

Nos. A07-417 and A07-418

State of Minnesota  
In Court of Appeals

City of Granite Falls, petitioner,

*Respondent,*

vs.

Soo Line Railroad Company  
a/k/a SLRCO and SERCO, et al.,

*Respondents below,*

BNSF Railway Company (formerly named The Burlington  
Northern and Santa Fe Railway Company),

*Appellant (A07-417),*

Twin Cities & Western Railroad Company, a/k/a TC&W,

*Appellant (A07-418).*

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## ARGUMENT<sup>1</sup>

### I. BECAUSE THE CITY FAILED TO COMPLY WITH THE REQUIREMENTS OF MINN. STAT. § 117.036, THE TRIAL COURT NEVER ACQUIRED SUBJECT MATTER JURISDICTION

“Statutory interpretation is a question of law subject to *de novo* review.” *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). The parties are in agreement that the *de novo* standard applies to the trial court’s rulings with respect to Section 117.036. *See* City’s Brief at pp. 3-4.

Section 117.036 applies to “the acquisition of property for public highways, streets, roads, alleys, airports, mass transit facilities, or for other transportation facilities or purposes.” *Id.* at subd. 1. The City advances a number of creative but ultimately unconvincing arguments as to why Section 117.036 should not apply to this proceeding.

One is that the statute applies only to acquisitions of property for “mass transportation” purposes. (City’s Brief at p. 4.) The City does not cite any authority for that proposition, and the City’s argument reads into the statute a concept – “mass transportation” – that is simply not there. Had the Legislature intended to limit the statute to “mass transportation” purposes, it would surely have chosen wording better suited to that purpose. While it is true that some of the listed facilities are associated with mass transportation (e.g., highways, mass transit facilities, some streets, roads, and airports), others are not (e.g., alleys,

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<sup>1</sup> Abbreviations and definitions used in BNSF’s opening Brief are used in the same manner herein.

some streets, roads, and airports). The common link among the listed facilities is not “mass transportation” but simply “transportation.” Thus, the concluding phrase of the statute encompasses all other “transportation facilities or purposes,” not merely other “mass transportation” facilities or purposes. Here, the proposed trail would provide a means of transportation between Wegdahl and Granite Falls analogous to a street or alley, hence is clearly within the ambit of the statute.<sup>2</sup>

The City also argues that *State by Washington Wildlife, Inc. v. State*, 329 N.W.2d 543 (Minn. 1983), is irrelevant to the question whether Section 117.036 applies to a recreational trail. (City’s Brief at p. 5.) City’s argument fails to recognize that the core holding in *Washington Wildlife* – that an easement for transportation purposes is not extinguished when a former railroad line is converted to a recreational trail – rests squarely on the proposition that such a trail is a transportation use. *Id.* at 547 (“The right-of-way is still being used as a right-of-way for transportation even though abandoned as a railroad right-of-way”).

Finally, the City attempts to distract the court with the red herring argument that the railroads’ interpretation of Section 117.036 “could put ANY proposed project of a municipality within the scope of this law.” (City’s Brief at p. 5 (emphasis in original).) There are at least two reasons why that argument is not convincing. One is that the statute, as in effect when this proceeding was

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<sup>2</sup> Indeed proponents of the proposed trail are not hesitant to characterize the trail as a transportation facility when it is their best interest to do so. *See, e.g.*, Attachment 8 to Hathaway Aff. at p. 1 (referring to a TEA-21 grant “to cover the costs of paving the trail from Wegdahl to Granite Falls”).

commenced, was targeted at a limited class of eminent domain proceedings: those where the property is acquired for transportation facilities or purposes. Eminent domain proceedings that were brought to acquire property for non-transportation projects were simply not subject to the statute. The other is that the City's public policy argument has, in fact, been rejected by the Legislature, which chose in 2006 to extend the requirements of Section 117.036 to all municipal projects.<sup>3</sup>

The City also advances a number of arguments as to why its failure to comply with Section 117.036 does not require the dismissal of this action. The City argues, for example, that Section 117.036 is not jurisdictional, relying principally on *State v. Frisby*, 260 Minn. 70, 108 N.W.2d 769 (1961), *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980), and the concurring opinion of Justice Anderson in *Housing and Redevelopment Authority in and for the City of Richfield v. Adelman*, 590 N.W.2d 327 (Minn. 1999).<sup>4</sup> Those

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<sup>3</sup> See Minn. Stat. § 117.036, subd. 1 (2006), which now is no longer limited to transportation facilities or purposes but, rather, "applies to the acquisition of property under this chapter."

