

Case No. A120391

State of Minnesota

In Court of Appeals

CITY OF CLOQUET,
Petitioner-Respondent,

v.

Julie Crandall, et. al.,
Respondents-Appellants.

An appeal from the Findings of Fact and Conclusions of Law and
Order on October 12, 2011 and
Order Denying motions to amend and for new trial and Judgment
on February 21, 2012 in Case No. 09-CV-10-913
In Carlton County District Court,
Judge David M. Johnson

**BRIEF OF
RESPONDENTS-APPELLANTS**

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Dated: April 12, 2012

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

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STATEMENT OF ISSUES

I. Whether to be classified as a comparable property under the Minimum Compensation Statute the property must possess features that are (1) equivalent to those present in the acquired property, and (2) important to the use of the acquired property on the date of taking.

The trial court held in the negative, erroneously considering properties of lesser quality than the subject property.

County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. 2012).

Minn. Stat. § 117.187.

II. Whether a trial court must consider the important features required for the equivalence evaluation in its selection of comparable properties under the Minimum Compensation Statute.

The trial court held in the negative, completely ignoring features such as size, at grade square footage, interior layout, and structural condition.

Minn. Stat. § 117.187.

III. Whether the universe of comparable properties under the Minimum Compensation Statute must be limited to those actually available for purchase on the date of taking.

The trial court held in the negative, erroneously including comparable properties that were not available on the market for purchase.

County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. 2012).

Minn. Stat. § 117.187.

IV. Whether a comparable property under the Minimum Compensation Statute must have a determined market value.

The trial court held in the negative, erroneously including properties whose value was undetermined.

County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. 2012).

Minn. Stat. § 117.187.

V. Whether Appellants required the full square footage of the acquired property.

The trial court held in the negative, a clearly erroneous finding considering all evidence on the record indicating the contrary.

Minn. R. Civ. Pro. 52.01.

City of Golden Valley v. One 1998 Pontiac Grand Prix, VIN No. 1G2WP521WF309530, 616 N.W.2d 780, 782 (Minn. Ct. App. 2000).

VI. Whether Respondent's Minimum Compensation Report and Testimony were admissible evidence.

The trial court held in the affirmative. Respondent's Minimum Compensation Report and Testimony did not determine market value of comparable property nor an actual purchase price for a comparable and must therefore be excluded.

County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. 2012).

City of Mankato v. Hilgers, 313 N.W.2d 610 (Minn. 1981).

Susnik v. Oliver Iron Mining Co., 205 Minn. 325, 286 N.W. 249 (1939).

Minn. Stat. § 117.187.

VII. Whether Appellants are entitled to a new trial based on the Commissioners' receiving and using private, unsworn testimony and the Commissioners' resulting inadmissible testimony being the sole basis for the trial court's findings.

The trial court held in the negative, erroneously accepting the Commissioners testimony that was obtained from sources not under oath and outside the presence of counsel and refusing a new trial based on the foregoing errors.

State v. Dorsey, 701 N.W.2d 238 (Minn. 2005).

Spinner v. McDermott, 190 Minn. 390, 251 N.W. 908 (1933).

Minn. Stat. § 117.085.

STATEMENT OF THE CASE AND FACTS

Petitioner, the City of Cloquet (“City”), acquired real property at 1201 Avenue C, Northeast corner of 12th Street and Avenue C in the City of Cloquet, County of Carlton, State of Minnesota Concord Boulevard East (“Subject Property”) on July 23, 2010.¹

The masonry building on the Subject Property underwent significant renovations in the 1980’s when Sears converted it to a retail operation.² The building includes at least 10,500 square feet of floor area and with all of the floor area possessing at-grade access.³ As one expert testified, “items could either be wheeled up the ramp or loaded into a pickup truck and brought up to the main level. It was not necessary to use any staircases to load or unload heavy items.”⁴

Respondents Kerry Crandall and Julie Crandall (the “Crandalls”) are contract for deed vendees, occupants, and equitable owners of the Subject Property prior to the taking.⁵ The remaining respondents stipulated and agreed that all their rights and interest in any proceeds from the condemnation are released to the Crandalls.⁶ This release includes Respondents Lyn E. Johnson and Rae L. Johnson who released Kerry

¹ See Appendix at APP-1-13.

² See Appendix at APP-330 and 333, Trial Exhibit 9, David Reach Appraisal at Tab 2, Page 8.

³ Id.

⁴ See Trial Transcript at p. 20:19-22 and p. 21:11-15; see also APP-525 and 526 pictures in Trial Exhibit 18, Appraisal of John Vigen (also contained in Addendum at ADD-12-14); see also APP-337 Reach Appraisal.

⁵ See Appendix at APP-330, Trial Exhibit 9 Reach Appraisal at Tab 2, Page 5.

⁶ See Appendix at APP-14.

Crandall and Julie Crandall from any and all obligations related to the Contract for Deed and filed a satisfaction of the contract for deed.⁷

Pursuant to statute, a hearing was held to determine just compensation for Crandalls before a panel of commissioners. At the hearing, the City offered the testimony of John Vigen as to the market value of the Subject Property. The Crandalls did not dispute Vigen's market value of the Subject Property. Instead, the Crandalls offered evidence concerning damages under the Minimum Compensation Statute (Minn. Stat. § 117.187). The City offered no testimony on the issue of minimum compensation at the commissioners' hearing. In fact, the City's expert, Vigen, candidly admitted that he had not done a minimum compensation analysis, never had done such an analysis before, nor had an opinion minimum compensation in this case until he completed his report dated March 9, 2011.⁸ The commissioners' hearing concluded on September 21, 2010.

Unbeknownst to the Crandalls and their attorneys, the commissioners continued to take testimony after the hearing concluded.

Over the eight days between the September 21st hearing and their September 30th report, the commissioners interviewed a number of witnesses and used this information in their deliberations. The post-hearing ex parte testimony was taken privately, not under oath, and included several City employees including one of the witnesses who testified at the hearing (giving testimony that he did not at the hearing).

⁷ Id.

⁸ See Appendix at APP-550, Trial Exhibit 19, Vigen's report dated March 9, 2011.

In fact, the commissioners did a complete investigation outside the scope of the testimony that was taken at the commissioners' hearing, instead of just relying on the sworn testimony taken before counsel.

As pointed out in Crandalls' pretrial motion in limine⁹ to exclude the commissioners from testifying, Roger Maki, the commissioners' chair, testified in his deposition:

Q Are you familiar with the requirements of the Crandall auction business versus the Wait auction business, as far as being in a property?

A I don't know if there are particular requirements that are different between the two, but I made a call to Holly Butcher, the community development director and zoning expert for the City of Cloquet, to ask her whether if the Crandalls were to buy the Wait property, whether they could continue to do auctions there.

And I have someplace in my notes here when I did that. Okay. *I called Holly Butcher on Monday, September 27th, and I asked her about this.* And she said that it's grandfathered in as an auction business. And so it would not be a problem for them to do auctions there.

Now, the only thing I know, if you're talking about Crandall auctions being different than the Wait auctions, if that's what you're saying, *the only thing I know about that is that Mr. Wait told us that when we toured his building*¹⁰ that he sells, at least mostly if not all, new materials that he buys from stores that have the stuff

⁹ See Appendix at APP-46-53.

¹⁰ Maki testified that the meeting with Waite occurred on September 28, 2010. See APP-73-74, Affidavit of E. Kelly Keady filed May 4, 2011 at Exhibit C, excerpts from the Deposition of Roger Maki at pp. 22-23.

that's not selling.

And so he'll make a deal with them to buy a big bunch of whatever, what is new, and then he will auction that off. Whereas Mr. Crandall, as I understand it, I've had previous experience with him on property that I have had listed, and he would at least in the past, he probably still will, he would go in and remove everything from a property and not charge anything to clean it all out.

Where you have someone that, maybe it's an estate or nobody really wants to clean it out, he'll go there, he'll clean it out, take everything out, but then he'll sell what he can. He'll dispose of the rest, which works out well sometimes for the owners of the property, and it works out well for him if he gets something that he can make some money on.

So he's selling, as far as I know, mainly used property. I've never been to his auction, I can't say that he doesn't have new property, but I know that he's done that in the past in the way I described, and ***I know what Mr. Wait told us***. So that's, if those, that's a distinction between the auction businesses, then I don't know. But that's what I know of the two businesses.¹¹

....

....What I'm speaking of is any other independent investigations into the Crandall case, other than what you've already testified to; meaning, going out and viewing the other properties, going to and inspecting the Carlton Avenue one, calling Holly Butcher about zoning, and talking to Mr. Wait when you inspected that premises?

A ***I think I had a discussion with Gerry***

¹¹ See Appendix at APP-75-77 at Affidavit of E. Kelly Keady filed May 4, 2011 at Exhibit C, excerpts from the Deposition of Roger Maki at p. 25:4-25, p.26, p. 27:1-9.

