

CASE NO. A11-705

**STATE OF MINNESOTA
IN COURT OF APPEALS**

City of Moorhead,

Appellant,

vs.

Red River Cooperative Power Association,

Respondent.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

Kathleen M. Brennan (# 256870)
Corey J. Ayling (#157466)
McGRANN SHEA CARNIVAL
STRAUGHN & LAMB, CHTD.
800 Nicollet Mall, Suite 2600
Minneapolis, MN 55402-7035
Telephone: (612) 338-2525

Benjamin E. Thomas (#0204882)
WOLD JOHNSON, P.C.
500 Second Avenue North, #400
Box 1680
Fargo, ND 58107
Telephone: (710) 235-5515

Attorneys for Appellant
City of Moorhead

Harold LeVander, Jr. (#62509)
FELHABER, LARSON, FENLON
& VOGT, P.A.
444 Cedar Street, Suite 2100
St. Paul, MN 55101-2136
Telephone: (651) 222-6321

Sara McGrane (#233213)
220 South Sixth Street, Suite 2200
Minneapolis MN 55402-4504
Telephone: (612) 339-6321

Attorneys for Respondent
Red River Cooperative Power Association

Additional counsel on next page

Susan L. Naughton (#0259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
Telephone: 651-281-1232

Attorney for *Amicus Curiae*
League of Minnesota Cities

Elizabeth A. Wefel (#251951)
FLAHERTY & HOOD, P.A.
525 Park Street, Suite 470
St. Paul, MN 55103

Attorney for *Amici Curiae*
Minnesota Municipal Utilities Association
Missouri River Energy Services
Western Minnesota Municipal Power
Agency
Coalition of Greater Minnesota Cities

TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities.....	ii
Statement of the Legal Issue.....	1
Statement of the Identity of Amicus Curiae.....	2
Statement of the Case and Facts.....	2
Introduction and Summary of Argument.....	2
Legal Argument.....	4
I. This case will have a statewide impact on Minnesota cities.....	4
II. The creation of a new exception to the constitutionally required fair-market-value standard will have negative practical impacts on Minnesota cities.....	5
III. The creation of a new exception to the constitutionally required fair-market-value standard will have negative policy impacts on Minnesota cities.....	7
Conclusion.....	10

TABLE OF AUTHORITIES

	Page
Minnesota Constitution	
Minn. Const. Art. I, § 13.....	4
Minn. Const. Art. III, § 1.....	8
Minnesota Statutes and Session Laws	
Minn. Stat. § 15B.31.....	7
Minn. Stat. § 103D.335.....	7
Minn. Stat. § 161.20.....	7
Minn. Stat. § 216B.47.....	<i>passim</i>
Minn. Stat. § 645.17 (3).....	7
Minn. Stat. § 645.17 (5).....	10
2006 Minn. Laws Ch. 214.....	8
Minnesota Cases	
<i>Albert and Harlow, Inc. v. Great Northern Oil Co.</i> , 167 N.W.2d 500 (Minn. 1969).....	8
<i>Brayton v. Pawlenty</i> , 781 N.W.2d 357 (Minn. 2010).....	7
<i>City of St. Paul v. Rein Recreation, Inc.</i> , 298 N.W.2d 46 (Minn. 1980).....	5
<i>Cooperative Power Ass'n v. Assand</i> , 288 N.W.2d 697 (Minn. 1980).....	9
<i>Larson v. State</i> , 790 N.W.2d 700 (Minn. 2010).....	8
<i>Moorhead Economic Dev. Auth. v. Anda</i> , 789 N.W.2d 860 (Minn. 2010).....	8
<i>State v. Pahl</i> , 100 N.W.2d 724 (Minn. 1960).....	5

Federal Cases

Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984).....5

Olson v. United States, 292 U.S. 246 (1934).....4-5

STATEMENT OF THE LEGAL ISSUE

Courts have consistently applied a fair-market-value standard to comply with the constitutional requirement of providing just compensation for property acquired by eminent domain. Minn. Stat. § 216B.47 provides that when a city acquires public utility property by eminent domain damages must include four factors but does not provide that the four factors are exclusive, does not prohibit applying the fair-market-value standard, and requires the inclusion of “other appropriate factors.” Did the trial court err by interpreting § 216B.47 to exclude all fair-market-value evidence when determining damages?

