SENT VIA FACSIMILE AND U.S. MAIL

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Dear Mr. Mayor and Members of the City Council:

At the City Council meeting on October 15, 2008, the Council directed staff to obtain a legal opinion from its City Attorney regarding efforts by the Port Authority to condemn the Property owned by Advance Shoring Company. We believe that it is important for the Mayor and the Council to understand some of the legal arguments that the St. Paul Port Authority ("Port Authority") will be facing. The Port Authority's efforts to condemn the Property will be met with a vigorous legal defense. Ultimately, we firmly and without hesitation believe that the

Court will conclude the taking is unlawful, exposing the Port Authority (and therefore the City) to significant financial risk.

INTRODUCTION.

The Advance companies consist of Advance Shoring Company, Advance Specialties Company and Advance Equipment Company (collectively "Advance"). Advance is a woman-owned family business started by Karen and Terry Haug's father in 1960. The Haug family located its businesses in the City of St. Paul nearly 48 years ago. Advance has been at its present location at 1400 Jackson Street ("Property") for more than three decades.

Advance leases and sells construction related equipment and material. The three companies are organized as follows[1]:

- Advance Shoring Company, which rents and sells concrete shoring and forming equipment. Shoring and forming equipment functions as a brace and a mold, respectively, into which concrete is poured. It provides temporary support until the concrete hardens and achieves the necessary strength to support loads.

- Advance Equipment Company, which sells, rents and services tower cranes and material hoists, as well as sells and services concrete pumps. It is too expensive for construction companies to own their own cranes, so they rent from companies like Advance.

- Advance Specialties Company, which sells concrete and masonry supplies.

The St. Paul skyline is lined with projects that were built or renovated with Advance equipment. Among other projects, Advance contributed to the Xcel Energy Center, Regions Hospital, the Cathedral of St. Paul and numerous other projects that make St. Paul what it is today.

[1] There are other businesses and entities that occupy the Property, all of which are owned by the Haug family.

Advance typically employs between 43 and 45 people. Approximately one-half of the employees are union.[2] Advance pays an average wage of $24.00 per hour *plus* full benefits including health care for its employees and their families. Approximately one-half of the employees have been with Advance for more than 20 years. Many of them are second-generation employees.

Advance is strategically located near downtown St. Paul with easy access to Interstate 35E, Interest 94 and the rest of the "94 loop" around the Twin Cities Metropolitan Area. The Property is also centrally located for the convenience of Advance's highly-skilled employees. Advance, like members of the City Council, has repeatedly requested that the Port Authority identify another Property with similar features in the City of St. Paul. The Port Authority has refused to provide any feasible relocation site – further evidencing the importance of Advance's Property.

It is an understatement that Advance has been a loyal, tax-paying employer within the City of St. Paul. It is undisputed that the Property is not on any state or federal registry of polluted or contaminated lands. The Property presents no danger to the employees of Advance or the public. The Property is well-organized and meticulously maintained. The Property is not visible from any residential neighborhood. In short, the *Port Authority's* own appraiser concluded (multiple times in his appraisal) that the Property is *currently* being used for its highest and best use. For your convenience, a copy of excerpts of the appraisal is attached as *Exhibit A.*[3]

[2] Nine workers are members of the International Union of Operating Engineers – Local 49, and 11 workers are members of the International Brotherhood of Teamsters—Local 120

[3] The appraisal is voluminous. Advance will be happy to provide the entire appraisal if requested.

I. THE 2006 LEGISLATIVE AMENDMENTS TO MINNESOTA'S CONDEMNATION STATUTE

The legal landscape for condemnation actions has changed dramatically. The United States Supreme Court made it clear in *Kelo v. New London,* that its decision does not prevent States from adopting more stringent restrictions:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

545.U.S.469.489(2005) The Minnesota Legislature took the invitation from *Kelo* and resulting public outcry and imposed "further restrictions". In 2006, the Minnesota legislature adopted broad and sweeping condemnation reform. As a result of the legislation, the Constitutionally required (yet rarely invoked) "public use" requirement no longer means whatever the condemning authority wants it to mean. Rather, public purpose is restricted in Minn. Stat. § 117.025 as:

> Subd. 11. **Public use; public purpose.** (a) "Public use" or "public purpose" means, exclusively:
>
> (1) the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies;
>
> (2) the creation or functioning of a public service corporation; or
>
> (3) mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned Property, or removal of a public nuisance.

Minn. Stat. §117.025. In addition to expressly defining public purpose, the 2006 legislation prohibits takings for economic development even if the development increases taxes and creates jobs (which, as discussed below, is the real reason the Port Authority is seeking to take the Property). According to the statute:

> (b) The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.

