

Nos. A07-417 and A07-418

State of Minnesota
In Court of Appeals

BNSF Railway Company,
Respondent/ Appellant (A07-417),
and

Twin Cities & Western Railroad Company,
Respondent/ Appellant (A07-418),
vs.

City of Granite Falls,
Petitioner/ Respondent.

**BRIEF OF APPELLANT
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STATEMENT OF ISSUES

- A. Was condemnation of an easement for a recreational trail along and over a railroad right-of-way necessary, where the City did not intend to design, build, operate, own, or maintain a trail on the easement, but instead intended to convey the easement to the Minnesota Department of Natural Resources (DNR), the City had not had any contact with DNR, there was no agreement for DNR to accept the easement and build a trail, DNR had not decided whether, where, when or how to build a trail, and the City did not establish that the construction and operation of the trail will not interfere with and burden the railroad's use of its right-of-way?

Trial Court's Holding: yes.

Apposite Authorities: *City of Duluth v. State*, 390 N.W.2d 757, 764 (Minn. 1986); *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334, 79 N.W. 315 (1899); *Regents of the University of Minnesota v. Chicago & North Western Transp. Co.*, 552 N.W.2d 578 (Minn. Ct. App. 1996); *Schumm v. Milwaukee County*, 258 Wis. 256, 45 N.W.2d 673 (1951).

- B. Does a municipality have power to condemn an easement for a recreational trail outside its borders when it does not intend to design, build, operate, own, or maintain the trail, intends to convey the easement to the State, has not had any contact with the State concerning the trail or the intended conveyance, and there is no agreement between the State and the municipality to build the trail over the easement?

Trial Court's Holding: yes

Apposite Authorities: Minn. Stat. §§ 85.015, 117.016, 465.01; Op. Minn.

Att’y Gen. 59a-14 (December 30, 1938)

- C. Did the District Court properly deny a motion to dismiss the condemnation petition for failure to comply with the appraisal and negotiation requirements of Minn. Stat. § 117.036 where the appraisal was not furnished to the landowner until over a year after the filing of the condemnation and where the City had made no offer to negotiate the purchase of the property?

Trial Court’s Holding: yes

Apposite Authority: Minn. Stat. § 117.036

STATEMENT OF CASE

This is an appeal in an eminent domain case. Appellant Twin Cities & Western Railroad Company ("TCW") appeals from the order of Judge Paul A. Nelson of the Chippewa County District Court dated December 21, 2006, denying a motion for summary judgment, finding the taking was for a public purpose and was necessary, and determining to appoint commissioners to appraise and report the amount of damages that will be sustained on account of the taking.¹

The City of Granite Falls started this proceeding in March 2005 by serving and filing a petition seeking to condemn property in Chippewa County owned by TCW. The petition sought to obtain fee title for the purpose of "constructing a multiple-user trail." *Appendix of Appellants ("A") 1*. Subsequently, in February 2006 the City served and filed an amended petition which sought to obtain a permanent easement along and across TCW's railroad right-of-way "for purposes of establishing, constructing, operating, maintaining, and replacing an all-seasons, multi-purpose and non-motorized recreational trail for public use, including . . . the right of the Petitioner to all the grasses, shrubs, trees, and natural growth on the real property (now existing and hereafter planted or grown thereon) and the right to use, move, and/or remove all the earth and other materials of the real property for purposes of the Permanent Easement." *A 5-6*. The area sought for the easement was TCW's right-of-way northeast of a line parallel with and 25 feet from the centerline of the main line of tracks. *A 7-11*.

TCW and BNSF Railway Company ("BNSF") (BNSF's tracks intersect with

¹ The December 21, 2006 order which found a public purpose and necessity for the taking is appealable as of right prior to entry of any final judgment. *Blue Earth County v. Stauffenberg*, 264 N.W.2d 647, 650 (Minn. 1978).

TCW's main line and the City also seeks to cross BNSF tracks) moved to dismiss the petition for failure of the City to comply with Minn. Stat. § 117.036 or, in the alternative, to continue the hearing set for March 10, 2006, authorize discovery, and schedule a conference. *A 24*. After the hearing on the motions to dismiss, an appraisal was supplied by the City. In an order of April 7, 2006, the District Court concluded that the arguments based on the appraisal and negotiation requirements of § 117.036 were moot and scheduled a case management conference for April 21 and the hearing on the petition for May 22, 2007. *A 28*. At the conference, trial dates of September 28 and 29, and October 3, 2006 were set, which were subsequently changed to October 3, 4, and 5, 2007. *A 28, 32*.

In August 2006, TCW moved to postpone the trial to a later date to allow the District Court time to consider motions for summary judgment. *A-45*. Both BNSF and TCW filed motions for summary judgment. *A 47, 49*. In an order dated September 5, 2006, the District Court struck the trial dates. *A 51*.

In the December 21, 2006 order appealed from, the District Court denied the motions for summary judgment, found there was a public purpose and public necessity for the taking, and said it would appoint commissioners. *A 53*.

STATEMENT OF FACTS

In December 2003, the City Council of Granite Falls adopted a resolution authorizing the acquisition of private lands, including the use of the power of eminent domain, for a paved trail from Wegdahl to Granite Falls along a corridor defined generally as "the outside twenty-five feet (25.0') of the railroad rights-of-way." *A 21, Resolution No. 03-202*. The City authorized an attorney to prepare legal descriptions and to negotiate with TCW and BNSF for the acquisition of lands and to file eminent domain petitions. *Id.* The

resolution also authorized the execution of a promissory note to the Parks and Trails Council of Minnesota for an amount not to exceed \$75,000 to acquire land for the trail. The resolution specifically provided that the notes “contain express provisions that there shall be (A) No interest payable on the amounts so borrowed, and (B) That the City shall have no obligation to repay said note(s) unless/until the State of Minnesota purchases the corridor from the City of Granite Falls.” *A 23 at ¶ E.*

In its original petition of March 2005, the City sought to condemn a fee simple interest in land owned by TCW for the trail. *A 1.* In May 2005, counsel for the City and TCW met and agreed to postpone the hearing on the petition. *Affidavit of Thomas V. Seifert dated Feb. 28, 2006 (“Seifert Aff.”) ¶ 2.* In a letter dated May 4, 2005, counsel for the City said the City would provide further detail and information regarding the proposed trail project and that another meeting would be held. *Letter dated May 4, 2005 from Kevin K. Stroup, attached to Seifert Aff. as Exhibit A.* Following the letter, counsel for TCW did not receive any communication from the City or its counsel until an amended petition was served in February 2006. *Seifert Aff. ¶ 5.* No appraisal was sent to TCW or its counsel before either of the petitions was filed. *Affidavit of Mark Wegner dated March 1, 2006 ¶ 5; Seifert Aff. ¶ 6.* The City made no effort to negotiate with TCW to acquire the property it sought to condemn before filing the petitions. *Affidavit of Mark Wegner dated March 1, 2006 ¶ 7; Seifert Aff. ¶ 7.*

In its amended petition, the City seeks to condemn a permanent easement over land owned by TCW. *A 5.* According to the petition, the City seeks to condemn the easement “for purposes of establishing, constructing, operating, maintaining, and replacing an all-seasons, multi-purpose and non-motorized recreational trail for public use, including .

