

NO. A05-1505

State of Minnesota
In Court of Appeals

Instant Testing Company, et al.,

Appellants,

v.

Community Security Bank, Eagan Economic
Development Authority, Barbara Alice Kopacek, et al.,

Respondents.

APPELLANTS' REPLY BRIEF

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LEGAL ISSUES

- I. In its brief, the EDA failed to make a single argument in support of the district court's conclusion that it lacked subject matter jurisdiction to consider Appellants' claim for relocation benefits.

- II. Appellants had standing under Minnesota Statute § 117.232 to bring their claim for a determination of the amount of relocation benefits for which they are eligible.

OVERVIEW OF THE CASE

1. When rendering its decision, the district court completely ignored the fact that the Eagan Economic Development Authority (hereinafter "EDA") determined Appellants to be eligible for relocation benefits when it initiated negotiations to acquire the property on which they were located. It appears that both the district court and the EDA believe that if they ignore the determination of Appellants' eligibility for relocation benefits, this means it did not happen and also means Appellants were barred from bringing their motion under Minnesota Statute § 117.232.
2. The district court also ignored this Court's decision in the *Wren* case when it rendered its decision. Based upon *Wren*, Appellants became eligible for relocation benefits when Delta Development approached Mr. Kopacek about the acquisition of his property due to the actions of the EDA and Delta Development being so sufficiently intertwined that it made this one project undertaken by the EDA.
3. Even if this Court ignores the EDA's determination of eligibility, the district court clearly erred when it concluded Appellants were not tenants at the time the EDA initiated negotiations. Despite the arguments of the EDA, the record reflects that Mr. Wilson identified a significant amount of Appellants' personal property remained on the property after the EDA initiated negotiations. Had Appellants vacated the property prior to the initiation of negotiations, as the district court concluded, the EDA would have never determined Appellants to have been eligible in the first place.

ARGUMENT

I. In its brief, the EDA failed to make a single argument in support of the district court's conclusion that it lacked subject matter jurisdiction to consider Appellants' claim for relocation benefits.

In its brief, the EDA attempts to make it appear as if it supports the district court's conclusion that it did not have subject matter jurisdiction to consider Appellants' relocation claim. However, all of the arguments in the EDA's brief ultimately address the issue of whether Appellants had standing to file their motion in district court. The reason for this is, as Appellants argued to the district court, the EDA cannot find any authority, statutory or otherwise, to support the conclusion that a municipal ordinance can strip the district courts of jurisdiction specifically conferred upon them by the Minnesota legislature.¹ In fact all authority supports the contrary, which is a municipal ordinance cannot forbid what a statute specifically allows. *Buss v. Johnson*, 624 N.W.2d 781, 784 (Minn. App. 2001). For these reasons, this Court should reverse the decision of the district court to protect the integrity of its jurisdiction over these types of cases.

II. Appellants had standing under Minnesota Statute § 117.232 to bring their claim for a determination of the amount of relocation benefits for which they are eligible.

A. Appellants were owners as defined in Minnesota Statute § 117.025.

In its brief, the EDA repeatedly argues that Appellants did not have standing to bring their motion because they moved prior to the date it initiated negotiations for the purchase of the property on which they were located. This

argument, as previously noted, is without merit. At the time it initiated negotiations for the purchase of Gordon Kopacek's (hereinafter Mr. Kopacek") property, the EDA determined and confirmed such in writing, that Appellants were eligible for relocation benefits. It was only after Appellants submitted their actual cost claim that the EDA retaliated against them and determined them to not be eligible for relocation benefits.

In an attempt to demonstrate that Appellants vacated their property prior to the initiation of negotiations, the EDA cites a letter in Appellants' appendix addressed to Mr. Kopacek from the EDA's relocation consultant, Daniel Wilson (hereinafter "Mr. Wilson"). (Resp't Br. at 4) The EDA argues that Mr. Wilson was not referring to the significant amount of personal property remaining on the site² as belonging to Appellants, but belonging to Mr. Kopacek.³

Despite the EDA's attempt to connect these dots, there is no evidence on the record that Mr. Kopacek, as a private individual, ever stored any of his personal property on Appellants' property. The record, and Mr. Wilson's letter, clearly reflect that all of the personal property belonged to Appellants and that the EDA knew Appellants had a significant amount of personal property on the site after it initiated negotiations for the purchase of Mr. Kopacek's property. (App. 4)

¹ In this case, that authority is Minnesota Statute § 117.232.

