
State of Minnesota
In Supreme Court

DANNY O. LUNDELL AND MARY E. LUNDELL,

Appellants,

vs.

COOPERATIVE POWER ASSOCIATION,

a Minnesota Corporation,

Respondent.

APPELLANTS' BRIEF AND APPENDIX

LAMPE, SWANSON, MORISETTE
& HEISLER, L.L.P.
Lance R. Heisler, Esq. (#43631)
105 East Fifth Street
Post Office Box 240
Northfield, Minnesota 55057
(507) 663-1211

Attorneys for Appellant

MOSS & BARNETT
Paul B. Zisla, Esq.
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 347-0300

Attorneys for Respondent

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STATEMENT OF THE CASE

This case arises out of an action in eminent domain pursuant to Minn. Stat. Ch. 117 brought by the Respondent, Cooperative Power Association, to condemn a five acre tract of land owned by the Appellants, Danny O. Lundell and Mary E. Lundell. Respondent had a long term lease on the property which commenced in 1980 and expires in 2030. Respondent used the property to maintain a telecommunications tower.

In November, 2002, after several months of negotiations, the parties agreed to an amendment to the lease. At no time during the negotiations did Respondent indicate an interest in purchasing the property, nor did Respondent indicate an interest in extending the term of the lease. Respondent prepared the written amendment, which was signed by Appellants without changes. Respondent then refused to sign the written amendment, and took the position that the agreement reached by the parties was not binding. The sole issue was the amount of rent to be paid.

When Appellants brought an action in unlawful detainer against Respondent for failure to pay rent, Respondent commenced this action in eminent domain, asking that the court issue an order granting title and possession under Minn. Stat. § 117.02 "quick take" provisions. The action was brought in Goodhue County District Court before the Honorable Karen Asphaug. Respondents challenged the necessity for the taking, and alleged that there was no good cause to increase Respondent's current interest in the property, and further alleged that the Respondent's determination to condemn the

property was made in bad faith. Appellants also claimed that since Respondent was already possession of the property, there was no basis for an order for a “quick take” under the statute.

The trial court determined that the taking was necessary and granted the Respondent’s petition to condemn the property. The trial court made no findings on the issues of good cause or bad faith, and issued no memorandum. The trial court also granted Respondent’s request for a “quick take” of the property. Subsequent to the proceedings to determine damages to be awarded to Appellants, the Appellants filed an appeal to the court of appeals. The court of appeals affirmed the trial court decision, and ruled that neither good cause nor bad faith were relevant considerations in assessing whether there was a public purpose and necessity for the taking.

STATEMENT OF THE ISSUES

I. DID THE LOWER COURTS ERR IN DETERMINING THAT RESPONDENT HAD ESTABLISHED A SUFFICIENT PUBLIC PURPOSE AND NECESSITY FOR THE TAKING?

The trial court and the court of appeals ruled that a sufficient public purpose and necessity for the taking had been established.

City of Freeman v. Salis, 630 N.W. 2d 699, 703 (S.D. 2001).

City of Marietta v. Edwards, 519 S.E. 2d 217, 218 (Ga. 1999)

Village of St. Louis Park v. Minneapolis, N&S RY Co., 194 N.W. 327 (Minn. 1923)

Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685, 17 S. Ct. 718 (1897)

II. DID THE LOWER COURTS ERR IN FAILING TO REQUIRE RESPONDENT TO SHOW GOOD CAUSE TO INCREASE ITS INTEREST IN APPELLANT'S PROPERTY?

Neither the trial court nor the court of appeals ruled that it was necessary for Respondent to show good cause to increase its interest in the property.

In Re Petition of Burnquist, 220 Minn. 48, 19 N.W. 2d, 397 (1945)

New York & H.R. Co. v. Kip, 46 N.Y. 546, 7 Am.Rep. 385;

Houston North Shore R. Co. v. Tyrrell, 128 Tex. 248, 98 S.W.2d 786, 108 A.L.R. 1508.

Ferguson v. Department of Employment Services 311 Minn. 34, 247 N.W. 2d 895,(Minn. 1976).

III. DID THE LOWER COURTS ERR IN FAILING TO ASSESS WHETHER

BAD FAITH OR TAINTED MOTIVE NEGATED ANY SHOWING BY THE RESPONDENT OF PUBLIC PURPOSE OR NECESSITY FOR THE TAKING?

Neither the trial court nor the court of appeals considered the impact of bad faith or tainted motive relevant to deciding the issues of public purpose or necessity for the taking.