STATEMENT OF THE IDENTITY OF AMICUS CURIAE

The League of Minnesota Cities (“League”) has a voluntary membership of 830 out of 854 Minnesota cities including the city of Moorhead (“City”).¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League’s mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

STATEMENT OF THE CASE AND FACTS

The League concurs with the City’s statement of the case and facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the City (which operates a municipal electric utility) exercised its power of eminent domain under Minn. Stat. § 216B.47 to acquire the property of a rural electric cooperative after the City annexed some property into its borders. Under Minn. Stat. § 216B.47, damages must include: “the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors.” Even though the statute’s plain language does not provide that the four factors are exclusive, does not prohibit application of the fair-market-value standard, and explicitly requires the inclusion of “other appropriate

¹ The League certifies pursuant to Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

factors,” the trial court interpreted the statute to require the exclusion of all fair-market-value evidence when determining damages.

This interpretation of the statute conflicts with well-established case law that has consistently required application of the fair-market-value standard to comply with the constitutional requirement of providing just compensation for property acquired by eminent domain. This erroneous statutory interpretation harms Minnesota cities and their citizens by creating a new exception to the fair-market-value standard that will result in the award of falsely inflated eminent-domain damages that must be paid for with tax dollars. For example, in this case, because the trial court prohibited the City from introducing any fair-market-value evidence regarding the age of the condemned utility facilities and the need for capital improvements during the ten-year damages period, the City was ordered to pay damages that were \$214,865 higher than the damages calculated by the City’s expert. *See* City’s Brief at p. 11. This type of discrepancy in damages would likely be even greater in situations involving larger annexations of land.²

The City’s Brief demonstrates why the district court’s decision should be reversed. The League concurs with the City’s legal arguments and will not repeat them here. Instead, this brief focuses on the statewide significance of this case and on the negative practical and policy impacts on Minnesota cities if this Court affirms the trial court’s creation of a new exception to the fair-market-value standard.

² The annexation of electric-service territory in this case only involved 65 existing customers. T. 393.

LEGAL ARGUMENT

I. THIS CASE WILL HAVE A STATEWIDE IMPACT ON MINNESOTA CITIES.

This case will have a statewide impact on Minnesota cities. This case will directly impact the ability of Minnesota cities to use the power of eminent domain to acquire public utility property and service territory when city borders expand. According to the Minnesota Municipal Utilities Association, there are currently 125 municipal electric utilities and 31 municipal gas utilities operating throughout the state.

<http://www.mmua.org/>.

In addition, this case is important to all 854 Minnesota cities because their eminent-domain authority is at stake. If this Court affirms the creation of a new exception to the fair-market-value standard, it will weaken cities' sovereign power of eminent domain. Indeed, all Minnesota cities rely on the consistent application of the fair-market-value standard to ensure that public funds are not used to pay falsely inflated damages for property acquired by eminent domain, but instead, are used to pay for the property's fair market value.

It is well-established law that courts must use the fair-market-value standard to comply with the constitutional requirement of providing just compensation for property acquired by eminent domain. Minn. Const. Art. I, § 13 (“[p]rivate property shall not be taken, destroyed, or damaged for public use without just compensation”); U.S. Const. amend. V. (“nor shall private property be taken for public use without just compensation”); *See, e.g., Olson v. United States*, 292 U.S. 246, 255 (1934) (just

compensation is the “market value of the property at the time of the taking”); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984) (just compensation generally means “the fair market value of the property on the date it is appropriated”); *State v. Pahl*, 100 N.W.2d 724, 728 (Minn. 1960) (in eminent-domain proceedings the property owner is entitled to compensation for its “fair market value”). Likewise, it is well-established law that fair market value is defined as what a willing buyer would pay to a willing seller at the time of the taking. *See, e.g., Kirby Forest Indus., Inc.*, 467 U.S. at 9-10 (the owner is entitled to receive “what a willing buyer would pay in cash to a willing seller” at the time of the taking); *City of St. Paul v. Rein Recreation, Inc.*, 298 N.W.2d 46, 49 (Minn. 1980) (the “willing buyer-willing seller test applies” to eminent-domain actions). If this Court affirms the creation of a new exception to the fair-market-value standard, it will be contrary to this well-established case law and the constitutional requirement on which it is based. The creation of a new exception will also have negative impacts on Minnesota cities from a practical and policy perspective.

