A11-1273

STATE OF MINNESOTA

IN COURT OF APPEALS

County of Dakota,

Respondent,

v.

George W. Cameron, IV,

Appellant.

RESPONDENT'S BRIEF

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STANDARD OF REVIEW

In cases reviewing eminent domain proceedings there are two levels of deference paid to condemnation decisions: the district court gives deference to the legislative determination of public purpose and necessity of the condemning authority and the appellate courts give deference to the findings of the district court, using the clearly erroneous standard. *Lundell v. Cooperative Power Association*, 707 N.W.2d 376 (Minn. 2006). That is consistent with the rules of civil procedure for actions tried upon the facts by a court sitting without a jury. "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 witnesses." Minn.R.Civ.P. 52.01

Several of the issues raised in this case will concern interpretation of the meaning of phrases used in Minn. Stat. § 117.187. Interpretation of those phrases will be questions of first impression. As to those issues of statutory construction, the appellate court review will be *de novo* review. "A case of first impression presenting an issue of statutory construction will be given *de novo* review by the appellate court." *Meder v. Rapid Sports Center, Inc.*, 773 N.W. 2d 341 (Minn. App. 2009), citing *Houston v. Int'l Data Transfer Corp.,* 645 N.W.2d 144, 149 (Minn. 2002).

The issues for which the standard of review is *de novo* are identified as issues 1, 3, 4 and 5 below. Issues 2 and 6, below, will be reviewed under the clearly erroneous standard.

When interpreting a statute, case law and statutory rules of construction are available to assist the court. When asked to interpret various provisions of the Minnesota No-Fault

Insurance Law, the Minnesota Supreme Court identified the following factors to be considered:

1. ". . . 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." (citations omitted)

2. "Basic canons of statutory construction instruct that we are to construe words and phrases according to their plain and ordinary meaning." (citations omitted)

3. "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." (citations omitted)

4. "We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." (citations omitted)

5. ". . . courts should construe a statute to avoid absurd results and unjust consequences." (citation omitted)

6. "When construing a statute, our goal is to ascertain and effectuate the intention of the legislature." (citation omitted)

American Family Insurance Group v. Schroedl, 616 N.W.2d 273 (Minn. 2000).

One presumption in ascertaining legislative intent glaringly omitted from that list of considerations is:

7. "<u>the legislature intends to favor the public interest as against any private interest</u>." Minn. Stat. § 645.17 (5) (Emphasis added)

Another canon of statutory construction stated in Minnesota law that will be of significance in this case states as follows:

8. "this court is prohibited from adding words to a statute and cannot supply what the legislature either purposely omitted or inadvertently overlooked." *Knutson v. Clearwater County*, No. A10-943, 2010 WL 4721612, citing *Tracy State Bank v. Tracy-Garvin Coop*, 573 N.W.2d 393 (Minn. App. 1998). Copy attached as Appendix 1, per Minn. Stat. § 480A.08, subd. 3.

In the most recent Minnesota Supreme Court condemnation decision considering the effect of the 2006 legislative changes to Minn. Stat. Chap. 117, the Court held, "The object of all statutory interpretation and construction 'is to ascertain and effectuate the intention of the legislature.' Minn. Stat. § 645.16 (2010). A statute is read 'as a whole' and each section is interpreted 'in light of the surrounding sections to avoid conflicting interpretations." (citation omitted) When 'the words of a law are not explicit,' this court may consider, among other things, the object to be obtained by the law, prior versions of the law, and the circumstances surrounding the law's enactment. Minn. Stat. § 645.16." *State of Minnesota v. Gary Kettleson, et al.*, A09-1894, 2011 WL 3477047 (Minn. 2011).

SUMMARY OF FACTS

Appellant's Summary of Facts set forth in its brief on pages 8 through 16 is objected to as being argumentative rather than factual. Its apparent purpose is to try to establish credibility in Robert Strachota, Appellant's real estate expert, while challenging the credibility of Dan Wilson, the expert retained by Dakota County. Witness credibility is determined by the trial court. Minn.R.Civ.P. 52.01, *Dufrane v. Comm'r of Public Safety*, 353 N.W.2d 705 (Minn. App. 1984). At trial Strachota testified that he is an appraiser.[1] However, Exhibit 3, the Shenehon report on the Cameron replacement property was not an appraisal.[2] And, it was only the third such report "we've done" since Minn. Stat. § 117.187 was adopted. ("We" is not identified). Dan Wilson on the other hand, testified that he has prepared 20 minimum compensation analyses for over 10 clients since the 2006 amendment and that 7 of those reports were for commercial properties.[3]

STATEMENT OF FACTS

Respondent believes the following statement of facts more accurately depicts the nature of this case.

