

Case No. A08-1405

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Mark O. Kvam, as Trustee of the Mark O. Kvam Revocable Trust; Phillip I. Kvam; Spouse of Phillip I. Kvam, if any; Kvam Limited Partnership, a limited partnership under the laws of Minnesota; U.S. Bank, National Association, fka First Trust Company, as Trustee of Trust B Created by the Last Will and Testament of Andrew Kvam; Ivan P. Kvam, as Trustee of Trust B Created by the Last Will and Testament of Andrew Kvam; Mark Kvam, aka Mark O. Kvam; Spouse of Mark Kvam, aka Mark O. Kvam, if any; Thomas A. Kvam, aka Thomas Andrew Kvam; and Spouse of Thomas A. Kvam, aka Thomas Andrew Kvam, if any,

Appellants,

v.

City of Willmar, a municipal corporation under Minnesota Law,

Respondent.

APPELLANTS' BRIEF AND APPENDIX

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

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ISSUE PRESENTED

Did the District Court err in allowing the City of Willmar to take a fee simple interest in property when an easement would have been sufficient for the purpose and need of a sanitary sewer line?

I. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

Phillip, Mark and Tom Kvam are brothers who own about 4,000 acres of property in Kandiyohi County. Each of the brothers owns property separately and together. In addition, they are beneficiaries of the Andrew Kvam Trust that owns property in the same area. Phillip Kvam testified that he and his family have purchased various pieces of farmland through the years in order to develop a large piece of land to farm as one unit. (Feb. 28 Tr., Kvam, pgs. 41-45.) The reason for this was to have an efficient farming operation.

For several years, the City of Wilmar planned a wastewater treatment plant expansion to accommodate growing demands on the existing plant and to accommodate industrial waste from the local Jennie-O plant. (Jan. 17 Tr., Kvam, pgs 3-5.) In addition to the treatment plant, the plans required a large interception sewer to be placed within underground sanitary sewer right of way easement running across several miles of farmland outside the City. (Id.) Prior to initiating condemnation proceedings, the City demanded access to the Kvam properties to conduct testing on croplands. (Exhibit G-G8.) Phillip Kvam, on behalf of the Kvam properties, insisted that the City provide

reassurance regarding possible damage, or that access be conducted under the judicial supervision contemplated by Minnesota Statutes Section 117.041. (Exhibit J.) The City concluded that Kvam's position regarding pre-condemnation access was unreasonable, and responded by deciding to take the Kvam properties land in fee, instead, thus cutting a broad strip of city-owned property up to 200 feet in width through the Kvam properties and dividing and isolating fields and turning the Kvams' farming practices on its head.

The City commenced quick-take proceedings proposing to pay the Kvams the same amount for the fee, as it has originally proposed to pay for an underground easement based on its conclusion that taking all of the Kvams' rights in the property would damage them no more than would taking an easement that would allow them to farm. (Exhibit O.) The Kvams challenged only the extent of the acquisition sought and whether a fee simple title was necessary for the project. Although seeming to find that the Kvams had proposed to provide the City with an easement that addressed all of the City's legitimate needs, nonetheless, on June 13, 2008, Judge David L. Mennis granted the City's petition for immediate possession and transfer of title in fee simple absolute to the Right of Way Parcels. (Order.) We commenced this appeal to challenge the City's right to take the fee through prime farmland fields for an underground sanitary sewer pipe.

B. Facts.

The Kvam farms consist of approximately 4,000 acres in Kandiyohi County. Most of the land is farmed as a unit, in corn or soybeans. The fields are laid out so that farm

equipment and implements which allow rounds as much as one mile long and 120-feet wide are used for more efficient planting, spraying and harvesting. (Feb. 28 Tr., Kvam, pgs. 51-53.) Lying within the assessed areas of several public drainage systems, the fields also utilize an integrated system of tile lines which cross the property that the City proposes to take. (Feb. 28. Tr., Kvam, pgs. 45-46.)

The planned treatment plant is approximately 5.5 miles west of the city limits and the proposed interceptor sewer line would run east to west connecting the existing wastewater system to the new plant. (Jan. 17 Tr., Holmes, pg. 5.) Also, a proposed pressure pipeline that conveys waste water from the production facilities at the Jennie-O Turkey Store would connect to the new waste water treatment facility. (Jan. 17 Tr., Holmes, pg. 5.) As the City considered various locations for proposed sanitary sewer and pressure pipeline utility right of way easements, the Kvams suggested that the City consider alternative locations that would avoid crossing the Kvam properties at all. The Kvams' efforts in this regard were entirely lawful and reasonable and fell entirely within their constitutional rights as citizens to advocate their views. In fact, in order to assist in the project the Kvams offered the City a piece of property where it could put its new waste treatment plant closer to the City of Willmar on County Road 5. (Feb. 28 Tr., Kvam, pg. 64.) In response, the City conducted a study of the alternatives and concluded that the route ultimately adopted, through the Kvam-related farms was the best choice. (Exhibit V.) The Kvams did not, and do not, challenge any decision in the

eminent domain proceedings regarding the location of the project. They have not challenged the public purpose of the sanitary sewer plant or the taking of a right-of-way. They did not engage in attempts to challenge the negative declaration or the need for the environmental impact study, an action customarily used by adversarial opponents utilizing scorched earth tactics to oppose a project.¹ Furthermore, they have not engaged in civil disobedience or in any other way sought to depart from established norms or rules of fair conduct. None of their legal positions have been challenged by the City on Rule 11 grounds, nor could they be.

