

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.

**REPLY BRIEF OF APPELLANT
TWIN CITIES & WESTERN RAILROAD COMPANY**

Thomas V. Seifert, Esq. (#98863)
HEAD, SEIFERT & VANDER WEIDE
333 South Seventh Street, Suite 1140
Minneapolis, Minnesota 55402
Tel: (612) 339-1601
Fax: (612) 339-3372

*Attorney for Appellant Twin Cities &
Western Railroad Company*

Kevin K. Stroup, Esq. (#170094)
STONEBERG, GILES & STROUP, P.A.
300 O'Connell Street
Marshall, Minnesota 56258-2638
Tel: (507) 537-0591
Fax: (507) 532-3498

Attorney for the City of Granite Falls

(Additional Counsel Listed on following page)

Glenn Olander-Quamme, Esq. (#128405)
SPENCE, RICKE, SWEENEY &
GERNES, P.A.
325 Cedar Street, Suite 600
St. Paul, Minnesota 55101
Tel: (651) 223-8000
Fax: (651) 223-8003

*Attorney for Appellant BNSF Railway
Company*

David Phillips, Esq.
Assistant Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, Minnesota 55101
Tel: (651) 296-6196
Fax: (651) 297-4193

Attorney for State of Minnesota

David S. Drach, Esq.
CANADIAN PACIFIC RAILWAY
501 Marquette Avenue South
Suite 804
Minneapolis, Minnesota 55402
Tel: (612) 904-6139
Fax: (612) 904-6147

Attorney for Soo Line Railroad Company

Bradley V. Larson, Esq.
METCALF, LARSON, MUTH &
FLEMING, P.C.
313 West Broadway
P.O. Box 446
Monticello, Minnesota 55362
Tel: (763) 295-3232
Fax: (763) 295-3132

Attorney for Lawrence A. Kreger

Susan L. Naughton, Esq. (#259743)
145 University Avenue West
St. Paul, Minnesota 55103
Tel: (651) 281-1232

Attorney for League of Minnesota Cities

Dwayne N. Knutsen, Esq.
PRINDLE, MALAND, SELLNER,
KNUTSEN & STERMER, CHTD.
P.O. Box 591
Montevideo, Minnesota 56265
Tel: (320) 269-6491
Fax: (320) 269-5433

Attorney for Chippewa County

Mr. Keith Beito
3030 – 110th Street S.E.
Granite Falls, Minnesota 56241
Tel: (320) 981-0276

Appearing for Granite Falls Township pro se

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
ARGUMENT	1
I. THERE IS NO "PLAN IN PLACE"	1
II. SPECULATIVE PURPOSES DO NOT SHOW NECESSITY	2
III. THE CITY FAILED TO SHOW PRACTICAL NECESSITY TO CONDEMN RAILROAD PROPERTY	5
IV. THERE IS NO AUTHORIZED PURPOSE FOR THIS CONDEMNATION	10
V. THIS CASE IS NOT THE USUAL CONDEMNATION BY A CITY	14
VI. THE CITY'S FAILURE TO COMPLY WITH § 117.036 REQUIRED DISMISSAL OF THE PETITION	16
CONCLUSION	18
CERTIFICATE OF COMPLIANCE	20

TABLE OF AUTHORITIES

CASES

<i>Chicago Great Western Railway Co. v. Jesse</i> , 249 Minn. 324, 82 N.W.2d 227 (1957)	4
<i>City of Duluth v. Duluth St. Ry. Co.</i> , 179 Minn. 548, 229 N.W. 883 (1930)	4, 5
<i>City of Duluth v. State</i> , 390 N.W.2d 757 (Minn. 1986)	2, 15
<i>City of Minneapolis v. Wurtele</i> , 291 N.W.2d 386 (Minn. 1980)	2, 3, 4, 15
<i>Eighth & Walnut Corp. v. Public Library of Cincinnati</i> , 57 Ohio App. 2d 137, 385 N.E.2d 1324 (1977)	13, 14
<i>Hous. and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.</i> , 630 N.W.2d 662 (Minn. Ct. App. 2001)	2
<i>Hous. and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.</i> , 641 N.W.2d 885 (Minn. 2002)	7
<i>Hous. and Redevelopment Auth. of the City of St. Paul v. Exxonmobil Oil Corp</i> , No. A05-511, 2006 WL 997699 (Minn. Ct. App. April 18, 2006)	2
<i>In The Matter Of Condemnation By Suburban Hennepin Regional Park District of Certain Lands of the County of Hennepin</i> , 561 N.W.2d 195 (Minn. Ct. App. 1997)	9, 10
<i>Itasca County v. Carpenter</i> , 602 N.W.2d 887 (Minn. Ct. App. 1999)	2
<i>Lundell v. Coop. Power Ass'n</i> , 707 N.W.2d 376 (Minn. 2006)	2
<i>Minnesota Power & Light Co. v. State</i> , 177 Minn. 343, 225 N.W.164 (1929)	6
<i>Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.</i> , 76 Minn. 334, 79 N.W. 315 (1899)	6