. . . the right of the Petitioner to all the grasses, shrubs, trees, and natural growth on the real property (now existing and hereafter planted or grown thereon) and the right to use, move, and/or remove all the earth and other materials of the real property for purposes of the Permanent Easement.” *A* 5-6. The easements are sought over “that part of the railroad right of way . . . which lies northeasterly of a line which is parallel with and lies 25.00 feet northeasterly of the centerline of the main track of the railroad (said 25.00 feet measured perpendicularly to said main track).” *A* 7-11.

At the time the motions to dismiss were argued on March 7, 2006, no appraisal had been completed. *Transcript of hearings (“T”) at 5; Affidavit of Mark Schultz dated Mar. 3, 2006 ¶ 7.* Subsequent to the hearing on the motions to dismiss, an appraisal was filed and sent to TCW. *A* 29.

If the City acquires the easements described in the amended petition, its intention is to convey the easements to the State of Minnesota Department of Natural Resources (“DNR”). *A* 33, *response to request 1; A* 23 at ¶ *E.* The City has no plans to construct a trail if DNR does not. *A* 33.

The City has not authorized the expenditure of money to construct the trail. *A* 33, *response to request 2.* The City does not intend to authorize the expenditure of money to construct the trail. *A* 33, *response to request 3.* The City does not intend to construct the trail. *A* 33, *response to request 4.*

The City has not appropriated any money of its own to acquire an easement for the trail. Instead, the Parks & Trails Council of Minnesota has agreed to lend the City, interest free, up to \$75,000 for purposes of acquiring the right of way, with the loan to be repaid only if and when the right of way is conveyed to DNR. *A* 22-23, *Resolution No. 03-*

202 at 14th “Whereas” clause and ¶ E. The City has not begun to prepare an environmental assessment worksheet or an environmental impact statement with respect to the trail. A 34, responses to request nos. 6, 8.

There has been “no contact” between the City and DNR with respect to the trail. A 39, answer to interrogatory 17. DNR has no current plan to acquire the trail right of way from the City. A 41, answer to interrogatory 1. DNR is developing a master plan for the Minnesota River State Trail but, “The draft plan has not been formally released for public review and the DNR commissioner has not approved the plan pursuant to Minnesota Statute §86A.08 which is necessary before the development of a state trail can occur.” *Id.* DNR “is not aware of any proposed or pending legislation regarding funding for the Trail or the Minnesota River State Trail.” A 43, response to Request for Documents No. 4.

The trail the City seeks to condemn (or any alternate trail alignment between Granite Falls and Wegdahl) would be a small segment of a much larger proposed trail – the so-called Minnesota River Trail – that would extend from the headwaters of the Minnesota River at Big Stone Lake State Park to a connection with the Minnesota Valley Trail at LeSueur. Minn. Stat. § 85.015 subd. 22. The total funding thus far authorized by the Minnesota Legislature for the entire Minnesota River Trail is only \$526,000, of which \$226,000 is allocated to the trail segment between the Big Stone National Wildlife Refuge and the City of Ortonville (a segment of the trail that does **not** include the subject property), leaving only \$300,000 for the entire balance of the trail. 2005 Minn. Session Law, ch. 1, Art. 2, § 11, subd. 6 (i) (\$200,000 for an agreement between DNR and the University of Minnesota to provide trail planning assistance); 2005 Minn. Session Law,

ch. 20, Art. 1, § 7, subd. 14 (\$100,000 appropriation for land acquisition); 2006 Minn. Sess. Law, ch. 258, § 7, subd 21 (\$226,000 appropriation for segment of Minnesota River Trail between the Wildlife Refuge and Ortonville).

Not only does DNR have no plans or money to build a trail over the easement, but significant engineering issues could very likely result in the choice of an alternative route if and when DNR does decide to build a trail at some unspecified future date.

A preliminary cost estimate from 1998 for the approximately 8 miles of trail from Wegdahl to Granite Falls put the total acquisition and construction cost at \$2,799,600.² *SRF Consulting Group, Inc., "Preliminary Design and Engineering Study for the Minnesota River Trail" (July 1998) at p. 25 (hereinafter "SRF"), Attachment 2 to the Affidavit of Geoffrey Hathaway dated March 15, 2006.* The SRF study recognized the trail would cross several streams that cross TCW's right-of-way on their way to the Minnesota River, which is on the south side of TCW's track and runs parallel to and immediately adjacent to the tracks. *SRF map following p. 7 and p.12.* SRF noted the "limited space between hill and floodplain" along the railroad right-of-way. *Id.* The SRF study did not discuss the effect of clearing trees and vegetation on soil erosion of the hills' slopes along the railroad right-of-way or whether altering the drainage and slopes of the hills would lead to mudslides blocking the tracks.

The SRF study did not discuss how a narrowed railroad right-of-way of only 25 feet on the north side of the tracks would affect TCW's ability to clear wreckage from

² The City presented no information updating the 1998 preliminary cost estimate. TCW believes an updated estimate which included the costs of crossing the streams and ravines would be several times the 1998 estimate.

derailments along the right-of-way or maintain the tracks.

In its December order, the District Court cited a study by Short Elliot Hendrickson, Inc. ("SEH") and a March 28, 2001 letter to a legislative committee that construction of the trail was "feasible." *A-54, Memorandum from John Wingard dated March 28, 2001 and cross section and topography sheets (hereinafter "SEH"), Attachment 4 to the Affidavit of Geoffrey Hathaway dated March 15, 2006.* While the amended petition says the City seeks an easement over TCW's property, the SEH plans show that construction of the trail would entail clearing almost all vegetation, cutting down the hill tops and slopes, and rechanneling the several streams which cross the right-of-way. For example, along 2400 feet of the easement and at three other locations, the plans call for removing two feet of topsoil and building three tiers of retaining walls with the edge of the lowest retaining wall at the very southerly edge of the easement – only 25 feet from the centerline of TCW's tracks. *SEH sheets 4 and 5.* The plans do not show how the retaining walls would be anchored to prevent erosion and mudslides blocking the railroad tracks.

Similarly, the SEH plans show 13 ravines along TCW's right-of-way but do not show or explain how the ravines would be bridged or filled or how alteration of the slopes and drainage would affect the integrity of the railroad track bed *SEH sheets 10-13 and 1-6.*

The City presented no evidence or explanation why the trail must be so close to the main line of TCW; the edge of the easement would be only 25 feet from the centerline of the tracks. *A 7-11.*

ARGUMENT

Summary

The City failed to demonstrate necessity for condemning TCW's property. The City admitted that it does not intend to design, build, operate, own, or maintain a trail on the easement. Instead the City wants to convey the easement to DNR, at a future undetermined time and an undetermined price. But the City admitted it has not had any contact with DNR concerning the intended conveyance and that there is no agreement between the City and DNR concerning the proposed trail. DNR itself has no current plan to acquire the trail from the City and DNR has no money to design and build a trail on the easement the City seeks to condemn. The City's condemnation of a permanent easement over TCW's railroad property is for a purely speculative purpose.

Just as the City has no need to condemn railroad property to build a trail, the City failed to show the practical necessity for using the railroad right-of-way without interfering with the railroad's present and future use of its property. The plans cited by the District Court show that the construction and use of a trail on the easement will inevitably burden and interfere with TCW's use of its right-of-way. Because of the engineering difficulties and the immense cost of building a trail on the easement, the City failed to show that TCW's right-of-way is a reasonable and practical route for a trail.

