

No. A05-1419

A05-1418

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**State of Minnesota  
In Court of Appeals**

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The Housing and Redevelopment Authority  
for the City of St. Anthony, Minnesota,

Petitioner/Respondent,

vs.

Ronald Rasmussen, et al.,

Appellants.

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**BRIEF OF APPELLANTS RONALD AND JUDITH RASMUSSEN**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE LEGAL ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
A. The Rasmussens have owned and operated the Tires Plus store in St. Anthony since the early 1980s.....	3
B. The relevant Lease provisions .....	3
C. The HRA purchased the fee interest in the property in 1997 for the purpose of establishing a municipal liquor store.....	5
D. The Apache Plaza redevelopment.....	5
E. To comply with the terms of the Redevelopment Agreement, the HRA authorized the condemnation of the Rasmussens' leasehold interest.....	6
F. The Rasmussens' commenced a lawsuit against the HRA.....	7
G. The HRA commenced a condemnation action .....	7
STANDARD OF REVIEW .....	8
ARGUMENT .....	8
I. LIKE ANY OTHER PARTY, THE HRA SHOULD BE HELD ACCOUNTABLE FOR BREAKING ITS PROMISE.....	10
A. General principles of contract law apply to the HRA.....	10
B. The HRA broke its promise to the Rasmussens.....	11
C. The HRA cannot ignore the promises it made under the Lease, and, at the same time, use the Lease as a sword to deprive the Rasmussens of just compensation for the taking .....	12
II. THE SOVEREIGN ACTS DOCTRINE DOES NOT SAVE THE HRA.....	14
A. The HRA's use of the power of eminent domain arose from its contract with Apache Redevelopment .....	16

B.	The HRA targeted its obligation to the Rasmussens .....	16
C.	By becoming a party to the Lease and promising to provide quiet use and possession of the property, the HRA did not promise not to exercise its power of eminent domain .....	17
III.	NEITHER GOODYEAR SHOE NOR GIOVANETTO ENTERPRISES SAVES THE HRA .....	17
IV.	IN ANY EVENT, THE LEASE DOES NOT PREVENT THE RASMUSSENS FROM MAKING A LEASEHOLD ADVANTAGE CLAIM .....	20
A.	The Condemnation Provision of the Lease did not contemplate the Condemnation action being initiated by the lessor .....	20
B.	The Lease did not automatically terminate because all of the premises were not taken .....	21
C.	The waiver provision does not apply .....	23
V.	PUBLIC POLICY SUPPORTS THE RASMUSSENS' POSITION .....	24
A.	Just compensation is the bedrock principle underlying the exercise of the power of eminent domain .....	24
B.	The Rasmussens should not be forced to subsidize the Wal-Mart Development .....	25
C.	Finding for the Rasmussens will not chill redevelopment.....	26
	CONCLUSION .....	27

## TABLE OF AUTHORITIES

### MINNESOTA CASES

<i>Boe v. Christlieb</i> , 399 N.W.2d 131 (Minn. Ct. App. 1987).....	1, 20
<i>Cook v. Connolly</i> , 366 N.W.2d 287 (Minn. 1985).....	8
<i>Cussler v. Firemen's Ins. Co.</i> , 194 Minn. 325, 260 N.W. 353 (1935) .....	1, 12
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997) .....	8
<i>Employers Mut. Liability Ins. Co. of Wis. v. Eagles Lodge of Hallock</i> , 282 Minn. 477, 165 N.W.2d 554 (1969) .....	20
<i>Enviro-Fab Inc. v. Blandin Paper Co.</i> , 349 N.W.2d 842 (Minn. Ct. App. 1984) .....	1, 11
<i>Ketterer v. Independent School Dist. No. 1</i> , 79 N.W.2d 428 (Minn. 1956) .....	11
<i>Morgan v. Crowley</i> , 85 S.E.2d 40 (Ga. Ct. App. 1954).....	12
<i>Seman v. First State Bank of Eden Prairie</i> , 394 N.W.2d 557 (Minn. Ct. App. 1986).....	11
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990) .....	8
<i>Stees v. Leonard</i> , 20 Minn. 494, 1874 WL. 3737 (1874) .....	11

### FEDERAL CASES

<i>Allegre Villa v. United States</i> , 60 Fed. Cl. 11 (2004) .....	14, 15
<i>Amino Bros. Co. v. United States</i> , 178 Ct. C 372 F.2d 485 cert. denied 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967) .....	17
<i>Freedman v. United States</i> , 320 F.2d 359 (1963) .....	14
<i>GLS. v. Wal-Mart Stores, Inc.</i> , 3 F. Supp. 2d 952 (N. D. Illinois 1998).....	12
<i>Gencorp, Inc. v. American International Underwriters</i> , 178 F.3d 804 (6th Cir. 1999).....	12

<i>Heckler v. Community Health Services of Crawford City, Inc.</i> , 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984) .....	10
<i>Horowitz v. United States</i> , 267 U.S. 458, 45 S. Ct. 344, 69 L. Ed. 736 (1925).....	14
<i>Kelo v. City of New London</i> , 125 S. Ct. 2655 (2005) .....	24, 25
<i>Lynch v. United States</i> , 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).....	10
<i>Market Street Assoc. Ltd. Partnership v. Frey</i> , 941 F.2d 588 (7th Cir 1991) .....	12
<i>Monongahela Nav. Co. v. United States</i> , 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893) .....	24
<i>Murray v. Charleston</i> , 96 U.S. 432, 24 L. Ed. 760 (1878) .....	10
<i>Sinking Fund Cases</i> , 99 U.S. 700, 23 L. Ed. 496 (1879).....	10
<i>United States v. Winstar Corporation</i> , 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) .....	1, 14, 15
<i>Yankee Atomic Elec. Co. v. United States</i> , 112 F.3d 1569 (Fed. Cir. 1997).....	15