After deciding on a proposed route, the City of Wilmar authorized its engineer and attorney to proceed to take right of way easements on the preferred route, a route running a considerable distance through the center of the Kvam farms. (Jan. 17 Tr., Holmes, pg. 23.) It cannot seriously be contended that the City or its engineers contemplated taking anything other than a right-of-way easement until the Kvams challenged the City's right to enter their land without judicial supervision. Every action taken by the City throughout demonstrates that the City and its engineers recognized that the project called for and required only easements.

The City's engineer, Donohue and Associates sent out a letter to the various property owners who would potentially be effected by the project, including the Kvams,

¹ We mention these as common actions taken by landowners truly attempting to obstruct a public project in unreasonable manner.

stating that “the City of Willmar may need an easement across your lands...” (Exhibit E; Exhibit G1-G8.) On November 30, 2007, the City submitted its mandatory Environmental Assessment Worksheet (EAW) to the Minnesota Pollution Control Agency, which was the Responsible Governmental Unit (RGU) for determining whether the project had potential for significant environmental effects. One of the central requirements of the EAW is that it must accurately describe the project. This is critical, because the purpose of the EAW is to afford all interested parties and agencies, and especially the RGU (that is the MPCA), an opportunity to assess and comment on the consequences of the proposal and suggest potential alternatives.

The EAW submitted by the City did not mention the possibility that right of way would be taken in fee, and in fact specifically represented that all but the eight acres that would be needed for structures would be returned to farmers so that they could continue cropping the land.² (Exhibit MM at pg. 27.) It is also undisputed that the City never corrected its representation to the Minnesota Pollution Control Agency, and that the

² As explained below at page 25, if the City had been contemplating fee acquisition of a 200 wide strip of land running across thousands of acres of Minnesota prime farmland, the City would have been required to document that fact in its project description and plainly justify in the environmental review Minnesota law protecting agriculture requires that acquisitions preserve agricultural land and conserve its long-term use for the production of food and other agricultural products by: (1) Protection of agricultural land and certain parcels of open space land from conversion to other uses; Minn. Stat. §17.80. Under Chapter 17, a determination of the necessity for the taking of prime farmland must occur either upon reference to the Minnesota Department of Agriculture, or in connection with a Chapter 116D environmental review.

environmental clearance granted to the City rests on its stated intention that the project would not take, or negatively impact more than 10 acres of prime farmland. (Feb. 28 Tr., Holmes, pg. 111.)

To prepare for the potential taking, the City retained an appraiser who conducted a survey of compensation paid in right-of-way takings. (Exhibit BB.) The “appraisal” compared the value of properties with a utility easement to the value of properties with no utility easement.³ It did not even consider properties with strips taken in fee. (Feb. 7 Tr., Holmes, pgs. 54 - 57.) Moreover, the “appraisal” contained no upward adjustment to reflect the taking of a fee, nor support for the conclusion that the two values are the same. No appraisal of possible severance damages to the fields was performed. (Id.)

The City’s decision to take the fee instead arises from, and postdates, a dispute that occurred in March and April of 2007, when the City’s engineer, Donohue and Associates, sent a letter to various property owners, including the Kvams, seeking consent to enter their land to conduct non-environmental field investigations, surveys, appraisals, inspections, soil borings and wetland delineations (Exhibits G1-G8; Exhibit H.) The letter informed the Kvams and other landowners that the work contemplated on their land might cause crop damage and offered to pay for that damage to the extent that it occurred. (Id.) The City’s authority to enter land rests upon Minnesota Statutes Section 117.041

³We call this document an “appraisal”, but it is really a highly limited document prepared by an appraiser for preliminary purposes.

subdivision 1, which authorizes a City to make environmental surveys and examinations “relative to any proceedings under this chapter”, provided that the taking authority does “no unnecessary damage.”⁴

Under the statute, a condemnor has limited authority to enter private lands, without a court order, unless the landowner consents. See Minn. Stat. §117.041. The Kvams exercised their statutory right to require issuance of that Court order. The Kvams had several concerns. First, the City’s letter specifically contemplated that the testing procedures might inflict damage, yet there was no mechanism for resolving the scope and extent of damages. (Feb. 28 Tr., Kvam, pgs. 67-68.) Second, the statute itself appears to contemplate that the entry will occur under the mantle of already initiated eminent domain proceedings, but the City here was seeking entry without initiating those proceedings. Third, the Kvams wanted the protection of a court order establishing the groundrules governing the scope and manner of entry, and accommodating their concerns that the testing not occur in a way that would spread disease. (Id.) On May 21, 2007, the City