<i>Regents of the University of Minnesota v. Chicago & Northwestern Transp. Co.</i> , 552 N.W.2d 578 (Minn. Ct. App. 1996)	3, 5
<i>St. Paul Union Depot Co. v. City of St. Paul</i> , 30 Minn. 359, 15 N.W. 684 (1883)	5
<i>State by Washington Wildlife Preservation, Inc. v. State</i> , 329 N.W.2d 543 (Minn. 1983)	16
<i>State ex rel. Ford Motor Co. v. District Court of Fourth Judicial Dist.</i> , 133 Minn. 221, 158 N.W. 240 (1916)	12, 13, 14
<i>U.S. Dept. of Interior v. 16.03 Acres of Land, More or Less, Located in Rutland, Vt.</i> , 26 F.3d 349 (2d Cir. 1994)	17, 18
<i>Walser Auto Sales, Inc. v. City of Richfield</i> , 635 N.W.2d 391, 395 (Minn. Ct. App. 2001)	15
<i>Williams Pipeline Co. v. Soo Line Railroad Co.</i> , 597 N.W.2d 340 (Minn. Ct. App. 1999)	8

STATUTES

Minn. Stat. § 117.016	12
Minn. Stat. § 117.016, subd. 1	10
Minn. Stat. § 117.042	17
Minn. Stat. § 117.085	7
Minn. Stat. § 117.145	7
Minn. Stat. § 117.175	7
Minn. Stat. § 465.01	10, 15
Minn. Stat. § 85.015	10, 11, 12, 14, 15, 16
Minn. Stat. § 85.015, subd. 1	10
Minn. Stat. §85.015, subd. 1, 13(c), 14(c)	11

OTHER AUTHORITIES

Op. Minn. Att’y Gen. 59A-14 (December 30, 1938).....	12
--	----

ARGUMENT

I. THERE IS NO “PLAN IN PLACE”

The City claims there is a “plan in place” for the trail and that the condemnation is necessary to accomplish “the plan.” City of Granite Falls Brief (hereinafter referred to as “Brief”) at 10-11. The City ignores the uncontested facts:

- The City does not intend to construct a trail over the easement. *A 33.*
- The City has not authorized and does not intend to authorize the expenditure of any money to construct the trail. *A 33.*
- The City does not intend to use its own funds to pay the condemnation award.¹
- If the City acquires the easement, its intention is to convey the easement to the Minnesota Department of Natural Resources (“DNR”). *A 33.*
- The City has had “no contact” with the State relative to the trail. *A 39.*
- DNR has “no current plan to acquire” the trail from the City. *A 41.*
- DNR “is not aware of any proposed or pending legislation regarding funding for the trail or the Minnesota River State Trail.” *A 43.*

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” *A 41-2.* The draft plan merely says the “corridor” or “search

¹ A private group, The Parks and Trails Council of Minnesota, agreed to lend the City, interest free, up to \$75,000 for the purpose of acquiring the right-of-way for the trail, with the loan to be repaid only if and when the right-of-way is conveyed to DNR. *A 22-23.*

area” for the Trail between Wegdahl and Granite Falls would be on the north side of the river. *Fourth Affidavit of Glen Olander-Quamme dated September 22, 2006 ¶ 2 and page 31 of draft plan.*

Given this undisputed evidence, the District Court’s conclusion (*A 61*) and the City’s argument – that there is a “plan in place” – are without foundation.

II. SPECULATIVE PURPOSES DO NOT SHOW NECESSITY

The condemnation in this case is speculative because the land the City seeks to condemn may never be used to build a trail, there is no timetable or other evidence to show a reason to condemn the easement at this time, and there is no practical necessity to put the trail along the railroad mainline right of way where it will interfere with railroad operations.