**CASES FROM OTHER JURISDICTIONS**

<i>City of Glendale v. Giovanetto Enterprises, Inc.</i> , 23 Cal. Rptr. 2d 305 (Cal. Ct. App. 1993).....	17, 18, 19
<i>Farmers' Electric Cooperative, Inc. v. Missouri Department of Corrections</i> , 977 S.W.2d 266 (Mo. 1998) .....	12
<i>Goodyear Shoe Machinery Co., v. Boston Terminal Co.</i> , 176 Mass. 115, 57 N.E. 214 (1900).....	17, 18, 19

## STATEMENT OF THE LEGAL ISSUES

1. May the government ignore its obligations under a lease with a tenant, exercise its power of eminent domain to acquire the tenant's interest in real estate (seventeen years before the expiration of the lease) so that the government can perform under a contract with a private developer, and then refuse to pay the tenant just compensation for the taking of the tenant's leasehold interest?

**Trial Court decision.** The trial court granted the HRA's motion for partial summary judgment, holding that the Rasmussens are not entitled to recover just compensation in this condemnation proceeding based upon a leasehold advantage claim.

**Most apposite cases.**

*Murray v. Charleston*, 96 U.S. 432, 445, 24 L.Ed. 760 (1878).  
*Cussler v. Firemen's Ins. Co.*, 194 Minn. 325, 260 N.W. 353, 356 (1935).  
*United States v. Winstar Corporation*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed. 2d 964 (1996).  
*Enviro-Fab Inc. v. Blandin Paper Co.*, 349 N.W.2d 842, 848 (Minn. Ct. App. 1984).

2. Given the undisputed facts, does the subject lease prohibit the Rasmussens from making a leasehold advantage claim in this condemnation proceeding?

**Trial Court decision.** The trial court granted the HRA's motion for partial summary judgment, holding that the Rasmussens were not entitled to make a leasehold advantage claim in this condemnation proceeding.

**Most apposite cases.**

*Boe v. Christlieb*, 399 N.W.2d 131 (Minn. Ct. App. 1987).  
*Employers Mut. Liability Ins. Co. of Wis. v. Eagles Lodge of Hallock*, 282 Minn. 477, 165 N.W.2d 554 (1969).  
*Enviro-Fab Inc. v. Blandin Paper Co.*, 349 N.W.2d 842, 848 (Minn. Ct. App. 1984).

## STATEMENT OF THE CASE

On May 19, 2004, Respondent The Housing and Redevelopment Authority for the City of St. Anthony (the "HRA") commenced a condemnation proceeding to acquire the leasehold interest of Ronald and Judith Rasmussen in the real property located at 3800 Silver Lake Road in the City of St. Anthony. App. 007. The HRA's Petition names Ronald and Judith Rasmussen as the only interested parties in the condemnation. App. 012. The case was assigned to the Honorable John T. Finley, Judge of Ramsey County District Court.<sup>1</sup>

In conjunction with its Petition, the HRA sought to obtain title and possession to the subject property pursuant to Minn. Stat. § 117.042. App. 007. The HRA's quick-take motion asserts, however, that "because the owners' property interest terminated upon taking, the owners have no compensable interest and as such a deposit of the appraised amount of the property interest is not required." App. 009. On July 14, 2004, the Rasmussens objected to the HRA's attempt to make a quick-take deposit of zero. App. 029. On July 28, 2004, the Rasmussens supplemented their position regarding the quick-take deposit. App. 039. On August 13, 2004, the trial court granted the HRA's Petition. App. 054. The trial court's order directed the HRA to include a valuation of the Rasmussens' leasehold interest in the property through 2021. App. 061.

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<sup>1</sup> In anticipation of the condemnation, the Rasmussens commenced a breach of contract action against the St. Anthony HRA on May 7, 2004. App. 014. The breach of contract action was also assigned to Judge Finley. The matters, though not formally consolidated, were considered at a single hearing. The Court's order granting the HRA's motions for summary judgment contains both captions. App. 001. The breach of contract action has also been appealed. *See Ronald and Judith Rasmussen v. The Housing and Redevelopment Agency for the City of St. Anthony*, Court of Appeals File No. A05-1418.

The parties then made cross-motions for summary judgment regarding the Rasmussens' leasehold advantage claim. On January 7, 2005 the trial court granted the HRA's motion for partial summary judgment regarding the Rasmussens' leasehold advantage claim and granted the HRA's motion for summary judgment in the breach of contract claim. App. 001. After judgment was entered, the Rasmussens appealed both decisions. App. 203, 207.

### **STATEMENT OF THE FACTS<sup>2</sup>**

**A. The Rasmussens have owned and operated the Tires Plus store in St. Anthony since the early 1980s.**

The Rasmussens have owned and operated the Tires Plus store located at 3800 Silver Lake Road since the early 1980s. App. 014. The Rasmussens have occupied the property pursuant to a series of leases. In July 1996, the Rasmussens signed a Lease (the "Lease") with their then-landlord, the Ste. Marie Company, that governs their interest in the subject property. App. 089.

**B. The relevant Lease provisions.**

The term of the Lease is for 180 months (through 2011), with an option to extend for two five-year periods. App. 089, 090. The Rasmussens have alleged that the Lease terms are well below market rates. App. 018.