Manthey, the building inspector, at some point. I don't know why I don't have any notes on that as to when that happened exactly.

And I think it happened, if I remember right, he's at Cloquet City Hall, his office, and I was in there, I don't remember if I went there just to see him or if I was there on other business, but I think we had a discussion with the condition of the Crandall building.

And I think he mentioned -- it may have not been the same time, but at some point he mentioned that he owned a building, which we would refer to as the Old Chief Theatre Building in the west end of town, and it --

Q I'm sorry, what was the name?

A It's C-H-I-E-F as Indian chief. Chief Theater, used to operator for many years, but hasn't for probably 25 as a theatre. Mr. Manthey owns it, and he has, his ex-wife, I think it was, runs an antique shop out of there and kind of an ice cream snack kind of place also, the last that I know.

But he had mentioned to me something like that, well, why don't the Crandalls buy my property, that would work. And so I said, well, I wasn't aware that it -- it wasn't on the market. I didn't even know he owned it.

Well, I guess, well, I knew he probably had something to do with it, because his ex-wife was running the thing and they have a relationship, I guess, at least business-wise. And, so I guess I did know that he owned it, but I didn't know that he wanted to sell it.

And I think, if I remember right, he told me that he would sell it, but I believe what he said was 350,000. That's my recollection. And again, I didn't, I didn't take notes on that, so I could be off

a little bit, but I know it was over 300,000, 325, 350, something like that.

Q *And did you share that information with the other commissioners?*

A *I believe I did.* ¹²

.....

Q Okay. Now, what Mr. Wait -- *I'm sorry, what Mr. Manthey told you, that wasn't at the commissioners' hearing?*

A *No.*

Q *That was outside the commissioners' hearing?*

A *Yes.*

Q *Okay. Anything else, information that you garnered outside of commissioners' hearings, other than what you've testified to that you considered in your deliberations?*

A *Not that I recall.* ¹³

In addition to Waite, Bucher, and City employee Manthey, Maki later recalled that he also spoke with the County Assessor prior to deliberations and shared the assessor's information with the other commissioners.¹⁴ As a final tally, the commissioners solicited information from four witnesses outside the confines of the hearing: two of which were City employees and three of which never listed as witnesses nor testified at the commissioners' hearing.

The commissioners found for the City and awarded \$198,000 in just compensation.¹⁵

¹² *Id.*, Affidavit of E. Kelly Keady filed May 4, 2011 at Exhibit C, Deposition of Roger Maki at p. 20:23-25 (APP-72), p.30 (APP-79), p. 31(APP-80), p. 32:1-5 (APP-81).

¹³ *Id.*, at Affidavit of E. Kelly Keady filed May 4, 2011 at Exhibit C, Deposition of Roger Maki at p.33:17-25 (APP-82), p. 34:1-2 (APP-83).

¹⁴ *See* Appendix at APP-83-84, at Affidavit of E. Kelly Keady filed May 4, 2011 at Exhibit C, Deposition of Roger Maki at pp. 41-42.

¹⁵ *See* Appendix at APP-30.

The Crandalls appealed¹⁶ the commissioners' award to District Court which heard this matter without a jury.

On behalf of the City, John Vigen, again, opined at trial that that just compensation is the fair market value of the Subject Property that he found to be \$198,000.¹⁷ This time, he also offered testimony on the issue of minimum compensation.¹⁸

Vigen opined that the Carlton Avenue property was a comparable property for purposes of the Minimum Compensation Statute. Although admitting that the Carlton Avenue property was inferior to the Subject Property, he opined that the \$198,000 awarded was more than enough to purchase the Carlton Avenue property and make renovation to the property. He offered no opinion to the specific renovations required or as to the actual or even estimated costs for the renovations.¹⁹

Vigen also opined that the Chief Theater property was a comparable property for purposes of the Minimum Compensation Statute.²⁰ Vigen admitted that because it only has about 6,000 square feet of floor area with at-grade access and its second floor can only be accessed by stairs, that the Chief Theater property will not work for the Crandall business with its present configuration.²¹ Vigen acknowledged that modifications for the Chief Theater would include additional access opportunity for the

¹⁶ See Appendix at APP-32.

¹⁷ See Appendix at APP-489, Trial Exhibit 8, Vigen Appraisal.

¹⁸ See Appendix at APP-550, Trial Exhibit 19, Vigen Minimum Compensation Report.

¹⁹ See Trial Transcript at pp. 221 and 225.

²⁰ See APP-550, Trial Exhibit 19, Vigen's Minimum Compensation Report.

²¹ See Trial Transcript at p. 112:13-25, p. 113:1.

second floor and a different type of loading door.²² He provided no cost analysis for these modifications because he believes it is not required under the statute.²³ Although the asking price for the Chief Theater property (\$350,000) was more than that was awarded, Vigen believed that price could negotiated down from the \$350,000.²⁴ Vigen did not provide a purchase price for the Chief Theater.²⁵

Again, the Crandalls' expert, David Reach ("Reach"), offered no opinion on the fair market value of the Subject Property, but testified as to compensation under the Minimum Compensation Statute.

At trial, the experts agreed that the purpose of the Minimum Compensation Statute is to allow displaced property owners to move to a new location and continue their business in the new, alternate location.²⁶

The experts testified that a comparable property under the Minimum Compensation Statute must be one that can house the needs of the particular business and allow the displaced owner to move into and operate his business in that location.²⁷

However, only Reach discerned the needs of the Crandall auction business which include at least 10,500 square feet of floor area and that all of that floor area needs at-grade access or access to at-grade by elevator or ramp.²⁸

²² See Trial Transcript at p. 289:10-13.

²³ See Trial Transcript at p. 209:3-6.

²⁴ See Appendix at APP-555.

²⁵ See Trial Transcript at p. 225:13.

²⁶ See Trial Transcript at p. 86:21-24; p. 224:17-21.

²⁷ See Trial Transcript at p. 58:9-19, p. 85:21-25, p. 86:1-11, 21-24, p. 187:1-4, p. 285:21-25, p. 286:1.

²⁸ See Trial Exhibits 9 & 10 and Trial Transcript at p. 16:19-25, p. 17:5-25, p. 21:7-15, p. 22:12-19, p. 28:1-4, p. 24:11-12, p. 25:1-17 p. 35:22-24, p. 36:4-7, p. 72:23-25, p. 73:1, p. 75:9-10, p. 75:23-25, p. 76:1-3, p. 231:17-25, p. 232:1-11, p. 234:16-25, p. 235:1-4, p. 254:24-25, p. 255:1.

Although Vigen admitted that he did not investigate the needs of the Crandall auction business, he confirmed that the Crandall auction business used the entire 10,584 square feet in the building on the date of taking.²⁹ Vigen also recognized that all of the space being used by Crandalls in their business had at-grade access.³⁰ He further stated that basements are not used for storage unless an elevator or a ramp exists, because such storage use is not very practical or efficient.³¹ Vigen also acknowledged the ramp access to the lower level of the Subject Property, and stated that such access is much more desirable than a basement that only has access by stairs.³²

Since only Reach discerned the needs of the Crandall auction business, he was in a unique position to determine whether the Crandall auction business could move into and operate the business in the proposed comparable properties.

Reach opined that the Carlton Avenue property is not a comparable property under the Minimum Compensation Statute for the Subject Property because it does not meet the needs of the Crandall auction business by being 1) too small, 2) in very poor condition with possible mold issues and structural integrity problems from water penetration, and 3) cannot service all of the floor area needs at-grade access or access to at-grade by elevator or ramp.³³

Reach opined that the Chief Theater property is not comparable property under the Minimum Compensation Statute to the acquired property because it was not

²⁹ See Trial Transcript at p. 228:12-15, p. 229:3-6, 236:22-25, p. 237:1-2, p. 255:16.

³⁰ See Trial Transcript at p. 272:8-15.

³¹ See Trial Transcript at p. 267:16-25, p. 268:1-15.

³² See Trial Transcript at p. 269:4-15.

³³ See Appendix at APP-471(last bullet point); see also APP-361-362; see also Trial Transcript at pp. 69-73; 342-350.

available at the date of taking.³⁴ The property was never listed³⁵ and its availability only came to light when the City's employee said he would be willing to sell it during the *ex parte* investigation by the commissioners.³⁶

Reach finally opined that the Kolar property is the only comparable offered at trial that was available and that met the needs of the Crandall auction business. It was his opinion that the minimum amount of money necessary for the Crandalls to purchase the Kolar property was \$843,000.

On October 12, 2011, the Honorable David M. Johnson, Sixth Judicial District, entered his findings of fact and conclusions of law.³⁷ The Trial Court's findings and conclusions relied heavily on the commissioners' testimony and adopted their conclusions.³⁸

³⁴ See Trial Transcript at p. 30:25 to 31:2, 32:1-3.

³⁵ See Trial Transcript at p. 32:1-3.

³⁶ See Trial Transcript at p.313:10-17.

³⁷ See Appendix at APP-205.

