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**State of Minnesota**  
**In Supreme Court**

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DANNY O. LUNDELL AND MARY E. LUNDELL,

*Appellants,*

vs.

COOPERATIVE POWER ASSOCIATION,  
a Minnesota Corporation,

*Respondent.*

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**APPELLANTS' REPLY BRIEF**

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## APPELLANTS' REPLY TO BRIEF OF RESPONDENT

In its brief, Respondent makes factual assertions that are simply not correct. It states as a fact that "CPA had subleased space on the Cannon Falls Tower to a telecommunications company (Sprint), and the Appellants, through counsel, disputed Respondent's right to do so." Respondent repeats this false claim over and over again in its brief (See Brief of Respondent, p. 5, 6, 13, & 32) The right of Respondent to sublease space on the tower was never challenged by the Appellants. The Appellants simply asked for the identification of entities occupying their land - a reasonable request from any landowner. (AA 77) No landowner would be expected to allow anyone to occupy his land without some claim of right.

A second letter was required because Great River Energy, the management company for Respondent, and the company that was exclusively involved in all of the negotiations in this matter, did not respond to the first letter. The second letter warned of eviction of "any third parties occupying or using the property without a valid lease or assignment." (AA 78). This, of course, did *not* include Respondent. The Appellants have never claimed, as Respondent continues to allege, that Respondent was in breach of the lease because of any subleases. All the Appellants wanted was confirmation that there in fact *was* a subtenant, and the identity of any subtenant. Once Sprint was identified as an authorized subtenant, that issue was resolved. There was never any claim that the sublease was a breach of the lease between the parties.

Respondent states that “Following the execution of the lease, CPA erected the Cannon Falls Tower on the Tower Site . . .” That is not entirely accurate. As it turns out, Respondent used more of the land than the lease permitted to secure the tower. More buildings than were contemplated by the lease were constructed on the property. For over twenty years, Respondent paid no additional compensation to the landowner for this increased usage. Respondent did not pay the real estate taxes it was required by the lease to pay. The rent Respondent was paying at the time of the negotiations between the parties was more than \$700 *per month* less than the current fair market rate. The Appellants simply requested a fair market rent for the property based on the amount and kind of usage employed by Respondent. They negotiated for that in good faith, made concessions on other issues, and were prepared to abide by the agreement that was reached. Unfortunately, the same cannot be said for Respondent.

Respondent asserts that “CPA was willing to increase the rent to \$750 per year, not \$750 per month.” This is simply not true. Respondent continues to insist on the existence of “facts” which contradict its own counsel. Counsel for Respondent states specifically in its letter of August 6, 2002 that “GRE is willing to increase the rent to \$750 *per month* for the tower . . .” Counsel further states that “The *substantial rent increase* and a corresponding amendment to the Lease should resolve any concerns regarding increased use and fair compensation.” (AA 156, emphasis added) It is important to note that this was not an unauthorized communication from counsel. In fact, counsel specifically noted

that the agreed upon amendment would not be prepared until counsel had obtained “final confirmation from GRE to proceed with drafting the amendment.” (AA 160). Indeed even after obtaining “final confirmation” counsel noted that the amendment would not be sent to counsel for Appellants until it had been reviewed by “the responsible person for this matter” from GRE. (AA 161). The amendment, which was prepared by counsel for Respondent, provided for a rent increase to “\$750 each month.” (AA 27). The amendment was signed unchanged and returned to counsel for Respondent, who indicated that he would “arrange for execution by our client.”

Ultimately, it appears there were internal disputes at Respondent’s headquarters regarding the agreement, but the uncontradicted fact is that Respondent, through both the “responsible person” and its counsel *did* agree to increase the rent to \$750 per month. The offer was clearly communicated in writing, accepted in writing, and memorialized in a document prepared by the Respondent and signed, without changes, by the Appellants. There was consideration. In exchange for the increased usage and additional land, Respondent agreed to pay \$750 per month. The contract was made. Contrary to Respondent’s assertions, the negotiations did not fail. What failed was the Respondent in its duty to abide by its agreement.

It is indicative of Respondent’s attitude and motive in this matter that it now calls its decision to pay a fair market rent for the land “an unfortunate mistake.” For many years the Respondent paid rent far below market rates. It used more land than the lease

provided. It added buildings not contemplated by the lease. It did not pay the taxes it was required to pay. During all of that time, as well as during the six months of negotiations between the parties, Respondent never once mentioned its “policy” to acquire title to leasehold property. There was no mention of its need to occupy the tower site beyond the year 2030. It is no coincidence that those “policies” and “needs” did not surface until after Respondent was confronted with the prospect of honoring its agreement with the Appellants.