<sup>4</sup> The City also suggests that TC&W mischaracterized Colorado's position on the question whether negotiations are a jurisdictional prerequisite. (City's Brief at pp. 8-9 (citing *Board of County Comm'rs v. Auslaender*, 745 P.2d 999 (Colo. 1987), and *Minto v Lambert*, 870 P.2d 572 (Colo. App. 1993), cert. den. (Colo. 1994).) In point of fact, the decisions of the Colorado Supreme Court support the railroads' position that good faith efforts to negotiate are a jurisdictional prerequisite to the filing of a condemnation proceeding. *E.g.*, *Auslaender*, 745 P.2d at 1001, 1002 (noting that the Colorado Supreme Court has repeatedly held that good faith efforts to negotiate are a jurisdictional prerequisite and declining, on the record before it, to determine whether the condemning authority could be relieved of the obligation to negotiate if good faith negotiations would have been futile). In the *Minto* case, the property owners failed to raise the issue of good faith negotiations at the trial court level, and the Colorado Court of Appeals

authorities are not on point. *Wurtele* involved procedural errors in the creation of a development district, and *Frisby* and *Adelmann* addressed post-petition proceedings.<sup>5</sup> In addition, both of the latter cases were decided prior to the enactment of Section 117.036 and therefore cannot and do not address the impact of the pre-petition requirements set forth in that statute.<sup>6</sup>

Justice Anderson's concurrence in *Adelmann* actually lends support to the railroads' argument that the City's failure to comply with the pre-petition requirements of Section 117.036 precludes subject matter jurisdiction and requires dismissal of this proceeding. That concurrence is founded on the proposition "that a district court acquires subject-matter jurisdiction over eminent domain proceedings upon the presentation to the court of a **proper** condemnation petition." 590 N.W.2d at 333 (emphasis added). In support of that proposition, Justice Anderson quotes the following from *Frisby*: "the court acquired jurisdiction by the presentation of the petition . . . **in accordance with the provisions of [the] statute.**" *Id.* (emphasis added (quoting *Frisby*, 260 Minn. at 76, 108 N.W.2d at 773)). Thus, under Justice Anderson's analysis, jurisdiction is

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declined to address the issue where it was raised for the first time on appeal, reasoning that good faith negotiations were "an element of the claim for relief" as opposed to a jurisdictional prerequisite. 870 P.2d at 576. The *Minto* analysis has not been adopted by the Colorado Supreme Court. Moreover, even under that analysis, this proceeding cannot stand, as it is clear that the City's failure to prove that it made a "good faith attempt to negotiate" (Minn. Stat. § 117.036, subd. 3 (2005)) would defeat an essential element of its claim for relief.

<sup>5</sup> *Frisby* involved a deficiency in the commissioners' award. *Adelmann* involved alleged deficiencies in a notice of award and notice of appeal.

not established until a “proper” petition – one that is “in accordance with the provisions of [the] statute” – is presented to the district court. Here, due to the City’s failure to comply with the pre-petition requirements of Section 117.036, the Petition and Amended Petition were neither proper nor in accordance with the provisions of the statute.

The City further contends that negotiations would have accomplished nothing, hence that its failure to comply with Section 117.036 does not justify dismissal of this proceeding. (City’s Brief at pp. 6-8.) That argument is legally and factually unsupportable. The City freely admits that it “did not negotiate with BNSF” (*id.* at p. 6), but purports to justify that failure on the basis that negotiation “was not necessary because the property sought was already a public crossing” (*id.*), and on the further basis that “BNSF [has] made it clear that [it] would not have agreed to the easement” (*id.* at p. 7). Those purported justifications are replete with errors:

- The City erroneously assumes that the negotiation requirement in Section 117.036 is limited to the value of the property in question.<sup>7</sup> There is no such limitation in the statute. To the contrary, the statute establishes separate and distinct requirements relating to valuation and negotiation.<sup>8</sup>

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<sup>6</sup> Section 117.036 was enacted in 2003. (Laws 2003, 1<sup>st</sup> Sp. Sess., Ch. 19, Art. 2, § 3.) *Frisby* was decided in 1961, *Adelmann* in 1999.

<sup>7</sup> The trial court fell into the same trap. See App. at pp. A-30 to A-31, A-60 (court’s inquiry into Section 117.036 compliance is focused on the appraisal).

<sup>8</sup> Compare Minn. Stat. § 117.036, subd. 2 (appraisal requirements) with *id.* at subd. 3 (negotiation requirements).

Subdivision 3 of the statute provides, in pertinent part, as follows: “In addition to the appraisal requirements under subdivision 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.” Here, the City’s own submissions reveal the complex and thorny issues that necessarily arise when one proposes to locate a recreational trail along or across an active railroad line, and demonstrate the necessity for negotiations to resolve those issues.<sup>9</sup> Trail crossings of active railroad tracks, such as the proposed crossing of BNSF’s main line, pose particularly significant issues, thereby making negotiations an absolute necessity. *See RWT Lessons Learned* at p. 69 (“The point at which trails cross active tracks is the area of greatest concern to railroads, trail planners, and trail users”). The City’s admitted failure to even attempt negotiations with BNSF belies the City’s contention that BNSF’s “substantial rights” (City’s Brief at p. 8) were not prejudiced by the City’s failure to undertake the required good faith negotiations.

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<sup>9</sup> *See, e.g.*, “Rails-with-Trails: Lessons Learned” (U.S. DOT, 2002) (hereinafter cited as *RWT Lessons Learned*) at p. 27 (“Trail agencies must involve the railroad throughout the process and work to address their safety, capacity, and liability concerns”), pp. 50-56 (discussing the types of agreements that are typically used), and Appendix C (sample agreements). *RWT Lessons Learned* is part of Attachment 6 to the Hathaway Aff.

