

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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No. A05-1419

A05-1418

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

**Petitioner, Respondent,**

**vs.**

**Ronald Rasmussen, et al.,**

**Appellants.**

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No. A05-1418

**Ronald and Judith Rasmussen,**

**Appellants,**

**vs.**

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

**Respondent.**

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**BRIEF OF RESPONDENT THE HOUSING AND REDEVELOPMENT  
AUTHORITY FOR THE CITY OF ST. ANTHONY, MINNESOTA**

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David D. Meyer (#72436)  
Steven J. Quam (#250673)  
FREDRIKSON & BYRON, P.A.  
200 South Sixth Street, Suite 4000  
Minneapolis, Minnesota 55402  
Telephone: (612) 492-7000  
**Attorneys for Appellants  
Ronald and Judith Rasmussen**

David Y. Trevor (#0152997)  
Heather C. Toft (#322611)  
DORSEY & WHITNEY LLP  
50 South Sixth Street, Suite 1500  
Minneapolis, Minnesota 55402-1498  
Telephone: (612) 340-2600  
**Attorneys for Petitioner/Respondent  
The Housing and Redevelopment  
Authority for the City of St. Anthony,  
Minnesota**

James J. Thomson (#145300)  
Mary Tietjen (#279833)  
KENNEDY & GRAVEN, CHARTERED  
470 U.S. Bank Plaza  
200 South Sixth Street  
Minneapolis, Minnesota 55402  
Telephone: (612) 337-9300

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

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## STATEMENT OF ISSUES

I. Did the Housing and Redevelopment Authority for the City of St. Anthony, Minnesota (“St. Anthony HRA” or “HRA”), by exercising its inherent right to acquire property by eminent domain, breach the covenant of quiet enjoyment in the lease with Ronald and Judith Rasmussen?

*Trial Court’s Ruling:* The trial court held that “there is no question that the HRA had the right to condemn the property in its capacity as a governmental entity,” and dismissed the Rasmussens’ claim for breach of the Lease.

*Apposite Cases:*

*Village of St. Louis Park v. Minneapolis, N. & S. Ry. Co.*, 156 Minn. 164, 194 N.W. 327 (1923);

*Farmer’s Electric Cooperative, Inc. v. Missouri Department of Corrections*, 977 S.W.2d 266 (Mo. 1998);

*City of Glendale v. Giovanetto Enterprises, Inc.*, 18 Cal.App.4th 1768, 23 Cal.Rptr.2d 305 (1993); and

*Goodyear Shoe Mach. Co. v. Boston Terminal Co.*, 57 N.E. 214 (Mass. 1900).

II. Did the Lease provision assigning “any” condemnation award to the landlord as its “sole property” and providing that the tenant “waives any rights” with respect to the leasehold operate to prevent the Rasmussens from recovering a condemnation award for the loss of their leasehold?

*Trial Court Held:* That “the Rasmussens have given up their right of any compensation pursuant to [Article] 17(e) of the Lease.”

*Apposite Cases:*

*Housing and Redevelopment Authority of City of St. Paul v. Lambrecht*, 663 N.W.2d 541 (Minn. 2003);

*In re Widening Third Street in City of St. Paul*, 228 N.W. 162 (Minn. 1929);

*Cooney Brothers, Inc. v. State of New York*, 276 N.Y.S.2d 337 (N.Y.A.D. 1966); and

*McGregor v. Board of Regents of the University System of Georgia*, 548 S.E.2d 116 (Ga. App. 2001).

III. Did the provision terminating the Lease in the event of a taking of “all of the Premises” trigger when the St. Anthony HRA condemned all rights which it did not already hold in all of the physical space comprising the “Premises” under the Lease?

*Trial Court Held:* The trial court did not expressly rule on whether or not the Lease terminated, but did hold that if the Lease in fact terminated, the Rasmussens were not entitled to further compensation under it.

*Apposite Cases:*

*Korengold v. City of Minneapolis*, 95 N.W.2d 112 (Minn. 1959);

*Bradley Facilities, Inc. v. Burns*, 551 A.2d 746 (Conn. 1988); and

*Township of Bloomfield v. Rosanna’s Figure Salon, Inc.*, 602 A.2d 751 (N.J.A.D. 1992).

## **STATEMENT OF THE CASE**

### **I. The Condemnation Action and the Contract Action.**

This consolidated appeal involves two actions between St. Anthony HRA and the Rasmussens. On May 19, 2004, St. Anthony HRA filed a Petition in Condemnation (hereinafter, the “Condemnation Action”), to obtain all remaining rights to the parcel of land located at 3800 Silver Lake Road in St. Anthony, Minnesota, where the Rasmussens rented space in a commercial building. Pursuant Minn. Stat. § 117.042, St. Anthony HRA also sought an accelerated “quick-take” transfer of the leasehold interest, in order to meet the schedules for the redevelopment project which necessitated the condemnation in the first place.

The Rasmussens initiated a breach of contract lawsuit (hereinafter, the “Contract Action”) against St. Anthony HRA on May 7, 2004. In the Contract Action, the Rasmussens contend that St. Anthony HRA’s condemnation of the Rasmussens’ leasehold interest was a breach of the covenant of quiet enjoyment contained in the Lease of the premises at issue. The Lease was originally entered into between the Rasmussens and St. Marie Company, but the landlord’s interest in the Lease was assigned to St. Anthony HRA when it purchased the fee interest in the property from St. Marie in 1997.

In the Condemnation Action, the hearing on whether to grant the Petition and the quick-take request occurred on July 16, 2004. On August 13, the trial court granted the Petition, as described in more detail below.

On August 31, 2004, pursuant to the Court’s August 13 Order, all remaining interests in the property formally transferred from the Rasmussens to the St. Anthony HRA.

The parties agreed to bring cross motions for partial summary judgment on the question of whether the Rasmussens were barred from claiming damages in the Condemnation Action for the loss of their leasehold, and to simultaneously bring cross-motions for summary judgment in the Contract Action. The trial court heard these motions on December 30, 2004. On January 7, 2005, the court issued an order granting St. Anthony HRA’s motions in both the Condemnation Action and the Contract Action, and denying the cross-motions by the Rasmussens. The parties eventually stipulated to

notice of entry of judgment on May 16, 2005, and this appeal followed.

**II. The Trial Court's August 13, 2004 Findings of Fact, Conclusions of Law and Order.**

On August 13, 2004, the trial court issued an Order granting St. Anthony HRA's condemnation petition and appointing condemnation commissioners. The court found that St. Anthony HRA was duly organized and established and had appropriate eminent domain power pursuant to Minn. Stat. § 469.012. (App. 055) The court also found that St. Anthony HRA had adopted a redevelopment plan and had entered into a redevelopment agreement in furtherance of the redevelopment plan. (*Id.* at ¶ 3)

The court found that St. Anthony HRA had "determined that it is necessary" to acquire the Rasmussens' leasehold. (*Id.* at ¶ 4) The court found that the acquisition of the Rasmussen's leasehold "serves a necessary public purpose and is necessary to further the objectives of and is consistent with the Redevelopment Plan." The court specifically found that the acquisition of the leasehold "will further increase the tax base and generally provide for the health, safety, morals and welfare of the citizens of the City of St. Anthony." (App. 058 at ¶ 10) None of these Findings are challenged on appeal.

**III. The Trial Court's January 7, 2005 Summary Judgment Ruling.**

The January 7 Order granting St. Anthony HRA's motions for summary judgment in the two actions and denying the cross motions by the Rasmussens focuses on the sovereign authority of St. Anthony HRA to conduct the condemnation, and on the

specific language of the Lease article governing condemnation. The trial court concluded that there was “no question” that St. Anthony HRA had the right to condemn the property and did in fact do so.

The court then addressed the condemnation provisions of the Lease, particularly those relating to the ownership of any award relating to the value of the leasehold in a condemnation. The court pointed out that regardless of whether the condemnation was seen as a “total” taking or “partial” taking, Article 17(e) of the Lease “clearly states that the award for any taking . . . [is] the sole property of the landlord.” Noting that the Rasmussens had “already been compensated” for moving expenses, personal property and trade fixtures, the court found the Rasmussens had no additional viable claims.

### **STATEMENT OF FACTS**

#### **I. Parties.**

St. Anthony HRA is a duly organized housing and redevelopment authority, established under Minnesota Statutes Chapter 469, and has all powers necessary and convenient to carry out the purposes of Chapter 469, including, but not limited to, the power and right of condemnation pursuant to Minn. Stat. § 469.012. App. 055.

The Rasmussens are the tenants in the property at issue in this condemnation, on which they operate a Tires Plus retail business. HRA App. 4 – HRA App. 38; App. 055.