⁴ West’s Minnesota Practice Series, Real Estate Law, Section 10.12, describes the authority under this Statute as follows: Minnesota law permits a condemnor to conduct preliminary environmental testing before it makes a commitment to acquire the property. Under the statute, the state or its political subdivisions “may enter property for purposes of investigation, monitoring, testing, surveying, boring, or other similar activities necessary or appropriate to identify” environmental contamination. The state agency or political subdivision determines the necessity of testing by making certain findings by order or resolution. The state agency or political subdivision must then serve notice on the property owner requesting permission to enter the property. If the owner refuses permission, the state agency or political subdivision may apply to the court for an order authorizing the entry and testing.

commenced action to force the Kvams to allow access and testing on their properties. (Exhibit K.) On July 9, 2007 the District Court authorized the City to gain entry to the Kvams' properties. (Jan 17 Tr., Holmes, pg. 26.)

There is not a shred of evidence in the record that the Kvams crossed any boundaries of propriety in exercising their rights under section 117.041. They did not appeal from the Court's order, even though the City was using section 117.041 to conduct non-environmental testing without first initiating condemnation. They did not engage in civil disobedience. They proposed conditions for the testing, and after negotiations, the City and the Kvams agreed to those conditions. (Feb. 28 Tr., Kvam, pgs. 96-97.) At no time during the negotiations, did the City inform the Kvams that their conditions were so onerous, that it intended to demand the taking of a fee. The Kvams fully complied with the Court's order, and the testing proceeded without incident.

It appears that the City took great offense to the Kvams' decision to insist that the City enter their properties using appropriate legal proceedings. (Feb. 7 Tr., Holmes, pgs. 83-84.) After issuance of the Court order, the City proceeded to convert its acquisition plan to a fee rather than an easement. The new taking would no longer allow the Kvams, or any other landowner, for that matter, to farm across large strips of land that ran through their properties. On each side of the strip, landowners would now have to shorten their crop and cultivation rows and turn around at the point of easement. Where previously, the landowner would have retained the fee, and the right to farm, now the City

would retain the fee. Under the new paradigm, the City would grant back to the landowner an easement for the purposes of maintaining the landowner's drain tile network, but any maintenance that occurred must be conducted at the sole discretion of the City engineer. (Exhibit P.)⁵

Although the City was now significantly altering the scope of the taking, it made no effort to change the data on which the proposed taking would now be based. The City reasoned that appraisal of properties subject to fee takings would be required to determine the acquisition price of the fee. (Exhibit BB.) Apparently drawing on experience with the relative acquisition cost of street right of way easements versus the acquisition of the fee for these purposes, the City reasoned that the compensation payable to landowners for taking a 200 foot strip of land down the middle of active farm fields would be essentially the same as the compensation payable for installing an underground utility easement and allowing them to continue perpetually the farming of that land. This conclusion was part of the City's decision authorizing a taking in fee.

The City concluded, without appraisal evidence, that there would be no severance damages to the surrounding lands. (Exhibit BB.) Based on the appraisal data accumulated when the City had proposed to take a utility easement only, the City

⁵ It is somewhat ironic that the City claims the right to construct an easement granting to the City the sole discretion to regulate the way in which the farmer maintains his tile, yet lacks the imagination to envision an easement similarly protecting the City in connection with the landowner's exercise of cropping rights.

concluded that the severance damages to the remaining fields would be zero. (Id.) All of this resulted directly after the Kvams' insistence that their fields should not be subjected to unrestricted testing, and rather, should be subject to the judicial supervision clearly contemplated by Minnesota Statutes Section 117.041.

At trial, Holmes testified that the City concluded that, because the Kvams had exercised their legal right to insist that the City obtain proper authority to enter their lands, that it followed that the Kvams, especially Phillip Kvam, would unreasonably interfere with the City's right of access to the easement once that legal right had been duly acquired in eminent domain proceedings. (Feb. 7 Tr., Holmes, pgs 83-84.) Holmes claimed that the pipeline had to be available on short notice without having to negotiate with the landowners to enter the properties again (Id.) Furthermore, the City claimed that if it acquired the lands in fee simple the City would be less likely to be subjected to claims by the fee owner (e.g., for crop loss, soil contamination, infestation by pests, or other perceived sources of injury). (Exhibit O at p.4.) In short, the City claimed the right to take all of a property owner's rights—the fee—because it allegedly could not devise a mechanism to assure ready access to the pipeline.