- City's argument is premised on the legally unsupportable notion that because the City is of the view that BNSF would not be damaged by the taking,<sup>10</sup> it is excused from its obligations under Section 117.036. Even if the City were correct that the trail easement would not impose an additional burden on BNSF's property, the statute does not give the City the right to make a unilateral determination that it need not comply with the appraisal and negotiation requirements.<sup>11</sup>
- The City's argument incorrectly assumes that the trail crossing will be at the same location as the existing township road crossing (City's Brief at p. 6), an assumption that is contradicted by the City's own submissions. *See* memorandum from John Wingard to Committee Members of the State House Committee at p. 1, attached to Hathaway Aff. as Attachment 3 ("The current proposal is to have the trail route parallel the existing road on an off-road basis"). Indeed, the record indicates that the trail crossing would necessarily be oriented at a different angle to the track than the road

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<sup>10</sup> *E.g.*, Tr. at p. 20 (lines 5-6); City's Brief at p. 6.

<sup>11</sup> BNSF would also note that the City's view on the burden issue is demonstrably incorrect. The proposed easement, even if at the same location as the existing township road, would have a legal existence separate and distinct from the road, such that abandonment or vacation of the road would not effectuate an abandonment or vacation of the trail. That is, the City is not proposing to "piggy-back" on the Township's existing rights but, rather, is proposing to take rights from both BNSF and the Township to establish a legally distinct trail easement. *See* Exhibit A to Amended Petition at pp. 8, 13.

crossing and would therefore burden BNSF property that is not burdened by the road.<sup>12</sup>

- The City's conclusory statements to the effect that negotiations would have been futile (*e.g.*, City's Brief at pp. 7, 9) are not supported by the record, were not the subject of briefing, argument, or a ruling by the trial court, are hotly contested by TC&W, and, insofar as BNSF is concerned, are simply untrue.<sup>13</sup>

## II. THE PROPOSED TAKING IS NOT REASONABLY NECESSARY

Before turning to the substantive issue, it is necessary to address the standard of review. The City contends that the trial court's decision on the necessity issue should be reviewed under the "clearly erroneous" standard. (City's Brief at p. 4.) That is incorrect. Where, as here, the trial court's decision is based on documentary submissions, as opposed to testimony, its decision is subject to *de*

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<sup>12</sup> The road crosses the track at a sharp angle (Exhibit 2 to BNSF's Reply Mem. dated 2/7/06), and the crossing surface is only as wide as the road surface (*id.* at Exhibits 2 through 5). *RWT Lessons Learned* notes that bicycle paths should be at right angles to the track whenever possible. *Id.* at pp. 72-73 (in part quoting from the AASHTO [American Association of State Highway and Transportation Officials] Bike Guide). Consistent with this design parameter, the concept plan for the crossing shows the trail oriented at approximately a right angle to the track. (Attachment 4 to Hathaway Aff. at Sheet 12 of 13 (depicting, in pertinent part, RAILROAD CROSSING BURLINGTON NORTHERN SANTA FE RAILROAD)). And as noted in the text, the trail itself is proposed to be parallel to the road, as opposed to occupying a portion of the existing road surface. When these facts are taken together, it is obvious that the proposed trail crossing cannot be co-located with the existing crossing.

<sup>13</sup> Without going into specifics, BNSF is prepared to show that, subsequent to the filing of the Amended Petition, it initiated negotiations with the City and submitted a draft agreement to the City for consideration.

*novus* review. *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986) (“in line with Rule 52 [Minn. R. Civ. P.], a trial court’s findings of fact will be subject to review *de novo* where those findings are based on documentary evidence equally available to [the reviewing] court”).

Turning to the merits, the City and *amicus curiae* League of Minnesota Cities (“LMC”) both argue that the trail project is not speculative because there is a plan in place. (*E.g.*, City’s Brief at pp. 10, 11; LMC’s Brief at p. 10.) They both cite Minn. Stat. § 85.015, subd. 22, as proof that a plan exists. (City’s Brief at p. 10; LMC’s Brief at p. 11.) However, their reliance on Section 85.015 is fatally flawed. The pertinent portion of the statute reads as follows:

Subdivision 1. Acquisition.

(a) The commissioner of natural resources shall establish, develop, maintain, and operate the trails designated in this section. Each trail shall have the purposes assigned to it in this section. The commissioner of natural resources may acquire lands by gift or purchase, in fee or easement, for the trail and facilities related to the trail.

....

Subd. 22. Minnesota River Trail.

The trail shall originate at the entrance to Big Stone Lake State Park and extend along the Minnesota River Valley to connect to the Minnesota Valley Trail at the city of Le Sueur.