³⁸ See Appendix at Trial Exhibits 9 (APP-302) and 10 (APP-469).ADD-1, Trial Court's order filed October 12, 2011 made the following findings and conclusions:

5. ***The commissioners conducted*** a minimum compensation analysis within the intent and meaning of the minimum compensation statute by comparing the various available properties identified in the report prepared by David Reach for purposes of determining whether they could serve as locations for the displaced auction business.

6. ***The commissioners concluded*** that the property located at [hereinafter the "Carlton Avenue property"] was a comparable property within the meaning of the minimum compensation statute.

7. ***The commissioners concluded*** that the award of \$198,000 would have provided just compensation for Respondents Julie and Kerry Crandall to purchase the Carlton Avenue property and make improvements such that the Carlton Avenue property could have served as a location for their auction business.....

11. ***The commissioners concluded*** that the property located at 3206 River Gate Avenue in Scanlon, Minnesota [hereinafter the "Kolar property"] was not a comparable property within the meaning of the minimum compensation statute....

3. ***The commissioners properly identified*** the Carlton Avenue property as a comparable property...

4. ***The commissioner's award*** of \$198,000 fully compensated....

On February 21, 2012, the Trial Court denied the Crandalls motion for a new trial and for amended its findings.³⁹ Final judgment was also entered in this matter on February 21, 2012.

On March 6, 2016, the Crandalls noticed their appeal in this matter.⁴⁰

³⁹ See Addendum, Trial Court's Order filed February 21, 2012 denying motions to amend and for a new trial.

⁴⁰ See Appendix at APP-569.

ARGUMENT

The Minimum Compensation Statute was recently enacted in 2006 and contains relatively short, concise language:

When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community and not less than the condemning authority's payment or deposit under section 117.042, to the extent that the damages will not be duplicated in the compensation otherwise awarded to the owner of the property. For the purposes of this section, "owner" is defined as the person or entity that holds fee title to the property.

Minn. Stat. § 117.187 (2010). To date, there is only one appellate decision interpreting the statute. County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. Mar. 26, 2012).

I. IN ORDER FOR A PROPERTY TO BE CLASSIFIED AS A COMPARABLE PROPERTY UNDER THE MINIMUM COMPENSATION STATUTE, THAT PROPERTY MUST POSSESS FEATURES WHICH ARE 1) EQUIVALENT TO THOSE PRESENT IN THE ACQUIRED PROPERTY AND 2) IMPORTANT TO THE USE OF THE ACQUIRED PROPERTY ON THE DATE OF TAKING.

Identifying a comparable property is a critical determination for the application of the Minimum Compensation Statute. The only appellate decision to address this statute to date found that term to be ambiguous. County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. Mar. 26, 2012). In reconciling this ambiguity, the Cameron court identified two terms that could be considered to express its meaning: "similar" and "equivalent". These two words, though, have materially different

meanings. The term “equivalent” is defined as “equal in value, force, meaning, effect, etc.” while the term “similar” has been given the meaning of “bearing resemblance to one another or something else.” In comparing these definitions, one observes that the term “similar” can encompass something of lesser quality, while the term “equivalent” does not. In order to resolve this ambiguity, it is necessary to examine the legislative history of the statute. While the Cameron court undertook this exercise, it did not uncover the most relevant portions of that history.

The legislature history reveals that the earlier versions of the Minimum Compensation Statute stated:

When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a *similar house or building of equivalent size* in the community and not less than the condemning authority's payment or deposit under section 117.042⁴¹

The language “similar house or building of equivalent size” was changed by amendment to clarify “the criteria that it is something beyond just size for these properties.”⁴² Instead of “similar house or building of equivalent size” the bill substituted the term “comparable property”.⁴³ The reason for the change was to expand the definition, not limit it. Discussion during the Transportation Committee hearing revealed two important points. The original language, which uses the terms “similar” for houses and “equivalent” for other buildings, contemplated “same size” as the meaning for these terms, and the new language intended to incorporate consideration of

⁴¹ See Minn. Stat. § 117.187 as introduced, 1st engrossment and 2nd engrossment, for House Bill 2846 and Senate bill 2750 for the 84th Legislative session (2005-6).

⁴² See March 23, 2006 House Transportation Finance Committee hearing on House Bill 2846 amendment no. A06-1271.

⁴³ See ADD-20, Amendment to Minimum Compensation Statute.

the characteristics of the whole property as opposed to limiting compensation solely based on size.⁴⁴

These points are revealed in the statements from Senator Robling:

as I was reading the first time I thought, you could purchase a similar house or building of equivalent size in the community and I thought, ***as long as it's the same size*** it can be on any lot in the community if we're only addressing the house itself, so ***if you wanted to have a house that is now on a lake*** and if we're only addressing the house and the size of the house, I would think it could have been read that way, and I think we've clarified it by taking out "of an equivalent size" we are not still addressing property. But I'm hoping that we're addressing the whole package, the lot and the house, so we're mainly dealing with the whole property and not just the house. I think we may be doing that here, but ***I just want to make sure that that's clear...I want to make sure it's addressing the whole property, the land and the building on it, and not just the building.*** So that you could have a building that would be on a much more valuable piece of property and ask for that comparison.⁴⁵ (emphasis added)

Consequently based upon this legislative history, the selection of a comparable property requires 1) identification of the important features associated with the use of the acquired property and 2) assurance that those features are equivalent in the comparable property.

The court in Cameron provided insight into the categories of features that should be investigated relative to importance when searching for an selecting a comparable property. These include: "size, features, and location; the square footage, age, design, and construction quality of any structures on the land; as well as features related to the

⁴⁴ Id.

⁴⁵ See March 16, 2066 Senate Transportation Committee on Bill 2750 (statement occurs near the very end of the hearing at approximately 3:20:00).

property's usage." County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. Mar. 26, 2012).

At trial, both Crandall and the City provided extensive testimony about the features of the acquired property, which were important for its use on the date of taking. The testimony of Reach⁴⁶, Crandall⁴⁷, Tondryk⁴⁸, and Vigen⁴⁹ all agreed that the Crandall business was using and needed the entire (100%) floor space in the building (main floor and lower level) which was 10,584 square feet. By using and needing this amount of space, that amount was important, and a comparable property would need an equivalent amount of floor space.

In addressing the size (floor area) issue, quantity alone was not the only consideration. In utilizing the entire space, Reach noted that the Crandall business involved the storage of inventory where some of the inventory consisted of heavy items.⁵⁰ Because the acquired property consisted of two floors, easy movement between floors was extremely important.⁵¹ This ease of movement in the acquired property was achieved because both the lower level and main floor had at-grade access with a ramp allowing for vehicle access between the two floors to facilitate inventory movement between floors.⁵² Crandall even acknowledged that floor space accessible

⁴⁶ See Trial Transcript at p. 17:5-25, p. 28:1-4, p. 24, p. 75.

⁴⁷ See Trial Transcript at p. 114, p. 117, p. 329.

⁴⁸ See Trial Transcript at p. 129.

⁴⁹ See Trial Transcript at p. 228, 229, 236, 255.

⁵⁰ See Trial Transcript at p. 36:4-7, p. 72:23-25, p. 73:1.

⁵¹ See Trial Transcript at p. 22:12-19, p. 35:22-24.

⁵² See Trial Transcript at p. 21:7-15.

only by stairs does not work for his business when he discussed the Chief Theater's shortcoming of only having stair access to the second floor.⁵³

Vigen, the City's expert, also acknowledged the importance of at-grade access for the Crandall business. While discussing the Chief Theater as a comparable property, Vigen testified that modifications for the Chief Theater were required and would include additional access opportunity to the second floor.⁵⁴

Vigen also elaborated on the deficiencies of access to a basement for storage where access occurs only by way of stairs. He noted that basements are not used for storage because moving product is a problem unless you have an elevator or a ramp.⁵⁵ He described the problem as "not very practical or efficient."⁵⁶ He concluded that it is much more desirable to have a ramp to the basement than just stairs. Given that the lower level of the acquired property was used for storage, the testimony from Crandall and both experts explains that at-grade access for all of the floor area in the acquired property was important for the Crandall business.

Given the trial court's ultimate conclusion for a comparable property, construction quality and condition of the acquired property also became important features. Reach testified that the foundation and above-grade wall structure were all of concrete construction.⁵⁷ While Vigen did not do an investigation of the construction quality of the acquired property, he acknowledged that masonry construction is sturdier

⁵³ See Trial Transcript at p. 112.

⁵⁴ See Trial Transcript at p. 289:10-13.

⁵⁵ See Trial Transcript at p. 267.

⁵⁶ See Trial Transcript at p. 268.

