

STATE OF MINNESOTA
COUNTY OF WRIGHT

DISTRICT COURT
TENTH JUDICIAL DISTRICT

Northern States Power Company (d/b/a Xcel Energy) a Minnesota corporation, by its Board of Directors; Great River Energy, a Minnesota cooperative corporation, by its Board of Directors; ALLETE, Inc. (d/b/a Minnesota Power), a Minnesota corporation, by its Board of Directors; Western Minnesota Municipal Power Agency, a municipal corporation and political subdivision of the State of Minnesota, by its Board of Directors; and Otter Tail Power Company, a Minnesota corporation, by its Board of Directors,

Petitioners,

vs.

Scott J. Sypnieski, *et al.*,

Respondents.

RESPONDENTS CAROL A. STICE AND DAVID C. SHORE'S MEMORANDUM OF LAW IN SUPPORT OF THEIR REQUEST THAT PETITIONERS ADHERE TO THE REQUIREMENTS OF CHAPTER 117 OF THE MINNESOTA STATUTES

File CV-10-7551

Case Type: Condemnation

IN THE MATTER OF THE CONDEMNATION OF CERTAIN REAL ESTATE IN THE COUNTY OF WRIGHT, STATE OF MINNESOTA, FOR HIGH VOLTAGE TRANSMISSION LINE PURPOSES

INTRODUCTION

Carol A. Stice and David C. Shore ("Homeowners") respectfully submit this memorandum of law in support of their rights as homeowners under Minnesota Statutes Chapter 117. Homeowners plead for an Order:

1. Finding that Homeowners, as a result of their election under Minnesota Statutes Section 216E.12, are "displaced persons" and requiring Petitioners to comply with Minnesota Statutes Sections 117.50-117.56 which require Petitioners to provide

relocation assistance, services, payments and benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and the rules promulgated thereunder.

2. Requiring Petitioners to comply with Minnesota Statutes Section 117.187 which requires “minimum compensation” to be paid to the displaced Homeowners.

BACKGROUND FACTS

Stice/Shore Home:

Carol A. Stice and David C. Shore built their home in 1996 after years of saving and planning. (Affidavit Carol A. Stice). They enjoy “the pleasure of taking a stroll on our own wildlife sanctuary, frequently encountering deer, turkey, fox, bald eagles, and red tailed hawks, let alone dozens of song birds at our feeders.” (Affidavit David C. Shore). They have raised their family in this home and have enjoyed many celebrations including birthdays, college and high school graduations, anniversaries and holidays and wish that their grandkids could share in the joy of their home. (Affidavit David C. Shore).

CapX Project:

CapX is a conglomerate of eleven power utility companies that have come together to create CapX2020. Petitioners are part of CapX. CapX plans to construct more than 700 miles of high voltage transmission lines throughout Minnesota, North Dakota, South Dakota, and Wisconsin. The majority of the new high voltage transmission power lines will be located in Minnesota. The new lines are necessary on a state and multi-state regional level, not for local demand. The lines will consist of large steel towers 130 to 190 feet in height. CapX plans to construct the project in a manner that allows for additional lines to be strung in the future. The

total cost of the CapX project is estimated at \$1.3 to \$1.6 billion dollars. The section from Monticello to Fargo alone is estimated to cost \$390 to \$560 million dollars.

Petitioners have sought a permanent high voltage transmission line easement over part of the Stice/Shore property. The remainder of the property is encumbered by an easement for access, maintenance, repairs, and construction.

Impacts on Stice Shore Home:

Until Stice and Shore were approached by CapX representatives, they had no intent to move from their home (Affidavits and Personal Statements of Carol Stice and David Shore). Their property is now, as a result of this condemnation action, encumbered by a 3.2 acre high voltage transmission line easement. Id. CapX’s high voltage transmission line project will result in the removal of a significant number of trees that provide a visual and sound buffer for their home from the road. Id. A pole and lines will be visible from nearly every room in their house, including their bedroom, the large bank of windows in their living room, their solarium, and their large screened porch, which are all located on the front of their south facing house. They will not be able to escape the ugly reality of the CapX project. Id. The high voltage power lines and poles resulting from the CapX project will destroy everything that David and Carol enjoy and love about their home. (See Affidavit and Personal Statement of David C. Shore and Affidavit and Personal Statement of Carol A. Stice). As a result of this impact to their home, Stice and Shore elected to exercise their rights to require Petitioners to buy their property under a provision of State law known as “Buy the Farm.”