Minn. Stat. § 85.015 subds. 1 (a), 22 (2006). Even if one assumes that the brief reference to the Minnesota River Trail is a “plan,” it is clear that the implementation of that “plan” is committed not to the City but, rather, to the Commissioner of Natural Resources. There is nothing in Section 85.015 to suggest that municipalities have any independent authority to implement that “plan.” Moreover, allowing municipalities to usurp control of the “plan” from the Commissioner could have serious adverse consequences, as municipalities with different priorities scramble to create trail segments that are particularly advantageous to their residents, without regard to whether those segments are consistent with the creation of the Minnesota River Trail as a whole. The City’s attempt to seize the initiative is bad policy and cannot serve as a basis for a finding of necessity, particularly where, as here, it is undisputed that DNR does not have a master plan for the Minnesota River Trail (App., pp. A-41 to A-42), has not approved the proposed Wegdahl-to-Granite Falls segment (*id.*; partial copy of DNR draft master plan annexed to 4<sup>th</sup> Olander-Quamme Aff.), has not been contacted by the City regarding that proposed segment (App., p. A-39), and does not have a plan to acquire the proposed trail segment from the City (*id.* at p. A-41). Given that the Commissioner has yet to put meat on the “plan” set forth in Section 85.015, subd. 22, and that it is the Commissioner’s responsibility – not the City’s – to execute that “plan,” it is clear that the City is proposing to engage in speculative stockpiling of property, the very type of conduct that was condemned by this Court in *Regents of the University of Minnesota v. Chicago and*

*Northwestern Transportation Co.*, 552 N.W.2d 578, 580 (Minn. App.), review den., 1996 Minn. App. LEXIS 874 (Minn. 1996).

LMC attempts to buttress the City's position by characterizing the proposed trail as something that "is eventually to be part of the Minnesota River Trail." (LMC's Brief at p. 2 (emphasis added). *Accord id.* at p. 10.) That characterization is not supported by the record. The most that can be said on the existing record is that the City *hopes* the proposed trail will eventually be incorporated into that Trail. That hope is not sufficient to sustain a finding of necessity.

The City attempts to distinguish *Regents* on the ground that the University "was stockpiling for an undetermined use, not acquiring land for an articulated purpose such as a recreational trail." (City's Brief at p. 11.) That purported distinction does not hold water. No one would dispute that the City has "articulated" a purpose for the proposed taking. But that purpose is not simply to acquire "a recreational trail" but, rather to acquire a specific alignment for a trail segment – a segment that the City has no intention of constructing – in the hope that DNR will at some future time determine that the segment is suitable for inclusion in the Minnesota River Trail and that the Legislature will see fit to fund the acquisition of that trail segment and the construction of the trail. That is to say, the City's purpose for the proposed taking is contingent on a multitude of factors that are entirely beyond the City's control.

The nature of these contingencies, and the fact that they are beyond the City's control, distinguish this case from cases such as *Itasca County v. Carpenter*,

602 N.W.2d 887 (Minn. App. 1999). There, the impediments to carrying out the road project did not render the project speculative because “modification of the existing plan is within [the County’s] control.” *Id.* at 891. Here, in contrast, responsibility for the creation of a plan for the Minnesota River Trail is vested in the Commissioner of Natural Resources, and funding to implement that plan is controlled by the Legislature. BNSF would also note that *Itasca County* distinguished *Regents* in part on the basis that in *Regents* “no projects had been approved for the site.” 602 N.W.2d at 890. Here, the ultimate project is a state trail, the establishment of which is committed to the Commissioner of Natural Resources, and the evidence is undisputed that the Commissioner has not yet created a master plan for the state trail, much less adopted a particular alignment for the Wegdahl-to-Granite Falls segment. In other words, the project in question (i.e., the Wegdahl-to-Granite Falls segment of the Minnesota River Trail) has not been “approved for the site.”

This case is also distinguishable from cases such as *Housing and Redevelopment Authority in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. App. 2001), where the permits and approvals needed for the completion of the project were “normal contingencies for a major redevelopment project.” *Id.* at 670. Here, the project proposed by the City is contingent not on “normal contingencies” but, rather, on matters that go to the very essence of the project – including whether the proposed trail alignment will

fit into the DNR's as-yet-undeveloped master plan for the Minnesota River Trail and whether the Legislature will authorize the necessary funding.<sup>14</sup>

The City contends that its petition "specifically prohibits the easement sought from interfering with the safe and orderly operation of the railroads." (City's Brief at p. 12.) In point of fact, the Amended Petition does **not** contain such a prohibition. Rather, it describes the proposed easement in terms that are broad and of uncertain meaning, and that appear to contemplate substantial restrictions on the railroads' rights:

The City ... deems it necessary for park, multi-user trail, and **other public purposes**,<sup>15</sup> to obtain and to take easements over and across certain lands, all as described in Exhibit "A"..., for the purposes of beautifying and

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<sup>14</sup> The City attempts to downplay the significance of the funding contingency. City's Brief at p. 11 ("While the legislature may not have set aside complete funding for the plan, this should not be misread. It is good fiscal practice to only spend the public's tax dollars as needed, and not to set aside large amounts of public funds before the property on which they will be spent has actually be[en] acquired"). In point of fact, the current fiscal condition of the State suggests that the City's optimistic assessment is unwarranted, particularly given that the preliminary cost estimate for the proposed trail (Attachment 2 to Hathaway Aff.) has not been updated since 1998 and highlights the unusually high costs of constructing a trail on an active railroad right of way. *Id.* at p. 26 (noting that excavation and grading costs "are greater than that normally required for rails-to-trails conversions, due to the topography over which the trail corridor traverses and the absence of a pre-graded bed over most of the trail length," that retaining walls are necessary "given the sideslope gradient within the River Valley and close proximity to railroad or roadway corridors," that "[p]rovision for trail crossings of the railroad must be accommodated," including "rubberized railroad crossings and flashing safety signals," and that fencing may be required, "contingent upon liability issues to be resolved between the railroad and [the trail owner]").

