¶26-27.) Mr. Kaiser generally described how monitoring wells are installed and used to collect groundwater samples. (AA.26, FOF ¶27.) He testified that monitoring wells are

used so several samples can be collected over a period of time without requiring a new hole to be bored every time a sample is needed. (T.46:20-25.) Monitoring wells were used during the Phase II analysis performed on the properties in the District. (T.47:15-18.) When the wells are no longer needed, they are filled with bentonite clay filling or concrete slurry and closed. (AA.26, FOF ¶27.)

Mr. Kaiser testified that test pits are created using a backhoe and allow for discovery of the condition and the character of the soils. (AA.26, FOF ¶26; T.44:15-45:4.) When a test pit is created, the spoils from the digging are placed near the pit, and then once samples are taken, the holes are refilled and the spoils compacted. (AA.26, FOF ¶26.) Addressing Mr. Huttner's concerns about the time it takes to dig and refill a test pit, Mr. Kaiser said that a test pit can usually be installed and filled in fairly quickly. (T.45:18-24.) The District Court asked what "fairly quickly" meant, and Mr. Kaiser stated, "Oh, less than an hour, and we have people on—generally have people on site observing and controlling public access or other people's access for safety reasons." (T.46:1-4.) He also testified that there were no problems with settling and depressions if the materials are compacted as they are replaced. (AA.26, FOF ¶26.)

3. Mr. Scott Tracy Acknowledged That Former Use Of IAA's Property As An Asphalt Plant Provided Good Reason To Test For Contaminants

IAA also called Mr. Scott Tracy, the Senior Project Manager for Tetra Tech EM, Inc. (AA.27, FOF ¶31; T.72:2-3.) Mr. Tracy had reviewed the Phase I and the Phase II reports completed in the 1990's by AET; a study completed by the Mostardi Platt environmental consulting firm in 2001 on Parcels 11 and 12; and a 2007 Phase I report

prepared for the Port Authority by Liesch Associates, Inc. ("Liesch"). (AA.27, FOF ¶31.) Mr. Tracy had extensive experience in remediating former scrap yards and automobile-salvage yards. (*Id.*)

Mr. Tracy was of the opinion that there was "a fairly minimal amount of contamination present in a non-contiguous manner," and that there was "primarily low-level petroleum hydrocarbon contamination." (T.76:5-9.) He also testified that there was lead contamination, but that the level of lead contamination discovered in the AET reports was below the MPCA standards for industrial uses. (T.76:15-77:15.) Mr. Tracy admitted on cross examination, however, that it was not uncommon to find lead and petroleum contamination on industrially-used properties, like those in the western forty acres of the District. (T.77:16-78:3.)

During his testimony, Mr. Tracy acknowledged that prior uses of the properties in the western forty acres of the District is a legitimate factor to consider in determining whether there is a good indication of current contamination of property. (AA.27, FOF ¶32; T.88:4-89:5.) Mr. Tracy testified that the Addendum to AET's 1995 Phase I stated that the former uses of the properties that IAA now occupied included: "from 1977 to the mid-1990s, Parcels 11 and 12 had been the site of Brac's Auto Parts; . . . the parcels south and east of the railroad tracks had been used from 1950 to 1955 by Oakes Construction Company as an asphalt plant and from 1975 to the mid-1990s by the Twin Cities Salvage Pool." (AA.28, FOF ¶32; T.88:13-24.) He "acknowledged that the former use of a property as an asphalt plant provides good reason to suspect and test for the presence of contaminants." (AA.28, FOF ¶32; T.88:25-89:5.)

Mr. Tracy testified that he reviewed the part of the 2001 Mostardi Platt study, done for IAA, concerning an area where there had been a car compactor. (AA.28, FOF ¶33; T.91:15-17, 90:8-9, 90:16.) Mr. Tracy testified that the Mostardi Platt study identified approximately 350 cubic yards of potentially-impacted soil, (AA.28, FOF ¶33, T.92:13-17, 93:16); and that the “350 cubic yards total comes partially from the gasoline AST area, the diesel fuel area, and the car compactor area.” (AA.28, FOF ¶33; T.93:21-25.) He testified that “There has been contamination documented to be present on the parcels, low-level petroleum in particular. The—the MPCA has been made aware of most of, if not all, of the contamination on the parcels and, in fact, has issued a closure letter for the releases of petroleum hydrocarbons on the site.” (T.81:13-18.) Finally, Mr. Tracy testified that he had no experience in dealing with the new eminent domain statutes and the standards required for condemning an environmentally-contaminated area. (AA.28, FOF ¶34; T.96:8-14.)

4. Testimony By Mr. Eric Hesse Explained How The Port Authority’s Testing Plan Would Cause Only Minimal Interference With Business Operations.

The Port Authority presented the testimony of Mr. Eric Hesse, the Senior Project Manager at Liesch, who testified about the Port Authority’s proposed testing and how Liesch went about preparing that proposal. (AA.28, FOF ¶35.)

First, Mr. Hesse explained how, after preparing the Phase I report in April 2007, he also prepared a Response Action Plan (a “RAP”) for the MPCA. (T.104:20-105:16.) He testified that a RAP is a plan that is prepared to deal with contamination on property, and that two of the elements of the RAP for this project specifically dealt with the

“excavation of contaminated areas, in particular some high levels of lead,” (T.105:11-12) and “the preparation of a cover system over the existing waste deposit for separation between that waste deposit and any future development.” (T.105:13-15).

Mr. Hesse then testified that Liesch used the past reports, information from people who had previously worked on the property, and the MPCA response to put together the testing plan. (T.106:1-4.) The testing plan included things like soil borings, monitoring wells, test pits, and vapor probes; the plan was admitted into the record as Exhibit 1. (AA.29, FOF ¶36; T.42:20-25; *see* T.43:11-18.) Tables attached to the plan described each test site and identified why each test was being proposed at each particular site. (AA.29, FOF ¶36.)

Mr. Hesse testified that monitoring wells would be on-site from six to eight weeks (AA.29, FOF ¶38) because ground-water testing required at least two samples, and then the results had to be submitted to the MPCA, which may require additional testing or approve the wells for closure (T.109:10-110:2). After the well is closed you cannot tell that the well had been present. (T.110:12-15.) Mr. Hesse testified that tests pits are dug by a track backhoe. (T.110:20-111:14.) Observations about the soil conditions are then made on-site, and the test pit is immediately refilled and compacted. (*Id.*) The entire process for digging and refilling test pits takes forty-five minutes to one hour to complete. (T.111:18-19.)

Mr. Hesse also testified about how, in implementing the testing plan, he would first contact all of the property owners, perform a walk-through of each site, and then determine how accessible the site was for equipment and testing. (AA.28, FOF ¶35.) He

testified that Liesch was willing to work with the property owners to minimize inference with business operations. (AA.29, FOF ¶37.) Liesch was also willing to work evenings and weekends to accommodate businesses like IAA who were open to the public during the week. (*Id.*) He also described how Liesch would use “at-grade” monitoring wells, which would allow traffic to pass over the well without interfering with testing. (*Id.*; T.108:9-109:2.)

