

**Case No. A11-1273**

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**State of Minnesota**

**In Court of Appeals**

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COUNTY OF DAKOTA,

Respondent,

v.

GEORGE W. CAMERON, IV,

Appellant.

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An appeal from the Findings of Fact and  
Conclusions of Law and Order and Judgment on  
February 23, 2011 and Order and Amended Judgment  
On May 23, 2011 in Case No. 19HA-CV-09-3756  
In Dakota County District Court,  
Judge Richard G. Spicer

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**REPLY BRIEF OF APPELLANT**

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## ARGUMENT

### I. THE FUNDAMENTAL UNDERLYING PROBLEM WITH THE TRIAL COURT'S DECISION AND THE POSITIONS OF THE COUNTY AND THE LEAGUE OF CITIES IS THEIR ABSOLUTE FAILURE TO INTERPRET THE MINIMUM COMPENSATION STATUTE IN CONJUNCTION WITH THE PURPOSE AND INTENT OF THE STATUTE.

This is a case of first impression for the Minimum Compensation Statute, so statutory interpretation is not only important; it is crucial. The obvious first step in any statutory interpretation is identifying the purpose or intent of the statute. In its pretrial order the Trial Court did recognize the purpose and intent of the statute:

The Court feels that the term “comparable property” refers to property of a similar location, size, age, condition, zoning, and access as the property taken. Further, *in a case such as this where a business needs to be moved, the comparable property should be such that it can reasonably house the business in question.*<sup>1</sup>

As the trial unfolded and progressed, this intent was either acknowledged or explained by both expert witnesses.<sup>2</sup> When the trial concluded, there was nothing in the pretrial order or the evidence on the record to even suggest that the intent of the statute was anything other than to allow a displaced condemnee to continue the displaced business at a new location.

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<sup>1</sup> See APP-175 to 176, Trial Court's May 26, 2010 pretrial Order and Memorandum at Issue 1.

<sup>2</sup> Strachota emphatically testified that the intent of the statute is “to keep the business alive so that it can continue to function.” See Trial Transcript at page 42, l. 2-5, see also page 25, l. 2-11. Wilson agreed stating that he believes “the whole series of chapters or sections of 117 are protections for people like Mr. Cameron.” Trial Transcript at page 305, l. 18-20.

Having identified the intent of the statute certainly does not reduce or limit the statutory interpretations required in this case. All parties and the Trial Court recognized several issues requiring interpretation. As Cameron's initial brief explained, the Trial Court in its final decision either abandoned or forgot about the statutory intent which was recognized in the pretrial order. What little interpretation was done by the Trial Court totally ignored the intent of the statute. In this reply brief we will focus on the interpretations offered by the County and League of Cities and show that they, too, ignore the intent of the statute.

The interpretations offered by the County and the League of Cities are relatively minimal. Instead, they both place great emphasis on the calamitous ruin that will befall condemning authorities if the interpretation offered by Cameron is adopted. "Windfall to the condemnee" is their mantra. In the final analysis, this "windfall" concept is what overcame the Trial Court ("Cameron should not enjoy a windfall as a result of the taking"<sup>3</sup>). Once it realized the reality produced by the intent and purpose of the Minimum Compensation Statute, the Trial Court simply ignored this statutory intent and fashioned an *ad hoc* decision. According to the Trial Court, the Minimum Compensation Statute is intended to produce something more than the traditional before/after damages, but the amount is

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<sup>3</sup> See APP-202 (also at ADD-6 of Cameron's initial brief), the Trial Court's findings from February 23, 2011 in its memorandum on page 6, ¶ 2.

determined in an entirely arbitrary fashion by the court to produce an “equitable” result.

The logic of the Trial Court (and the County and League of Cities in their briefs) fails for very important reasons. First, we must understand that the large awards which the Trial Court, the County, and League of Cities fear actually reflects the reality which displaced condemnees actually encounter. As Strachota testified, many small businesses actually close because the cost to acquire a new location to continue the business far exceeds the traditional eminent domain award.<sup>4</sup> By enacting the Minimum Compensation Statute, the Legislature was simply reacting to this reality and setting a policy that eminent domain takings should not destroy small businesses. The Trial Court, the County, and League of Cities want to ignore that reality and the policy being furthered by Legislature. Cameron cannot ignore reality. As a result of the taking, his expenses are “five or six times greater” than they were before the taking and he soon will lose his business.<sup>5</sup>

The concept of “windfall” only arises if the amount determined under the Minimum Compensation Statute is compared to the traditional before/after eminent domain award. However, the Minimum Compensation Statute does not mention “windfall” or any words, clauses, or language of

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<sup>4</sup> Trial Transcript at pp. 24-25.

<sup>5</sup> Trial Transcript at pp. 211-212.

any kind even remotely related to this concept. On page 3 of its brief, the County states that a significant canon of construction for this case prohibits a court “from adding words to a statute” or supplying “what the Legislature either purposely omitted or inadvertently overlooked.” The League of Cities agreed with this on page 7 of its brief. Yet, by imposing a “windfall” consideration on the statute, the position advocated by the County and the League of Cities violates this very canon of construction. The Trial Court’s actual ruling violates this canon as well.