Id.

Because the Port Authority can no longer take private property for economic development, it is attempting to circumvent the restrictions by proceeding under Minn. Stat. § 117.025 (subd. 11)(3)(environmental contamination).[4] As discussed below, this argument is blatant pre-text to do what is otherwise unlawful.

Importantly, the Port Authority no longer may simply declare the Property contaminated and expect the Court to turn a blind eye. Indeed, Courts now take an active role to prevent condemnation abuses:

> (b) If the taking is for the mitigation of a blighted area, remediation of an environmentally contaminated area, reducing abandoned Property, or removing a public nuisance, then, notwithstanding any other provision of general or special law, *a condemning authority must show the district court by preponderance of the evidence* that the taking is necessary and for the designated public use.

Minn. Stat. § 117.075 (emphasis added). Therefore, unlike prior to 2006, when Courts were virtually prohibited from second guessing the decision of the condemning authority, today, Courts play an active role in protecting individual Property rights and enforcing the statute.

When the Port Authority fails in its efforts to condemn the Property, it (and therefore the City) will also be responsible for Advance's attorneys' fees and costs. According to Minn. Stat § 117.031:

[4] The Port Authority has not even asserted that the taking will fulfill any of the remaining statutory exceptions to the public use limitations. Nor would any such exceptions apply.

> (b) In any case where the court determines that a taking is not for a public use or is unlawful, the court shall award the owner reasonable attorney fees and other related expenses, fees, and costs in addition to other compensation and fees authorized by this chapter.

Minn. Stat. § 117.031. In order to respond to the claims by the Port Authority, Advance is being forced to engage expert witnesses and attorneys with varying professional and legal backgrounds.[5] It is impossible to predict with any certainty what the attorneys' fees and other related expenses, fees and costs will be because the Port Authority's litigation efforts will impact what is required. However, the City Council should ensure that the Port Authority has reserved many hundreds of thousands of dollars to pay these attorneys' fees, expert fees and costs when Advance succeeds in defeating the taking.

Advance would prefer to work with the City and the Port Authority. However, the Port Authority is leaving it no options but to fight for its property rights and prevent the abuse of eminent domain by the Port Authority under the guise of "environmental clean-up." The efforts by the Port Authority to take the Property are unlawful because, among other reasons:

(a) The Port Authority Does Not Have the Statutory Authority to Take The Property.

(b) The Taking is Not for a Predominately Public Use

(c) The "Environmental Clean-Up" is Pretextual. There is Absolutely No Need to "Clean Up" the Property. Any Minor Environmental Concerns Have Been or Will Be Fully Addressed by Advance if Required by the Minnesota Pollution Control Agency ("MPCA").

Each of these issues is discussed below. Moreover, also as discussed below, the Port Authority has failed to properly evaluate the risks associated with this taking.

[5] It is worth noting that the Port Authority must agree that this is necessary, as it is doing the same thing. One internal Port Authority Memorandum identifies multiple attorneys and a myriad of "experts" or "consultants" Thus, it is perfectly reasonable for Advance to engage its own "team."

III. THE PORT AUTHORITY DOES NOT HAVE THE STATUTORY AUTHORITYTO TAKE THE PROPERTY

A. The Alleged Need For An Environmental Cleanup Of The Advance Site Is A Pretext.

The Port Authority asserts that the Advance Properly requires a cleanup and is "heavily contaminated." It is wrong on both counts. First, only MPCA—not the Port Authority—has the authority to determine whether a cleanup of the Advance Property is necessary. Second, only hazardous substances at elevated levels on the Advance site are located at least four feet below the Property's surface soils. The Port Authority's environmental consultant also concludes that the "petroleum issues" on the Advance Property are "pretty minor." Advance, therefore, may continue to operate its business without undertaking any cleanup of the Property. The Port Authority cannot put the cart before the horse and determine that it wishes to redevelop the Property, propose extensive excavation associated with the redevelopment, and then assert that a cleanup is necessary.

1. No Cleanup Is Necessary For Hazardous Substances At The Advance Property.

a. Only MPCA May Determine When A Hazardous Substance Cleanup Is Necessary.