The Lease contains an express peaceful and quiet use and possession provision:

Quiet Enjoyment. Landlord hereby warrants that it and no other person or corporation has the right to Lease the Premises. So long as Tenant shall perform each and every covenant to be performed by Tenant hereunder, Tenant shall have peaceful

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<sup>2</sup> The facts underlying the trial court's decision are undisputed.

and quiet use and possession of the Premises without hindrance on the part of Landlord, and Landlord shall warrant and defend Tenant in such peaceful and quiet use and possession.

App. 110.

The Lease also contains a condemnation provision:

- B. Total Taking. If **all of the Premises shall be taken in Condemnation**, except for a taking for temporary use, this Lease shall be terminated automatically as of the Date of Taking.
  
- C. Partial Taking.
  - (1) If (a) twenty five percent (25%) or more of the parking area in the Subject Parcel; or (b) twenty five percent (25%) or more of the rentable area of the Subject Parcel shall be taken; or (c) twenty-five percent (25%) or more of the square footage of the Premises shall be taken, then Landlord shall have the option to terminate this Lease by notice in writing to Tenant given within thirty (30) days after the Date of Taking, which notice shall take effect sixty (60) days after the Date of Taking.
  
- E. Award. The Award for any taking shall be the sole property of Landlord. Tenant hereby waives any rights it may have with respect to the loss of its Leasehold interest in this Lease, provided, however, that Landlord shall not have any right or claim to any award or settlement for Tenant's moving expenses or for the loss of Tenant's stock, personal property and trade fixtures or for the unamortized costs of improvements paid for by Tenant pursuant to this Lease which are the sole property of Tenant for which Tenant shall be entitled to claim separately.

App. 104-105 (emphasis added). The Lease, like any other contract, is subject to an implied covenant of good faith and fair dealing.

**C. The HRA purchased the fee interest in the property in 1997 for the purpose of establishing a municipal liquor store.**

On or about June 27, 1997, the Ste. Marie Company conveyed its interest in the real property, identified as Lot 5, Block 1, Silver Lake Center, to the HRA. App. 067. The HRA purchased the property so that a municipal liquor store could be constructed adjacent to the Tires Plus store. App. 193. The conveyance was made subject to the Rasmussens' rights under the 1996 Lease. App. 193. From 1997 through August 2004, the HRA accepted the Rasmussens' rent payments under the 1996 Lease. App. 067.

**D. The Apache Plaza redevelopment.**

On or about December 19, 2003, the City of St. Anthony, the HRA, and Apache Redevelopment, LLC, entered into a Redevelopment Agreement for the redevelopment of the former Apache Plaza shopping center. App. 122. In the Redevelopment Agreement, the HRA agreed to transfer the Tires Plus/Liquor Store Parcel to Apache Redevelopment. App. 130. As part of the Redevelopment Agreement, Apache Redevelopment agreed to construct and furnish a new liquor store within the commercial development. App. 131. The HRA also agreed to use its power of eminent domain to condemn certain properties, including the Rasmussens' leasehold interest. App. 132. The properties condemned by the HRA would be transferred to Apache Redevelopment. App. at 133-134. Ultimately, the Tires Plus store property will be used as a Wal-mart parking lot. App. 187.

By entering into the Redevelopment Agreement, the HRA put itself in a position where it had to choose whether to breach the Rasmussen Lease, or to breach the Redevelopment Agreement. The HRA chose to breach the former and perform the latter.

- E. To comply with the terms of the Redevelopment Agreement, the HRA authorized the condemnation of the Rasmussens' leasehold interest.**

On May 11, 2004, the HRA adopted a Resolution authorizing the HRA and its attorneys to condemn the Rasmussens' leasehold interest. App. 139. The authorizing resolution provides in part:

**WHEREAS, St. Anthony Redevelopment Authority has determined that in order to perform its obligations under the Redevelopment Agreement it will be necessary for the HRA to commence the proceedings for the acquisition by the HRA by its powers of eminent domain of the Authority Parcels (as those terms are defined in the Redevelopment Agreement), and pursuant to the terms of the Redevelopment Agreement has given the HRA a request to adopt a resolution commencing such action; and**

**WHEREAS, in order for the HRA to perform its obligations under the Redevelopment Agreement it will be necessary for the HRA to commence the proceedings for the acquisition by the HRA by its powers of eminent domain of the rights of the lessee, if any, under the Lease Agreement between the HRA and Ronald and Judith Rasmussen, dba Tires Plus, as lessee with respect to property located at 3800 Silver Lake Road (the "Tires Plus Lease") and pursuant to the terms of the Redevelopment Agreement has given the HRA a request to adopt a resolution commencing such action;**

**\*\*\***

**NOW, THEREFORE, BE IT RESOLVED, that in order to provide for the redevelopment of the property in Redevelopment Project Area No. 3 that is subject to the Redevelopment Agreement in a manner that would meet the objectives and purposes of the Redevelopment Plan, the HRA proceed to acquire all right title and interest to the Authority Parcels and to the rights of the lessee, if any, under the Tires Plus Lease under its power of eminent domain.**

App. 139 (emphasis added).

**F. The Rasmussens' commenced a lawsuit against the HRA.**

In early May 2004, after the HRA had indicated that it would file a condemnation petition to condemn the Rasmussens' leasehold interest, the Rasmussens commenced a lawsuit against the HRA. App. 014. The Rasmussens' Complaint alleges that the HRA, by taking steps to condemn the Rasmussens' interest in the property, breached its obligation to provide peaceful and quiet use and possession of the premises without hindrance from the HRA. App. 018. The Complaint seeks damages from the HRA for breach of the Lease. App. 018. Because the lease was terminated early, the Rasmussens contend that they will suffer over \$100,000 in damages. App. 163. In its Answer to the Complaint, the HRA alleges that it is not liable for a breach of the Lease because the Lease automatically terminates on the condemnation of the premises. App. 028-29.