5. Mr. Wade Carlson’s Affidavit Confirmed The Presence Of Lead In The Soils

Advanced Shoring Co., Advanced Equipment Co, and the Estate of Ordean Haug, (collectively “Advanced”), submitted the affidavit of Mr. Wade Carlson, the President and Senior Geologist at ProSource Technologies, Inc. (AA.29, FOF ¶39.) Mr. Carlson attested that ProSource had commenced and completed environmental testing on Parcels 5 and 10, and that his testing revealed that the primary contaminant on the properties was lead. (*Id.*)

6. The Fee Owners of IAA’s Rented Parcels Had No Objections To Environmental Testing

Mr. Robert Brackey, the fee owner of Parcels 11 and 12, which are rented to IAA, attended the evidentiary hearing and submitted a letter to the District Court. (AA.20; AA.30, FOF ¶40.) Mr. Brackey indicated that he was willing to consent to the entry of an Order from the District Court which would allow the Port Authority’s proposed testing on his property to proceed, subject to certain conditions as set forth in his letter. (AA.30, FOF ¶40.) The Port Authority’s counsel stated that the Port Authority was willing to comply with Mr. Brackey’s conditions. (*Id.*)

Mr. Richard and Mrs. Jean Pellow own and reside on Parcel No. 8; they also own Parcel No. 13, which they lease to IAA. (AA.30, FOF ¶41.) Through their attorneys, the Pellows indicated that they were amenable to allowing the Port Authority to access their properties for the purposes of environmental testing, but were reluctant to do so without certain conditions, one of which included the Pellows being named as additional insureds on any liability insurance policy related to the Port Authority's proposed testing. (*Id.*)

E. THE DISTRICT COURT ISSUED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND AN ORDER GRANTING ACCESS ONLY TO SOME OF THE WESTERN FORTY ACRES OF THE DISTRICT

On October 30, 2007, the District Court issued Findings of Fact, Conclusions of Law, and an Order granting the Port Authority access to certain Parcels in the western forty acres of the district. The Order was filed on October 31, 2007.

1. The District Court Found as Facts That the Port Authority Had Met the Statutory Prerequisites to Authorize Environmental Testing.

The District Court's Order set forth forty-one Findings of Fact. (AA.20-30.) The first six findings reviewed the history of the District and identified the various parcels or property in Arlington-Jackson West. The Court particularly described the uses and occupants of Parcel No. 6, Vinai Office Park, and Parcels 1 through 4, which were acquired by RLR, Inc. in 1998, and how RLR had removed all of the preexisting buildings, built 30,000 square feet of new buildings on the site, and had added two warehouse buildings. (AA.22, FOF ¶9.) The District Court noted how one of the Port Authority's Site Concept Plans for Arlington-Jackson West had not included Parcels Nos.

1 through 4 and the western two-thirds of Parcel No. 6 in future acquisitions or redevelopments. (AA.22, FOF ¶11.)

In Findings of Fact 15 through 19, the District Court reviewed the Port Authority's findings as set forth in its Resolution No. 4212. The District Court carefully summarized and analyzed the testimony of Mr. Jeffrey Huttner. (AA.24-25, FOF ¶¶20-22.) The District Court paid particular attention to the testimony of Mr. Robert Kaiser, who described the results of environmental testing done in the 1990s. (AA.25-27, FOF ¶¶23-30.) The Court summarized in detail Mr. Kaiser's historical review, explanation of prior soil borings, descriptions of how test pits and monitoring wells are used, and his professional opinion that there was good reason to believe that hazardous substances, pollutants, or contaminants were present in Arlington-Jackson West. (AA.25-27, FOF ¶¶24-30.)

The District Court filled four paragraphs with a summary of the testimony by Mr. Scott Tracy. (AA.27-28, FOF ¶¶31-34.) The District Court used another four paragraphs to summarize the testimony of Mr. Eric Hesse. (AA.28-29, FOF ¶¶35-38.) Finally, the District Court summarized the Affidavit of Mr. Wade Carlson, which disclosed that the primary contaminant of interest on Parcels 5 and 10 was lead in the soil. (AA.29-30, FOF ¶39.)

2. The District Court Concluded That It Must Grant the Port Authority's Petition

The District Court began its legal analysis by reviewing the Port Authorities Act, including how the Minnesota Legislature had authorized the Port Authority to use the

power of eminent domain to further its purposes under the Port Authority Act—to acquire and redevelop marginal properties. (AA.30-31, COL ¶44.) The District Court concluded that when the Port Authority purports to use the power of eminent domain, it must do so according to the procedures and limitations contained in Minnesota Statutes Chapter 117. (AA.31, COL ¶45.) The District Court concluded that the Port Authority did not exceed the scope of its powers under the Port Authorities Act when it passed Resolution No. 4212 authorizing its agents to gain access to the properties for environmental testing under Section 117.041, Subd. 2. (AA.36, COL ¶62.)

The District Court then reviewed Minnesota Statutes Chapter 117. (AA.31-32, COL ¶¶46-50.) The District Court acknowledged that Minnesota Statutes Section 117.025 had been recently amended: “The new statute specifically provides that ‘remediation of an environmentally contaminated area’ is a ‘public use’ or a ‘public purpose.’” Minn. Stat. § 117.025, Subd. 11. (AA.31, COL ¶46.) The District Court then quoted from Minn. Stat. Section 117.025, Subd. 8, which defines an “environmentally contaminated area.” (AA.32, COL ¶47.) Finally, the District Court quoted Section 117.041, Subd. 2, which defines when and how a political subdivision may access property to “conduct environmental testing before commencing eminent domain proceedings.” (AA.32, COL ¶48.)

After addressing the applicable statutes, the District Court addressed, and rejected the Respondents’ constitutional arguments. The District Court presumed that these statutes were constitutional, thus placing the burden on the Respondents to demonstrate that they were not constitutional. (AA.33, COL ¶51 (citing Minn. Stat. § 645.17).)

First, the District Court addressed the takings-clause arguments that IAA and Advanced made in their briefs before the September hearings. The District Court reviewed *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and stated that the United States Supreme Court's decision was narrow and that not every physical occupation was a taking. (AA.33, COL ¶52.) Then the District Court looked to Minnesota case law, namely *Spaeth v. City of Plymouth*, 344 N.W.2d 815 (Minn. 1984), and held that the *Spaeth* case did not support the Respondents' arguments that Section 117.041 is unconstitutional either. (AA.33-34, COL ¶53.) The District Court's analysis focused on how Section 117.041, Subd. 2 authorized only temporary access to the property, that the statute prohibits political subdivisions from doing unnecessary damage, and that it requires the political subdivision to "restore the property to substantially the same condition in which it was found." (AA.34, COL ¶54.) Ultimately, the District Court concluded that Section 117.041 was not a taking of property, rather it was more akin to a license, and that it was not unconstitutional under the takings clauses of the state and federal constitutions. (*Id.*)

Next, the District Court concluded that the Port Authority had satisfied the requirements of Section 117.041, Subd. 2(a). (AA.34-36, COL ¶¶55-64.) The District Court focused on Resolution No. 4212 and the evidence presented at the evidentiary hearing in reaching that conclusion: The Port Authority considered the Phase I analysis prepared by Liesch, the historic uses of the property, the current uses of the property, and AET's studies in the mid-1990s in concluding that the presence of certain contaminants,

lead and petroleum for example, were present in the property and that the presence of such contaminants warranted testing and possible acquisition. (AA.34-35, COL ¶56.)

For each of the three factors enumerated in Minn. Stat. § 117.041, Subd. 2(a), the District Court separately concluded that the Port Authority had satisfied each of the statutory prerequisites:

In Resolution 4212, the Port Authority had reason to believe that the lack of economic investment, the marginal condition of the Arlington-Jackson West properties, and the discovery and environmental analysis demonstrating contamination, satisfied the criteria of Subdivision 2(a)(1) of Minn. Stat. § 117.041. The Port Authority concluded it has reason to believe that acquisition of some or all of the Parcels in Arlington-Jackson West may be required. Therefore, Minn. Stat. § 117.041, Subd. 2(a)(1) is satisfied.

Based on the evidence identified in paragraph [56], Port Authority has reason to believe that “a hazardous substance, pollutant or contaminant is present on the Parcels or the release of a hazardous substance, pollutant or contaminant may have occurred or is likely to occur on the Property.” Minn. Stat. § 117.041, Subd. 2(a)(2) is satisfied.