City of Minneapolis v. Wurtele, 291 N.W. 2d 386, 390 (Minn. 1980)

Housing and Redevelopment Authority of City of St. Paul v. Schapiro 210 N.W. 2d 211, Minn. 1973

City of Freeman v. Salis, 630 N.W. 2d 699, (S.D. 2001)

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IV. DID THE LOWER COURTS ERR IN DETERMINING THAT RESPONDENT HAD MADE A SUFFICIENT SHOWING FOR THE NECESSITY OF A "QUICK TAKE" OF APPELLANT'S LAND DURING THE CONDEMNATION?

The trial court and the court of appeals ruled that Respondent had made a sufficient showing for the necessity of a "quick take" of Appellant's land.

Minn. Stat. § 117.042

In re Condemnation by City of Minneapolis of Certain Lands in City of Minneapolis, 2001, 632 N.S. 2d 586.

STATEMENT OF FACTS

A summary of the chronological history of undisputed facts is as follows:

1. April 29, 1980 – CPA (Respondent) entered into a Land Lease Agreement with Howard and Luella McKinley for lease of 4.5 acres for a telecommunications tower. The rent was \$450 per year, with no increases for 25 years. CPA has the automatic right to extend the lease to the year 2030. The lease cannot be terminated by the landowner. (See Land Lease Agreement, AA23)
2. December 14, 2001 – Lundell (Appellant) acquired fee ownership of the property from McKinleys. (AA21)
3. The Tower Site actually used by CPA encompassed more area than provided by the Lease. (AA34)
4. April 12, 2002 – Lundell, through counsel, made its first inquiry regarding apparent use of the land beyond that contemplated by the lease. (AA77)
5. July 12, 2002 – Letter to GRE counsel from counsel for Lundell requesting payment for real estate taxes required by the lease, and requesting a rent increase to **\$750 per month** based upon additional buildings added to the tower site. (emphasis added). The amount of the rent increase is based upon the Lundell's inquiry into the current market rate for tower space in the immediate area. (AA81 & AA71)

6. August 6, 2002 – GRE , through its counsel, states that “GRE is willing to increase the rent to **\$750 per month** for the tower . . .” (emphasis added) Counsel for GRE further states that “**the substantial rent increase and a corresponding amendment to the Lease should resolve any concerns regarding increased use and fair compensation.**” (emphasis added) GRE’s counsel concludes the letter as follows: “Please let me know whether your client is amenable to amending the Lease as proposed in this letter. We will then prepare the appropriate document.”(AA156)
7. September 19, 2002 – Counsel for GRE sends email indicating that he needs “**final confirmation**” before drafting the amendment. (emphasis added) . (AA160)
8. September 19, 2002 – Second email from Counsel for GRE – Indicates that CPA/GRE has “**the OK to prepare the amendment**”. (emphasis added). (AA161)
9. October 31, 2002. - Counsel for CPA/GRE obtained approval from its client and prepared an Amendment to Lease and Memorandum of Amendment to Lease. Consistent with the prior negotiations and correspondence between the parties, the documents prepared by GRE provided for a rent payment of **\$750 per month**. (AA19, AA27 & AA30)

10. November 20, 2002 – The Amendment to Lease and Memorandum of Amendment to Lease were signed by Lundells, with no changes or corrections, and returned to counsel for GRE. (AA19)
11. November 22, 2002 – Counsel for GRE acknowledged receipt of the signed amendment to Lease and indicated he would “*arrange for execution by our client.*”(emphasis added) (AA162)
12. December 13, 2002 - counsel for GRE advised counsel for Lundell that GRE would not honor the negotiated Amendment to Lease – specifically that it would not pay the rent to which it had agreed. (AA71)
13. March 27, 2003 – Counsel for Lundell serves Notice of Default of Lease upon counsel for GRE alleging failure to pay rent from March 1, 2002 through March 1, 2003, and makes offer of settlement. AA87 & AA89)
14. GRE paid the amount in default with a reservation of rights. (AA76).
15. April 10, 2003 – GRE determines by resolution that it is “necessary in the conduct of GRE’s business to own in fee sites for telecommunication towers” and specifically determines that “it is necessary and convenient for GRE to acquire in fee” ownership of the Lundell’s property. GRE Board also determined that it was necessary to acquire title and possession of the Lundell’s property prior to the filing of an award by the court-appointed commissioners. (AA40) Prior to this time, neither GRE nor any of its representatives had ever mentioned any

“policy” to purchase leasehold properties.

16. April 25, 2003 – GRE files a Petition to condemn the Lundell’s property by way of eminent domain proceedings. (AA3)
17. May 27, 2003; June 20, 2003 – Lundell’s file responsive documents challenging the public necessity for the taking; asserting bad faith on the part of GRE; and challenging the necessity for the use of the “quick take” provisions of Minn. Stat. § 117.042. (AA15 & AA 64)
18. August 13, 2003 - Findings of Fact, Conclusions of Law, and Order Transferring Title and Possession and Appointing Commissioners entered by Court. The Findings signed by the Court were identical to those submitted by GRE. There was no memorandum issued by the District Court. (AA163 & AA172)

ARGUMENT

The Minnesota Supreme Court has held that the foundation idea on which the right of eminent domain rests is public necessity. Northern States Power Co. v. Oslund, 1952, 236 Minn. 135, 51 N.W.2d 808.