#### **II. The Lease.**

In 1996, the Rasmussens entered into a lease of the Tires Plus premises at 3800

Silver Lake Road in St. Anthony. HRA App. 4 – HRA App. 38. The Rasmussens had in fact occupied that address prior to that time, but entered into a new lease with St. Marie Company, the then-owner of the land. HRA App. 8.

Several of the significant Lease provisions are discussed below:

**A. The “Premises.”**

The Lease uses the term “Premises” to describe the physical space being leased by the Rasmussens. Article 1 of the Lease “demises and leases” the Premises to the Rasmussens, and the Premises are described as being “shown on Exhibit C.” HRA App. 8. Exhibit C is a drawing of the Tires Plus building, with an expansion area marked at the top. HRA App. 36. Article 2 states that the Rasmussens are already “in possession of the Premises,” except for an expansion area (which they subsequently occupied as well). HRA App. 8. The “Data Sheet” at the beginning of the Lease describes the premises as the “area” marked on Exhibit C and states that the Premises “contain 6,461 square feet.” HRA App. 6.

**B. Defined Terms in the Condemnation Clause.**

Article 17 of the Lease is entitled “Condemnation,” and paragraph A of that Article defines “Condemnation.” HRA App. 21. “Condemnation” includes “(a) the exercise of any governmental power, whether by legal proceedings or otherwise, by a Condemnor, or (b) a voluntary sale or transfer by Landlord to any Condemnor, either under threat of condemnation or while legal proceedings for the condemnation are

pending.” HRA App. 21; App. 056 – App. 058.

Article 17A also defines “Award” as “all compensation, sums, or anything of value awarded, paid or received on a total or partial condemnation.” HRA App. 21; App. 056 – App. 058.

**C. Different Types of “Takings” Described in Condemnation Clause.**

In addressing the circumstances under which the Lease may be terminated, Article 17 distinguishes between three different types of “takings.” HRA App. 21.

Article 17B, “Total Taking,” provides for the automatic termination of the lease in the event “all of the Premises shall be taken in Condemnation.” HRA App. 21; App. 056 – App. 057.

Article 17C describes various “Partial” takings, all of which are described by the amount of “square footage” taken in the condemnation (*e.g.*, “twenty-five percent (25%) or more of the square footage of the Premises”). *Id.* The partial taking provisions of 17C assign an option to terminate the Lease to the landlord or the tenant, depending on the amount of physical area which is taken by condemnation. *Id.*

Article 17D deals with “Temporary” takings and provides that in the event of a temporary taking the Lease continues in full force and effect. *Id.*

**D. Allocation Of The Condemnation Award.**

Article 17E is entitled “Award,” and it provides that the “*Award for any taking shall be the sole property of Landlord.*” *Id.* (Emphasis added); App. 056 – App. 058. It

then provides that “*Tenant hereby waives any rights it may have with respect to the loss of its leasehold interest . . .*” *Id.* (Emphasis added.) It also provides that the landlord has no claim on any compensation the tenant might receive for moving expenses, stock, personal property, trade fixtures and unamortized improvements. *Id.*

**E. Covenant of Quiet Enjoyment.**

Article 29A of the Lease is entitled “Quiet Enjoyment” and it states:

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

HRA App. 27.

**III. St. Anthony HRA’s Acquisition Of Subject Property.**

In 1997, one year after the Rasmussens entered into the Lease, St. Anthony HRA purchased the property from St. Marie. App. 185; App. 056. St. Anthony HRA needed a location for its municipal liquor store, and there was additional space on the property suitable for that purpose. *Id.* The purchase was subject to the Lease, which was not changed in any way. *Id.*; Findings ¶ 5.

The Rasmussens had a right of first refusal to purchase the subject property at the time the HRA offered to buy it from St. Marie in 1997. HRA App. 29 – HRA App. 30. The Rasmussens declined to exercise that right. App. 185. Pursuant to the terms of

Article 29V of the Lease, the Rasmussens' failure to exercise the right of first refusal in 1997 terminated that right with respect to any future transactions. HRA App. 29 – HRA App. 30.

**IV. Apache Plaza Redevelopment.**

The Rasmussens' Tires Plus business is located within what was formerly the Apache Plaza Shopping Center. HRA App. 6; App. 182. This area of the City of St. Anthony has long been “[v]ery blighted,” with commercial vacancy rates of up to 80% and other problems. App. 182. The City of St. Anthony and the St. Anthony HRA have long sought to redevelop the area into a more economically vibrant use. *Id.*

The St. Anthony HRA adopted a formal redevelopment plan which covers Apache Plaza (sometimes referred to as the “Northwest Quadrant” redevelopment). App. 055. In December 2003, the St. Anthony HRA entered into a formal redevelopment agreement covering the area and requiring acquisition of the Rasmussens' leasehold. *Id.*

**V. Public Purpose Of Inclusion Of Subject Property In The Redevelopment.**

The Rasmussens do not challenge the public purpose and necessity of the taking of their leasehold. HRA App. 40 – HRA App. 42. At the July 16, 2004 hearing on the condemnation petition, the Rasmussens' counsel stated that “We don't contest the public purpose, we don't contest the reasonable necessity of this property to achieve that public purpose.” App. 180. Counsel also stated that the Rasmussens “don't contest the resolutions that have been passed [by St. Anthony HRA]” App. 179.

At the July 16 hearing, Michael Mornson of the St. Anthony HRA testified that the land at 3800 Silver Lake Road, which includes the Rasmussens' leasehold premises, was essential to the larger Apache Plaza Redevelopment. App. 187 – App. 188. The retail anchor tenant of that redevelopment is a Wal-Mart store, and the St. Anthony HRA was required to provide a certain number of parking places in order to induce Wal-Mart to agree to be part of the development. *Id.* Providing the requisite amount of parking required that 3800 Silver Lake Road be taken and converted into a portion of the larger parking lot for the redevelopment. *Id.*

#### **VI. The Rasmussens' Relocation And Relocation Benefits.**

The Rasmussens secured a site across the street from their former premises and constructed a new store on that site. The St. Anthony Building Inspector issued a building permit for the construction of the new Tires Plus store on May 2, 2004. HRA App. 146. The Rasmussens were able to move to their new business premises by August 31, the date on which the St. Anthony HRA obtained title and possession of their former premises. The St. Anthony HRA issued a certificate of occupancy to the Rasmussens on September 4, 2004. *Id.*

The St. Anthony HRA agreed to provide the Rasmussens with relocation benefits, pursuant to the provisions of Minn. Stat. §§ 117.50 – 117.56. *Id.* The St. Anthony HRA retained a consultant to work with the Rasmussens (and other owners and tenants displaced by the redevelopment) to determine the appropriate amount of compensation

due for relocation. HRA App. 47.

Based upon documentation provided by the Rasmussens, the consultant recommended that the HRA pay the Rasmussens \$85,000.00 in relocation costs. HRA App. 48. The HRA submitted a check to the Rasmussens in the amount of \$85,000.00 on August 11, 2004. HRA App. 49 – HRA App. 50. The Rasmussens also received an additional \$21,600 for the value of fixtures left at their former premises. *See* September 22, 2004 Order. To date, the Rasmussens have not documented any further claims for relocation expenses. HRA App. 48.

## ARGUMENT

### SUMMARY OF ARGUMENT

The judgment should be affirmed in all respects. The trial court, in finding that St. Anthony HRA had the power to proceed with this condemnation, impliedly recognized the unanimous authority holding that a sovereign entity, acting as a condemnor, does not breach the covenant of quiet enjoyment in a lease when it condemns the property which is subject to that lease. That disposes of the Contract Action. It also negates the Rasmussens' argument in the Condemnation Action that the specific Lease provisions governing condemnation should somehow be disregarded because of St. Anthony HRA's supposed "breach" of the Lease.

Under the condemnation provisions of the Lease, it is absolutely clear that the Rasmussens contracted for precisely this outcome: They received moving expenses and

the value of personal property and fixtures, but not value of the leasehold itself. They are getting nothing less than what they bargained for, and are entitled to nothing more.

The Rasmussens' reliance on the covenant of quiet enjoyment has one glaring and fatal problem: It *assumes* that a condemnation breaches that covenant, when the opposite is true. All of the authorities, case law and treatises, agree that the covenant of quiet enjoyment is not breached by a condemnation. A governmental entity's power to take private property for a public purpose cannot be limited by contract.

There is no question about the public purpose of this condemnation. Thus, it is wrong to say that St. Anthony HRA is acting simply to benefit Wal-Mart or a private developer. The converse is true. The development, in which the developer and Wal-Mart are participants, benefits the citizens of the city of St. Anthony. The St. Anthony HRA made that determination, and the district court expressly adopted it.