The windfall argument has its genesis in the confusion by the Trial Court with the terms market value and minimum compensation. This is evidenced in the Trial Court’s opinion quoting the “fluid approach” in Anda as well as the Supreme Court’s holding in Commodities Trading:

*[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner of public, courts has fashioned and applied other standards... Whatever the circumstances under which such constitutional questions arise, the dominant consideration remains the same: What compensation is ‘just’ both to an owner whose property is taken and to the public that must pay the bill?*

United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)

[emphasis added]. This is where the Trial Court derived its authority for its *ad hoc* analysis. However, Anda and Commodities Trading describe the pitfalls and imprecision of market value analyses. This is not a market value case. This is a minimum compensation case.

The Minimum Compensation Statute is an alternative method for determining damages payable to a condemnee. It requires an independent damage calculation based upon the price to acquire an actual property without regard to the traditional eminent domain damage analysis that is based on the market value of the acquired property. The two amounts are, then, simply compared to each other with the condemnee receiving whichever is greater.

Traditional eminent domain damages are determined by subtracting the after value of the remainder from the before value of the parcel. For a total take, such as this case, those damages are simply the market value of the property before it is acquired. By contrast, the Minimum Compensation Statute does not base damages on value. As Cameron explained in his initial brief, minimum compensation damages are based upon the amount of money needed to acquire some specific comparable property. If that amount happens to be more than market value, it is not a windfall; it is simply the damages imposed by the statute based upon the amount of money needed to acquire some specific comparable property.

To calculate the purchase price for the comparable property, there certainly are questions about determining the comparable property and the community. But those questions must be analyzed in the context of the statute's purpose: allowing the displaced condemnee to continue the business at a new location after the date of taking. With this backdrop, we

will now address the flaws in the reasoning presented by the County and the League of Cities.

**II. IN THIS CASE, THE BURDEN OF PROOF SHIFTED, AND THE COUNTY'S FAILURE TO MEET THAT BURDEN, AS REFLECTED IN ITS STATEMENT OF FACTS, IS FATAL TO ITS POSITION AND THE CONCLUSION BY THE TRIAL COURT<sup>6</sup>.**

On page 6 of its brief, in its Statement of Facts, the County states that "Cameron did not do any analysis of the cost to convert an existing building to a liquor store." This is true, but Cameron had no burden or obligation to do so. More importantly, though, the County did not do such an analysis either, but it had such a burden, as we will explain, if such information was to be considered by the Trial Court.<sup>7</sup>

Like the traditional method for calculating eminent domain damages, the property owner (Cameron in this case) has the initial burden to establish minimum compensation damages. To satisfy this burden, Cameron's expert, Robert Strachota, searched for existing buildings for sale that would satisfy the comparable property characteristics. When none were found, he determined that the comparable property would have to be new construction purchased by Cameron, which would be identical to the

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<sup>6</sup> In its statement of facts, the County argues that Cameron has slanted the facts in its favor. Given that Cameron has cited to the record for all of its facts, this Court can confirm that such is not the case.

<sup>7</sup> Given this, the Trial Court's analysis has no support from the record. The costs it cites are merely a building's dimensions divided by the value. There is no evidence of renovation costs (bids, estimates) on the record.

specifications (except for modifications required by codes/ordinances) as existed for the acquired building, on a parcel purchased by Cameron.<sup>8</sup> Strachota's testimony and report satisfied Cameron's burden. There is nothing to suggest that Cameron needed to show that new construction on vacant land can only be considered after determining that the option of new construction on an existing building did not exist. If the latter scenario was a possible, less expensive option, the burden shifts to the County to offer that option at trial. By failing to undertake that analysis (an analysis which its own expert endorsed<sup>9</sup>); the County cannot claim that this omission from the record is any fault of Cameron.

Since both Cameron and the County agree that the record contains no evidence of new construction added to an existing building, that option simply does not exist for the Trial Court to consider. Yet that is exactly what the Trial Court apparently did. It acknowledged that the Robert Trail property was too small, so it arbitrarily added a per square foot cost for additional main floor area and added that to the price paid for the Robert Trail property.<sup>10</sup> Without any record to support this analysis, the Trial Court has to be reversed.

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<sup>8</sup> See Trial Exhibit 3, at APP-356, Trial Transcript at pages 73-75.

<sup>9</sup> Dan Wilson, the County's expert, included this analysis option in his instructional worksheet that is Trial Exhibit 23 on page 10 of the materials, see APP-10.

<sup>10</sup> The only other way to describe the Trial Court's analysis is that it used the Robert Trail sale to provide a unitary value which was multiplied by the subject's main floor area. This, though, is a valuation analysis rather than a purchase price analysis. As a valuation analysis, it is extremely

Concerning the Robert Trail property, the County's statement of facts admits:

The County's expert, Dan Wilson, prepared a minimum compensation analysis of the Cameron's property on Concord Boulevard, and identified a liquor store for sale on South Robert Trail as a comparable property. **That liquor store sold before the effective date of take. Wilson concluded that there were no other existing properties that would qualify as a comparable property for purposes of the minimum compensation statute.**<sup>11</sup>

The Trial Court made the same finding (see finding 19 at APP-199) that the Robert Trail property was not available on the date of taking. The undisputed fact that the Robert Trail property was not available on the date of taking is sufficient for this Court to reverse the Trial Court. The logic is simple. If the property is not available on the date of take, it is impossible for an owner purchase that property for relocation. Cameron explains this more fully in its initial brief at pages 25-27, but it defies common sense to base minimum compensation damages on a property that the owner cannot possibly purchase.