Consequently, it is clear that a landowner may oppose condemnation proceedings as respects his own land upon the ground that the proposed taking is not necessary. Minneapolis Ry. Terminal Co. v. Minneapolis Union Ry. Co., 1888, 38 Minn. 157, 36 N.W. 105. Further, whether the purpose for which private property is to be taken is a public purpose is a judicial question which the owner is

entitled to have determined by the courts before his property is actually appropriated. Webb v. Lucas, 1914, 125 Minn. 403, 147 N.W. 273.

The District Court's determination in a condemnation proceeding regarding public purpose and necessity are questions of fact that will not be reversed on appeal unless clearly erroneous. Town of Fayal v. City of Eveleth, App.1999, 587 N.W.2d 524, review denied.

The Court may properly deny a Petition for condemnation where the proposed condemnor's actions are *manifestly arbitrary or unreasonable*. Regents of University of Minnesota v. Chicago and North Western Transp Co., App. 1996, 552 N.W. 2d 578, review denied.

As Respondent points out, a finding of "absolute necessity" is not required in a condemnation proceeding; it is enough to find that the proposed taking is reasonably necessary or convenient for the furtherance of a *proper purpose*.(emphasis added) Itasca County v. Carpenter, App.1999, 602 N.W.2d 887. The court elaborated on the definition of necessity, holding that the condemnor must demonstrate a necessity "either now or in the near future". Itasca County v. Carpenter, Minn. App.1999, 602 N.W.2d 887.

Even though several issues were raised by the Appellant at the trial court level, including the issues of bad faith and whether there was good cause to increase the interest Respondent already had in the property, the Trial Court in this case nevertheless adopted Respondent's proposed findings verbatim, and

without comment or memorandum .

Although the verbatim adoption of one party's Findings does not change the standard for review, the Court of Appeals has noted that it takes a dim view of this practice. (*Sigurdson v. Isanti County*, 408 N.W. 2d 654, Minn. App. Ct. 1987). The danger, of course, is that the wholesale adoption of one party's Findings in a contested matter may be an indication that the Trial Court did not conduct an independent evaluation of the claims made in the case. It is even more troubling where, as here, the findings do not address issues raised by the Appellant, and there is no memorandum from the Trial Court setting forth the rationale for accepting or rejecting the parties' claims.

The essence of Appellant's argument in this case is that neither the District Court nor the Court of Appeals properly considered whether Respondent had good cause to expand its existing interest in the property, nor whether Respondent had acted in bad faith, and whether the existence of bad faith might negate the public purpose for the taking. Appellant submits that whether there was good cause for the taking in this case, and whether the Respondent acted in bad faith have a direct bearing on whether the Respondents actions were "manifestly arbitrary or unreasonable."

I. DID THE LOWER COURTS ERR IN DETERMINING THAT RESPONDENT HAD ESTABLISHED A PROPER PUBLIC PURPOSE AND NECESSITY FOR THE TAKING?

The issues of public necessity, good cause to increase an interest in the property, and the impact of bad faith on a finding of public purpose are very much related issues. The Court of Appeals ruled that “The Great River board’s declaration of necessity operates as prima facie evidence of public purpose and necessity”. (AA195), and cited the case of *City of Pipestone v. Halbersma*, 294 N.W. 2d 271, 274 (Minn. 1980) for that proposition. In that case, the city of Pipestone condemned land for the extension of a municipal airport. The resolution for that condemnation, however, came only after several years of study by the City, and long before any disputes with the adjoining landowners arose. The circumstances in this case which led to Respondent’s declaration of necessity are far more suspicious in that the first evidence of the alleged necessity did not surface at any time during six months of lease negotiations, but only *after* a dispute over the amount of rent to be paid arose.

The Trial Court adopted Respondent’s assertion that “The policy of GRE is to convert telecommunications tower sites occupied as a lessee to sites occupied as fee owner and to acquire such sites by purchase. The Tower Site was previously identified by GRE as a location to acquire as fee owner.” (AA125).

This finding is clearly erroneous and contrary to the evidence in this case. If in fact it was Respondent’s “policy” to acquire title to tower sites in general, and to acquire Appellant’s property specifically, before this dispute arose, there should logically be some evidence of either the creation, recitation or implementation of

that policy. There is no such evidence in the record. Respondent offered no explanation as to why it did not mention, much less follow, this policy during more than six months of lease negotiations. Respondent has produced no documentation whatever that this policy existed prior to the lease dispute - no resolution; no correspondence; no minutes of meetings; no interoffice memos; *nothing*.