The condemnation statute does not authorize the Port Authority to require a cleanup of the Advance Property. Under the statute, the Port Authority may use eminent domain only for a public use or public purpose. *Minn. Stat. § 117.012, subd. 2.* As discussed above, a "public use or public purpose" includes the "remediation of an environmentally contaminated area." Minn. *Stat. § 117.025, subd. 11.* An "environmentally contaminated area" is where more than fifty percent of an area's parcels contain hazardous substances and for which the estimated costs of a "removal action" or "remedial action" exceed 100 percent of the assessor's estimated market

value for the contaminated parcel. *Minn. Stat. § 117.025, subd. 8.* The condemnation statute incorporates the "removal action" and "remedial action" definitions of the Minnesota Environmental Response and Liability Act ("MERLA"), *Minn. Stat. ch. 115B.*[6]

The Port Authority has no authority to order a MERLA removal action or remedial action. Only MPCA has the authority under MERLA to order a removal action or a remedial action to clean up hazardous substances on the Advance Property. *Minn. Stat. § 115B.17, subd. 1.*[7] MPCA may order a cleanup by issuing a Request for Response Action ("RFRA") to Advance under the MERLA enforcement process. *Id.* Alternatively, MPCA may approve a voluntary proposal by Advance to clean up the hazardous substances under the Voluntary Investigation and Cleanup ("VIC") program. Minn. Stat. § 115B.175.[8] The Port Authority, lacking any statutory authority, may not issue a RFRA under MERLA and cannot undertake a voluntary cleanup of the Advance Property because it does not have Advance's consent for a cleanup. In short, the Port Authority has no legal authority to determine to redevelop the Advance Property, propose extensive excavation associated with the redevelopment, and then bring a condemnation proceeding on the grounds that a cleanup is necessary.

b. Given The Levels And Location Of The Hazardous Substances At The Advance Property, There Is No Need For A Cleanup.

The Port Authority will not be able to demonstrate any need to clean up the Advance Property. Given the levels and location of hazardous substances that the Port Authority alleges

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[6] "Removal" actions and "remedial" actions are collectively known as "response" actions. Minn. Stat. § 115B.02, subd. 18.

[7] The Port Authority may not take any action regarding the Advance Property that conflicts with MPCA's actions with respect to the Property. Minn. Stat. § 115B.17, subd. 11.

[8] The VIC program addresses the liability and technical issues associated with buying, selling, or developing Property contaminated by hazardous substances. MPCA VIC Guidance Document #1 at 1 (May 2002). Under the VIC program, Property owners may request MPCA assistance in investigating and cleaning up Property in anticipation of future Property transactions, to obtain financing, or to avoid being required to investigate and clean up Property under the MERLA enforcement process. *Id.*

to have found, Advance may continue to operate its businesses on the Property. The Port Authority's most recent environmental assessment determined that the only hazardous substances on the Property at levels above the values MPCA sets for industrial facilities are located at least four feet below the Property's surface soils.[9]

In March 2008, the Port Authority's environmental consultant prepared an extensive Phase II environmental assessment of the contamination at the Advance Property. The Phase II reveals all hazardous substances in the top four feet of soil on the Property are present at levels below the Tier 2 Industrial Soil Reference Values ("SRVs") that MPCA has established.[10] For example, the Port Authority found that the only lead contamination in soils exceeding Tier 2 Industrial SRVs are at a depth of four to six feet below the surface.[11] In addition, groundwater in the area is not a drinking water source and the Phase II does not identify any hazardous substances in groundwater at concentrations above MPCA action levels.

MPCA has reviewed the Port Authority's March 2008 Phase II, but has not required that Advance undertake any cleanup of hazardous substances on the Property. For example, MPCA has not placed the Advance site on the MERLA permanent list of priorities ("PLP") which is a list of sites with releases or threatened releases of hazardous substances that MPCA establishes for purpose of taking remedial or response actions Minn.Stat.§ 115B.17, Subd.13. Similarly,

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9 Advance is not responsible for the release of the any of the hazardous substances found on the site. The Port Authority's environmental assessments determined that the Property's prior owners released the hazardous substances.

[10] SRVs are contaminant-specific soil concentrations above which MPCA predicts an unacceptable risk to human health. MPCA developed Tier 2 SRVs for human exposure based upon industrial and recreational Property use.

[11] Advance operates a commercial business on the Property, so Tier 2 Industrial SRVs are the relevant screening standards for the cleanup of any hazardous substances on the Property. The Port Authority's Response Action/Construction Contingency Plan ("RAP") for the proposed redevelopment of the Advance Property reaches the same conclusion. The RAP, which MPCA has approved, recommends Tier 2 Industrial SRVs as the cleanup standards for hazardous substances on the Advance Property. In determining appropriate cleanup standards for a response action under MERLA, MPCA must consider the planned use of the Property after a cleanup is complete. *Minn. Stat. § 115B.17, subd. 2a.*

MPCA has not issued Advance a RFRA requiring a cleanup of the hazardous substances on the Property. [12]

MPCA's only correspondence with Advance regarding information in the March 2008 Phase II is focused on methane gas. Long before Advance purchased the Property in the early 1970's, the former owners buried construction debris in low-lying swampy areas on the site. The Phase II notes elevated levels of methane gas on the Property, generated by either buried debris or by naturally-occurring peat. MPCA raised concerns regarding the methane levels and Advance conducted a methane investigation. The investigation detected methane in Advance's on-site buildings at levels well below those MPCA deems safe. Advance nonetheless submitted its investigation results to MPCA, installed methane monitors, and has committed to install methane mitigation measures at its own expense if MPCA determines that such measures are necessary.

c. No Cleanup Is Necessary For Petroleum At The Advance Property.