In 2008 Dakota County commenced a condemnation action to acquire various properties in Inver Grove Heights and South St. Paul to provide the right-of-way for reconstruction of CSAH 56, aka Concord Boulevard. The effective date of taking, per the court order approving public need, is July 25, 2008.

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[1] T. refers to trial transcript. T. 15, Line 4
[2] T. 27, Line 2-14
[3] T. 260, Lines 18-24

Property belonging to George W. Cameron, IV was acquired in fee simple because the relocated highway would encroach into the building located on the property. At the time of taking the property included land and a building from which Cameron's Warehouse Liquors, Inc., a Minnesota corporation, sold beer, wine and liquor. The corporation was the holder of a liquor license issued by the City of Inver Grove Heights. There was no lease between Mr. Cameron and the liquor store. After the quick-take date of possession, a lease was entered into between Dakota County as Lessor and George W. Cameron, IV and Cameron's Warehouse Liquors, Inc., as the Tenant, that allowed the liquor store to continue to operate in the Concord Boulevard location until July 18, 2009.

On the date of taking the Appellant's property consisted of a triangular shaped parcel of real property totaling 13,388 square feet. The land is in an area zoned I-1; Limited industrial. The building on the site had been constructed in 1885 and contained 4,444 square feet of space on the ground level plus an unfinished basement containing 1,600 square feet of space used for storage of inventory and various mechanical components of the building. Approximately 2 feet of the westerly portion of the building and parking lot encroached on the existing public right-of-way for Concord Boulevard. Portions of the parking lot on the easterly side of the property encroached on adjacent railroad property.

The inside of the building contained a small office area, a bathroom, a stairway leading to the basement, and various coolers, freezers and shelf or display areas used by the business for liquor inventory.

The County's approved appraisal of damages to Appellant's property was $560,400. When the parties were unable to negotiate a settlement of the condemnation damages the matter was heard by the three court-appointed condemnation commissioners on April 28-30, 2009. At the hearing the County's appraiser increased his estimate of fair market value to $580,400. Appellant appeared at the hearing to testify, but offered no appraisal testimony and no personal opinion of the value of his property. The condemnation commissioners awarded Appellant $655,000 in damages in their report of damages filed on May 5, 2009.

A notice of appeal requesting a new trial was filed by Appellant on June 11, 2009.

A court trial was held on November 15 and 16, 2010. The Honorable Richard J. Spicer was the trial court judge. Most of the evidence at trial consisted of arguments from both sides on the meaning of what is being called the "minimum compensation" statute, Minn. Stat. § 117.187, a new statute adopted by the legislature in 2006. There have been no reported cases involving judicial interpretation of that statute.

At trial Appellant's case included testimony to the effect that a broker hired to assist in identifying an existing property that could be acquired as a replacement property was unable to identify any improved property that would allow the business to operate as it had prior to the taking. Appellant's expert, Robert Strachota, testified that no comparable property existed in the community as it related to the Cameron property. Strachota therefore concluded that Cameron should be awarded funds sufficient to purchase a parcel of vacant land and construct a new, custom-built building. Appellant did not do any analysis of the cost to convert an existing building to a liquor store.

Respondent's expert, Dan Wilson, prepared a minimum compensation analysis of the Appellant'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.

The trial court held that mere licensure as a liquor store did not restrict a search for a replacement property to only the City of Inver Grove Heights. The court further held that it is more important to determine whether a business can function as a retail operation at a given location than it is to retain particular customers or to stay in a particular trade area. In the end, the trial court held that the goal of searching for a comparable replacement property is to identify a property that is representative of the real estate market.

The trial court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment on February 24, 2011. The trial court awarded Appellant the sum of $997,055.84 as damages caused by the taking and as minimum compensation damages. Post-trial motions were heard on May 19, 2001 and an Order and Amended Judgment was filed on May 23, 2011. The trial court sustained its award of damages to Appellant and further awarded Appellant the sum of $223,971.13 for reasonable attorney fees, litigation expenses, appraisal fees, other expert's fees, and other related costs. This appeal to the Court of Appeals followed.