**III. OTHER THAN AS AN HISTORICAL CONTEXT, CONSTITUTIONAL LAW ISSUES ARE IRRELEVANT IN THIS CASE.**

In its first argument section (pages 8-12), and throughout its brief, the County argues that the Trial Court followed long-standing

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poor. If undertaken by an appraiser, it would be considered a "back of a napkin" appraisal with no analysis and a total lack of credibility.

<sup>11</sup> See Respondent's brief at p. 7.

constitutional law principles and judicial precedent, while Cameron's positions are contrary to the Minnesota and Federal constitutions. The League of Cities agrees in its amicus brief.

First of all, the County waived any constitutional arguments by failing to raise them at the Trial Court level. See McGuire v. C & L Restaurant Inc., 346 N.W.2d 605 (Minn.,1984); Hampton v. Hampton, 303 Minn. 500, 501, 229 N.W.2d 139, 140 (1975); Automotive Merchandise, Inc. v. Smith, 297 Minn. 475, 477, 212 N.W.2d 678, 679-80 (1973).

More importantly, the constitutional rights guaranteed by the Takings Clause in both the Minnesota Constitution and the United States Constitution are not to protect government from the people, but the other way around. The purpose of the Takings Clause "is to ensure that the government does not require 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn.,2007); see also Palazzolo v. Rhode Island, 533 U.S. 606, 618-19, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). These constitutional protections are for the benefit of private citizens, like Cameron, to protect them from government tyranny, not shield the government from liability. It is preposterous for the County and League of Cities to insinuate that they are entitled to such protection.

As to the merit of their argument, the County and League of Cities argue that, since the constitution uses the term “just compensation” and that term has previously been defined in terms of “market value”, any award over market value is unconstitutional. Again, the Takings Clauses are to protect citizens, like Cameron, by setting a minimum of what must be done to protect citizens if their property has been taken. If the Minimum Compensation Statute awards a property owner more than market value, it is not violating the constitution because it is still paying the citizen at a minimum, market value, for the taking.

In addition, statutory eminent domain remedies should be liberally construed in favor of property owners, Moorhead Economic Development Authority v. Anda, 789 N.W.2d 860, 876 (Minn.2010). This was argued in Cameron’s initial briefing (pages 18-20). Moreover, statutory construction requires that the proper interpretation should produce a result that fulfills the intentions of the statute rather than one that is absurd or meaningless. Milbank Mut. Ins. Co. v. Kluver, 302 Minn. 310, 225 N.W.2d 230 (1974). The Trial Court’s finding of a fictional comparable property that cannot be purchased (because it does not exist) cannot possibly fulfill the intentions of the Legislature to relocate small business owners in Cameron’s position.<sup>12</sup>

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<sup>12</sup> See Trial Transcript at page 42, l. 2-5, see also page 24, l. 22-24. and page 25, l. 2-11.

Furthermore, just because the condemnor's side of the eminent domain bar disagrees with condemnee's does not mean the statute is ambiguous. A statute is ambiguous if it is *reasonably* susceptible to more than one interpretation. Tuma v. Commissioner of Economic Sec., 386 N.W.2d 702, 706 (Minn.1986). The existence of ambiguity, though, does not equate to unconstitutionality. While not necessary for any constitutional analysis, we will nevertheless explore the County's and the League of Cities' briefs to determine if they really are *reasonably* susceptible to more than one interpretation.

On page 10 of its brief, the County argues that the phrase when an owner "must relocate" is vague because "no owner is forced to relocate." Cameron disagrees. If the County takes your commercial property, tears the building down, and you still want to continue your business, you must relocate. Sure, an owner can keep the fair market compensation under 117.036 and do nothing, but the purpose of 117.187 was to compensate the small business owners who want to stay in business where the taking adversely affects their ability to do so.<sup>13</sup> Moreover, it should be clear to anyone with even a limited experience in eminent domain that the Legislature is simply distinguishing between those takings that have an impact on relocation and those that do not. For example, a sliver taking from a parcel that has no impact on the commercial building is a situation

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<sup>13</sup> See Trial Transcript at page 42, l. 2-5, see also page 24, l. 22-24. and page 25, l. 2-11.

where an owner is not forced to relocate, as opposed to a total take like this case where the commercial building is taken.

The County also argues that “for an owner to purchase” is confusing. The plain language is straight forward, but the County wonders when the purchase is to occur and if it should be some kind of reimbursement. The County’s attempt to create an issue borders on the absurd. Using the findings in this case (which Cameron disputes), the amount the Trial Court determined to purchase a comparable property was \$997,055.84. Is the County really wondering whether the statute should require him to spend \$997,055.84 before he receives any money from the condemnor? Or if he receives only \$580,400 from the condemnor should he be forced to buy a \$997,055.84 property when it will take him two and a half years to get the additional \$430,000 by taking the condemnor to court? It is silly to argue that condemnees should bear such a financial burden especially when it is their property that is being taken against their will.

