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Case No. A08-1405

STATE OF MINNESOTA
IN COURT OF APPEALS

Mark O. Kvam, as Trustee of the Mark O. Kvam Revocable Trust; Phillip I. Kvam; Spouse of Phillip I. Kvam, if any; Kvam Limited Partnership, a limited partnership under the laws of Minnesota; U.S. Bank, National Association, fka First Trust Company, as Trustee of Trust B Created by the Last Will and Testament of Andrew Kvam; Ivan P. Kvam, as Trustee of Trust B Created by the Last Will and Testament of Andrew Kvam; Mark Kvam, aka Mark O. Kvam; Spouse of Mark Kvam, aka Mark O. Kvam, if any; Thomas A. Kvam, aka Thomas Andrew Kvam; and Spouse of Thomas A. Kvam, aka Thomas Andrew Kvam, if any,

Appellants,

v.

City of Willmar, a municipal corporation under Minnesota Law,

Respondent.

APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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

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I. COMPETENT EVIDENCE DOES NOT SUPPORT WILLMAR'S ASSERTION THAT THE DAMAGE TO KVAM PROPERTIES IS THE SAME WHETHER THE FEE OR AN EASEMENT IS TAKEN.

Willmar has pointed out an inaccuracy in our brief, and we begin by acknowledging that inaccuracy, while defending the main thrust of the point that we were trying to make. We challenged Willmar's conclusion that one could take strip of land through a farmer's field in fee, and do essentially the same damage to that field as if you take an easement and allow the farmer to plant, cultivate and harvest across that strip. Our issue was not with the amount of valuation shown in the "restricted use appraisal", but rather its use of data based on the taking of easements to draw that conclusion. In making that point, we referred to the restricted use appraisal as being an appraisal of easements, when in fact it purports to be an appraisal of the taking of the fee.

It is technically true that Willmar submitted a real estate market value restricted use appraisal report in evidence that purported to be a restricted use appraisal of the cost of taking the fee. Exhibit BB was submitted without its author being present in the Courtroom. The document was a restricted use before and after market value appraisal which purported to determine the acquisition cost of taking strips of land in fee from the Kvam properties. Willmar's brief is thus accurate when it says that we wrongly called this appraisal a right of way appraisal. We stand corrected. But we stand by our criticism of the process by which Willmar made its decision, and we stand just as firmly

behind our criticism of Willmar's assumption that taking the fee and taking the easement result in the same damage to the farm.

The issue that we were trying to address, was not the actual valuation of taking the fee. That issue gets addressed in the damages phase of the case, of course. We were trying to address Willmar's assumption that you can take a strip of land in fee in farmer's field and inflict the same damage to that field if instead you leave the farmer with the right to continue to cultivate, harvest and plant, unimpeded across that strip. There is no appraisal basis for this contention, yet that contention represents a fundamental basis for Willmar's decision. Willmar conceded this to be the case at trial. February 2 Tr. 75.

The Court can best understand the issue, by looking at a copy of Exhibit DD-3, which is City of Willmar interceptor Sewer Right of Way Plat No. 3. (A-48). We have appended this exhibit to our Reply brief and cross-hatched the property that Willmar is taking in fee. This Exhibit is illustrative of the approach that led Willmar to conclude that taking a strip in fee through prime farmland is no big deal. The width of the strip that Willmar proposes to take varies, ranging from as wide as 200 feet to 75 feet. Exhibit DD-3 shows the interceptor line running approximately parallel to a drainage system, which of course prevents access to the property just to the south of the system. Exhibit DD-3 shows that Kvam interests own land on both sides of the ditch system that is running across this exhibit in an east-west direction. Notice that the "right of way" parcel 32 cuts off a large irregularly shaped parcel just to the North. The effect is to

create a narrow, but significant, inaccessible parcel that can no longer be planted or cultivated using machinery sweeps from the south. When Willmar decided that the damages inflicted to agriculture from taking the fee would be about the same as taking an easement, Willmar assumed that taking parcel 32 would inflict no adverse consequences–no severance damages--to the parcel that lies between Parcel 32 and the ditch system. The engineer who testified at the hearing introduced Exhibit BB to prove that conclusion. Now under the City's taking plan, Kvam is left with this stray strip of property, cut off from his farm to the South, without the means effectively to farm it, but without compensation. Not only is there no compensation paid for the loss of this land, but the loss of this land to effective farming was never considered during the environmental review.