ARGUMENT

1. THE TRIAL COURT FOLLOWED LONG-STANDING CONSTITUTIONAL LAW PRINCIPLES AND JUDICIAL PRECEDENT TO INTERPRET A VAGUE AND AMBIGUOUS STATUTE TO DETERMINE JUST COMPENSATION IN A FAIR AND REASONABLE MANNER.

Given the vague and imprecise language used in § 117.187 and absent any clear legislative direction, the trial court appropriately considered the constitutional requirement of "just compensation" and the judicial preference for fair market value as demonstrated by the actual real estate market when it applied the language of Minn. Stat. § 117.187 to the facts of this case and rendered its decision. The decision of the trial court should be affirmed.

Minnesota Statutes, Chapter 117, is the codification of the eminent domain laws applicable to taking of private lands for public use. Minnesota Constitution Article I, Section 13, states, "Private property shall not be taken, destroyed or damaged for public use without just compensation, first paid or secured."

A condemnation action is an *in rem* proceeding against the acquired real estate. *City of Rochester v. Northwestern Bell Tele. Co.*, 431 NW2d 874, 877 (Minn.Ct.App. 1988), citing *United States v. Petty Motor Co.,* 27 US *372*, 376 (1946*).* "*In rem*" is a term which describes "Proceedings or actions instituted against the thing, in contradistinction to personal actions..." J.D. Eaton, *Real Estate Valuation in Litigation 53* (The Appraisal Institute, 2d ed. 1995). The legal action is not against the individual owners of the condemned property, it is against the property itself, without regard to the identity, plans or intentions of its owners:

> Condemnation proceedings are *in rem* and just compensation must be based upon the value of the rights taken, without regard to the personality of the

> owner or his personal relationship to the property taken. The value of the property for his personal purposes must be disregarded. Opportunities which the owner of the condemned property loses as a result of condemnation are not elements to be considered in determining the value of the property.

Nichols on Eminent Domain Chapter 12, § 12.04 (2) at 12-97-99 (Matthew Bender 3rd Ed.). From *The Before and After Rule, the Project Influence Rule, the Unit Rule, and In Rem Proceedings: Can All the Rules be Reconciled* by Marc J. Manderscheid, Briggs and Morgan, P.A. presented to Hennepin County Bar Association on May 6, 2011.

Until Minn. Stat. § 117.187 was adopted "just compensation" was defined by Minnesota courts to mean, ". . . the fair market value of the property that was taken as of (date property taken)." Minn. CIVJIG 52.35.

In turn, "fair market value" has been defined to mean, "...the price that would be paid for the entire property by a willing buyer to a willing seller." Minn. CIVJIG 52.40. Just compensation is equivalent to the market value of the property at the time of the taking. The owner "must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions." *Olson v. United States*, 292 U.S. 246, 255 (1934).

It is obvious that Appellant and amicus, Minnesota Eminent Domain Institute, want a very different interpretation of § 117.187 than the one provided by the trial court. Therein lies the basic problem with this statute: it is so vague and ambiguous that reasonably minded persons cannot agree upon its meaning. "The law does not permit speculation or conjecture in construing an act. It is not the function of the judicial branch of the government to remedy

or supply defects in matters committed to the legislature." *Anderson v. Burnquist*, 11 N.W.2d 776 (Minn. 1943).

In trying to determine the legislative intent in § 117.187 several obvious, and very basic, problems are presented. Those problems include the following:

The legislature failed to address what it means when it says that "an owner must relocate." No owner is forced to relocate. That is an independent decision made by each person or business whose property is condemned. An owner could keep its damage award and do virtually anything else.

The legislature failed to define what it means when it says that damages must be sufficient "for an owner to purchase." Must the owner identify a property and actually purchase it before becoming eligible for payment of damages? When must the purchase take place?

The legislature failed to define what it means by a "comparable property." The facts of this case demonstrate just how divergent the views are of what it means to be comparable. The trial court had testimony that to an appraiser of real property a "comparable" is a property that has already been sold.[4] A comparable has already gone through the negotiation process so factors such as actual sale price and terms of sale have been completed. If that is what the legislature meant by "comparable", no displaced owner would ever be able to identify a comparable to purchase because, by definition, the sale of any comparable property has already taken place.