The remediation of lead, petroleum, and hazardous materials, which have already been found in the Arlington-Jackson West properties, is rationally related to the health, safety or welfare concerns of the Port Authority and the citizens of the City of St. Paul. Minn. Stat. § 117.041, Subd. 2(a)(3) is therefore satisfied as well.

(AA.35, COL ¶¶57, 58, and 59.)

With regard to IAA’s argument that Mr. Carlson’s affidavit disclosed only low-level contamination, the District Court stated that Section 117.041, Subd. 2(a)(2) did not require the Port Authority to prove that any certain levels of contamination were present, but only that it had reason to believe that there was a hazardous substance, pollutant, or contaminant present on the property. (AA.36, COL ¶61.)

The District Court concluded that the Port Authority had met all three prerequisites of Section 117.041, Subd. 2(a). (AA.36, COL ¶63.) Because the statute says that the court “‘shall’ issue an order authorizing” access if the statute is satisfied, the District Court granted the Port Authority’s Petition. (AA.36, COL ¶64.)

3. The District Court Issued A Conditional Order Authorizing Access for Environmental Testing.

Pursuant to Minn. Stat. § 117.041, Subd. 2, the District Court granted the Port Authority, its employees, contractors, and designees, access to the Eastern one-third of Parcel 6, and all of Parcels 7-8, 10-14, and 16-18 of the District “for purposes of investigation, monitoring, testing, surveying, boring, or other similar activities necessary or appropriate to identify the existence and extent of a release or threat of release of a hazardous substance, pollutant, or contaminant for the period of time commencing with the filing of this Order and extending for 180 days from the date of entry of this Order.” (AA.36-37, Order ¶1.) The Port Authority was directed to name each of the Respondents as additional insureds on a liability insurance policy that would cover the Port Authority’s activities related to the environmental testing. (AA.37, Order ¶3.) The Port Authority was also directed to “personally meet with representatives of each of the Respondents to review the specific locations for the testing and monitoring to be conducted hereunder.” (AA.38, Order ¶4.) The Port Authority was further directed to provide at least five days notice of the times and dates for when testing was scheduled to take place, to allow representatives of the Respondents to be present and to observe any

testing, sampling, or monitoring activities; and to provide each Respondent with any written reports or analyses. (*Id.*)

The District Court's Order required that when conducting testing or monitoring activities pursuant to the Court's Order, "the Port Authority shall do so in a manner that provides as little interference with the business activities of the Respondents as is reasonably practical, including the conducting of testing and monitoring in the evenings or on weekends." (AA.37-38, Order ¶5.) The Port Authority was directed to "do no unnecessary damage to the Parcels" (AA.38, Order ¶7) and for any soils, buildings, vehicles, or equipment that were disturbed, damaged or moved during the testing or monitoring activities, all such items or things were "to be restored by the Port Authority to the same location, in the same composition, to the same compaction, and to the same type of service as they were prior to the testing or monitoring activities." (AA.38, Order ¶6.)

Finally, upon completion of any activity undertaken pursuant to the Order, the Port Authority was required to "remove any and all equipment and other personal property brought on to the parcels, and close and fill all soil penetrations." (AA.38, Order ¶8.)

On November 13, 2007, the Port Authority served a Notice of Filing Order upon all Respondents and their counsel. (Notice of Filing Order of 11/13/07.) On November 20, 2007, IAA gave Notice that it had substituted new lawyers into the case in place of those who had previously been involved with the litigation. (IAA Notice of Substitution of Counsel of 11/20/07.) The new counsel filed a Notice of Appeal to the Court of Appeals on November 20, 2007. (AA.39-40.) No other Respondent has filed a Notice of

Appeal, and the time for filing an appeal has passed. *See* Minn. R. Civ. App. P. 104.01, Subd. 1.

IAA also sought a stay of the District Court's Order. (IAA Notice of Motion and Motion of 12/5/07.) IAA and the Port Authority each filed briefs and presented oral argument. (IAA Memo. of 12/5/07; Port Authority Memo. of 12/11/07; IAA Reply Memo. of 12/17/07.)

On January 4, 2008, the District Court denied IAA's request for a stay. (AA.49-50.) IAA then filed a request for a stay with the Court of Appeals. (*See* AA.51.) On February 5, 2008, the Court of Appeals remanded the stay issue to the District Court with directions to make findings supporting whatever decision it made. (AA.52-54.) On March 17, 2008, the District Court issued an Order again denying IAA's motion for a stay pending appeal, and included findings of fact in support of its decision.⁴ (RA.1-4.)

⁴ Submitting new materials, like public records, and the District Court's March 17, 2008 Order denying a stay, is appropriate. *State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000); *In re Livingood*, 594 N.W.2d 889, 895-96 (Minn. 1999) (conclusive, documentary evidence is properly considered if it supports affirming of the district court).

ARGUMENT

I. STANDARD OF REVIEW

“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01. On appeal, the record is viewed in a “the light most favorable to the judgment of the District Court.” *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). “Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted).⁵

Application of basic found facts to law includes a determination of mixed questions of law and fact, such as the case where a trial court weights statutory criteria in light of those facts. *Maxfield v. Maxfield*, 452 N.W.2d 219, 221 (Minn. 1990). When reviewing mixed questions of law and fact, this court corrects erroneous applications of the law, but accords the District Court discretion in its findings of fact and ultimate conclusions. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997). If the conclusions are consistent with the statutory mandate, an appellate court will affirm. *Colburn v. Pine Portage Madden Bros., Inc.*, 346 N.W.2d 159, 161 (Minn. 1984).

⁵ IAA does not appear to challenge the District Court’s Findings of Fact; rather, IAA argues that the District Court committed a legal error, likely to avoid the more stringent “clearly erroneous” standard of review.

Minn. Stat. § 645.17(3) presumes that: “the legislature does not intend to violate the Constitution of the United States or of this state.” Thus, the courts’ “power to declare a statute unconstitutional should be exercised with extreme caution.” *Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 308 (Minn. 2000). The power of appellate courts “to declare a statute unconstitutional should be exercised . . . only when absolutely necessary.” *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). “The party challenging a statute has the burden of demonstrating beyond a reasonable doubt a violation of some provision of the Minnesota Constitution.” *Id.*

Statutory construction is a question of law, which this court reviews *de novo*. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). Review of a decision regarding the constitutionality of a statute is also *de novo*. *Hamilton v. Comm’r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999).

II. THE DISTRICT COURT CORRECTLY GRANTED THE PORT AUTHORITY’S PETITION AUTHORIZING ACCESS UNDER SECTION 117.041, SUBD. 2

The District Court had ample record evidence by which it could properly conclude that the Port Authority satisfied the plain language of Section 117.041, Subd. 2. The proper reading of the statute and application of that statute to this record demonstrates that the District Court did not err in authorizing the Port Authority to conduct environmental testing on the Parcels in the western forty acres of the District.

Minn. Stat. § 117.041, Subd. 2(a) authorizes state agencies and political subdivisions to enter property to conduct an investigation and to monitor and test for the existence or threat of a release of a “hazardous substance, pollutant, or contaminant,”

provided the political subdivision meets three criteria. Section 117.041, Subd. 2(a). By IAA's own admission, Section 117.041, Subd. 2 is "plain and unambiguous." (IAA Br. at 16.) In this case, the District Court found facts and concluded that the Port Authority had met all three of the prerequisites required by the legislature.