Also on page 10, it is argued that the Legislature failed to define “comparable property” in the Minimum Compensation Statute. The League of Cities repeats this argument and adds that Cameron’s perfect comparable standard is too narrow. First, everyone needs to take a step back and remember that the term “comparable property” is not defined anywhere in the rest of Chapter 117. This has not prevented the creation of an operational definition for that term for completing a traditional eminent

domain damage analysis. The definition is consistent with the intent of that statute: determining fair market value. Likewise a definition can also be determined for minimum compensation, and it does not have to be the same definition used for determining traditional damages. Rather, the definition should be consistent with the intent of the Minimum Compensation Statute: provide sufficient funds to purchase a property so the condemnee can continue the displaced business.

Cameron is not seeking a “perfect” comparable as argued by the League of Cities and espoused by the Trial Court. Cameron merely seeks a comparable that will effectuate the intention of the Minimum Compensation Statute, a comparable that “can reasonably house the business in question,” as even the Trial Court noted in its pretrial order. Lack of perfection is not the reason that the Robert Trail property is not comparable. The reason is simple. Besides not being available for purchase, it simply will not work for the displaced business to continue operations (see Cameron’s initial brief at pp. 25-32).

In describing the “divergent views” on this issue at the bottom of page 10 of its brief, the County is purposefully trying to mislead the Court. The County quotes its own expert (Wilson) with the phrase: “to an appraiser of real property a ‘comparable’ is a property that has been sold”. The County neglects to explain that this definition is used for determining value – not a purchase price under the Minimum Compensation Statute.

Wilson, along with Strachota, testified that a comparable property search under the Minimum Compensation Statute involved **listings – not sales**.<sup>14</sup>

On page 11, the County argues that the Legislature failed to define the term “in the community” and, again, the County is trying to manufacture an issue where there is none. There is a good reason why the Legislature did not define “community”. That term will vary from case to case depending on the facts.<sup>15</sup> The League of Cities then rails against Cameron by arguing that Cameron’s claim of a three mile radius for the community is too narrow. This is not Cameron’s claim. **It is the record**. In this case, **all** of the witnesses who testified about this term and its relation to the Minimum Compensation Statute understood the term and agreed that “in the community” should be synonymous with the trade area or service area applicable to Cameron’s business.<sup>16</sup> Wilson even agreed that the trade area was three miles.<sup>17</sup> Once again, the Trial Court ignored the undisputed record and defined community as “municipality” to fit its *ad hoc* solution for the case.

The County’s recitation of facts about Cameron’s knowledge of the taking (page 11) is irrelevant and defies the legal principle of Fitger Brewing Co. v. State,, 416 N.W.2d 200, (Minn. Ct. App.1987) review

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<sup>14</sup> Trial Transcript at pages 61-62, 264-267; Trial Exhibit 3, at APP-356.

<sup>15</sup> “Community” is likely to change from case to case depending upon the nature of the displaced business. For example, where the displaced business is a manufacturing plant, “community” may be the geographical area where the plant can relocate and still retain all of its employees.

<sup>16</sup> See Trial Transcript at pp. 40-41, 243, 294 and 320.

<sup>17</sup> See Trial Transcript at page 296, 1.1-8 and page 320, 1. 5-11.

denied, certiorari denied 109 S.Ct. 61, 488 U.S. 819, 102 L.Ed.2d 39 (mere fact that the condemnor wants the property owners' property or plans to take the property is irrelevant until a taking has actually occurred). Whether Cameron knew about the taking and whether the Robert Trail property was available months or years before the taking is irrelevant under Fitger.

Cameron could not be bound by the consequences of the taking until the taking actually occurs. Furthermore, in this case, like most construction projects, there were several alignments and postponements of the project timeline (and questions if it would ever occur).<sup>18</sup> Cameron could never be certain that the County was ever going to take his property, so why would he buy another one until his property was actually taken?

Moreover, it is well established law that damages are determined at the time of taking. See Iowa Electric Light & Power v. City of Fairmont, 243 Minn. 176, 183, 67 N.W.2d 41 (1954); State by Spannaus v. Heimer, 393 N.W.2d 687 (Minn.App., 1986). Since damages are determined at the time of taking, and the Minimum Compensation Statute requires the purchase of an actual, specific comparable property, the opportunity to purchase that property must exist on the date of taking.

Finally, the County's last sentence of its Argument 1 on page 12 sheds light on how narrow-minded and oblivious condemnors are to the plight of condemnees. The County states that at "any time during that 20

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<sup>18</sup> Trial Transcript at pp. 158-9.

month period [from 8 months before the taking to 12 months after the taking], Cameron could have purchased a replacement property to relocate his business.” Cameron’s response is simply, “With what money?” Cameron had to wait over two years to get an additional \$447,000 from the County. That is still far short of the amount of money he needs to acquire a property to carry on his business. Even more ridiculous is asking why Cameron did not buy a new property before the taking occurred (the 8 month period described above). How could he? He did not even have the low ball \$560,000 that the County would eventually pay. Condemnees do not have the financial wherewithal government entities do. These small businesses cannot pull a million dollars out of thin air to relocate when the government comes along to take their property and business away from them.