II. The creation of a new exception to the constitutionally required fair-market-value standard will have negative practical impacts on Minnesota cities.

The creation of a new exception to the constitutionally required fair-market-value standard will have negative practical impacts on Minnesota cities. For example, if cities cannot present relevant evidence regarding what a willing buyer would actually pay a willing seller for public utility property that is acquired by eminent domain, it will increase the cost of takings. This increased cost will likely make it difficult—and in some cases impossible—for cities to ensure that municipal utilities can continue to

expand along with municipal borders especially considering the current economic difficulties cities are facing.

As a result, cities may be forced to abandon their general policy of extending municipal utility services to areas annexed into municipal borders. This, in turn, could create several additional negative practical impacts on Minnesota cities and their citizens. A lack of uniformity of utility services could create confusion and inconsistency for citizens served by different utility providers. Neighbors might pay different utility rates, receive different levels of customer service, and be eligible for different programs for renewable energy and energy conservation.

In addition, creating a new exception to the fair-market-value standard will remove any incentive for public utilities to negotiate for the voluntary sale of their property in situations involving annexation. Instead, public utility property owners will always hold out for a forced acquisition in a judicial or administrative proceeding because they will know that they will be entitled to a standard that will provide damages in an amount greater than the fair market value of their property.

And finally, if this Court holds (in this case of first impression) that the fair-market-value standard does not apply to a taking of public utility property under Minn. Stat. § 216B.47 because the Legislature has not expressly stated that it is applicable in the statute, it will create inconsistencies in eminent-domain law. For example, if the Legislature has not expressly stated that the fair-market-value standard applies in other types of takings that are currently referenced in statute, presumably additional exceptions

to the fair-market-value standard will be created for those types of takings as well.³ This result will also create uncertainty in other areas of law as well because this holding directly conflicts with well-established law that holds that statutes should be interpreted to comply with constitutional requirements even when those requirements are not expressly referenced in the statute. Minn. Stat. § 645.17 (3) (courts are to construe statutes to comply with the Constitution rather than presume a conflict); *See, e.g., Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010) (interpreting the unallotment statute (Minn. Stat. § 16A.152, subd. 4) to avoid constitutionally prohibited separation-of-powers conflicts even though the statute does not expressly reference this constitutional requirement). In short, if this well-established law no longer applies in the context of eminent-domain law, it will also create uncertainty regarding whether it continues to apply in other areas of law.

III. The creation of a new exception to the constitutionally required fair-market-value standard will have negative policy impacts on Minnesota cities.

The creation of a new exception to the constitutionally required fair-market-value standard will also have negative policy impacts on Minnesota cities. For example, the creation of such an exception will violate constitutional principles of separate

³ A search of the many Minnesota Statutes referencing the power of eminent domain demonstrates that statutory references to the fair-market-value standard are rare. For example, the following statutory grants of eminent-domain authority do not contain any reference to the fair-market-value standard or to Chapter 117 of the Minnesota Statutes: Minn. Stat. § 15B.31 (authorizing the state to acquire by eminent domain any real property in the Capitol area necessary to expand or beautify the area); Minn. Stat. § 103D.335 (authorizing watershed districts to acquire by eminent domain real and personal property for lawful conservation purposes); Minn. Stat. § 161.20 (authorizing the state to acquire by eminent domain all lands and properties necessary in laying out, constructing, maintaining, and improving the trunk-highway system).

governmental power. Minn. Const. Art. III, § 1 (dividing “[t]he powers of government into three distinct departments: legislative, executive and judicial”). By creating this new exception, the judicial branch of government will be unilaterally amending eminent-domain law to change the historic standard of damages and require the exclusion of relevant evidence without allowing the legislative branch of government an opportunity to debate and decide whether such an amendment is good public policy.