**G. The HRA commenced a condemnation action.**

In May 2004, after it had been served with the Rasmussens' lawsuit, the HRA filed its condemnation petition. App. 007. The HRA's Petition sought to take the Rasmussens' leasehold interest in the property. App. 012. In connection with its Petition, the HRA made a motion for possession of the subject property pursuant to Minn. Stat. § 117.042. App. 007. Relying on the condemnation provision of the Lease, the HRA alleged that it was not required to pay the Rasmussens' any compensation for the taking of their leasehold interest. App. 009. The HRA has since agreed to pay just compensation for any fixtures that were taken in this condemnation.

The Rasmussens have alleged that the Lease terms are well below market rates. App. 163. Given the length of the term remaining on the Lease, the Rasmussens believe

that they could present a leasehold advantage claim in the condemnation proceeding for over \$100,000 in just compensation. App. 163.

### STANDARD OF REVIEW

The Minnesota Supreme Court set forth the standard for summary judgment in *DLH, Inc. v. Russ*, 566 N.W.2d 60 (Minn. 1997): “Rule 56 of the Minnesota Rules of Civil Procedure is designed to implement the stated purpose of the rules—securing a just, speedy, and inexpensive determination of the action—by allowing a court to dispose of an action on the merits if there is no genuine issue of material facts, and a party is entitled to judgment under the law applicable to such facts.” 566 N.W.2d. at 69; *see also Cook v. Connolly*, 366 N.W.2d 287, 292 (Minn. 1985) (dismissing unsupportable claims on summary judgment relieves the court system of the burden and expense of unnecessary litigation). Accordingly, summary judgment is proper when “there is no genuine issue as to any material fact and [the movant] is entitled to a judgment as a matter of law.” *Russ*, 566 N.W.2d at 69 (quoting Minn. R. Civ. P. 56.03).

On appeal from summary judgment, the Court asks two questions: “(1) Whether there are any genuine issues of material fact, and; (2) whether the lower Court erred in its application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

### ARGUMENT

Under the express terms of the Lease, the HRA was required to provide the Rasmussens with possession of the subject premises, **without hindrance**, until 2021. In spite of its promise to the Rasmussens, the HRA signed the Redevelopment Agreement in 2003 that required it to convey the same property to a private developer in 2004. In order

to keep its promise to the developer of a Wal-Mart, the HRA broke its promise to the Rasmussens. That fact lies at the very heart of this case. In spite of this fact, the HRA insists that it owes the Rasmussens nothing for acquiring/terminating the Rasmussens' interest in the Lease seventeen years before it was set to expire.

To justify its position, the HRA contends that the actions of its left hand (the hand that exercises the sovereign power of eminent domain) do not impact the obligations of its right hand (the hand that enters into contracts with private parties). Moreover, the HRA argues that it is free to bounce between its role as a sovereign, and its role as a party to a contract, whenever it benefits the HRA. Thus, the HRA contends that the following course of conduct was appropriate and lawful:

- Wearing its contractor hat, the HRA had the right to enter into a binding the Lease with the Rasmussens.
- As the Rasmussens' landlord, and wearing its contractor hat, the HRA could both accept the benefits of the Lease and require the Rasmussens to meet their obligations under the Lease.
- Wearing its contractor hat, the HRA had the right to enter into a Redevelopment Agreement with a private developer that obligated the HRA to convey the Rasmussen property to the developer 17 years before the Rasmussen Lease was to expire.
- To meet its obligation to the developer, the HRA had the right to take off its contractor hat, put on its sovereign hat, and condemn the Rasmussens' leasehold interest in the property 17 years before the Lease was set to expire.
- Because it had its sovereign hat on when it condemned the Rasmussens interest, the HRA was not required to comply with its obligations under the Lease and, therefore, is immune from liability in the Rasmussens' breach of contract action.

- Finally, once again taking off its sovereign hat and putting on its contractor hat, the HRA is free to use the condemnation clause in the Lease as a weapon to prevent the Rasmussens from recovering just compensation in the condemnation case and damages in the contract case.

The HRA's position, if adopted, would create a profound injustice. This Court should not permit that injustice to occur.

**I. LIKE ANY OTHER PARTY TO A CONTRACT, THE HRA SHOULD BE HELD ACCOUNTABLE FOR BREAKING ITS PROMISE.**

**A. General principles of contract law apply to the HRA.**

In general, when the government is a party to a contract, the government's rights and duties are "governed by the laws applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); *Sinking Fund Cases*, 99 U.S. 700, 719, 23 L.Ed. 496 (1879)("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term applies, as it would be if the repudiator had been a State or a municipality or a citizen.").

A promise to comply with the terms of a contract, with a reserved right to deny or ignore that promise, is an absurdity. *Murray v. Charleston*, 96 U.S. 432, 445, 24 L.Ed. 760 (1878). The United States Supreme Court has further recognized the general principle that "[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." *Heckler v. Community Health Services of Crawford City, Inc.*, 467 U.S. 51, 61, n. 13, 104 S.Ct. 2218, 2224, n. 13, 81 L.Ed. 2d 42 (1984). Minnesota courts

have similarly recognized that contract law generally applies to contracts in which the government is a party. *Ketterer v. Independent School Dist. No. 1*, 79 N.W.2d 428, 435 (Minn. 1956).

