

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Denial of the
Partial Relocation Claim of
Duininck Brothers, Inc.

ORDER ON
CROSS-MOTIONS
FOR SUMMARY DISPOSITION

The above-entitled matter is before Administrative Law Judge Kathleen D. Sheehy. On October 28, 2005, Claimant, Duininck Brothers, Inc., filed a Motion for Summary Disposition in this matter. On November 14, 2005, the Department of Transportation filed a Memorandum in Response to the Motion and a Cross-Motion for Summary Disposition. On November 21, 2005, Duininck Brothers filed a reply, and the Department submitted its reply on December 1, 2005. The Administrative Law Judge heard oral argument on the motions at the Office of Administrative Hearings on December 16, 2005.

Howard A. Roston, Esq., Malkerson Gilliland Martin LLP, 1900 U.S. Bank Plaza South Tower, 220 South Sixth Street, Minneapolis, MN 55402 appeared representing the Claimant, Duininck Brothers, Inc. (Duininck). Jeffrey S. Thompson, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN, 55101-2134 appeared representing the Department of Transportation (MnDOT).

Based upon the Memoranda filed by the parties, the oral argument, and for the reasons set out in the following Memorandum,

IT IS HEREBY ORDERED:

- (1) That the Claimant's Motion for Summary Disposition is GRANTED in part and DENIED in part.
- (2) That the Department's Motion for Summary Disposition is GRANTED in part and DENIED in part.
- (3) That this matter shall be scheduled for an evidentiary hearing to determine Duininck's actual and reasonable moving expenses related to the cost of relocating the processed sand and gravel from the acquired property to Duininck's property outside of the proposed highway right-of-way. The parties shall confer regarding the date of an evidentiary hearing and shall submit a proposed schedule to the ALJ within ten days.

Dated: This 17th day of January, 2006.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Duininck is appealing a decision by MnDOT denying its claim for relocation benefits arising from Duininck's movement of sand and gravel from property condemned by MnDOT for a highway right-of-way. The issues presented in the cross-motions for summary disposition are whether Duininck is a displaced person and whether the claimed expenses are for moving personal property.

Undisputed Facts¹

Duininck is the fee owner of certain parcels of property located in Kandiyohi County, north of Willmar and near the intersection of Trunk Highway 23 (TH23) and County Road 9 (CR9). Duininck operates a sand and gravel business on the property. The parcels of the property that are relevant to this proceeding are parcels 7, 7A, 13, and 16. Duininck also leases parcel 9 from Willmar Poultry and, pursuant to the terms of a Lease Agreement dated September 9, 2002, Duininck has the right to extract sand and gravel from this parcel during the lease term. At all relevant times, Duininck possessed either a permit or grandfathered rights to extract sand and gravel from all of these parcels.

From 2003 to 2005, MnDOT undertook a highway improvement construction project (the Project) involving approximately ten miles of TH23. The Federal Highway Administration participated in the Project and contributed funds to the Project. By letter dated August 20, 2002, MnDOT notified Duininck of its intent to acquire and its offer to purchase parcels 7, 7A, 13 and 16 for the Project for the purposes of establishing a MnDOT right-of-way. MnDOT also notified Willmar Poultry of its intent to acquire parcel 9 for the same purpose.

After it received the letter from MnDOT notifying it of MnDOT's intent to condemn the identified parcels, but before the date of taking, Duininck extracted the sand and gravel from the areas of the proposed MnDOT right-of-way, processed it to a uniform size to make it a commercially classified product, and relocated the sand and gravel outside of the area of the proposed MnDOT right-of-way. Duininck also extracted and processed sand and gravel from parcel 9 and relocated the sand and gravel outside of the proposed MnDOT right-of-way.

MnDOT condemned parcels 7, 7A, 9, and 13 in two separate actions filed in Kandiyohi County District Court, and acquired the properties on February 13, 2003.² The parties agree that the settlement reached on the just compensation for taking the property does not include the value of the sand and gravel. By letter dated August 9, 2004, Duininck submitted to MnDOT a claim for costs and

¹ For purposes of this motion, MnDOT agrees with the facts recited above from Duininck's "Statement of Undisputed Facts" section of its Memorandum in Support of its Motion for Summary Disposition.