The City cites several decisions in which condemnations were allowed. Brief at 9-11. *See, Lundell vs. Coop. Power Ass’n*, 707 N.W.2d 376 (Minn. 2006); *City of Duluth v. State*, 390 N.W.2d 757 (Minn. 1986); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980); *Hous. and Redevelopment Auth. of the City of St. Paul v. Exxonmobil Oil Corp*, No. A05-511, 2006 WL 997699 (Minn. Ct. App. April 18, 2006); *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), *aff’d by equally divided court*, 641 N.W.2d 885 (Minn. 2002); *Itasca County v. Carpenter*, 602 N.W.2d 887 (Minn. Ct. App. 1999). In every case cited by the City, either the condemning authority was already using or planned to use the land itself or the condemning authority had a contract in existence under which a private entity had agreed to build on the land.

For example, in *Exxonmobil*, the Housing and Redevelopment Authority of St. Paul sought to condemn land owned by Exxon in order to build housing. Because there was contamination on the site and the efficacy of remediation was uncertain, Exxon argued the public purpose was speculative. The court disagreed and distinguished *Regents of the University of Minnesota v. Chicago & Northwestern Transp. Co.*, 552 N.W.2d 578 (Minn. Ct. App. 1996):

Here, not only has HRA approved a development plan with a specific use for Exxon's land, but also the MPCA has approved HRA's proposed remediation plan, the portions of the plan using land other than Exxon's land are proceeding, and there is no allegation that, if adequate remediation can be achieved, HRA will not use the land for the purpose for which it is being condemned.

2006 WL 997699 *5.

This case presents the opposite situation. The City itself does not intend to build or operate a trail on the easement. The City intends to acquire the easement solely to convey it to DNR. But the City has had "no contact" with DNR concerning the trail. DNR has "no current plan to acquire" the easement from the City, has not agreed to build a trail on the easement, and has no money to do so. There is no evidence that parts of the projected Minnesota River State Trail south of Granite Falls are being built. In fact, given the high cost of building a trail on the land the City seeks to condemn (Brief of Appellant TCW at 8, 18), no trail may ever be built on the easement. Instead, DNR may choose a different specific alignment for the trail.

In *City of Minneapolis v. 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. Here, there has been “no contact” between the City and DNR relative to the trail, much less any agreement that DNR will build a trail on the easement.

In *Wurtele* the court found that was a “concrete financing proposal.” *Id.* at 395. Here there is no financing proposal at all. The City does not intend to use any of its own funds to acquire or build a trail and DNR is “not aware of any proposed or pending legislation regarding funding for the Trail or the Minnesota River Trail” (A 43).

The City also argues that necessity can be based upon a “need in the future” (Brief 10), citing *Chicago Great Western Railway Co. v. Jesse*, 249 Minn. 324, 82 N.W.2d 227 (1957). However, the court’s actual language in *Jesse* was, “[N]ecessity in this connection may mean in the **near future**. See, *City of Duluth v. Duluth St. Ry. Co.*, 179 Minn. 548, 229 N.W. 883.” *Id.* at 330, 82 N.W.2d 232 (emphasis supplied).

In *City of Duluth v. Duluth St. Ry. Co.*, the Supreme Court said, “‘Necessity’ as here used, 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 . . .**” *Id.* at 551, 229 N.W. 884 (citations omitted, emphasis supplied). In this case, there was no evidence that DNR has decided to build a trail on the easement, much less that it plans to do so in the near future.

The City is not going to build a trail or spend any of its own money to acquire it. The City has not even had contact with DNR, much less obtained an agreement to build a trail on the easement. DNR has no plan to acquire the easement and DNR has no funds

to build a trail on the easement. DNR is still studying where to build the Minnesota River Trail; it has not decided that the land the City seeks to condemn is where the trail should be built. There is no “urgent public convenience” as required by *City of Duluth v. Duluth St. Ry. Co.* The City is attempting to use its condemnation power to obtain land in the hope that DNR will someday decide to build a trail on the easement. In *Regents* the court held this type of stockpiling or “landbanking” does not satisfy the constitutional and statutory requirements of necessity.