1. The Port Authority May Not Consider Petroleum Cleanup Costs In Determining Whether A Parcel Is An "Environmentally Contaminated Area."

The condemnation statute allows the Port Authority to consider only the costs of MERLA removal actions and remedial actions in determining whether a parcel is an environmentally contaminated area. *Minn. Stat. § 117.025, subd. 8.* Petroleum is not a MERLA hazardous substance. MERLA's definition of "hazardous substance" specifically excludes "petroleum," including diesel range organic compounds ("DROs") and gasoline range organic compounds

[12] A cleanup is only appropriate when MPCA deems the action is necessary to protect human health or welfare or the environment. *Minn. Stat. § 115B.17, subd. 1.* Before spending public money on a remedial or removal action, MPCA must issue a RFRA to a party and determine whether the party will comply. *Id.* If the party does not comply with the RFRA, MPCA may itself undertake the response action or request that the Attorney General seek an injunction compelling the party to implement the RFRA. *Minn. Stat. § 115B.18.* In addition, MPCA may seek penalties of up to $20,000 per day against the party for failure to comply with the RFRA. *Id. Minn. Stat. § 115B.18.*

("GROs"). *Minn. Stat. § 115B.02, subd. 8.* MPCA has no authority to address petroleum contamination in MERLA "removal actions" or "remedial actions." As a result, the Port Authority cannot include DRO and GRO remediation costs in alleging that cleanup costs exceed 100 percent of the assessor's market value for the Advance Property. *See Minn. Stat. § 117.025, subd. 8.*

2. The Port Authority's Environmental Consultant Concludes That The Petroleum Issues At The Advance Property Are "Pretty Minor."

Even if the Port Authority could consider petroleum cleanup costs, the Port Authority's environmental consultant concludes that the DROs and GROs at the Advance Property do not require remediation. In a recent email to MPCA staff, the Port Authority's environmental consultant stated that "the petroleum issues on Parcel 10 [the Advance Property] are pretty minor." *Email from Eric Hesse, Liesch Associates, Inc., to Stacy VanPatten, MPCA, May 19, 2008. Exhibit B.* The Port Authority's consultant also acknowledged that the Port Authority failed to submit the Response Action/Construction Contingency Plan, which proposes a cleanup of the Advance Property in anticipation of redevelopment, to the MPCA Petroleum Brownfields program. *Email from Eric Hesse, Liesch Associates, Inc., to Steve Heurung, Lindquist & Vennum, May 16, 2008.*[13] *Exhibit B.*

MCPA appears to agree with the conclusion of the Port Authority's environmental consultant that the petroleum issue at the Advance site is "pretty minor." MPCA has the authority under the Petroleum Tank Release Cleanup Act to address the release of petroleum

[13] The Petroleum Brownfields program, formerly known as the Voluntary Petroleum Investigation and Cleanup program, is similar to the MERLA VIC program for hazardous substances. *See* Minn. Stat. § 115C.09, subd. 3b. The Petroleum Browfields program provides technical assistance liability assurance to facilitate and expedite the development, transfer, investigation, and cleanup of Property contaminated with petroleum. MPCA Petroleum Brownfields Program, Guidance Document 5-02 at 1 (April 2005).

from tanks into the environment. *Minn. Stat. §§ 115C.02, subd. 12; 115C.03.* MPCA, however, has not required Advance or any other party to clean up the DROs and GROs on the Property.

Advance's efforts to invest in systems to address the methane issue have not deterred the Port Authority from its plan to take the property for its own development. Rather, the Port Authority is using environmental scare tactics to try and force the Haug family off their land. But Advance has taken every step necessary to address methane gas on the site, and will undertake additional measures if MPCA believes that they are appropriate. In other words, if MPCA requires methane gas mitigation, as little as $50,000 separates Advance from addressing the Port Authority's pretext that it needs to take the property to remediate environmental contamination.