Respondent did not offer any evidence that it had ever converted such a lease site to fee ownership, other than its own self-serving statement made after this dispute arose. (AA74) It offered no resolution of its Board applying this "policy" to the Respondent's property until April 2003, long after this dispute arose. Respondent had never contacted the Appellants, nor the prior owners regarding this "policy". and there was no attempt by Respondent to purchase this property until after Respondent determined that it did not want to pay the rent that had been negotiated.

On the contrary, the evidence clearly establishes that Respondent's determination that it was "necessary in the conduct of GRE's business to own in fee sites for telecommunication towers" and specifically that it was "necessary and convenient" to acquire title to the Appellant's property was made by resolution dated April 10, 2003 - *after* the Appellants made it clear that they expected Respondent to honor the lease agreement they had made. (AA40). Other than Respondent's unsupported self serving statement, there is absolutely no evidence in the record that Respondent had such a policy, acted on such a policy, or even

considered such a policy before April 10, 2003.

Apart from the consideration of whether or not Respondent ever in fact had a policy to acquire fee title to leasehold property, both the trial court and the court of appeals appeared to accept Respondent's assertion that "the leasing dispute demonstrates the need for taking by showing that it was perilous to rely on the long-term lease arrangement for use of the property." (AA195) Specifically, the court of appeals found that "the parties' irreconcilable dispute called the stability of their lease arrangement into serious question; this fact alone supports the district court's finding of necessity." (AA197)

The question which was never addressed by either the trial court or the court of appeals, however, is whether it is acceptable for the condemning authority, by its own conduct, to create the dispute, and then use that dispute as justification for the necessity for condemnation.

The "instability" of the lease arrangement here was simply that Respondent did not pay the rent it owed. The sole question in the lease dispute was how much rent was to be paid. Every tenant, be it private party or public authority, has a legal obligation to pay rent for property it leases. If a tenant does not pay the rent, the tenant has no legitimate right or expectation to occupy the property.

There is no evidence that Respondent did not have the financial means to pay the rent, whether it was determined to be \$400 per year or \$750 per month. On the contrary, it was receiving more money from its own private tenants on the

property than the rent requested by Appellant. Respondent's right to occupy the property through the year 2030 was never threatened or even in question, provided it paid the rent that was due. Accordingly there was no more instability regarding Respondent's right to occupy the property during the time of the dispute than there had been for the 22 years prior to that time.

It is incorrect to conclude, therefore, that the dispute affected the stability of the lease arrangement. It affected only the rent to be paid. A simple court proceeding would resolve that issue, and Respondent's unfettered right to continue to occupy the property would be left in tact regardless of the outcome of the rent issue.

It must be remembered that the dispute regarding the amount of the rent was not created by Appellant. It was created by Respondent. The court of appeals indicates that the rent requested by Appellant was based on an "alleged unwritten agreement." However, that statement is in error. There was a written agreement, which was in fact prepared by Respondent's representatives after months of negotiations, and after obtaining "final approval" from Respondent. The amount of rent requested by Appellant - \$750 per month - was documented both in prior correspondence between the parties, and in the agreement prepared by Respondent, which was signed by Appellant and returned to Respondent without changes.

It may be that a court would ultimately decide that Respondent is not legally bound by its offer and representation to pay \$750 per month rent. It is

beyond dispute, however, that the predicament itself was created exclusively by Respondent. They are now using that very predicament to justify the necessity for this condemnation. Appellant submits that this is an inappropriate use of the right of eminent domain and should not be allowed.

The court of appeals opinion indicates that “Appellants also contend that the significance of the lease dispute is diminished because respondent took an untenable position in lease negotiations. (AA197) The court then cites two cases from other jurisdictions, to wit: City of Freeman v. Salis, 630 N.W. 2d 699, 703 (S.D. 2001) and City of Marietta v. Edwards, 519 S.E. 2d 217, 218 (Ga. 1999) holding that “In similar circumstances, other courts have upheld the exercise of eminent domain despite evidence supporting the landowner’s position in dispute with the condemning authority”. (AA197).

That characterization misses the mark. The issue is not the ultimate resolution of the merits of the dispute. The issue is first that Respondent created the dispute and used it as a basis to claim necessity, and second that the resolution of the dispute had no impact on Respondent’s rights or ability to use the land for its intended purpose, regardless of how the dispute came out, as long as it paid the rent. The *Freeman* and *Marietta* cases focused on the issue of bad faith, and more will be said about that later. What is important to note at this time is that in neither case did the municipality use of the fact of litigation to justify the necessity for the condemnation. In both of those cases, the right and ability of the municipality to

use the land for the intended purpose was at stake in the controversy. In this case, Respondent's use of the land for its tower was never the issue.