Willmar's engineer concluded that Kvam's farm would suffer no severance damages by using the restricted use appraisal, Exhibit DD. The author of the restricted use appraisal never took the stand to endorse this conclusion.[1] When the appraiser visited the sites for inspection purposes, he had no idea that he was doing a fee appraisal, because the City was intending to take an easement. According to page 2 of the appraisal, (Exhibit BB) Mr. Ruhland conducted his site visit on August 8, 2007. At that time, the City was still planning on taking an easement. Mr. Kvam met with Ruhland at the site,

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[1] The engineer testified that he was not competent to answer questions on cross examination about the appraiser.

so that Kvam could assist Mr. Ruhland in evaluating the site for potential damages. Mr. Ruhland did not inform Kvam that the taking of a fee was under consideration, because of course it was not. Kvam learned for the first time that the City wanted to take a fee in October. Thus, during Ruhland's visit to the farm, he would not have had any reason to look at the severance problems caused by taking of a fee, because it wasn't even a part of his appraisal problem.

Moreover, the appraisal document itself states the document cannot be used for any purpose, because the rest of the restricted use appraisal is in the possession of the appraiser in his office. The document gives the customary warning for restricted use appraisals that its use is in fact restricted, and that it cannot be understood "without additional information in the work file of the appraiser."

Now what the appraiser has done in Exhibit BB is to suggest that cutting a 100-200 foot wide strip through the middle of prime farmland inflicts no severance damages, using the market sales comparison approach. He found a number of properties that had been sold in the marketplace that were subject to underground utility pipeline easements. That is to say, the properties already had utility pipeline easements on them when sold. The appraisers' grid specifically states with respect to each comparison property that there has been no change in use as a result of the pipeline. None of these properties had pipeline easements taken in fee, in other words on these farms, agriculture continued across the easement. He then compared other sales which had no utilities at all, which

there are no pipeline easements on similar lands. You can find these sales in Exhibit D to Exhibit DD "Summary of Paired Sales."

None of these paired sales involve the sale of farms encumbered by the taking of a fee strip for a utility. The appraiser could not find a sale with a utility easement taken in fee to use as a comparison. Its just not done. The comparison grid shows that when a utility company acquires an easement in a farmer's field, and allows the farmer to continue to farm across that field, the appraiser can discern no negative impact on the remainder of the land. In short, allowing the farmer to continue to farm across the easement preserves his farm value. This document proves the exact opposite of the conclusion drawn by Willmar. It shows that utilities regularly take easements, and that when they take easements, there is no damage to the remainder, because of course, the farmer continues to farm across the easement as before.

What Willmar has done is to take this information and conclude that since you can take an easement without doing damage, it follows that you can take the fee without doing damage as well. They are saying that the isolated strip in our appendix is just as valuable before the taking as it will be after. We emphasize that this severance problem arises, in one form or another, throughout the length of the takings.

The problem here is that this decision to convert acquisition from an easement taking to a fee taking was a last minute deal. The appraiser took easement purchases and uncritically and without explanation converted them to fee acquisitions. The contention

that you can take a strip of land in a farmer's field, and interfere with his farming practices, or even cut off a large strip of land so that it is cumbersome to maneuver equipment into that land and that such a taking damages the property in the same manner as an easement is not a rationalization, not a reason. The reason to switch to fee acquisition can be traced unequivocally to Willmar's belief that Kvam shouldn't have made the City start a separate lawsuit, as the City puts it, to get onto his land for purposes of testing.

II. WILLMAR CANNOT PENALIZE KVAM PROPERTIES BECAUSE THEY REQUIRED WILLMAR TO COMMENCE AN ACTION TO CONDUCT TESTING.

In this regard, Willmar's brief displays a fundamental misconception with regard the accrual of its rights relative to property that it wants to condemn. When Willmar decided to take a right of way across the Kvam properties, that decision conferred no property rights on the City of Willmar. It didn't have the right to criticize existing farming practices. It didn't have the right to demand entry without a court order, nor did it acquire the right to take retaliatory action against the landowners if they elected to stand on their rights to farm, unimpeded and unencumbered by City equipment running across its fields or doing necessary or unnecessary damage. The farm families still owned that property exclusively. If they wanted to protect their property against nematodes they had an absolute right to do that whatever the City might think about the validity of that concern.