B. The Environmental Clean-Up Costs Do Not Come Close to the Value of the Property.

Advance does not believe that the Port Authority will ever get to the point of establishing clean up costs are required or that the Port Authority has the right to require clean up of the Advanced Property. However, even if a Court were to consider the clean up costs, the Port Authority will be unable to demonstrate such costs exceed the taxable value of the Property.

As discussed above, MCPA's only concern with respect to the property focuses on methane. Advance has investigated the methane issue, submitted the information to MPCA, and installed methane monitors. If MPCA requires, Advance will install measures to mitigate methane gas buildup in its on-site buildings. Advance estimates that the cost of such mitigation measures will be approximately $50,000. By comparison, The Port Authority estimates that it will needlessly spend approximately $4.4 million in cleanup costs on the site, because the

economic development project that the Port Authority is proposing will require extensive on-site excavation.

In short, after a careful analysis of the environmental issues, Advance asks the Council to conclude that the Port does not have the authority to take the Property under the environmental exception to the public purpose restrictions in Chapter 117.

IV. THE TAKING IS NOT FOR A PREDOMINANTLY PUBLIC USE AND ITS PRETEXTUAL

Both the United States Constitution and the Minnesota Constitution require a taking to be for a public use. Even before the 2006 Amendments, the Courts acted to prevent governmental abuses of the Condemnation process. Courts are obliged to prevent the condemnation of private Property for an improper purpose when governmental bodies abuse their legislative discretion to determine what constitutes a lawful public purpose. *Port Authority of City of St. Paul v. Groppoli*, 295 Minn. 1, 8-9, 202 N.W.2d 371, 375 (1972) ("[I]t is the duty of the courts to intervene for the protection of the Property owner whenever it clearly appears that, under the guise of taking his Property for a public purpose, it is in fact being taken for an improper purpose.") The recent *Lundell* decision *(attached as Exhibit C)* sends a clear message that members the Minnesota Supreme Court are willing to take a closer look at whether a taking is lawful. While the *Lundell* Court held that a utility could condemn Property for utility purposes, at least two members of the Minnesota Supreme Court indicated an interest in revisiting the issue in a redevelopment case.

In an opinion by Justice Paul Anderson, joined by Justice Alan Page, the two justices noted that the decision should not necessarily be understood to apply to exercises of eminent domain power that benefit private entities with only "incidental" public benefits. Justice Anderson stated:

> I write separately to temper, for my own part, the court's very narrow characterization of our ability to exercise judicial review over what constitutes a public purpose sufficient to warrant the taking of private Property under the eminent domain provisions of both the United States and Minnesota Constitutions. While the case before us today does provide the proper occasion for an in-depth analysis of what type of takings case might require a more demanding standard of review, this court should not foreclose the possibility that a more stringent standard than what we articulate today might be appropriate under certain circumstances. Neither constitution permits a taking that confers benefits on particular, favored private entities with only incidental or pretextual public benefits; yet, the possibility definitely exists that such a case will come before us. If and when such a case comes before us, we must retain the ability to apply a sufficiently demanding level of scrutiny such that the constitutional right of the people of our state to remain secure in the ownership of private Property may be protected.

Lundell, 707 N.W.2d at 383 (Justice Anderson concurring). Prior to the *Lundell* decision, in *Walser* the Minnesota Supreme Court divided equally (with one Justice abstaining) on whether the acquisition of private Property for the Best Buy headquarters (under the pre-2006 Legislation) was constitutional. *Housing and Redev. Auth. v. Walser Auto Sales, Inc.,* 641 N.W.2d 885 (Minn. 2002).

Advance believes that the Court will see through the Port Authority's sham and conclude that the taking is not constitutional. In particular, for all of the reasons discussed above, the claimed environmental clean up is merely a pre-text.

The pretextual takings doctrine (also called "bad faith" takings or takings by "subterfuge") has roots in Minnesota. Most recently, in 1973, the Supreme Court of Minnesota mentioned favorably the doctrine of "bad faith" takings.[14] And in *Ford Motor Co.*,[15] the court explicitly applied the term "pretext" in dismissing a condemnation proceeding where the City of Minneapolis attempted to condemn private Property for "streets and alleys" while intending to

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[14] *Housing & Redevelopment Authority v. Schapiro*, 210 N.W.2d 211, 214 (1973) ("[A] municipality's finding of public purpose can be negated by a showing of bad faith or tainted motive. . .").
[15] *Ford Motor Co. v. District Court of Fourth Judicial Dist.*, 158 N.W. 240, 242-44 (Minn. 1916).

use the land for the purpose of "a switching track," for which it had no power of eminent domain. Many other states recognize that a taking can be challenged when its asserted public purpose is not, in fact, the real purpose of the taking.[16]

Minnesota courts have essentially been deferring to local governments' claims of public purpose. See *City of Duluth v. State* in 1986.[17] That all changed with the legislative reforms in 2006. As such, the pretextual takings doctrine has been reinvigorated as a defense of private Property from abusive use of the eminent domain power.