<sup>15</sup> The "other public purposes" are never described or defined.

making improvements to the northerly entrance to its downtown retail area, landscaping and planting trees, installing new street lighting, installing curbs and gutters, installing sidewalks, constructing park and other public facilities, installing fences, and constructing a multiple-user trail, all as determined necessary and beneficial for the recreational use and general welfare of the public; keeping and having the exclusive control of the property to the extent necessary for improvement and maintenance as may, from time to time, occur; mitigating deterioration of property values in this part of the city; and doing any and all things reasonably related thereto.

.....

Petitioner also does not propose or intend any taking of such easement rights of [Respondents TC&W or BNSF],<sup>16</sup> if any, as may be minimally and reasonably necessary, pursuant to standards established by Minnesota law,<sup>17</sup> for said Respondents' safe and orderly operation of its railroad through and across the lands being taken,<sup>18</sup> the easement rights to be granted to Petitioner in this taking being defined herein.

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<sup>16</sup> The reference to easement rights of TC&W and BNSF is contrary to their acknowledged status as fee owners. See pp. 1 and 8 of Exhibit A to the Amended Petition.

<sup>17</sup> Given that many aspects of railroad operations are regulated solely at the federal level, the reference to standards established by Minnesota law could inappropriately limit the railroads' ability to comply with federal standards. It could also limit the railroads' ability to comply with self-imposed standards that exceed applicable state and federal requirements.

<sup>18</sup> The Amended Petition does not address the trail's impact on the railroads' operations or property beyond the limits of the easement.

....

Petitioner specifically requests an Order granting: A Permanent Easement over, across and upon real property ... described [on Exhibit A] 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 Petitioner to establish, construct, operate, maintain, and replace all facilities, fixtures, improvements, and beautifications relating thereto, and the right of Petitioner to all the grasses, shrubs, trees, and natural growth on the real property (now existing or 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.

Amended Petition at ¶¶ 2, 5, 8 (footnotes and emphasis added).

LMC argues that “[i]f projects like these are deemed speculative, it will result in a ‘Catch-22’ to the detriment of Minnesota citizens,” because cities “will not be able to acquire the property” for state trails and the State will not provide the necessary funding “because the necessary property has not been secured.” (LMC’s Brief at p. 10.) This is another red herring argument and ignores the fact that the Legislature could cure the so-called “Catch-22” through the simple expedient of **authorizing DNR to use eminent domain to acquire trail rights of way**, something it has thus far seen fit to do in only limited circumstances. *See* Minn. Stat. § 85.015. LMC’s view is also bad public policy, in that it would

encourage a mad scramble among competing municipalities to dictate the courses of the various state trails, thereby wasting resources and potentially compromising the role that the Legislature has delegated to the Commissioner of Natural Resources.

In conjunction with its argument regarding necessity, the City asserts (1) that the railroads bear the burden of proof on the issue whether the proposed trail would be inconsistent with railroad use and (2) that the condemnation should be allowed. (City's Brief at p. 12.) Those assertions are addressed in part V, below.

### **III. THE PROPOSED TAKING IS NOT FOR A PROPER MUNICIPAL PURPOSE**

This issue is one of law, and the parties are in agreement that the decision of the trial court is reviewed *de novo*. *STAR Centers, Inc. v Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002); City's Brief at p. 4.

The City and LMC misconstrue the thrust of the municipal purpose argument. For example, LMC asserts that the railroads are urging the Court to adopt a "new, heightened standard."<sup>19</sup> That is incorrect.

Insofar as the assertion that the municipal purpose doctrine is new, it is sufficient to note that the doctrine was first articulated more than 90 years ago in *State ex rel. Ford Motor Co. v. District Court*, 133 Minn. 21, 158 N.W. 240 (1916).

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<sup>19</sup> *E.g.*, LMC's Brief at p. 2.