Because of the sovereign's power to take property in the public interest, it is understood that no landlord can or does covenant to protect a tenant from an eminent domain taking. As the case law makes clear, the coincidental fact that St. Anthony HRA is both condemnor and landlord in this matter does not change that outcome at all. Regardless of the identity of the landlord, the covenant of quiet enjoyment simply does not apply to eminent domain takings. The landmark *Goodyear Shoe* case (cited with approval by the Minnesota Supreme Court) expressly so holds, as do all later cases which expressly address the subject. The Rasmussens' case law simply deals generally with the

government's obligation to live up to its contracts. That is certainly true as a general proposition, but no contractual undertaking has been violated here, because the covenant of quiet enjoyment does not affect condemnation. Once that is clear, the Contract Action is, of course, properly dismissed.

In the Condemnation Action, the issue is what compensation, if any, is due to the Rasmussens. Where a leasehold is condemned, the terms of the lease are critical in allocating compensation between the tenant and landlord. So-called "condemnation clauses," which are common in commercial leases, are universally recognized as binding. Such clauses take two primary forms: (1) assigning a condemnation award, or a portion thereof, to the landlord; and (2) terminating the lease in the event of condemnation. The Lease here contains *both* clauses, and *either* is sufficient to bar the Rasmussens' claim.

Under the allocation provisions of this Lease, as the trial court recognized, the Rasmussens' have agreed they have no claim for the value of their leasehold. They specifically contracted that such an award would be the property of the landlord in "any" condemnation, and expressly waived any right to such an award.

The Rasmussens' response, with its highly strained and unconvincing parsing of the definitions of "total" and "partial" takings in the Lease, essentially argues that this was neither a total nor a partial taking, and therefore presumably not a "taking" at all. That is of course patently absurd, as the trial court recognized. The allocation clause of the Lease alone resolves this issue in St. Anthony HRA's favor.

Alternatively, this Court can affirm the ruling in the Condemnation Case based on the termination provisions of Article 17 of the Lease. Although the trial court did not make a ruling on that issue, it is clear that this condemnation constitutes a “total” taking, which terminates the Lease. A total taking is one which takes all of the Rasmussens’ “Premises,” which this taking clearly does, by condemning all of the Rasmussens’ interest in the property. The fact that the fee interest was already held by the condemnor, and therefore not subject to condemnation, does not affect the *totality* of the taking from the Rasmussens’ perspective. Both the language of the Lease and case law from other jurisdictions addressing this very point confirm that taking an entire leasehold is a “total” taking for purposes of a condemnation clause. Even without the allocation provisions of Article 17, the termination provisions operate here to terminate the Lease.

Finally, the Rasmussens’ contention that they are unfairly being left with “nothing” from this condemnation are simply not true. The Rasmussens are getting what they contracted to receive, and that is substantial compensation. They received over \$106,000 for relocation expenses, personal property and fixtures. The one thing they are not getting is the one thing they expressly contracted not to get, leasehold damages. There is no unfairness here, and any contrary result would be contrary to the parties’ agreement and unfair to the people of the City of St. Anthony.

#### **STANDARD OF REVIEW**

The Rasmussens’ brief accurately sets forth the standard for review of a grant of

summary judgment. It should also be noted that the Rasmussens do not contend that any material facts are in dispute here, nor do they supply any evidence which would be sufficient to create such a dispute.

## ARGUMENT

### **I. The HRA Did Not Breach the Lease When it Condemned the Rasmussens' Leasehold Interest.**

#### **A. Introduction.**

The HRA did not breach the Lease when it condemned the Rasmussens' leasehold interest. Virtually all authority on the subject supports the HRA's position that a taking under the power of eminent domain does not breach a covenant of quiet enjoyment. Also, when the HRA assumed the Lease with the Rasmussens, the HRA did not forfeit its governmental power and eminent domain authority, nor could it lawfully bargain away those powers. All private contracts, including the Lease, are subject to, and must yield to, the government's power of eminent domain.

The Rasmussens have provided no law to support their argument that the HRA's condemnation of their leasehold interest breached the Lease. Therefore, this Court should affirm the trial court and dismiss the Rasmussen's breach of contract claim.

#### **B. A taking under the power of eminent domain does not breach a covenant of quiet enjoyment.**

The Rasmussens claim that the HRA breached the "covenant of quiet enjoyment" under the Lease when the HRA condemned their leasehold interest in the Property is

contrary to an abundance of authority and should be rejected. A claim for breach of the covenant of quiet enjoyment contemplates an action by an adverse party claiming superior title to property. *See Efta v. Swanson*, 115 Minn. 373, 376, 132 N.W. 335, 336 (1911). That is not the situation in this case. This case involves the exercise of the HRA's sovereign power of eminent domain, which the courts have consistently ruled does not breach the covenant of quiet enjoyment.

The general rule is that "a lease implies a covenant of quiet enjoyment. The [implied] covenant is to the effect that the tenant shall have quiet and peaceful possession, as against the lessor or anybody claiming through or under the lessor or anybody with a title superior to the lessor." 3 *Friedman on Leases*, § 29:2.1 (5th. Ed. 2004). However, if a lease contains an express covenant of quiet enjoyment, that express covenant "has the effect of superseding and nullifying the covenant that would be implied in its absence, thus leaving the tenant with only such protection as is given him by the express covenant." *Id.* § 29:2.2.

Minnesota case law has historically defined a breach of the covenant of quiet enjoyment as a case where "outstanding superior title is asserted in hostility to the title of the covenantee."<sup>1</sup> *Roseville Properties Management Co. v. DiMed Corp.*, No. C8-93-2501, 1994 WL 396350 (Minn. Ct. App. Aug. 2, 1994) (unpublished opinion) (citing *Efta*, 115 Minn. at 376; 132 N.W. at 336) (HRA App. 52 – HRA App. 54); *Miles v. City*

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<sup>1</sup> Many of the Minnesota cases do not specify whether the covenant at issue was implied or express. In this case, the Lease contains an express covenant, which, if anything, grants the Rasmussens less rights than an implied covenant.

of *Oakdale*, 323 N.W.2d 51, 57 (Minn. 1982) (where property owners claimed breach of covenants of warranty deed when city allegedly diverted water onto owners' property, court held that covenant of quiet possession applies to adverse claims on title, but does not apply to trespass or actions of wrongdoing by third parties).

The taking of leasehold property under the power of eminent domain is not a breach of the covenant of quiet enjoyment. *Friedman*, § 29:2.1 (citing *Goodyear Shoe Mach. Co. v. Boston Terminal Co.*, 57 N.E. 214 (Mass. 1900); 1 *American Law of Property* § 3.54 (1952); 15 *S. Williston Contracts* § 48:10 (4th. ed. 2000)<sup>2</sup>; 1 *H. Tiffany Landlord and Tenant* § 79, at 526 (1910)); see also 1 *H. Tiffany The Law of Real Property* Ch. 5, § 92 (3rd. ed. 1939) (The covenant of quiet enjoyment does not “extend to the acts of the state, or of an agency of the state, acting in the exercise of the right of eminent domain or of the police power.”) Rather, “[i]t is an exercise of sovereign power, which provides for compensation for the lost term.” *Friedman, supra* (recognizing, however, that “most leases deprive a tenant of compensation in condemnation for a lost term”).

“The interference with the tenant’s possession [caused by a taking of the leased premises by eminent domain] is not due to any defect in the lessor’s title. . . . *Where there is a total eviction by a taking of the fee under eminent domain, the effect is to terminate the lease.* The legal theory is that the acquisition by the condemnor of . . . the leasehold

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<sup>2</sup> Citing cases holding that restrictions imposed by the police power of the state will not amount to a constructive eviction, in violation of the covenant of quiet enjoyment. See *Dillon-Malik, Inc. v. Wactor*, 728 P.2d 671 (Ariz. Ct. App. Div. 2 1986) (no breach arose from city’s insistence that tenant comply with the zoning code).

results in a merger, completely extinguishing the lease and any obligations thereunder.” *American Law of Property*, § 3.54 (emphasis added) (citing *P.J.W. Moodie Lumber Corp. v. A.W. Banister Co.*, 190 N.E. 727 (Mass. 1934); *Corrigan v. City of Chicago*, 33 N.E. 746 (Ill. 1893)).

