

CASE NO. A11-0705

STATE OF MINNESOTA
IN SUPREME COURT

City of Moorhead,

Appellant,

vs.

Red River Cooperative Power Association,

Respondent.

BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES

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STATEMENT OF THE LEGAL ISSUE

Courts have historically applied a fair-market-value standard to determine just compensation for property acquired by eminent domain. When cities acquire electric utility property by eminent domain, Minn. Stat. § 216B.47 provides that damages “must include” four factors but does not provide that the factors are exclusive, does not prohibit consideration of fair market value, and expressly requires consideration of “other appropriate factors.” Does § 216B.47 prohibit consideration of fair market value?

The district court held that fair market value may not be considered in determining damages under Minn. Stat. § 216B.47 and prohibited the City from introducing any evidence of fair market value.

STATEMENT OF THE IDENTITY OF AMICUS CURIAE

The League of Minnesota Cities (“League”) has a voluntary membership of 830 out of 853 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

Here, the City operates a municipal electric utility and exercised its power of eminent domain under Minn. Stat. § 216B.47 to acquire the property of a rural electric cooperative after the City annexed property into its borders. T. 343-44; Appellant’s Apx-1. Under § 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 listed factors are exclusive, does not prohibit consideration of fair

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.

market value, and explicitly requires inclusion of “other appropriate factors,” the lower courts interpreted the statute to prohibit consideration of fair market value.

This interpretation conflicts with well-established precedent that has historically applied a fair-market-value standard to comply with the constitutional requirement of providing just compensation for property acquired by eminent domain. This erroneous interpretation harms Minnesota cities and their citizens by creating an exception to the fair-market-value standard that will result in the award of falsely inflated eminent-domain damages that will be paid for with tax dollars. In this case, for example, the trial court prohibited the City from presenting evidence that it would cost \$78,957 during the 10-year damages period to replace Red River’s facilities that were over 40 years old. Appellant’s Add-30-31. In addition, the City made an offer of proof that if its expert had been allowed to testify concerning this deduction for deferred capital investment and had also been allowed to testify to his opinion of damages using a fair-market-value approach, he would have testified to damages in a significantly lower dollar amount. T. 381-2. This type of discrepancy in damages would likely be even greater in situations involving larger annexations of land.² In short, this appeal’s resolution will have a direct impact on the expenditure of a significant amount of tax dollars by Minnesota cities.

The City’s Brief demonstrates why the court of appeal’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 this appeal’s statewide significance, on how the

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

creation of an exception to the fair-market-value standard for eminent-domain proceedings involving electric utility property will have negative effects on Minnesota cities, and on why the creation of such an exception would be bad public policy.

LEGAL ARGUMENT

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

This case will have a significant, statewide impact on Minnesota cities. This case will directly impact Minnesota cities' ability to use the power of eminent domain to acquire electric utility property and service territory when city borders expand through annexation or consolidation. According to the Minnesota Municipal Utilities Association, there are currently 125 municipal electric utilities operating throughout the state. <http://www.mmua.org/>. Cities with municipal electric utilities will be directly affected by this appeal's resolution. But this case is also important to all 853 Minnesota cities because their eminent-domain authority is at stake. If this Court creates an exception to the fair-market-value standard here, it will weaken cities' sovereign power of eminent domain by making the exercise of this power more expensive. It will also create an incentive for property owners to push for additional exceptions that will allow them to receive more than the fair market value of their property. For example, property owners will be able to use the many other eminent-domain statutes that are silent regarding fair market value to claim that they are entitled to a more favorable damages standard.³ This will harm Minnesota cities because they rely on the consistent

³ The following statutory grants of eminent-domain authority, for example, do not contain

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. Instead, application of the fair-market-value standard ensures the payment of compensation that is just to both property owners *and* taxpayers.

II. If this Court creates an exception to the fair-market-value standard for determining damages for eminent-domain proceedings involving electric utility property, it will have negative effects on Minnesota cities.