² Specifically, Mr. Wilson identified in his letter that "debris, car/truck bodies, tires, batteries and other personal property" was still on the site on at least May 8, 2003.

³ This was more than a month after the EDA admits it contacted Mr. Kopacek about purchasing his property. (Resp't Br. at 3)

Even if Appellants had no personal property on the site when the EDA initiated negotiations with Mr. Kopacek, per the decision in *Wren*, Appellants would still be eligible for relocation benefits because of Delta Development's offer to purchase the property on behalf of the EDA. *In the Matter of the Kenneth Wren, Residential Relocation Claim*, 699 N.W.2d 758 (Minn. 2005). In *Wren*, the Minnesota Supreme Court concluded that when the actions of a governmental entity and a private developer are sufficiently intertwined their combined actions make the acquisition of a displaced person's property a joint undertaking for the purposes of conferring eligibility for relocation benefits upon the displaced person. The actions of the EDA and Delta Development were so intertwined that Appellants became eligible for relocation benefits when Delta Development initially approached Mr. Kopacek about the acquisition of his property.

Additionally, the EDA cites this Court's decision in *Chanhassen II* in support of its argument that former tenants are not entitled to relocation benefits. *In re Lecy*, 2005 WL 626614 (Minn. App. Mar. 15, 2005). In *Chanhassen II*, this Court concluded that without a valid leasehold at the time of their move, a displaced business is not eligible to make a claim for relocation benefits. *Id.* This Court's decision in *Chanhassen II* is not applicable in this case because the record clearly demonstrates that Appellants remained in lawful possession of the property. (App. 4)

Specifically, the EDA argues that because Appellants quit paying rent to Mr. Kopacek for the property in Eagan in March 2003, they were no longer

tenants on the property. This argument is preposterous, because payment of rent is not necessarily an indicia of a valid leasehold.⁴ As this Court noted in *Chanhassen II* “[t]he provisions of the lease control the right to occupy” property. *Id.* This Court concluded in *Chanhassen II* that Chanhassen Chiropractic Center was not eligible to make a claim for relocation benefits because it violated the terms of its lease and moved because “it was being evicted for nonpayment of rent and for an illegal assignment.” *Id.* That is not what occurred in this case. Appellants only moved as a result of the acquisition of Mr. Kopacek’s property by the EDA.

While Appellants concede they did move a small amount of their personal property prior to the EDA approaching Mr. Kopacek about the acquisition of his property, they were still owners within the meaning of Minnesota Statute § 117.232 because:

- At that time, the EDA determined Appellants to be eligible for relocation benefits and it was only after they made their final claim that the EDA reversed this determination;
- At that time, Appellants remained in lawful possession of their property in Eagan; and
- At the time Delta Development initiated negotiations with Mr. Kopacek, the record is undisputed that Appellants were lawful tenants on their property in Eagan.

⁴ It is only logical that Mr. Kopacek, as Appellants’ owner, would not pay double rent to himself as the property owner given the dire financial straights in which he had been placed by the EDA and Delta Development. It is also logical that Mr. Kopacek would not proceed with an unlawful detainer against himself as well. For the EDA to suggest that Appellants failure to pay rent means they were no longer lawful tenants is absurd.

B. The sale of Mr. Kopacek's property to the EDA was not a voluntary sale as defined by the Uniform Relocation Act.

In addition to arguing that Appellants were not tenants on the date it initiated negotiations for the acquisition of Mr. Kopacek's property, the EDA also argues in its brief that because this sale was an "amicable or voluntary" acquisition "the earliest eligibility date for tenants is the *date of the purchase agreement*." (Resp't Br. at 14 (emphasis in original))

1. This argument is new on appeal and should be disregarded by this Court.

This is the first time the EDA has raised the issue of the sale of Mr. Kopacek's property as being voluntary thus making Appellants' date of eligibility the date Mr. Kopacek signed the purchase agreement. This Court should not consider this issue because it is being raised for the first time on appeal. "A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citations omitted).