The District Court made detailed Findings of Fact, each of which is supported by the evidence submitted by affidavit or adduced through testimony at the evidentiary hearing held on September 10, 2007. This Court cannot reverse the District Court's findings of fact absent a determination that those facts are clearly erroneous, or against the manifest weight of the evidence. *Rogers*, 603 N.W.2d at 656. Since there appears to be no dispute as to the accuracy of the Findings of Fact, this Court is bound by the District Court's findings. *See Plowman v. Copeland, Buhl & Co., Ltd.*, 261 N.W.2d 581, 583 (Minn. 1977).

A. The District Court Did Not Err In Concluding That The Port Authority Satisfied Section 117.041, Subd. 2(a)(1)

Resolution No. 4212, the District Court's findings, and the Port Authority's statutory power to acquire and remediate marginal properties all support the District Court's conclusion that Section 117.041, Subd. 2(a)(1) has been satisfied in this case. (AA.23, FOF ¶16; AA.35, COL ¶57.) The Port Authority need only show that it "has reason to believe that acquisition of the property may be required pursuant to eminent domain proceedings." Minn. Stat. § 117.041, subd. 2(a)(1).

The Port Authority determined in 1993 and again in 2007 that the Arlington-Jackson area is marginal property as defined in Minn. Stat. § 469.048, Subd. 5. It is an

area in which the private sector has made only minimal investment in new construction over many years. (AA.7-8; AA.21, FOF ¶4.) Arlington-Jackson West is home to an out-of-state auto insurance operation that stores hundreds of vehicles in outside locations, as well as large outdoor storage areas for a construction crane operation, and other construction related uses. (AA.7-8; AA.21, FOF ¶7.) Lead, petroleum, and other hazardous materials were identified in the mid 1990s as being in many of the properties in Arlington-Jackson West. (*See, e.g.*, AA.29, FOF ¶36.)

The District Court found that the Port Authority Board had resolved that the “lack of private-sector investment in recent years and the minimal number of jobs supported by the Arlington-Jackson West properties contribute to the marginal condition of the Arlington-Jackson West properties” and that such findings “gave the Port Authority reason to believe that acquisition of those properties may be required.” (AA.23, FOF ¶16.) In addition, the District Court concluded that the “discovery and environmental analysis demonstrating contamination” also supported the Port Authority’s reason to believe under subdivision 2(a)(1) “that acquisition *may* be required pursuant to eminent domain proceedings.” (AA.35, COL ¶57 (emphasis added).) That is all the Port Authority needed to show in order to satisfy Section 117.041, Subd. 2(a)(1). The operative term is “may,” which is “permissive.” Minn. Stat. § 645.44, Subd. 15. The District Court properly concluded that the Port Authority had made such a showing. (AA.35, COL ¶57.)

B. The District Court Did Not Err In Concluding That The Port Authority Satisfied Section 117.041, Subd. 2(a)(2)

The record in this case fully supports the District Court's Findings of Fact and Conclusions of Law that the Port Authority satisfied Section 117.041, Subd. 2(a)(2). Subdivision (a)(2) requires the Port Authority to show that it has "*reason to believe* that a hazardous substance, pollutant, or contaminant is present on the property or the release of a hazardous substance, pollutant, or contaminant may have occurred or is likely to occur on the property." (Emphasis added.)

Resolution No. 4212 identified "the prior and ongoing uses of the properties which constitute the western section of the District, and . . . the environmental analysis done during the Phase I of the Arlington Jackson Development Project," as giving the Port Authority good reason to believe that there was contamination present on the properties. (AA.8.)

Much of the record evidence which supports the District Court's Findings of Fact that there were contaminants on the parcels was adduced from testimony taken at the evidentiary hearing held on September 10, 2007. This record evidence falls into four categories: (1) the historical uses of the properties; (2) the Phase I and II reports prepared in the mid-1990s; (3) the current uses of the properties; and (4) other environmental reports. Record evidence from each category supports the District Court's findings and conclusions.

Two of the witnesses, Mr. Kaiser and Mr. Tracy, stated that prior uses of properties is a legitimate tool to determine whether contamination would likely be found.

AA.25, FOF ¶24; AA.27, FOF ¶32.) The prior uses of the properties included automobile-salvage operations, storage and repair of construction equipment, use as an asphalt plant, and filling with demolition and construction debris. (AA.22, FOF ¶12.) Even Mr. Tracy, who was called as a witness by IAA, admitted that the prior use of IAA's property as an asphalt plant was grounds for additional testing. (T.88:25-89:5; see AA.27-28, FOF ¶32.)

Mr. Tracy also testified that the Mostardi Platt study had identified 350 cubic yards of soil potentially impacted by GRO and DRO. (AA.28, FOF ¶33; T.90:18-22, 91:3-6.) He also acknowledged that there was low-level petroleum hydrocarbon contamination and lead contamination, (T.76:5-9, 20-21), and that it was not uncommon to find petroleum and lead contamination on industrially-used properties. (T.77:16-78:3.)

The initial Phase I and II reports prepared by AET in the mid-1990s were addressed by Mr. Kaiser. (AA.25, FOF ¶23.) Mr. Kaiser testified that AET found several different types of contaminants in the soils in the District, including lead, diesel-range organics, petroleum, petroleum-by products, construction and demolition waste, and other buried items. (AA.25, FOF ¶25.) There was "a lot of construction debris, a lot of wood, asphalt, [and] a lot of swamp deposits" as well. (T.50:15-17.) The 1993 Phase I report had recommended: "Additional soil borings should be conducted near SB-31 to determine the extent of DRO contamination." (AA.26, FOF ¶28; T.69:16-21.) Both lead and DRO are contaminants. (T.69:22-25.)

The current use of the properties includes uses similar to what had been on the properties before. Parcel 5 and Parcel 10 are home to a large outdoor storage and staging

operation for construction cranes. (AA.21, FOF ¶7.) Mr. Wade Carlson attested that the primary contaminant on those properties was lead. (AA.29-30, FOF ¶39.) Parcel 8 is used as a salvage yard. (See AA.21, FOF ¶7; Petition, Ex. C.) Parcels 11 through 14 are occupied by IAA, which stores thousands of wrecked cars outside. (AA.21, FOF ¶7.)

The Phase I prepared by Liesch in 2007 was prepared by looking at the past reports and the current uses of the properties. (T.106:1-4.) In preparing the RAP to the MPCA, Mr. Hesse testified that two of the biggest concerns that Liesch would have to deal with was the high concentrations of lead and the excavation or preparation of a cover system for the buried waste that was present on the properties. (T.105:11-15.)

At the September 11, 2007, hearing, IAA argued that the Port Authority did not have reason to believe that contamination was present, (T.158:11-15, 161:12-17); IAA now appears to have abandoned that argument in its brief to this Court, in favor of a completely new attack focusing on the first element of the Section 117.041, Subd. 2(a) analysis. Regardless of IAA's position on appeal, the record evidence submitted to the District Court, and even IAA's own witnesses, provide ample support for the District Court's Findings of Fact that there was "good reason" to believe contamination was present in the properties (AA.25-30, FOF ¶¶23-30, 32-33, 39; AA.24-35, COL ¶¶56, 58.)

Based on the environmental testing performed in the mid-1990s and on the historical uses of the properties, the District Court properly found that the Port Authority had "good reason to believe" that there were hazardous materials, pollutants, or contaminants present on the properties or that the threat of a release of any of those kinds of materials could have occurred. (AA.23, FOF ¶17; AA.35-36, COL ¶¶58, 61, 63-64.)

C. The District Court Did Not Err In Concluding That The Port Authority Satisfied Section 117.041, Subd. 2(a)(3)

The Port Authority determined that the remediation of lead, petroleum by-products, and other waste materials was rationally related to the health, safety, and welfare of Saint Paul residents. (AA.8.) Based on the types of materials that were found to be present in the properties in the mid-1990s, and based on the stated benefits of redevelopment of marginal properties, the District Court properly concluded that the Port Authority satisfied the third element of Section 117.041, Subd. 2(a)(3), that “entry on the property for environmental testing is *rationally related* to health, safety, or welfare concerns of the state agency or political subdivision in connection with possible eminent domain proceedings.” Minn. Stat § 117.041, Subd. 2(a)(3) (emphasis added); (AA.35, COL ¶59.)