**B. The HRA broke its promise to the Rasmussens.**

Under basic contract law, if a party promises to perform, the party must keep its promise unless performance is rendered impossible by an act of God or by the law. *Steas v. Leonard*, 20 Minn. 494, 1874 WL 3737 (1874). Every contract in Minnesota contains an implied covenant of good faith and fair dealing, and every party to a contract is bound by that duty of good faith and fair dealing. *Enviro-Fab Inc. v. Blandin Paper Co.*, 349 N.W.2d 842, 848 (Minn. Ct. App. 1984); *Seman v. First State Bank of Eden Prairie*, 394 N.W.2d 557 (Minn. Ct. App. 1986). Under the general principles of contract law, if a party fails to perform its obligations under a contract, the law holds the breaching party accountable. “The law does no more than enforce the contract as the parties themselves have made it.” *Steas*, 1874 WL at \*2.

In this case, the HRA promised the Rasmussens that they would have peaceful and quiet use and possession of the property through 2021. Further, the HRA explicitly promised that it would not hinder the Rasmussens’ right to use and enjoy the property. The HRA broke that promise. Instead of providing the Rasmussens with peaceful and quiet use and possession of the property through 2021, the HRA condemned the Rasmussens’ interest in the property 17 years before the Lease expired. Under general contract law, the HRA breached its obligation to provide the Rasmussens with the peaceful and quiet use and possession of the property until 2021.

**C. The HRA cannot ignore the promises it made under the Lease, and at the same time, use the Lease as a sword to deprive the Rasmussens of just compensation for the taking.**

By evicting the Rasmussens 17 year prior to the expiration of the Lease, the HRA violated its obligation to provide the Rasmussens with peaceful and quiet use and possession of the premises. Yet, at the same time, the HRA is attempting to enforce the Lease's condemnation provision in this proceeding to deprive the Rasmussens of just compensation for the taking of their interest in the property.

This is a clear violation of basic contract law. A party to a contract cannot benefit from its own breach of that contract. *See also Cussler v. Firemen's Ins. Co.*, 194 Minn. 325, 260 N.W. 353, 356 (1935)(the law will not permit insured to profit from his own breach of contract when insured disregarded his obligation to cooperate with insurer); *Gencorp, Inc. v. American International Underwriters*, 178 F.3d 804 (6<sup>th</sup> Cir. 1999)("it is axiomatic that a party cannot benefit from its own breach"); *Market Street Assoc. Ltd. Partnership v. Frey*, 941 F.2d 588, 592 (7<sup>th</sup> Cir 1991)(holding that a contracting party cannot be allowed to use his own breach to gain an advantage); *Morgan v. Crowley*, 85 S.E.2d 40, 49 (Ga. Ct. App. 1954)("A party cannot take advantage of his own default in the performance of a contract."); *GLS. v. Wal-Mart Stores, Inc.*, 3 F. Supp. 2d 952, 968 (N. D. Ill. 1998)(Wal-Mart "could not take advantage of its own breach of contract") (emphasis in original). In colloquial terms, a party to a contract cannot eat its cake (breach its obligations under the Lease) and have it too (use the terms of the Lease to its advantage).

This principle applies to governments as well. In *Farmers' Electric Cooperative, Inc. v. Missouri Department of Corrections*, 977 S.W.2d 266 (Mo. 1998), the Missouri

Department of Corrections signed a twenty-year contract (beginning in 1986) with the Farmers Electric Cooperative for the provision of electric service to a correction facility that was to be located just outside the City of Cameron. Farmers Electric Cooperative did not have the authority to provide electric service inside the city limits of the City of Cameron. In 1996, the Department of Corrections signed a petition of annexation, requesting the annexation of its property by the City thereby placing its property inside the city limits and outside the Cooperative's service area. Then the Department of Corrections repudiated the Cooperative's 20-year contract and entered into a new contract with another service provider.

The Farmers Electric Cooperative sued the Department of Corrections for breach of contract. On appeal, the Department of Corrections argued that it should not be held responsible for breaching the contract. The Court rejected that argument, stating:

It is assumed in every contract that the parties will not avoid their obligations under the contract. The department may not enjoy the benefits of its contract with Farmers while avoiding its obligations under it.

*Farmers Electric Cooperative*, 977 S.W.2d at 272.

This practical analysis is equally applicable to the instant case. The HRA enjoyed the benefits of its contract with the Rasmussens for over six years. In 2003, the HRA decided to ignore its obligation under the Lease. Rather than permit the Rasmussens to possess the property until 2021, as it had promised to do, the HRA decided to transfer the premises to a developer so that a Wal-Mart could be constructed. Now, after violating its Lease obligations, the HRA seeks to use the Lease's condemnation provision as a sword to

deprive the Rasmussens of compensation. This Court should not permit the HRA to breach those provisions in the Lease it does not like and, at the same time, enforce those provisions it finds favorable.

## II. THE SOVEREIGN ACTS DOCTRINE DOES NOT SAVE THE HRA.

The HRA may contend that its condemnation of the Rasmussens' interest in the property is not a breach of its promise to provide peaceful and quiet use and possession of the property, without hindrance, until 2021, because it was acting in its sovereign capacity when it condemned the property. The HRA's theory is that, when the HRA is wearing its sovereign hat, it is free to ignore its contractual obligations.

The sovereign acts doctrine is an affirmative defense under which the government, typically the United States, may avoid liability for an "obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Allegre Villa v. United States*, 60 Fed. Cl. 11, 16 (2004), quoting *Horowitz v. United States*, 267 U.S. 458, 461, 45 S. Ct. 344, 69 L.Ed. 736 (1925); see also *United States v. Winstar Corporation*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed2d 964 (1996). The purpose of the doctrine is to balance the Government's need for freedom to legislate with its obligation to honor its contracts. *Winstar*, 518 U.S. at 896. The doctrine does not "relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Allegre Villa*, 60 Fed. Cl. At 16, quoting *Freedman v. United States*, 320 F.2d 359, 366 (1963).