Second, the State's power of eminent domain is delegated to municipalities only to further municipal purposes. Because the City does not intend to design, build, maintain, own, or operate the trail and most of the trail is outside City limits, there is no valid municipal public purpose for this condemnation. The City's admitted intent – to acquire permanent easement rights and convey them to DNR – demonstrates that the City has no

municipal public purpose. No statute authorizes a municipality to act as an unauthorized, volunteer land agent for the State, especially where the State has not indicated, much less agreed, that it wants or needs or intends to use the property. Minnesota law forbids use of the power of eminent domain to stockpile land. If the State needs an easement to build a trail, the State itself should make that judgment, not an unbidden municipality. If the State does decide someday to build a trail from Wegdahl to Granite Falls, the State has the ability to acquire the property it needs.

Finally, the City failed to comply with the appraisal and negotiation requirements of Minn. Stat. § 117.036. The sanction for the failures should be dismissal of this petition.

I. STANDARD OF REVIEW

This Court will reverse a district court's finding of public purpose and necessity when it is clearly erroneous. *City of Shakopee v. Minn. Valley Elec. Coop.*, 303 N.W.2d 58, 62 (Minn. 1981) (necessity); *Blue Earth County v. Stauffenberg*, 264 N.W.2d 647, 651 (Minn. 1978) (necessity). The existence or non-existence of the required necessity "is a judicial question." *City of Duluth v. State*, 390 N.W.2d 757, 764 (Minn. 1986) Speculative purposes do not satisfy the necessity requirement. *Regents of the University of Minnesota v. Chicago & North Western Transp. Co.*, 552 N.W.2d 578, 580 (Minn. Ct. App. 1996).

II. THERE IS NO NECESSITY FOR THIS CONDEMNATION

A. The Power Of Eminent Domain Comes With The Burden Of Proving Necessity

Eminent domain is a right possessed by the state in its sovereign capacity and is not conferred, but restricted, by the Constitution. *State by Peterson v. Severson*, 194 Minn. 644, 646, 261 N.W. 469, 470 (1935). Eminent domain powers may be delegated

by the legislature to various governmental authorities or administrative bodies. *N. Pac Ry. Co. v. Pioneer Fuel Co.*, 148 Minn. 214, 217, 181 N.W. 341, 342 (1921). Pertinent to this appeal, the legislature has given the power of eminent domain to municipalities. Minn. Stat. § 465.01 (2004).

The Minnesota Constitution restricts eminent domain power by providing that “private property shall not be taken, destroyed, or damaged for public use without just compensation therefor, first paid or secured.” Minn. Const. Art. I, §13. The Minnesota Supreme Court has explained that the “power of condemnation may be exercised only for a public use or purpose. If private property is taken for a use that is not public, the owner’s constitutional rights are infringed.” *Hous. & Redevelopment Auth. v. Schapiro*, 297 Minn. 103, 106, 210 N.W.2d 211, 213 (1973) (citations omitted).

The Minnesota Supreme Court has recognized a second element required for a government taking to withstand constitutional scrutiny. The court has held that “it is the intent of our constitution and statutes that, in all eminent domain cases in this state, necessity, as well as public purpose, must be shown.” *City of Duluth v. State*, 390 N.W.2d 757, 764 (Minn. 1986). The existence of necessity “is a judicial question.” *Id.*; see also *City of Shakopee v. Minn. Valley Elec. Coop.*, 303 N.W.2d 58, 62 (Minn. 1981). Minn. Stat. § 117.075, subd. 2 expressly provides that the district court is to determine if the proposed taking is “necessary and . . . is authorized by law.” The condemning authority has the burden of proving that the taking is necessary. *Regents of the University of Minnesota v. Chicago & North Western Transp. Co.*, 552 N.W.2d 578, 580.

B. Speculation is Not Necessity

Speculative purposes will not support a petition for condemnation. *Regents*, 552 N.W.2d at 580. Speculation defeats a condemnation petition if it occurs on either of two levels - the purpose for the taking or the likelihood that the purpose will be accomplished within a reasonable period of time. *Id.* at 579-80. In case law going back nearly a century, the Minnesota Supreme Court has held that where the condemning authority was unable to establish that the project is lawful, the petition is properly denied. *See, e.g., Minn. Canal & Power Co. v. Pratt*, 101 Minn. 197, 226, 112 N.W. 395, 403 (1907) (affirming judgment against condemning authority, in part, because “[i]f the land is taken, it may never be used for [the specific public purpose described in the petition], because the petitioner may not be able to obtain the necessary authority.”)

Judicial review of a condemnation petition includes a determination of whether the public purpose is reasonably attainable. In *Minn. Canal & Power Co. v. Fall Lake Boom Co.*, 127 Minn. 23, 32, 148 N.W. 561, 564 (1914), the supreme court explained,

The duty to determine whether the property is to be taken for a public use, whether it is necessary therefor, and whether it may lawfully be taken for the purpose designated has been imposed upon the court. This necessarily includes the duty to determine whether the object of the proposed enterprise can be lawfully and efficiently accomplished.

Moreover, eminent domain does not authorize a taking “unless it appears that the public purpose, for which alone property rights may be condemned, can be attained.” *Id.* at 33, 148 N.W.2d at 564.

Timing is another element of necessity. In *State ex rel. City of Duluth v. Duluth St. Ry. Co.*, 179 Minn. 548, 229 N.W. 883 (1930), the court said that “necessity” means “now or in the near future.” 179 Minn. at 551, 229 N.W. at 884. “Necessary” does not

mean that a thing will possibly be needed at some remote time in the future. . . . Indeed ‘public necessity,’ in such measures should be construed as meaning urgent public convenience. . . . Speculative purposes will not support the assertion of necessity.” *Id.* (citations omitted).

Speculative future use of property – stockpiling -- was rejected in *Regents of the University of Minnesota v. Chicago & North Western Transp. Co.*, 552 N.W.2d 578. The University commenced a condemnation proceeding for approximately 30 acres of railroad land located near the East Bank campus. The University and the railroad had discussed a sale of the land on several occasions and the University had considered several possible uses for it but had not approved a single project. After the railroad received a purchase offer from another party, the University made its own offer that was rejected. The University then filed the condemnation petition. Because of contamination, the University could not use the land for any of the possible uses for an uncertain time. The trial court found the condemnation was not necessary and dismissed the petition.

This Court affirmed, stating, “‘Necessity’ in this context ‘means now or in the near future.’ *State ex rel. City of Duluth v. Duluth Street Ry.*, 179 Minn. 548, 551, 229 N.W.2d 883, 884 (1930) (citations omitted). ‘Speculative purposes will not support the assertion of necessity.’” 552 N.W.2d at 580. The Court said the petitioner had the burden of proving the condemnation was necessary and had failed to do so, in part because the parties had never agreed on a plan for decontaminating the land, making the time period before the University would actually use the property “potentially indefinite.” *Id.* The Court concluded, “The University may well have the right to purchase this property, but it cannot acquire it for speculative future use (stockpiling) by condemnation.” *Id.*

C. Railroad Property is Devoted to Public Use

Where an entity seeks to condemn operating railroad property, there is an additional consideration. A railroad has long been recognized to be a public use of land. *See, e.g., Northern Pac. Ry. v. City of Duluth*, 153 Minn. 122, 124, 189 N.W. 937, 938 (1922); *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334, 347, 79 N.W. 315, 318 (1899); *Williams Pipeline Co. v. Soo Line RR. Co.*, 597 N.W.2d 340, 345 (Minn. Ct. App. 1999); *Suburban Hennepin Regional Park District of Certain Lands in the County of Hennepin*, 561 N.W.2d 195, 196 (Minn. Ct. App. 1997). In the absence of a specific statute, a general grant of the power of eminent domain can be used only where the proposed use is not inconsistent with the use by the railroad. *City of Shakopee v. Clark*, 295 N.W.2d 495, 499 (Minn. 1980); *Suburban Hennepin Regional Park District of Certain Lands in the County of Hennepin*, 561 N.W.2d 195, 196.