Willmar's brief implicitly ridicules Kvam's farming practices as if they were extreme or unreasonable. But there is not a shred of evidence in this record that his farming practices are unreasonable. The only competent evidence before the Court was that of Mr. Kvam. He is the only person who testified who had any farming knowledge, and there is not a shred of evidence that would suggest that he and the others with whom he jointly farms, are anything other than extraordinarily successful. At one time, our court system was populated by judges with extensive agricultural experience. In those days, it would have been impossible for a City to make absurd contentions about farming practices, to manufacture them out of thin air without a shred of evidentiary support, and get away with it. But our society has become so urbanized that it is now possible to insert the line "steam clean" in a brief, and pass that off as proof that the City is dealing with a difficult person. But ths contention is totally unfounded, baseless and manufactured out of thin air.[2]

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[2]We cannot refer to external sources in this brief to prove that nematodes are a problem in farm country. We are left in the uncomfortable position that the City is claiming that Kvam is unreasonable without evidentiary support. We insist, that the City's attempt to regard Kvam's reliance on his own farm experience as somehow out of line or preposterous, is not supported in this record. Nematodes can move no more than a few inches a year on their own, so they depend on "hitching rides" on tillage, planting, or harvesting machinery, or in soil peds with seed. Clean machinery thoroughly with steam, hot water, or dry heat before moving from infested fields to noninfested fields and plant only seeds that have been thoroughly cleaned to remove soil particles or obtain seed from non-infested SCN locations. SCN can also be introduced into a field by wind-blown dust, animals, or flooding http://ohioline.osu.edu/ac-fact/0039.html; http://www.planthealth.info/scnguide

In farm country, pests are controlled through a variety of farming practices, none of which are evidently familiar to Willmar. The farmer who currently controls the land, who is putting in the crop in the current year is fully entitled to choose those practices and stick to them. The farmer may use approved pesticides, or may use organic farming practices. His decision may involve choice of crop, crop rotation, cleaning of equipment, monitoring soil for evidence of pest invasion, and yes, it may involve making an effort to keep equipment clean when moving that equipment from field to field, as Kvam has testified.

It is evident that Willmar would rather avoid having any interlocking relationship with Kvam at all. But by running its sewer line through his fields, that relationship is unavoidable. The assumption that it can obliterate this relationship by clear-cutting through the fields again seems based on a city dweller's view of how things work in farm country. Willmar wrongly assumes that what it does on its strip of land has no impact on adjoining farms. In farm country, adjoining farms have a mutual interest in protecting each other from the spread of pests, disease, and weeds. Farmers regularly collaborate to make sure that adjoining fields will not inflict harm on each other. If one farmer uses farming practices which put the other at risk, they communicate and work together to solve the problem. Adjoining farmers cooperate in weed control, pest control, and drainage. Adjoining properties are engaged in a mutual and interdependent enterprise,

and running a clear zone through Kvam's farm doesn't avoid that problem, it makes it worse.

Kvam has never suggested that he reserved the right to be unreasonable in dealing with the City. The simple answer to Willmar's concerns is that acquisition of an easement will give Willmar whatever rights that Willmar puts in that easement. Kvam will have to adjust his farming practices to that easement and we made it quite plain in the District Court that Kvam recognizes that he will not have the same rights after acquisition that he did before. That, indeed, is why the District Court found that the easement that we proposed seemed to resolve all of Willmar's concerns. The real issue in this case, then, is whether Willmar can disregard the fact that there is a simple solution to its concerns, and decide to take a fee instead of an easement, because it thinks that Kvam's farming practices on land that he owned were over cautious.

We find that presumption in the opening argument in Willmar's brief in this court. We find it evident in the transcript as Willmar criticizes Kvam because he made the City "start a separate lawsuit" to get on his property. The fact that Willmar had to start a "separate" lawsuit is not Kvam's fault–it is Willmar's fault, because Willmar decided it wanted to come on Kvam's property and do the testing before commencing eminent domain proceedings. It is plain from the statutory language in section 117.041 that the statute contemplates that the City will file eminent domain proceedings and then seek a court order to conduct environmental or other testing. When the City does that, then it

doesn't need to start separate proceedings; it commences eminent domain proceedings and then requests an order to inspect. When the City doesn't do this, the statutory method of obtaining access to private property is to get a court order. What Willmar is now saying here is that if a property owner insists that a City follow the statutory procedure, a City has thereby acquired the right to expand its proposed taking. The practical effect of this position will be to send a message to attorneys for landowners that they must advise their clients to be careful about asserting their property rights, because the condemnor may respond by demanding more of their property.