The California Court of Appeals, in a factually similar case, ruled that a city’s condemnation of a leasehold interest did not constitute a breach of the lease, and therefore, the lessee was not entitled to recover contract damages. *See City of Glendale v. Giovanetto Enterprises, Inc.*, 18 Cal.App.4th 1768, 23 Cal.Rptr.2d 305 (1993). In that case, the City of Glendale leased a city-owned building to a private party for 20 years under a lease that provided for specified damages should the city terminate the lease prematurely. After five years, the city filed an eminent domain action to take the balance of the lessee’s leasehold interest. The lessee cross-complained for damages for breach of contract. The issue in the case was whether a public-entity lessor in a lease with a minimum fixed term may be liable for breach of contract for exercising its power of eminent domain over the leasehold interest prior to the expiration of the term. The court answered in the negative, emphasizing that parties are presumed to contract in contemplation of the inherent right of the state to exercise the eminent domain power:

The contractual commitments assumed by the City under the lease were entered into in its proprietary capacity as the owner of the property involved. Its agreement not to terminate the lease for a fixed period of time was a legal and binding commitment; but it says nothing about the exercise of its sovereign and governmental authority to condemn the leasehold. . . In our view, *the promise made as lessor cannot result in the loss of a proper*

*governmental power.* There are two reasons for this. First, such a promise cannot be implied and, second, even if we were to do so, it could not be enforced, as a governmental entity may not contract away its sovereign authority. . .

The foregoing principles compel us to conclude that GEI's lease did not contractually restrict the City's authority to condemn GEI's leasehold interest. Put another way, *the City had no contractual obligation to refrain from exercising its power of eminent domain. Therefore, the City's condemnation of GEI's leasehold interest did not constitute a breach of the lease, and GEI is not entitled to recover contract damages.*

*Id.*, 18 Cal.App.4th at 1777-80 (emphasis added).

Applying the same the rationale as the court in *Giovanetto*, other courts have also held that the exercise of the power of eminent domain does not breach the covenant of quiet enjoyment—a covenant that goes only to the lessor's title and does not warrant against the exercise of the sovereign's power:

A covenant of quiet enjoyment is not breached by the landlord when the tenant is evicted by the sovereign's exercise of its power to take by eminent domain, inasmuch as *such a covenant goes only to the lessor's title, and does not warrant against those fundamental liabilities to action on the part of the sovereign power which lie behind all private titles.* The rights of the lessee in the land owned by the lessor are held as the property of all citizens is held, subject to the exercise of the power of eminent domain and *the exercise of that power by the sovereign does not constitute a breach of the covenant of quiet enjoyment by the landlord.*

*Dolman v. U.S. Trust Co. of New York*, 157 N.Y.S.2d 537 (N.Y. 1956) (emphasis added) (citing *Goodyear Shoe Co.*, *supra*); see also *Flower v. Town of Billerica*, 87 N.E.2d 189 (Mass. 1949) (citing *Goodyear*, court held that “[t]he exercise of the sovereign power to take by eminent domain is not a breach of any of the ordinary covenants . . .”).

The fact that the condemning authority is also the landlord does not change the conclusion that condemnation is not a breach of the lease. *See Giovanetto* (condemnation initiated by city landlord). In *Goodyear Shoe*, the condemnor owned the underlying fee and sought to condemn the leasehold. The tenant claimed breach of the covenant of quiet enjoyment, which the court rejected:

But the sovereign power to take by eminent domain is not an incumbrance, and the exercise of the power is not a breach of any of the ordinary covenants. . . It follows that it cannot matter that the person who sets the delegated sovereign power in motion is the landlord. *The exercise of that power has not been covenanted against.*

57 N.E. at 215 (emphasis added); *see also In re Real Property Located at 196 Plandome Road*, 353 N.Y.S.2d 142, 143 (N.Y.Sup.Ct. 1974) (“The fact that the petitioner is also the landlord does not negate its right to exercise the power of Eminent Domain”); 2 *Friedman* § 13:1 at 13-4 (“A government landlord is not in breach of contract when it exercises eminent domain rights to terminate a lease.”). *Cf. Summers v. Midland Co.*, 209 N.W. 323, 324 (Minn. 1926) (in case involving covenants in contract for deed covering land subject to condemnation, Court held that “[n]o person is presumed to covenant against the acts of sovereignty.”)

In a futile attempt to distinguish *Giovanetto*, the Rasmussens point out that the city in *Giovanetto* paid just compensation to the tenant for the leasehold and that the HRA in this case is attempting to deprive them of a claim for just compensation. Whether the tenant in *Giovanetto* received condemnation damages, however, is not relevant to the

issue of a tenant's entitlement to breach of contract damages. In *Giovanetto*, the tenant's eminent domain recovery was governed by other terms of the lease (which contained no condemnation clause such as that found here), not the covenant of quiet enjoyment. The *Giovanetto* court held that the tenant was *not* entitled to breach of contract damages. The Rasmussens not only take the *Giovanetto* court's discussion of just compensation out of context, but they also incorrectly merge their claims for condemnation damages and contract damages. The court in *Giovanetto* clearly held that those claims were independent of each other. Whatever rights the Rasmussens have to condemnation damages must be determined by analyzing the provisions in Article 17 of the Lease, not the covenant of quiet enjoyment in Article 29A.

In Article 29A, the original owner of the property covenanted that "it and no other person or corporation, has the right to lease the Premises." (HRA App. 27) The owner also covenanted that the tenant would "have peaceful and quiet use and possession of the Premises without hindrance on the part of the Landlord, and Landlord shall warrant and defend Tenant in such peaceful and quiet use and possession." (HRA App. 27) When the HRA assumed the Lease, the HRA, as Landlord, assumed the obligation to comply with that provision. In doing so, the HRA did not agree, however, to relinquish or diminish its powers of eminent domain. The HRA's act of condemning the Rasmussens' leasehold interest in the Property was not an act by the HRA as Landlord. Rather, the HRA's condemnation action was in its capacity as a government body with the powers of

eminent domain. As such—and as supported by an overwhelming amount of authority—the condemnation was not a breach of the covenant of quiet enjoyment.

**C. The Lease was subject to the HRA’s power of eminent domain.**

The Rasmussens argue that, under basic contract law, the HRA must provide them with quiet use and possession of the property until the end of the Lease term. The HRA does not dispute that it, like other government entities, is obligated to keep its contractual commitments. However, as already noted, when the HRA condemned the Plaintiffs’ leasehold, the HRA was not acting in its capacity as a party to the Lease. The HRA was exercising the power of eminent domain in its capacity as a government body, separate from its role as Landlord under the Lease. Because the HRA had no contractual obligation to refrain from exercising its power of eminent domain and private contract rights are subordinate to the government’s power of eminent domain, the Rasmussens’ breach of contract claim has no merit.

**1. The HRA cannot bargain away its powers of eminent domain.**

The Minnesota Supreme Court has held that private contract rights are subordinate to the powers of eminent domain and that the future use of eminent domain powers cannot be bargained away:

The contract . . . while now in effect, must yield if rights now withheld by it should be acquired by defendant through condemnation proceedings. . . Public service corporations hold the powers of eminent domain which the state has granted to them for the public interest which requires that such powers remain unfettered by the contracts of the holders. Boards of directors cannot bargain away the right of the future to such improvements

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<sup>3</sup> In fact, the Lease expressly provides that it will automatically terminate if the premises are taken in condemnation.

as progress and changing conditions demand. . . [I]t is beyond the powers of public and private corporations effectually to contract that in the future no resort shall be had to the power of eminent domain to enlarge rights given by contract.

*Village of St. Louis Park v. Minneapolis, N. & S. Ry. Co.*, 156 Minn. 164, 168-69, 194 N.W. 327, 329-30 (1923) (citations omitted). Similarly, the Connecticut Supreme Court, relying on long-standing precedent, upheld the fundamental rule that all contracts are subject to the eminent domain power and that parties are presumed to know this when entering into a contract:

It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the existence of government. But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws . . . of the community to which the parties belong . . . Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain.

*Bradley Facilities, Inc. v. Burns*, 551 A.2d 746, 750-51 (Conn. 1988) (quoting *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532-33, 12 L.Ed. 535 (1848)); see also *Flower*, 87 N.E.2d at 191 (private individuals cannot effectively contract that property will not be taken by eminent domain); *In re Real Property Located at 196 Plandome Road*, 353 N.Y.S.2d at 143 (“This power [of eminent domain] . . . is given to the Town to be used when the public necessity requires and private contractual relationships cannot stand in the way.”); *Giovanetto*, 23 Cal.Rptr.2d at 312-13 (holding that “the City, as a

governmental entity, could not in any event abridge by contract its sovereign authority to take property by eminent domain”; every contract is subject to the law of eminent domain); *Goodyear Shoe*, 57 N.E. at 215 (the exercise of the sovereign power has not been covenanted against).