III. THE CITY FAILED TO SHOW PRACTICAL NECESSITY TO CONDEMN RAILROAD PROPERTY

Minnesota law has long recognized that railroad land is a public use and that where another entity seeks to condemn railroad property, the condemnation may proceed only if the proposed use is not inconsistent with railroad operations. *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359, 15 N.W. 684 (1883), held the City of St. Paul could not condemn part of a railroad depot to create a street because the railroad was already using the depot grounds for a public purpose; the two uses were “necessarily inconsistent.” *Id.* at 364, 15 N.W. 687.

It is also the general rule that **a general statutory authority in a charter cannot be presumed to authorize the taking of . . . land within the lines of the location of the railroad and parallel with the track**, for the purposes of a street or highway, for the reason that it has already been set apart for a specific public use under the sanction of law, and it cannot, therefore, be diverted to another public purpose, except the power be expressly given or necessarily implied. And there can ordinarily be no necessary implications of the existence of such authority from the grant of a general statutory power to lay out streets, because there is ample authority to appropriate other lands, and especially where, as in this case, the public necessity for the particular street is not demonstrated.

Id. at 363, 15 N.W. 686.

“There is a distinction between power to merely cross a railway or other line and authority to construct a railway or line longitudinally upon or through property already devoted to a public use.” *Minnesota Power & Light Co. v. State*, 177 Minn. 343, 347, 225 N.W. 164, 165-66 (1929).

In *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334, 79 N.W. 315 (1899), the court said that to allow condemnation of railroad land there must be “a **practical necessity** for the exercise of eminent domain over property already devoted to a public use.” *Id.* at 347, 79 N.W. 318.

The City argues that a recreational trail will not substantially interfere with the railroad’s use of its property and that there has been no allegation that the trail would make railroad operations impossible; “no such allegations have been made in this case.” Brief 12. The City’s assertion that there has been no allegation that the trail will make railroad operations impossible is inaccurate. Counsel raised these issues on several occasions in the District Court. *T 23, 24-5, 34-6, 37-40, 42-49, 101.*

In its opening brief, TCW outlined some of the engineering and safety issues. They include the failure of the SEH and SRF plans to show how soil erosion and mudslides onto TCW’s tracks would be prevented, TCW’s need to use the full width of its land to clear wreckage from derailments², and the likelihood that altering the 13

² Along most of the property at issue, TCW owns a 100-foot wide right-of-way with the tracks located in the middle. In the event of a derailment at up to 30 m.p.h., cars and/or locomotives may end up more than 25 feet from the track. The cranes, Caterpillars, and other heavy equipment needed to clear the wreckage need room to work.

ravines and watercourses along the railroad tracks will diminish ditch capacity and direct more water to the track bed, destabilizing it. Brief of Appellant TCW at 23-24. If the rail line is blocked by a mudslide, derailments cannot be cleared, or the track bed is destabilized so it cannot be used, railroad operations will be impossible.

The City argues that TCW and BNSF failed to ask for an evidentiary hearing. Brief 15. In its motion for summary judgment, TCW said that if its motion for summary judgment was not granted, the conflict between railroad operations and the construction, maintenance and use of the trail will require an evidentiary hearing including “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.2.³ BNSF similarly stated in its motion for summary judgment that if the motion was denied the hearing on the Amended Petition should be continued to a later date. *BNSF Railway Company’s Memorandum in Support of Motion for Summary Judgment* at 11. At the hearing on the motions for summary judgment, the City even

³ The City argues that the failure of the District Court to hold an evidentiary hearing and allow TCW to present additional evidence of the conflict between railroad operations and the trail will be cured in the future because “there will be an opportunity for Appellants to address their concerns following the commissioner’s report.” Brief 15-16. However, if the order is affirmed, the commissioners will hold hearings and make an award of damages. Minn. Stat. § 117.085. Only the amount of the award can be appealed to the District Court for a jury trial. Minn. Stat. § 117.145. “The court or jury trying the case shall reassess the damages de novo” Minn. Stat. § 117.175. The statutes governing condemnation do not provide for the order granting the petition to be reviewed again by the District Court. The case cited by the City (Brief 15), *Hous. and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002), held transfer of title did not moot an appeal of the public purpose issue. The case does not give any indication TCW could somehow obtain review by this court a second time by appealing the eventual judgment.

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

Without explanation, the District Court denied the motions and entered the order appointing commissioners without affording TCW an evidentiary hearing or making any finding whether the trail is inconsistent with the railroad's use of its land. *Compare, Williams Pipeline Co. v. Soo Line Railroad Co.*, 597 N.W.2d 340 (Minn. Ct. App. 1999) (General authority to condemn was insufficient to condemn railroad land for a petroleum pipeline; court made extensive findings of the inconsistency of the proposed pipeline use with the current use by the railroad).