After the Legislature limited the scope of permissible public purposes, unfortunately some local governments will use all the tools they can to continue their redevelopment projects—including using accepted public purposes like environmental remediation as a pretext, or excuse, to use eminent domain. If a local government cannot show by a preponderance of the evidence that the taking is for a legitimate public purpose, the Courts will conclude the stated public purpose is simply a pretext for an *ultra vires* or illegal taking, that is, one for which the government has no authority—like economic development. *Minn. Stat. § 117.075, subd. 1.*

The evidence of pretext is everywhere in this case. The Property has been part of a redevelopment district for almost 20 years. The Port Authority's own public statements—on the radio and in the City Council—have continued to stress the project's potential to create jobs and increase the City's tax base. But the Port Authority's "jobs, jobs, jobs" mantra only underscores

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[16] *See, e.g., Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227 (Del, 1987) (proposed taking for parking ramp was unlawful and beyond authority's statutory power where stated reason for taking was pretext for providing expansion space to newspaper City wanted to retain); *Borough of Essex Falls v. Kessler Inst. for Rehabilitation*, 289 N.J. Super. 329, 673 A.2d 856 (N.J. Super. Ct. App. Div. 1995); *Pheasant Ridge Assocs. v. Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152 (Mass. 1987); *Brannen v. Bulloch County*, 193 Ga. App. 151, 387 S.E.2d 395 (Ga. Ct. App. 1989); *Southwestern Ill. Dev. Auth. v. Nat'l City Env'l, LLC*, 768 N.E. 2d 1 (Ill. 2002) ("While the activities have been undertaken in the guise of carrying out its legislative mission, SWIDA's true intentions were not clothed in an independent, legitimate government decision. . . . It appears SWIDA's true intentions were to act as a default broker of land.").

[17] 390 N.W.2d 757 (Minn. 1986).

the illegality of the taking and threatens the City with a liability for attorneys' fees when the taking is rejected by the Courts.

As the Port Authority's own documents establish, this taking is an attempt to finally finish a long-desired project. The documents, such as the Port Authority's cleanup grant applications, contain repeated references to economic development.

For instance, in its grant application to the Metropolitan Council, the Port Authority specifically stated that "[t]his area has been a priority redevelopment area for the City of St. Paul and the adjacent neighborhoods for over 10 years." Further, the Port Authority goes on to highlight the uniqueness of the Property:

> There are no other industrial sites comparable to the Arlington-Jackson West Redevelopment Area in size and function in the City of St. Paul. The site has easy access to I-35E which is critical and very desirable for our end-users. The success of Phase I (1997) of the Arlington Business Center serves as a model and impetus for the redevelopment of the site. The Port Authority is confident in its ability to remediate and sell the Site to end-users (with the typical outcome of large numbers of living wage jobs housed in *high-performance* buildings). A Met Council TBRA grant is an important step in recycling this *under-utilized* Property and continuing the Port Authority's success of job creation, Property tax enhancement, and urban redevelopment.

(Emphasis added.) As discussed above, the Port Authority's own hand-picked appraiser has stated that the Property is not "under-utilized" and is instead currently being put to its highest and best use.[18] Thus, the Port Authority is jettisoning both the evidence and the public good to ram through an ill-advised economic development project.

The Port Authority describes its redevelopment mission as "acquiring sites too risky to develop because they are polluted and then clean them to Minnesota Pollution Control Agency standards with federal, state and local loans and grants." But the Advance Property is not an

[18] The Port Authority's appraiser also stated that Advance's outdoor storage yard was the highest and best use of the Property even *after* environmental remediation.

abandoned Brownfield that no one will develop. Rather, the Port Authority is seeking to destroy a thriving business whose Property complies, as noted above, with all the MPCA's directives. The Port Authority is acting far outside the scope of its mandate and exaggerating an environmental problem to further its real goal of "economic development"—the very thing prohibited by the legislative reforms in 2006.

As discussed above, Advance is prepared to address any MPCA concerns regarding the Property with private funds. The Port Authority's environmental red herring is just a means to an end to take Advance's land for the Port Authority's real goal, namely, creating a new "business center" redevelopment project on Property that rightfully belongs to the Haug family.