Courts have historically applied a 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”). If this Court creates an exception to the fair-market-value standard here, it will be contrary to this well-established precedent and the

any reference to fair market value: 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. § 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). The City provides several additional examples of eminent-domain statutes that do not reference fair market value at p. 27 of its brief.

constitutional requirement on which it is based. Creation of such an exception will also have several negative effects on Minnesota cities.

First, if the fair-market-value standard does not apply, it will generally increase the cost of takings damages for electric utility property—damages that will be paid for with tax dollars. In this case, for example, the jury awarded falsely inflated damages that were calculated from a seller’s perspective because the district court held that fair market value could not be considered in awarding damages and prohibited the city from introducing any evidence regarding fair market value. Appellant’s Add-4, ¶¶ 8-9. But the rejection of the fair-market-value standard could also result in situations where a utility would receive less than the fair market value of its property. Application of the fair-market-value standard protects both property owners and condemning authorities by ensuring that just compensation is awarded.

Second, increased takings damages will make it difficult—and in some cases likely impossible—for cities to ensure that municipal utilities can grow along with municipal borders. This is especially true given the current economic difficulties Minnesota 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 effects on the Minnesota citizens that will be served by different electric utility providers. For example, a lack of uniformity of utility services could create confusion and inconsistency. Neighbors might pay different rates for similar services, receive different levels of customer service, and be eligible for different programs for renewable energy and energy conservation.

And finally, if this Court creates an exception to the fair-market-value standard here, it will remove any incentive for the owners of electric utilities to negotiate for the voluntary sale of their property in situations involving annexation or consolidation. Instead, the electric utilities will always hold out for a forced acquisition that will require the use of additional public resources in the form of a judicial or administrative proceeding because they will know that they will be entitled to a damages standard that will likely result in them receiving more than the fair market value of their property.

III. The creation of an exception to the fair-market-value standard would be bad public policy.

There are several reasons why it would be bad public policy to create an exception to the fair-market-value standard for eminent-domain proceedings involving electric utility property. First, it will create confusion in eminent-domain law because under the court of appeals' approach, any time the Legislature did not specify that the fair-market-value standard is applicable in a particular eminent-domain statute, it will be presumed not to apply. And again, this could have a significant, statewide impact because statutory references to the fair-market-value standard are rare because this is a standard that was judicially created. *See* Appellant's Br. at 27.

Second, the creation of such an exception will cause separation-of-powers conflicts. Minn. Const. Art. III, § 1 (dividing "[t]he powers of government into three distinct departments: legislative, executive and judicial"). For example, such an exception will weaken cities' sovereign power of eminent domain by making it more costly to exercise this power. *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”). In addition, by creating this exception, the judicial branch will be unilaterally amending eminent-domain law to change the historic standard of damages without allowing the Legislature an opportunity to debate and decide whether such a drastic change is good public policy. This Court should avoid a separation-of-powers conflict by refusing to adopt such a drastic change in eminent-domain law without clear direction from the Legislature. *See, e.g., Albert and Harlow, Inc. v. Great Northern Oil Co.*, 167 N.W.2d 500, 505 (Minn. 1969) (this Court declined to adopt a significant change in Minnesota’s lien law because there was no statutory language “clearly and unequivocally” supporting the change).

Indeed, this Court recently confirmed that statutes in derogation of the common law should be strictly construed and that courts should not presume that the Legislature intends to abrogate or modify a common law rule except to the extent expressly declared or clearly indicated in statute. *Staab v. Diocese of St. Cloud*, ___ N.W.2d ___ at p. 6 (Minn. April 18, 2012). The plain language of Minn. Stat. § 216B.47 does not even mention the terms fair market value or just compensation, and it definitely does not express a clear intent to overrule over a century of precedent from the common law. Instead, the statute simply specifies that certain nonexclusive factors must be considered when awarding damages in an eminent domain proceeding involving electric utility property. And as the City has already explained, consideration of the statutory factors is compatible either with using a fair-market-value methodology to consider each specified

factor or with considering fair market value as a separate factor under the catch all of “other appropriate factors.” Appellant’s Br. at 38-43.