As we have said, the City also rested its decision to take a fee rather than an easement, based on the conclusion that the value lost by a farmer when the City takes an easement that allows continued farming is the same as when the farmer loses the right to farm on that same strip of land. (Exhibit O; Feb. 7 Tr., Holmes, pgs. 75-76.) That

conclusion, however, is contradicted by information developed by the City's engineer in connection with the original easement taking (Exhibit X.) In addition, Holmes testified that he would agree that more value would be left to a landowner if he could farm over an easement, than if he had a strip of land he was excluded from. (Feb. 7 Tr., Holmes, pg. 78.)

At trial, Phillip Kvam testified that he and his brothers would be willing to give the City a comprehensive easement for this project. (Feb. 28 Tr., Kvam, pgs. 86-87.) He proposed an easement that would address all of the City's concerns, including maintenance and damage claims. The easement would include rights of entry and re-entry for the City to access the pipeline for maintenance, repair and replacement. (Id.) However, the City argued, and the District Court evidently agreed, that notwithstanding the fact that the proposed easement would evidently meet all of the City's concerns, the City had broad legislative discretion to take the fee to accomplish the objective of installing an underground sanitary sewer pipeline, whether the easement would be sufficient or not. (Order.) We appeal and assert that while the legislative discretion of a municipality is indeed broad, that the City's actions in this case are arbitrary, capricious, unlawful and an abuse of its discretion.

II. ARGUMENT

A. Summary

The City's decision regarding the necessity of taking a fee rather than an easement

in the Kvams' properties should be overturned because it was arbitrary, capricious and unlawful. First, the statute the city was proceeding under did not give the City the authorization to take a fee in the Kvams' properties, but only the right-of-way. The City has been unable to point to any other authority which would gives it the right to take property beyond a right-of-way. The City rests its position on an erroneous belief that it has authority to protect itself from having to deal with a landowner it prefers not to deal with in the future.

Second, the City's reasons for obtaining a fee from the Kvams were based on an improper purpose. The City based its decision on an alleged acrimonious relationship between the Kvams and the City evidenced by the fact that the Kvams refused the City entry upon their lands. Allowing a City to utilize this response to good faith actions taken by a citizen chills the exercise of the citizen's right to address his claims to the Court.

Third, the City's decision to take the fee was arrived at without engaging in the due diligence required by Minnesota Law. It evaded the environmental review contemplated by Chapter 116D and Chapter 17, which seek to prevent unnecessary conversion of Minnesota agricultural land. Here, the City has engaged in an unprecedented taking of the fee through prime farmland, simply to avoid dealing with citizens with whom it disagrees.

The City's decision is marked by indicia of manifest unreliability both in the substantive justification offered for the taking and the manner that the City proceeded in

concluding that the fee was reasonably necessary to fulfill its statutory purposes. The first of these indicia of unreliability is the complete failure of the City and its engineer to advance the suggestion that the taking of a fee would be reasonably necessary during project design. The second of these indicia of unreliability is the failure of the City to include the proposed taking in the project description in its Environmental Assessment Worksheet, and its consequent failure of that review to take into account Minnesota's policy favoring preservation of prime farmland. The third of these indicia of unreliability is the City's summary unsupported determination that the taking of a fee required substantially the same compensation to the landowner as the taking of an easement which would allow the landowner to continue farming as before. The fourth of the indicia of unreliability is the City's summary and unsupported conclusion that it could take up to a 200 foot wide swath of land in fee through a farmer's field without inflicting severance damages to the remaining lands. The fifth of these indicia of unreliability is the fact that the decision arose only after the Kvams exercised their statutory and constitutional right for Court supervision of the proposed entry onto their properties.

B. Taking a fee for underground sanitary sewer purposes represents a major change in practice of monumental significance.

To say that a condemnor has the unrestrained right to take the fee in farm country for underground utilities is a contention of monumental significance when applied to farm country. The City's engineer could not offer a single example where the fee has been taken in order to accommodate an underground sanitary sewer. Granting Cities and

utilities this unrestrained power represents a major expansion of governmental powers, especially when justified by the City's belief that one or more landowners might be difficult to deal with during the condemnation proceedings themselves. We take exception to the suggestion that the conduct of the Kvams was extraordinary or exceptionable. One need only look to the history of truly controversial utility projects, to obtain some perspective as to what landowners might do, when they push the limits and make the actions of a utility really difficult. See Wellstone and Capstar, Powerline: The First Battle of America's Energy War (University of Minnesota Press, 1983). The mere assertion of the right that the government cannot enter your land without a court order, pales in comparison to the kinds of efforts utilized by project opponents who might be characterized as adversarial, obstructionist or difficult.