When the HRA purchased the Property subject to the Lease, the HRA did not, nor could it, contract or bargain away its power of eminent domain. Nothing in the Lease impliedly or expressly abrogates the HRA’s eminent domain powers and, in fact, the opposite is true. The Lease expressly contemplates the possibility of condemnation and addresses how, if at all, the tenant would be compensated. As parties to a private contract, the Rasmussens are presumed to know that the obligations in the Lease are subject to, and must yield to, the power of eminent domain.

**2. The contract cases relied upon by the Rasmussens do not apply.**

The Rasmussens contend that the HRA, like any other party to a contract, should be held accountable for its contractual obligations. The HRA does not dispute this, and has never claimed that it is exempt from the basic principles of contract law. The Rasmussens argument misses the point. None of the cases they cite in their brief involve the situation of a government body’s exercise of the power of eminent domain, or whether the exercise of that power constitutes a breach of contract.

The primary case upon which the Rasmussens rely—*Farmer’s Electric Cooperative, Inc. v. Missouri Department of Corrections*, 977 S.W.2d 266 (Mo. 1998)—is easily

distinguishable and, if anything, supports the HRA's position in this case. In *Farmer's Electric*, a rural electric cooperative entered into a 20-year contract with the Department of Corrections to provide electric service to the Department's facilities, which were located outside of the city limits and therefore within the electric cooperative's service territory. Eight years after entering into the contract, the Department signed a petition requesting that the property be annexed into the city. The annexation petition was ultimately granted, which meant that the electric cooperative could no longer furnish electricity to the Department's facilities because by state law the cooperative could not operate within a city.

The Department argued that it did not violate the contract because "annexation is a valid exercise of the police power" and "Farmers' contractual rights are subject to the exercise of this power." *Id.* The court disagreed, finding that the Department's act of *requesting* annexation did *not* involve an exercise of the police power and was not a "sovereign act" because "requesting annexation is not a power unique to the state." *Id.* In concluding that the Department's act of requesting annexation breached the contract, the court clearly distinguished *requesting* annexation from the annexation itself. The court found that the act of annexation "is part of the municipal police power" and that power belonged to the city, not to the Department. *Id.*

In their analysis of *Farmer's Electric*, the Rasmussens ignore the crucial portion of the court's legal analysis. In *Farmer's Electric*, the court held that the Department of Corrections' action in requesting annexation "did not involve an exercise of police power"

and “was not a sovereign act.” *Id.* In this case, the HRA’s exercise of eminent domain was an exercise of its police power and was a “sovereign act” because eminent domain is a power unique to governmental bodies. If the city had been the party to the contract in *Farmer’s Electric* and subsequently exercised its annexation authority, the court clearly would have concluded that the city had not breached the contract. Unlike the Department in *Farmer’s Electric*, the HRA acted pursuant to its police powers and sovereign authority. That distinction is crucial, and the Rasmussens completely ignore it.

The HRA was lawfully and officially acting in its capacity as a government body when it initiated condemnation. That act did not violate the Lease.

**3. Under the principles of the “sovereign acts” doctrine, the HRA’s exercise of eminent domain did not breach the Lease.**

Although typically applied to acts by the federal government, the principles of the sovereign acts doctrine are helpful to show that the HRA’s exercise of its eminent domain power did not violate any contractual obligations. The Rasmussens argue that the principles underlying the sovereign acts doctrine do not apply because the HRA’s condemnation was directed at avoiding its contractual obligations under the Lease. However, the case law relied upon by the Rasmussens supports the HRA’s position that the exercise of the power of eminent domain was a sovereign act and did not breach the Lease.

“The sovereign acts doctrine is an affirmative defense under which the United

States, when sued as a party to a contract, cannot be held liable 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) (emphasis added).

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. Otherwise, the Government could avoid any contractual obligation simply by enacting legislation.” *Id.* (citation omitted).

In order for the government to successfully assert the sovereign acts doctrine, it must show that its actions were general acts *as a sovereign*, taken for the public good. The sovereign acts doctrine does not apply “when the Congress instead targets the government’s contractual obligations in an effort to obtain a better deal.” *Cuyahoga Metropolitan Housing Authority v. U.S.*, 57 Fed.Cl. 751, 772 (2003).

In *Allegre Villa*, the case relied upon by the Rasmussens, the Court found that the government’s actions did not constitute a protected sovereign act and thus, a breach of contract had occurred. *See* 60 Fed.Cl. at 16. In that case, several property owners sued the United States for breach of contract when Congress amended legislation directly aimed at restricting the property owners’ rights to prepay their mortgages with the Farmers Homes Administration (“FmHA”). The owners had prior loan agreements that allowed them to prepay their mortgages. Congress had adopted the later statutes when it realized that the increased frequency of prepayments by property owners was threatening

the loan program goal of providing discounted housing. In finding that the federal government breached the prior mortgage agreements, the Court held that the adoption of the later statutes was not a sovereign act, but rather, “specifically targeted FmHA agreements with section 515 program borrowers.” *Id.* at 16; *see also Sunswick Corp. of Delaware v. U.S.*, 75 F.Supp. 221 (Ct.Cl. 1948) (holding that directive order of wage adjustment board compelling contractor to pay higher wages was not “act of sovereign” where order was issued on a particular job by one agency of the government).

When the government exercises a true sovereign power for the public good, its actions do not constitute a breach of contract, even if the effect of the sovereign act is that a private party’s contractual interests are injured. *See Horowitz v. U.S.*, 267 U.S. 458, 45 S.Ct. 344 (1924) (dismissing breach of contract claim and holding that government was not liable for damages for delivery of silk under contract where delay in delivery was caused by embargo; “[t]hrough their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants”).

A point that the Rasmussens fail to make is that the exercise of the power of eminent domain is one of the “sovereign powers” protected under the sovereign acts doctrine:

[T]he sovereign powers that are protected by the [unmistakability]<sup>4</sup> doctrine share features with the acts covered by the sovereign acts doctrine. These

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<sup>4</sup> The *Cuyahoga* court described the “unmistakability doctrine” and the “sovereign acts” doctrine as being essentially the same. The “unmistakability doctrine” begins with the general rule that “when the United States enters into contract relations, its rights and duties therein are generally governed by the law applicable to contracts

powers are . . . those that could otherwise affect the Government's obligation under the contract, exhibiting . . . unique features of sovereignty . . . those that . . . [are] described as needful for the public good and according to the sampling of the opinions, include the police and taxing powers, *the power of eminent domain* and of navigational servitude.

*Cuyahoga Metropolitan Housing Authority*, 57 Fed.Cl. at 772 (citations omitted)

(emphasis added).

The Rasmussens assert that the HRA's condemnation action is not protected under a sovereign acts analysis because the condemnation was simply a means for the HRA to satisfy its contractual obligation in the redevelopment agreement and because they were the only named respondents in the condemnation petition. However, under the court's rationale in *Allegre Villa*, the HRA's condemnation action was indeed an exercise of a "sovereign power" that did not breach the Lease. The Rasmussens' arguments ignore the nature and purpose of the HRA's condemnation. Unlike Congress' acts in *Allegre*, which were done solely for the purpose of protecting the federal government's interests in the loan agreement, the HRA did not condemn Plaintiffs' leasehold in an effort to get a better deal for the HRA under the Lease. The condemnation, rather, was one piece of an overall redevelopment project undertaken by the HRA for the public purpose of

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between private individuals. This general precept, however, ordinarily is not viewed as limiting the government's sovereign powers. Sovereign power . . . governs all contracts subject to the sovereign jurisdiction, and will remain intact *unless surrendered in unmistakable terms.*" *Cuyahoga*, 57 Fed.Cl at 763 (emphasis added). "[T]he orbit of this doctrine significantly intersects that of the sovereign acts doctrine—both apply when the Congress acts to protect public safety, morals or the economy; neither applies when the Congress instead targets the government's contractual obligations in an effort to obtain a better deal." *Id.* at 774.

improving and revitalizing a blighted area of the city.<sup>5</sup> Because the condemnation was a sovereign act by the HRA in its capacity as a government entity (and not in its capacity as the Landlord), it did not breach the HRA's obligation in the Lease. The Rasmussens have provided no authority holding otherwise and, therefore, the dismissal of their breach of contract claim should be affirmed.

**II. In The Condemnation Case, The Trial Court Correctly Enforced The Condemnation Clause Allocating Any Leasehold Damages To The Landlord.**

Once the covenant of quiet enjoyment is dealt with, a large part of the dispute in the Condemnation Case falls away. The arguments set forth at pp. 10-20 of the Appellants Brief in Case No. A05-1419 all assume that the covenant was breached, which it clearly was not. However, the Rasmussens also argue that they can make a leasehold advantage claim<sup>6</sup> even under the language of Article 17 of the Lease, and that "public policy" supports their claim. None of these arguments are availing.