With respect to the assertion that the doctrine creates a “heightened standard” for review of municipal takings – presumably a form of heightened public purpose analysis – the simple fact is that the doctrine is **not** a “standard.”<sup>20</sup> Rather, it is a narrow judicially-created exception to a municipality’s eminent powers. The doctrine holds that it is improper for a municipality to use its eminent domain powers for the benefit of an entity that has eminent domain authority but has either chosen not to use it or is not permitted to use it for the purpose in question. For example, in *Ford Motor Co.* the Supreme Court held that where the city petitioned to take property for an alley, but the real purpose was to acquire property for a railroad switch track, the proposed taking was for an improper purpose and *ultra vires*, noting “It is true that the railway company might have condemned a right of way for that purpose, but it made no attempt to do so, and the city has *no power to do so.*” *Id.* At 229, 158 N.W. at 244 (emphasis added). And in *Op. Minn. Att’y Gen. 59a-14* at 1 (Dec. 30, 1958) (reproduced in the Addendum to BNSF’s opening Brief), the Attorney General concluded that a proposed municipal taking which had as its object the acquisition of land that the city intended to convey to the State for use as a roadside parking area and historic monument, was beyond the powers delegated to the city by Section 465.01, reasoning that the proposed taking was forbidden because it was “not for

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<sup>20</sup> Because the City and LMC misconstrue the municipal purpose doctrine, they spend many pages of their briefs discussing cases related to the issue of public purpose – an issue that is not relevant to this appeal.

municipal but for state purposes” and that the municipality would be “a mere conduit for the transfer of the property to the state.” *Id.* at p. 3.

Here, it is undisputed and undisputable that the City has no intention of constructing or operating the proposed trail. Rather, it seeks to acquire the trail right of way in the hope that the State will at some point purchase it from the City and construct and operate a state trail upon it. And it is also undisputed and undisputable that the State, as the sovereign, has broad powers of eminent domain. Here, however, the Legislature has clearly indicated that DNR is not permitted to use those powers for the purposes of the Minnesota River Trail. Minn. Stat. § 85.015 (the Commissioner of Natural Resources “may acquire lands by gift or purchase ... for the trail”). Thus, in this case the City’s attempt to exercise its eminent domain powers on behalf of the DNR is not merely *ultra vires* but would actually subvert the Legislature’s intention that property required for the Minnesota River Trail be acquired by voluntary means rather than condemnation.

The City cites Minn. Stat. § 117.016 as support for the proposition that Minnesota law has “evolved .. to encompass the conveyance of property taken by eminent domain by one governmental unit to another.” (City’s Brief at p. 13.) That assertion is simply wrong. The statute does **not** authorize one condemning authority to act on behalf of another. Rather, it provides as follows:<sup>21</sup>

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<sup>21</sup> In its opening Brief, BNSF quoted subdivision 1 of the statute. (*Id.* at p.23.) However, due to a clerical error, certain extraneous words (i.e., the phrase “to use its limited delegation of eminent domain”) were inadvertently inserted into the

Subdivision 1. .... 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.

Subdivision 2. .... 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.

Subdivision 3. .... **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.

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quotation. That error is corrected in the text of this Brief and can be corrected in the original Brief by lining through the extraneous words.

Minn. Stat. § 117.016 (2005) (emphasis added). The statute does **not** authorize one condemning authority to act on behalf of another but, rather, facilitates the economical acquisition of property by allowing multiple condemning authorities to enter into an agreement for the acquisition of property in a single eminent domain proceeding, to be carried out “in the names of the parties to the agreement.” If anything, the statute demonstrates the fallacy of the City’s position, by making it clear that a condemning authority is only allowed to use eminent domain for “the particular portion or part of the tract of land desired by” that condemning authority. Here, the City proposes to acquire the trail right of way solely for the purpose of transferring it to DNR. Given that the City has no intention of retaining ownership of any portion of the trail right of way, it would not qualify to participate in an agreement under Section 117.016.

LMC spends a good portion of its Brief arguing that a municipality’s “legislative determination of public purpose” (*id.* at p. 4) is entitled to substantial deference from the courts. (LMC’s Brief at pp. 4-8.) The problem with that argument is that it is irrelevant to the issues before this Court. The municipal purpose doctrine is not concerned with whether there is a public purpose for the proposed project but, rather, with whether the condemning authority is impermissibly using its eminent power for the benefit of an entity that has eminent domain authority but has either chosen not to use it or is not permitted to use it for the purpose in question. As shown above, that is precisely the case here. Thus,

even if one assumes that there is a legitimate public purpose for the proposed taking, the instant eminent domain proceeding is *ultra vires*.

#### **IV. THE DESCRIPTION OF BNSF'S PROPERTY IS FATALLY DEFECTIVE**

This issue is one of law, and the parties are in agreement that the decision of the trial court is reviewed *de novo*. *STAR Centers, Inc., supra*, 644 N.W.2d at 76-77; City's Brief at p. 4.

Minn. Stat. § 117.055 specifies that “[i]n all cases a petition, describing the desired land, ... shall be presented to the district court ....” *Id.* at subd. 1. The case law is clear that the required description must be sufficiently definite that a surveyor could locate the property on the ground. *E.g., Fairchild v. City of St. Paul*, 46 Minn. 540, 545, 49 N.W. 325, 326 (1891); *Otter Tail Power Co. v. Brastad*, 128 Minn. 415, 418, 151 N.W. 198, 199 (1915). The City attempts to sidestep this statutory requirement on the basis that the admittedly deficient description is in “substantial compliance” with the statute, citing *Wurtele*. (City's Brief at pp. 14-15.) *Wurtele* is not applicable, for the reasons sets forth in BNSF's opening Brief at p. 27.