In *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, a telephone company sought to condemn a right of way parallel to the railroad's right of way for the erection of its poles and wire lines. The court determined that the telephone company did not prove the necessity of erecting poles and wires on the railroad right of way.

The use which [the telephone company] proposes to make of the strip it seeks to condemn must **not be inconsistent with the paramount right** which [the railroad] acquired long ago, nor can it be such as will **materially interfere with, essentially injure, or tend to defeat the public use to which the property has already been devoted**. There must also be some necessity for the appropriation, not a necessity created by the corporation asserting the right, that it may be inconvenienced, or a **necessity arising out of a desire to unreasonably economize**. So, in cases where the power is not expressly granted by statute, but is to be implied therefrom, the conditions surrounding any particular case must disclose a **practical necessity** for the exercise of eminent domain over property already devoted to public use.

76 Minn. at 347, 79 N.W. at 318 (emphasis supplied).

To condemn rights across railroad land – land already devoted to a public use – the condemnor must show that the use intended will not be “inconsistent with the paramount right” of the railroad, that the proposed use will not “materially interfere with, essentially injure, or tend to defeat the public use” by the railroad, and “a practical necessity for the exercise of eminent domain over property already devoted to a public use.” 76 Minn. at 347, 79 N.W. at 318. Mere convenience and a “desire to unreasonably economize,” *id.*, does not establish necessity.

In *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.* the court went on to discuss the practical necessity question:

[P]ublic policy requires that no other use or occupation inconsistent with the efficient management of its tracks and trains can be tolerated. The inconvenience and the danger of having the poles and wires of plaintiff's lines on defendant's right of way, as well as the men and teams while building and thereafter keeping in repair, with the right of ingress and egress for all time, are not to be forgotten as among the surrounding conditions, and when considering the question of practicality.

76 Minn. at 348, 79 N.W. at 318. The court then analyzed how the telephone lines could be strung so that it was not necessary to take any railroad property and reversed the condemnation. *See also, Milwaukee & St. Paul Ry. Co. v. City of Faribault*, 23 Minn. 167, 169 (1876) (City was without authority to condemn land to build a street within railroad depot); *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 225 N.W. 164, (1929) (Utility wanted to extend a power line through a state park but court found that the company's only claim was that it was more convenient and less expensive to build its line through the park, which the court held did not rise to the level of public necessity).

D. “Necessity” Means “Now or in the Near Future”; No Necessity is Present

This case presents exactly the type of speculative purposes that negate necessity. It is undisputed that the City does not intend to build, maintain, own, or operate a trail on the easement it seeks to acquire and that the City has not dedicated any of its own funds to acquire the easement. Instead, the City resolved to obtain an interest free loan from the Parks and Trails Council of Minnesota to acquire the right of way and that the loan is to be repaid only “unless/until the State of Minnesota were to re-purchase the land from the City” *A 22-23, City Resolution No. 03-202 at 14th “whereas” clause and ¶ E.* The City has not authorized the expenditure of its own money to build the trail, does not intend to authorize any expenditures to build it in the future, and the City does not intend to construct the trail itself. *A 33, responses to Requests for Admissions No. 2, 3, and 4.*

While the City says it wants to convey the easement it seeks to DNR, despite the passage of over three years from the resolution, the City has had no contact or other communication with DNR concerning such a conveyance or the creation of the trail by DNR. *A-39, answer to Interrogatory No. 17.* (“Upon information and belief, there has been no contact between the City of Granite Falls and the State regarding this matter.”)

DNR itself has “no current plan to acquire the Trail from the City.” *A 41, answer to Interrogatory No. 1.* DNR is currently developing a master plan for the Minnesota River State Trail between Big Stone Lake Park and the City of Franklin, but “The draft plan has not been formally released for public review and the DNR Commissioner has not approved the plan pursuant to Minnesota Statutes section 86A.09, which is necessary before the development of a state trail can occur.” *Id.* Further, DNR “is not aware of

any proposed or pending legislation regarding funding for the Trail or the Minnesota River State Trail.” *A 43, answer to Document Request No. 4.*

Not only is there no present intention by DNR to acquire the easement the City seeks to condemn and build a trail on the easement, but DNR has no funds with which to pay the costs of designing and building a trail on the easement described in the amended petition. In 1998, almost nine years ago, SRF Consulting Group, Inc. estimated the acquisition and construction cost for the trail from Wegdahl to Granite Falls at \$2,799,600.³ SRF at p. 25. The total funding so far for the **entire** Minnesota River Trail is only \$526,000 (see *supra* p. 8).

The facts that the City does not intend to finance, design, own, and build a trail, that DNR has not agreed to accept a conveyance of the easement, that DNR has not decided when, where, or how it may someday want to build a trail between Wegdahl and Granite Falls, and that DNR has no money to construct a trail over the easement means there is no necessity for the taking.

Indeed, DNR may **never** want to use the easement the City seeks to condemn to build a trail between Wegdahl and Granite Falls. The amended petition seeks to condemn an easement located northeasterly of a line parallel to and 25 feet from the center line of the main track of TCW. *A 7-11*. There was no evidence presented by the City of any reason for locating the trail so close to the mainline of the railroad. The preliminary estimate of the cost of building and acquiring the trail, \$2,799,600, is over 8 years old. DNR may well conclude that, today, the easements are not favorable and economic loca-

³ The 1998 SRF cost estimate has not been updated and does not include any detailed plans. The SEH study from 2000 did not have any cost estimate.

tions for a trail between Wegdahl and Granite Falls and that alternative paths should be considered. The City offered no evidence that DNR has even considered building a trail on the easement, much less that the easement is a reasonably likely location for a trail from Wegdahl to Granite Falls.

The City cannot supply or even suggest a date upon which it would convey the easements to the State or upon which the State would commence designing and building a trail over the easements. In *City of Duluth v. Duluth St. Ry. Co.*, the court said that the “necessity” required to allow condemnation means “now or in the near future. . . . ‘Necessary’ does not mean that a thing will possibly be needed at some remote time in the future . . . Indeed ‘**public necessity**’ in such measures should be construed as meaning **urgent public convenience**” 179 Minn. at 551, 229 N.W. at 884 (emphasis supplied; citations omitted). The absence of any indication of when the easement would be needed means there is no necessity for the taking.