III. THE HOPKINS V. CHICAGO RAILROAD CASE IS NOT A CONDEMNATION CASE.

Willmar contends that Hopkins v. Chicago, St. P., M&O Ry Co. 78 N.W. 969 (Minn. 1899) stands for the proposition that Cities have the authority to take a fee when they only need an easement. The case says nothing of the sort. Hopkins is not a condemnation case. It is a litigation about whether, in a previous action, the railroad had taken the fee or an easement. In a prior action, the Railroad had commenced a condemnation action to exercise its statutory right to acquire a clear zone on either side of the railroad. In that action, the District Court had issued a taking order that granted the railroad absolute ownership in fee. The landowner did not challenge that order. Instead the Court appointed commissioners, who then made an award. On entry of the award, the landowner accepted the award in return for the fee.

The cause of the dispute in Hopkins was that the landowner continued to farm the strip taken by the railroad in fee, evidently with the acquiescence of the railroad. At some point, however, the Railroad decided that Hopkins' farming efforts jeopardized its operations, and the Railroad barred Hopkins from continued use of the land. Hopkins commenced a suit claiming that the railroad had taken only an easement, but the court rejected that contention by construing the decision of the Court in the prior condemnation case. The Hopkins case tells us nothing about whether a City can take the fee for a sanitary sewer, when it only needs an easement. The head note for the case makes this clear: The holding is "When a railroad acquires land for any railroad purpose by condemnation proceedings under the statutes, the necessity for taking the land for such public use is settled and determined by the order appointing commissioners to ascertain the amount of the landowner's compensation."

IV. WILLMAR'S DECISION TO TAKE THE FEE DOES VIOLATE STATE POLICY.

In our main brief, we pointed out in the District Court that Willmar was required prior to obtaining clearance from the MPCA for this project, to submit information about the environmental impact of this project. We said that if Willmar had actually planned to take a fee based on engineering or other considerations, then it would not have represented to the MPCA that all but a few acres of prime farmland would be restored to production. We examined on this point at trial. Eg. February 7 Tr, 53 ff. The suggestion that the issue was not raised is simply not true.

We argued in our brief that this Court's deference to legislative decision making depends upon observance of the process designed to inform that legislative judgment. We said that part of that process involves subjecting the external consequences of its decision-making to a public review, so that Willmar would have the benefit of not just citizen comment, but also agency comment. What Willmar did is stack the deck against the possibility that the MPCA leadership, or the Department of Agriculture, or others, might step in and raise concerns about taking the unprecedented step of taking the fee for underground utilities in farm country. Willmar evaded this issue by both understating the amount of land that it was removing from agricultural production, but it also understated the amount of land impacted by ignoring the fact that it was severing fields in the way that we have described above. If Willmar had proposed to take the fee on the grounds that it sought the unencumbered right to avoid having issues with its neighboring farms, that contention too might have been exposed to public review. Willmar might have realized, based on comment from MPCA staff or farming interests, that in fact, pest and weed control in farm country is indeed a shared problem that requires collaboration.

The idea that this State does not have a policy zealously protecting prime farm land from unwarranted and unnecessary invasion simply will not stand scrutiny. When pipelines are run through prime farmland the pipeline company is required to submit an agricultural protection plan designed to minimize damage to agriculture and those plans are even reviewed by an Administrative Law Judge at a public hearing.

We did not claim in the District Court, nor do we claim here, that the entire sewer project is invalid and must be stopped because it was predicated on an invalid environmental review. Since Minnesota law prohibits Willmar from proceeding on a project that is predicated on a materially misleading environmental review, we might have asserted, but did not, that the takings could not go forward, that they should be delayed along with the entire project because of a fundamentally flawed environmental review. But it has been appellants' consistent position that, even though they adamantly reject the City's taking of a fee-strip out of their farms, when that is unnecessary, that they are not trying to stop the project. If Appellants had wanted to blow up the entire project, they might also have commenced proceedings before the MPCA or the EQB, to challenge the adequacy of the environmental review, on the grounds that it was based on materially misleading information.

