NO. A11-1116

State of Minnesota

In Supreme Court

Robert T. Pudas, et al.,
Brett R. Hanson, et al.,

Appellants,

vs.

Northern States Power Company, et al.,

Respondents.

BRIEF OF *AMICUS CURIAE* MINNESOTA EMINENT DOMAIN INSTITUTE

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INTRODUCTION

The Minnesota Eminent Domain Institute (hereinafter "MEDI") is an organization comprised of Minnesota attorneys who practice primarily in the area of eminent domain. The purpose of MEDI is to promote legislation and to advance case law that will protect the rights of property owners, tenants and displaced persons throughout the state. MEDI is intended, in part, to serve as a counterbalance to the extensive lobbying and litigation efforts currently conducted by a wide variety of profit-making utilities with condemnation power.

MEDI's interest in this appeal is primarily private in nature and is intended to promote the fair treatment of property owners who are having their property taken from them to accommodate the installation of high voltage transmission lines ("HVTL").[1] However, MEDI also believes there is a strong public interest in ensuring that property owners that are impacted by HVTL easement takings receive all protections afforded to them by Minnesota Statutes Chapter 117.

MEDI respectfully submits this *amicus* brief in this case to address issues of particular importance to property owners impacted by HVTL easement takings, which include: the importance of receiving minimum compensation under Minn. Stat. § 117.187 to ensure that they able to acquire a comparable property within their community, and being determined to be eligible for relocation benefits and payments under Minn. Stat. § 117.52.

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[1] Pursuant to Minn.R.Civ.App.P. 129.03, MEDI certifies 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 made a monetary contribution to its preparation or submission.

ARGUMENT

I. THE HISTORY AND PURPOSE OF MINNESOTA STATUTE § 216E.12, THE BUY-THE-FARM STATUTE.

To understand the Buy-the-Farm statute, we must examine the history surrounding its enactment.[2] This statute was born out of a 1970's HVTL project that, like the subject HVTL project, was spearheaded by utility companies that joined forces. It was called the CU Powerline Project ("CU Project").

To say this CU Project was controversial is to minimize its magnitude. Fourteen of the tall power line towers were toppled by protestors. Ten thousand power line insulators were shot out. Two hundred Minnesota State Troopers, half of the State's entire force, were sent to the project area to keep order. Those property owners, like the CapX property owners of today, were concerned that the power line would reduce the values of their remaining land, as well as create negative health effects on humans and animals from stray voltage and electromagnetic current. They were also concerned that the takings would sever their farms and make farming much more difficult.

Candidates for political office made the CU Project a campaign issue. Civil disobedience was common and the matter received statewide and even national attention. It also garnered the interest of the Minnesota legislature which passed the Buy-the-Farm ("BTF") statute in 1977 as a remedy.

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[2] The following facts discussed in this section of MEDI's amicus brief are located at the website: http://en.wikipedia.org/wiki/CU_project_controversy, which was visited by MEDI's attorneys on October 30, 2012.

In the case *Haage v. Steies*, 555 N.W.2d 7, 9 (Minn. App. 1996), the Minnesota Court of Appeals noted that when trying to ascertain the intent of the legislature, one must consider ". . . the contemporaneous legislative history of the statutes. Contemporaneous legislative history may include events leading up to the introduction of the act, the history of the act's passage, and any modifications made during the course of the bill's passage." If we view the words and phrases in the BTF statute in the context in which that statute was passed, which was part of the overall reaction to the CU Project, it is clear the legislature sought to provide property owners with a very significant option not previously available to them under Minnesota law.

When it comes to construing these types of remedial laws "[i]t is a general rule of law that statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefit of the statute." *Blankholm v. Fearing*, 22 N.W.2d 853, 855 (Minn. 1946). In the case *Spicer v. Stebbins*, 237 N.W. 844, 845 (Minn. 1931), the Minnesota Supreme Court noted "[w]hen the Legislature amends a practice, the presumption should be and is that it intends to aid the administration of justice, to better the practice, or to remedy some defect discovered in the operation of the existing law."