Buy The Farm:

Minnesota has adopted a property owner protection statute referred to as “Buy the Farm”

that allows homeowners, farmers, and certain other property owners to require a utility seeking an easement for high voltage transmission lines to acquire all of the impacted property owners' contiguous property in fee. (See Minn. Stat. § 216E.12, Subd. 4). Carol and David are now facing the destruction of their property. Carol and David's property will become unrecognizable to them and they are faced with having a buzzing high voltage transmission line only a stone throw away from their front door. In light of the new high voltage transmission line, Carol and David have opted to exercise their statutory right to force Petitioners to acquire their once beautiful property in fee rather than be left to suffer the impacts of the easement.

Application of Chapter 117:

When property is taken in fee and private homeowners are forced to relocate as a result, the law imposes restrictions and obligations upon the condemning authority. Petitioners have alleged that they are not required to provide homeowners electing for the "Buy the Farm" with "minimum compensation" to ensure they receive sufficient funds to move into a comparable property (Minn. Stat. § 117.187), or to provide relocation services and benefits to assist homeowners with the move (Minn. Stat. § 117.52- which applies to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act to purchases within the State of Minnesota but outside of the normal federally funded acquisitions). It seems implicit that when homeowner's property is condemned by Petitioners, they would be treated like other property owners whose homes are condemned for highways, hospitals and even redevelopment projects. Petitioners, however, have asserted that such an election results in a "voluntary" sale preventing Carol and David from being eligible for the property owner protections created in Minnesota Statutes Chapter 117.

Respondents ask the Court to find that Stice/Shore are displaced persons eligible for relocation benefits and services and to find that Stice/Shore are entitled to minimum compensation under Minnesota Statutes Section 117.187.

LAW AND ARGUMENT

LEGAL ISSUE:

Are power companies, who install a high voltage transmission line across homesteaded property, required to provide minimum compensation under Minn. Stat. § 117.187 and relocation benefits and services under Minn. Stat. § 117.52 to the displaced homeowners who have exercised their rights under Minn. Stat. § 216E.12, Subd. 4?

A. History and background of applicable law.

A history and background of the surrounding law is important to understand the intent of the Legislature. Public utilities have the authority to condemn property for purposes of their operations. (See Minn. Stat. § 216E). Minnesota Statutes Chapter 216E, known as the Minnesota Power Plant Siting Act, addresses issues relating to the siting of large electric power facilities, including high voltage transmission lines. The Minnesota Power Plant Siting Act not only provides economic and social considerations for permitting the siting of new electric facilities, but also provides specific protections to rural residential property owners who had in the past disproportionately suffered the brunt of the costs of siting these high voltage transmission line projects. (See Minn. Stat. § 216E.12, Subd. 4). Minnesota Statutes Section 216E.12, Subd. 4 of the Minnesota Power Plant Siting Act was intended to correct this problem with what is referred to as the “Buy the Farm” law. The “Buy the Farm” portions of the Minnesota Power Plant Siting Act read in relevant part as follows:

Contiguous land. When private property that is an agricultural or

non-agricultural homestead, non-homestead agricultural land, rental residential property, and both commercial and noncommercial seasonal residential recreational property, as those terms are defined in section 273.13 is proposed to be acquired for the construction of a site or route for a high-voltage transmission line with a capacity of 200 kilovolts or more by eminent domain proceedings, the fee owner, or when applicable, the fee owner with the written consent of the contract for deed vendee, or the contract for deed vendee with the written consent of the owner, ***shall have the option to require the utility to condemn a fee interest in any amount of contiguous, commercially viable land which the owner or vendee wholly owns*** or has contracted to own in undivided fee and elects in writing to transfer to the utility within 60 days after receipt of the notice of the objects of the petition filed pursuant to section 117.055. Commercial viability shall be determined without regard to the presence of the utility route or site. The owner or, when applicable, the contract vendee shall have only one such option and may not expand or otherwise modify an election without the consent of the utility. ***The required acquisition of land pursuant to this subdivision shall be considered an acquisition for a public purpose and for use in the utility's business, for purposes of chapter 117 and section 500.24, respectively;*** provided that a utility divest itself completely of all such lands used for farming or capable of being used for farming not later than the time it can receive the market value paid at the time of acquisition of lands less any diminution in value by reason of the presence of the utility route or site. Upon the owner's election made under this subdivision, the easement interest over and adjacent to the lands designated by the owner to be acquired in fee, sought in the condemnation petition for a right-of-way for a high-voltage transmission line with a capacity of 200 kilovolts or more shall automatically be converted into a fee taking.

(Minn. Stat. § 216E.12, Subd. 4 (emphasis added)).