One of the strongest indicators of pretext in this case is the fact that the Port Authority is only going to remove soil and debris from the Property because the excavation is necessary to install building foundations for the Port Authority's economic development project. Advance may continue the business on the Property without any such excavation. If Advance is allowed to continue the businesses, there is absolutely no need for the Port Authority's environmental clean up.

The Port Authority has decided to test the scope of the 2006 eminent domain reform law's contamination provision within the eminent domain reform law with the goal of creating a loophole large enough to drive a cement mixer through. It plans to take an industrial Property that posses no threat to human health, welfare, or the environment then turn it over to a private party for economic development. In essence, the Port Authority's plan is to do *Kelo*-style economic development under the pretext of environmental remediation. But the Port Authority will not be able to show by a preponderance of the evidence that the primary purpose of this

taking is to remove contamination from the Property. Thus, a court will likely conclude that this taking by subterfuge is both pretextual and unconstitutional.

V. ADDITIONAL LITIGATION RISKS

Advance does not believe that the Port Authority has properly evaluated the litigation and financial risks. Advance wants to be clear that it would prefer not to litigate at all with the Port Authority or the City, but it is committed to defending its constitutionally protected Property rights. However, in the event that the Trial Court grants the Petition and the Minnesota Court of Appeals and Minnesota Supreme Court conclude that the Port Authority can take Advance's Property, Advance is entitled to significant compensation. "The clear intent of Minnesota law is to *fully compensate* its citizens for losses related to Property rights" acquired by the government. *State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992).

While the Council is undoubtedly aware of the obligation to pay "just compensation," the 2006 Legislative amendments to Minnesota's condemnation statute require condemning authorities to pay even more.

A. Minimum Compensation

In addition to the constitutionally required just compensation, condemning authorities now have the affirmative obligation to make sure that the condemned party has the financial resources to remain in the community. According to the relevant statute:

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

Minn. Stat. § 117.187 (emphasis added). The Port Authority has utterly failed to locate a comparable Property in the City of St. Paul.[19] It has also not made an offer to Advance that includes a payment to permit Advance to purchase a comparable Property in the City of St. Paul.

B. Going Concern or Business Losses

If Advance goes out of business or its businesses are damaged as a result of the taking, the Port is also responsible for its business losses:

> Subd. 2. **Compensation for loss of going concern.** If a business or trade is destroyed by a taking, the owner shall be compensated for loss of going concern, unless the condemning authority establishes any of the following by a preponderance of the evidence:
>
> (1) the loss is not caused by the taking of the Property or the injury to the remainder;
>
> (2) the loss can be reasonably prevented by relocating the business or trade in the same or a similar and reasonably suitable location as the Property that was taken, or by taking steps and adopting procedures that a reasonably prudent person of a similar age and under similar conditions as the owner, would take and adopt in preserving the going concern of the business or trade; or
>
> (3) compensation for the loss of going concern will be duplicated in the compensation otherwise awarded to the owner.

Minn. Stat. § 117.186. Notably, the Port Authority has the obligation to establish that it did not cause the business losses. The Port Authority does not appear to have evaluated this financial risk.

C. Relocation Fees and Expenses.

In addition to the required just compensation, minimum compensation and potential going concern damages, the Port Authority will also be responsible for relocation and

[19] The Port Authority has represented to the Council, to the Mayor and on the radio that it has relocation sites. Advance has repeatedly requested information on available relocation sites. None have been provided. The Council should carefully examine the Port Authority's actions (or inactions) in this regard.

reestablishment expenses. *Minn. Stat. § 117.52, et. seq.* The Port Authority has yet to estimate these expenses for Advance, but Advance will be required to relocate more than 10 acres of heavy equipment. The costs of relocation will likely be several million dollars.

D. Attorneys' Fees

Advance has not yet determined what its damages will be, mostly because it has been focusing on defeating the ill-advised condemnation and because it is impossible to evaluate the damages until the Port Authority identifies a relocation site in The City of St. Paul. However, Advance's initial due diligence indicates that its claim for damages (in the event that the Port Authority is permitted to condemn its Property) will be substantially greater than the Port Authority's offer. The 2006 Legislative amendments now include a requirement to pay the owner's attorneys' fees.

> (a) If the final judgment or award for damages, as determined at any level in the eminent domain process, is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition, the court shallaward the owner reasonable attorney fees, litigation expenses, appraisal fees, other experts fees, and other related costs in addition to other compensation and fees authorized by this chapter. If the final judgment or award is at least 20 percent, but not more than 40 percent, greater than the last written offer, the court may award reasonable attorney fees, expenses, and other costs and fees as provided in this paragraph. The final judgment or award of damages shall be determined as of the date of taking. No attorney fees shall be awarded under this paragraph if the final judgment or award of damages does not exceed $25,000. For the purposes of this section, the "final judgment or award for damages" does not include any amount for loss of a going concern unless that was included in the last written offer by the condemning authority.