One need only look to the litany of litigation engendered by the Walser-Best Buy taking to find an example of a landowner that utilized the full panoply of legal remedies and truly run a municipality through a maze of legal obstacles. In re Business Relocation Claims by Walser Auto Sales, Inc., 2005 WL 623554 (Minn.App. Mar 15, 2005); Hous. & Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. App. 2001) (challenge to quick-take and public purpose finding); Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391 (Minn. App. Nov 13, 2001) (review granted); Walser Auto Sales, Inc. v. City of Richfield, 644 N.W.2d 425 (Minn. 2002); Hous. & Redevelopment Auth. ex rel. City of Richfield v. Walser Auto Sales,

Inc., 641 N.W.2d 885 (Minn. Apr 18, 2002) (NO. C8-01-309), rehearing denied (May 22, 2002); certiorari denied by Walser v. Hous. and Redevelopment Auth. for the City of Richfield, 537 U.S. 974 (2002); Walser Auto Sales, Inc. v. Best Buy Co., Inc., 2002 WL 172025 (challenge to denial of contested case for Best Buy's Indirect Source Permit).⁶

The City of Wilmar has added a new arrow to the quiver of powers available to condemning authorities: the ability to take the fee, instead of an easement, from farmers deemed unduly concerned with protecting their legal rights and their farms.⁷

Nor is it a small matter to suggest, as the City of Wilmar seems to do, that having been granted the power to take land for a right-of-way, it may convert that right into the right to take the fee, simply to avoid possible future controversies with the fee holder. Utility easements crisscross rural Minnesota, from drainage easements under Chapter 103E, to power line easements, to communication easements of various kinds, to natural gas and petroleum easements. There are drainage easements, power line easements and natural gas and petroleum easements. Taking these in fee, instead of a right-of-way, would destroy agriculture.

A recent work on sustainable landscape construction points out that "many modern

⁶ See also In re Agassiz Valley Water Management Project, 2004 WL 1615198 (Minn.App.) (four years of litigation challenging public purpose, including four dispositive motions and two interlocutory appeals to the Court of Appeals).

⁷ We cast no aspersions whatsoever on the motivations or actions of Walser or any other landowner. Our point is merely to compare the relatively timid approach taken by Kvam to landowners who are fully engaged in utilizing every possible lever to battle a taking.

landscapes are crisscrossed with buried and overhead utilities. Thompson & Sorvig, Sustainable Landscape Construction, (Island Press, 200) page 36. "Although some of these systems are invisible, constructing and maintaining them seriously alters the landscapes through which they pass." Id. The authors continue pointing out that "according to the Edison Electric Institute, no one keeps national records of the total lengths or land area occupied by utility easements." Id. However, the California utility Pacific Gas and Electric, as a single example:

has 14,000 miles of electrical transmission lines. A 50-foot wide easement uses about 6 acres per mile. At this common width, PG&E's transmission lines alone could require as much as 80,000 acres. Add to this the other types of utilities, and multiply it across the continent, it is clear that the size and maintenance of utility easements have a major impact on landscape health nationally. Id.

The consequences of taking a fee rather than an easement on agricultural lands for utility purposes are monumental. One consequence is the large amount of acreage that would be instantly taken out of production directly. However, the consequences are not limited to the loss of production from the strip taken in fee. The ability of condemners to cut across fields, severing one field from another creates a major threat to the agricultural community. Phillip Kvam explained that he and his family have purchased various pieces of farmland through the years in order to develop a large piece of land to farm as one unit. (Feb. 28 Tr., Kvam, pgs. 41-45.) The reason for this was to have an efficient farming operation. Once condemning authorities are allowed to break up these fields, it will become more and more difficult for our nation's farmers to efficiently farm their lands.

Minnesota law and public policy are clearly designed to prevent unwarranted interference with agriculture for just this reason. “It is the policy of the state to preserve agricultural land and conserve its long-term use for the production of food and other agricultural products by: (1) Protection of agricultural land and certain parcels of open space land from conversion to other uses....” Minn. Stat. § 17.80, Subd. 1. To this end, the Minnesota Pollution Control was not authorized to issue a permit for a project that adversely impacts more than ten acres of farmland unless either the Department of Agriculture conducts a review to determine that the acquisition is reasonably necessary, or in the alternative, the evaluation is conducted pursuant to Minnesota Chapter 116D. Minn. Stat. § 17.82. The City evaded this review entirely by representing in the EAW that only eight acres of prime farmland would be taken out of production.

C. The City’s decision regarding the necessity of taking a fee must be overturned because it was arbitrary and capricious and in violation of law.

The review of a taking for eminent domain follows a customary decision tree. The first question is whether the condemnor is taking for a purpose recognized in its applicable authorizing statute. For example, a Housing and Redevelopment Authority could not take land to build a city street, unless in conjunction with a project that falls within the Authority’s statutory redevelopment mission, even if the street would otherwise serve a public purpose. Cf. City of Pipestone v. Halbersma, 294 N.W.2d 271, 274 (Minn. 1980) (citing Reilly Tar & Chemical Corp. v. City of St. Louis Park, 121