**A. The Rasmussens are bound by the Lease's condemnation clause.**

The Rasmussens' rights in condemnation are governed by the Lease. In Minnesota, the enforceability of lease "condemnation clauses" has been recognized since at least 1929. *See In re Widening Third Street in City of St. Paul*, 228 N.W. 162, 163

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<sup>5</sup> In fact, the trial court, in the Condemnation Action, found that "the acquisition of the Property Right by the exercise of the power of eminent domain . . . serves a public purpose and is necessary to further the objectives of and is consistent with the Redevelopment Plan. The acquisition of the Property Interest will further increase the tax base and generally provide for the health, safety, morals and welfare of the citizens of the City of St. Anthony." August 13, 2004, Findings of Fact, Conclusions of Law, Order Granting Petition and Appointing Commissioners.

<sup>6</sup> A tenant makes a "leasehold advantage" claim when his rent is lower than a market rate, under a theory that the new premises he will rent will be more costly.

(Minn. 1929). Recently, the Minnesota Supreme Court reaffirmed the enforceability of condemnation clauses in *Housing and Redevelopment Authority of City of St. Paul v. Lambrecht*, 663 N.W.2d 541, 546 (Minn. 2003) (“a lease agreement containing what is commonly referred to as a ‘condemnation clause’ may further determine the rights of the tenant in the event of a condemnation.”) The United States Supreme Court agrees. *United States v. Petty Motors*, 327 U.S. 372, 376 (1946); *see also*, *City of Manhattan v. Galbraith*, 945 P.2d 10, 14 (Kan. App. 1997) (Tenant’s condemnation rights “can be waived by agreement such as in the present case”); *Van Asten v. State of Wisconsin*, 571 N.W.2d 420, 423 (Wis. App. 1997) (“We hold that the condemnation clause is controlling”); *Bajwa v. Sunoco, Inc.*, 320 F.Supp.2d 454, 461 (E.D. Va. 2004) (“It is well established that, in cases of condemnations, the landlord and tenant may modify the division of any condemnation award through their own private agreement.”)

As the Minnesota Supreme Court noted in *Lambrecht*, there are two principal types of condemnation provisions: (1) clauses which terminate the lease in the event of a condemnation; and (2) clauses which assign some or all of the tenant’s rights to a condemnation award to the landlord and/or waive the tenant’s right to make a claim for leasehold damages. 663 N.W.2d at 546. *Both* types of clauses are contained in the Lease in this case, and *either* clause is sufficient to bar the Rasmussens’ claims for the loss of their leasehold interest.

**B. In the event of “any taking,” the Rasmussens expressly agreed that they had no right to a condemnation award for their leasehold.**

Article 17E of the Lease directly addresses the allocation of condemnation damages as between the landlord and the tenant, and clearly and explicitly bars the Rasmussens from *any* award for the loss of their leasehold.

**1. The Lease expressly contemplates a possible condemnation by “any” condemning authority.**

The Rasmussens argue that the Lease does not contemplate a condemnation by a governmental body which is also the landlord. In fact, the Lease clearly allows for both assumption of the Lease by a condemnor and for a subsequent taking by that entity.

Article 17, entitled “Condemnation,” includes sweeping, all-inclusive definitions of both “Condemnation” and “Condemnor.” Condemnation is defined as including “the exercise of *any* governmental power, whether by legal proceedings or otherwise, by a Condemnor.” Art. 17A(1) (emphasis added). “Condemnor” in turn is defined as “*any* public or quasi-public authority . . . having the power of condemnation.” Art. 17A(4) (emphasis added). The St. Anthony HRA is a public authority which possesses the power of eminent domain, and it is thus a “Condemnor” within the meaning of Article 17. This proceeding is certainly the exercise of governmental power by the Condemnor, and thus is a Condemnation. Thus, the Lease provides not only for condemnation, but for condemnation by the St. Anthony HRA, which is indisputably a “public or quasi-public authority” and indisputably has “the power of condemnation.”

The Lease also recognizes the possibility that a Condemnor might become the landlord under the Lease. It provides for assignment from the original landlord to *any* other potential landlord in the world. It provides, in Article 16B, that “Landlord’s rights to assign this Lease are and shall remain unqualified.” Thus, the Lease recognizes that *any* condemnor may condemn this property, and that *any* person or entity may become the Landlord under the Lease. Nothing in the language of the Lease indicates that a condemnor cannot assume the Lease, or that St. Anthony HRA cannot condemn the property, or that it loses that power of condemnation if it becomes the Landlord. Nothing in the Lease purports to alter the provisions of Article 17 if the landlord and the condemnor happen to be the same entity.

The Rasmussens’ reliance on the alternate definition of “Condemnation” in Article 17A (a voluntary sale under threat of condemnation) is unpersuasive, since the definition expressly provides that *either* a governmental proceeding (such as this) *or* a sale can constitute a “Condemnation.” This proceeding clearly satisfies the first half of the definition, and need not satisfy the second.

Moreover, the question of what was “contemplated” is not relevant, where the language of the Lease is clear. The Rasmussens do not contend that the Lease is ambiguous, nor could they. What they may have subjectively contemplated cannot change the plain language of a contract, and in fact there is no evidence that they ever specifically contemplated the issue of a condemnation in which their landlord was also

the condemnor.

Finally, the Rasmussens do not suggest that they were unaware of the language of Article 17 when they entered into the Lease, or that they have any other basis for claiming that it is not part of their contract. Terms such as this are common and enforceable, and they reflect the underlying economic bargain made by the landlord and the tenant. The Rasmussens could have tried to negotiate a more favorable condemnation clause, but perhaps would have had to give up concessions elsewhere in the Lease, such as a higher rent. By signing the Lease, they elected not to do that; they made a bargain which included no damages for the loss of their leasehold in the event of a condemnation. They must be held to their agreement.

2. **The provisions of Article 17E bar any leasehold claim.**

Given that this proceeding fits cleanly into the Lease's definition of a "Condemnation," the parties' agreement with respect to a leasehold advantage claim is crystal clear: "The Award for *any taking* shall be the *sole property* of Landlord." (Emphasis added.) HRA App. 22. "Award" is defined as "all compensation, sums, or anything of value awarded, paid or received on a total or partial condemnation." *Id.* Article 17E continues by providing that the tenant "*waives any right* it may have with respect to the *loss of its leasehold interest* in this Lease." (Emphasis added.) *Id.* This language leaves no room for dispute as to its intent.

Unlike the termination language discussed below, the language of Article 17E

does not depend upon the type of taking at issue; it explicitly applies to “any” taking. The waiver language is similarly expansive-the tenant waives “any” rights regarding the loss of its leasehold interest. No one disputes that the current condemnation proceeding is a “taking” or that the Rasmussens are attempting to claim precisely the type of right they waive in Article 17E, *i.e.*, damages for “the loss of [their] leasehold interest.”

Nor is there any doubt that, as noted above, condemnation clauses are fully enforceable. That rule specifically applies to clauses allocating a condemnation award or waiving the tenant’s right to claim damages. The Minnesota Supreme Court in *Lambrecht*, although specifically dealing with a lease termination condemnation clause, cited with approval an ALR annotation noting that condemnation clauses can provide “that some or all of the tenant’s rights are assigned to the landlord.” 663 N.W.2d at 546 (citing Jay M. Zitter, *Validity, Construction And Effect Of Statute Or Lease Provision Expressly Governing Rights And Compensation Of Lessee Upon Condemnation Of Leased Property*, 22 ALR 5<sup>th</sup> 327, 350 (1994)).<sup>7</sup> The leading treatise on the subject also explicitly recognizes the right of parties to allocate the condemnation award:

Where the lease provides for the allocation of the condemnation award, it will be given effect. For example, where a lease provision exists by which the tenant expressly waives compensation and apportionment in the event of condemnation, the tenant will not be permitted to recover against his landlord.

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<sup>7</sup> Because of other issues in the case, the *Lambrecht* decision is comprised of a main opinion joined in by three justices, with three other justices concurring in the result. All of the opinions, however, approve of the main opinion’s discussion of condemnation clauses.

7A Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain*, § 11.05[3] at 11-24 (Rev. 3<sup>rd</sup> Ed. 1999).

It is clear that such allocation clauses are enforceable regardless of whether lease termination language is present or applies to the situation. In *Cooney Brothers, Inc. v. State of New York*, 276 N.Y.S.2d 337 (N.Y.A.D. 1966), the condemnation clause provided only that the lessor was to receive the condemnation award; there was no lease termination language. Nonetheless, the court regarded that as the “most easily disposed of issue” in the case, because it was “clear” that such an agreement means that “the lessee has no claim for injury to his leasehold interest.” *Id.* at 339.