Nor did we suggest that Willmar violated Minnesota law by violating the statute that requires Minnesota Agencies to send decisions like this to the Department of Agriculture. We said that the process for conducting this review, for Cities, is the environmental review contemplated by Chapter 116D. The integrity of that review requires that Willmar provide accurate information in its EAW (worksheet) and accompanying documents, so that the responsible governmental organization can submit that information to the appropriate commenters. Had Willmar represented that it was taking the unprecedented action of taking right of way land in fee through farm country,

instead of representing that only 8 acres would be taken out of production, the Department of Agriculture would have been an appropriate commenter in this process. We have said that ordinary deference this decision is not appropriate, because Willmar skipped over a key part of the process.

Remarkably, at some points, Willmar has suggested that its representation to the MPCA that the land would be returned to agricultural production is not misleading, because it may lease out the strip of land for farming once construction is completed. This again would seem to be the kind of assertion born of a city dweller's impractical view of farming realities. Take a look again at our appendix. Willmar told the District Court that it might mitigate this problem by renting the cross hatched land to a farmer. Who is this farmer going to be, one might ask? How is he going to access this land? If it is going to be Kvam, then we are left to conclude that Willmar doesn't object to allowing Kvam farm the land after all. And if that is the case, then all it needs to do is put the same conditions in the easement that it intends to put in the lease. If it is not going to be Kvam, but some other farmer, then how does Willmar intend to manage the relationship between Kvam and the tenant who is somehow going to maneuver his equipment into that narrow strip and cultivate. The absurdity of this situation is more proof that Willmar's reasons are really rationalizations for taking retaliatory action for, as Willmar puts it, making them start a "separate action."

Willmar is trying to negate what is really a rather simple point in our brief.

Willmar decided to take an easement, as Cities always do when they build underground sanitary sewers. It filed an EAW consistent with that intent. Then, it suddenly reversed its position, but failed to consider the implications of that decision by amending the project description as required by law. That undercuts Willmar's suggestion that it proceeded properly and considered all of the implications of its actions. When we raised this issue in the District Court, Willmar even suggested that there would be no negative impact, because it might return the land to agricultural production.

V. MINNESOTA STATUTES DO NOT GRANT AUTHORITY TO TAKE THE FEE WHEN AN EASEMENT IS SUFFICIENT.

In our brief we pointed out that the one statute that provides express authority for sanitary sewer refers to right of way. Willmar makes two points in response. First, Willmar argues that we failed to claim that Willmar lacked the authority to take a fee. We've addressed that contention in our response to Willmar's motion to strike, and we will not readdress that issue here, except to point out that the whole purpose of our appearance at the public purpose and necessity hearing was to challenge Willmar's authority to take a fee. Second, Willmar argues that the specific statute governing sanitary sewer, Minn. Stat. §465.01 (2007), is implicitly overruled by Chapter 117, which provides generic takings authorities to cities.

It is true, that Chapter 117 grants municipalities generic authority to take property. The suggestion is that the specific statute, which refers to taking of easements only, was impliedly overruled as to extraterritorial sanitary sewer takings in prime agricultural land,

by a generic statute which simply grants general authority to take fee or easement. To reach that conclusion, one would have to envision that the legislature knowingly granted to Cities the unrestricted legislative authority, to wreak agricultural havoc in townships and counties where their legislative authority is not subject to scrutiny by the voters impacted by the decision. One is inclined to think that it is more likely that the concept of taking a fee in prime agricultural land, where an easement would do the job, was never considered by the legislature, because the contention is so incredible.

The legislature, through the enactment of statutes is the sole judge of the extent of the estate which serves the public necessity. Buck v. City of Winona,135 N.W.2d 190, 193 (1965)(citing Fairchild v. City of St. Paul, 49 N.W.2d 325, 326)." There are really three levels of statutory guidance that can be provided by the legislature. The first kind of guidance is found in section 465.01, wherein the legislature specifically restricts the taking to an easement. We find a similar limitation in Chapter 116I with regard to underground pipelines impacting agriculture. The second level of guidance is found in generic statutes which signal no intent that a certain kind of taking should be utilized. The rule under these statutes is that only such an estate or interest can be taken as is necessary to accomplish the purpose in view, and, when an easement is sufficient, no greater estate can be taken." Fairchild v. City of St. Paul, 49 N.W.2d 325, 326 (1891); Brooks Inv. Co. v. City of Bloomington, 232 N.W.2d 911(Minn. 1975).