Whether or not the Respondent had a policy to acquire title to leasehold property, and whether or not it had made a determination that it had a need for the property beyond the year 2030, the District Court should be required to make findings on whether the Respondent acted in bad faith, which in turn has a bearing on whether the Respondent’s actions are arbitrary and unreasonable. If, as Respondent claims, it had such a policy, and a need for the tower beyond the year 2030, there is no explanation offered by the Respondent as to why it acted contrary to that policy, and why it made no attempt to address that need, during the six months of lease negotiations with the Appellants. When the Respondent itself demonstrates no regard for its own policy, and does nothing to address its claimed need, even when the opportunity is clearly presented to it, the district court should evaluate whether there is in fact a real necessity here, or whether bad faith on the part of the Respondent negates the stated necessity.

Respondent argues that the Appellants instigated this dispute “by questioning

CPA's legal right to sublease to other parties and demanding a dramatic rent increase." (See Brief of Respondent, p. 32) Respondent has mischaracterized this situation in order to justify its taking of the property. Appellants never questioned Respondent's legal right to sublease to other parties. Further, the demand for a rent increase was based on observed violations of the lease by the Respondent, i.e. the failure to pay real estate taxes as required by the lease agreement, and use of the property beyond that contemplated by the lease agreement. When confronted with those violations, the parties entered into a re-negotiation of the lease terms. There was no real dispute until Respondent failed to pay the rent it had agreed to pay.

To the extent that there is any disruption, risk or uncertainty regarding the leased property, such that condemnation becomes necessary, it is the direct result of the actions of the Respondent. The label of "instigator" cannot be appropriately applied to one who is exercising legal rights in response to another's misconduct. It is the litigation brought about by Respondent's own breach of contract (which it now classifies as an unfortunate mistake) which creates disruption, risk, and uncertainty regarding the leased property such that the condemnation of the property by Respondent, the breaching party, is necessary. Appellants submit that for Respondent to create necessity by its own conduct is to act in a manner which is "manifestly arbitrary and unreasonable" and that therefore the petition to condemn this land should be denied as a matter of law.

When Respondent didn't pay the rent it owed, the Appellants served a notice of

eviction - a remedy every tenant who doesn't pay rent should expect. Again, it is indicative of Respondent's attitude and motive that it characterizes compliance with a negotiated agreement as "kowtowing to a landlord's disputed demands." (See Brief of Respondent, p. 17). Respondent argues that when faced with such a notice, it had only two choices: (1) to pay the rent or (2) to condemn the property. Of course, this is not accurate. One obvious choice would have been for Respondent to simply deny that any rent was owing, and to present the issue of whether the lease had been amended to the district court. The entire history of the lease negotiations was documented, and could easily have been presented on stipulated facts for a decision. If Respondent prevails, there is no eviction. If Respondent loses, it simply has to pay the rent, and there is no eviction. There is absolutely no evidence in the record that Respondent did not have the means to pay the rent. All the evidence is to the contrary. Respondent was taking in much more money on this property than it was paying out, even if the rent increased to \$750 per month. Therefore, eviction was never a real threat to the Respondent in this case.

Respondent argues that there is uncertainty because the tower site is larger than the leased premises, and therefore a portion of the tower site is at risk. This is just another example of the Respondent creating a dispute by its own actions to justify the necessity for the taking. The original Lease was drafted by the Respondent. The legal description it desired for the tower site was drafted by the Respondent. As it turned out, the Respondent did not stay within the bounds of the lease area that Respondent itself carved out. There

was never any objection voiced by the Appellants to this mistake. In fact, the Lundells were not aware of this mistake until the Respondent again drafted a legal description and determined that it had exceeded the boundaries of the lease.

Despite the discovery of yet another lease infraction by the Respondent, the Lundells did not object to this increased usage. Appellants' only comment was that "there is no basis for [Respondent] taking more or different land than that currently utilized by the [Respondent]." (AA20). They made this comment because they did not understand at the time why the legal description was different than the one the Respondent had used previously. Assuming that the Respondent has finally got the description right, the Appellants have no objection whatever to the current, existing placement and usage of the tower site, nor to the description that properly encompasses the existing usage. Their only objection is that the Respondent refuses to pay the rent.