The City argues "there has been no showing that the recreational trail with [sic] render railroad operations impossible[,] [and] an evidentiary hearing is not warranted." Brief 15. However, the purpose of an evidentiary hearing is to present evidence as to the conflict between a trail and railroad operations. The City's argument is illogical since it would deny a hearing where such evidence of the conflict can be presented.

The City argues that its petition did not seek an easement which would interfere with the railroad and claims "it does not seek permission to construct the recreational path without due regard for TCW's use of the rail line." Brief at 12. However, the amended petition sought a permanent easement along and across TCW's 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 the grasses, shrubs, trees, 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 (emphasis supplied). There is nothing in this language that restricts construction of a trail in any way. The SEH cross section and topography sheets show building the trail on the easement would require excavations, removal of trees and vegetation, constructing retaining walls and culverts, filling over a dozen ravines, cutting off the tops of hills, and altering the slope along thousands of feet of railroad line.⁴ The SRF or SEH studies do not show any consideration for the integrity of the railroad tracks.

The District Court’s order granting the petition did not restrict the City in constructing the trail. The order did not impose any conditions upon the taking; it granted the petition and ordered the appointment of commissioners. The court below thus failed to examine the issue of the consistency of a trail with railroad operations or make any findings. In the absence of an express finding that there was “practical necessity” for using railroad property, the condemnation cannot be allowed.

The City cites *In the Matter Of Condemnation By Suburban Hennepin Regional Park District of Certain Lands of the County of Hennepin*, 561 N.W.2d 195 (Minn. Ct. App. 1997). Brief at 12. That case involved a spur line where trains operated only two days a week at a speed of 5 to 10 m.p.h. This case, by contrast, involves TCW’s mainline where trains operate daily with a speed limit of 30 m.p.h. Moreover, the terrain in Golden Valley and Plymouth (where the spur line was located) is far different from the

⁴ *Attachment 3 to Affidavit of Geoffrey Hathaway dated March 15, 2006.*

rough country along the bottom lands adjacent to the Minnesota River involved in this case.⁵ Nothing in the court's opinion in *Suburban Hennepin Regional Park* shows there were any of the type of engineering issues involved in that case as there are here.

IV. THERE IS NO AUTHORIZED PURPOSE FOR THIS CONDEMNATION

The statute delegating the power of eminent domain to municipalities, Minn. Stat. § 465.01, says a city may acquire private property for "any purpose for which it is authorized by law." The District Court recognized this delegation statute requires an enabling statute and held Minn. Stat. § 117.016, subd. 1 supplied that authority. *A 59*. In its opening brief, TCW explained why § 117.016, subd. 1 does not apply to this condemnation. Brief of Appellant TCW at 29-31. The City does not even mention the issue, conceding that the District Court's reliance upon § 117.016, subd. 1 was error.

Instead, the City claims that its condemnation of the easement and possible transfer to DNR is authorized by Minn. Stat. § 85.015, subd. 22. Brief at 11, 14. The City's argument ignores the plain language of that statute.

The statute directs the Commissioner of DNR to "establish, develop, maintain, and operate the trails designated in this section." Minn. Stat. § 85.015, subd. 1. The statute then identifies 24 trails. § 85.015, subd. 2-24. The Minnesota River Trail involved here is the subject of subdivision 22. The plain language of the statute makes the trails designated projects of the State of Minnesota. The responsibility to establish the trails is that of the Commissioner of DNR, not local units of government. The statute only mentions units of

⁵ The topography sheets prepared by SEH show the elevations. *Attachment 3 to Affidavit of Geoffrey Hathaway dated March 15, 2006*.

local government concerning three of the trails. The Commissioner is given power to contract with local governments in creating the Countryview Trail and is directed to “cooperate” with local units of government “whenever feasible” in establishing the Minnesota Valley Trail and the Luce Line Trail. § 85.015, subd. 3, 6, 10. As to the Minnesota River Trail involved in this case, the statute merely says it “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.” § 85.015, subd. 22. The statute does not give any role or responsibility to the City of Granite Falls or any other city or local unit of government. The statute does not even require the Commissioner to “cooperate” with a local government unit in establishing or developing the Minnesota River Trail.