Then, there is a third class of statutes where the legislature specifically directs that a specific kind of taking may proceed as a taking by fee. Willmar convinced the District Court, and is arguing here, that the City has that third class of authority with regard to extraterritorial acquisition of underground sanitary sewer in prime farmland. To reach this conclusion, Willmar offers here, as it did in the District Court, two airport cases. City of Pipestone ex Rel. Spannaus v. Halbersma, 294 N.W.2d 271 (Minn.1980) and City of New Ulm v. Schultz, 356 N.W.2d 846 (Minn.App. 1984). These cases, the very cases on which Willmar relies, directly state our own position, advanced at the trial court, that the question whether a fee can be taken depends first and foremost upon the language of the statute under consideration. Willmar's brief wrongly asserts in this Court that under City of Pipestone ex Rel. Spannaus v. Halbersma, 294 N.W.2d 271 (Minn.1980) and City of New Ulm v. Schultz, 356 N.W.2d 846 (Minn.App. 1984) the City has unrestrained authority to take the fee, when an easement is enough, under these two cases.

Halbersma and Schultz are both airport cases, as we have said. The legislature has long believed that airport authorities should have broader taking authority because it does not want airport authorities to have to litigate whether to narrow the safety zone before a District Judge and potentially compromise flying safety. In Halbersma, the City of Pipestone decided to expand its airport to accommodate larger airplanes. The landowners argued that the City could position the runways differently, and take less land. In essence, they wanted to re-engineer the project with the runways at a different angle, so

that the airport could be built more economically. They sought to second-guess the judgment of the City's engineering consultant that the proposed project would be safer and more convenient than the configuration advocated for by the appealing landowner.

The central issue in Halbersma was whether the Court should apply the somewhat higher level of scrutiny allegedly called for in a previous decision of the Supreme Court, the redevelopment case Reilly Tar & Chemical Corp. v. City of St. Louis Park, 121 N.W.2d 393 (1963). As the Halbersma Court explained, The landowner argued that Halbersma should be required to "apply the more restrictive approach a higher showing of public necessity than a showing of reasonableness of a means to an end." The holding of Halbersma is that the Court's approach is driven by the text of the statutory authority granted by the legislature in the authorizing statute.

City of New Ulm v. Schultz, 356 N.W.2d 846 (Minn.App. 1984) finds that the airport statute provides a broader all encompassing authority. The case itself says that the key inquiry is to examine the text of the statute which grants taking authority and to determine whether the legislature grants unfettered authority to take the fee, or whether instead, the condemnor's authority is constrained. The statute involved in Schultz quoted the statutory airport condemnation authority and emphasized the express grant of authority to take easements or fee without constraint. The Court held:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; * * * [and] the acquisition of airport protection privileges * * * are hereby declared to be public, governmental, and municipal functions, exercised for a public purpose, and matters of public

> necessity, and such lands * * * acquired and used by the state * * * for [such] purposes * * * shall and are *849 hereby declared to be acquired * * * as a matter of public necessity. Minn.Stat. § 360.033 (1982). Thus, appellants are effectively precluded from litigating whether the taking of their lands in fee was a public necessity.

The statutory question presented here is whether the legislature intended that Cities should have unconfined extraterritorial authority to cut through prime farmland, without showing necessity as in the case of airports, or whether instead, they must make a showing greater than a concern that the farmer required a court order before entering his property.

VI. CONCLUSION

Willmar's decision represents a penalty imposed on Kvam for treating his own property as if it his own. Stripped to its essentials, Willmar's argument asserts that when a landowner raises concerns about the manner of testing that will occur on the landowner's private property, that furnishes a basis for taking property that the City has otherwise decided it does not need. Everything else presented by Willmar here is not a reason for its action; but a rationalization. It is beyond belief that if Kvam had merely acceded to the City's request, and waived his statutory rights, that Willmar would have suddenly switched to a fee taking. There is no evidence that Willmar even remotely considered taking a fee until Kvam decided to, as the City puts it, "make the City start a

separate lawsuit" to get on his property. All of the other factors, the rationalizations for this action, were present from day one. If they were the reasons, instead of the rationalization, then Willmar would have decided to take the fee from day one.

Dated: October 30, 2008

Respectfully Submitted,

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