Additionally, even if it was an issue raised before the district court, the district court did not consider it, and it was not in either the Findings of Fact or Conclusions of Law. (App. 93) This Court must not consider issues "not passed on by the trial court." *Id.* at 582 (citations omitted).

2. The voluntary sale provisions of the Uniform Relocation Act have not been adopted in Minnesota.

In the case *Pickering v. The City of Plymouth*, 2004 WL 728147 (Minn. App. 2004), this Court rejected the City of Plymouth's argument that the Pickerings were not eligible displaced persons because they had voluntarily sold their home to the City of Plymouth. The reason why this Court rejected the City of Plymouth's argument was because the voluntary sale provisions, which were contained in the "persons not displaced" subpart of the definition of "displaced person" in the Uniform Relocation Act (hereinafter "URA"), had not yet been adopted in Minnesota when the Pickerings were displaced. *Id.* The same rationale applies in this case as well.⁵ The URA definition of displaced person had not yet been adopted in Minnesota when Appellants moved and none of the exclusions (such as voluntary sale) had been adopted yet either.

Additionally, the voluntary sale requirements of 49 C.F.R. 24.101(a) have not yet been adopted in Minnesota because they are located in the acquisition portion of the URA. The only parts of the URA that have been adopted in Minnesota are those parts related to "relocation assistance, services, payments and benefits" Minn. Stat. § 117.52; *See also, In re Application for Relocation Benefits of James Brothers Furniture*, 642 N.W.2d 91, 96 n.5 (Minn. App. 2002).

3. The voluntary sale exclusion only applies to property owners.

⁵ As the EDA noted in its brief, the Minnesota legislature did not adopt the definition of displaced person contained in the URA until July 2003. (Resp't Br. at 13) This means the old definition of displaced person applies in this case because Appellants moved prior to July 2003.

Even if the voluntary sale exclusion had been adopted at the time Appellants moved, it only applies to the owner of the property. 49 C.F.R. 24.2. The record is clear, Appellants were not owners of the property on which they were located, Mr. Kopacek was the owner. (App. 6) In cases of a voluntary sale on behalf of the owner, “the displacement of a tenant as a direct result of any acquisition . . . is subject to this part.” 49 C.F.R. 24.2. The reason for this is that it would be unfair to punish tenants by not providing them with relocation benefits, if the owner of their building chose to voluntarily sell the property on which they were located.

4. The acquisition of Mr. Kopacek’s property by the EDA was not a voluntary sale as defined by the URA.

Even though the voluntary sale exclusion does not apply to Appellants because they were tenants, the sale by Mr. Kopacek was not a voluntary sale as defined by the URA. This is because the sale did not meet all the necessary requirements for the sale to be voluntary so as to void the EDA’s duty to provide relocation benefits to Appellants:

- **No specific site or property needs to be acquired. Where an agency wishes to purchase more than one site within a geographic area on this basis, all owners are to be treated similarly.** 49 C.F.R. 24.101(a)(1)(i).

Mr. Kopacek’s property was located within the Cedar Grove Redevelopment Area and needed to be acquired to allow redevelopment within the project area. (App. 1-2, App. 8-53)

- **The property to be acquired is not part of an intended, planned or designated project area where all or substantially all of the**

property area is to be acquired within specific time limits. 49 C.F.R. 24.101(a)(1)(ii).

Based upon the record, all properties in the Project area needed to be acquired within two to ten years. (App. 8-24)

- **The agency will not acquire the property in the event negotiations fail to result in an amicable agreement, and the owner is so informed in writing.** 49 C.F.R. 24.101(a)(1)(iii).

From the very beginning of the project, Appellants were informed the property on which they were located needed to be acquired for the project. (App. 1) The development agreement between the EDA and Delta Development required the EDA to acquire Mr. Kopacek's property through eminent domain if negotiations had failed to result in a direct purchase of his property. (App. 33) When the EDA initiated negotiations with Mr. Kopacek, it never informed Appellants in writing that Mr. Kopacek's property would not be acquired if negotiations failed.

C. The waiver signed by Mr. Kopacek in the purchase agreement did not meet the requirements for a valid waiver of relocation benefits under Minnesota Statute § 117.521.