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[4] T. 251-252, Line 24-25, 1-5

The legislature failed to define what it means by "in the community." Is that an artificial circle drawn around a business location or can it include a broader search area to include a location where a business can survive and be profitable?

The legislature failed to state that the "comparable property in the community" must be a specific and certain property. Appellant and *amicus* would have this Court attach that requirement to the statute. Are modifications or additions allowed to an identified property before it can be considered as a comparable?

The legislature failed to state that "comparable property in the community" must be available for purchase on the effective date of taking determined in the court proceedings. That date will be known only if the condemning authority is using the quick-take provisions in Minn. Stat. § 117.042. Further, it flies in the face of reality to assume all actions in a condemnation proceeding take place on the effective date of take. In the instant case, Dan Wilson testified to having contact with Appellant as early as October, 2007,[5] and regularly thereafter in his position as relocation adviser. Between October, 2007 and the date of take on July 25, 2008, Appellant had ample opportunity to identify and negotiate the terms of purchase of a replacement property. Further, Gary Peppard testified that Appellant was advised in writing of the County's offer in January, 2008, so Appellant knew how much money he had available to aid in his search for a replacement property. (Trial Exhibit No. 18)[6] In addition, the County negotiated a lease with Appellant that allowed him to continue

[5] T. 262, Lines 1-2
[6] T. 223, Lines 1-5

to occupy the subject property for "approximately a year" after the date of taking.[7] At any time during that 20 month period, Appellant could have purchased a replacement property to relocate his business, if he chose to do so.

2. THE TRIAL COURT PROPERLY CONSTRUED THE MINIMUM COMPENSATION STATUTE LIBERALLY IN FAVOR OF THE LANDOWNER USING THE STATUTE'S PLAIN MEANING TO ACHIEVE A RESULT THAT IS CONSISTENT WITH THE PURPOSE OF THE STATUTE.

Whether a statute is entitled to a liberal construction is not a case of first impression. This issue should be reviewed under the "clearly erroneous" standard.

One must assume the legislature was aware of the state of the eminent domain laws in Minnesota when it adopted Minn. Stat. § 117.187. Testimony at trial established that the legislature had the counsel of at least one real estate appraiser.[8] What the legislature adopted, however, is not a model of clarity. As is obvious from the trial court's Memorandum, the Court had no alternative other than to fall back on existing constitutional requirements and existing case law in its effort to provide meaning to the new statute.

As noted earlier, our Supreme Court held in *American Family Insurance Group v. Schroedl*, 616 N.W.2d 273 (Minn. 2000) that when interpreting a statute, ". . . we first look to see whether the statute's language, on its face, is clear or ambiguous. (citation omitted) A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." 616 N.W.2d at 277, 278.

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[7] T. 161, Lines 4-8
[8] T. 23, Lines 5-22

The trial court, in its Memorandum attached to the Order of February 24, 2011, found Minn. Stat. § 117.187 to be vague and in need of clarification. "It is this Court's hope that the legislature will revise the minimum compensation statute to more directly and clearly define the concepts of "purchase", "comparable property", and "in the community", and provide guidance as to whether, and under what circumstances, new construction is appropriate in this context." (A. p. 203)

It accomplishes nothing to argue that the new statute in question is remedial and entitled to liberal construction. The question is, how liberal? Is the owner of a 124 year old building that is non-conforming in every aspect of current building standards entitled to build a brand new building at public expense that is better in every aspect and in full conformance with all building standards? If so, the best thing that could happen to such an owner is to be condemned. 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.

The Federal and state constitutions both require payment of "just compensation" when private property is taken for public use. U.S. Constitution, Amendment V; Minn. Constitution Art. I, § 13. Appellant argues that the 2006 adoption of §117.187 shows a legislative intent to abandon the concept of fair market value in certain circumstances and give a displaced owner a blank check for locating and acquiring a replacement property. The most recent Minnesota Supreme Court opinion on the subject, however, issued four years after the 2006 amendments, continues to tie the concepts of just compensation and fair market value. In *Moorhead Economic Development Authority v. Anda*, 789 N.W.2d 860, 880

(Minn. 2010), the Court said as follows: "Although condemnation awards are usually based on the fair market value of the property in whatever condition the property is at the time of the taking, the constitutional standard that courts must adhere to is "just compensation." (emphasis added) Courts can be fluid in the standards they apply to determine "just compensation" when fairness so requires. *See United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). In *Commodities Trading*, the Supreme Court held:

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

That is the same approach adopted by the trial court. (A. p. 202) The trial court awarded more than fair market for the property taken because the comparable property identified was in need of an addition to adjust for the difference in square footage of the Appellant's property.