Courts around the country overwhelmingly agree that award allocation clauses such as the one found in this Lease cut off any right for the lessee to recover for the leasehold. *See, e.g., McGregor v. Board of Regents of the University System of Georgia*, 548 S.E.2d 116, 118 (Ga. App. 2001) (affirming summary judgment in favor of a condemnor and against lessee where “the contract language is clear that (1) McGregor waived his right to seek condemnation proceeds from the condemnor and (2) he assigned to NationsBank any condemnation proceeds paid for his leasehold interests”); *Bi-State Devel. Agency of the Missouri-Illinois Metro. Dist. v. Nikodem*, 859 S.W.2d 775, 781 (Mo. App. 1993) (“Where the lease expressly makes provision for distribution of the proceeds, the lease is controlling”); *Traendly v. State of New York*, 51 A.D.2d 489, 492 (N.Y.A.D. 1976) (Reversing trial court which failed “to give proper consideration to the

condemnation clauses in the lease in apportioning the damages between landlord and tenant . . . The court hearing the condemnation proceeding must divide the award according to the terms of the agreement”); *Jersey City Redevelopment Agency v. Exxon Corp.*, 504 A.2d 1207, 1209-10 (N.J.A.D. 1986) (Enforcing waiver of leasehold damages by tenant and noting that such waivers “are commercially common and normally enforceable”); *Direct Mail Services, Inc. v. Best*, 729 F.2d 672, 675 (10<sup>th</sup> Cir. 1984) (Upholding apportionment clause and noting that where parties have contracted for the apportionment, “the apportionment of that amount among persons claiming a share thereof is not the concern of the State”); *State of Washington v. Farmer’s Union Grain Co.*, 908 P.2d 386, 389-90 (Wash. App. 1996) (Enforcing contractual allocation clause).

The parties here were very clear on how a condemnation award was to be allocated; it was to be the “sole property” of the landlord (which is now St. Anthony HRA), and the tenant waived “any rights” with respect to the leasehold. Those provisions are clear and enforceable.

**C. This condemnation is a “total” taking and terminates the Lease.**

The Rasmussens also argue that the lease termination provisions of Article 17B do not apply, because this condemnation is not a taking of “all of the Premises.” As shown above, the Court need not even reach this issue, since 17E clearly negates the Rasmussens’ purported claim, but the Lease termination language of 17B provides a second, independent ground for rejecting the Rasmussens’ claim. This is indeed a taking

of “all of the Premises” and thus terminates the Lease.

1. **Where the lease is terminated by a condemnation clause, the lessee has no leasehold-related damages.**

Article 17B provides that if there is a taking of “all of the Premises,” then “this Lease shall be terminated automatically.” HRA App. 21. It is clear that such a termination cuts off any damages to the tenant for loss of the leasehold. *See Lambrecht*, 663 N.W.2d at 547 (noting that Minnesota has “adopted the general rule that if a tenant agrees to a lease clause that automatically terminates a lease at the time of condemnation, ‘the tenant has no right which persists beyond the taking and can be entitled to nothing;’”); *Korengold v. City of Minneapolis*, 95 N.W.2d 112, 115 (Minn. 1959) (holding that a lease termination clause left the tenant “without a compensable interest in the condemned premises.”) A lease termination clause, once triggered, leaves the tenant with no compensable leasehold interest in the property.

2. **Leasehold condemnations trigger termination clauses.**

The Rasmussens argue that the termination clause is not triggered here because only the leasehold interest is being condemned, not the underlying fee interest, which St. Anthony HRA already owns. They contend that this cannot be a “total” taking, because only the leasehold is being condemned, not the fee. In fact, the law has addressed this situation and resolved it directly contrary to the Rasmussens’ argument.

While leasehold-only condemnations are less common than fee takings, cases have

analyzed similar termination language in the context of a leasehold-only taking and determined that it does indeed trigger the termination of the Lease.

In *Bradley Facilities, Inc. v. Burns*, 551 A.2d 746 (Conn. 1988), the state of Connecticut leased property to a tenant. When the state determined that it needed to condemn the leasehold interest, the tenant claimed damages for value of the leasehold, while the state contended that condemnation triggered a clause which terminated the lease in the event of a condemnation of “the entire Demised Premises, or so much thereof that the remainder is not useful to Tenant.” *Id.* at 747 n.1. The tenant made essentially the same argument the Rasmussens make here, that the phrase “entire Demised Premises” referred to “a taking of the fee in the land described in the lease, which the state held before the execution of the lease and continued to hold after the taking of the plaintiff’s leasehold interest.” *Id.* at 749. The court rejected that argument, finding that the phrase “entire Demised Premises” referred to “the physical parcel of land being leased and not to the diverse interests that may exist in that land, such as those of the lessor and the lessee.” *Id.* The court found that its interpretation was supported by the remainder of the condemnation clause, which contrasted taking the entire premises with a partial taking of a portion or percentage of the premises.

Like the Rasmussens’ Lease here, the lease in the *Bradley Facilities* case defined “Demised Premises” by marking the physical area on a site plan. Finally, the court noted the extreme improbability of the tenant’s proffered interpretation, which would give it

substantial compensation if only the leasehold interest were taken, but no compensation rights if the leasehold plus the fee were taken. *Id.* at 749-50. That extreme improbability is equally applicable here.

Other cases have similarly recognized that the termination of a leasehold interest, even where the fee is not taken, triggers a condemnation clause. *See, e.g., United States v. 10,620 Square Feet, Etc.*, 62 F.Supp. 115, 121 (S.D.N.Y. 1945) (“The condemnation clause cannot be limited to a taking of the fee. It specifically refers to a taking of the whole or part of ‘demised premises.’”); *United States v. 40,438 Square Feet of Land in Boston*, 66 F.Supp. 659, 662 (D. Mass. 1946) (Denying lessee a share in the condemnation award because condemnation of a leasehold interest constituted “a taking of the whole premises”); *United States v. 21,815 Square Feet of Land*, 155 F.2d 898, 900 (2<sup>nd</sup> Cir. 1946) (Rejecting claim of lessees who argued that the condemnation clause “contemplates the taking of the fee, not the taking of use and occupancy for a temporary term,” the court held instead that “the purpose was clear to terminate the lease when possession was taken by any condemnor”).

While no Minnesota court has directly addressed the operation of a condemnation clause when only the fee was taken, Minnesota has adopted one of the underlying concepts which *Bradley Facilities* used to analyze this issue. Like the court in *Bradley Facilities*, the Minnesota Supreme Court has held that the term “premises,” used in a lease, refers to “the space the tenant occupied.” *Larson v. City of Minneapolis*, 114

N.W.2d 68, 71 (Minn. 1962).

Despite the clear applicability of these cases (and the fact that all of them were cited to the trial court in this case), the Rasmussens simply ignore them. Not one of the cases cited in this section is addressed at all in the Rasmussens' opening brief.

**3. This condemnation is a taking of "all of the Premises."**

In this case, St. Anthony HRA is clearly taking "all of the Premises," thus automatically terminating the Lease and cutting off any damages for loss of the Rasmussens' leasehold. First, as in *Bradley Facilities* and *Larson*, the Lease here uses the term "Premises" to refer to the physical space occupied by the tenant. The Lease describes the "Premises" by reference to the space marked on a site plan attached as an exhibit. The Lease's Data Sheet refers to the Premises as a particular "area." The square footage of the "Premises" is addressed in several clauses of the Lease. In this Lease, Premises clearly refers to physical space, not to the fee interest in that space. This condemnation takes "all of" that space.

Second, it is clear from the structure of the condemnation clause itself that the reference is to the amount of space being taken. Articles 17B and 17C address, respectively, "Total" takings and "Partial" takings. HRA App. 21. The difference between the two is not the legal interests being taken, but rather the square footage. The partial takings in 17C are defined by what percentage of the property is taken. A Total Taking is different from a Partial Taking because all of the square footage in the Premises

is involved, not because more or fewer interests in the land are subject to it. Because this taking involves *all* of the square footage the Rasmussens own, it is a taking of *all* of the Premises. The Rasmussens' argument, that this is neither a total nor a partial taking, amounts to arguing that this isn't a "taking" at all, which is clearly absurd.

Third, it must be remembered that the language being construed is contained in a Lease of the property. The Rasmussens' only interest in a condemnation would be its effect on the leasehold. For example, if the fee were being condemned but the lease left in place, such an event would have no effect on the Rasmussens. Here, all of the Rasmussens' interests are being condemned. They will have nothing left. The former site of their Tires Plus business will become a parking lot. Of course that constitutes "all of the Premises" being taken. There is literally nothing left that is not being taken.