1. Minnesota Statute § 117.521 defines the requirements for a valid waiver.

In Minnesota, the only way an acquiring authority may avoid its duty to provide relocation benefits to an eligible displaced person is by obtaining a valid waiver of those benefits. Minn. Stat. § 117.521, Subd. 1. The EDA attempted to limit the amount of relocation benefits it owed to Appellants by inserting a waiver clause into the purchase agreement signed by Mr. Kopacek. If, as the EDA has argued, this was truly an arms-length voluntary transaction, it begs the question of why the EDA inserted this waiver clause into the purchase agreement in the first place. By having Mr. Kopacek sign the waiver, the EDA must have concluded at

that time that Appellants were indeed eligible for relocation benefits but that it did not want to provide the full amount of these benefits to Appellants. If this Court determines that the waiver clause signed by Mr. Kopacek was not valid under Minnesota Statute § 117.521, Subd. 1, Appellants are de facto eligible for relocation benefits.

Additionally, if the EDA thought Appellants were eligible for relocation benefits and wanted them to waive their eligibility, they should have simply provided Mr. Kopacek with a proper waiver and given him the option of signing it. Either way, it is irrelevant because even though Mr. Kopacek signed the purchase agreement containing the waiver, Appellants are still eligible for relocation benefits because the waiver was not valid. *In re Wren*, 699 N.W.2d 758, 765 n. 11 (Minn. 2005). Pursuant to Minnesota Statute § 117.521, Subd. 1, for a waiver of relocation benefits to be valid, the owner-occupant must sign,

- A waiver specifically describing the type and amounts of relocation assistance, services, payments, and benefits for which eligible.
- A waiver that also separately lists those benefits being waived.
- A waiver that states that the agreement is voluntary and not made under any threat of acquisition by eminent domain by the acquiring authority.
- The acquiring authority must also explain the contents thereof to the owner-occupant before they sign the waiver.

Minn. Stat. § 117.521, Subd. 1, *See also, In re Wren*, 699 N.W.2d at 765 n. 11.

The waiver language contained in the purchase agreement only stated that Mr. Kopacek accepted the \$41,000.00 in relocation payments in “full satisfaction of any and all claims for benefits, which may be available to Sellers pursuant to

Minn. Stat. §117.52 and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970”. (App.

Obviously, the waiver signed by Mr. Kopacek did not provide him with any of the statutorily required information. There is no evidence on the record that anyone from the EDA ever reviewed the waiver with Mr. Kopacek or described to him the types and amounts of benefits for which his businesses were eligible. The only information on the record is that the EDA’s relocation consultant, Daniel Wilson (hereinafter “Mr. Wilson”), informed Mr. Kopacek that he was eligible for \$41,000.00 without any explanation or documentary support for the basis of his determination. (App. 7)

The testimony of Mr. Wilson in the *River City Woodworking* case further demonstrates that he did not provide Mr. Kopacek with the information needed to sign a valid waiver. *In the Matter of River City Woodworking, Inc.*, A04-2106 (Minn. App. June 21, 2005). As was noted in Appellants’ brief:

- In the *River City Woodworking* case, Mr. Wilson testified that he provided the displaced business in that case with a MnDOT brochure explaining to the owner of that displaced business of his right to make a claim for relocation benefits, along with how to properly document his claim. (App. 57) Mr. Wilson never provided Mr. Kopacek with that MnDOT brochure or with information on how to properly submit a claim. (App. 7)
- Per the relocation regulations, Mr. Wilson also testified, it is standard for him to obtain, early in the claim process, two estimates from commercial movers to determine the cost to move the personal property owned by the business. (App. 58) Despite stating under oath that this is the standard procedure in business relocation claims, Mr. Wilson did not obtain any such estimates for Appellants. (App. 7)

- Mr. Wilson further testified that when he deals with businesses that are not represented by attorneys he stated I work “with the displacee in accumulating those invoices, [for relocation expenses] determining -- and preparing the claim on their behalf. (App. 60) Despite his testimony of the *River City Woodworking*, Mr. Wilson provided no assistance in this regard to Mr. Kopacek. (App. 7)