The trial court was liberal in its award of monetary damages to Appellant. The award was 42 percent higher than the County's appraisal value and 33 percent higher than the award of the condemnation commissioners. However, the trial court chose not to add the remedy of "new construction" to the words used in § 117.187. It clearly would not have been appropriate to do so under the circumstances, and a trial court is prohibited from doing so. *Knutson v. Clearwater County*, *supra*.

If the Court of Appeals, in its review of the meaning attributed to § 117.187, agrees that the overarching inquiry in this case is to determine what compensation is just for Appellant, this Court will sustain the Orders of February 24, 2011 and May 23, 2011 on this issue. There has been no showing that the decision of the trial court was clearly erroneous.

3. THE TRIAL COURT REASONABLY IDENTIFIED AND VALUED A COMPARABLE PROPERTY IN THE COMMUNITY BY USING MARKET DATA TO ADJUST THE SALE PRICE OF THE SOUTH ROBERT TRAIL LIQUOR STORE TO ACCOUNT FOR THE LARGER SIZE OF CAMERON'S PROPERTY.

Respondent believes this issue to be an issue of first impression and presenting an issue of statutory construction. As such, the appellate court review will be *de novo* review. *Meder, supra.*

The irony of Appellant's argument in this issue is impossible to ignore. Appellant would have this Court throw out the trial court judgment because the trial court used actual market-derived data to adjust the sale price of the South Robert Trail Liquor Store to account for the larger size of the former Cameron building. Instead, the Appellant asked the trial court to accept a contrived sale price of $2,175,000 for a hypothetical, brand new, non-existent building to be built on land that belonged to the City of Inver Grove Heights. Only paper plans existed for that building and site development. Further, George Cameron testified that he did not have a final design ready for a new building, and that the new building might be different than and might cost more than the one testified to by Robert

Strachota.[9] It is difficult to conceive of a demand based on any more hypothetical proposal than the one submitted by Appellant.

One of the rules of statutory construction states that a court must interpret each section of a statute in light of the surrounding sections to avoid conflicting interpretations. In this case Minn. Stat. § 117.188 must be reviewed in order to avoid conflicting interpretations with § 117.187. Minn. Stat. § 117.188 reads:

> The condemning authority must not require the owner to accept as part of the compensation due any substitute or replacement property.

If the condemning authority was able to identify a perfect, mirror image property to replace property being taken, under § 117.188, an owner appears to have absolute veto power with regard to that property. Appellant's allegation that the court can only look at specific, existing properties as comparable properties cites to no authority and is meaningless if the owner has exclusive ability to reject any comparable. And, while the market value of the replacement property may be of some benefit to the condemning authority in trying to cap the damages owed, Appellant has already argued against the concept of market value as being an acceptable measure of damages.

Once again, Appellant is asking the trial court, and this court, to add words to § 117.187. That is not permitted. The trial court correctly accepted well established real estate practices and applied case law-mandated standards to identify and value a comparable property for the purpose of awarding just compensation. The decision of the trial court was fair and reasonable in view of all of the evidence submitted and should be affirmed.

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[9] T. 207, Lines 8-23

4. THE TRIAL COURT APPROPRIATELY CONSTRUED THE CONCEPT OF COMMUNITY TO PROVIDE A FAIR AND JUST INTERPRETATION OF THE STATUTE.

Respondent believes this issue raises an issue of first impression and statutory construction and, as such, should be given *de novo* review by the appellate court. *Meder, supra*.

Appellant, in briefing this issue, is trying to re-litigate their position. They offer no statutory or case law to support their argument. Interpreting the statute as argued by Appellant would unreasonably restrict displaced owners in their search for a replacement property. Rather, using the fluid approach to statutory interpretation evidenced in the *Anda supra*., decision, favored by our Supreme Court, the trial court properly considered all of the evidence to allow for greater flexibility, and owner choice, when determining what constitutes a "community" under this statute.