As the District Court noted, the Minnesota Legislature has determined:

[T]he decline of marginal lands often cannot be reversed except by developing all or most of those lands. Private development may be uneconomic and practically impossible because of costs and lack of legal power. The public may have to acquire sizable areas of marginal property at fair prices to remedy the conditions on the marginal property, and to develop the areas under proper supervision, with appropriate planning and continuing land use. The development of land acquired under sections 469.048 to 469.068 is a public necessity and use and a governmental function. The sale or lease of the land after development is incident to the real purpose: to remove the condition making the property marginal.

* * *

The development of marginal property and its continuing use are public uses, public purposes, and government functions that justify spending or advancing public money and acquiring private property. The development is a state concern in the interest of health, safety, and welfare of the people of the state and of all residents and property owners in communities having

marginal property. Marginal property causes problems beyond control of police power alone.

(AA.31, COL ¶ 45); *Accord Camara v. Municipal Court*, 387 U.S. 523, 535 (1967) (municipal inspections of properties are often necessary, “because unsightly conditions adversely affect the economic value of neighboring structures”).

Mr. Kaiser testified that lead and DRO are contaminants. (T.69:22-25.) The nature of the contaminants—lead, petroleum, and other hazardous materials—led the Port Authority, and the District Court to conclude that entry on to the properties to investigate and test for these pollutants, with an eye toward remediation, was rationally related to the health, safety, and welfare of the citizens of the City of Saint Paul. (AA.35, COL ¶59.) *See* Minn. Stat. § 115B.02, Subds. 8 and 9 (defining hazardous substances and hazardous wastes).

The District Court correctly determined that the unchallenged presence of lead, petroleum, and former landfill debris could be further investigated by the Port Authority to determine the scope and effects of these contaminants. It cited the 2006 amendments to the Eminent Domain Statute, which specifically provide that “remediation of an environmentally contaminated area” is a “public use” or a “public purpose.” Minn. Stat. § 117.025, Subd. 11. (AA.31, COL ¶46.) She also cited Minn. Stat. § 117.025, Subd. 8, which provides a new definition of an “environmentally contaminated area” and sets forth a formula which requires a potential condemnor to have accurate data concerning “the estimated costs of investigation, monitoring and testing, and remedial action or removal.” (AA.32, COL ¶47.) The cost analysis contemplated by the new statute can

only be determined if there is data concerning the location and quantity of polluted areas or contaminated materials.

D. The District Court Correctly Concluded That The Port Authority Satisfied Section 117.041, Subd. 2(a)

The plain language of Minn. Stat. § 117.041, Subd. 2(a) demonstrates that the District Court properly applied the undisputed factual record to the unambiguous language of the statute in concluding that the Port Authority satisfied all of the requirements of Section 117.041, Subd. 2. The District Court concluded:

Minn. Stat. § 117.041 provides that if the political subdivision has met the requirements of subdivision 2(a), then the Court “shall” issue an order authorizing the political subdivision to enter property for purposes of investigation, monitoring, testing, surveying, boring, or other similar activities. Minn. Stat. § 645.16, Subd. 16, provides that “shall” is mandatory. Thus, the Court must grant the Port Authority’s Petition.

(AA.36, COL ¶64.)

The District Court, therefore, did not commit legal error in granting the Port Authority’s Petition. On the record before this Court, there is but one conclusion that can reasonably be reached: the Port Authority satisfied the plain language of Section 117.041, Subd. 2, and because the statute requires it, the District Court correctly granted the Port Authority’s Petition.

III. IAA MISINTERPRETS THE REQUIREMENTS OF SECTION 117.041, SUBD. 2

The District Court properly applied the plain, unambiguous language of Section 117.041, Subd. 2 when it granted the Port Authority’s Petition. The Port Authority resolved that it had reason to believe that the properties may be acquired by it because

they were marginal; that the properties may be contaminated; and that the entry was rationally related to issues of health, safety, or welfare. The District Court applied the proper standard, and the Port Authority made the showing required by the statute. IAA's argument that the statute requires something more than what is set forth in its express language is without merit.

A. The Port Authority, At This Juncture, Need Only Meet The Standards In Section 117.041, Subd. 2, Not The "Public Use" Or "Public Purpose" Standards For Condemnation

The procedural posture of this case does not support IAA's contention that the Port Authority must prove it can acquire IAA's property in the future as a pre-condition to gaining entry for environmental testing. "When interpreting a statute, we first look to see whether the statute's language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). "When the words are *not* explicit, the intention of the legislature may be ascertained" Minn. Stat. § 645.16 (emphasis added). IAA admits that Section 117.041, Subd. 2 "plain and unambiguous." (IAA Br. at 16.) The Court must, therefore, give Section 117.041, Subd. 2 its plain meaning—no reliance on legislative history is authorized.

Section 117.041, Subd. 2 plainly states that the required showing is that the Port Authority has reason to believe that acquisition "may" be required. The Legislature's use of the word "may" acknowledges that any final decision concerning the acquisition by the public agency is not required. Minn. Stat. § 645.44, Subd. 15 ("may" is permissive). The authority required to conduct environmental testing as authorized by Section

117.041, Subd. 2 is not the same standard that must be met in order to acquire real property pursuant to the power of eminent domain. Section 117.041, Subd. 2 is titled “Environmental testing *before* eminent domain proceedings.” (Emphasis added). Commentators concur that Section 117.041, Subd. 2 is intended to be used *prior* to the commencement of eminent domain proceedings: “Minnesota law permits a condemnor to conduct preliminary environmental testing *before* it makes a commitment to acquire the property.” J. Dorsey, B. Gunn, M. Simpson, 25 Minnesota Practice Series § 10.12 (2007) (emphasis added); R. Lindall, J. LeFerre, and M. Dobbins, *Minnesota Condemnation Law and Practice*, 100-104, 102 (1992) (condemnor may enter “to determine the existence, extent, and cost of remediating any environmental contamination that exists on the property”).

A fair reading of the plain and unambiguous statute, in light of the procedural posture of this case, demonstrates that IAA’s contention that Section 117.041, Subd. 2 requires more than what is stated by its express terms is without support. The District Court properly determined that the Port Authority met the applicable standard for access for environmental testing, and that it did not need to prove more:

At this stage of these proceedings, the Port Authority has demonstrated that [it] has reasonable grounds to find out what contamination is present and the extent of that contamination. Should the Port Authority find sufficient contamination, then eminent domain proceedings may be considered, but that matter is not presently before this Court and nothing in this order may be binding [on] any future condemnation proceedings.

(AA.34, COL ¶ 55.)

IAA also mistakenly argues that there was some “order of magnitude” that a political subdivision must establish as a “condition precedent” before securing entry for environmental testing. (IAA Br. at 14-18.) IAA is simply wrong in its reading of the statutory prerequisites. There is no requirement that a petitioner must establish either a minimum threshold of contamination, nor establish the estimated cost for remediating the contamination found to exist on the subject properties in Section 117.041, Subd. 2.

The District Court specifically considered and rejected a similar argument by the Respondents:

The Court has taken notice of the arguments by several of the Respondents that the levels of contamination may not present a present risk to the public health or do not exceed certain health-risk levels. As the Court reads Minn. Stat. § 117.041, Subd. 2(a)(2), however, the statute merely requires good reason to believe that hazardous substances, pollutants, or contaminants are present on the property or have been released on the property; the statute does not identify any particular level of contaminants or pollution which must be present before a political subdivision may proceed pursuant to Minn. Stat. § 117.041.