² *State v. Macon, et al.*, District Court File No. C0-02-1560, and *State v. Saude, et al.*, District Court File No. C0-02-1561. (MnDOT also condemned parcel 16. Duininck did not excavate any sand and gravel from parcel 16, so it is not relevant to Duininck's claim for relocation benefits.)

expenses incurred as a result of the MnDOT project. MnDOT denied Duininck's claim in an Order dated May 10, 2005, and this appeal followed.

Motion Standard

Both Duininck and MnDOT have moved for summary disposition. Summary disposition is the administrative equivalent of summary judgment.³ Summary disposition is appropriate when there is no genuine dispute about the material facts, and one party must necessarily prevail when the law is applied to those undisputed facts.⁴ When considering a motion for summary disposition the decisionmaker must view the facts in the light most favorable to the non-moving party.⁵ The moving party carries the burden of proof and persuasion to establish that no genuine issues of material fact exist.⁶ The non-moving party cannot rely upon general statements or allegations, but must show the existence of specific material facts which create a genuine issue.⁷

Arguments of the Parties

The Uniform Relocation and Real Property Acquisition Policies Act of 1970 (URA), as amended,⁸ and associated federal regulations provide that a business displaced as a direct result of a federally-assisted project is entitled to payment for certain actual reasonable moving and related expenses.⁹ The URA is remedial in nature and its primary purpose is to ensure that persons displaced as a direct result of federally assisted projects are treated fairly, consistently, and equitably, so that such persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole.¹⁰ Because Duininck's relocation claims arise from the taking of its property for the construction of TH23, which is a federally funded project, the URA applies.

The threshold question in this matter is whether Duininck is a "displaced person" and eligible for relocation benefits. The regulations define a "displaced person" as "any person who moves . . . his or her personal property from the real property . . . (i) as a direct result of a written notice of intent to acquire, the initiation of negotiations for, or the acquisition of, such real property in whole or in part for a project."¹¹ Under the regulations implementing the URA, a "displaced person" is entitled to "actual and reasonable moving and related expenses."¹²

³ *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

⁴ *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955).

⁵ *Ostendorf v. Kenyon*, 347 N.W. 834 (Minn. Ct. App. 1984), *Carlisle v. City of Minneapolis*, 437 N.W. 2d 712, 715 (Minn. Ct. App. 1988).

⁶ *Theille v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

⁷ *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (Minn. 1976).

⁸ 42 U.S.C. § 4601 *et seq.*

⁹ 42 U.S.C. § 4622; 49 C.F.R. § 24.303(a). (Title 49 of the Code of Federal Regulations was amended in February of 2005. Citations in this decision are to the version of the regulations in effect at the time Duininck made its claim.)

¹⁰ 42 U.S.C. § 4621; 49 CFR § 24.1(b).

¹¹ 49 CFR § 24.2.

¹² 49 CFR § 24.303.

The regulations provide that any business that qualifies as a “displaced person” is entitled to payment for such actual moving and related expenses as the agency determines to be reasonable and necessary, including expenses for:

- (1) Transportation for personal property . . .
- (2) Packaging, crating, unpacking, and uncrating of the personal property . . .
- (4) Storage of personal property . . .
- (8) Professional services necessary for:
 - (i.) Planning the move of personal property,
 - (ii.) Moving the personal property, and
 - (iii.) Installing the relocated personal property at the replacement location.¹³

To qualify for reimbursement of its claimed expenses, Duininck must prove that the expenses for which it seeks reimbursement were: (1) “moving” expenses; (2) incurred moving “personal property”; and (3) incurred as a “direct result” of the taking.

Duininck maintains that it is a “displaced person” under the regulations implementing the URA and is entitled to relocation benefits because it incurred “actual and reasonable moving and related expenses” removing and transporting sand and gravel from real property as a direct result of MnDOT’s August 20, 2002, notice of intent to acquire its property. According to Duininck, it incurred \$1,695,757 in actual and reasonable costs and expenses moving the sand and gravel from the acquired property to an area of its property outside of MnDOT’s proposed highway right-of-way. Duininck contends that sand and gravel is personal property as a matter of law, and cites to several cases holding that once minerals, such as sand and gravel, are severed from real estate, they are considered personal property.¹⁴

MnDOT argues that Duininck is not a displaced person under the URA and its claimed expenses are not recoverable. While MnDOT concedes that *stockpiled* sand and gravel is personal property, it insists that sand and gravel is not personal property during the production process. That is, sand and gravel become personal property as it is piled, and not before. MnDOT maintains that because Duininck’s claim ends at the creation of the stockpiles, there are no expenses to recover for the movement of the piles. Moreover, MnDOT argues that because Duininck would have eventually mined the sand and gravel anyway in its ordinary course of business, it cannot claim that the production expenses are a consequence or “direct result” of the taking.