⁵⁷ See Trial Transcript at p.349.

and of higher quality than wood frame construction.⁵⁸ With regards to condition, he testified that he had no concerns about the structural integrity of the acquired property.⁵⁹ According to Vigen, the acquired property was in fair condition.⁶⁰

The foregoing recitation of trial testimony established that three features of the acquired property were important for its use by the Crandall auction business on the date of taking:

1. The building had 10,524 square feet of floor area that was being entirely used by the Crandall auction business;
2. All of the floor area in the acquired building had at grade access which was needed to accommodate the movement of inventory by the Crandall auction business; and
3. The acquired property was built of masonry construction and had no structural concerns.

II. THE TRIAL COURT IGNORED THE IMPORTANT FEATURES REQUIRED FOR THE EQUIVALENCE EVALUATION IN ITS SELECTION OF THE CARLTON AVENUE PROPERTY AS A COMPARABLE PROPERTY.

In selecting the Carlton Avenue property as the comparable property, the Trial Court's decision identified and found equivalency for only three features:

the Carlton Avenue property was comparable because it was previously used to house an auction business, it was zoned for continued use as an auction business, and it was located in the same community as the subject property.⁶¹

⁵⁸ See Trial Transcript at p. 246.

⁵⁹ See Trial Transcript at p. 250.

⁶⁰ See APP-518; Trial Exhibit 18, on page 27 of his appraisal report Vigen states the acquired property is "fair quality"; and at APP-554, Exhibit 19, Vigen's Minimum Compensation Report describes the property in "fair" condition in his grid on page 5.

⁶¹ ADD-8, at p. 4 of Trial Court's Order.

While these conclusions are supported by the record, they do not even address the important features previously noted.

Regarding the feature of size, the Trial Court even acknowledged that “the square footage of this [Carlton Avenue] property is smaller than the subject property.” With only 4,258 square feet of at-grade floor area, the Carlton Avenue Property falls well short of equivalency with the acquired property by over 6,000 square feet.⁶² The second floor and basement areas of this property are disregarded because they could only be accessed by narrow stairs.⁶³ Additionally, the limited main floor area of the Carlton Avenue property required maneuvering through five narrow doorways to get inventory from the back storage area to the auction floor.⁶⁴ Because of the size deficiency, the Carlton Avenue Property must be rejected as a comparable property because it fails the equivalency test for this important feature.

The Trial Court dismissed this size requirement deficiency for two reasons. First, the court stated that “Crandall testified that he could operate his business out of a smaller space.” That is an absolute misstatement of the record. Not only did Crandall say he was using the entire floor area in the acquired building,⁶⁵ he stated he needed that amount of space in any new location.⁶⁶ In making its statement, the Trial Court appears to rely on Crandall’s “yes” answer to the question: If you had a building with 8,000 square feet and *you could even do some additional remodeling to it to outfit it to*

⁶² See Trial Transcript, p. 206:4-5.

⁶³ See Trial Transcript, p. 71:3-25, p. 73:13-25, p. 74:1-3.

⁶⁴ Id.

⁶⁵ See Trial Transcript at p. 96, 117, 329.

⁶⁶ See Trial Transcript at p. 114.

work for you, would something like that work for you? (emphasis added.)⁶⁷ The Trial Court disregarded Crandall's clarification to his answer: "As long as I had enough area to work."⁶⁸ The highlighted language and his full answers show he was concerned about the full floor area he had testified that he needed.

The second reason for the Trial Court dismissing the size equivalency requirement is that an addition could be constructed to the Carlton Avenue property. Assuming that installing additions to small properties in order to achieve size equivalency is allowed under the Minimum Compensation Statute, the reason expressed by the Trial Court still fails based on the record in this case. As the record revealed, and discussed in more depth later in this brief, the Carlton Avenue Property is in extremely poor condition. Given the building's wood frame construction, exposure to the elements, and visible structural problems, it is most likely that this building would be recommended for demolition rather than renovation with an addition of 6000+ square feet of new construction. In other words, increasing the footprint of this building by 150 percent would be classified as waste. Furthermore, for the purposes of pricing or valuing the Carlton Avenue property with the addition in place, no evidence was introduced on the record to address this issue.

Since the City was the proponent of the Carlton Avenue property as a comparable property, it had the burden of proof on this issue. Its expert (Vigen)

⁶⁷ Trial Transcript at p. 110:18-22.

⁶⁸ Trial Transcript at p. 110:24, p. 111:19.

acknowledged that this building would need adaptations and additional storage areas,⁶⁹ but he did not make a determination as to the extent of any modifications required or costs associated with modifications needed to make the property suitable for a 10,584 square-foot auction space.⁷⁰ Consequently, the Trial Court's excuses for ignoring the size equivalency requirement are not justified. The Carlton Avenue Property must be rejected as a comparable property because it fails to meet this important requirement in this case.

By selecting the Carlton Avenue property, with its poor condition, as a comparable property, the Trial Court made condition and construction quality an important feature for equivalency analysis. Although Vigen concluded that the Carlton Avenue Property was a comparable property, he *never saw the inside of the Carlton Avenue property*.⁷¹ By contrast, Reach inspected the interior and took numerous interior and exterior photos of it.⁷² The exterior photos showed extensive upper areas of the building's sidewalls that were exposed to the elements with no siding.⁷³ Reach was concerned about this lack of siding because of the negative ramifications caused by water penetration.⁷⁴ The problems resulting from water penetration are rotting of the

⁶⁹ See Trial Transcript at pp. 208, 264.

⁷⁰ See Trial Transcript at pp. 265, 266.

⁷¹ See Trial Transcript at p. 203:17-18.

⁷² See Trial Exhibit 33, photos of the Carlton Avenue property. Vigen complained at trial that the owner repeatedly avoided appointments with him to inspect the property. Reach solved that problem by simply going to the building when the owner was holding one of his auctions there. See Trial Transcript at p. 350:25, p. 351:1-3. One has to wonder how serious Vigen really was about wanting to document the condition of the Carlton Avenue property.

⁷³ See Trial Exhibit 33, photos of the Carlton Avenue property; see also Trial Transcript at pp. 342-3.

⁷⁴ See Trial Transcript at p. 349:4-15, p. 350:7-15.

structure and the formation of mold.⁷⁵ The interior pictures, showing vertical and horizontal twisting of the main structural beam,⁷⁶ only intensifies the water penetration concerns for that building which is of wood frame construction. By contrast the acquired property is of masonry construction which Vigen even acknowledged is superior to wood.⁷⁷ Vigen also stated that he had no concerns about the structural integrity of the acquired property.⁷⁸

It has been said that “a picture is worth a thousand words”. The pictures of the acquired Property in the addenda to Trial Exhibit 18 (and to the Addenda of this brief) reflect the condition of the acquired property as it existed prior to the taking.⁷⁹ Trial Exhibit 33 includes pictures showing the condition of the Carlton Avenue property for comparison to Trial Exhibit 18 (again, these are attached in this Addenda too). The exterior of the acquired property (first two pages of Tr. Ex. 18’s addenda) is materially superior to the Carlton Avenue building’s weather worn exposed walls (marked DSC_0028, DSC_0029, DSC_0030, DSC_0031, DSC_0035, and DSC_0036 from Tr. Ex. 33). The display and auction areas inside the acquired property (pages 3 & 4 of Tr. Ex. 18’s addenda) are also markedly superior to the Carlton Avenue building’s cramped interior (marked DSC_005, DSC_006, DSC_007, and DSC_008 from Tr. Ex 33). The lower level storage area of the acquired property (page 6 of Tr. Ex. 18’s addenda) is more open and accessible than the restricted storage area of the Carlton Avenue

⁷⁵ Id.

⁷⁶ See Trial Exhibit 33 (Reach’s pictures of the Carlton Avenue property).

⁷⁷ See Trial Transcript at p. 246:5-8, p. 248:24-25, p. 249:1-7.

⁷⁸ See Trial Transcript at p. 250:8-10.

⁷⁹ See Trial Transcript at p. 333.

property (marked DSC_009, DSC_010, DSC_011, DSC_012, DSC_0015, and DSC_0016 from Tr. Ex. 33). Even Vigen admits that the condition of the Subject Property was better than the Carlton Avenue Property.⁸⁰ The pictures dramatically show that the condition and construction quality of the Carlton Avenue property is vastly inferior and nowhere close to equivalent to the condition and construction quality of the acquired property. Thus, the Carlton Avenue property also fails the equivalency test for this important feature. *No owner should have minimum compensation based upon a building with a level of quality and condition as bad as the Carlton Avenue property when compared to the acquired property.*

Not only has the City failed to satisfy its burden to prove the equivalency test for the Carlton Avenue property, the record has established that equivalency has not been met for any of the important features. Therefore, the Carlton Avenue property must be rejected as a comparable sale as a matter of law.

III. THE UNIVERSE OF PROPERTIES ELIGIBLE FOR COMPARABLE PROPERTY STATUS CANNOT INCLUDE THE CHIEF THEATRE.

In Cameron, the court concluded that the universe of properties eligible for comparable property status did not need to be limited only to properties available for purchase on the date of taking. This conclusion was based upon an *assumption* that the owner was not required to purchase a replacement property.⁸¹ Such an assumption is

⁸⁰ See Trial Transcript at p. 207:23-24; and further in his reports (Trial Exhibits 18 and 19) where condition of acquired property is “fair” while Carlton in “poor”.