(AA.36, COL ¶61.)

The political subdivision is not required to do any more than to meet the statutory prerequisites. At this stage of the proceedings, the Port Authority did not need to show that the extent of the contamination exceeded established health risk limits. The Port Authority also did not need to establish at this time the relationship between the estimated costs of investigation, remediation, and cleanup, and the assessed value of the property. The District Court correctly found that the Port Authority had fully complied with all of the statutory prerequisites for access for pre-condemnation environmental testing. The

District Court was correct in not adding additional prerequisites beyond those required by the State Legislature.

Access for environmental testing pursuant to Minn. Stat. § 117.041 is a statutory proceeding. The legislature set forth three specific prerequisites for environmental testing; it would be wrong and inappropriate for the Court of Appeals to add new requirements beyond those already existing in the statute.

B. The Port Authority Must Satisfy Both The Port Authorities Act And Chapter 117 To Condemn Property

IAA fundamentally misinterprets the relationship between Minnesota Statutes Chapters 469 and 117. The Port Authority has consistently acknowledged that it intends to comply with *both* Chapters 469 and 117. Minnesota Statutes Chapter 117 is generally not a grant of any “power” of eminent domain, rather, it sets forth the procedures for *how* the power granted in other statutes is to be exercised. (AA.30, COL ¶43.)

The Port Authorities Act, Minnesota Statutes Chapter 469, dictates what port authorities may do, and in this case, the legislature has vested the Port Authority with the power to acquire and redevelop marginal properties, including the use of the power of eminent domain. Minn. Stat. § 469.058, Subd. 2; (AA.30-31, COL ¶¶43, 44.) The Port Authorities Act does not define the procedures for how a port authority may acquire property using eminent domain; the Act merely states that a port authority has the power of eminent domain for the purposes that are authorized under the Port Authorities Act.

On the other hand, Minnesota Statutes Chapter 117 is generally not a grant of any power of eminent domain, rather it sets forth procedures and limitations on how the

power granted in other statutes is to be exercised. Minn. Stat. § 117.012. When a port authority condemns property, it must comply with the procedures and limitations contained in Chapter 117. This includes the limitations defining a “public use” and “public purpose” in Section 117.025, Subd. 11. The Port Authority has never contended that it may pursue condemnation only under the auspices of the Port Authorities Act; rather, the Port Authority has always stated that it intends to comply with both the Port Authorities Act and with Chapter 117. (8/29 T.9:1-25, 11:9-17:14; T.178:4-182:4.)

IAA’s position that Minn. Stat. Section 117.012, Subd. 1 repeals sections of the Port Authority Act ignores two crucial canons of construction. First, laws that apparently conflict “are to be construed together, if possible, to give effect to both provisions.” *State by Beaulieu v. Indep. Sch. Dist. No. 624*, 533 N.W.2d 393, 396 (Minn. 1995); Minn. Stat. § 645.26, Subd. 1. And second, implied repeals are disfavored under Minnesota law. A law is not simply repealed by a later enactment of a different statute if the provisions of the two statutes are not necessarily inconsistent. *State v. City of Duluth*, 238 Minn. 128, 131, 56 N.W.2d 416, 418 (Minn. 1952). If both statutes can stand together, then neither can be deemed impliedly repealed, as IAA argues in the case. *See id.* The Port Authorities Act and Chapter 117 can and should be construed together, which gives effect to both statutes and avoids any implied repeal.

For instance, Section 117.012, Subd. 1 states that “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. 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” Section 117.012, Subd. 1 does not itself repeal any part of the Port Authorities Act, rather it is a savings clause for those “additional procedures, remedies, or limitations” that are not inconsistent with Chapter 117. The purpose of a savings clause is not to “nullify” or “defeat,” but to “preserve all existing rights which were not inconsistent with those created by the statute.” *Blackburn v. Doubleday Broad. Co.*, 353 N.W.2d 550, 555 (Minn. 1984) (citation omitted).

IV. IAA’S CONSTITUTIONAL CHALLENGES” ARE WITHOUT MERIT; SECTION 117.041 IS CONSTITUTIONAL

In its Answer, IAA raised numerous “constitutional” challenges; including that Minn. Stat. § 117.041 violated the Fifth Amendment to the United States Constitution, and also that the Fourth Amendment to the United States Constitution and Article 1, Section 10 of the Minnesota Constitution. Several times, IAA asserted that “Minn. Stat. § 117.041 is unconstitutional and unconstitutional as applied.” (AA.13, 16). When it argued before the District Court, however, IAA did not vigorously pursue any of its purported “Constitutional” arguments, which is presumably why the District Court in its Order only addressed the “unlawful taking” argument. (AA.33-34, COL ¶¶51-54).

In Appellant’s Statement of the Case, filed with its notice of appeal, IAA did not even reference the Federal or State Constitution in identifying the “specific issues proposed to be raised on appeal.” (AA.42.) Yet, two weeks later, IAA served and filed a Notice of Constitutional Challenge of Statute, asserting violations of the takings, due process, and unreasonable search and seizure provisions of both the Minnesota and

Federal constitutions. (AA.48.) Now, before this Court, IAA's Brief raises new arguments alleging unreasonable searches and unlawful takings violative of the respective constitutions. (IAA Br. at 1, 18-23.)

"A facial challenge to the constitutionality of a statute requires a showing that 'no set of circumstances exists under which the Act would be valid.'" *Soofoo v. Johnson* 731 N.W.2d 815, 821 (Minn. 2007) (citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990)). IAA cannot successfully challenge Section 117.041, Subd. 2 as a facial constitutional challenge "unless it would be unconstitutional as applied" to *all* persons whose property is to be tested under the provisions of Section 117.041, Subd. 2. *Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*, 162 N.W.2d 206, 213 (Minn. 1968). Unless a statute is facially unconstitutional, the constitutional validity depends not on assumptions, but on "the record before the court." *Medill v. State*, 477 N.W.2d 703, 707 (Minn. 1991).

A. Section 117.041, Subd. 2 Does Not Result In A Compensable Taking Of Property

The District Court carefully considered the "takings" issue and found no taking. (AA.33-34, COL ¶¶52-55.)⁶

First, the District Court considered *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), in which the United States Supreme Court stated at the

⁶ Although the District Court clearly made Findings of Fact and Conclusions of Law, IAA's statement of issues states that the District Court never reached the Fifth Amendment takings issues. (IAA Br. at 1, Issue 4.) It did reach this issue, and held that there was no taking, rather that the entry was akin to a license. (AA.33-34, COL ¶¶51-54.)

outset: “This case presents the question of whether a minor but *permanent* physical occupation of an owner’s property authorized by government constitutes a taking of property” (Emphasis added.) In *Loretto*, it was the permanent nature of the occupation that was determinative, not the scope of the occupation. *Id.* at 441. The District Court in this case distinguished *Loretto*, noting “The permanence and absolute exclusivity of a physical occupation distinguish it from the right to exclude. Not every physical invasion is a taking.” (AA.33, COL ¶152 (citing *Loretto*, 458 U.S. at 436 n.12).)

In discussing a then-recent case, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980), *Loretto* noted that a temporary physical invasion of solicitors (pursuant to their First Amendment rights) on shopping-center property was not a taking because, although they physically occupied the property, “the fact that [the solicitors] may have ‘physically invaded’ [the owners’] property cannot be viewed as determinative” because the invasion was “temporary and limited in nature.” *Id.* at 434. There was no permanent physical occupation in *Prune Yard*, and therefore no taking. *Id.* There is no permanent invasion in the case at bar, and therefore no taking.