N.W.2d 393, 397 (1963)). If the manner and purpose of taking is consistent with statutory authority, then there remains the question whether the condemnor's authority has been exercised to take property that is reasonably necessary for a valid public purpose. In the absence of special circumstances demonstrating bad faith, a condemnor's decision is regarded as legislative in nature, and entitled to great deference. City of Duluth v. State, 390 N.W.2d 757, 764 (Minn. 1986). Even though great weight is given to the condemning authority's determination, courts are "reluctant to surrender their right to prevent an abuse of the discretion delegated by the legislature by an attempted appropriation of land in utter disregard of the public necessity of its use." Housing & Redevelopment Auth. v. Minneapolis Metropolitan Co., 104 N.W.2d 864, 874 (1960)). The condemning authority's actions are "manifestly arbitrary or unreasonable where they are taken capriciously, irrationally, and without basis in law or under conditions which do not authorize or permit the exercise of the asserted power." City of Pipestone, 294 N.W.2d at 273. Courts will presume that property taken for eminent domain purposes are stated in the condemnation proceeding. Housing & Redevelopment Auth., 104 N.W.2d at 874. However, the presumption is not final and courts will intervene for the landowner's protection if it appears that under the guise of taking the property for a proper purpose instead it has been taken for an improper purpose. Id.

Despite the City's evident conviction that the Kvams, especially Phillip Kvam, were unreasonable, the Kvams have never challenged the public purpose or necessity of

this project, nor have they argued that the City shouldn't take a right of way for that purpose. If one reads the City's argument to the District Court in support of the taking, one would be led to the conviction that the Kvams forced the City to prove that a waste water treatment plant does not serve a public purpose. The Kvams did not demand that the City prove this, and the City's extensive argument to the District Court to that effect was not compelled by any action taken by the Kvams. The issue in this case is not whether the City of Wilmar needs a waste water treatment plant, nor whether it can take a right-of-way, but whether the City was justified in converting the scope of its taking from easement to fee after the Kvams insisted on having a court order to govern the City's entry onto private lands.

The City provided the Court with the statutory authority that plainly grants it the power to take a right-of-way for sanitary sewer. Again, we have never contended that the City lacks authority to take a right-of-way, nor have we challenged the City's broad legislative authority to locate its right-of-way in a manner subject to the lowest level of judicial review. The City's authority to take a right-of-way rests on Minnesota Statutes Section 465.01, which states as follows:

All cities may exercise the power 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 and may exercise the power of eminent domain for the purpose of acquiring a right-of-way for sewerage or drainage purposes and an outlet for sewerage or drainage within or without the corporate limits thereof. Minn. Stat. § 465.01 (2007) (emphasis added).

This statute explains the city's authority to take a right-of-way easement, but it does not provide authority to take the fee. The City must look to some other statutory authority if it wants to justify its decision to take beyond the fee, and it is our position that the desire to refrain from dealing with citizens who enforce their statutory and 4th and 5th Amendment rights is not a valid public purpose authorized by any statute.

A "right-of-way" is defined as "1. the right to pass through property owned by another. A right-of-way may be established by contract, by longstanding usage, or by public authority. 4. The strip of land subject to a nonowner's right to pass through."

Blacks Law Dictionary (West 2004). Furthermore, the Minnesota Supreme Court has held that:

A right-of-way is an easement only and a conveyance thereof is not a conveyance of land itself. In its strict meaning a right-of-way means the right to pass over another's land. It is only an easement and the grantee requires only the right to a reasonable and usual enjoyment thereof. Minneapolis Athletic Club v. Cohler, 177 N.W.2d 786, 789 (1970).

A right of way is to be distinguished between an ownership in "fee simple," which is defined as "an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs." Blacks Law Dictionary (West 2004). Because a "right-of-way" is the right to pass over another's land only it cannot be found that it also includes the right to hold an entire interest in land. Thus, a right-of-way is not a fee.

One has only to look at a variety of other statutes which express the right to take

more broadly, implying the ability to take the fee. For example, “a municipal gas agency may acquire all real or personal property that it deems necessary for carrying out the purpose of sections 453A.01 to 453A.12, whether in fee simple absolute or a lesser interest, by condemnation and the exercise of eminent domain.” Minn. Stat. § 453A.06 (2007) (emphasis added). Also, when acquiring land for roadway purposes, “the commissioner is authorized to acquire by purchase, gift or by eminent domain proceedings as provided by law, in fee or such lesser estate as the commissioner deems necessary, all lands and properties necessary in preserving future trunk highway corridors . . .” Minn. Stat. §161.20, Subd. 2 (2007) (emphasis added). It is doubtful that the legislature would have used the term “right of way” in connection with Chapter 465, if it had intended to allow condemnors to take the fee for underground easements. The Legislature knew how to manifest its intent in giving certain municipal agencies the specific power to take a fee for eminent domain purposes. Because it chose to exclude the term “fee” from section 465.01, it can be concluded that the Legislature did not want to give the condemning authority the specific authority to take a fee for sewerage purposes.