The trial court had reliable, expert witness testimony on which to base its decision. On direct examination Dan Wilson went into detail as to the steps he takes to help businesses relocate. In his opinion the minimum compensation statute and the Minnesota Relocation Act, Minn. Stat. § 117.152, work together.[10] Exhibit 23, Wilson's written analysis, was received in evidence in addition to his direct testimony.[11] Based upon his 41 years of experience in acquiring land for public use, and his experience and training in providing relocation assistance, Mr. Wilson addressed the issue of what it means to relocate a business

[10] T. 256, Lines 4-25; T. 257, Lines 1-24
[11] T. 258, Line 17; A.-1

to a replacement site.[12] In his opinion Mr. Wilson believes the important question is ". . . can the particular business function as a retail operation in this replacement site?"[13] The trial court obviously found this opinion and this approach to be credible as it is the substance of Findings of Fact number 25.[14] Contrast this testimony with the attempt by Robert Strachota to defend his definition of the Cameron "community" as the trade area as being the blue collar area around the King of Diamonds strip club and close to a marina on the Mississippi River.[15] The trial court rejected that line of reasoning as speculative.[16]

Further, Mr. Wilson also pointed to the changes made to Minn. Stat. § 117.152 in 2006 to increase the business re-establishment expense allowance from $10,000 to $50,000. That increase was subsequently re-affirmed by the legislature in 2007. If it was the intent of the legislature to give displaced owners and businesses unlimited public funds to purchase and relocate to another property there would be no reason to cap their eligibility for re-establishment expenses at $50,000.[17]

The analysis and reasoning of the trial court is clearly spelled out in the Memorandum attached to the February 24, 2011 order. Defining a community as a small trade area is too inflexible. Since Appellant had a liquor license issued by the City of Inver Grove Heights, and the City is not so large that customers would not be able to get to any location within the city limits, it was reasonable to conclude that community, in this case, could mean the

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[12] T. 266, Lines 6-25
[13] T. 267, Lines 1-3
[14] A-199
[15] A-327, 336
[16] T. 67, Lines 10-23
[17] T. 275, Lines 2-20

corporate limits of the City of Inver Grove Heights. Expanding the community to an even greater area, outside the corporate limits of the City, would introduce uncertainty as to whether Appellant would have been able to obtain a liquor license in a different city.

While *de novo* review would allow this court to substitute its interpretation of the meaning buried in § 117.187, the ruling of the trial court is reasoned and reasonable and based upon years of reported cases involving litigation over damages arising from eminent domain claims. The statute is not clear and unambiguous. The ruling of the trial court is reasonable and should be affirmed.

5. THE TRIAL COURT REASONABLY CONCLUDED THAT THE MINIMUM COMPENSATION STATUTE DOES NOT ENTITLE THE LANDOWNER TO CONSTRUCTION OF A NEW BUILDING AS A REPLACEMENT FOR THE LANDOWNER'S 124 YEAR OLD, NON-CONFORMING, BUILDING.

This issue is one of first impression and presents an issue of statutory construction. As such, appellate review should be *de novo* review. *Meder, supra.*

Again, Appellant is adding words to § 117.187 that the legislature either purposely omitted or inadvertently overlooked. This argument was raised by Appellant in its pretrial motion. There, Appellant claimed that the trial court had implicitly approved the concept of new construction in the Court's pre-trial order of May 26, 2010.

As explained in the Order of May 23, 2011, the trial court made its final decision after hearing all of the facts presented at trial. While not precluding the possibility of new construction in an appropriate case, the trial court found new construction was not

appropriate in this case. The real estate market data on comparable properties does not justify an award for new construction in this case.

Throughout this case, Appellant has never offered an opinion of value of the property taken.[18] Rather, they have consistently argued they are entitled to a brand new building because no "comparable" property existed for them to purchase. The trial court rejected their claims, finding that a comparable property did exist to aid in determination of just compensation, and that just compensation, not the purchase of a specific building, is the goal of the law. If this Court exercises its *de novo* review authority and determines that no comparable property did exist in the community on the date of taking this Court will need to fashion a definition for the terms "comparable property" and "in the community." Because the *Moorhead v. Anda* decision shows our Supreme Court is satisfied that just compensation is the constitutionally mandated goal, this Court should not take it upon itself to re-write § 117.187.