**III. THE MINIMUM COMPENSATION STATUTE MUST BE CONSTRUED LIBERALLY IN FAVOR OF CAMERON USING THE STATUTE’S PLAIN LANGUAGE TO ACHIEVE A RESULT CONSISTENT WITH THE PURPOSE OF THE STATUTE.**

The County argues that the Trial Court liberally construed the Minimum Compensation Statute to achieve a result consistent with the purpose of the statute. The purpose of the statute is to provide enough money to a displaced business owner to purchase a replacement property that allows the business to continue. That has not happened. No property was identified which Cameron could purchase for \$997,055.84 and

continue his business. The modified Robert Trail property described by the Trial Court does not exist, and even if it did exist, it was unavailable for purchase on the date of the taking or any time later.

The County argues on page 13 that “certainly no private buyer in an arm’s length fair market transaction would pay the cost of new construction for such an old and non-conforming property.” Once again, the County seeks to confuse the issue. The Minimum Compensation Statute is not about purchasing the subject property being acquired by eminent domain, it is about the price required to purchase a replacement property that allows the business to continue.

The County’s argument also feeds into the fair market value frenzy that surrounds the Minimum Compensation Statute. Fair market value is the measure of damages for traditional eminent domain damage calculations. Fair market value is irrelevant under the Minimum Compensation Statute. If minimum compensation is based upon fair market value, there would be no point to the Minimum Compensation Statute. Instead, the Minimum Compensation Statute states that, “*the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community.*” Consequently, what is sought is the purchase price of a comparable property in the community, not fair market value.

The County argues on page 14 that courts can be “fluid”<sup>19</sup> in their application of eminent domain remedies. Any fluidity, though, cannot be at the expense of completely ignoring the record before it and fashioning its own remedy out of thin air. As more fully argued in Cameron’s initial brief (pages 25-32), the Trial Court’s finding that the Robert Trail property is a comparable property is in blatant disregard of the undisputed evidence that that property was too small, not available for purchase, and not located within the community. Moreover, there was no evidence on the record regarding costs to renovate any existing building for Cameron, much less the Robert Trail property (where the evidence actually proved the inability to renovate that building).

**IV. THE SELECTION AND ADJUSTMENTS MADE TO THE ROBERT TRAIL PROPERTY WERE NOT SUPPORTED BY THE RECORD.**

We begin this section by again noting that the mere use of the Robert Trail property as a comparable warrants reversal since the undisputed evidence establishes that that property was too small, not available for purchase, and not located within the community (see pages 25-32 of Cameron’s initial brief). Any one of the above three reasons eliminates the Robert Trail property from consideration, but taken together, there is absolutely no doubt that this is not a comparable under the Minimum Compensation Statute.

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<sup>19</sup> The error in relying on this “fluid” approach is addressed above on pp. 7-8.

The County argues that the Trial Court's decision is based upon market data while Strachota's analysis is something akin to a drawing on the back of a napkin. The only market data used by the Trial Court was the sale of the Robert Trail property before the date of taking. The trial record, which the Trial Court ignored, established that this market data was worthless for satisfying the intent of the Minimum Compensation Statute. The undisputed evidence showed Cameron's business needed, and used, all 6,200 square feet of floor area on two levels (a main floor and basement) of the acquired building.<sup>20</sup> Even the County agreed.<sup>21</sup> Despite the fact that it was undisputed at trial that the minimum size for an existing comparable improved property for comparable property purposes under the Minimum Compensation Statute must be at least 6,200 square feet in size<sup>22</sup>, the Trial Court still selected<sup>23</sup> the 3,200 square foot Robert Trail property and fictionally modified it to only 4,444 square feet. Both are too small<sup>24</sup> for Cameron to relocate and continue his business (even if Cameron lived in the fictional world that allowed him to do so). Even Wilson acknowledged that "maybe, I made a mistake" when faced with the actual main floor

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<sup>20</sup> See Trial Exhibit at Exhibit 3 at APP-355 (5<sup>th</sup> bullet point item); see also Trial Transcript at page 198, l. 7-17.

<sup>21</sup> See Trial Transcript at page 228, l. 3-8.

<sup>22</sup> See Trial Transcript at page 75, l. 21-23, see also Trial Exhibit at Exhibit 3 at APP-355 (5<sup>th</sup> bullet point item).; see also, Trial Transcript at page 228, l. 3-8; and Trial Transcript at page 228, l. 3-8.

<sup>23</sup> By determining the Robert Trail property was too small, the Trial Court should have ended its analysis at that point instead of creating a fictional building unsupported by the record.

<sup>24</sup> Even Wilson acknowledged that "maybe, I made a mistake" when faced with the actual main floor square footage of the Robert Trail property. See Trial Transcript at page 316, l. 1.

square footage of the Robert Trail property.<sup>25</sup> In addition, the Robert Trail property was out of Cameron's undisputed trade area/community.<sup>26</sup> Finally, the site was not even available for purchase even if it was larger and closer.<sup>27</sup>

On the other hand, Strachota's comparable, the construction at the Cameron Park site, would be able to house the Cameron warehouse liquor business. Unlike Robert Trail, the building proposed for construction by Strachota is identical in size and configuration to the Cameron building on the acquired property and is to be built using the same building materials that existed in the acquired building.<sup>28</sup> Far from a plan drawn on the back of a napkin, Strachota's testimony and report are extremely detailed. In fact, the undisputed evidence at trial showed that the use of contractor estimates, like Strachota did, is appropriate to determine the cost to construct the replacement building<sup>29</sup> (this methodology was also utilized by Callahan anytime that he sought cost estimates for construction projects requiring his

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<sup>25</sup> See Trial Transcript at page 316, l. 1.