Fourth, as the *Bradley Facilities* court also noted, it would be completely incongruous to award the tenant damages just because the landlord happens to also be the condemner, when clearly no damages would be allowed if there was any other condemning authority. In other words, if someone else had purchased the parcel of land at 3800 Silver Lake Road, clearly St. Anthony HRA could and would have condemned the entire parcel, including the fee and all leaseholds. It would have had to do so in order to convey that property to the developer for parking lot purposes. The Rasmussens are not entitled to a windfall recovery based simply on the coincidental fact that their landlord happens to also be the condemning authority. That is neither logical, nor fair.

Moreover, there is no way in which it can be called a reasonable construction of the Lease language.

Finally, as the court pointed out in *Township of Bloomfield v. Rosanna's Figure Salon, Inc.*, 602 A.2d 751 (N.J.A.D. 1992), a municipal entity which purchases the fee interest in property covered by a condemnation clause has "presumably paid what it and [the seller] agreed was full fair market value. If the municipality has to compensate [the tenant] for its leasehold, Bloomfield will have paid more than fair market value." *Id.* at 755. The appellate court approved a trial court ruling which "avoids that unfair result." *Id.* Similarly here, the St. Anthony HRA paid "full fair market value" when it purchased 3800 Silver Lake Road in 1997. (The Rasmussens had the opportunity at that time to match St. Anthony HRA's offer, but declined to do so.) Having already paid the full fair market value for this property once, St. Anthony HRA should not be forced to pay more than that amount.

#### **IV. Public Policy Supports Holding the Rasmussens to Their Bargain.**

Finally, the Rasmussens claim that "public policy" requires giving them a leasehold advantage claim, apparently because a private developer is involved in the redevelopment plan, because Wal-Mart is an anchor tenant in the redeveloped property, and because the Rasmussens are not receiving "just" compensation. None of these contentions are supported by any recognized policy.

First, there is no public policy against redeveloping blighted property with the help

of a private developer. To the contrary, the Minnesota Legislature has expressly *authorized* any HRA to “make any of its land in a redevelopment project available for use by private individuals, firms, corporations, . . . or other private interests,” so long as this is done “[i]n accordance with a redevelopment plan.” Minn. Stat. § 469.029, subd. 1. That, of course, is precisely what the St. Anthony HRA did here; pursuant to the redevelopment plan it had duly adopted, it contracted with a developer to build a project which will benefit the citizens of the City of St. Anthony. Minnesota public policy, as codified in § 469.029, endorses this procedure.

The Rasmussens cite no authority to the contrary. The primary case discussed in their brief for this argument, *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), actually upholds the transfer of condemned property to private parties and allows condemnation to be used to further an economic redevelopment achieved through a private developer. *Id.* at 2661-67. This condemnation is fully in accordance with public policy requirements. Indeed, the Rasmussens acknowledged as much by agreeing that there was a public purpose for this taking and that the property was reasonably necessary for the accomplishment of the redevelopment plan.

Second, public policy favors the enforcement of contracts, and the Rasmussens are getting precisely what they bargained for. They knew what the Lease said when they entered into it, and thus knew that they could not ever expect to receive an award for the loss of the leasehold. The rent they paid presumably reflects the agreed value of all the

Lease terms, including the condemnation clause. *See Eller Media Co. v. Mississippi Transp. Comm.*, 882 So.2d 198, 203 (Miss. 2004) (“[t]hese termination restrictions on the lease agreement were bargained for and reflected in the price paid by Eller.”) Moreover, in 1997 the Rasmussens had the opportunity to buy the property (which would have entitled them to receive any future condemnation award) for the same price St. Anthony HRA had already agreed to pay, pursuant to their right of first refusal, but they declined to do so. The Rasmussens have never offered a convincing reason why a condemnation by St. Anthony HRA should entitle them to pursue a claim they expressly contracted away.

Third, St. Anthony HRA is also getting precisely what *it* bargained for, when it bought the property and assumed the landlord’s rights and obligations under the Lease. St. Anthony HRA became the landlord under the Lease, by purchasing the property from the original Landlord. By receiving an assignment of the Lease, St. Anthony HRA succeeded to the Landlord’s rights. Those included the condemnation provisions. The purchase price reflects the parties’ bargained-for valuation of all of the rights associated with the property, including those embodied in the Lease, such as Article 17. In other words, when St. Anthony HRA bought this property, it paid the full fair market value. To require it to pay more to the Rasmussens now would force St. Anthony HRA to overpay for that property. *Township of Bloomfield, supra* . St. Anthony HRA bought property with a condemnation clause in the relevant Lease; it is contractually entitled to the benefit

of that condemnation clause. Public policy favors allowing it to enjoy the benefit of that bargain.

Fourth, the Rasmussens' invocation of "public policy" ignores the *public*. This condemnation arises because the St. Anthony HRA carefully considered the need for redevelopment of the Apache Plaza area over many years. As outlined in the Mornson testimony and the resolutions of the St. Anthony HRA, the property suffered from urban blight; it was included in a properly authorized redevelopment plan. The condemnation is necessary to complete the redevelopment of blighted commercial property, and the unchallenged finding of both the HRA and the trial court is that this will benefit the citizens of St. Anthony. The trial court found (and the Rasmussens do not contest) that the condemnation:

serves a necessary public purpose and is necessary to further the objectives of and is consistent with the Redevelopment Plan. The acquisition of the Property Interest will further increase the tax base and generally provide for the health, safety, morals and welfare of the citizens of the City of St. Anthony.

August 13, 2004 Findings of Fact, Conclusions of Law, Order Granting Petition and Appointing Commissioners at 5. Conversely, paying the Rasmussens for a claim they agreed they did not have would harm the citizens of St. Anthony, on whom the burden of any award would fall.

This is not some scheme to injure the Rasmussens for the benefit of Wal-Mart, nor is it an arbitrary decision by the St. Anthony HRA. It is an integral part of an important

redevelopment effort, which is removing urban blight and benefiting the “health, safety, morals and welfare of the citizens of the City of St. Anthony.” For the Rasmussens to suggest otherwise is simply wrong.

Finally, the Rasmussens are indeed receiving “just compensation.” Article 17E does not deprive the Rasmussens of *all* compensation in the event of a condemnation. It provides that the landlord has no right to share in the tenant’s “moving expenses” or for compensation for the loss of “stock, personal property and trade fixtures or for the unamortized costs of improvements paid for by the Tenant.” Thus, while the Rasmussens clearly contracted away any right to recover for the loss of their leasehold, they can receive compensation for various items related to moving expenses. Indeed, they received over \$106,000 for the claims they reserved in the Lease. To award them amounts that they contracted away is neither lawful nor “just.”

### CONCLUSION

For the reasons expressed herein, the judgment of the district court should be affirmed.

Dated: September 20, 2005

**DORSEY & WHITNEY LLP**

By 

David Y. Trevor (#0152997)

Heather C. Toft (#322611)

50 South Sixth Street, Suite 1500

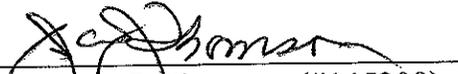
Minneapolis, Minnesota 55402-1498

Telephone: (612) 340-2600

**Attorneys for Petitioner/Respondent  
The Housing and Redevelopment  
Authority for the City of St. Anthony,  
Minnesota**

Dated: September 20, 2005

KENNEDY & GRAVEN, CHARTERED

By 

James J. Thomson (#145300)

Mary Tietjen (#279833)

470 U.S. Bank Plaza

200 South Sixth Street

Minneapolis, Minnesota 55402

Telephone: (612) 337-9300

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

**CERTIFICATE OF COMPLIANCE WITH RULE 132.01, Subd. 3(a)(1)**

The undersigned hereby certifies, pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, Subd. 3(a)(1), that this brief (exclusive of the table of contents, the table of authorities, any addendum, and any certificates of counsel, contains 12,730 words, as ascertained by using the word count feature of the Microsoft® Word 2000 (9.0.3821 SR-1) word-processing software used to prepare the brief, and conforms to the typeface and type style requirements of the Rules by being in 13-point Times New Roman format.

Dated: September 20, 2005

DORSEY & WHITNEY LLP

By David Y. Trevor

David Y. Trevor (#0152997)

Heather C. Toft (#322611)

50 South Sixth Street, Suite 1500

Minneapolis, Minnesota 55402-1498

Telephone: (612) 340-2600

**Attorneys for Petitioner/Respondent The  
Housing and Redevelopment Authority for  
the City of St. Anthony, Minnesota**

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).