Another case that the Respondents cited was the Minnesota Supreme Court’s holding in *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 817 (Minn. 1984), where the Supreme Court addressed whether the construction of a storm-water pond was a compensable taking. In deciding the issue, the Supreme Court turned to *Loretto* and stated: “Where government action results in a permanent physical appropriation or occupation of property, there certainly has been a taking.” *Id.* at 821 (citing *Loretto*, 458 U.S. at 435). The Minnesota Supreme Court stated the rule regarding permanence:

“Permanent in this context refers to ‘a servitude of indefinite duration,’ even if intermittent. . . .” *Id.* at 822. In *Spaeth*, there was evidence that the property “generally remained flooded for approximately three years.” *Id.* Again, the determinative factor in finding a taking was that the storm-water pond was permanent; it was not temporary. *Id.* The District Court distinguished *Spaeth* on the same grounds that it distinguished *Loretto*, namely that “temporary invasions were distinguishable from permanent physical occupations” and the temporary access granted to the Port Authority was not a “servitude of indefinite duration.” (AA.33-34, COL ¶53.)

IAA suggests that *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), is support for the idea that the Port Authority’s requested access rises to the level of a permanent physical occupation. (IAA Br. at 22). *Hendler* commands no such conclusion. At the hearing, the Port Authority distinguished *Hendler* from this case. (T.144:13-147:9.)

In *Hendler*, in September 1983, the EPA issued an administrative order granting itself access to Hendler’s property to monitor and extract contaminated ground water migrating from the nearby Stringfellow Acid Pits. *Id.* at 1369. The issue was whether the activity was “so short lived as to be more like the tort of trespass . . . ,” and therefore not compensable. *Id.* at 1371. The Court of Appeals upheld the Court of Claims’s initial decision that there had been no taking. *Id.* at 1375. The Court of Appeals also found, however, that after years had passed, the wells were still there, and held that such facts “were comfortably within the degree necessary to make out a taking.” *Id.* at 1377. That Court found two factors determinative: (1) “Nothing in the Government’s activities

suggests that the wells were a momentary excursion shortly to be withdrawn, and thus little more than a trespass,” and (2) “Nor does the Order or the Government’s subsequent actions disclose any indication of a timetable for withdrawal.” *Id.* at 1376. Under those facts, which are unlike the instant situation, the court found a compensable taking. *Id.* The District Court did not address the *Hendler* decision in its conclusions of law, presumably because its facts were so different.

In this case, the District Court only authorized a temporary access to perform testing, which delineated a specific timeframe in which the Port Authority may enter the property, perform the statutorily-permitted testing, and leave. (AA.37-38, Order ¶1.) Second, Section 117.041, Subd. 2 does not contemplate permanent physical occupation of the property. Rather, the import of Section 117.041, Subd. 2 is to permit environmental testing *before* instituting condemnation proceedings—*i.e.*, before there is any taking of the property.

The District Court carefully considered the language of the statutory provisions and the requirements of the constitutions:

[Minn.] Stat. § 117.041 does not provide for an unlawful taking of property under either the United States Constitution or the Minnesota Constitution. The statute does not provide for a “taking” of “property,” instead, the statute merely authorizes temporary access, which is in the nature of a license,⁷ and does not authorize any transfer of ownership to the political

⁷ “[A] license is not an estate [in property] but a permission giving the licensor a personal legal privilege enjoyable on the land of another.” *Minn. Valley Gun Club v. Northline Corp.*, 290 N.W. 222, 224 (Minn. 1940); *Pine Valley Meats, Inc. v. Canal Capital Corp.*, 566 N.W.2d 357, 361-62 (Minn. Ct. App. 1997), *review denied* (Sept. 18, 1997). “A licensee is one who has a ‘mere permission to use land, dominion over it

subdivision. Moreover, the access is governed by the statutory requirements that the political subdivision do no unnecessary damage to the property and that it shall restore the property to substantially the same condition in which it was found.

(AA.34, COL ¶54.)

The District Court heard and considered the “unconstitutional” arguments of the Respondents, including IAA and Advanced, and rejected those arguments. (AA.34, COL ¶¶54-55.) After weighing the evidence presented at the evidentiary hearings, the District Court determined that Section 117.041, Subd. 2 is constitutional and that it did not result in a taking for which compensation would be required. (AA.34, COL ¶54.) This Court should reach a similar conclusion and affirm the District Court.

B. There Has Been No Violation Of The Fourth Amendment Protection Against Unreasonable Search And Seizure

“The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution, protects individuals from unreasonable searches and seizures by the government.” *State v. Voss*, 683 N.W.2d 846, 849 (Minn. Ct. App. 2004). “A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation to privacy.” *State v. Carter*, 569 N.W.2d 169, 176 (Minn. 1997). The Fourth Amendment, however, does not prohibit all searches and seizures. “Rather, it bars only those ‘intrusions which are not justified in the circumstances, or which are made in an improper manner.’” *Humenansky v. Minn. Bd. of Med. Examiners*, 525 N.W.2d 559, 565 (Minn. Ct. App. 1994), *review denied* (Feb. 14, 1995).

remaining in the owner and no interest in or exclusive possession of it being given’ to the occupant.” *Seabloom v. Krier*, 18 N.W.2d 88, 91 (Minn. 1945) (citation omitted).

The leading case in expressing the Constitutional authority for administrative types of search warrants is *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Camara* held that administrative searches “are significant intrusions upon the interest protected by the Fourth Amendment” and therefore are covered by the warrant requirement. 387 U.S. at 534. The Court, however, held that the Fourth Amendment’s probable cause standard is satisfied if the search is “reasonable.” *Id.* For instance, the Court concluded, “routine periodic inspections of all structures” or “area inspection[s]” may be reasonable even without probable cause to believe that a code violation exists in a particular structure. *Id.* at 535-36. The Court explained that “reasonable legislative or administrative standards for conducting an area inspection” must be satisfied. *Id.* at 538. The Court elaborated:

Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., in multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Id.

The United States Supreme Court specifically rejected the argument “that warrants should issue only when the inspector possesses probable cause to believe that a particular dwelling contains violations of the minimum standard prescribed by the code being enforced.” *Id.* at 534. The Court found that code-enforcement type of inspections had a long history of judicial and public acceptance, that the public interest demanded that dangerous conditions be prevented or abated, and that “because the inspections are neither personal in nature, nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen’s privacy.” *Id.* at 537. More recently, the

Supreme Court has questioned whether a “probable cause” standard is even appropriate when addressing administrative searches: “the probable-cause standard, however, ‘is peculiarly related to criminal investigations’ and may be unsuited to determining the reasonableness of administrative searches” *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002).

The case law cited by IAA does nothing to support any argument that Section 117.041, Subd. 2 authorizes an “unreasonable” search and seizure. First, IAA cites two cases which deal with warrantless searches, a factual situation which is completely different from considering a statute which authorizes access after court approval. *See Voss*, 683 N.W.2d at 849; *Humenasky*, 525 N.W.2d at 565. IAA then cites *Camara* for a basic statement of black letter law, but fails to acknowledge that *Camara*’s holding actually supports legislative enactments such as Section 117.041. Finally, IAA cites *In re Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273 (Minn. Ct. App. 1998). Yet, in *Rozman*, the Court approved a contempt order which had issued when the property owner had refused to allow inspections of apartment rental units in violation of administrative search warrants executed by the city’s fire chief. *Id.* at 275. If the courts find compliance with constitutional guarantees in upholding search warrants issued by a fire chief, then an order authorizing access for inspection issued by a district court judge pursuant to statutory authority must surely pass constitutional muster.