The State trail system is quite plainly a state, rather than a local municipal project. It would make little sense to have local units of government responsible to establish the trails since that would lead to a patchwork of unconnected trails with different, uncoordinated user characteristics.

Section 85.015 directs the Commissioner to acquire land for the trails by “gift or purchase.” The statute gives the Commissioner the power of eminent domain only for two trails, the Arrowhead Region Trail and the Gateway Trail. Minn. Stat. §85.015, subd. 1, 13(c), 14(c). The decision by the legislature to restrict the use of the power of eminent domain to only two of the trails shows that the creation of the state trail system is generally not sufficiently imperative, urgent, or compelling to allow DNR to use the power of eminent domain.

The City argues that there is nothing barring the State from acquiring property from an entity which acquires the property by eminent domain. It asserts “this approach is used in many state projects, forcing the local municipality to shoulder some of the burden of moving a project forward.” Brief at 14. The City gives no citation to any statute allowing this or even a single example of what “state projects” entail local governments condemning property to turn it over to the state. While Minn. Stat. § 117.016 allows the state and any of its political subdivisions to enter into agreements to condemn land where each needs different parts of the same tract of land, that statute does not apply here. See Brief of Appellant TCW at 31. The simple fact is that § 85.015 does not provide any role for the City in obtaining land for the Minnesota River Trail. Section 85.015 is not an enabling statute to allow the City to use the power of eminent domain in this case.

Most of the land the City seeks to condemn in this case is outside the boundaries of the City. This is a reason to carefully scrutinize the City’s authority since the political checks and balances – the power to vote – are absent.

The City’s claim that it would “shoulder some of the burden” (Brief 14) overlooks the fact that the City has not allocated any of its own funds to condemn the easement. Instead, the City was given an interest-free loan by a private group to be repaid only in the event that DNR purchases the land from the City. The City’s “burden” is pretty light.

The City also criticizes the significance of the Minnesota Attorney General opinion. Op. Minn. Att’y Gen. 59A-14 (December 30, 1938). Brief 13. Minnesota law requires careful examination of a condemnor’s authority. In *State ex rel. Ford Motor Co. v. District Court of Fourth Judicial Dist.*, 133 Minn. 221, 158 N.W. 240 (1916), the City

of Minneapolis sought to condemn land, purportedly to establish an alley. Ford contended the City was not taking its property for alley purposes, but instead was condemning a right of way for a Great Northern railway switching track. The Supreme Court reversed the condemnation, finding that the City was not authorized to use its condemnation power. "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. The court also said, "[I]t is the duty of the courts to intervene for the protection of the property owner whenever it clearly appears that under the guise of taking his property for a proper purpose, it is in fact being taken for an improper purpose." *Id.* at 227, 158 N.W. 243.

In *Eighth & Walnut Corp. v. Public Library of Cincinnati*, 57 Ohio App.2d 137, 385 N.E.2d 1324 (1977), the county library, which did not have the power of eminent domain, entered into a contract with the City of Cincinnati in which the City agreed to act as the library's agent to condemn land and transfer it to the library. The court said,

It is true that instances occur where the legislature of this state has authorized a combination of political entities to concur in condemning property for public purposes. Examples have included School district public libraries, operated by one board of trustees but with condemnation authority vested in another, and agreements for joint construction between cities or a city and county. We find no such statutory authority authorizing powers of eminent domain for the joint venture at point here, and none, we conclude, may be assumed by inference. We, therefore, hold that the trial court erred in . . . granting summary judgment in favor of the defendants, since these enactments provide no grant of power to municipalities to appropriate property, directly or indirectly, for the purposes of a County free public library.

Id. at 140, 385 N.E.2d 1327 (citations and footnotes omitted). The court went on to hold

there was a genuine issue of fact as to whether the city had power to condemn the property to further its urban renewal plan. If the condemnation was for the purpose of accommodating the library's desire to expand, a declaratory judgment against the condemnation would be appropriate. "The power to condemn property is not alienable, and may not be lent by a condemning authority to others no matter how laudable the objective or result may be." *Id.* at 148, 385 N.E.2d 1331. The sole authority cited was *State ex rel. Ford Motor Co. v. District Court of Fourth Judicial Dist.*

Eighth & Walnut is directly on point. The City of Cincinnati, which possessed the power of eminent domain, was attempting to condemn property and transfer it to the library, a public entity which did not have the power of eminent domain. Here the City is trying to condemn land and transfer it to DNR, which does not have the power of eminent domain with respect to the Minnesota River Trail. If this is allowed, the limitations established by the legislature in Minn. Stat. § 85.015 on DNR's use of eminent domain will be evaded.