Based upon this lack of statutorily mandated information, Mr. Kopacek could not give informed consent to the waiver because he did not understand the kinds and amounts of relocation benefits for which his businesses were eligible. As Mr. Kopacek stated in his motion, had he known the full amount of relocation benefits for which his businesses were eligible “I would never had agreed to accept that payment and I would have insisted that Mr. Wilson assist my businesses in documenting a complete and thorough relocation claim once the move had been completed.” (App. 7)

The Minnesota legislature was very specific in defining what constitutes a valid waiver and it wanted eligible displaced persons to know exactly what types and amounts of benefits they were waiving before signing a waiver. By adopting these specific requirements, the Minnesota legislature wanted to avoid a scenario in which an acquiring authority has an otherwise eligible displaced person sign a waiver of their eligibility when they do not even understand the rights they are waiving. In other words, the Minnesota legislature wanted displaced persons to be able to provide informed consent when waiving their eligibility to make a full claim for relocation benefits. A person cannot waive what they do not know and

the law makes it clear that these rights can be waived but only if done in accordance with the above requirements.

- 2. By filing their final relocation claim within the 18-month claim period, Appellants rejected the EDA's determination of the amount of relocation benefits for which they are eligible.**

In its brief the EDA argues that because Mr. Kopacek signed the waiver, he did not reject the EDA's offer for relocation benefits and therefore Appellants did not have standing to bring their motion in district court. (Resp't Br. at 16) This argument ignores the fact that the EDA did not provide Mr. Kopacek with the information he needed to make an informed decision in this regard.

As previously noted, Mr. Kopacek stated in his affidavit that had he known the full amount of relocation benefits for which his businesses were eligible he never would have accepted the \$41,000.00 in full satisfaction of Appellants' claim. The EDA should not benefit from its negligence in not providing Mr. Kopacek with the information he needed to make an informed decision. Had the EDA provided him with the appropriate information he would have rejected the EDA's offer.

Additionally, the EDA's argument ignores that the URA allows a displaced business tenant to make their final claim for relocation benefits within 18 months from the date of their move. 49 C.F.R. 24.207(d). Once Appellants were informed of the full amount of relocation benefits for which they were eligible, they submitted their final claim to the EDA within this 18-month claim period. The EDA denied Appellants' claim and informed them they were not eligible for any

additional relocation benefit payments. Appellants rejected this determination, giving them standing under § 117.232, Subd. 2, to file their motion in district court.

D. Persons displaced via direct purchase of the property on which they were located are not required to avail themselves of the administrative appeal hearing process.

In its brief, the EDA asserts that the only remedy for aggrieved displaced persons is to submit to the administrative appeal hearing process. (Resp't Br. at 19) The EDA cites this Court's decision in *Chanhassen I* as evidence that the State of Minnesota has adopted the administrative appeal hearing process outlined in the URA and because of that Appellants were required to submit to the EDA's relocation appeals policy. (Resp't Br. at 17) The EDA's argument in this regard is incorrect.

This Court did not conclude in *Chanhassen I* that Minnesota has adopted the relocation appeals procedure in the URA, it actually concluded the exact opposite of the EDA's argument, which is that Minnesota *has not* adopted the relocation appeals procedure in the URA. *Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. App. 2003). *Chanhassen I* actually holds that because Minnesota has not adopted the appeal process contained in the URA, the only guidance for the procedural requirements for these types of administrative appeal hearings are "common law and constitutional procedural due process principles." *Id.* at 562.

In *Chanhassen I*, this Court concluded that because Chanhassen Chiropractic Center chose to avail itself of the administrative appeal hearing process adopted by the City of Chanhassen, the hearing before the Chanhassen City Council met the minimum requirements for procedural due process. *Id.* at 562. *Chanhassen I* does not, nor does any case cited by the EDA, require persons displaced via direct purchase to avail themselves of the administrative appeal hearing process. To the contrary, in cases of direct purchase, Minnesota Statute § 117.232, Subd. 2, specifically grants a remedy that is an alternative to the administrative appeal hearing process.