In *Freeman*, there was a memorandum of understanding between the City of Freeman and the landowners regarding the city's ability to keep a drainage ditch free from obstructions. There was a legitimate dispute in that case, which could not be resolved in a single, simple litigation, as to the city's ongoing right and obligation to keep the ditch free of obstructions. In other words, the nature and extent of the use of the property for a legitimate public purpose was genuinely in question.

Likewise in *Marietta*, the issue involved the city's need for a right of way which it did not have, and which the landowner was unwilling to give it. In short, both *Freeman* and *Marietta* dealt with the city's ability to use the land in a way that was necessary to further the public purpose. In this case, the use of the land by GRE for its stated purpose - to operate and maintain a telecommunications tower - has never been in question. The tower Respondent claims it needs has been there for 22 years, and under the lease it had a guaranteed right to keep it there for another 27 years. At no time during the lease negotiations did Respondent ever suggest it needed rights to use of the property beyond the year 2030. Even when Respondent added buildings and used more land than specified in the lease, the issue was never whether it would be allowed to do so. The issue was only what rent would be paid for the increased usage.

It is not the Appellant's position that the existence of the lease, by itself, prohibits the exercise of eminent domain. However, it is submitted that the examination of the claim of public necessity bears more scrutiny where the following factors are present:

1. The condemning authority already has rights to the property under a guaranteed long term lease .
2. There is no proposal by the condemning authority to change or expand the proposed use of the property.
3. No evidence of the claimed necessity surfaces until after a dispute arises with the owner.

Essentially, to the extent that usage and control of the property are the same after the condemnation as before, there is valid reason to question whether there really is any public necessity involved.

In all of the cases cited by the court of appeals which involved existing contracts, there were legitimate purposes which either were not or could not reasonably be served under the existing contractual arrangement. (eg. In *Village of St. Louis Park v. Minneapolis, N&S RY Co.*, 194 N.W. 327 (Minn. 1923) where use of steam powered trains was desired but was prohibited under the existing contractual arrangement; and in *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685, 17 S. Ct. 718 (1897) where the obvious need of the city to have and control its own water supply was lacking before the condemnation; in *Bear Creek*

Development Corp. V. Dyer 790 P.2d 897,(Colo. App. 1990) where the existing lease established a de facto toll road that operated outside of the necessary statutory framework; and in Cent. Hanover Bank & Trust Co. V. Pan AM Airways, 188 So. 820, 824 (Fla. 1939) where there occurred a tremendous increase in traffic on property leased for small plane operation, such that additional facilities, including a terminal building, were necessary and that “there were obvious objections to the construction of an improvement of this character on real estate on which the company had only a leasehold tenure.”)

In all of those cases, something additional and significant was gained by the condemnation. In this case, the only public purpose revealed and supported by the evidence is the purpose to get out of a bargain GRE ultimately found to be unattractive. the only thing GRE changed by the condemnation was their obligation to pay the rent.

Appellant contends this is not a “proper purpose” as a matter of law. Or, put another way, the condemnation of land for this purpose is manifestly arbitrary or unreasonable as a matter of law.

II. DID THE LOWER COURTS ERR IN FAILING TO REQUIRE RESPONDENT TO SHOW GOOD CAUSE TO INCREASE ITS INTEREST IN APPELLANT’S PROPERTY?

It is not disputed that the Respondent already had a significant and long term interest in the property it proposed to take from the Appellants. The Court of

Appeals concluded that “Appellant’s argument on good cause merely reiterates the contention that there was no legitimacy in a taking that followed unsuccessful negotiations between the parties.” (AA198) The Court of Appeals further opined that “the power of eminent domain is not restricted by the existence of a previous contract that governs the rights between parties.” (AA196)

Appellant contends that while the fact that the condemning authority already owns an interest in the land does not prohibit the exercise of the power of eminent domain, it does (and should) require a showing of good cause to increase that interest. Appellant submits that the “good cause” requirement needed to increase an interest in land by eminent domain in Minnesota was acknowledged by the Minnesota Supreme Court in In Re Petition of Burnquist, 220 Minn. 48, 19 N.W. 2d, 397 (1945). Quoting from 18 Am. Jur. Eminent Domain, s88, the Court held “It may be stated as a general rule that, except where restricted by statute, a right or interest already owned in property may be increased, or a burden in respect thereof may be relieved, **upon good cause shown**, by the exercise of eminent domain; in other words, the mere fact that one already owns some right or interest in property is not a bar to his acquisition, by the exercise of eminent domain, of the fee title to the property, or of some other increased interest therein.”(emphasis added) Id. P. 397-398 (Citing' New York & H.R. Co. v. Kip, 46 N.Y. 546, 7 Am.Rep. 385; Houston North Shore R. Co. v. Tyrrell, 128 Tex. 248, 98 S.W.2d 786, 108 A.L.R. 1508.