The above quoted "Buy the Farm" requirement imposed upon power utilities companies, including Petitioners in this action, results from the premise that only the State has the inherent power of eminent domain. Power companies, including Petitioners, have only those eminent domain powers that are specifically delegated to them by the State. The Minnesota Supreme

Court in Cooperative Power Ass. v. Aasand, et al., 288 N.W.2d 697, 700 (Minn.1980), made it clear that the State can “condition” that delegation of power. Id. The “Buy the Farm” law is a “condition” to the grant of power by the State of Minnesota to Petitioners. In Aasand the Court noted that:

“(t)he statute [116C.63, now 216E.12, Subd. 4] defines such acquisitions to be for a public purpose. In this manner, the Legislature affords landowners, not wishing to be adjacent to such right-of-ways, the opportunity to obtain expeditiously the fair market value of their property and go elsewhere. The statute, in doing so, responds to parties most affected by the operation of high voltage transmission lines; the statute eases the difficulties of relocation by shifting the transaction cost of locating a willing purchaser for the burdened property from landowner to utility.” Id.

The “Buy the Farm” statute reflects a Legislative response to a conflict between rural landowners and utilities

The Court in Aasand noted that the statute arose as a result of: “opponents of the utilities, resisting further encroachment upon the rural landscape and fearing the effects upon the rural environment and public health, not only challenge the placement and erection of high voltage transmission lines, but question whether the rural community’s sacrifice to the commonwealth serves a greater social good. The legislature, sensitive to these concerns but perceiving the occasion as demanding the construction of additional power-generating plants and high voltage transmission lines, enacted § 116C.63, Subd. 4 [now Minn. Stat. § 216E.12, Subd. 4] in partial response.” Cooperative Power Ass. v. Aasand, et al., 288 N.W.2d 697, 700 (Minn.1980).

Not only does the Minnesota Power Plant Siting Act set out the conditions of the grant of the power of eminent domain to power utility companies, but it also specifically addresses the process to be used. (See Minn. Stat. § 216E.12). The Minnesota Power Plant Siting Act requires that “in eminent domain proceedings by a utility for the acquisition of real property proposed for construction of a route or site, the proceedings shall be conducted in the manner prescribed in Chapter 117, except as otherwise specifically provided in this section.” (See Minn.

Stat. § 216E.12, Subd. 2).

In addition to the specific language of the Minnesota Power Plant Siting Act, Minnesota Statutes Chapter 117 contains preemption language applying Chapter 117 to virtually every acquisition of property using the power of eminent domain in the State of Minnesota including high voltage transmission line projects. (See Minn. Stat. § 117.012, Subd. 3 (excluding *only* township roadways and certain drainage/watershed district actions)). Minnesota Statutes Section 117.012 is in fact very specific as to its preemption over other laws:

“Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, all condemning authorities, including home rule charter cities and all other political subdivisions of the state, must exercise the power of eminent domain in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations.”

(Minn. Stat. § 117.012, Subd. 1).

Minnesota Statutes Section 117.012 quoted above is also very specific in that it allows the “Buy the Farm” provisions of Chapter 216E to supplement the protections afforded to property owners in Chapter 117 when it states that:

“Additional procedures, remedies, or limitations that do not deny or diminish the substantive and procedural rights and protections of owners under this chapter may be provided by other law, ordinance, or charter.”

(Minn. Stat. § 117.012, Subd. 1).

It is clear from the Minnesota Power Plant Siting Act and from the specific language found in Minnesota Statutes Chapter 117 that they are intended to supplement one another and are not intended as limitations of rights or remedies.

Since Chapter 117 applies to Petitioners’ actions in condemning property needed for its high voltage transmission lines, it is important to understand the significant changes that have

occurred to that statute in the past few years. Some of these changes were directly aimed at Petitioners and their CapX 2020 project. In 2006, the Minnesota Legislature amended Chapter 117 as part of a comprehensive overhaul of the eminent domain statutes in Minnesota. This action was part of a national backlash against what the public saw as abusive, overreaching actions by acquiring authorities. It is important to note that this overhaul provided substantially more rights to homeowners and placed substantially more limitations on acquiring agencies. Examples of these changes include the requirement that virtually all acquisitions follow the procedures of Chapter 117 (Minn. Stat. § 117.012); limitations on acquisitions for economic development (Minn. Stat. §§117.012 & 117.025, Subd. 11); the requirement that acquiring agencies share all appraisals in their possession with property owners (Minn. Stat. § 117.036); providing property owners with the ability to recover attorneys' fees (Minn. Stat. § 117.031); increased appraisal reimbursement limits (Minn. Stat. § 177.036 Subd. 2); the addition of specific statutory rights to be compensated for "loss of going concern" (Minn. Stat. § 117.186); "minimum compensation" to allow the owner to purchase a comparable property within the community (Minn. Stat. § 117.187); a prohibition on condemning authorities forcing a property exchange (Minn. Stat. § 117.188); statutory compensation for loss of driveway access in certain situations (Minn. Stat. § 117.186, Subd. 4); providing owners with certain rights of first refusal to repurchase unused property (Minn. Stat. § 117.226); and increasing relocation benefits for business reestablishment and allowing for a more efficient appeal of relocation claims (Minn. Stat. §§ 117.51 & 117.52).