Whether the basis for entry is defined as a “reason to believe” or “probable cause,” the process engaged in by the District Court was sufficient to protect IAA from any *unreasonable* search and seizure. The protections of the Fourth Amendment and Article

1, Section 10 are incorporated into the requirements of Section 117.041, Subd. 2. In fact, similar to the constitutional protections for criminal matters, Section 117.041, Subd. 2 requires that the political body obtain either the consent of the owner to conduct environmental testing, or a court order permitting access to perform the testing. Minn. Stat. § 117.041, Subd. 2(b) (the owner shall have the option to refuse entry); *see, e.g., State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (requiring consent to perform a search in the absence of a warrant).

Absent consent, the political subdivision may apply to the court to obtain an order authorizing entry and removal of materials for testing, provided that the political subdivision meets the requirements in subdivision 2(a). *Id.* Subdivision 2(a) requires that the political subdivision make a three-part showing: (1) that it has “*reason to believe* that acquisition of the property may be required;” (2) that it has “*reason to believe*” that hazardous substances are present or may have been released; and that (3) entry is “*rationally related* to health, safety, or welfare.” Minn. Stat. § 117.041, Subd. 2(a) (emphasis added). When that showing is made, the Legislature has determined that a court is compelled to grant access to permit environmental testing. Minn. Stat. § 117.041, Subd. 2(b).

Section 117.041 comports with the requirement that a government have some particularized reason to enter onto private property before an entry and search can occur and that these reasons be stated in an order or resolution. The government must have made some inquiry into facts that support the criteria, and must articulate those facts before entry will be allowed. In other words, the state agency or political subdivision

must articulate reasons that support entry; Section 117.041, Subd. 2 does not authorize entry *carte blanche*. Both because of what the state agency and political subdivision must do before they can access the property for environmental testing, and because of the court oversight required in subdivision 2(b), Section 117.041 meets Constitutional standards.

If anything, the procedures, hearings, and briefing in this case exceeded the standards under the Fourth Amendment and Article 1, Section 10 regarding searches and seizures. Here, the Port Authority articulated the reasons that it believed contamination was present on the properties, and IAA was afforded numerous opportunities to challenge those reasons before a district court judge. In this case, the Port Authority did precisely what was required by the statute, and in that respect, this cannot be said to violate the prohibition against unreasonable searches and seizures in the state and federal constitutions. The District Court found that the Port Authority's reasons were sufficient under the statute to justify granting access to perform environmental testing, thus fully satisfying all Constitutional prerequisites.

V. IAA WAIVED REVIEW OF SEVERAL ISSUES ON APPEAL BECAUSE THESE ISSUES WERE NOT PRESENTED, NOR DECIDED BY THE DISTRICT COURT

In its statement of issues, IAA purports to raise three issues before this Court that were never raised, heard, considered, nor decided by the District Court. (IAA Br. at 1.) These new issues or theories having not been raised before the District Court, they are not properly before this Court. The Minnesota Supreme Court has stated that appellate courts should not pass judgment on new issues or theories. "A reviewing court must generally

consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citation omitted). This is particularly true of constitutional arguments. *Metro. Sports Fac. Comm’n v. Minn. Twins P’ship*, 638 N.W.2d 214, 228 (Minn. Ct. App. 2002). The rule requiring issues to be preserved in the District Court also covers a prohibition on the presentation of new theories on appeal, even if the issues were raised below. *Thiele*, 425 N.W.2d at 582 (citing *Pomush v. McGroarty*, 285 N.W.2d 91, 93 (Minn. 1979); *Sec. Bank of Pine Island v. Holst*, 215 N.W.2d 61, 62 (1974) (stating that it is elementary that a party cannot shift his position on appeal)). A party is bound by the arguments it makes to the District Court. *N. States Power Co. v. Gas Servs., Inc.*, 690 N.W.2d 362, 367 (Minn. Ct. App. 2004).

Even if an appellate court is inclined to deviate from the general rule and consider an issue that was not first raised and considered by the District Court, the appellate court is bound by the District Court’s record. *Thiele*, 425 N.W.2d at 582-83; *Plowman*, 261 N.W.2d at 583 (stating that the appellate court may not consider matters outside the district-court record); *see also* Minn. R. Civ. App. P. 110.

IAA, for the first time on appeal, contends that the District Court erred in applying the law when it determined that the Port Authority had satisfied the requirements of Section 117.041, Subd. 2. When arguing before the District Court, IAA had only asked for a review of the record and determination that the record evidence was insufficient to meet the standards in Section 117.041.

IAA most certainly did not argue that the Port Authority was required to assert a “public purpose” or a “public use” under Section 117.025, Subd. 11 in its Petition under Section 117.041, Subd. 2 or that the Port Authority cannot rely on the “environmentally contaminated area” provisions of Section 117.025, Subd. 11. (IAA Br. at 7-12.) Accordingly, under the rule in *Thiele*, these new issues and new theories are not properly before the Court on appeal. This Court should decline to review these new issues and new theories presented by IAA.

IAA also proffers an argument that a public purpose or public use is a condition precedent to entry by disguising it as an argument that the Port Authority did not have reason to believe that there was contamination present in the parcels. Again, IAA failed to present this argument to the District Court, and the District Court did not have any occasion to resolve this issue below. What IAA argued to the District Court is that the Port Authority did not have a record to support Resolution No. 4212—*i.e.* that the Port Authority could not meet the three elements of Section 117.041, Subd. 2. Again, under the rule in *Thiele*, this Court should decline to review this new argument or theory because it was not pursued by the IAA before the District Court.

IAA utterly failed to develop or pursue any argument before the District Court concerning the constitutionality of Section 117.041, Subd. 2, as an unreasonable search and seizure. Moreover, the District Court never mentioned the state or federal prohibitions on unreasonable searches and seizures in its Findings of Fact, Conclusions of Law, and Order. Accordingly, IAA has waived review of this issue, and it is not properly before this Court. *Metro. Sports Fac. Comm’n*, 638 N.W.2d at 228. Even if this issue

had been properly presented and considered by the District Court, the argument currently advanced by IAA does not render Section 117.041 unconstitutional as allowing an *unreasonable* search of private property.

CONCLUSION

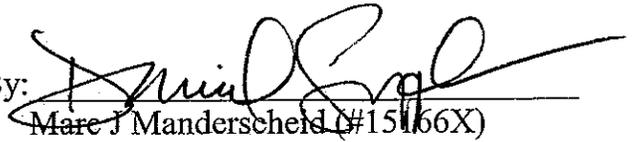
The Port Authority's Petition for access to the western forty acres of the District comported with the plain and unambiguous language of Minn. Stat. § 117.041, Subd. 2 in all respects. The Findings of Fact made by the District Court readily support its Conclusions of Law and Order Granting Access for Environmental Testing. Although IAA attempts to parse Section 117.041, Subd. 2 to read-in additional requirements, that argument must be rejected. The language is clear, the District Court properly understood it, and applied the facts in the record to reach its decision.

Section 117.041, Subd. 2 is consistent with the protections against takings and unreasonable searches and seizures in the United States and Minnesota Constitutions. Section 117.041, Subd. 2 authorizes entry, but it does not authorize a permanent physical occupation by the Port Authority of the property. As the District Court correctly found, the entry is akin to a license and is temporary. The protections intended by the Fourth Amendment are incorporated into Section 117.041, Subd. 2 as well.

In this case, the District Court got it right. After an evidentiary hearing, the District Court issued detailed findings of fact and conclusions of law in support of its order granting the Port Authority access to the properties to perform testing. That decision was not legal error, and the Port Authority respectfully requests that this Court affirm the District Court's decision.

Dated: April 2, 2008

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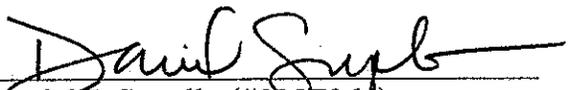
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Port Authority of the City of Saint Paul, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 13,948 words, including headings, footnotes and quotations.

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