This is what occurred with the passage of the BTF statute. The legislature saw that in these HVTL takings cases, property owners were being left in a far worse position than they were in prior to their property being taken, so it provided those owners with a new remedy: the right to require the utility company to acquire the balance of their property. When one considers the remedial nature of this statute and the context in which

it was passed, it becomes clear that the Minnesota legislature wanted to provide a significant remedy to a significant problem to owners like Appellants whose property is subject to an easement taking for a HVTL.

II. RESPONDENT POSSESSES THE AWESOME POWER OF EMINENT DOMAIN AND PROFITS GREATLY FROM THAT POWER.

Respondent, as a monopolistic coalition of utility companies, has been granted the awesome power of eminent domain by the Minnesota legislature. Minn. Stat. § 216E.12, Subd. 1. "A state's ability to use eminent domain to take an individual's property is an awesome power. Eminent domain is the inherent power of a sovereign to take an individual's private property without the individual's consent." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010) (citations omitted).

We know that Respondent exercised this power in these and many other takings, yet it argues that it ought not to be held to the same laws that the government that granted it the power of eminent domain is held to. To be more specific, the government is required to comply with all of the requirements contained within Minnesota Statutes Chapter 117. Why not Respondent[3]? Respondent reasons that the BTF statute is elective and not compulsory. (*Appellant Br.*, p. 14) For the good reasons cited above, the Minnesota legislature recognized landowners who have a forced taking and who must face the many known and unknown impacts of HVTLs should have a remedy afforded to them to require the utility company to acquire their entire properties. Legislature to

[3] NSP is a "for profit" utility with publically sold stock. Other members of this consortium are municipal utilities and electric coops. Utility petitioners could and have included privately owned companies such as Koch Industries, which recently condemned the MinnCan Oil Pipeline, which impacted over 1100 properties.

HVTL Utilities: Be careful what you wish for. If you take a portion of the property, you may have taken all of it.

In eminent domain takings by the government, it is not uncommon for condemnees to compel the government to take the entire parcel. Sometimes the extent of the damages caused by the partial taking simply make a total taking the only reasonable option, and when this happens, it is hardly "a convenient election" for the landowner. It is a forced burden not imposed on other utility customers for which the legislature has given a remedy. When that remedy is used by a property owner against a utility company, such as Respondent, the full compliance with all provisions of Minnesota Statutes Chapter 117 is required. Minnesota Statute § 216E.12 could not be more clear in this regard. To characterize BTF as "a convenient election" for property owners ignores the reason why that statute was adopted in the first place.

Finally, Respondent represents a coalition of powerful utility companies that generate great profits from operation of their HVTLs. On this project alone, Respondent has a virtual army of staff, surveyors and agents. Respondent has committed hundreds of millions of dollars towards construction of its new HVTLs and has powerful and well-connected big firm lobbyists and lawyers to help it reach its profit making objective. Despite all of this, Respondent does not want to pay those who have concluded they cannot live with these HVTLs on their properties what any other condemnor in Minnesota would have to pay. Somehow, Respondent either sees itself as being above the law or different from the very entity that granted it the power of eminent domain. Such an unjust notion must be rejected by this Court.

III. APPELLANTS DO NOT NEED TO REQUIRE RESPONDENT TO ACQUIRE THEIR ENTIRE PROPERTIES UNDER THE BUY-THE-FARM STATUTE TO BE ENTITLED TO RECEIVE MINIMUM COMPENSATION AND RELOCATION BENEFITS.

A. The Minimum Compensation Statute Does Not Require A Condemning Authority To Acquire A Property Owner's Entire Property In Fee For That Property Owner To Be Entitled To Receive Minimum Compensation.

Nowhere in the Minimum Compensation Statute does it require a condemning authority to acquire a property owner's entire property in fee in order to be entitled to receive minimum compensation damages. The Minimum Compensation Statute only states that,

> [w]hen 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. While the Minimum Compensation Statute does define an owner "as the person or entity that holds fee title to the property," the only requirement in that statute for an owner to be eligible for minimum compensation is that they must have relocated from their property. There is no requirement for such a relocation to be total.