The Legislature is quite capable of providing clear statutory direction in eminent-domain law when it chooses. In fact, the Legislature made significant changes to eminent-domain law in 2006 but did not modify or even address the fair-market-value standard in either Chapter 117 or in Minn. Stat. § 216B.47. *See* 2006 Minn. Laws Ch. 214. In fact, this Court recently recognized that the 2006 amendments did not disturb another well-established eminent-domain precedent that requires courts to give broad deference to condemning authorities’ legislative determinations of public purpose. *State v. Kettelson*, 801 N.W.2d 160, 165 (Minn. 2010) (noting that “the 2006 changes have not affected the broad deference we give to the condemning authority”). In addition, the court of appeals recently confirmed that a fair-market-value analysis is applicable even when damages are awarded under the Minimum Compensation Statute—a statute that was adopted in 2006, that does not refer to fair market value, and that also requires specific factors to be considered when awarding damages in an eminent-domain proceeding where a property owner is forced to relocate. Minn. Stat. § 117.187; *County of Dakota v. George W. Cameron, IV*, __ N.W.2d __, at 7 (Minn. Ct. App. March 26, 2012).

Third, it would be bad public policy to create an exception to the fair-market-value standard because it would conflict with well-established precedent holding that statutes should be interpreted to comply with constitutional requirements. 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 to avoid a separation-of-powers conflict even though the statute does not expressly reference this constitutional requirement). It is illogical to argue that statutory silence regarding a constitutional requirement must be interpreted as the Legislature's rejection of that requirement. Indeed, as the City points out, it would be impractical to require the Legislature to affirm in every statute all of the applicable constitutional principles. Appellant's Br. at 28.

Fourth, it would be bad public policy to interpret Minn. Stat. § 216B.47 to prohibit consideration of fair market value because such an interpretation is not reasonable. This Court has already held that a "requirement of reasonableness" must be read into a legislative delegation 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, this Court interpreted the statute at issue to include a requirement of reasonableness.

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). Likewise, a "requirement of reasonableness" must also be read into Minn. Stat. § 216B.47. It is unreasonable to believe that the Legislature could have intended to abandon over a century of case law without providing clear statutory direction. It is also unreasonable to believe that the Legislature would choose to adopt a damages standard that conflicts with

a constitutional requirement. Further, it was unreasonable for the lower courts to conclude that Minn. Stat. § 216B.47 prohibits consideration of fair market value but permits application of other typical eminent-domain proceedings even though these proceedings—like the fair-market-value standard—are not expressly referenced by § 216B.47. *See* Appellant’s Br. at 7 (detailing some of the typical eminent-domain proceedings that occurred here).

And finally, it would be bad public policy to create an exception to the fair-market-value standard because it would elevate the private interests of property owners over the public interests in preserving public fiscal resources and in allowing municipal utilities to grow with municipal borders. Minn. Stat. § 645.17 (5) (courts 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 constitutionally entitled to while also ensuring that tax dollars are not spent to pay falsely inflated damages. In addition, application of the fair-market-value standard 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

Minn. Stat. § 216B.47 provides that four factors must be included in damages when a city acquires electric utility property by eminent domain but does not provide that the four factors are exclusive, does not prohibit consideration of fair market value, and

explicitly requires the inclusion of “other appropriate factors.” The lower courts erred by interpreting § 216B.47 to prohibit the consideration of fair market value. This interpretation conflicts with well-established precedent that has historically applied the fair-market-value standard to comply with the constitutional requirement of providing just compensation for property acquired by eminent domain. This erroneous interpretation harms Minnesota cities and their citizens by creating an exception to the fair-market-value standard that will result in the award of falsely inflated eminent-domain damages that will be paid for with tax dollars. This Court should not create an exception to the fair-market-value standard for eminent-domain proceedings involving electric utility property because it would have negative effects on Minnesota cities and it would be bad public policy. For all of these reasons, the League respectfully requests that this Court reverse the court of appeal’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.

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