¹³ 49 CFR § 24.303(a).

¹⁴ *Shirley v. National Applicators of California*, 566 P.2d 322, 326 (Ariz. Ct. App. 1977) (“sand and gravel become personal property when severed from the freehold”); *Finstrom v. First State Bank of Buxton*, 525 N.W.2d 675, 677 (N.D. 1994)(“Upon severance of the gravel, the royalty interest accrues and becomes a personal property interest.”).

The steps used to process sand and gravel into personal property, for which Duinick is seeking reimbursement, are as follows: (1) moving the processing equipment onto the mining land; (2) removing or stripping the top soil to expose the sand and gravel; and (3) scooping, sorting, and piling the sand and gravel. In this final step, Duinick both crushed and screened the sand and gravel to reduce it to a uniform size and render it a commercially classified product. When the sand and gravel has passed through the crusher or screens, it is then conveyed to the appropriate pile to keep it sorted with other material of its class. Duinick contends that the expenses it itemized for “screen” and “crusher” necessarily include all of the elements of moving the material by conveyor and relocating it outside of the right of way.

MnDOT argues that Duinick’s relocation claim relates only to the costs of producing the sand and gravel and not transporting it. According to MnDOT, the amount claimed by Duinick for reimbursement as moving costs is the amount spent to perform the gravel mining and processing steps that would have occurred at Duinick’s expense eventually in the normal course of business, regardless of MnDOT’s condemnation. MnDOT contends that the processing steps are not acts of moving just because the finished product had to be placed in a different location; nor does the fact that the sand and gravel, once mined, had to be moved to a different location make those production expenses the “direct result” of the condemnation. MnDOT asserts that Duinick is simply trying to get reimbursed for 100% of its production costs and argues that the URA cannot be read so broadly that production costs become moving expenses.

The Administrative Law Judge concludes that Duinick is a “displaced person” within the meaning of the URA because it did move personal property as a direct result of MnDOT’s notice of intent to acquire. The parties agree that Duinick was free to extract the sand and gravel, for whatever reason, before the date of the taking. By that date, the sand and gravel was personal property and MnDOT is responsible for the cost of moving it from the acquired property to the property on which it was stockpiled. Duinick would not have had to incur the costs of relocating the processed sand and gravel from one parcel to another but for MnDOT’s taking. Therefore, these moving costs are a direct result of MnDOT’s notice of intent to acquire the property, and the Administrative Law Judge will hold an evidentiary hearing on that portion of Duinick’s claim that are related to these costs.¹⁵

The Administrative Law Judge also concludes, however, that the majority of the costs claimed by Duinick are not compensable because they are production costs rather than “actual and reasonable moving and related expenses,” and such production costs are not reimbursable under the URA as expenses to move personal property. Even if the sand and gravel moving along the conveyor belt to the screen or crusher is personal property, the crushing and screening of that personal property is not a moving expense. It is a production

¹⁵ Duinick, as the claimant, bears the burden of proving that it is entitled to receive reimbursement for these expenses in its relocation claim under Minn. R. 1400.7300, subd. 5.

expense. The cases cited by Duininck, which hold that sand and gravel once severed from the ground is personal property, may be persuasive as a matter of property law, but they are not determinative of whether the costs claimed are compensable moving expenses under the URA. In addition, if Duininck were to be reimbursed for its production costs, it would result in a windfall for Duininck. Duininck would have 1,142,312 tons of sand and gravel for which it did not have to pay production costs and, unlike its competitors, when Duininck sold the gravel, it would realize a profit out of which production costs would not need to be recouped. The primary purpose of the URA is to insure that displaced persons do not suffer “disproportionate injuries” as a result of public projects; not to bestow windfalls or an economic advantage.

Because the Administrative Law Judge has concluded that Duininck is entitled to only those moving expenses related to relocating the processed sand and gravel to the parcel outside of MnDOT’s highway right-of-way, the ALJ does not need to address the parties’ arguments relating to costs incurred prior to August 20, 2002.

K.D.S.