Respondent's argument that somehow it needs protection from the Lundells because Respondent used more land than Respondent said it would need is nonsensical. The logical extension of Respondent's argument is that every public authority that is contracted with a private landowner would automatically be justified in condemning the land, due to the uncertainty that exists because of the potential that the public authority will not honor its contractual obligations, and thereby put its use of the property at risk when the landowner exercises its legal rights. Ironically, under Respondents theory, the more contract violations the public authority commits, the greater the justification for the

condemnation. Surely, this is exactly the kind of “arbitrary and unreasonable” behavior that the courts have determined will defeat the exercise of the power of eminent domain.

The Respondent argues that the standard for a condemning authority to take property should be lower, and not higher, when the condemning authority already has an interest in the land. It argues that this is less intrusive than when the condemning authority has no previous interest. This argument makes sense only if you are a condemning authority with little regard for private ownership rights. Permanent loss of ownership, against the will of the landowner, is something that no landowner takes lightly, and that no free society should ever take lightly. That is the reason that a proper public purpose and necessity are required before such taking is allowed. A condemning authority has no business taking a greater interest in private land than it reasonably needs. It should be a legitimate expectation of every citizen that the power of eminent domain will not be used where it is not necessary.

Private contracts and leases provide to both sides an opportunity to reach an agreement that is mutually beneficial without a change of ownership. Contrary to Respondent’s assertions, the blow of loss of ownership is not softened because there is existing usage by the condemning authority. By definition, the existing usage is not intrusive. It was willingly and freely negotiated by the landowner, with his consent. Leasing is one of many choices the landowner can make concerning his property. When the lease expires, that and all the other options of ownership will be available again. The

condemnation permanently takes away those choices, and it is no consolation that the property was already leased to the condemning authority. In this case, the land has been in the Appellants' family for over 100 years. The tower site is a homestead site in a beautiful location - a rare commodity not easily replaced because of zoning restrictions. The fact that Appellants have pursued this matter, despite being awarded substantial compensation by the court appointed commissioners, stands as testimony that this condemnation is *not* less intrusive to them simply because Respondent already had a lease.

Applying a "good cause" standard where there is an existing contract makes sense. Certainly, the existence of a contract which already provides for use of the property by the condemning authority bears on the issue of necessity. An existing contract, negotiated at arms length, is evidence that the condemning authority has all the interest in the land that it reasonably needs - both as to time and manner of usage. It is prudent, and not unreasonable, to require the condemning authority to show good cause why the interest which it once agreed was sufficient, is no longer sufficient. The public policy should be tilted against, rather than in favor, of the forceful taking of private land. Respondent's assertion that a good cause standard would prompt condemning authorities to condemn land they would not otherwise need to condemn, just to avoid meeting the standard, says much about the Respondent's attitude toward the exercise of the power of eminent domain. No condemning authority acting in good faith should be concerned about showing good cause to condemn property it is already using.

Respondent argues that the proposed good cause rule could lead to absurd results in this case - that perhaps the Respondent would be able to condemn the land where the tower supports are located, but not the tower site itself. That is simply not true. There is nothing to be feared from each parcel being treated on its own merits. Apart from use of the tower site, the Respondent could not demonstrate the necessity or purpose for the land, and the condemnation of the separate strip would fail on its merits. Application of the standards already in place would prevent the absurd result the Respondent conjectures.

Respondent's suggestion that the lease could be terminated in order to make the condemnation easier by lowering the standard raises no legitimate concern. In fact, the possibility of such a scenario supports the Appellants' position that bad faith on the part of the condemning authority should be considered in determining whether the taking is necessary. If the condemning authority were to jeopardize its operations associated with the tower, which it claims are necessary, by terminating the lease just to avoid having to show good cause to increase its interest, the district court should properly take that into consideration in assessing whether the condemnor is acting in good faith, and whether the taking is indeed necessary for a proper public purpose.

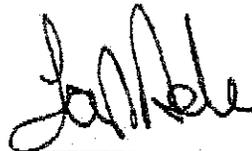
Lastly, Respondent argues that even if the quick take procedure was not appropriate, the Appellants have suffered no harm as a result of that procedure. First, the presence of harm is not the issue. The condemning authority is required to demonstrate

that it has a need for the property before the commissioner's award could be filed. There was no such need demonstrated. Respondent already had use of the property. There was an existing lease which could not be terminated by Appellants. There was no eviction proceeding pending, and Respondent had assurances that none would be started pending the outcome of the eminent domain proceedings. Even if eviction proceedings had commenced, the Respondent could maintain possession simply by paying whatever rent the court determined was due.

Second, Respondent is incorrect. There is harm to the Appellants. The early taking deprives Appellants of rent that would otherwise have been payable on the property prior to the conclusion of the eminent domain proceeding. This is rent that the Respondent should justly have to pay in this case.

Date: June 9, 2005

Respectfully submitted,



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