A showing of good cause, of course, is required in a number of areas of law in Minnesota.. The Supreme Court in *Ferguson v. Department of Employment Services* 311 Minn. 34, 247 N.W. 2d 895,(Minn. 1976), an unemployment compensation case, offered the following clarification of the “good cause” standard:

“The standard of what constitutes good cause is the standard of reasonableness as applied to the average man or woman . . . We think that 'good cause' in the law of instant concern connotes substantial reason; just ground for such action; adequate excuse that will bear the test of reason; and always the element of good faith. (Id. P.900)

Appellants urge the court to adopt such a standard here, where the Respondent already has a substantial long term interest in the land it seeks to acquire. Demonstrating a substantial reason based on good faith in such cases affords reasonable protection to the rights of the landowner, guards against abuses of the exercise of the power of eminent domain, and does not unreasonably restrict the condemning authority’s right to accomplish a legitimate public purpose.

III. DID THE LOWER COURTS ERR IN FAILING TO ASSESS WHETHER BAD FAITH OR TAINTED MOTIVE NEGATED ANY SHOWING BY THE RESPONDENT OF PUBLIC PURPOSE OR NECESSITY FOR THE TAKING?

The issues of good cause and bad faith are related. As the Court in *Ferguson* noted, good cause “connotes . . . always the element of good faith.” i.e. the absence

of bad faith. (*Ferguson v. Department of Employment Services* Id. P. 900) The trial court did not address the issue of bad faith. The court of appeals ruled that “Minnesota courts have declined to invalidate takings on the ground of bad faith, viewing this argument through the lens of public purpose and necessity. (AA198). The cases cited by the Court of Appeals, however, do not support that proposition.

On the contrary, the Minnesota Supreme Court says specifically in *City of Minneapolis v. Wurtele*, 291 N.W. 2d 386, 390 (Minn. 1980) that “We have said a municipality's finding of public purpose can be negated by a showing of bad faith or tainted motive.”(citing *Housing and Redevelopment Authority of City of St. Paul v. Schapiro* 210 N.W. 2d 211, Minn. 1973) Also in *Schapiro* the Minnesota Supreme Court noted specifically that “. . . the motive of the condemnor is doubtless a **significant and important factor** in a taking of private property. . . .”(emphasis added) (Id. P. 108) As it happens, the Court in both *Wurtele* and *Schapiro* concluded that bad faith was not sufficiently proven. The point, however, is that in both cases the Court conducted an analysis to determine whether bad faith was present, and if so, whether the public purpose was thereby negated. The clear implication in both cases is that if bad faith had been established, the result may have been different. When the issue is specifically raised, as it was in this case, and where there is circumstantial evidence that calls into question the condemnor's motives, the analysis should be done.

Other jurisdictions have upheld the principal that bad faith or improper

motives on the part of the condemnor can affect the validity of the condemnation. In City of Freeman v. Salis, 630 N.W. 2d 699, 703 (S.D. 2001) the South Dakota court held that “Courts may not lightly attribute improper motives to cities and their council members where valid reasons exist to support condemnation. (Citing Pheasant Ridge Associates Ltd. Partnership v. Burlington, 399 Mass. 771, 506 N.E.2d 1152, 1156 (1987). A municipality acts in bad faith when it condemns land for a private scheme **or for an improper reason**, though the superficially stated purpose purports to be valid.(emphasis added) In most instances, of course, this type of bad faith must be shown by circumstantial evidence.” *Id.* at 1156. The South Dakota court further noted that “ A hallmark of bad faith in condemnation proceedings is the use of the power of eminent domain for an improper purpose.”(City of Freeman v. Salis, ID.p. 704)(See also Cent. Hanover Bank & Trust Co. V. Pan Am Airways, 137 So. 808, 818. (Fla 1939) where the court held in eminent domain proceedings the court will not interfere with the condemning authority “unless it acts in bad faith”.)

Likewise, in City of Marietta v. Edwards, 519 S.E. 2d 217, 218 (Ga. 1999), much of the discussion focused on whether bad faith had been established. The court made it clear that bad faith, if shown, would have an impact on whether the city could condemn the property. Like most courts, the court in *Marietta* noted “This court has been reluctant to find bad faith on the part of a condemnor in its determination of public purpose in the exercise of the right of eminent domain.”