Based upon the statute's plain language, it is irrelevant whether the condemning authority acquires a property owner's entire property. The only inquiry that needs to be made is whether that property owner had to relocate as a result of an involuntary taking. If the acquisition is of the entire property in fee, then that inquiry is easy; the property owner needed to relocate and is entitled to minimum compensation damages.

If the acquisition is not of the entire fee, the relevant facts must be analyzed to determine if the property owner was forced to relocate. There are scenarios in which a partial acquisition of property will result in a property owner having no choice but to relocate from their property. For instance, the HVTL easement could include a landowner's home itself. Since no structure is allowed on the easement, the home is destroyed and the owner must relocate even though it is only a partial taking.

This demonstrates why the decision of the Court of Appeals and Respondent's argument regarding the applicability of the Minimum Compensation Statute in this case must be rejected. Had the property owner in our example not invoked the requirements of the BTF statute, they would have been eligible to receive minimum compensation. However, because they did invoke the requirements of the BTF statute the Court of Appeals concluded they are not eligible for minimum compensation. If that is the case, it results in an absurd interpretation of the BTF statute. It also begs the question as to why the legislature would have passed that remedial statute if a property owner would be penalized for trying to invoke its protections.

Therefore, for the foregoing reasons, MEDI respectfully requests that this Court reverse the decision of the Court of Appeals and conclude that Appellants and others similarly situated are entitled to minimum compensation.

B. Appellants Are Eligible For Relocation Benefits Under The Uniform Relocation Assistance And Real Property Acquisition Policies Act Of 1970, As Amended And Minnesota Statutes §§ 117.50 – 117.56, Whether They Required Respondent To Acquire Their Entire Properties Under The Buy-The-Farm Statute Or Not.

The purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended ("URA") and Minnesota Statutes §§ 117.50 – 117.56 ("MURA") is to assist persons and businesses that are displaced by the acquisition, rehabilitation or demolition of the property on which they are located by an acquiring authority.[4] The URA was promulgated to "ensure that persons displaced . . . are treated fairly, consistently, and equitably so that such persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole . . . ." 49 C.F.R. § 24.1(b). (Doesn't Chapter 117 have an identical purpose?)

A displaced person is eligible for relocation benefits if they move from their real property or move personal property from real property "[a]s a direct result of . . . the acquisition of such real property *in whole or in part* for a project . . . ." 49 C.F.R. § 24.2(a)(9)(i)(A). (*Emphasis added*). This means a displaced person is entitled to relocation benefits even if they move as a result of only a partial acquisition of their property. It also means that the decision of the Court of Appeals that because Appellants required Respondent to acquire their entire properties under the BTF statute, they are not eligible for relocation benefits, is an error of law, as that decision penalizes such landowners for exercising their BTF option.

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[4] Minn. Stat. § 117.50, Subd. 5(a), defines "acquiring authority" as "the state and every public and private body and agency thereof which has the power of eminent domain . . . ." Respondents have the power of eminent domain in this matter.

As Judge Cleary noted in his dissent, the taking of the HVTL easements by Respondent, "effectively encompassed the entire homesteads of several of the parties and jeopardized the residual value of the properties." *Northern States Power Co. ex rel. Bd. of Directors v. Aleckson*, 819 N.W.2d 709, 714 (Minn. App. 2012). In regards to the Pudas' home, Judge Cleary specifically noted in his dissent that their 2.6 acre property would "be traversed by a high-voltage power line and tower, and the entire property would be encumbered by a permanent easement for access, maintenance and repair." *Id.* at 714 n.2.

As a result of the impact the taking was going to have on their properties, Appellants' exercised their option to require Respondent to acquire their entire properties under the BTF statute. In its decision, the Court of Appeals concluded that this was a voluntary conveyance, which negated their claims of eligibility for relocation benefits.[5] *Id.* at 713.

As was true on the issue of minimum compensation, the Court of Appeals' decision in this regard is incorrect as well. Based upon that decision, Appellants would have been eligible for relocation benefits if they moved as a result of only the partial easement acquisition by Respondent, but are not eligible for relocation benefits because they required Respondent to acquire their entire properties under the BTF statute. Such a result simply does not make any sense and should not stand.