Therefore, because the right to take a fee is not expressly granted or implicated by the statute, the City is limited to what is necessary to achieve the public purpose of its sewer line and nothing greater. Piche v. Indep. Sch. Dist. No. 621, 634 N.W.3d 193, 199 (Minn. App. 2001) (citing Fairchild v. City of St. Paul, 49 N.W.2d 325, 326 (1891)).The

City's contention that it may take beyond the right-of-way to avoid potential disputes in the future about its use of the right of way is a bootstrap argument designed to create a power that does not otherwise exist.

The legislature's decision to limit municipalities to a taking of right of way only is the statutory embodiment of a basic principle that runs substantially deeper than the statute itself. It rests on the Constitutional principle that the public can only take what it reasonably needs in order to accomplish its public purpose. If the power of eminent domain has been given to a municipality and the statutory delegation of such power limits its authority to situations of actual need, the municipality may not proceed under the statute in absence of such a need. City of Pipestone v. Halbersma, 294 N.W.2d 271, 274 (Minn. 1980) (citing Reilly Tar & Chemical Corp. V. City of St. Louis Park, 121 N.W.2d 393, 397 (1963)). If it does, the courts may hold the municipality's actions "in excess of the statutory authorization and hence invalid." Id. Furthermore, the condemning authority is required to show that the proposed taking is reasonably necessary or convenient for the advancement of a proper purpose. Id. If an easement satisfies the public necessity, it is impermissible to take a fee because the landowner is entitled to keep whatever estate public needs do not require. Nichols Law of Eminent Domain section 9.02[5][A]. Also, if a fee is taken where an easement is adequate this is unjust to the public because the public should not have to pay for more than it needs. Id.

The City lacked the legislative discretion to take a fee in these circumstances, but

even if it had been delegated that discretion, the record shows that this hypothetical discretion has been abused. The City's decision is marked by indicia of manifest unreliability both in the substantive justification offered for the taking and the manner that the City proceeded in concluding that the fee was reasonably necessary to fulfill its statutory purposes.

The first indicia of unreliability is the complete failure of the City and its engineer to advance the suggestion that the taking of a fee would be reasonably necessary during project design. The decision to take the fee was not motivated by project design considerations. In fact, the City's engineer could not offer up a single other circumstance where a sanitary sewer pipe has resulted in the taking of the fee. Here, obtaining a fee was not necessary for the City to construct and maintain sanitary sewer lines. Craig Holmes testified that the City needed a fee in order to access the pipeline on short notice (Feb. 7 Tr., Holmes, pgs. 83-84). However, underground utilities generally involve only temporary and permanent easements and not the acquisition of fee simple title. (Feb. 28 Tr., Voth, pgs. 7-8). The pipelines used for this type of project have a fifty-year design life. (Feb. 28 Tr., Voth, pg.16). Thus, it is not expected that anyone should have to access or replace the pipeline for that amount of time. (Feb. 28 Tr., Voth, pg. 16). Furthermore, Mr. Holmes testified that the blinds occurring in the pressure line would be "unlikely" and the need to actually access the manholes for inspection is even "less likely." (Feb. 28 Tr., Holmes, pgs. 110-111).

In addition, the need for pipeline access, maintenance and repair can be sufficiently addressed by an easement. (Feb. 28 Tr., Voth, pgs. 16-17). Phillip Kvam testified that he and his brothers would be willing to give the City an easement for this project. (Feb. 28 Tr., Kvam, pgs. 86-87). The easement would include rights of entry and re-entry for the City to access the pipeline for maintenance, repair and replacement, limitation on the appellant's surface uses to those consistent with the City's facilities, allowance of above-ground manholes and cleanouts and a limit on future crop damage claims due to the City's entry rights. (Feb. 28 Tr., Kvam, pgs. 86-87). The proposed easement would have been broad enough to enable the City to do what was necessary for the construction and maintenance of its sanitary sewer lines. Because an easement satisfies the public necessity for the City's underground sanitary sewer project the taking of a fee was unnecessary and impermissible.

The second indicia of unreliability is the failure of the City to include the proposed taking in the project description in its Environmental Assessment Worksheet (EAW). The City submitted its project to the Minnesota Pollution Control Agency (MPCA) to conduct an EAW. The EAW provides information on whether there will be any potential environmental effects caused by the proposed project. Also, the public is encouraged to comment on the EAW and its potential effects. The current EAW states:

“Prime Farmland. About 88 acres will be affected by the construction of the proposed WWTF and conveyance system. About 8 acres will be converted to lawns, landscaping, and structures. The remaining cropland will be restored to cropland.” (Exhibit MM at pg. 27.) (Emphasis added).