<sup>26</sup> See discussion at Cameron's initial brief at pp. 28-30.

<sup>27</sup> Strachota also analyzed the Robert Trail Property as a potential comparable property for Minimum Compensation Statute purposes although he was concerned that this property should not be considered at all because it was sold prior to the date of taking of the Subject Property. Strachota rejected the Robert Trail Property as a comparable property because it was too small to house Cameron's business and it was located over seven miles from the Subject Property, significantly outside the three-mile trade area applicable for the business. See Trial Transcript at pages 68-72.

<sup>28</sup> See Trial Exhibit at Exhibit 3 at APP-368, 369, 374, 376; see also, Trial Transcript at pages 90-92.

<sup>29</sup> See Trial Transcript at page 98, l. 2-4.

involvement<sup>30</sup>). Strachota followed standard procedures in determining the costs associated for all components of construction for the replacement property.<sup>31</sup> He properly included the purchase price that Cameron will pay to the City for Cameron Park as part of the total purchase price for the comparable property.<sup>32</sup> Strachota did what anyone would do to determine the purchase price of new construction in the real estate market before it is constructed and the keys to the new building are handed over to the purchaser.

The County points out that Cameron testified that he did not have a final design for a new building and that a new building might cost more than the one described by Strachota. This testimony is irrelevant. Strachota based his testimony and report upon Cameron's business needs as of the date of taking – no more and no less. Strachota excluded costs of a larger building. Those extra costs would be Cameron's responsibility.

On page 16, the County argues that Cameron's interpretation of the statute is inconsistent with 117.188 in that somehow the condemnor is forcing a property on the condemnee. That is not the case. Courts are limited to awarding an amount of money ("damages") to the property owner. City of Mankato v. Hilgers, 313 N.W.2d 610, 612 (Minn., 1981).

The court has no authority to issue non-monetary orders. Id. The Minimum

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<sup>30</sup> See Trial Transcript at page 243, l. 13-15.

<sup>31</sup> See Trial Transcript at pages 97-98.

<sup>32</sup> See Trial Exhibit at Exhibit 3 at APP-374; see also, Trial Transcript at pages 89, 93, 94

Compensation Statute does not force a property on a condemnee. The statute merely provides damages to the displaced business owner so that the owner can purchase a comparable property to relocate their business in the community.

The County also argues that Cameron is asking courts to add words to the Minimum Compensation Statute. It is unclear what accusations the County is making, but if related to the previous paragraph page 16, the County is simply confused. Cameron is not adding words that a comparable has to be perfect or that the owner has veto power. Cameron only seeks to satisfy the purpose of the Minimum Compensation Statute: a comparable property for sale that will house the business when it relocates. The Trial Court in its pretrial ruling agreed, holding, “in a case such as this where a business needs to be moved, the comparable property should be such that it can reasonably house the business in question”.<sup>33</sup> It’s a standard that was not only objective, but undisputed in this case. Unfortunately, the Trial Court ignored its own reasoning when it came time to write the decision.

**V. THE ROBERT TRAIL PROPERTY WAS NOT “IN THE COMMUNITY”.**

The County derides Cameron for trying to relitigate this issue on page 17 of its brief. Since the County states that this Court has *de novo* review on this issue, that is what is supposed to happen.

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<sup>33</sup> See APP-175-176, Trial Court’s May 26, 2010 pretrial Order and Memorandum at Issue 1.

This issue was addressed in detail in Cameron’s initial brief at pages 28-30. The County’s arguments/facts on pages 18-19 are simply contrary to the evidence on the record. All of the witnesses who testified about the term “community” under the Minimum Compensation Statute agreed that that term should be synonymous with the trade area or service area applicable to Cameron’s business.<sup>34</sup> All of the witnesses who testified about the trade area or service area agreed that that area comprises a three mile radius around his former location on the west side of the Mississippi River.<sup>35</sup> Therefore, it follows that the term “community” under the Minimum Compensation Statute for the Cameron property is three miles radius around his former location on the west side of the Mississippi River. This is uncontroverted, and nothing in the statute directs that “community” is synonymous with “municipality” as the Trial Court concluded.<sup>36</sup>

As for the County’s regurgitation of Wilson’s testimony on pages 17 and 18 of its brief, the County conveniently omits some of his critical testimony:

- The term “in the community” is a requirement of the Minimum Compensation Statute and that, for a commercial

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<sup>34</sup> See Trial Transcript at pp. 40-41, 243, 294 & 320.

<sup>35</sup> See Trial Transcript at pages 195, 325 & 294.

<sup>36</sup> See Record.

business, the trade area of the business will be its community<sup>37</sup>; and,

- Cameron's trade area was a radius of three miles around his former location on the west side of the Mississippi River.<sup>38</sup>

Moreover, if the standard is simply whether or not a particular business can function at a relocation site (as the Trial Court concluded), the words "in the community" would have no meaning, particularly in light of the intent of the statute. It is obvious that the Legislature placed a great deal of importance on "community". More importantly, whether Cameron's business could function at any relocation site regardless of the community standard, the evidence in this case was clear that the Cameron could not relocate to Robert Trail regardless of the distance because the site was too small and unavailable for purchase.