Such a holding is an absurd interpretation of the BTF statute, which requires this Court to conclude that the legislature wanted property owners to be worse off by exercising their BTF right than they would have been had they not required the utility

[5] That the sales in this case are not voluntary will be addressed later in this brief.

companies to acquire their entire properties under that statute. Given the atmosphere in which the BTF statute was passed and the remedial nature of that statute, no reasonable person could conclude that the legislature intended such an outcome.

IV. RESPONDENT'S ACQUISTION OF APPELLANTS' PROPERTIES DOES NOT MEET THE VOLUNTARY SALE REQUIREMENTS OF THE URA.

As noted above, Appellants are eligible for relocation benefits because they will move "[a]s a direct result of . . . the acquisition of" their properties "in whole or in part" for Respondent's HVTL project. 49 C.F.R. § 24.2(a)(9)(i)(A). However, in its decision, the Court of Appeals concluded that Appellants' will be voluntarily selling their properties to Respondent, so they "are ineligible for relocation benefits under Minn. Stat. § 117.52." *Aleckson*, 819 N.W.2d at 713. The decision by the Court of Appeals in this regard is incorrect because the sale of Appellants' properties to Respondent does not meet the strict voluntary sale requirements in the URA and the MURA and because of that they are eligible for relocation benefits.

In support of its conclusion, the Court of Appeals cited the URA conference committee when that committee considered the issue of whether voluntary sales meet the "direct result" requirement of the definition of displaced person. *Id.* at 713. In its meeting that conference committee noted: "'In certain cases where a property owner voluntarily agrees to sell his or her property and moves from the property in connection with the sale, the move should not be considered to be permanent displacement as direct result of the project and that person should not be eligible for relocation assistance under the Act.'" *Id.* at 713 (citing H.R. Rep. No. 100-27, at 230 (1987) (Conf Rep.).

While the Court of Appeals is correct that persons who voluntarily convey their property to an acquiring authority are not eligible for relocation benefits, the URA has very strict requirements as to which conveyances are truly voluntarily thereby negating a property owner's eligibility for relocation benefits. The conveyance of Appellants' properties does not meet those requirements and because of that they are eligible for relocation benefits.[6]

Under the URA, the determination of eligibility for relocation benefits is a two-step process. We must first look to see if the claimant meets the definition of displaced person under 49 C.F.R. 24.2(a)(9)(i) and if so, we must then look to see if any of the exceptions contained within 49 C.F.R. 24.2(a)(9)(ii) would negate the eligibility of an otherwise eligible displaced person.

The voluntary sale exception to a person's eligibility for relocation benefits are contained in two places:

1. 49 C.F.R. 24.2(a)(9)(ii)(E); and
2. 49 C.F.R. 24.2(a)(9)(ii)(H).

Pursuant to 49 C.F.R. 24.2(a)(9)(ii)(E), an otherwise eligible owner-occupant who meets the voluntary sale requirements of that section is not eligible for relocation benefits if they move "as a result of an acquisition of real property as described in §§ 24.101(a)(2) or 24.101(b)(1) or (2) . . . ." Pursuant to 49 C.F.R. 24.2(a)(9)(ii)(H) an otherwise eligible owner-occupant is not eligible for relocation benefits if they convey their "property, as

[6] The voluntary sale exceptions contained within the URA are designed to apply to "voluntary open-market purchases . . . ." *Regional Transportation District v. Outdoor Systems, Inc.*, 34 P.3d 408, 416 (Colo. 2001). As will be discussed below, Respondent's acquisition of Appellants' properties is not a voluntary open-market purchase.

described in §§ 24.101(a)(2) or 24.101(b)(1) or (2), after being informed in writing that if a mutually satisfactory agreement on terms of the conveyance cannot be reached, the Agency will not acquire the property." (*Emphasis added.*)

A. Respondent's Acquisition Of Appellants' Properties Does Not Meet The Voluntary Sale Exception Contained Within 49 C.F.R. § 24.2(A)(9)(ii)(H).