We have earlier suggested that this representation to the MPCA proves that the decision to take the fee was an afterthought. But the failure to include the proposed intent to take a fee is a procedural flaw that violates the requirement that significant governmental action may not be taken unless the impact of the proposed decision is adequately exposed to a full and comprehensive review. The purposes of the EAW is to force the Responsible Governmental Authority (here the MPCA) and the project proponent to consider the implications of its decision, and to consider alternatives. Many of the mistaken assumptions which led to the City's decision to take the fee, might well have been avoided if the proper review had been conducted. Where an environmental review is conducted pursuant to Section 116D.04, as it was here, the environmental review process is the method by which State policy protecting prime farm land is supervised. One of the purposes of this review is to implement the state policy to preserve agricultural land and conserve its long-term use for the production of food and other agricultural products by:

(1) Protection of agricultural land and certain parcels of open space land from conversion to other uses; Minn. Stat. §17.80, Subd. 1. The MPCA's negative declaration in its environmental review, and the City's decision weighing the alternatives were fundamentally flawed, because the City failed to expose that decision to the primary mechanism which provides data necessary to make that decision.

The third of these indicia of unreliability is the City's summary, unsupported determination that the taking of a fee required substantially the same compensation to the

landowner as the taking of an easement which would allow the landowner to continue farming as before. It is important to keep in mind that the City did not engage in due diligence to arrive at this strange result. The pre-taking limited use appraisals collected only data on properties subject to utility right of way easements and his comparables were thus based on easement acquisitions.

Evidently, the City jumped to the conclusion that compensation for the easement would be substantially equivalent to compensation for the fee, based on its experience, or its engineer's experience in taking fees and easements for street and highway purposes, but the two are totally different. When the City takes a road or highway easement, it is true that technically the landowner retains a fee interest in the property taken. But the rights retained, and the value of those rights, are nominal to say the least. The public retains all possessory rights in the property, and any act by the fee holder that would invade the public's right of way would constitute an impermissible invasion of the public's rights. The fee holder cannot earn income from the fee. He retains an remote expectancy that could potentially return the property in the unlikely event that the condemning authority decides to abandon all future public transportation uses. This contingency ripens only at some unknown time in the distant future, and its present value is virtually worthless. It is for this reason, that the taking of the fee and easement for highway purposes are properly regarded as requiring virtually the same compensation.

But the taking of an underground sewer easement preserves the right to the

landowner to continue to earn virtually the same income from the property as before. He loses a small portion of the bundle of rights associated with fee ownership, but he retains the rights critical to value—the right to earn a farming income in perpetuity. It is, after all, the right to continue receiving this income that gives farmland its primary value, and it is customary when valuing productive farmland to appraise the land using the value discounted future income stream, less production costs, to determine the value of the property for agricultural uses.

The fourth of the indicia of unreliability is the City's summary and unsupported conclusion that it could take up to a 200 foot wide swath of land in fee through a farmer's field without inflicting severance damages to the remaining lands. It defies belief that a City could run a 200 foot wide strip through prime farmland without inflicting damage on the remaining farmlands. The City's conclusion in this regard was made without exposing the assertion to the review process contemplated by Chapter 116D.

D. An alleged acrimonious relationship between the appellant and the City is not a proper reason for taking a fee.

The City's main rationale for taking fee appears to focus primarily on its distaste for dealing with the Kvams, especially Phillip Kvam. An eminent domain proceeding is an action in rem. It is not addressed to the person, but to the nature of the land required. It should come as no surprise that citizens confronted with the possibility that their land would be taken become upset and seek to enforce their rights to object to the manner of the taking, or the compensation being offered. Across Minnesota, takings of agricultural

land draws vociferous opposition, and pre-taking acrimony is common. But this is the first condemnor to make the unprecedented assertion that if farmers get upset when the State proposes to take their land, that the remedy is to take more.

The Kvams have staked out their position using proper means for a proper purpose. Assuming that there was an acrimonious relationship, this cannot be a basis for taking private property. The City, or any condemning authority, cannot use its power of eminent domain to punish a property owner whom it dislikes by taking more property interest than is necessary. The Kvams have used the Courts to advance their position, and their right to do so is protected by the Fourth and First Amendments of the Constitution.

As the Supreme Court explained:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. Eastern Rail Pres. Conf. v. Noerr Motor Frgt. Inc., 365 U.S. 127 (1961)

A long line of cases have made it clear that the right to advance claims in good faith in the Courts is part of the sacred rights of citizenship protected by the First Amendment. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (U.S. 1972). "The right of access to the courts is indeed but one aspect of the right of petition." See Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941). The courts have repeatedly recognized that the Noerr Pennington doctrine prevents the government from seeking to bar access to the courts in this way. See, e.g., Miracle Mile Associates v. City

of Rochester, 617 F.2d 18 (2d Cir 1980). The decision to split up the Kvams' farms by dividing it by a 200 foot wide unfarmable strip of municipal property, because the City does not like the Kvams' efforts to enforce their statutory and constitutional rights is completely unjustified. By basing its need for fee title on the fact that there was an acrimonious relationship, the City is taking the interest for an improper purpose.

III. CONCLUSION

The District Court's ruling that the City of Willmar's decision to take Right of Way Parcels for its project in fee simple would be necessary or convenient for the public purpose should be reversed because the City's decision to take a fee interest rather than an easement was arbitrary and capricious and unlawful.

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Respectfully Submitted,

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