Id. P. 219 (Citing Concept Capital Corp. V. Dekalb County, 255 Ga. 452, 453(3), 339 S.E. 2d 583(1896). However, the court went on to state that “This court has found bad faith in the determination of public purpose only when the stated purpose was a subterfuge.”Id. City of Marietta v. Edwards, p.219

That is exactly the claim of the Appellant here - that since there was no evidence or indication of Respondent’s policy, intent, or even interest in acquiring Appellants land prior to the lease dispute, the condemnation was merely a subterfuge to allow Respondent to escape its legal obligation under the lease. Appellants submit that use of eminent domain proceedings for such a purpose does not further a legitimate public interest. In a case such as this, the existence of improper motive or bad faith should be considered in the context of whether the Respondent’s actions were arbitrary or manifestly unreasonable, which could therefore negate any superficial public purpose.

The loss of private property by the landowner is often a significant loss, despite the fact that the law provides for just compensation when the land is taken. There is not much to limit government’s right to take private land by eminent domain. But the right to take private land is not unrestricted. The purpose behind the taking, as well as the process for taking the property *does* matter. As elsewhere, Minnesota courts should determine what impact the existence of a tainted motive or bad faith may have on whether the condemnor’s purpose is

proper, or whether the condemnor's actions are in fact arbitrary and unreasonable.

Public necessity requires a credible showing that the governing authority has a need for something it doesn't already have, and that in determining and satisfying that need, the governing authority is acting in good faith. It may be that the public interest would require approval of the condemnation, even when bad faith is present, but the court should make that determination only after considering the implications of bad faith in each case where the issue is legitimately raised.

The district court found that Respondent had a policy to convert leased property to fee ownership. More specifically, that "the Tower Site was previously identified by GRE as a location to acquire as fee owner". (AA 175) The only evidence of the existence of this policy is in the affidavit of James L. Goodin, Manager of Technology Services of Great River Energy (AA37). The affidavit is dated June 3, 2003, more than one year after the Appellant first contacted Respondent. (AA38) The court of appeals notes that the affidavit is adequate evidence of the existence of the policy, but "more importantly, the presence or absence of such a policy is immaterial to a determination of need for a particular taking." (AA195)

Appellant respectfully disagrees with that assessment. Respondent has claimed that this policy in general, and the identification of this tower site in particular,

substantiates the need for the taking. The declaration of this “policy” by Respondent creates a significant credibility issue that bears directly on the claimed necessity for the taking. The fact that Respondent has no documentation of this policy that pre-dates the lease dispute, and the fact that Respondent made no mention of this policy during months of lease negotiations with Appellant is strong circumstantial evidence that it had no such policy, and that it had identified no such need. If in fact this were the policy of Respondent, what better time to raise the issue when you are engaged in lease negotiations with the owner? How can Respondent say that it negotiated the lease amendment in good faith if all the while it had determined to own the property, and not to rent it?

Such a self serving statement of policy by Respondent, made after the dispute arises, which is completely unsupported by timely documentation and is contrary to Respondent’s its own actions, would rarely be accepted as “adequate support” in any other context. It should not be accepted as adequate here.

This facts of this case illustrate why it is important to consider the issue of bad faith as it relates to public necessity. Respondent claims two grounds for the necessity for the taking: (1) That it is pursuing an established policy based on a need to own the tower sites and (2) That the taking is necessary to remove the uncertainty that accompanies litigation with the landowner. With regard to the first ground, there is strong circumstantial evidence that there was no such policy,

and therefore no need was in fact identified. With regard to the second ground, there is no question that the dispute was the result of the Respondent's actions. Accordingly, there is a strong evidentiary basis in this case for a court to conclude that the Respondent has simply invented the need in order to escape its obligations. It is self evident that this would not be a proper purpose nor a public necessity. Respondent has played the eminent domain "trump card" simply because it can.

Any legal process can be abused, including the exercise of eminent domain. Even though the condemning authority is accorded wide latitude in its decisions to take property, the courts must be free to assess how the motives and actions of the condemnor impact the validity of the stated need. If, as the court of appeals states, Minnesota courts "decline to invalidate takings on the ground of bad faith" a valuable tool for uncovering and checking abuse has been lost.

Appellant contends that to allow the condemnation to stand in this case is to have a "chilling" effect on the rights of landowners. The unmistakable message here is that either the landowner must agree to a lease on terms very favorable to the governing authority, or he will lose the land. Nor does the landlord dare insist on its rights under the lease, thus creating instability which in turn provides sufficient basis for the condemnation. What Appellant did not realize when they began the lease negotiations here is that a fair lease that allowed them to keep the

land was not possible. If Respondent could not continue to rent this land at rates drastically below market rates, it was going to take the land, and that is what it did. This should be exactly the kind of bad faith and unreasonable or arbitrary action which negates any superficial public purpose.