⁸¹ This is a fatal flaw with the Cameron decision because there is no legal basis for such a assumption. The assumption was based solely on a “No” answer from the owner’s counsel to a question from the court seeking the attorney’s opinion whether such a purchase was required under the statute. It was not

inappropriate. The Minimum Compensation Statute compels a contrary presumption. In this case Crandall does intend to purchase a replacement property. He explained the problems with his temporary location and what he needs for a permanent one.⁸² Given this presumption, which is opposite from the assumption in Cameron, the resulting conclusion must be opposite as well, i.e. the universe for comparable sales must be limited to properties that are available for sale on the date of taking.

In this case, only the Carlton Avenue property and the Kolar property were listed for sale on the date of taking. The Chief Theater property was never listed for sale and its “for sale” existence only became known after a City employee-witness (Manthey) told a commissioner (Maki) in an ex parte communication after the commissioners hearing. Maki testified that he is an experienced broker with over 30 years experience.⁸³ He was not aware of the Chief Theatre being for sale until he had the conversation with Manthey which was long after the date of taking. If Maki was not aware that the Chief Theatre was for sale, Crandall cannot be expected to know that. Without such knowledge and without being listed, the Chief Theatre cannot be considered “Available for sale” for inclusion in the universe of properties to be considered for comparable property status.

a position argued or advanced by the owner in Cameron because that owner actually did purchase a replacement property.

⁸² See Trial Transcript at pp. 107, 114, 117.

⁸³ See Trial Transcript at p. 275

IV. THE CARLTON AVENUE PROPERTY MUST BE EXCLUDED FROM CONSIDERATION AS A COMPARABLE PROPERTY BECAUSE NO MARKET VALUE WAS DETERMINED FOR THAT PROPERTY.

In traditional eminent domain cases the focal point is determining the fair market value of the property acquired by the taking. According to the court in Cameron, the focus shifts to determining “the market value of comparable properties in the community under the Minimum Compensation Statute.”⁸⁴

Vigen was the only expert who considered the Carlton Avenue Property as a comparable property under the Minimum Compensation Statute. In applying this statute, he did not do an appraisal of the Carlton Avenue property.⁸⁵ He did not provide any amounts for purchase or renovation costs for the Carlton Avenue Property.⁸⁶ In short, Vigen did not determine either a market value or a purchase price for that “comparable” property. Although we have shown above, that the Carlton Avenue Property does not satisfy the equivalency tests to qualify as a comparable property, without a market value determination the Cameron decision prevents it from being considered for purposes of determining minimum compensation damages, as well.

The equivalency test prohibits a comparable property from possessing important features which are less than equivalent to those features as they exist in the acquired property. Since the Minimum Compensation Statute is a remedial statute to benefit

⁸⁴ Crandall believes the Cameron decision was decided in error and the determination should be the price to purchase a comparable property as the plain language of the Minimum Compensation Statute provides. This price will always be more than its market value depending upon the degree of modifications and other costs incurred by the displaced owner in purchasing the property. For purposes of this brief, Crandall will assume the Cameron decision was not in error.

⁸⁵ See Trial Transcript at p. 210.

⁸⁶ See Trial Transcript at pp. 209, 266.

owners, the equivalency test cannot eliminate a property from comparable property status where the important features of the comparable property are more than equivalent to those features as they exist in the acquired property. The Trial Court erred by eliminating the Kolar property for precisely this reason.

The primary feature that Reach considered in his search for a comparable property was the need for that property to have sufficient floor space with at-grade access to be equivalent with the acquired property.⁸⁷ Of all the properties available in the marketplace, only the Kolar property met this criteria. Properties with less than 10,500 square feet simply are not big enough to meet the equivalency test for size as determined by the needs for the Crandall business. Reach⁸⁸, Vigen⁸⁹, Tondryk⁹⁰, and Maki⁹¹ all agree that the comparable/replacement property needs to be large enough to house the business, and it is undisputed that Crandalls were using the full 10,584 square foot space for their auction business.⁹² Those with traditional basements (stair access only) could not have that space considered for comparison because that space simply does not have at-grade access.

⁸⁷ See Trial Exhibits 9 & 10 and Trial Transcript at p. 16:19-25, p. 17:5-25, p. 21:7-15, p. 22:12-19, p. 28:1-4, p. 24:11-12, p. 25:1-17, p. 35:22-24, p. 36:4-7, p. 72:23-25, p. 73:, p. 75:9-10, p. 75:23-25, p. 76:1-3, p. 231:17-25, p. 232:1-11, p. 234:16-25, p. 235:1-4, p. 254:24-25, p. 255:1.

⁸⁸ See Trial Transcript at p. 58:9-19, p. 85:21-25, p. 86:1-11, 21-24.

⁸⁹ See Trial Transcript at p. 187:1-4, p. 224:17-22, p. 285:21-25, p. 286:1.

⁹⁰ See Trial Transcript at p. 127:25, p. 128:1-4.

⁹¹ See Trial Transcript at p. 320:6-9.

⁹² See Trial Transcript at p. 228:12-15, p. 229:3-6, 236:22-25, p. 237:1-2, p. 272:8-15.

As part of his analysis, Reach not only determined the purchase price for the Kolar property⁹³, he based that price upon the market value of the Kolar property by researching and comparing sales of other properties. In his report, Reach stated the following about the Kolar property:

Purchase Price - The purchase offer is \$600,000 (\$35.76 per square foot GBA) and involves terms. The property owner has received the offer and is reviewing it. They have not counter offered. The list price is \$799,000 (\$47.62 per square foot GBA). It is likely that if the purchase agreement can be negotiated, the purchase price would be between these figures. In the Addenda of this report, we have included 7 recent sales and 1 current listing of auto related facilities in Outstate Minnesota locations. The sale prices ranged from \$31.00 to \$60.76 per square foot. We have used an amount between the current offer price and the list price of \$700,000 (\$41.72 per square foot GBA) in this analysis.⁹⁴

Consequently, Reach did exactly what the Cameron court directed by determining a market value for the Kolar Property, which he converted to a purchase price.

The Trial Court's overall findings (especially no. 12) appear to adopt Vigen's criticism of the Kolar property. That criticism is misplaced because it ignores the equivalency requirement. The Trial Court stated that the Kolar Property is "a considerable upgrade both in size and condition of the building."⁹⁵ While that may be true, the Trial Court mysteriously disregards the fact that the Carlton Avenue Property is a considerable *downgrade* for these same features. The equivalency test prohibits downgrades but allows upgrades. The Trial Court misapplied this rule.

⁹³ The Court's finding (no.13) on the taxes and operating expenses on the Kolar property actually has the issue reversed. The Crandalls conceded that Kolar expenses would be higher and Reach testified to this, however that is not a reason to exclude the comparable. It simply is another damage item because the Crandalls would not have such expenses but for the taking. As Reach testified, these items would need to be capitalized and added to his number, but it is not a reason to exclude the Kolar property.

⁹⁴ See APP-387, Trial Exhibit 9, at Tab 3, page 36.

⁹⁵ See ADD-3 at Finding No. 12.

The Trial Court further stated that “under the plain language of the statute, Respondents are not entitled to damages that would allow them to purchase a property in better condition than the subject property.”⁹⁶ It then concluded as a matter of law that, “the purpose and intent is not to provide property owners a windfall.”⁹⁷ Both of these statements are illogical.⁹⁸ There is nothing in the Minimum Compensation Statute that prohibits the purchase of a “better” property. To the contrary, as the legislative history for the statute shows, *inferior* properties, like the Carlton Avenue Property, are prohibited from consideration as comparable properties. Likewise, the statement about

⁹⁶ See ADD-8 at page 4 of Trial Court’s Order.

⁹⁷ See Findings of Fact and Conclusions at conclusion 2. The Court of Appeals in Cameron also stated “the district court also correctly reasoned that ‘Cameron should not enjoy a windfall as a result of the taking.’” County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. Mar. 26, 2012). Despite this statement, the Court did not define “windfall” and affirmed an award of \$430,655.84 over and above the original \$560,400.00 awarded.

⁹⁸ 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 any kind even remotely related to this concept. In fact the statute states exactly the opposite of windfall, “the amount of damages payable, *at a minimum*”. Despite this language there is this preoccupation with windfall. Yet, by imposing a “windfall” consideration on the statute, the first canon of statutory construction (that plain language controls) is violated because now you are ignoring the plain language and intent (purchase price to relocate) and replacing it with market value. McCaleb v. Jackson, 307 Minn. 15, 17 n.2, 239 N.W.2d 187, 188 n.2 (1976).

This “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 citing the “fluid approach” in Moorhead Econ. Dev. Auth. v. Anda, 789 N.W.2d 860, 880 (2010) which was based upon a quote from the United States Supreme Court’s holding in United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950). However, the Trial Court omits the Commodities Trading quote which qualifies the “fluid approach”. As stated in Anda, the Commodities Trading quote states:

[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...