V. THIS CASE IS NOT THE USUAL CONDEMNATION BY A CITY

Amicus League of Minnesota Cities raises several points which emphasize that this condemnation is for a use that is uncertain, not imminent, and which the City has no ability to achieve on its own.

Amicus points out that cities have the legal authority to establish recreational facilities such as trails. Brief of Amicus League of Minnesota Cities (hereinafter "Amicus Brief") 5-6. However, the City has no intention to build or operate a trail and has no plan to spend any of its own funds to condemn the land or construct a trail. The general statute

authorizing cities to use the power of eminent domain, Minn. Stat. § 465.01, requires an enabling statute authorizing the municipal purpose. As pointed out above, the statute creating the state trail system, Minn. Stat. § 85.015, does not provide any role for the City to play in creating the Minnesota River Trail.

While Amicus claims cities in Minnesota have “created numerous recreational trails” (Amicus Brief 5), it cites no report or other evidence of a city using the power of eminent domain to do so. It would be a very rare case for a city to use the power of eminent domain to condemn land **outside its boundaries** for a recreational trail.

Amicus also points out that Minnesota courts have upheld cities transferring condemned property. Amicus Brief 6-7. However, the cases allowing cities to condemn property and transfer it to a private entity which did not have the power of eminent domain all involved a written agreement between the City and the private entity, allowing the city to control the use of the land and ensure the project was built. *See, e.g., City of Duluth v. State*, 390 N.W.2d 757, 761 (Minn. 1986) (Duluth authorized development agreement for construction of papermill and created a tax increment financing district); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 390 (Minn. 1980) (City approved a development plan and entered into a development contract with Oxford); *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, 395 (Minn. Ct. App. 2001), *aff'd by equally divided court*, 644 N.W.2d 425 (Minn. 2002) (Richfield created a tax increment financing district and entered into an agreement with Best Buy to build a 1.5 million square foot office facility before condemnation proceedings were begun). By contrast, here the City has no agreement with DNR to build a trail on the land and has no control

over whether, if ever, DNR may ultimately at some future date decide to use the land to build a trail and obtain funds to do so.

Amicus cites no cases allowing a public entity which has the power of eminent domain to condemn land for the purpose of transferring it to another public entity which does not have the power of eminent domain. That is the case here, where the City is attempting an end run around the provisions of § 85.015 which restrict DNR from using the power of eminent domain to establish most trails, including this one. Evading statutory restrictions is not the type of “cooperation between two or more public entities” (Amicus Brief 7) that can be allowed.

VI. THE CITY’S FAILURE TO COMPLY WITH § 117.036 REQUIRED DISMISSAL OF THE PETITION

The City fails to provide any convincing reason to hold Minn. Stat. § 117.036 does not apply. The plain language of the statute refutes its argument that the statute only applies to “public mass transportation” (Brief 4); that phrase does not appear in the statute. It applies to “the acquisition of property for public highways, streets, roads, alleys, airports, mass transit facilities, or for other transportation facilities or purposes.” The proposed trail is plainly a transportation facility. *See, State by Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 547 (Minn. 1983) (abandoned railroad right-of-way used by hikers, bikers, skiers, and horseback riders was used for transportation).

The District Court denied the motion to dismiss for failure to comply with § 117.036 on the ground that preparation of an appraisal after the hearing on the motions to dismiss was harmless error. *A 60*. That reasoning means condemning authorities will

almost always be excused from complying with the statute since an appraisal is required to do a “quick take” under Minn. Stat. § 117.042.