IV. DID THE LOWER COURTS ERR IN DETERMINING THAT RESPONDENT HAD MADE A SUFFICIENT SHOWING FOR THE NECESSITY OF A “QUICK TAKE” OF APPELLANT’S LAND DURING THE CONDEMNATION

Minn. Stat. § 117.042 provides that the court can issue an order granting immediate title and possession of the land to the petitioner in an eminent domain proceeding “whenever the petitioner shall require title and possession of all or part of the owner’s property prior to the filing of an award by the court appointed commissioners.” The trial court ordered a “quick take” in this case, and the court of appeals affirmed the trial court’s order, noting that the Respondent’s leasehold right “was encumbered by a pending, serious dispute between the parties concerning payment of property tax, the extent of use of the property, and the terms of the leasehold arrangement.” (AA199)

The proper interpretation of the quick take condemnation statute in conjunction with governing case law presents a question of law, which is reviewed de novo In re Condemnation by City of Minneapolis of Certain Lands in City of Minneapolis, 2001, 632 N.S. 2d 586.

Appellant submits that there was simply no basis for a quick take order in this case. Respondent had possession of the property for more than 22 years prior to this action. There was no unlawful detainer proceeding pending when the quick take order was issued. Contrary to the language in the opinion of the court of appeals, there were no disputes as to taxes or use of the property, or any terms of the leasehold. The only dispute was the amount of rent to be paid. The amount was requested was an amount which Respondent had agreed to pay, in writing. No matter the outcome in any litigation on that issue, the Respondent had the absolute right to continue the same use and possession of the property that it had enjoyed for 22 years. All it had to do was pay the rent. Again, that is true of *any* tenant. Respondent's right to use of the property was never in question.

Even when faced with eviction for failure to pay rent, Respondent was free to challenge whether any rent was due in court. No eviction could have occurred unless a court agreed that the rent was delinquent, and even then Respondent had the absolute right to pay the rent and maintain possession. There is nothing in the record to suggest that Respondent could not pay the rent. Accordingly, there was never any credible basis for Respondent's claim that somehow their use or possession of the land was threatened. Respondent was responsible for the circumstances that led to this dispute. Control of the "threat" was exclusively in the hands of the Respondent. The "quick take" should not have been allowed by the trial court in this case.

CONCLUSION

The uncontradicted evidence in this case is that the Respondent negotiated a lease agreement with the Appellant, and then decided it did not like the deal it made. There was no evidence of the Respondent's need to own the land until that happened. During its prior 22 years of occupancy of the property, Respondent had never given any indication that it wanted or needed fee title to the property. The first hint of that did not come until after Appellant insisted that Respondent honor its agreement. There is strong circumstantial evidence in this case that Respondent brought a petition in eminent domain solely to avoid paying the rent it had agreed to pay.

By refusing to honor its agreement, Respondent created a dispute with the Appellant, and then used that dispute to establish a necessity for the condemnation. By simply paying the rent, the Respondent had the guaranteed right to continue to use the property for its telecommunications tower until the year 2030. No other use of the property by the Respondent has been proposed.

Appellant submits that in order to increase its interest in the property, the law required Respondent to show good cause. The lower courts did not require such a showing, and there is no evidence in the record that good cause existed. Further, the law does or should require the courts to take into consideration whether tainted motive or bad faith on the part of Respondent might negate the

public purpose or necessity for the taking. Appellant submits that bad faith is a significant factor in assessing whether or not the Respondent's actions have been "manifestly arbitrary or unreasonable". No analysis of the impact of bad faith was done by the lower courts in this case.

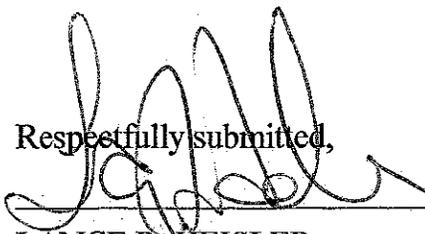
Finally, since Respondent already had possession of the land, and there was no reasonable basis to believe that possession would be threatened during the pendency of the eminent domain process, it was an abuse of discretion to order the "quick take" of the Appellant's land.

Appellants request an Order of the court reversing the decision of the court of appeals and the trial court, and denying the Respondent's petition to take the Appellants land. In the alternative, Appellant requests an order of the court remanding this matter to the district court for a determination on whether the Respondent has shown good cause to increase its interest in the property, and whether the existence of bad faith or tainted motive negates the public necessity for the taking in this case.

Date:

April 28, 2005

Respectfully submitted,



LANCE R. HEISLER

Lampe, Swanson, Morisette & Heisler, LLP

105 East Fifth Street, PO Box 240

Northfield, MN 55057

(507) 663-1211

Attorney Registration No. 43631

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).