United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) [emphasis added]. As can be read by the full text, Anda and Commodities Trading describe the pitfalls and imprecision of *market value analyses*, which is exactly why the courts adopted the fluid approach. As stated before, this is *not* a market value case. *It is a minimum compensation case*. In a minimum compensation case you are not trying to find the market value of a property; instead, you must find a “purchase price” of a property that the property owner can move into.

a windfall is totally baseless. The most creative and fertile imagination cannot explain how “windfall” is addressed in the language of the statute. The only windfall produced by the Trial Court’s decision was in favor of the City when it selected a comparable property that was grossly inferior to the acquired property.

These criticisms lose sight of the basis for making a comparison consistent with the statute: will the comparable property allow the business to continue? For that critical comparison question regarding the Kolar property, the answer is a resounding “yes”. The Kolar Property should properly be rejected where a second property satisfies the equivalency test but has a lower market value or purchase price. But that situation does not exist. Only the Kolar property satisfies the equivalency test and will allow the auction business to continue. Equally important, it is the only comparable property which satisfies the market value test required by Cameron.

If the basic premise of the Minimum Compensation Statute is to provide sufficient money to Crandalls to purchase a property where they can continue their business, Reach has provided that evidence and did so consistent with this Court’s ruling in Cameron. Having characteristics that are “better” than the subject property is not a reason for rejecting the Kolar property as a comparable for establishing minimum compensation damages. The Kolar property is not identical to the subject property, but identity is not required. Equivalency is. Equivalency rejects inferior properties, but accepts identical or superior properties. We must always be mindful that Crandalls did not choose to have their property taken, yet, they are the ones that should be put “in as good a position pecuniarily as if his property had not been taken.” Olson v. United

States, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934). If an identical comparable cannot be found yet a better property which can be purchased, can still house the business, any unfairness should fall on the condemnor. The equivalency test and rules for remedial statute construction dictate that a superior property is acceptable for a comparable property but an inferior property is not. The Kolar Property will not be the ultimate comparable property if another less valuable comparable property is found that passes the equivalency test. The burden to locate that second property falls on the City. As shown above, the City does not meet this burden with respect to the Carlton Avenue Property.

V. THE CRANDALLS REQUIRED THE FULL SQUARE FOOTAGE OF THE ACQUIRED PROPERTY.

The Trial Court also heard testimony from Kerry Crandall who discussed the needs of his business. Crandall explained the history of his use of the building for his business. Initially, he only used half of the main floor, with the lower level being used for the storage of vehicles.⁹⁹ He quit storing vehicles in the lower-level after 2001, because he needed all of that lower level space for his auction business.¹⁰⁰ However in 2007, he expanded his business so that it used the entire main floor of the subject property.¹⁰¹ Thus, on the date of taking and for several years prior to the date of taking, his business was using the entire subject property floor area.¹⁰²

⁹⁹ See Trial Transcript at p. 328:15-20.

¹⁰⁰ See Trial Transcript at p. 329:2-9.

¹⁰¹ See Trial Transcript at p. 96:4-7, p. 333:8-22 (referencing pictures in Trial Exhibit 18).

¹⁰² See Trial Transcript at p. 117:20-23. Reach also explained the importance of at-grade access for his business by noting that the upper and lower levels of the two Vigen comparable properties, which only

As far as business needs are concerned and the square footage required, one of the commissioners (Tondryk) testified that a comparable property should be large enough so that the auction business could function in that property in the same way it did in the subject property.¹⁰³ However Commissioner Tondryk admitted that the commissioners *never determined how much space the auction business needed because they felt that that was beyond the scope of what they could do.*¹⁰⁴ Along that same line, Tondryk readily admitted that he did not know what he was doing with regards to interpreting the Minimum Compensation Statute.¹⁰⁵

Commissioner Roger Maki also weighed in on the size requirement for a comparable property. *He testified the replacement building would need to have close to the same amount of floor area as Crandalls had been using in the subject property.*¹⁰⁶ However, again he never made any inquiry, though, to determine how much floor area the Crandalls needed for their business.¹⁰⁷

As shown above, all the evidence shows that the Crandall business needs at least 10,500 square feet of floor area, and all of the floor area needs at-grade access or access to at-grade by elevator or ramp and that that was how much space they were using as of the date of taking.

had stair access, would not work for him See Trial Transcript at p. 112:13-25, p. 113:1, p. 115:1-12, p. 116:5-23

¹⁰³ See Trial Transcript at p. 127:25, p. 128:1-4.

¹⁰⁴ See Trial Transcript at p. 128:17-21.

¹⁰⁵ See Trial Transcript at p. 132:17-25.

¹⁰⁶ See Trial Transcript at p. 320:6-9.

¹⁰⁷ See Trial Transcript at p. 316:6-9. This information was available in the Reach report which was presented to the commissioners, however they obviously ignored it.

In complete contradiction all of the above testimony, in its Finding No. 8, the Trial Court found that “Respondents business did not require the full square footage enjoyed in the subject property.”¹⁰⁸ In support of this finding, the Trial Court stated:

Respondent Kerry Crandall admitted at trial that he could operate business out of a space containing less than 10,500 square feet. When asked if he could operate in a building with 8,000 square feet that was properly outfitted for his business he replied “yes.” *See* Trial Tr. at p. 110.¹⁰⁹

The cited trial transcript testimony states:

18 Q Okay. Okay. If you had a building with 8,000 square feet
19 and you could even do some additional remodeling to it to
20 outfit it to work for you, would something like that work
21 for you?
22 A Yes.¹¹⁰

Given the qualifying language “*you could even do some additional remodeling to it to outfit it to work for you*”, the cited testimony is not an admission. In addition, the circular logic in the question itself (if you can make something work for you, would it work for you) also disqualifies the answer. More important, the Trial Court’s reliance on this piece of flimsy evidence, in direct contradiction to all the other testimony from Reach, Vigan, Maki, and Tondryk (above) especially since he clarifies his response several times later¹¹¹, including the next sentence of his testimony “as long as I had

¹⁰⁸ See ADD-2.

¹⁰⁹ See ADD-7, Trial Court’s Order filed February 21 at p. 3.

¹¹⁰ See Trial Transcript at p. 110-18-22.

¹¹¹ See Trial Transcript at p.110:24, p.111:19.

enough area to work,” and Crandall’s other testimony¹¹² illustrates how the Trial Court bent over backwards to reach a conclusion consistent with the commissioners’ findings.

Finally, this Court must not forget the legislative history discussed above. The mandate of the Legislature was that a comparable must be at least of *equivalent* size. The Crandalls undisputedly used 10,500 square feet, anything less than that would not be *equivalent* in size. Certainly, the 4,258 square feet of at grade access in the Carlton Avenue property is not *equivalent* in size.¹¹³

VI. THE COMMISSIONERS COULD NOT HAVE FOUND THE CARLTON AVENUE PROPERTY TO BE A COMPARABLE UNDER THE MINIMUM COMPENSATION STATUTE.

The Trial Court relied on the commissioners findings for its findings.¹¹⁴ In fact the commissioners’ findings were the sole basis for the Trial Court finding that the

¹¹² Crandall repeatedly testified that he was using the entire 10,500 floor area in the acquired building (Trial Transcript at pp. 96, 117, 329); and Crandall testified that he needed that amount of space in any new location (Trial Transcript at p. 114).

¹¹³ See Trial Transcript at p. 206:4-5.

¹¹⁴ See ADD-2 and 3, Trial Court’s order filed October 12, 2011 made the following findings and conclusions:

5. ***The commissioners conducted*** a minimum compensation analysis within the intent and meaning of the minimum compensation statute by comparing the various available properties identified in the report prepared by David Reach for purposes of determining whether they could serve as locations for the displaced auction business.
6. ***The commissioners concluded*** that the property located at [hereinafter the “Carlton Avenue property”] was a comparable property within the meaning of the minimum compensation statute.
7. ***The commissioners concluded*** that the award of \$198,000 would have provided just compensation for Respondents Julie and Kerry Crandall to purchase the Carlton Avenue property and make improvements such that the Carlton Avenue property could have served as a location for their auction business....
11. ***The commissioners concluded*** that the property located at 3206 River Gate Avenue in Scanlon, Minnesota [hereinafter the “Kolar property”] was not a comparable property within the meaning of the minimum compensation statute....
3. ***The commissioners properly identified*** the Carlton Avenue property as a comparable property...
4. ***The commissioner’s award*** of \$198,000 fully compensated....