In a futile attempt to buttress its position, the City cites *State Highway Commission v. Hurliman*, 230 Ore. 98, 368 P.2d 724 (1962), and *Yakima County v. Evans*, 135 Wash. App. 212, 143 P.2d 891 (2006). In *Hurliman*, the eminent domain complaint included a detailed legal description, and the court properly concluded that “the description employed in the complaint would enable anyone

familiar with the defendants' farm to locate this property." 230 Ore. at 106, 368 P.2d at 728. In *Yakima County*, the court held that the description met the statutory requirement that the property be described with "reasonable certainty." 135 Wash. App. at 219, 143 P.2d at 894. Those cases are consistent with the Minnesota requirement that the description be definite enough to allow a surveyor to locate the property on the ground. Here, that requirement is not met. Indeed, the City itself acknowledges that the existing description merely identifies the "approximate area" where the easement for the proposed trail would be located. (City Mem. in Opp. dated Sep. 15, 2006, at p. 7.)

**V. THE TRIAL COURT ERRED BY RULING ON THE MERITS WITHOUT GIVING THE RAILROADS AN OPPORTUNITY TO BE HEARD**

Before addressing the substance of the City's argument, it is necessary to speak to the standard of review to be used by the Court. The City appears to contend that the trial court's action should be reviewed under an abuse-of-discretion standard. (City's Brief at p. 4.) That is incorrect. The City's contention is founded on the erroneous premise that the railroads are appealing a decision to deny a motion for a continuance of discovery. (*Id.*) As will be explained at greater length below, the issue at hand is not the denial of a continuance but, rather, the trial court's decision to *sua sponte* decide the core issue in the case (i.e., the legality of the proposed taking), thereby depriving the railroads of an opportunity to be heard. Given the nature of that issue, the appropriate standard of review is not whether the trial court abused its discretion

but, rather, whether the court committed prejudicial error by depriving the railroads of the right to a hearing on the merits. *See Satellite Industries, Inc. v. Keeling*, 396 N.W.2d 635, 640 (Minn. App. 1986).

As explained at some length in BNSF's opening Brief, the trial court was apprised that the railroads' motions for summary judgment were made on the basis of preliminary discovery and were limited to certain salient defenses. In addition, the court was apprised of the existence of other potential defenses that were not ripe for summary adjudication and was informed that, in the event the motions were denied, further discovery and an evidentiary hearing would be necessary to ventilate those defenses. BNSF, TC&W, and the City were in agreement that the matter would have to proceed to trial in the event the summary judgment motions were denied. The City did not file a cross-motion for summary judgment and did not request any affirmative relief; it merely requested that the motions for summary judgment be dismissed and the matter be put back on the trial calendar.<sup>22</sup> It appears that the court either lost track of the fact that certain of the railroads' defenses were not ripe for resolution or somehow misconstrued the railroads' motions and the City's responses thereto as cross-motions for summary judgment

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<sup>22</sup> City's Mem. in Opp. dated Sep. 15, 2006, at pp. 6 (summary judgment should not be granted on the issue of necessity), 7 (same re issue of municipal purpose), 7 (same re issue whether the description of BNSF's property was deficient), 8 (the motions for summary judgment "should be denied in all respects" and "the hearing date should be reset"); City's proposed Order Denying Motions of BNSF Railway Company and Twin Cities & Western Railroad Company for Summary Judgment at p. 2 (proposing that the trial court deny the motions for summary judgment because "[t]here are material issues of fact in dispute").

on the merits. Whatever happened, the result was that the court issued an order that (a) addressed issues that were not within the scope of the motions, (b) granted relief that none of the parties had requested, (c) did not address a multitude of potential defenses that had been reserved by the railroads, including one (i.e., inconsistency of use) that the court itself had acknowledged was a “legitimate concern” (Tr., p. 60 (lines 24-25), and (d) ruled on the central issues in the case – issues going to the legality of the proposed taking – without notice to the railroads and without giving them an opportunity to be heard.

In *Satellite Industries, supra*, this Court faced a somewhat similar situation. There, Satellite sued to enforce a covenant not to compete and sought a temporary injunction. Keeling responded with a motion for summary judgment, challenging the enforceability of the covenant. What happened next is eerily similar to what happened here: “At the motion hearing the trial court misconstrued Satellite’s request for temporary relief as a motion for summary judgment, apparently equated crossmotions for summary judgment to a waiver of trial, and decided the entire action, including damages, without a trial.” *Id.* at 637. This Court concluded that the trial court’s decision with respect to damages – an issue not within the scope of the motions that were before the court – required reversal: “The only issues briefed and argued at the motion hearing were the enforceability of the contract and the temporary injunction. The trial court’s devised relief denies the parties the adversary process to arrive at damages based on actual sales.... Satellite is entitled to an adversarial hearing on the issue of damages.” *Id.* at 640.