The changes in Minnesota law in 2006 included a special provision for "public service corporations," exempting such entities from a variety of the new protections provided to property

owners. (See Minn. Stat. § 117.189). However, the Legislature acted in 2009 to narrow the loophole and ensure that high voltage transmission line projects are treated more like other acquisitions. In 2010, the Legislature completely closed the loophole to entirely exempt out high voltage transmission lines from the special treatment available to public service corporations. Representative David Bly, a sponsor of the bill which amended the statute in 2010, stated at a committee hearing that he was introducing this bill to force CapX 2020 to act in the same manner as the Minnesota Department of Transportation when acquiring properties. (See MN House, Energy Finance and Policy Division Comm., HF 1182 Public Service Corporation Eminent Domain Authority Clarified, 86th Leg. Reg. Sess. (Feb. 15, 2010)). The impacts of this inclusion should not surprise Petitioners since they were actively involved in attempting to alter eminent domain legislation in their favor. (See testimony of the Co-Executive Director of CapX 2020, Priti Patel, who testified against the bill. MN House, Energy Finance and Policy Division Comm., HF 1182 Public Service Corporation Eminent Domain Authority Clarified, 86th Leg. Reg. Sess. (Feb. 15, 2010)).

Specifically, at issue in this case is the application of two particular portions of Chapter 117 which were integral parts of the 2006 legislative overhaul. The first of these statutes is 117.187 which includes the requirement that “minimum compensation” be paid to owners who must relocate as a result of a taking. This statute states:

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

(Minn. Stat. § 117.187 (emphasis added)).

Minimum compensation is designed to ensure that when an owner is relocated as a result of a project, that the property owner is paid enough to purchase a comparable home on a comparable property. Its purpose is to put homeowners in the same position as they were before the condemnation. Minimum compensation is part of the valuation process undertaken by the condemnation commissioners or a jury and is distinct from relocation benefits, which are reimbursements for actual expenses as discussed below.

The second statute at issue in this case is Minnesota Statutes Section 117.52, pertaining to relocation benefits and services. The law provides that in all acquisitions undertaken by any acquiring authority, the acquiring authority, as a cost of acquisition, shall provide all relocation assistance, services, payments and benefits required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“Uniform Relocation Act”). (See Minn. Stat. § 117.52). The requirement that the Uniform Relocation Act apply in Minnesota has existed since 1973.

When enacting the Uniform Relocation Act, Congress found that, “minimizing the adverse impacts of displacement is essential to maintaining economic and social well-being of communities” and that, “the primary purpose of this title is to ensure that such persons shall not suffer disproportionate injuries as a result of programs or projects designed for the benefit of the public as a whole and to minimize the hardship of displacement.” (See 42 USC Section § 4621(b)). (See also 49 CFR 24.1 Purpose of the Rules Promulgated thereunder). These services and benefits include assistance in finding a replacement home, payment of actual and reasonable moving expenses, and payments to offset the transactional costs of purchasing and financing a

new home. (See 49 CFR 24; and Aff. of Igor Lenzner, **Exhibit B**).

Relocation benefits and services are to be provided to “displaced persons.” (See Minn. Stat. §§117.50-117.56). Minnesota Statutes Section 117.50 provides the definition of a “displaced person” by reference to the Uniform Relocation Act and the rules promulgated thereunder. The rules promulgated under the Act define a displaced person to include any person who moves from real property as a direct result of “the initiation of negotiations for, or the *acquisition* of, such real property in whole or in part for a project.” (See 49 CFR 24.2(a)(9) (emphasis added)). Minnesota Statutes Section 117.50 defines an “acquisition” as including “by eminent domain” and “by negotiation.” (See Minn. Stat. § 117.50). It is clear under Minnesota law that even when an acquiring authority acquires by negotiation and then displaces a person, the displaced person is eligible for relocation benefits and services. Minnesota Statutes Section 117.521 provides the sole mechanism for a waiver of relocation benefits in Minnesota. That mechanism provides only two situations where a waiver can be effective: when the owner requests acquisition through “voluntary negotiations” or when the owner-occupant has clearly shown the intent to sell the property on the open market. (See Minn. Stat. § 117.521).