This Court should avoid a separation-of-powers conflict by refusing to create such a dramatic change in eminent-domain law without clear statutory direction from the Legislature. *See, e.g., Albert and Harlow, Inc. v. Great Northern Oil Co.*, 167 N.W.2d 500, 505 (Minn. 1969) (the Minnesota Supreme Court declined to adopt a significant change in Minnesota’s lien law because of the lack of statutory language “clearly and unequivocally” supporting the change). The Legislature is quite capable of providing clear statutory direction in eminent-domain law. In fact, the Legislature made significant changes to eminent-domain law in 2006 without modifying or even addressing the fair-market-value standard in either Chapter 117 or in Minn. Stat. § 216B.47. *See* 2006 Minn. Laws Ch. 214; *See also*, City’s Brief at 35 (discussing the 2006 amendments). In short, this Court should refuse to turn eminent-domain law on its head because it would violate constitutional principles of separate governmental power by derogating cities’ sovereign power of eminent domain without clear statutory direction from the Legislature. *Larson v. State*, 790 N.W.2d 700, 701 (Minn. 2010) (characterizing eminent-domain as a “sovereign power”); *Moorhead Economic Dev. Auth. v. Anda*, 789 N.W.2d 860, 875

(Minn. 2010) (“[e]minent domain is an inherent and essential attribute or prerogative of sovereignty”).

Further, the Minnesota Supreme Court has already held that a “requirement of reasonableness” must be read into legislative delegations of eminent-domain power. In a case involving a constitutional challenge to a statute authorizing utilities to condemn easements to erect high voltage transmission lines, the Minnesota Supreme Court interpreted the statute in a way that avoided constitutional issues.

As written, § 116C.63, subd. 4 is subject to a construction that could produce bizarre and unjustifiable results; landowners could compel commercially unreasonable acquisitions which, in light of the purpose of the statute, would impose an undue burden on utilities. For § 116C.63, subd. 4 to survive review, a requirement of reasonableness must be read into its terms.

Cooperative Power Ass’n v. Assand, 288 N.W.2d 697, 701 (Minn. 1980). A

“requirement of reasonableness” must also be read into Minn. Stat. § 216B.47. Again, it is unreasonable to believe that the Legislature could have intended to abandon over a century of case law without providing clear statutory direction. In addition, it is unreasonable that the Legislature would choose to adopt a damages standard that conflicts with constitutional requirements. Further, it was unreasonable for the trial court to conclude that Minn. Stat. § 216B.47 requires the exclusion of any fair-market-value evidence when determining damages but permits the application of other typical eminent-domain proceedings even though those proceedings—like the fair-market-value standard—are not expressly referenced by the statute. *See* City’s Brief at pp. 4, 30 (discussing the typical eminent-domain proceedings that applied in this case).

And finally, creating a new exception to the fair-market-value standard would have an additional negative policy impact on Minnesota cities and their citizens because it would elevate the private interests of property owners over the public interests in preserving public financial resources and in allowing municipal utilities to grow with municipal borders. Minn. Stat. § 645.17 (5) (when interpreting statutes, courts should presume that “the legislature intends to favor the public interest as against any private interest”). Application of the fair-market-value standard advances the public interest because it ensures that property owners receive the just compensation that they are entitled to under the Constitution while also ensuring that tax dollars are not spent to pay falsely inflated damages for property acquired by eminent domain. Application of the fair-market-value standard also promotes the public interest by ensuring that municipal utilities can grow along with municipal borders—a purpose that the Legislature determined was in the public interest when it enacted Minn. Stat. § 216B.47 into law.

CONCLUSION

The plain language of Minn. Stat. § 216B.47 provides that four factors must be included in damages when a city acquires public utility property by eminent domain but does not provide that the four factors are exclusive, does not prohibit application of the fair-market-value standard, and explicitly requires the inclusion of “other appropriate factors.” The trial court erred as a matter of law by interpreting the statute to require the exclusion of all fair-market-value evidence when determining damages. This interpretation conflicts with well-established case law that has consistently applied the fair-market-value standard to comply with the constitutional requirement of providing

just compensation for property acquired by eminent domain. This erroneous statutory interpretation will also have negative statewide impacts on Minnesota cities from a practical and policy perspective.

For all of these reasons, the League respectfully requests that this Court reverse the trial court's decision and either require entry of judgment in the City's favor or remand for a new trial that would allow the City to present fair-market-value evidence.

LEAGUE OF MINNESOTA CITIES

Date: June 27, 2011


Susan L. Naughton (#0259743)
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232
Attorney for *Amicus Curiae*
League of Minnesota Cities