Likewise here, the Dec. 21 Order that triggered this appeal granted relief that had not been requested by the City and denied the railroads the right to an adversarial hearing on critical issues that were not embraced by their summary judgment motions.

The Dec. 21 Order is somewhat analogous to a *sua sponte* grant of summary judgment. Jurisdictions that recognize a court's ability to grant summary judgment *sua sponte* require that the parties be given notice and an opportunity to be heard before the court makes its decision. *E.g., Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3<sup>rd</sup> Cir. 1994); *Powell v. United States*, 849 F.2d 1576, 1579 (5<sup>th</sup> Cir. 1988); *Winfrey v. Brewer*, 570 F.2d 761, 764 (8<sup>th</sup> Cir. 1978). As the court said in *Powell*, "strict enforcement of the notice requirement is necessary because a summary judgment is a final adjudication on the merits.... Since a summary judgment forecloses any future litigation of a case the district court must give proper notice to insure that the nonmoving party had the opportunity to make every possible factual and legal argument." 849 F.2d at 1579 (citation omitted).

As noted in part II, above, the City's argument regarding necessity asserts (1) that the railroads bear the burden of proof on the question whether the proposed trail would be inconsistent with railroad use and (2) that the condemnation should be allowed. (City's Brief at p. 12 (citing *In the Matter of Condemnation by Suburban Hennepin Regional Park District*, 561 N.W.2d 195 (Minn. App. 1997).) Those assertions are inappropriate for a number of reasons:

- As shown above, the inconsistency issue was not within the scope of the railroads' summary judgment motions, the City did not ask the court to rule on the issue, and the court did not rule on the issue. Thus, the question whether the proposed trail is an inconsistent use is not before the Court on this appeal. This distinguishes the instant case from *Suburban Hennepin Regional Park District*, where the issue of inconsistency was specifically addressed by the trial court and was the primary focus of the appeal. (*Id.* at 196.)
- The only issue related to inconsistency of use that is before the Court on this appeal is whether the trial court erred by entering an Order that had the effect of depriving the railroads of a hearing on that issue (and other issues bearing on the lawfulness of the proposed taking).
- The burden of proof issue was never raised in, nor decided by, the trial court and is therefore not relevant to this appeal. However, it is worth noting that the authorities relied on by this Court in *Suburban Hennepin Regional Park District* (*id.* at 197) are rooted in a Minnesota Supreme Court decision which merely notes that the railroad might “perhaps” have the burden of proof on that type of issue. *Minneapolis & St. Louis R.R. v. Village of Hartland*, 85 Minn. 76, 78, 88 N.W. 423, 423 (1901) (“The railway company ... stood in the position of a defendant, and in fact in the negative on every issue in the proceedings, except, perhaps, upon the question of damages and whether opening the proposed street over its right

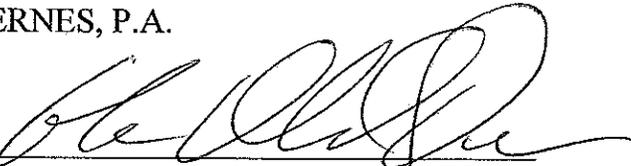
of way would essentially impair the use thereof for railroad purposes.”) The issue whether inconsistency is an element of the condemning authority’s claim or an affirmative defense has never been addressed by the Supreme Court, and the eminent domain statute in effect when this proceeding was commenced would appear to make the issue of the lawfulness of the proposed taking an element of the City’s claim. *See* Minn. Stat. § 117.075, subd. 2 (2005). If this matter were to be remanded to the trial court for further proceedings, the burden of proof issue would doubtless be the subject of research and briefing by the parties.

### CONCLUSIONS

The City did not comply with the jurisdictional requirements of Section 117.036; therefore, the trial court never acquired subject matter jurisdiction. The proposed taking is speculative, hence not reasonably necessary. The City’s attempt to use its eminent domain power on behalf of the State is *ultra vires*. The description of the property to be taken from BNSF is fatally defective. And the trial court’s ruling on the merits deprived the railroads of an opportunity to be heard.

Dated: July 23, 2007

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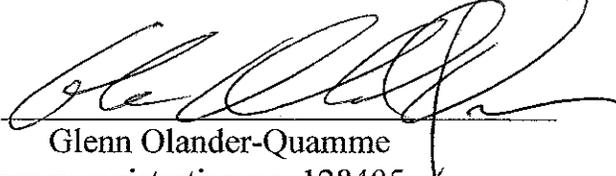
**CERTIFICATE OF COMPLIANCE**

Glenn Olander-Quamme, an attorney for Appellant BNSF Railway Company, hereby certifies pursuant to Rule 132.01, subd. 3, Minn. R. Civ. App. P., that Appellant BNSF Railway Company's Reply Brief in this matter contains 6,149 words, which is less than the 7,000 word limitation set forth in Rule 132.01, subd. 3(b), Minn. R. Civ. App. P., and is typed using a typeface that meets the requirements of Rule 132.01, subd. 1, Minn. R. Civ. App. P. The word count was performed, and the Brief was prepared, using Microsoft Word 2003.

Dated this 23rd day of July, 2007.

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