The County's discussions of relocation statutes such as 117.152 are irrelevant. Relocation benefits are processed administratively and are subject to judicial review only by writ of certiorari to the court of appeals. Instant Testing Co. v. Community Security Bank, 715 N.W.2d 124 (Minn.Ct.App.2006). Relocation benefits are completely separate from damages under a fair market value analysis or under the Minimum

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<sup>37</sup> See Trial Transcript at pp. 294, 320.

<sup>38</sup> Id. at page 296.

Compensation Statute. Whether or not the Cameron is eligible for such benefits is irrelevant to damages under a fair market value analysis or under the Minimum Compensation analysis.

**VI. WHETHER IT IS THE ONLY OPTION OR THE LEAST EXPENSIVE OPTION, NEW CONSTRUCTION IS AVAILABLE UNDER THE MINIMUM COMPENSATION STATUTE FOR DETERMINING THE COMPARABLE PROPERTY.**

The Trial Court reasoned in its opinion that it did not need to address this issue after it modified the Robert Trail property to its liking (therefore finding a comparable property). It did address this issue, though, in its pretrial order:

Dakota County would like the Court to declare, at this early stage in the proceedings, that Cameron is not entitled to a new custom-built building under the minimum compensation statute. The Court feels that it would be premature to make that call at this time, before any testimony or evidence is taken as to whether a comparable property exists. Minn. Stat. § 117.187 indicates that “the amount of damages payable, **at minimum**, must be sufficient for an owner to purchase a comparable property in the community...” [Emphasis added]. Thus, the minimum compensation statute means just that – that it is setting a minimum compensation, not a maximum. An award of funds to purchase a comparable property is certainly adequate under the statute, if such a comparable property exists. **However, if a comparable property does not exist, the statute does not foreclose upon the possibility that Cameron could be entitled to a new custom-built building to house his business.** Again, the “comparable property” provision is merely a minimum measure of damages. Whether Cameron is entitled to something more than that is an issue for trial.<sup>39</sup> [Emphasis added].

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<sup>39</sup> See APP-175 to 176, Trial Court’s order dated May 26, 2010.

Cameron agrees that the new construction issue is moot if an existing property can be purchased and modified for less money than purchasing new construction on a vacant parcel. However, if no existing comparable is found, “the statute does not foreclose upon the possibility that Cameron could be entitled to a new custom-built building to house his business.” As the Trial Court stated in its pretrial order, “the ‘comparable property’ provision is merely a minimum measure of damages.”

The County argues on page 14 of its brief and again under Section 5 (pages 19-21) that new construction is not allowed under the Minimum Compensation Statute. As stated above, there is certainly nothing in the statute to support a claim that new construction should be excluded. However, we will examine the County’s arguments more closely.

On page 14 of its brief, the County argues that the Trial Court would be prohibited from basing damages on the purchase price of new construction of a comparable based upon the unpublished decision in Knutson v. Clearwater County, 2010 WL 4721612. The County’s citation to this case is perplexing. It has nothing to do with new construction or the Minimum Compensation Statute.<sup>40</sup>

The County also argues new construction is contrary to Minn. Stat. 645.17(5) (“the Legislature intends to favor the public interest as against

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<sup>40</sup> As to adding language to a statute, the same could be said of the term “existing” used by the County in its interpretation. Nothing in the statute restricts comparable properties to existing improved buildings.

any private interest”). This rule addresses situations where public interests and private interests are independent from each other and are competing against each other. In Re Estate of Rosenburger, 495 N.W.2d 234, 236 (Minn. Ct.App. 1993). That is not the situation in eminent domain where the public entity has the absolute power to take the private property where public use is established. In the eminent domain situation the proper (and contrary) rule requires liberal construction in favor of the property owners for statutes that address damages. Moorhead Economic Development Authority v. Anda, 789 N.W.2d 860, 876 (Minn.2010). Moreover, this Court should consider Minn. Stat. 645.17(1) which provides that “the Legislature does not intend a result that is absurd, impossible of execution, or unreasonable.” If no existing improved comparable is found and new construction is unavailable, then owners in Cameron’s position are denied the benefits of the Minimum Compensation Statute. It is absurd to award minimum compensation damages to an owner where an existing improved comparable exists but deny the same owner minimum compensation damages solely because there is no existing comparable property for sale.

With all the wordplay in their briefs, it is fair for Cameron to point out to the Court (and the League of Cities and the County) that “comparable property” under the statute is not qualified by the term “existing”. The omission of the word “existing,” further shows that the Legislature did not want to limit this remedy to just existing improved

properties. By omitting the word “existing”, the remedy is not too narrow in scope to protect business owners like Cameron where an existing building cannot be found in his community to house his business.

As a final note, the County’s expert (Wilson) acknowledged that, as an instruction for proper application of the Minimum Compensation Statute, he recommends new construction installed unto an existing building when it is needed to make the building comparable.<sup>41</sup> Using new construction entirely is simply one end of the construction scale advocated by Wilson.