The District Court did not address the City’s failure to comply with the negotiation requirements of §117.036. The City’s chief argument is that negotiation would have been futile. Brief 6. The District Court made no such finding. The affidavits of Dorian Grilley and Geoffrey Hathaway cited by the City disclose that neither was appointed a representative or agent of the City to negotiate on behalf of the City. The City adopted its resolution in December 2003, which resolution authorized an attorney to negotiate with TCW and BNSF Railway Company, not Mr. Grilley or Mr. Hathaway. *A* 4. Following a meeting in May 2005 after the initial petition was filed, counsel for the City wrote a letter stating that the City would “provide further detail and information regarding the proposed trail project and that a meeting will then be set to discuss and see if any other issues can be resolved.” *Letter dated May 4, 2005 from Kevin K. Stroup, attached to the Affidavit of Thomas V. Seifert dated February 28, 2006.* However, no telephone calls, letters, or communications of any sort took place; instead, the City filed the amended petition in February 2006 without any notice to TCW. *Id.* No one from the City even attempted to contact counsel for TCW or TCW to negotiate acquisition of the property. *Id.*; *Affidavit of Mark Wegner dated March 1, 2006.*

U.S. Dept. of Interior v. 16.03 Acres of Land, More or Less, Located in Rutland, Vt., 26 F.3d 349 (2d Cir. 1994), a case cited by the City (Brief 9), described the requirement of negotiation under federal law as a condition precedent to commencing a condemnation for a recreational trail:

The first restriction created by § 1246(g) is that the Secretary must enter into land acquisition negotiations before exercising his eminent domain powers. The inclusion of the term “only” following the grant of condemnation authority effectively makes land acquisition negotiations a condition precedent to the exercise of that authority. . . . (“[T]he expectation of the committee is that eminent domain will continue to be used as a tool of last resort for the Trail” after land acquisition negotiations have failed.). The Secretary is simply not free to invoke his eminent domain authority without first attempting to purchase the land in question. The fact that the statute gives the Secretary discretion in deciding when “all reasonable efforts to acquire ... lands or interests therein by negotiation have failed” does not alter the statute's mandate that the Secretary enter into land acquisition negotiations before exercising his eminent domain powers.... Despite this discretion, a court could properly conclude the Secretary acted without authority if the evidence presented demonstrated the Secretary either never attempted to negotiate with a landowner or negotiated in such bad faith that he effectively failed to satisfy the negotiation condition before condemning the property.

Id. at 357 (citation omitted).

The City’s counsel promised in writing that he would communicate and schedule a meeting but never did so, despite the passage of over eight months. The City has not established that negotiation with TCW would have been futile, especially in light of the engineering and safety issues. The failure to comply with the negotiation requirements of the statute is unexcused. The District Court should have granted the motion to dismiss.

CONCLUSION

Condemning authorities have broad powers, and courts generally give great deference to the exercise of those powers. But there are limits on what actions condemning authorities can take, limits found in the Constitution, the enabling statutes, and case law. Here the condemning authority failed to follow the statutes that it claims authorize it to act. For this reason alone, its actions should be rejected. But there are

deeper and more significant flaws in the City's actions, which seek to acquire land not so the City itself can build a trail, but so *if at some point in the future* the State decides to build a trail, and *if part of that trail is to be located on the land the City seeks to condemn*, and *if the State has secured funds* to purchase and build the trail, then the City will transfer the land to the State. It is hard to imagine a more speculative and inappropriate use of the condemnation power, especially where there is no practical necessity for placing the trail on railroad property. The City's goal is to evade the statutory restrictions on DNR's use of the power of eminent domain.

The order of the district court should be reversed, and the case remanded with instructions to dismiss the petition. If the petition is allowed to proceed, then there must be an evidentiary hearing to determine if the proposed condemnation will unduly interfere with the railroad's use of its property.

Respectfully submitted,

Dated: July 13, 2007

HEAD, SEIFERT & VANDER WEIDE

By 
Thomas V. Seifert, #98863

Attorneys for Twin Cities & Western Railroad
Company
333 South Seventh Street, Suite 1140
Minneapolis, MN 55402
Telephone: 612-339-1601
Fax: 612-339-3372
E-mail: tseifert@hsvlaw.com

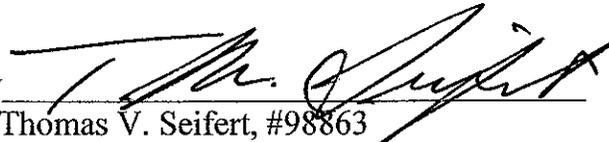
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

Proportional serif font, 13-point or larger.

The length of this brief is 5,852 words. This brief was prepared using Microsoft Word 2000.

By


Thomas V. Seifert, #98863

Attorneys for Twin Cities & Western Railroad
Company

333 South Seventh Street, Suite 1140

Minneapolis, MN 55402

Telephone: 612-339-1601

Fax: 612-339-3372

E-mail: tseifert@hsvwlaw.com