In *Allegre Villa*, the Court described the sovereign acts doctrine as follows:

“When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” *Winstar*, 518 U.S. at 895, 116 S.Ct. 2432. “The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties.” *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997). Thus, the doctrine would not apply if “the sovereign act is properly attributable to the Government as contractor” and if the specific legislation was designed to target prior government contracts. *Winstar*, 518 U.S. at 896, 116 S.Ct. 2432.

*Allegre Villa*, 60 Fed. Cl. at 16.

In *Winstar*, the Supreme Court recognized that it is important to address why the government took action to render its performance under a contract impossible. The

*Winstar* plurality stated:

The greater the Government’s self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government’s own improvidence, and where a substantial part of the impact of the Government’s action rendering performance impossible falls on its own contractual obligations, the defense will be unavailable.

*Winstar*, 518 U.S. at 898.

Thus, to resolve the question of whether the HRA’s breach of the Lease should be excused as a sovereign act, this Court must examine the circumstances underlying the condemnation action, the magnitude of the HRA’s self-interest, and whether the HRA’s conduct has specifically targeted its obligation to the Rasmussens.

**A. The HRA's use of the power of eminent domain arose from its contract with Apache Redevelopment.**

The circumstances surrounding the instant condemnation action are telling. In December 2003, the HRA signed the Redevelopment Agreement with Apache Redevelopment. That Agreement required the HRA to deliver title and possession of the Tires Plus premises to Apache Redevelopment by September 1, 2004. The resolution authorizing the commencement of the condemnation specifically states that the condemnation action is required so that the HRA can perform its obligations under its **contract** with Apache Redevelopment. App. 139. In this case, the government-as-contractor (with Apache Redevelopment) obligated the government-as-sovereign to condemn the Rasmussens' interest in the property so that the government-as-contractor could deliver that land to Apache Redevelopment.

**B. The HRA targeted its obligation to the Rasmussens.**

There can be no question that the HRA's conduct was directed at the Rasmussens. The Rasmussens are the only respondents named in the condemnation petition. Their property interests are the sole object of the condemnation. The HRA is condemning the Rasmussens' property because it seeks to deliver that property to its developer without cost to either the developer or itself. The HRA simply wants to avoid its contractual obligation to the Rasmussens so that it can perform its contractual obligation to the developer without cost to anyone, except the Rasmussens.

**C. By becoming a party to the Lease and promising to provide quiet use and possession of the property, the HRA did not promise not to exercise its power of eminent domain.**

The HRA may argue that the sovereign cannot contract away its right to exercise the power of eminent domain and that, therefore, any claim by the Rasmussens that the exercise of that power was somehow wrongful must be rejected. The HRA condemned the Rasmussens' interest in the property. There was no objection at the hearing on petition except to the HRA's claim that it could acquire the Rasmussens' interest without paying compensation. The HRA, by becoming a party to the Lease, retained its power of eminent domain; it also rendered itself liable for damages if it exercised that power to terminate the Lease before the expiration of the Lease term. *See, e. g. Amino Bros. Co. v. United States*, 178 Ct. Cl. 515, 525, 372 F.2d 485, 491, cert. denied 389 U.S. 846, 88 S.Ct. 98, 19 L.Ed.2d 112 (1967).

**III. NEITHER GOODYEAR SHOE NOR GIOVANETTO ENTERPRISES SAVES THE HRA.**

In its submissions to the trial court, the HRA cited *Goodyear Shoe Machinery Co., v. Boston Terminal Co.*, 176 Mass. 115, 57 N.E. 214 (1900), and *City of Glendale v. Giovanetto Enterprises, Inc.*, 23 Cal. Rptr.2d 305 (Cal. Ct. App. 1993), to support its position. For several reasons, the cases are not dispositive.

First, *Goodyear Shoe* is a 1900 case from Massachusetts; *Giovanetto* is a 1993 case from California. Neither case is binding on this Court.

Second, the circumstances in *Giovanetto* are dramatically different from the instant case.<sup>3</sup> In *Giovanetto*, the tenant leased property from the City of Glendale for the operation of a restaurant. The lease was for a twenty year term. The City, however, negotiated a provision that would permit it to terminate the lease after only ten years. Five years into the Lease, the City determined that the lease was necessary for the construction of a public building.

Unlike the present case, the government in *Giovanetto* did not attempt to use the lease offensively. To the contrary, the City agreed that it should pay just compensation to the tenant for the loss of the remainder of the leasehold. The fact that the tenant in *Giovanetto* was going to receive compensation for the taking was not lost on the court.

The court noted:

No injustice will result to [the tenant]. It seeks only to be fairly compensated for its loss and is clearly entitled to that result. Apart from the attorney's fees claim, it is not clear to us that there will be any real difference in the amount of compensation to which [the tenant] will be entitled if a contract damage measure is used.

*Id.* at 314.

The City in *Giovenetto* did not – as the HRA attempts to do here – ignore its obligations under one aspect of the lease, then cite other more favorable provisions of the lease to avoid paying damages. Ultimately, through its holding, the California Court of Appeals deprived the tenant of a claim for attorneys' fees that could have been made

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<sup>3</sup> The decision in *Goodyear Shoe* does not provide a detailed description of the facts from which to determine whether it is apposite.

under a breach of contract action. It did not deprive the tenant entirely of a claim for compensation, as the HRA is attempting to do here.