The Court Order of February 24, 2011 contains conclusion of law number 5 holding that the loss of going concern statute, § 117.186, subd. 2, was not applicable to this case. The Court's stated reason was that because Cameron intended to remain in business, the business was not destroyed.

Minn. Stat. § 117.187 is ambiguous and therefore subject to statutory construction. One of the statutory rules of construction previously cited provides that a reviewing court "must interpret each section in light of the surrounding sections to avoid conflicting

[18] T. 233, Lines 18-25; T. 234, Lines 1-5

interpretation." *American Family Insurance, supra.* One reasonable approach for determining just compensation when no comparable property in the community can be identified was offered in the testimony of Dan Wilson.[19]

There is no law that compels a property owner to purchase replacement property after the public takes what he or she owned. If that owner has the money value of what was taken, that owner is made whole. As a cap on damages in the type of case at issue herein, when the owner claims there is no comparable property to replace what was taken, then the public should be allowed to pay the fair market value, or the going concern value, of what was taken. It is inconsistent with Minn. Stat. § 645.17(5) to allow a private person to dictate that the public provide a blank check to pay for new construction in a case such as this one if new construction exceeds the value of what was taken. That would not be just to the owner <u>and</u> to the public that must pay the bill. *Moorhead Economic Development Authority v. Anda, supra.*

On *de novo* review this court should hold that new construction is not warranted under the facts of this case, or, in the alternative, that the loss of going concern statute can serve as a cap on damages payable by the public to owners that cannot locate a comparable property in the community.

[19] T. 302-311

6. THE TRIAL COURT AWARDED REASONABLE ATTORNEY FEES TO THE LANDOWNER.

This issue presents an issue of statutory construction of a relatively new statute. But, the statute is not claimed to be ambiguous or subject to more than one reasonable interpretation on this particular issue. As such, the standard of judicial review is "clearly erroneous," with deference given to the trial court. *Lundell, supra.*

Respondent agrees that Minn. Stat. § 117.031 provides for an award of "... reasonable attorney fees, litigation expenses, appraisal fees, other expert fees, and other related costs . . ." if the final judgment or award is more than 40 percent greater than the last written offer. Respondent agrees that the last award, confirmed on May 23, 2011, exceeded the last written offer by more than 40 percent. Respondent disagrees, however, that the award of fees by the trial court was unreasonable. The award is more than reasonable and should be affirmed by this Court.

The trial court's Order and attached Memorandum filed on May 23, 2011 directly addresses the issue of reimbursement for attorney fees and litigation expenses.[20] Since Appellant's complaint only deals with attorney fees the other expenses will be disregarded. Appellant is seeking $217,991.45 in attorney's fees.[21] The trial court awarded $161,964.50,[22] or about one-third of the amount by which the final award exceeded the last written offer.[23]

The trial court cites as authority for its analysis *State by Head v. Paulson*, 188 N.W.2d 424 (Minn. 1971). That case, and its successor *City of Minnetonka v. Carlson*, 298 N.W.2d

[20] A. 310-311
[21] A. 310

763 (Minn. 1980), are the cases most relied upon when courts confront this issue. The *City of Minnetonka* decision arose in the context of a condemnation case, although not specifically under § 117.031.

Both cases focus on six factors to be considered by a court when determining the reasonableness of attorney fees. They are: (1) time and labor required; (2) nature and difficulty of the responsibility assumed; (3) the amount involved and the results obtained; (4) the fees customarily charged for similar legal services; (5) the experience, reputation and ability of counsel; and (6) the fee arrangement existing between counsel and the client. 298 N.W.2d at 765. While Appellant complains that the trial court order ". . . forces a contingent fee arrangement on the parties ignoring the fee agreement Cameron had with his attorneys." (Appellant's Brief at pg. 38) the fee arrangement is only one of six factors to be considered in determining reasonableness. Just as significant to the trial court is the fact that Appellant was not able to prove its claim for the cost of new construction.