The voluntary sale exception contained within 49 C.F.R. 24.2(a)(9)(ii)(H) only applies in cases where the owner conveys their property pursuant to the requirements contained in §§ 24.101(a)(2) or 24.101(b)(1) or (2) **and** after they have been told that the acquiring authority would not otherwise acquire their property except in the case of a voluntary sale. *Pickering v. City of Plymouth*, 2004 WL 728147 *3 (Minn. App. 2004). Based upon the requirements of the BTF statute, such a sale is not possible in this case. A "voluntary" sale could be one in which a city wants private land for redevelopment, but only if the land is voluntarily sold by the owner. If it is such a voluntary sale, and the city made a policy decision not to use condemnation power, and tells the owner of that decision in writing, then the parties are on equal footing since the power of condemnation is off the table. So long as the acquiring authority has condemnation power and is willing to use it, no sale is "voluntary."

According to Minn. Stat. § 216E.12, Subd. 4, in cases such as this one, Respondent is required to acquire via condemnation under Minnesota Statutes Chapter

117[7], "any amount of contiguous land which the owner or vendee wholly owns . . . ." This means that under the BTF statute, the subject utility company has no choice; it is required to acquire that property and must do so under the provisions contained within Chapter 117. That is to say, after the landowner exercises a BTF option, the utility must condemn the entire property. That means the landowner must leave.

Whether the acquisitions in this case are ultimately completed by negotiated acquisition under Minnesota Statute § 117.036 or by going through the formal eminent procedures contained within §§ 117.055 – 117.145; it makes no difference. In these CapX cases, the Respondent cannot inform Appellants that it will not acquire their property by condemnation "if a mutually satisfactory agreement on terms of the conveyance cannot be reached." Respondent obtained approval of its route from the Minnesota Public Utilities Commission[8] and is required to acquire at least an easement over Appellants' properties to construct this HVTL, and that means that the voluntary sale exception contained within this section of the URA is not applicable.

B. Respondent's Acquisition Of Appellants' Properties Also Does Not Meet The Voluntary Sale Exception Contained Within 49 C.F.R. § 24.2(A)(9)(ii)(E).

As noted above, in order for the voluntary sale exception contained within 49 C.F.R. § 24.2(a)(9)(ii)(E) to apply and negate an otherwise eligible displaced person's

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[7] All condemning authorities in Minnesota that use the power of eminent domain to acquire private property, must exercise that power "in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations." Minn. Stat. § 117.012, Subd. 1.

[8] See *Pudas and Enos Brief*, pp. 1-5.

eligibility for relocation benefits, the person must have moved "as a result of an acquisition of real property as described in §§ 24.101(a)(2) or 24.101(b)(1) or (2) . . . ."

Similar to the language contained within 49 C.F.R. § 24.2(a)(9)(ii)(H), 49 C.F.R. § 24.101(a)(2) indicates that a property owner is not eligible for relocation benefits if the acquiring authority "will not acquire [their] property (by condemnation) because negotiations fail to result in an agreement [and] the owner of the property shall be so informed in writing."[9]

Additionally, the exception contained within 49 C.F.R § 24.101(b)(2) is not applicable to a required acquisition under the BTF statute. The reason for this is that the voluntary sale exception only applies to "acquisitions for programs or projects undertaken by an Agency" that "does not have authority to acquire property by eminent domain . . . ." 49 C.F.R § 24.101(b)(2). (An HRA would be an example of such an Agency.) As noted above, Respondent does have the power of eminent domain, which means any required acquisition made pursuant to the BTF statute, can never meet this requirement for a voluntary sale.

Finally, the voluntary sale exception contained within 49 C.F.R. § 24.101(b)(1) is not applicable in this case because an acquisition required by the BTF statute does not meet all four of the mandatory requirements contained within that section of the URA in order to be considered a truly voluntary sale.

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[9] Needless to say, no such notice saying Respondent will not condemn the property if it is not voluntarily sold, has been given to these Appellants, or any other property owner in the way of this 345v HVTL. Their properties will be taken, period. If that were not true, there would be no project. No landowner ever wants this power line on their property.

[49 C.F.R. §§ 24.101(b)(1)(i) – (iv). *See Pickering*, 2004 WL 728147 *3.]