B. Application of the law to the Homeowners.

Petitioners have asserted that the Homeowners are not being displaced by their high voltage transmission line project and are therefore ineligible for relocation assistance, benefits and payments required under Minnesota Statutes Section 117.52, and Petitioners have refused to consider application of Minnesota Statutes Section 117.187 to the Stice/Shore property.

What cannot be ignored is the fact that the Homeowners never chose for this high voltage transmission line to impact their property. (Aff. of Carol A. Stice and Aff. of David C. Shore).

Their property was not for sale prior to Petitioners filing a condemnation action. Id. The Homeowners are not willing sellers – their property is being taken from them through condemnation. Id. They are being forced into a position where their property and its value will be destroyed by the installation of enormous poles equipped with buzzing high voltage lines. Id. Anything in the way of the utility lines, such as trees, will be cut down and eliminated, resulting in a complete defacing of their property.

Petitioners assert that a condemnation under Minnesota Statutes Section 216E.12(4) is somehow different because the Homeowners have elected to have their entire property condemned and are not being required to relocate. Petitioners can cite no authority for its self-determined exemption from these statutes based upon their theory. Carol Stice and David Shore do not have the option to require the utility to “purchase” their property, but rather to “condemn” a fee interest in any amount of contiguous land under Chapter 117 for a public purpose. (See Minn. Stat. § 216E.12, Subd. 4). The plain language of the statute clearly places the expanded acquisition within the confines of Chapter 117 as a condemnation proceeding.

The simple answer under Minnesota Statutes Section 216E.12 is that once owners elect to exercise their “Buy the Farm” rights, Petitioner will “condemn” the entire fee interest in the property. This condemnation will “require” Stice and Shore to relocate from their home.

In addition to the logical conclusion that a condemnation results in a displacement, it is important to note even where “Buy the Farm” is not applicable, the State of Minnesota has addressed the issue of conversions from partial takings to total takings. The Minnesota Department of Transportation has a process by which an impacted homeowner can petition the State to convert the State’s acquisition from a partial taking to an acquisition of the entire

property. When such an election is made and accepted, the State treats the property in the same manner as all other total acquisitions for the project by providing full “minimum compensation” analysis and all relocation assistance, benefits and payments as provided under Chapter 117. (See Aff. of Igor Lenzner, **Exhibit C**).

CONCLUSION

Homeowners’ decision to exercise their right under Minnesota Statutes Chapter 216E.12 was made under duress:

1. Homeowners did not have their home on the market;
2. Homeowners were subject to a condemnation action for a permanent high voltage transmission line easement over a large portion of their property and temporary easements over the remainder;
3. Homeowners were left to accept the visual impact of 160 foot power poles equipped with high voltage lines on their property and loss of many mature trees;
4. Homeowners were left with the noise of buzzing and cracking high voltage lines and the concern about living within close proximity to the lines;
5. Homeowners are forced into a situation of not knowing how much they will be compensated for their home as a result of not being subjected to typical negotiations of a willing buyer and willing seller, but rather a condemnation process by which commissioners will decide the value.

Petitioners’ assertion that somehow these Homeowners are electing to have the line cross their property, electing to have Petitioners destroy their trees, electing to have their property suffer a complete defacing resulting in the total loss of the property’s unique character, and

electing voluntary sale of their home in which they have invested a tremendous amount of time and money is nothing more than an outright attempt to contradict the goals of the Legislature in adopting the "Buy the Farm" Statute. The statute is clear that once the Homeowner files their notice, it is not a matter of negotiation but rather an amendment of the condemnation petition to include fee ownership of their property. The goal of Minnesota's condemnation laws is to ensure that the costs of high voltage transmission lines are borne by all who benefit so that the costs and impacts of such lines are not disproportionately felt by the rural residents directly impacted by the huge poles and noisy lines.

Based on the above, the Homeowners respectfully request that the Court Order Petitioners to provide relocation assistance, services, payments and benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as adopted by the State of Minnesota (Minn. Stat. §§ 117.50-117.56) and the payment of "minimum compensation" to enable them to purchase a comparable property having all of the amenities of their current home (Minn. Stat. § 117.187).

Dated: 4-18, 2011

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