Carlton Avenue property was a comparable property and that \$198,000 represented adequate minimum compensation.¹¹⁵ However at the commissioners' hearing, the only evidence of a Minimum Compensation analysis was given by Reach. Reach did not give an opinion that the Carlton Avenue property could be a comparable for the purposes of minimum compensation. In fact, he rejected it for various reasons including the fact that it was too small and lacked at grade access for storage and display.¹¹⁶

Vigen also did not give an opinion that the Carlton Avenue property could be a comparable for the purposes of minimum compensation at the commissioners' hearing. Vigen's report, where he did opine as to the comparability of the Carlton Avenue property for the purposes of minimum compensation, was not completed until several months after the commissioners' hearing.

Consequently, the Trial Court's findings 6 and 7 as to the commissioners concluding that the Carlton Avenue property was a comparable under the Minimum Compensation Statute had no basis in fact. In fact, one of the commissioners readily admitted that he did not know what he was doing with regards to interpreting the Minimum Compensation Statute.¹¹⁷

Even if you consider commissioner Maki's secret investigations *after the hearing had concluded*, the commissioners never determined how much space

¹¹⁵ See ADD-7, Trial Court's order dated February 21, 2012 at page 3, stating, "To arrive at this conclusion, the commissioners compared the available properties identified by David Reach ("Reach"), evaluated which of the properties could accommodate Respondents' business, determined that the Carlton Avenue property could accommodate their business, and concluded that \$198,000 would adequately compensate Respondents' for the purchase price of that property and the costs of additional repairs."

¹¹⁶ See Trial Transcript at pp. 69-73; see also APP-361 and 362, APP-471 (at last bullet point).

¹¹⁷ See Trial Transcript at p. 132:17-25.

Crandalls' auction business needed because they felt that that was beyond the scope of what they could do.¹¹⁸ Moreover, whether you include the secret investigation or not, it was undisputed that Carlton Avenue would not fit the Crandall business needs as is. Even Vigen acknowledged that the Carlton Avenue building would need to be adapted and storage areas added.¹¹⁹ Yet, even at trial, Vigen could not specify the required modifications and did not do any cost analysis associated for the modification to the Carlton Avenue property.¹²⁰ Moreover, if there was never any evidence as to the costs required to modify the smaller Carlton Avenue property to meet the Crandalls business needs at trial, there certainly was not such evidence at the commissioners' hearing. There simply is no basis in fact as for the commissioners finding the Carlton Avenue property to be a comparable under the Minimum Compensation Statute.

VII. THE CITY'S MINIMUM COMPENSATION REPORT AND TESTIMONY WERE INADMISSABLE.

The parties in this case viewed the meaning of the Minimum Compensation Statute in two very different ways. As the City's expert Vigen noted, one view requires the completion of an appraisal report while the other view contemplates the completion of a market analysis.¹²¹ The appraisal view requires the determination of an amount of money. This is the approach that was completed by Dave Reach on behalf of Crandalls.¹²² It is also the requirement stated in Cameron. The other view simply requires the identification of a comparable property, without any price determination

¹¹⁸ See Trial Transcript at p. 128:17-21.

¹¹⁹ See Trial Transcript at p. 208:2-5.

¹²⁰ See Trial Transcript at p. 264:15-25, p. 265:1-6, p. 266:6-10.

¹²¹ See Trial Transcript at p. 185:3-9, p. 209:3-6, p. 210:1-7, p. 221:16-22.

¹²² See APP-302, Trial Exhibits 9 & APP- 469, Trial Exhibit 10, Reach reports.

attached to it. This is the analysis that was performed by Vigen.¹²³ Vigen testified that he specifically did not determine an amount of money in his minimum compensation analysis because he believed it was not required by the statute.¹²⁴ According to Cameron, Vigen is wrong. The Minimum Compensation Statute requires the determination of the market value of the comparable property. Vigen's report did not do this, so his report must be excluded.

The first reason rests in the very purpose of the damages (second) phase of an eminent domain proceeding. As noted above, in the damages phase, a court is 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). A court has no authority to issue non-monetary orders. Id. For example, a court cannot order the condemning authority to alter its acquisition to lessen the damage burden on the owner. Likewise, a court cannot order a third party to, say, provide access to a parcel that has been landlocked by an acquisition. All a court can do is award money. Period.

Clearly the Minimum Compensation Statute is intended to be applied in the damages phase of an eminent domain case. Consequently, it must further the objective of determining the damages to be awarded in the case. The damage figure under the Minimum Compensation Statute is the price to "purchase a comparable property". Vigen explained that determining a purchase price for his primary comparable property (Carlton Ave.) was not necessary. Under his reason the difference between the Carlton

¹²³ See APP-550, Trial Exhibit 19, Vigen Minimum Compensation report.

¹²⁴ See Trial Transcript at pp. 221, 225.

Avenue property offering price and his traditional damage award conclusion would be sufficient to make any necessary modifications.¹²⁵ His *reasoning* fails, though, under the scenario where his second comparable (the Chief Theater) is the only comparable property available.

For purposes of this analysis, we will assume that the Carlton Avenue property did not exist. By Vigen's own admission, the Chief Theater was a comparable property under the Minimum Compensation Statute.¹²⁶ He also acknowledged the asking price of \$350,000 before even considering the costs for any modifications (an elevator to the second floor and a wider access door) that he acknowledged would be necessary to make the Chief Theater usable by Crandalls.¹²⁷ The asking price for the Chief Theater, alone, is over 75 percent higher than the before/after damage conclusion he made of \$198,000. If the Chief Theater was the only comparable property, the failure to identify the total purchase price for this property, including the modifications to make a comparable¹²⁸, does nothing to assist the court in determining a damage award. It appears obvious that the final purchase price for the Chief Theater with required modifications will be significantly more than the traditional before/after value, but simply identifying it as a comparable property, without any purchase price analysis, does nothing to assist the court in determining a damage award for Crandalls under the Minimum Compensation Statute. Thus, the claim by the City and Vigen (that the

¹²⁵ See Trial Transcript at p. 207:17-25, p. 208.

¹²⁶ See Trial Transcript at p. 224:17-25, p. 225:1-25, p. 226:1-12.

¹²⁷ See Trial Transcript at p. 289:6-15.

¹²⁸ Vigen does not believe modification costs should ever be considered in the purchase price, See Trial Transcript at p. 288:17-25, p. 289:1.

Minimum Compensation Statute does not require a purchase determination) makes no sense.

The second reason that quashes the idea of a market analysis being the meaning of the Minimum Compensation Statute comes from the plain language of the statute, itself.¹²⁹ The grammatical subject for the first sentence in the Minimum Compensation Statute is the words “amount of damages”. In other words, the focus of this sentence is the “amount of damages”. In order to reach the market analysis conclusion espoused by Vigen and the City, the subject for that sentence in the Minimum Compensation Statute would need to be “identification of a comparable property”. A plain reading of the statute and a straightforward application of the rules of English grammar shows this is absolutely not the case. The interpretation by the City and Vigen requires a disregard of the rules of grammar and the “plain meaning” rule. Since the subject of the sentence is “amount of damages”, that is what must be determined, and an appraisal opinion on a purchase price for the comparable property is the requirement of the statute.¹³⁰ By Vigen’s own admission, he did not do this.¹³¹ Thus, his analysis (both his report and his

¹²⁹ When interpreting a statute, it is the court’s role is to effectuate the intention of the legislature. Peterson v. Haule, 304 Minn. 160, 170, 230 N.W.2d 51, 57 (1975). In doing so, courts construe technical words according to their technical meaning and other words according to their common and approved usage and the rules of grammar. Minn.Stat. § 645.08 (2009). When the language of a statute, so construed, is not ambiguous, a court must apply its plain meaning. McCaleb v. Jackson, 307 Minn. 15, 17 n.2, 239 N.W.2d 187, 188 n.2 (1976).

¹³⁰ When engaging in statutory construction, courts must interpret remedial legislation such as the Minimum Compensation Statute broadly to better effectuate its purpose. Harrison v. Schafer Constr. Co., 257 N.W.2d 336 (Minn.1977). Courts interpret exceptions contained within remedial legislation narrowly. Nordling v. Ford Motor Co., 231 Minn. 68, 77, 42 N.W.2d 576, 582 (1950).

¹³¹ See Trial Transcript at p. 209:3-6, p. 221:16-22.

testimony) lacks the foundation required for a minimum compensation analysis. It should have been therefore be stricken/excluded from evidence.¹³²

Using this plain meaning, statute requires the determination of the cost to purchase a particular property in a three step process:

1. Identify the community which is applicable to the owner;
2. Identify existing improved properties in that community which satisfy the baseline equivalency requirement for the facts which are important in the comparability analysis; and,
3. Determine the cost necessary to purchase each property (including the costs of required modifications to allow continuation of the relocated business) that satisfies step 2 (the lowest of these costs will be the minimum compensation damage amount).¹³³

When a comparable property is identified, the cost to purchase that property is all that matters under the statute, which is why Crandall objected to Vigen's speculative Minimum Compensation testimony that never provided a purchase price.¹³⁴

¹³² The Court allowed a continuing objection on Ex.19 and Vigen's testimony on this issue which it said it would rule on after post-trial briefing.