1. **No specific site or property needs to be acquired.**

   As part of the project, Respondent identified all of the specific properties in Stearns and Wright Counties, (as well as all other property owners along all its routes), that it needed to acquire easements across to accommodate its HVTL. *Aleckson*, 819 N.W.2d at 709. *See Regional Transportation District v. Outdoor Systems, Inc.*, 34 P.3d at 417 (the voluntary sale exception does not apply to "situations where an agency identifies a parcel of land needed for a particular project and then sets out to obtain it."). Additionally, Respondent is required to acquire the entirety of Appellants' properties in order to comply with the BTF statute.

2. **The property to be acquired is not part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired.**

   As noted immediately above, Appellants' properties were located within the planned and designated CapX 2020 project area and Respondent needed to acquire all of the easement areas to accommodate that project. Additionally, Respondent is required to acquire the entirety of Appellants' properties within that project area in order to comply with the requirements of the BTF statute.

3. **The Agency will not acquire the property in the event negotiations fail to result in an amicable agreement, and the owner is so informed in writing.**

   As noted above, Respondent cannot provide such a notice to Appellants because it is condemning their properties if voluntary acquisition does not occur.

4. **The Agency will inform the owner of what it believes to be the fair market value of the property.**

   Presumably, this will be the only one of these four requirements with which Respondent will be able to comply.

Because the required acquisition of Appellants' properties by Respondent cannot meet all four of these requirements, it is not a voluntary sale, and the Appellate Court's finding it was voluntary cannot stand.

C. The Practical Consequences Of The Court Of Appeals' Decision.

The consequences of upholding the Court of Appeals' decision with respect to these specific Appellants is made clear in their Briefs. MEDI would like to point out some additional consequences to many other affected land owners who have, or will exercise their BTF option. For our first example, let us take an average dairy farm that milks 100-150 cows. Such a dairy operation can be expected to have 10-15 buildings of one type or another to support such an operation. Normally you would expect the farmer's home to be located on this property also. Along comes an electric utility which requires a 150 foot easement for its 345kv transmission line. The easement literally runs through all or portions of the home, the milking barn, and two other of the necessary buildings on the farm. The buildings impacted by the easement itself must be removed. The farmer exercises his option under BTF.

Under the Court of Appeals' decision, this farmer is allowed minimum compensation as well as relocation benefits for the buildings directly impacted by the easement. According to the Court of Appeals, the remaining buildings and all of the equipment in them are not eligible for relocation benefits or minimum compensation. As a result, the farmer must move his house, his milking barn, and two more buildings that are located within the easement, and will be reimbursed for both the moving expenses and, if appropriate, will receive minimum compensation for those four buildings.

However, the farmer cannot operate without the remaining buildings. Nor can he operate having the remaining buildings three or four miles away from his home, milking barn, and the two buildings eligible for relocation and minimum compensation. That farmer needs all of his buildings and equipment on the same site. This farmer has no choice but to move his home, his milking barn, and the other two buildings. Because all of his buildings and equipment need to be together, this farmer is forced to move or recreate his additional buildings at his own cost and expense at a new site, thus bearing this substantial cost or burden, which should have been born by all of the Respondent's rate payers. This inane result follows from the Court of Appeals' decision.

Another example would be that of an organic farmer. His dairy barn and related equipment are within the easement and he must relocate those essential facilities five miles away. So he exercises his BTF option. He will need to grow organic feed at the new site but it take three years of being organic to be certified organic. This farmer has been put out of his business since he cannot claim to be organic as a result of a move forced upon him.

CONCLUSION

Who should bear the costs of these huge 345kv HVTLs? Those who are unfortunately in the way? Those who are forced out of some of their farm land and simply need to keep their farm together? We expect any reasonable person to answer those questions "No."

Therefore, based upon the foregoing, the Court of Appeals' conclusion that Appellants are not eligible for relocation benefits or minimum compensation (or

presumably other rights set forth in Chapter 117) because they "voluntarily" chose to sell their properties to Respondent is an error of law and should be reversed by this Court. These Appellant's and all similarly situated Minnesota property owners are entitled to, and should be granted, all rights under Minn. Stat. §117.

Respectfully submitted this 21st day of November, 2012.

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