The undisputed facts demonstrate that, at most, the City wants to condemn a permanent easement without using any of its own funds and then convey the easement at some undetermined future time and at some undetermined future price to DNR in the hope that, at some other future time, DNR would build a trail on the easement. DNR, the only intended recipient of the conveyance, has not had any contact with the City relative to such a conveyance, has not agreed to accept any such conveyance, has not agreed to build a trail upon the easement the City seeks to condemn, has not agreed to use the plans of SEH, and has no funds to build a trail upon the easement. There is no timetable or plan for any of these events. None may ever occur. It is hard to envision a more speculative project.

E. The District Court's Decision

1. Speculation

Surprisingly, the District Court ignored all these uncontested facts. The District Court relied on the feasibility study by SRF Consulting Group, Inc. and the resolution of the City Council of December 2003 to find public purpose and necessity. *A 57*.⁴ That resolution, however, itself demonstrates the absence of any necessity. The resolution does not authorize spending any funds of the City to acquire, design, build, operate, or maintain a trail. It says that a private group, the Parks and Trails Council of Minnesota, had agreed to lend the City up to \$75,000 to acquire the land for the trail “on a no-interest promissory note that would not need to be repaid unless/until the State of Minnesota were to re-purchase the land from the City.” *A 23*. The fact that the City did not authorize any of its own money to be spent in this condemnation robs the resolution of any weight.

The District Court also said that the City had had “many discussions with state agencies and authorities about the recreation trail.” *A 57*. There was no evidence of who discussed the trail, when, or what was said. Despite the fact that over three years have passed since the resolution was enacted, the City has not made any agreement with DNR that it would accept a conveyance, pay the City's acquisition costs, and design and build a trail on the easement. The discovery responses of both the City and DNR were unambiguous; the City has had “no contact” with DNR relative to the trail (*A 39*); DNR has “no current plan to acquire the Trail from the City” (*A 4*); DNR is “not aware of any proposed

⁴ The preliminary design and engineering study by SRF Consulting Group, Inc. was dated July 1998 and does not mention any plan for the City to condemn any property, much less to convey the easement to DNR. There was no showing that DNR has seen, much less endorsed, the report.

or pending legislation regarding funding for the Trail or the Minnesota River Trail” (A 43); and DNR is developing a “master plan” for the Minnesota River Trail between Big Stone Lake State Park and Franklin (which would include the Wegdahl to Granite Falls location), but the draft plan “has not been released for public review” and the DNR Commissioner “has not approved the plan.” A 41-42. The District Court ignored these uncontested facts, making its conclusions clearly erroneous.

The City resolution does not show the necessity required to condemn railroad property. As this Court said in *Regents of the University of Minnesota v. Chicago & North Western Transp. Co.*, 552 N.W.2d 578, 580, “‘Necessity’ in this context ‘means now or in the near future.’ *State ex rel. City of Duluth v. Duluth Street Ry.*, 179 Minn. 548, 551, 229 N.W.2d 883, 884 (1930) (citations omitted).” The uncontested facts show there is no likelihood of the trail being built on the easement “now or in the near future.”

The District Court next cited two cases on necessity, *Hous. and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. Ct. App. 2001) and *Lundell v. Cooperative Power Ass’n*, 707 N.W.2d 376 (Minn. 2006). Neither case involved condemning property of a railroad or other property that was already in public use. Moreover, unlike this case, in both cases the condemning authority had concrete plans for the imminent or continued use of the property it sought to condemn.

In *Richfield*, the Housing and Redevelopment Authority had already identified construction of the new Best Buy headquarters as the project to be built and it entered into a contract with Best Buy to build a 1.5 million-square-foot office facility on the land five months **before** the condemnation petition was even filed. *Walser Auto Sales, Inc. v.*

City of Richfield, 635 N.W.2d 391, 395 (Minn. Ct. App. 2001); *Hous. and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885, 887 (Minn. 2002). In *Lundell*, the electric coop was already occupying the property and using it to house a telecommunications tower that managed electrical transmission and distribution systems. The respondent landowners even conceded that the coop needed to continue to use the telecommunications tower to maintain a constant supply of electricity. 707 N.W.2d at 381.

The District Court also cited *City of Minneapolis v Wurtele*, 291 N.W.2d 386 (Minn. 1980), stating that decision held no final tax plan was needed prior to condemnation. However, the argument made and rejected in *Wurtele* was that the City failed to fully advise the county and school boards of the implications of the development district.

The court said,

[T]he council was required to “fully inform members of the county boards of commissioners and of the school boards of the fiscal and economic implications of the proposed development district.” . . . The tax plan was presented to the boards by members of the staff of the city coordinator's office. At no time have commissioners or school board members complained that they were not adequately informed about the economic ramifications . . . [T]he city council must have some **concrete financing proposal** in order to meet its responsibility to inform the boards

291 N.W.2d 395 (emphasis supplied). In *Wurtele*, the City approved a development plan and a tax increment financing plan and entered into a formal development contract with Oxford before the condemnation petition was filed. 291 N.W.2d at 390. *Wurtele* is a long way from this case, where there has been “no contact” between the City and DNR (*A 39*), much less any agreement. In *Wurtele*, the court found there was a “concrete financing proposal.” *Id.* Here there is no financing proposal to build the trail over the easement;

DNR has “no current plan to acquire the Trail from the City” (A 4) and DNR is “not aware of any proposed or pending legislation regarding funding for the Trail or the Minnesota River Trail” (A 43). *Wurtele* did not authorize the speculative purposes present here where there is no financing plan to build the trail and there is no agreement between the City and DNR of any sort.

2. Interference with the Railroad’s Use of Its Right-of-Way

The District Court also failed totally to address the fact that the condemnation would impact negatively TCW’s use of its land. As discussed above, when an authority seeks to condemn railroad property, it must show an additional element of necessity; that the use intended will not be “inconsistent with the paramount right” of the railroad, that the proposed use will not “materially interfere with, essentially injure, or tend to defeat the public use” by the railroad, and “a practical necessity for the exercise of eminent domain over property already devoted to a public use.” *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. at 347, 79 N.W. at 318.⁵

The District Court ignored these requirements, and the City did not present evidence showing that the construction of a trail on the easement would not materially inter-

⁵ In *In the Matter of Condemnation by Suburban Hennepin Regional Park District of Certain Lands in the County of Hennepin*, 561 N.W.2d 195 (Minn. Ct. App. 1997), this Court affirmed the grant of a condemnation petition of a railroad right-of-way for a recreational trail. That case involved a spur line where trains operated only two days a week at a speed of 5 to 10 miles per hour. This case involves TCW’s main line where trains operate daily with a speed limit of 30 miles per hour. The terrain in Golden Valley and Plymouth (where the spur line was located) is considerably different from the rough country along the bottom lands adjacent to the Minnesota River involved in this case where there are 13 ravines and several streams running down to the River. *SRF p. 10; SEH sheets 10-13*. Nothing in the Court’s opinion in *Suburban Hennepin Regional Park* indicates there were any of the type of engineering issues involved in that case as there are here, all of which were ignored by the District Court.

fere with railroad use of its property. The SRF and SEH studies illustrate some of the engineering issues of building a trail on the easement:

- For several thousand feet along TCW's right-of-way, the entire width of the easement area will be totally cleared and excavated and three tiers of retaining walls will be built, but no provision is made for anchoring the walls or ensuring there will be no soil erosion and mudslides coming down and blocking the tracks. *SEH sheets 4, 5.*
- Narrowing the right-of-way to only 25 feet will leave little room to clear wrecks in the event of a derailment because the cranes, front end loaders, bulldozers, and heavy equipment used to lift railcars would have no room to operate on the north side of the tracks and the Minnesota River is immediately adjacent on the south side of TCW's tracks in several locations. *SRF map following p. 7.*
- There are 13 ravines, several streams, and numerous smaller concrete pipes shown on the topographical maps along the easement. *SEH sheets 10-13 and 1-6.* To achieve the desired 5% grade, the topography of many of the hills and water-courses will have to be altered, leaving less ditch area for water to pool in and bringing more water to the railroad track bed, destabilizing it.