¹³³ If step 2 produces no improved properties, unimproved properties are identified instead, and step 3 is the lowest cost to purchase and construct a comparable property from those identified.

¹³⁴ An opinion of an expert must be based on facts sufficient to form an adequate foundation for an opinion. 20 Am.Jur., Evidence, § 795; 32 C.J.S., Evidence, § 522. An opinion based on speculation and conjecture has no evidentiary value. As the Minnesota Supreme Court stated in Susnik v. Oliver Iron Mining Co., 205 Minn. 325, 331, 286 N.W. 249, 252:

'* * * an affirmative finding cannot be sustained upon mere conjecture, as distinguished from real deduction. This rule applies to opinion evidence, even that of the best of experts, Honer v. Nicholson, 198 Minn. 55, 268 N.W. 852. It governs in weighing all evidence and its analysis for purposes of decision.'

By Vigen's own admission, he did not determine an amount of damages to purchase a replacement property:

Q: Did I understand you correctly to say that in your analysis that you did not attempt to determine an actual purchase price for a comparable property under your minimum compensation analysis?

A: I did not.

Q: So that is correct then?

A: That is correct.¹³⁵

At best, Vigen is simply saying that his fair market value of \$198,000 for the Subject Property should have been enough to purchase a comparable property in the community.¹³⁶ However, that is pure speculation unless you run all the numbers. Vigen did not do this. Vigen admitted his 'comparables' needed modification in order to accommodate the Crandalls business, however he had no costs, bids, or even estimates for these modifications. Simply saying that his fair market value of \$198,000 for the Subject Property should have been enough is pure inadmissible speculation.

The Trial Court disagreed with the three step approach (above), and stated that Vigen had the requisite foundation because "any competent evidence may be considered if it legitimately bears upon the market value" quoting County of Ramsey v. Miller, 316 N.W.2d 917 (1982).¹³⁷ The Trial Court misses the point. Market value of the Subject Property has nothing to do with determining the purchase price for minimum compensation. Fair market value was never disputed in this case. The dispute lies with finding the purchase price of a comparable property in the community. Reach

¹³⁵ See Trial Transcript at p. 221:16-22.

¹³⁶ This opinion is based upon the "*probable* total expenditure for this property (inclusive of acquisition and renovation)" from Exhibit 19 Vigen's Alternate Property Study at page 6 at the end of the second to last paragraph (emphasis added).

¹³⁷ See ADD-9, Trial Court's Order filed February 21, 2012 at p. 5.

found such a price. Vigen never did. Crandalls never disputed that Vigen can testify all he wants to about the fair market value of the Subject Property, but since he admittedly did not determine a purchase price, his testimony on minimum compensation was inadmissible speculation.

VIII. THE CRANDALLS ARE ENTITLED TO A NEW TRIAL BASED UPON THE COMMISSIONERS' VIOLATIONS OF STATUTE AND THEIR RESULTING INADMISSIBLE TESTIMONY BEING THE COMPLETE BASIS FOR THE TRIAL COURT'S FINDINGS.

The Trial Court's findings and conclusions of law reveal that the court simply adopted¹³⁸ the commissioners' findings in this case. However, by adopting the commissioners' opinions and relying on their inadmissible testimony, the Trial Court simply rubber stamped a fraud perpetuated on the judicial system.

As the Record shows, the commissioners heard testimony and received evidence in this condemnation case under oath on September 21, 2010. The Crandalls offered the testimony of its appraiser, Reach, while the City presented its witnesses, City

¹³⁸ See Trial Court's order filed October 12, 2011 made the following findings and conclusions:

5. The **commissioners conducted** a minimum compensation analysis within the intent and meaning of the minimum compensation statute by comparing the various available properties identified in the report prepared by David Reach for purposes of determining whether they could serve as locations for the displaced auction business.
6. The **commissioners concluded** that the property located at [hereinafter the "Carlton Avenue property"] was a comparable property within the meaning of the minimum compensation statute.
7. The **commissioners concluded** that the award of \$198,000 would have provided just compensation for Respondents Julie and Kerry Crandall to purchase the Carlton Avenue property and make improvements such that the Carlton Avenue property could have served as a location for their auction business.....
11. **The commissioners concluded** that the property located at 3206 River Gate Avenue in Scanlon, Minnesota [hereinafter the "Kolar property"] was not a comparable property within the meaning of the minimum compensation statute....
3. The **commissioners identified** the Carlton Avenue property as a comparable property...

employees Michael Stafford and Gerry Manthey (“Manthey”) and its appraiser Vigen. Those four individuals were the only witnesses sworn in and who testified before the commissioners at the hearing.

Unbeknownst to the Crandalls and their attorneys, the commissioners continued to take testimony *after* the hearing concluded.

Over the eight days between the September 21st hearing and their September 30th report, the commissioners interviewed a number of witnesses and used this information in their deliberations. The post-hearing testimony was taken privately, not under oath, and included several City (Petitioner/Respondent) employees including one of the witnesses who testified at the hearing (giving testimony that he did not at the hearing). In fact, the commissioners did a complete investigation outside the scope of the testimony that was taken at the commissioners’ hearing instead of just relying on the sworn testimony taken before counsel. In addition to Waite, and City employees Bucher and Manthey, Commissioner Maki later recalled that he also spoke with the County Assessor prior to deliberations and shared the assessor’s information with the other commissioners (see above in fact section).¹³⁹ As a final tally, the commissioners solicited information from four witnesses outside the confines of the hearing: three of which were City employees and three of which never listed as witnesses nor testified at the hearing.

Minn. Stat. § 117.085 states:

¹³⁹ See APP-83-84, Affidavit of E. Kelly Keady filed May 4, 2011 at Exhibit C, excerpts from the Deposition of Roger Maki at pp. 41-42.

The commissioners, having been duly sworn and qualified according to law, shall meet as directed by the order of appointment and hear the allegations and proofs of all persons interested touching the matters to them committed. They may adjourn from time to time and from place to place within the county, giving oral notice to those present of the time and place of their next meeting. ***All testimony taken by them shall be given publicly, under oath, and in their presence....***

Minn. Stat. 117.085 (2010). Commission Chair Maki flatly admits that his commissioners were taking testimony privately and not under oath (see above text accompanying footnotes 12 and 13). These admissions undisputedly prove that the statutory procedures under Minn. Stat. 117.085 were violated. Neither Holly Bucher, nor Greg Wait, nor the County assessor testified at the hearing under oath. Manthey was a witness at the hearing, but Maki admits that his conversation with Manthey occurred outside the hearing and what was discussed was never presented at the hearing. More important, Manthey and Bucher are employees of one of the parties, the City. Put aside the fact that Maki was running for City Council (and is now on the City Council), in direct conflict with the statute, City employees were whispering in the commissioners' ears without the Crandalls having any opportunity to cross examine the witnesses or offer anything in rebuttal.

As this Court is well aware, it is well established in our court system, that an impartial trial requires that conclusions reached by the trier of fact be based upon the facts *in evidence*, and ***prohibits the trier of fact from reaching conclusions based on evidence sought or obtained beyond that adduced in court.*** See State v. Dorsey, 701 N.W.2d 238, 249-50 (Minn. 2005) citing Johnson v. Hillstrom, 37 Minn. 122, 123, 33 N.W. 547, 548 (1887) and Spinner v. McDermott, 190 Minn. 390, 392, 251 N.W. 908,

908 (1933), respectively. Judges are generally prohibited from independently investigating facts in a case and “must consider only the evidence presented.” Minn. Code Judicial Conduct, Canon 3(A)(7) cmt. Likewise, jurors are instructed *not* to consider anything “you hear or learn about this case outside this courtroom” and specifically to “*not do your own investigation*” Minnesota Civil Jury Instruction Guide 10.15. The commissioners violated nearly every canon of our adversarial system yet the Trial Court still allowed them to testify at trial.

As pointed out to the Court in their motion in limine,¹⁴⁰ the Crandalls requested all commissioners’ testimony and their report should be excluded at trial since their star chamber violated nearly every canon of our adversarial system. The Court stated at trial that it would take all motions in limine under advisement. Instead of striking their testimony from the record which the Crandalls also requested,¹⁴¹ the Trial Court adopted the commissioners’ findings as its own. Given the Trial Court’s reliance on the inadmissible commissioners’ testimony and report, the Crandalls have been prejudiced and request a new trial.

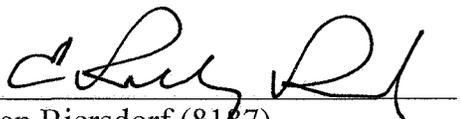
¹⁴⁰ See APP-33-86.

¹⁴¹ See APP-104-106.

CONCLUSION

For all the forgoing reasons this Court respectfully should reverse the District Court and remand this case for a new trial with instructions consistent with the Cameron case, without the testimony of the commissioners or their report, and without Vigen's testimony and report on minimum compensation.

Dated: 4-12-12



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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.

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