Minn. Stat. § 117.031. It is common for the final award of damages to greatly exceed the condemning authority's offer by more than 40 percent. The Courts that have interpreted this statute have been very quick to award fees and costs. *See Exhibit D.* It is impossible to predict

attorneys' fees and costs in this case until the litigation is complete, but they will undoubtedly be significant.

VI. INCONSISTENT STATEMENTS BY THE PORT AUTHORITY

Advance finds it troubling that at the public hearing before the Council, the Port Authority deemed it appropriate to raise a statement by Terry Haug from nearly 15 years ago. According to the Port Authority, Terry Haug requested "early acquisition" by the Port Authority. For the convenience of the Council the entire record of the proceedings from 1994 are enclosed as *Exhibit E.* What the actual minutes make clear is that in 1994, Advance was willing to relocate *if* the City found it another location meeting their needs. Advance requested early acquisition in 1994 because if the Port was going to relocate it, Advance naturally did not want to invest additional capital into the Property. Mr. Haug also noted to the Port Authority that if it did not find it a relocation site, its business would die. That is entirely consistent with Advance's present position.

Since 1994, Advance has built two new buildings and committed substantial investments in its current Property. Additionally, the Minnesota Legislature has since adopted sweeping condemnation reform providing private Property protections that Advance did not have in 1994.

As the Port Authority seems interested in pointing out statements it attributes to Advance, then Advance thinks the Council should also be aware of just some of the inconsistent statements by the Port Authority, *all within the last few months*, not some 15 years ago. Among others:

1. The Port Authority represented to the Metropolitan Council in seeking grant money for the present Property that it would not use eminent domain to acquire the Property. *(Exhibit F).*

2. The Port Authority commissioned two appraisals of the *same* Property within 90 days of each other that are mutually inconsistent regarding the value of Advance's Property.

3. The Port Authority's own appraiser has identified the highest and best use of the Property as it is *currently* being used by Advance. *(Exhibit A).*

4. During a radio interview, Mr. Hileman from the Port Authority stated that the lead encapsulated under clean fill on the Property presents a danger to children. This is absolutely false. There has never been (at least since Advance has owned the Property) a single health related incident on Advance's Property to *anyone* as a result of any lead. The Property has a state-of-the-art security system. Even if an intruder could access the Property, the intruder would have to dig through asphalt and clean fill to even reach the lead.

5. The Port Authority stated that Advance refused to meet with it. This is also false. The Port Authority's appraiser and relocation consultants met on site for several hours and took more than 100 pictures. (*Exhibit G*) In July of 2008, the Port Authority's consultant then *cancelled* a second meeting at the Property. Advance asks the Council to inquire what additional information the Port Authority believes it needs regarding the Property. The Port Authority has refused to identify any further information it wants from Advance.

CONCLUSION

This is an ill-advised, unlawful effort to take productive private property from a thriving St. Paul-based business. As Karen Haug has told the City Council, this is not about the money. She is challenging this taking not only to protect her business, but to protect the property rights of all small business owners, the jobs of hard-working people like her employees, and the dreams of all entrepreneurs who play by the rules of fairness and hard work and expect the government not to interfere.

If the Port Authority can take the Haug family's land for this private development project, it will gut the very eminent domain reforms that now protect homes, small businesses, and farms across Minnesota. Any residential property with lead or other common contaminants in the soil or in the building will be susceptible to condemnation. Given the sheer number of older properties and buildings in St. Paul—and other places—developers and local governments will have a potent new tool to push their so-called "economic development" projects, just like in

the days when "blight" designations were the weapon of choice for condemning whole neighborhoods. This taking is only the first step down a slippery slope where developers and municipalities can remake whole neighborhoods at their whim.

In an apt description of the Port Authority's use of eminent domain against Karen Haug and Advance, Justice O'Connor warned in *Kelo*:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

The Port Authority may believe individual property rights must yield to the commonweal. But make no mistake—the Port Authority cannot justify this taking by hiding behind some contorted conception of the common good or idealistic public policy goal. Minnesotans overwhelmingly support eminent domain reform. As demonstrated by the outcry over this project, they oppose eminent domain for private gain and economic redevelopment. Thus, there is little public policy justification for this project other than the aesthetic preferences of the planners at the Port Authority.

The Council should protect Advance's property rights. While Advance has no desire to litigate, it is confident that if the Council does not protect its rights, the Courts will do so under the 2006 legislation.

Respectfully Submitted, October 21, 2008

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