## **VII. ATTORNEYS FEES.**

The County argues that the attorneys fees awarded were reasonable and reviews the Paulsen factors that are discussed more fully in Cameron’s initial brief at pages 34-39.

The County also states that Cameron’s affidavits were self-serving and compare the fees awarded to public sector attorney’s salaries. First, there is nothing on the record as to public sector attorney’s salaries. More important, the County offered no evidence on the issue of fees. Consequently, there is nothing on the record as to the affidavits being self-serving or challenging the affidavits in any way.

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<sup>41</sup> Dan Wilson, the County’s expert, included this analysis option in his instructional worksheet that is Trial Exhibit 23 on page 10 of the materials, see APP-10.

On page 24 of its brief the County is still in denial about its inequitably low offer. It defies common sense to defend your offer of \$560,000 as reasonable when the court determined that you should have offered \$997,055.84.

Cameron agrees with the standard discussed in its Amicus brief:

If the claim for reimbursement and/or the affidavits presented in court by attorneys or others demonstrate that the fees considered are reasonable in light of what is regularly charged in the community, the fee is should be held to be *prima facie* “reasonable” under the statute.

Applying this standard to the present case, the Affidavits by Mark Savin<sup>42</sup>, Dan Biersdorf<sup>43</sup> and E. Kelly Keady<sup>44</sup> (with their attached exhibits) satisfied Cameron’s *prima facie* burden by establishing that the fees are reasonable in light of what is regularly charged in the community. Since the County failed to respond to Cameron’s affidavits in any manner, other than calling them self serving, the Trial Court erred in completely disregarding the reasonable hourly fees and fashioning its own contingent fee in this case.

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<sup>42</sup> See APP-439 to 440.

<sup>43</sup> See APP-231 to 232

<sup>44</sup> See APP-233 to 234.

## CONCLUSION

The Trial Court did not fall on its face completely. It correctly held:

The Court also notes that through no choice or fault of his own, Cameron has lost the benefit of housing his business in an older building whose non-compliance with applicable regulations was grandfathered.... Where Cameron was content with maintaining his business in the old building and had no intention to move until the County forced him to move, it would be a manifest injustice for Cameron to have to bear complete financial responsibility for the incremental 'upgrade' to a more modern building. The County should not be able to fulfill its obligation to provide just compensation by merely paying the strict replacement cost of a century-old non-compliant building, when reality dictates that it will cost Cameron significantly more than that to obtain a modern building that can house his liquor store business.<sup>45</sup>

Where the Trial Court erred is when it abandoned the plain language of the Minimum Compensation Statute and ignored the undisputed evidence on the record. The Trial Court's "fluid" approach incorrectly relied on market value to find a property that was representative of the market. Instead, this Court should follow the short exchange between Cameron's counsel and the County's star witness Dan Wilson:

Q. Does the Statute anywhere mention value?

A. No.

Q. Talks about purchase, doesn't it?

A. Yes.

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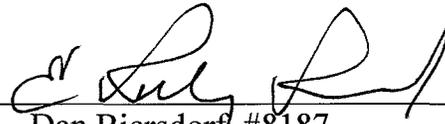
<sup>45</sup> See APP-204, Trial Court's memo accompanying its findings (also at Cameron's initial brief at ADD-8), second paragraph.

Q. And purchase is equated with price, am I right?

A. Yes.<sup>46</sup>

The plain language of the Minimum Compensation Statute requires that “the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community”. There is no mention of value, only purchase. The Trial Court, the County, and League of Cities are all stuck on value. However, only Cameron’s witness, Strachota, determined the actual purchase price of a comparable property in the community.

Dated: October 24, 2011



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<sup>46</sup> Trial Transcript at p. 312, l. 6-11.

**FORM AND LENGTH CERTIFICATION**

I certify that this brief conforms to the rules contained in Minnesota Rules of Appellate Procedure for a brief produced using the following font: Times New Roman, 13 point. The word count for this combined reply to Respondent and response to Amicus is 6,673 words.

Dated: October 24, 2011



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COURT OF APPEALS

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The County of Dakota,

Appellate Court Case No.:A11-1273

Respondent

v.

George W. Cameron, IV,

Appellant.

AFFIDAVIT OF SERVICE

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STATE OF MINNESOTA)  
)  
COUNTY OF HENNEPIN)

E. Kelly Keady being duly sworn and on oath, does certify:

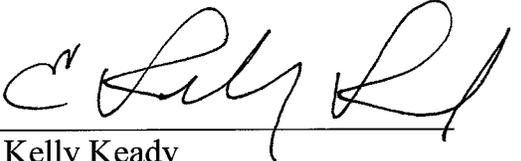
That on the 24th day of October, 2011, I caused to be served by hand, two true and complete copies of Appellant's Reply Brief upon Petitioner-Respondent's counsel and the Attorneys for Amicus Curiae at the following addresses:

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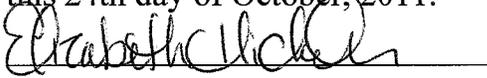
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FURTHER AFFIANT SAYETH NOT.

  
E. Kelly Keady

**Subscribed to and sworn before me**  
this 24th day of October, 2011.



Notary Public