Further, the tenant's property in *Giovanetto* was taken for a public building. The direct beneficiary of the taking was the California public. In the instant case, the leased premises are not going to be used for a public building or any public use. To the contrary, the HRA is condemning the Rasmussens' interest so that it can transfer that interest to a private developer for use as a Wal-mart parking lot. *Giovanetto* does not hold that the government/landlord may violate its lease obligations, take its tenants' property, convey that property to another private party, and deny the tenants any right to claim damages.

Third, in *Goodyear Shoe*, the court considered whether the implied covenant of quiet enjoyment was breached by the landlord's condemnation action. Unlike the implied covenant, which Justice Holmes held applied only to the lessor's title and which did not warrant against those liabilities created through the exercise of the sovereign power which underlies all private title, the HRA's promise to the Rasmussens in this case was express. Furthermore, the express promise in the Rasmussens' Lease extends well beyond a warranty regarding the lessor's title. In the Lease at hand, the HRA specifically promised not to interfere with the Rasmussens' peaceful and quiet use and possession. That promise was broken.

**IV. IN ANY EVENT, THE LEASE DOES NOT PREVENT THE RASMUSSENS FROM MAKING A LEASEHOLD ADVANTAGE CLAIM.**

For the reasons noted above, the HRA should not be permitted to rely on the condemnation provisions of the Lease to prevent the Rasmussens from making a leasehold advantage claim. Nonetheless, even if this Court does consider the condemnation provisions of the Lease, those provisions do not prevent the Rasmussens from making a leasehold advantage claim.

**A. The Condemnation Provision of the Lease did not contemplate the Condemnation action being initiated by the lessor.**

When construing a contract, the parties' intention must be gathered from the entire instrument, not from an isolated clause. *Boe v. Christlieb*, 399 N.W.2d 131, 133 (Minn. Ct. App. 1987). Similarly, the terms of a contract must be read in context of the entire contract, and courts should not construe terms so as to lead to a harsh and absurd result. *Employers Mut. Liability Ins. Co. of Wis. v. Eagles Lodge of Hallock*, 282 Minn. 477, 165 N.W.2d 554, 556 (1969).

In this case, the parties did not intend for Articles 17B, 17C, and 17E, which address condemnation, to apply to condemnation actions brought by the landlord. In 1996, the Rasmussens negotiated their lease with the Ste. Marie Company. At that the time the Lease was negotiated, the Ste. Marie Company did not have the power of eminent domain. Further, under the terms of the Lease, the landlord was required to provide the Rasmussens with the quiet use and possession of the property until 2021. If the parties had intended that the landlord could terminate the Lease at will, with impunity, the Lease would have contained a termination provision addressing that intent. The Lease does not

contain such a provision. In short, nothing in the Lease suggests that the Rasmussens accepted the risk that their landlord could terminate the Lease, without consequence, prior to the expiration of the Lease term.

The fact that the original parties to the Lease did not consider the possibility that the landlord and condemnor would be one and the same is evident from the definition of condemnation provided in the Lease. The Lease states that condemnation includes either: “a) an exercise of any governmental power, whether by legal proceedings or otherwise, by a Condemnor, **OR** b) a voluntary sale or transfer by the Landlord to any Condemnor, either under threat of condemnation or while legal proceedings for the condemnation are pending.” App. 104 (emphasis added). The definition contemplates not only the landlord and condemnor being separate entities, but also the landlord and condemnor being adversaries, *i.e.*, the condemnation is to be an involuntary condemnation or a voluntary sale due to the threat of condemnation. If the Rasmussens had the opportunity to negotiate directly with the HRA, they would have negotiated Lease provisions that specifically addressed the HRA’s power to terminate the Lease before the expiration of the Lease term.

Given the circumstances, this Court should conclude that the Articles 17B, 17C, and 17E of the Lease do not apply to condemnation proceedings initiated by the landlord.

**B. The Lease did not automatically terminate because all of the premises were not taken.**

Article 17B of the Lease sets forth when the Lease will terminate automatically, and when the landlord has the right to terminate the Lease. It provides:

- B. Total Taking. If all of the Premises shall be taken in Condemnation, except for a taking for temporary use, this Lease shall be terminated automatically as of the date of taking.

For the purposes of Article 17B, the question before the Court is whether “all of the Premises” have been taken in this condemnation. The Lease defines the premises as a 6,461 square foot building. App. 089, 119.

All of the premises are not being taken. To the contrary, the Petition clearly states that only the Rasmussens’ leasehold interest is being condemned and that the Rasmussens are the only parties affected by the condemnation. App. 112. The remainder of the property rights are not the subject of this condemnation proceeding. In short, under the clear language of the Lease, a “total taking” will not occur because “all of the Premises are not being taken in [this] condemnation.” Because a total taking will not occur, Article 17B will not cause the Lease to terminate automatically.

Article 17C (1) governs the Landlord’s ability to terminate the Lease upon the partial taking of the premises. It provides in pertinent part:

- C. Partial Taking.

(1) If (a) twenty five percent (25%) or more of the parking area in the Subject Parcel; or (b) twenty five percent (25%) or more of the rentable area of the Subject Parcel shall be taken; or (c) twenty-five percent (25%) or more of the square footage of the Premises shall be taken, then Landlord shall have the option to terminate this Lease by notice in writing to Tenant given within thirty (30) days after the Date of Taking, which notice shall take effect sixty (60) days after the Date of Taking.

Again, the only interest being taken is the Rasmussens' leasehold interest. Neither 25% of the parking area, 25% of the rentable area, nor 25% of the square footage of the premises is being taken in connection with this condemnation proceeding. Simply stated, a partial taking, as the phrase is defined by the Lease, will not occur. Accordingly, given the circumstances underlying this condemnation, Article 17C did not grant the HRA the right to terminate the Lease.