These and other engineering and safety issues were not mentioned, much less resolved, by the District Court, although counsel raised them on several occasions. T 23, 24-5, 34-6, 37-40, 42-49, 101.⁶ The City agreed such issues were present and requested

⁶ In the briefing on its motion for summary judgment, TCW advised that if its motion for summary judgment was not granted, the conflict between railroad operations and the construction, maintenance, and use of a trail on the easement would require an evidentiary hearing:

that if the railroads' motions for summary judgment were denied, the case should be scheduled for a "full trial on the merits." T 95.

In addition to the engineering issues not discussed by the District Court, the City's effort to condemn the easement for a trail so close to the main line track of a railroad may be based upon the City's desire to make acquiring the easement easier, since it only has to deal with a single landowner, TCW. If the trail was located further from TCW's tracks, the City would have to deal with several persons who own land north of TCW's right-of-way. The negotiation or condemnation of an easement for a trail from several landowners could be more time consuming and expensive than the "one stop shopping" the City has attempted in this case. But *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.* said that to condemn railroad property, "There must also be some necessity for the appropriation, not a necessity created by the corporation asserting the right, that it may be inconvenienced, or a necessity arising out of a desire to unreasonably economize." 76 Minn. at 347, 79 N.W. at 318. The convenience of only having to deal with one landowner does not create the "practical necessity" required to condemn railroad property for an inconsistent use.

F. There is no Present Necessity for This Condemnation

The City's condemnation is based on hope and speculation. There have been no

The conflict between TCW's use of its land for railroad operations and the interference with that use by the construction, maintenance, and use of a recreational trail only 25 feet from the mainline track is a separate issue not raised in the motion for summary judgment. Resolution of that issue would require a full scale trial including both fact and expert witnesses

Reply Memorandum of Twin Cities & Western Railroad Company in Support of Motion for Summary Judgment and to Deny a "Quick Take," at 6, n. 2.

contacts, much less an agreement, between the City and DNR relative to a conveyance of the easement the City seeks to condemn or using it to build a trail. DNR has no plan to acquire the easement, and neither DNR nor the City has the funds to construct a trail. The City itself does not intend to use the easement to build a trail. There is no evidence that the easement will ever be the path of a recreational trail from Wegdahl to Granite Falls, much less now or in the “near future.” If at some future time DNR decides that it wishes to build a trail between Wegdahl and Granite Falls, and if DNR wishes to put the trail on the easement – despite the engineering issues and costs -- the State itself can acquire the land it needs.

The City failed to show any reason for it to condemn the easement at this time and hold it for some undetermined period just in case DNR may some day wish to build a trail over the easement. *Regents of University of Minnesota v. Chicago & North Western Transp. Co.*, 552 N.W.2d 578, held that such “stockpiling” of land for future use did not satisfy the constitutional and statutory requirement of necessity which must be present to exercise the power of eminent domain. Courts in other jurisdictions have rejected condemnation petitions when the purpose was similarly speculative. *See, e.g., City of Phoenix v. McCullough*, 536 P.2d 230, 237 (Ariz. Ct. App. 1975) (affirming district courts’ decision to deny condemnation petition; “[I]f the condemning body is uncertain when future use shall occur, the future use becomes unreasonable, speculative and remote as a matter of law and defeats the taking.”); *Schumm v. Milwaukee County*, 258 Wis. 256, 264-5, 45 N.W.2d 673, 677 (1951) (where county had no obligation to actually build war memorial and the contract with a nonprofit contained several contingencies, “it is impossible for us to see how at the time of the condemnation proceedings the taking can be said

to be for public purposes.”).

Necessity is absent here because the City has no intent to actually use the easement itself, there is no plan or agreement between the City and DNR to use the easement to build a trail at any future date, and the plans presented by the City show the trail would substantially interfere with the railroad’s use of its right-of-way.

III. THERE IS NO VALID MUNICIPAL PURPOSE

A. The City Has Only Limited Power of Eminent Domain

The power of eminent domain is an inherent attribute of the sovereignty of the State of Minnesota. *State v. Christopher*, 284 Minn. 233, 236-7, 170 N.W.2d 95, 98 (1969); *State v. Flach*, 213 Minn. 353, 356, 6 N.W.2d 805, 807 (1942). The State has delegated some of its powers of eminent domain to municipalities in Minn. Stat. § 465.01: “All cities may exercise the right of eminent domain for the purpose of acquiring private property within or without the corporate limits thereof for any purpose for which it is authorized by law to take or hold the same by purchase or gift” The City only possesses the powers of eminent domain which are delegated to it by the State; cities have no inherent powers of eminent domain. *Independent School Dist. v. State*, 124 Minn. 271, 274, 144 N.W. 960 (1914). *See*, 11 Eugene McQuillin, *The Law of Municipal Corporations* § 32.12 (3d ed. 2000). The power of eminent domain “must be clearly granted, and every presumption is in favor of the individual landowner.” *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 435, 107 N.W. 405, 407 (1906). *See, Reilly Tar & Chemical Corp. v. City of St. Louis Park*, 265 Minn. 295, 121 N.W.2d 393 (1963).

Here, the City has no intent to design, build, own, operate, or maintain the trail. It

instead intends to condemn an easement and, at some undetermined future time, convey the easement to DNR. There is no municipal purpose for such a taking and it is beyond the eminent domain power delegated to the City.

An Attorney General opinion is directly on point. Op. Minn. Att'y Gen. 59a-14 (December 30, 1938) dealt with a plan for the City of Thief River Falls to take a tract of land and convey it to the State Highway Department for a roadside parking area and historic monument. The opinion concluded the proposed taking was beyond the eminent domain power delegated to the City because the delegation of the power of eminent domain is limited to condemning property where the City has a municipal purpose and the proposed taking involved a State purpose.

Here, the City intends to convey the easement to the State. In the case described in the Attorney General's Opinion, the State had offered to construct the parking area if it received the land. In this case, the City has not even had any contact with DNR and DNR has no plan to acquire the trail from the City or to build a trail on the easement.

There is no need or reason for the City to act as a surrogate condemnor for the State by taking an easement. If the State wishes to obtain an easement so it can build a recreational trail, it can do so itself. Allowing the City to take property when the State has not decided if it even wants to build a trail on the easement and has no funds to build a trail is pointless. There is no valid municipal purpose here; the delegation of eminent domain power in Minn. Stat. § 465.01 does not allow municipalities to take private property where there is no municipal purpose.