Had the EDA taken Mr. Kopacek's property via eminent domain, rather than direct purchase, Appellants would not have had standing under § 117.232 to bring their motion in district court and would have had to avail themselves of the EDA's relocation appeals policy. Appellants only remedy after that would have been an appeal to this Court via a writ of certiorari.

Additionally, had Appellants chosen to avail themselves of the EDA's relocation appeals policy, instead of filing their motion in district court, their only remedy after that hearing would have been an appeal to this Court via writ of certiorari. However, neither of those scenarios occurred in this case. The EDA acquired Mr. Kopacek's property via direct purchase and because of that § 117.232 specifically granted Appellants an alternative remedy to the EDA's relocation appeals policy.

E. Appellants were injured in fact when they were denied full compensation for the expenses they incurred as a result of being forced to move by the EDA.

In its brief, the EDA argues that Appellants lacked standing to bring their motion in district court because they had not suffered an injury in fact as a result of not being eligible to make a claim for relocation benefits. (Resp't Br. at 21) This argument is completely without merit and should be disregarded by this Court because it was not basis for the district court's decision.

As previously noted, the district court concluded Appellants lacked standing because they were not tenants on the property on the date the EDA initiated negotiations for the purchase of Mr. Kopacek's property. (App. 96) The district court made no Findings of Fact or Conclusions of Law in regards to Appellants' eligibility for relocation benefits. The only Finding of Fact made by the district court in this regard was that the EDA provided Appellants with relocation benefits "pursuant to Minn. Stat. §117.52 and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970." (App. 94)

The EDA's argument in this regard also begs of the question of why the EDA determined Appellants to be eligible for relocation benefits *and* paid Appellants \$41,000.00 in relocation benefits payments if they were not eligible to receive those payments. The answer is obvious. Everyone connected with this Project (Mr. Wilson, the EDA, City of Eagan staff, etc.) all knew Appellants were eligible for relocation benefits. Anyone of those persons could have made the conclusion, at that time, that Appellants moved prior to the initiation of

negotiations and were not eligible to receive relocation benefits. It was only after Appellants made their final claim for the actual costs they incurred as a result of their move that the EDA determined they were not even eligible in the first place.

This sort of behavior on behalf of a governmental entity charged with the duty of assisting businesses to relocate that it is forcing to move is appalling and should not be tolerated by this Court. This Court should reject any argument made the EDA regarding Appellants eligibility for relocation benefits and see them for what they are; a self-serving attempt to avoid having to pay what it admitted it had a duty to pay at the time Appellants moved to their replacement site.

Additionally, Appellants did suffer an injury in fact giving them standing to bring their motion in district court. The EDA only paid Appellants \$41,000.00 for the expenses they incurred as a result of being forced to move and Appellants were entitled to receive in excess of \$90,000.00 in reimbursement for expenses they actually incurred. As a result of the EDA's denial of eligibility, and the district court's decision, Appellants have suffered an injury in fact.

CONCLUSION

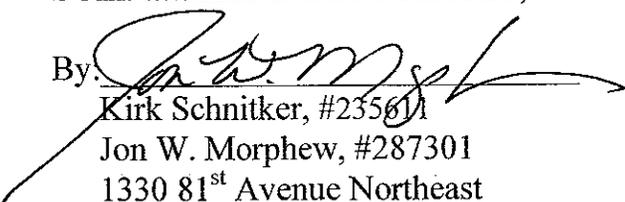
Despite the attempts by the EDA to create confusion regarding Appellants eligibility for relocation benefits, this is a relatively simple matter. At the time the EDA initiated negotiations for the purchase of Mr. Kopacek's property, it determined Appellants to be eligible for relocation and paid a portion of the benefits for which Appellants were eligible. When the EDA refused to fully compensate Appellants for all the eligible expenses they incurred as a result of

their move, they brought their motion in district court as they are allowed to do under Minnesota Statute § 117.232.

This Court should correct the errors made by the district court when it granted the EDA's motion to dismiss. The district court did have jurisdiction to consider Appellants motion. Additionally, Appellants had standing both as tenants on the property and as eligible displaced persons to bring their motion in district court. Therefore, Appellants respectfully request this Court to reverse the decision of the district court so a determination can be made of the total amount of relocation benefits for which they are eligible.

Respectfully submitted, this 16 day of December 2005.

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