**C. The waiver provision does not apply.**

The HRA argued below that, even if the Lease will not automatically terminate, the Rasmussens are still not entitled to compensation for the loss of their leasehold interest because they waived that right. The HRA's argument is based on Article 17E, which provides:

- E. Award. The Award for any taking shall be the sole property of Landlord. Tenant hereby waives any rights it may have with respect to the loss of its Leasehold interest in this Lease, provided, however, that Landlord shall not have any right or claim to any award or settlement for Tenant's moving expenses or for the loss of Tenant's stock, personal property and trade fixtures or for the unamortized costs of improvements paid for by Tenant pursuant to this Lease which are the sole property of Tenant for which Tenant shall be entitled to claim separately.

App. 105.

The definition of the term "taking" as used in this clause requires reference to Articles 17B and 17C of the Lease. Article 17B describes a total taking as the taking of **all** of the premises, and Article 17C describes **partial** takings. Neither provision is applicable in the instant action. Article 17E is intended to apply only under circumstances where

either Article 17B or Article 17C is implicated. Since neither provision applies to this case, Article 17E does not apply to the present situation.

## **V. PUBLIC POLICY SUPPORTS THE RASMUSSENS' POSITION.**

### **A. Just compensation is the bedrock principle underlying the exercise of the power of eminent domain.**

The Minnesota Constitution provides: "private property shall not be taken, destroyed or damaged for a public use without just compensation therefore, first paid or secured." Minn. Const. Art 1, § 13. The United States Constitution is equally clear: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

In the recent decision of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), Justice Stevens noted the critical role just compensation plays in the government's exercise of its power of eminent domain. Justice Stevens noted that the "Takings Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." 125 S. Ct. at 2667, FN. 19. Justices O'Connor and Thomas, in their respective dissents, similarly described the relationship between just compensation and the government's ability to take private property. Justice O'Connor stated:

While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus prevents the public from loading upon one individual more than his just share of the burdens of government.

*Id.*, 125 S. Ct. at 2672, quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893). In his dissent, Justice Thomas succinctly recognized the

bedrock principle underlying the exercise of the power of eminent domain that all “takings [require] the payment of compensation.” *Id.*, 125 S. Ct. at 2679.

The Rasmussens do not dispute that the government can take private property without the owner’s consent. When government does so, however, it must pay the owner of the private property just compensation for the taking. In this case, the HRA condemned the Rasmussens’ leasehold interest in the subject property. A taking has occurred. Because a taking occurred, the law presumes that just compensation should be paid. It is from this perspective that this Court should view this dispute.

**B. The Rasmussens should not be forced to subsidize the Wal-Mart Development.**

In this case, one of two things will happen. If the Rasmussens are permitted to bring a leasehold advantage claim, the HRA will be required to pay the Rasmussens damages for breaking its promise to provide the Rasmussens with peaceful and quiet use and possession of the premises until 2021. The damages should reflect the increased cost to the Rasmussens caused by the breach in order to make the Rasmussens whole. The result, given the circumstances, would be just. The damages provided to the Rasmussens, though significant to the Rasmussens, will be a relatively minor component of the ultimate cost to redevelop Apache Plaza.

On the other hand, if the trial court’s decision is upheld, the Rasmussens will receive no damage for early termination of the Lease, and no just compensation for the taking, an unjust and severe impact on the Rasmussens. For the next 17 years, the Rasmussens will face increased expenses. But the impact will not end there. By

depriving the Rasmussens of compensation, the Court will be reducing the cost of the Wal-Mart development. The Rasmussens' loss is the developer/HRA's gain. If the HRA wishes to subsidize the development of the Wal-Mart, the HRA, and not the Rasmussens, should bear the subsidy. In short, it is neither fair, just, nor lawful to force the Rasmussens to subsidize the development of a Wal-Mart

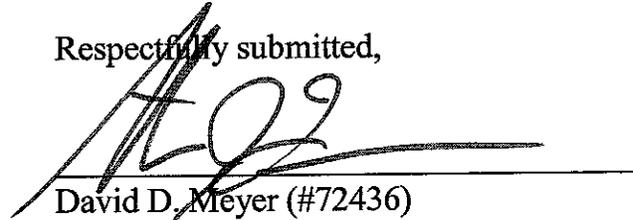
**C. Finding for the Rasmussens will not chill redevelopment.**

The HRA may argue that a ruling in favor of the Rasmussens will have a chilling effect on future redevelopment projects. If this Court reverses the trial court, the HRA will be required to pay its tenants just compensation for the taking of the tenants' leasehold interest in the subject property. This Court's holding will only apply to situations where a condemnor accepts the benefit of being a landlord for a period of years, decides to terminate a lease long before the lease is set to expire, and then seeks to use a different provision of the lease to prevent the tenant from making a leasehold advantage claim. Because few cases with similar facts will arise, the risk that a decision in favor of the Rasmussens will chill redevelopment is slight.

**CONCLUSION**

The HRA made a promise to the Rasmussens. It broke that promise. The Rasmussens ask this Court to hold the HRA accountable, just as it would any other landlord. To that end, the Rasmussens respectfully request that the decision of the trial court be reversed, and that they be permitted to make a leasehold advantage claim in the underlying condemnation proceeding.

Respectfully submitted,



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Dated: August 18, 2005

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**CERTIFICATE OF COMPLIANCE**

The undersigned, Steven J. Quam, hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(a), that the word count of the attached Brief of Appellants Ronald and Judith Rasmussen, exclusive of pages containing the Table of Contents and the Table of Authorities, is 7,250 words. The Brief complies with the typeface requirements of the rule and was prepared, and the word count was made, using Microsoft Word 2000.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).