Minn. Stat. §465.01 states, "All cities may exercise the right of eminent domain for the purpose of acquiring private property within or without the corporate limits

thereof or any purpose for which it is **authorized by law** to take or hold the same by purchase or gift” (emphasis added). Section 465.01 requires an enabling statute specifically authorizing a purpose for cities to exercise the power of eminent domain. No Minnesota statute authorizes a municipality to act as a land acquisition agent or broker for the State, especially where the State has not agreed to accept the land. Several statutes allow cities to establish, maintain, and manage paths, parks, and other recreational facilities. *See, e.g.*, Minn. Stat. §§ 412.221, subd. 6; 412.491; 412.511; 412.512.

However, those statutes are inapplicable here where the City is seeking to condemn an easement over land outside its boundaries and does not intend to design, build, own, maintain, or manage the trail. The only purpose intended by the City is to convey the easement to DNR. The statute requires a municipal purpose for the taking; the municipality must need the land for a specific project for which it – the municipality – has a purpose “authorized by law.” The public purpose here- the creation of a recreational trail-is a State of Minnesota purpose, not a municipal purpose. There is no statute which authorizes a municipality in Minnesota to act as a land agent and use the power of eminent domain to condemn land which the State might - some day - be interested in.

B. Section 117.016 Does Not Authorize This Condemnation

The District Court said § 465.01 requires an enabling statute and held that Minn. Stat. § 117.016 was the applicable enabling statute allowing the City to condemn land for the purpose of conveying it to the State. *A 59*. Section 117.016 does no such thing. It provides:

Subdivision 1. State or any of its agencies or political subdivisions. Whenever the state or any of its agencies or political subdivisions thereof is acquiring property for a public purpose and it is determined that a portion or a

part of a tract of land is **necessary** for its particular public purpose and that **other portions or parts of the same tract of land or the remainder thereof are needed by another agency or political subdivision of the state** for a public purpose, the state or its agencies or political subdivisions desiring such lands or parts thereof may enter into an **agreement** each with the other for the joint acquisition of such lands by eminent domain proceedings.

Subd. 2. Agreement to state purpose and describe land. Such **agreement shall state** the purpose of the land acquisitions and shall describe the particular portion or part of the tract of land desired by each of the public bodies and **shall include provisions for the division of the cost** of acquisition of such properties and all expenses incurred therein.

Subd. 3. Procedure. The proceedings in eminent domain for the acquisition of the lands so desired shall be instituted and carried to completion in the **names of the parties to the agreement** describing the lands each shall acquire but for the purposes of the proceedings and for ascertaining the damages for the taking, the lands so acquired shall be treated as one parcel.

(Emphasis supplied).

The plain language of the statute does not support the District Court's analysis. First, subdivisions 1 and 2 say the statute applies where both public entities need different parts of the land to be condemned. Here, the City has no intent to design, build, operate, own, manage, or maintain a trail on the easement, but instead wants to convey the entire easement to DNR. The City has no intent or need to own any part of the easement.

Second, both subdivisions 1 and 2 expressly require an "**agreement**" between the two public entities. The statute prescribes that the agreement must include the purpose of the acquisitions, "describe the particular portion or part of the land desired by each" public body, and include "provisions for division of the costs and expenses incurred." Here, there has been no contact between the City and the State, DNR has no intent to acquire the easement from the City, and **there is no agreement between the City and DNR**. Finally, subdivision 3 requires the eminent domain proceedings to be "instituted and carried

to completion in the names of the parties to the agreement.” The State is not a petitioner in this case.

The plain language of § 117.016 demonstrate a city is not authorized to condemn land for State use unless the city itself needs part of the property and the city has an agreement with the State for the condemnation and division of the costs and expenses. Absent compliance with the statute, a municipality has no power to condemn property if it only intends to convey it to the State for the State’s use.⁷

In the District Court, the City argued that Minn. Stat. § 465.025 provided it with authority. That statute provides, “Any municipal corporation in the State of Minnesota, owning lands in fee simple and not restricted by the grant, which are no longer necessary for municipal purposes, may convey said lands to the State of Minnesota without consideration when duly authorized by the governing body of said municipal corporation and the governor is authorized to accept such conveyance in behalf of the State.” Here the City seeks to condemn an easement, not a “fee simple” interest. Section 465.025 does not provide any authority for the City to condemn land or supply a “municipal purpose,” but instead merely allows a city to convey land to the State when the city no longer needs the land for a “municipal purpose.” Section 465.025 recognizes that municipalities should only hold land that is “necessary for municipal purposes.” The City failed to show any statutory authority that there is a municipal purpose for the City to condemn property and convey it to the State.

⁷ The District Court also cited to Minn. Stat. § 117.57 (*A 61*), but that statute only applies to defined entities seeking to develop abandoned railroad property which contains pollution. There is no allegation in the amended petition or evidence in the record that TCW’s

C. Use of Eminent Domain in This Case is Contrary to Legislative Policy and Statute

The District Court said condemning the easement was reasonably necessary to complete a portion of the Minnesota River Trail Project and that “[t]his project is authorized by Minn. Stat. § 85.015, Subd. 22.” *A 57*. The court failed to recognize that the legislative policy does not generally allow DNR to use eminent domain to acquire land for the Minnesota River Trail.

Minn. Stat. § 85.015, Subd. 1, directs the commissioner of natural resources to establish the 22 trails described in the section. The statute says the commissioner “may acquire lands by gift or purchase.” The language of the statute shows the legislature determined the purposes of the state trail system were not sufficiently compelling to allow use of eminent domain. The two exceptions to the legislative policy are for the Arrowhead Region Trails and the Gateway Trail. Minn. Stat. § 85.015, subd. 13(c), 14(c).⁸

The presence of two exceptions shows that the legislature knows how to make an exception to the general policy of not allowing the use of eminent domain. For the other trails listed in the statute, including this one, DNR cannot use eminent domain. Given this legislative policy, it is not too surprising that DNR has “no current plan to acquire the Trail” from the City and that the City says it has had “no contact” with DNR relative to the trail. *A 41, 39*. Any agreement DNR might make to have a city lend its power of emi-

property is polluted or has been abandoned or that the City is proceeding under that statute.

⁸ The authorization for use of eminent domain to acquire lands in the Arrowhead Region trails was limited. Before using eminent domain, the commissioner of administration (not the commissioner of DNR) must obtain approval from the Governor and the statute directs the Governor to consult with the Legislative Advisory Committee. § 85.015, subd. 13(c).

ment domain to DNR would be illegal.

The City should not be allowed to use its power of eminent domain to do something indirectly that the legislature has determined DNR cannot do directly. This condemnation is an attempted end run around the legislative policy as expressed in the statute regulating eminent domain and state trails.

IV. THE DISTRICT COURT FAILED TO ENFORCE THE REQUIREMENTS OF MINN. STAT. § 117.036

TCW moved to dismiss the Amended Petition because the City failed to comply with Minn. Stat. § 117.036 since it did not furnish an appraisal prior to commencing this proceeding and did not make a good faith effort to negotiate with TCW prior to commencing this proceeding.

Minn. Stat. § 117.036 was enacted in 2003. It provides,

Subdivision 1. Application. This section applies to the acquisition of property for public highways, streets, roads, alleys, airports, mass transit facilities, or for other transportation facilities or purposes.