The affidavits submitted by Appellant as to fees customarily charged and the experience, reputation and ability of counsel are simply self-serving and were provided by individuals whose primary purpose is to secure maximum fees and costs from public agencies. The award of attorney fees was more than fair and reasonable. By comparison, the fee demanded by Appellant would pay the entire salary of a public sector attorney for two or three years so that attorney could work on just that one property. That situation would never happen.

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[22] A. 311

Appellant also complains about the "inequitably low offer" made by the County. Until there is a final decision to the contrary, the measure of just compensation will continue to focus on fair market value. In that regard the County is the only party that submitted an independent fee appraisal of the property being taken. (Trial Exhibit 4) The County also obtained and submitted an expert's report on properties considered as comparables for minimum compensation purposes. (Trial Exhibit 24) That report concluded that Appellant would have been able to purchase a replacement property for less than the offer tendered by the County. All that Appellant ever offered the Court was a demand and an analysis of construction costs for a hypothetical new building that the trial court determined to be less than compelling. Respondent's last written offer was consistent with an independent fee appraisal of the market value of the subject property. It was not an inequitably low offer. That finding of the trial court should be affirmed.

The trial court order adequately addresses all of the arguments of Appellant and the appropriate law on the subject of attorney fees. The award should be affirmed.

Finally, the *amicus* filing by the Minnesota Eminent Domain Institute encourages this Court to consider the legislative environment surrounding the passage of the 2006 eminent domain amendments. Specifically, they point to the "nationwide public backlash" brought about by the U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). No authoritative source is provided for their claim to such a backlash. Rather, certain lawyers and lobbying groups, incensed by the thought that private property could be

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[23] *Ibid.*

taken by a public authority for conveyance to another private entity for economic development purposes, sought to restrict that development authority. The result is the legislative over-reaction that led to passage of vague and ambiguous statutes best exemplified by statutes such as § 117.187. *Kelo* has absolutely no application to the facts of this case. This case does not arise out of a desire for economic development by the city or county. Rather, it arose out of one of the most "traditional" uses of eminent domain authority: acquisition of right-of-way for a public highway. Those same lawyers and lobbying groups are now trying to use those vague and ambiguous laws to argue for judicial holdings that are inconsistent with the history of eminent domain in this county and this state, even though it takes verbal gymnastics to interpret the language of the statute to reach the conclusions they are advocating for.

CONCLUSION

Given the canons for judicial construction of legislative actions, and the limited authority courts have allowed themselves when attempting to flesh out the meaning of newly adopted statutes, the trial court properly followed precedent from our Supreme Court when it entered its award to Appellant. Though liberal, the award adequately compensated Appellant for the loss he suffered by the public taking of his land while it avoided the blank check so vigorously sought by Appellant and *amicus*.

Simply repeating the demand for new construction to replace an old building, or imposing artificial limits on the term "community", does not add the words to the statute necessary to support those conclusions. While the Supreme Court opinion in *State v. Strom/Woodbridge*,

493 N.W.2d 554 at 560 (Minn. 1992) stated that making highway projects prohibitively expensive was not a reason to under-compensate abutting landowners, the Court did not add words to a statute as a means for over-compensating such landowners either. In *Strom*, as in *Moorhead v. Anda*, our Supreme Court continues to look to the real estate market as a tool to determine just compensation. Even though the real estate market is not perfect, and has fluctuations that can be hard to accept at times, the market is the only independent, quantifiable source of data that has meaning. If the legislature chooses to create a new tool or new definitions for determining damages when land is taken for a public purpose, the legislature should be the body that supplies a clear and unambiguous law to accomplish that purpose.

The Court of Appeals should uphold the orders of the trial court in all respects.

Dated: September 27, 2011.

Respectfully submitted,

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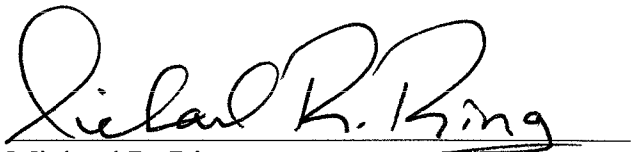
WORD COUNT COMPLIANCE

I, Michael R. Ring, certify that the Brief of Respondent County of Dakota contains 6,689 words, exclusive of the caption designations, the signature texts, and this certificate of compliance, as computed by the word processing program used to prepare the memorandum, Microsoft Office Word 2007.

Dated: September 27, 2011.



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