Subd. 2. Appraisal. (a) Before commencing an eminent domain proceeding under this chapter, the acquiring authority must obtain at least one appraisal for the property proposed to be acquired. In making the appraisal, the appraiser must confer with one or more of the owners of the property, if reasonably possible. At least 20 days before presenting a petition under section 117.055, the acquiring authority must provide the owner with a copy of the appraisal and inform the owner of the owner's right to obtain an appraisal under this section.

(b) The owner may obtain an appraisal by a qualified appraiser of the property proposed to be acquired. The owner is entitled to reimbursement for the reasonable costs of the appraisal from the acquiring authority up to a maximum of \$1,500 within 30 days after the owner submits to the acquiring authority the information necessary for reimbursement, provided that the owner does so within 60 days after the owner receives the appraisal from the authority under paragraph (a).

Subd. 3. Negotiation. In addition to the appraisal requirements under sub-

division 2, before commencing an eminent domain proceeding, the acquiring authority must make a good faith attempt to negotiate personally with the owner of the property in order to acquire the property by direct purchase instead of the use of eminent domain proceedings. In making this negotiation, the acquiring authority must consider the appraisals in its possession and other information that may be relevant to a determination of damages under this chapter.

The statute sets forth several mandatory requirements for a condemning authority. First, the acquiring authority must obtain at least one appraisal “[b]efore commencing an eminent domain proceeding...” § 117.036, subd. 1. Second, the appraiser retained by the acquiring authority must confer with the owners of the property. Third, “At least 20 days before presenting a petition under section 117.055,” the acquiring authority must provide the owner of the land with a copy of the appraisal and inform the owner of the owner’s rights to obtain an appraisal under the statute. Fourth, the acquiring authority is required to make good faith attempt to negotiate personally with the owner of the property “before commencing an eminent domain proceeding.”

The statute manifestly applies to this case. It governs use of eminent domain in the “acquisition of property for . . . transportation facilities or purposes.” The amended petition sought to condemn a permanent easement for a recreational trail, including the use of motorized wheelchairs and other motorized vehicles. *A 6*.

The City disregarded entirely the statutory requirements. The City did not obtain an appraisal and transmit it to TCW before commencing this proceeding. *Affidavit of Mark Wegner in Opposition to Petition for Condemnation dated March 1, 2006*. The City did not have any appraiser confer with TCW. *Id*. Finally, the City did not attempt to “negotiate personally” with TCW before commencing this proceeding. *Id*. The City failed to obtain an appraisal of all the property it seeks to condemn as the statute requires. *Affi-*

davit of Mark Schultz dated March 3, 2006; A 29.

The requirements of § 117.036 are not discretionary or capable of being relaxed; nothing in the statute gives a condemning authority the ability to modify the statute's requirements, much less ignore them. Nothing in the statute says a court hearing a condemnation petition can excuse the failure to comply with the statute. The statutory requirements are express conditions precedent to starting an eminent domain petition; they must be done **BEFORE** commencing a proceeding. The appraisal must be provided to the landowner "[a]t least 20 days before presenting a petition . . .," and the acquiring authority must attempt to negotiate personally with the landowner "before commencing an eminent domain proceeding" The City ignored the explicit statutory prerequisites. Since the City was not entitled to commence this proceeding, the amended petition should have been dismissed for failure to comply with § 117.036.

The City argued that § 117.036 does not apply to this proceeding. But the statute plainly governs "the acquisition of property for public highways, streets, roads, alleys, airports, mass transit facilities, or for other transportation facilities or purposes." The trail the City seeks to condemn would bring people into Granite Falls; the trail plainly is a "transportation facility" and has "transportation . . . purposes."

Section § 117.036 is obviously intended to restrict the ability of governments to initiate eminent domain proceedings unless they first comply with the requirements of the statute. Those requirements are not onerous. Indeed, requiring an appraisal be obtained protects the public interests. A purpose of the enactment of § 117.036 was to allow condemning authorities to give appraisals to property owners so they could understand the basis of the offer and try to reach an agreement without litigation. Op. Minn. Att'y Gen.

852 (April 13, 2004).

The requirement that an appraisal be obtained before the eminent domain proceeding is commenced ensures that the condemnor has sufficient funds to complete the taking and that the parties do not engage in expensive and extensive litigation over the taking, only to find that the petitioner does not intend to proceed due to the cost of the condemnation.

The requirements of Minn. Stat. § 117.036 are not unique to Minnesota. As said in 11A Eugene McQuillin, *Municipal Corporations* § 32.120 at 216-18 (2000):

The laws usually permit, but do not require, various political and administrative acts to be performed prior to and in preparation for proceedings to condemn property. Apart from, and in addition to, these preparatory acts, the laws usually require certain steps to be taken which constitute conditions precedent. For example, an attempt to agree with the landowner as to the sale price of the property, or an honest effort to purchase it, must generally be made. . . . Conditions precedent must be complied with.

Where conditions precedent to condemnation have not been completed, courts have dismissed condemnation petitions. *See, New Jersey Housing & Mortgage Finance Agency v. Moses*, 215 N.J. Super. 318, 521 A.2d 1307 (1987) (failure to enter into good faith negotiations). In *Board of County Com'rs of County of Jefferson v. Auslaender*, 710 P.2d 1180 (Colo. App.1985), the court held good faith negotiations with property owners were a jurisdictional prerequisite to condemnation.

The District Court denied the motions to dismiss, finding that because an appraisal was supplied twenty days after the motions were heard, the City's failures to comply with the appraisal and negotiation requirements were "moot." *A 31*. The District Court did not explain how supplying the appraisal somehow cured the City's failure to comply with the statute's requirement that the condemning authority make an attempt to negotiate with the

property owner “before commencing an eminent domain proceeding.” § 117.036, subd. 3.

The City filed its original petition on April 8, 2005 and did not supply an appraisal until March 27, 2006. *A 29*. If the statute can be satisfied by supplying an appraisal almost a year after a petition is filed and after motions to dismiss have been served and argued, the language of the statute requiring the condemning authority to supply an appraisal “at least 20 days before presenting a petition” becomes meaningless.

Since the City did not satisfy the requirements of the § 117.036, it did not have the right to commence this proceeding. The amended petition should have been dismissed.

CONCLUSION

The City failed to show the necessity required to condemn property because it has no intent, present or future, of using the easement to build, own, operate, or maintain a trail itself. There is no agreement or plan in place between the City and DNR for DNR to accept a conveyance of an easement and to design and build a trail. The easement may never be used to build anything, especially since the costs of building a trail over the easement are large and other, less expensive routes, exist. The speculative purposes of the City – the hope that DNR will accept the conveyance and someday build a trail on it - do not satisfy the constitutional and statutory mandate that the power of eminent domain can only be used where it is necessary.

The City also failed to show there was a practical necessity for taking the easement, since the construction of a trail would inevitably interfere with TCW’s use of its right-of-way. The City failed to present any evidence that there was any reason to build the trail in a narrow corridor only 25 feet from the railroad’s main line tracks.

The City's effort to act as a land agent for DNR is not authorized by any law, has no municipal purpose, and is contrary to legislative policy restricting the use of eminent domain to create trails. If DNR some day decides to build a trail and wants to acquire easements, the State can negotiate purchases or seek an exception to the legislative policy restricting use of eminent domain. Finally, the failure of the City to follow the appraisal and negotiation requirements of § 117.036 should be sanctioned.

TCW respectfully requests reversal of the District Court's order and dismissal of the amended petition.

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By 

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