

NO. A08-1405

State of Minnesota
In Court of Appeals

Mark O. Kvam, as Trustee of the
Mark O. Kvam Revocable Trust, et al.,

Appellants,

vs.

The City of Willmar,

Respondent.

RESPONDENT'S BRIEF, ADDENDUM 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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STATEMENT OF THE ISSUES

- I. **Was the trial court's finding – that the taking was reasonably necessary or convenient, and not arbitrary or unreasonable – clearly erroneous?**

The district court found that the City had shown that taking a fee simple was reasonably necessary or convenient to accomplish the public use or public purpose and that the reasons the City cited for the taking were not arbitrary or unreasonable. (A-6-7.)

Apposite Cases:

Lundell v. Cooperative Power Association, 707 N.W.2d 376 (Minn. 2006)
City of New Ulm v. Schultz, 356 N.W.2d 846 (Minn. Ct. App. 1984)
City of Pipestone v. Halbersma, 294 N.W.2d 271, 273 (Minn. 1980)

STATEMENT OF THE CASE

On November 1, 2007, Respondent City of Willmar (“City”) commenced this action under Minnesota Statutes chapter 117, filing a petition to acquire title and possession to certain parcels for the purpose of constructing sewer lines to and from a new City wastewater treatment plant (“Project”). The City sought to acquire title to the parcels needed for the Project in fee simple. Appellants, certain owners whose property was to be condemned, opposed the petition. Appellants concede the public purpose, the public use, and necessity of the City taking some interest in the land for the Project. Appellants contested the City’s condemnation of fee title for the Project, arguing that an easement would suffice and taking the fee was unnecessary. The City twice amended the petition, each amendment reserving easements that increased benefits to the Appellants and increased burdens on the City’s fee simple title.

Contested evidentiary hearings were held in Kandiyohi County District Court on January 17, February 7, and February 28, 2008, the Honorable David L. Mennis, presiding. The district court found that the City had shown that taking the parcels in fee simple was reasonably necessary or convenient to accomplish the public use or public purpose, and that the reasons cited by the City were not arbitrary or unreasonable. Accordingly, the district court issued its findings of fact, conclusions of law, and order approving the Amended Petition, transferring title and possession, and appointing commissioners on June 13, 2008.

STATEMENT OF THE FACTS

I. THE PROJECT

The City intends to construct a new wastewater treatment facility (“WWTF”). (A-2: Findings of Fact, ¶ 2; *see also* RA-2: Holmes Aff., ¶ 3.) The City’s existing wastewater treatment facility is unable to meet pending requirements of the Minnesota Pollution Control Agency (“MPCA”) and is inadequate to meet the projected needs of the City’s sewer service area. (RA-4: Holmes Aff., ¶ 6.) The existing facility uses a treatment technology that has been designated as “failed” by the U.S. Environmental Protection Agency (“EPA”). (*Id.*) The new WWTF site is located approximately 5.5 miles outside the City limits and beyond the City’s existing wastewater sewer system. (RA-3: *Id.*, ¶ 5.) The project includes construction of the WWTF and the interceptor sewers and other conveyancing equipment necessary to convey wastewater generated within the City’s collection system to the WWTF for treatment, and, following treatment, to Hawk Creek for discharge (“Project”). (RA-2-3: *Id.*, ¶ 3.)

The need for the Project itself and the route chosen for the Project are undisputed. (A-3: Findings of Fact, ¶ 4.) Appellants concede and the trial court found that the Project is for public use and purposes. (A-3: Findings of Fact, ¶ 4; Appellants’ Brief, pp. 18-19 (“[T]he Kvams have never challenged the public purpose or necessity of this project, nor have they argued that the City shouldn’t take right of way for that purpose.”).)

II. APPELLANTS' CONCERNS AND OBJECTIONS

Beginning in June 2006, the City had need to enter the various properties across which the City proposed to construct its new interceptor sewer line in order to plan, identify, inspect and survey the possible route of the Project improvements across the various properties. (RA-4: Holmes Aff. , ¶ 9.) Appellants originally objected to the plan to route sewer pipelines across their land (now conceded) and refused to grant permission for access to their properties. (A-3: Findings of Fact, ¶¶ 8-9; RA-4, 33-34; Holmes Aff., *Exh. J.*) In July 2006, the City Council directed the engineer to re-evaluate conveyance route alternatives. (RA-4: *Id.*, ¶ 10.) On July 24, 2006, the engineer delivered a technical memorandum to the City reaffirming the planned conveyance route. (RA-4, 16: *Id.*, ¶ 10 and *Exh. B.*)

The conveyance route was designed to take land right at the very edge of the parcels in order to minimize the potential for damaging the remainder. (1/17/08 Transcript, pp. 53-54.) To avoid bisecting parcels, the route is located where possible adjacent to the county ditch. (*Id.*)

Representatives of the City repeatedly attempted to obtain the consent of the owners or occupants to permit entry upon the properties and such consent was consistently denied. (RA-5, 17-21, 24-32: Holmes Aff., ¶ 11 and *Exhs. E, G, and H.*) In December 2006, the City Council once again directed the engineer to consider alternative conveyance routes, and even to consider an alternative WWTF site. (RA-5, 22-23: *Id.*, ¶ 12 and *Exh. F.*) In January 2007, then engineer presented a memorandum to the City that again affirmed the planned route as the most cost-effective route. (*Id.*) A public informational meeting was conducted on February 6,

2007, at which the public overwhelmingly endorsed the selected WWTF site and the conveyance route. (*Id.*) On February 20, 2007, the City Council reviewed the alternative routes and elected to continue with the original route across Appellants' properties, among other reasons because the engineer estimated that the alternative route favored by Appellants would add approximately \$7,750,000 to the Project costs. (RA-5, 22-23: *Id.*, ¶ 13 and *Exh. F.*)

After months of unsuccessful efforts to obtain voluntary access to the properties, the City Council directed legal counsel to commence legal proceedings to obtain access pursuant to Minnesota Statutes section 117.041. (RA-7, 35-54: *Id.*, ¶ 18 and *Exh. K.*) On July 9, 2007, after a contested proceeding, the district court issued an order requiring the owners of those parcels to grant the City access. (A-4: Findings of Fact, ¶ 10; RA-7: Holmes Aff., ¶ 19.)

When the City's representatives attempted to enter onto the property of Appellants for soil boring, Phillip Kvam demanded that the soil boring equipment be steam cleaned before entering the field so as to prevent introduction of agricultural pests. (A-4: Findings of Fact, ¶ 11; 1/17/08 Transcript, p. 39.) Steam cleaning of the equipment was not a requirement of the access pursuant to the court order. (A-4: Findings of Fact, ¶ 11.) Mr. Kvam does not steam clean his own equipment when traveling between fields. (*Id.*; 1/17/08 Transcript, p. 39-40.) Mr. Kvam did not know of a location where that could be done. (1/17/08 Transcript, p. 39.)

Mr. Kvam stated to City representatives his belief that pipeline construction may cause diminished soil productivity, may lead to infestation of pests and fowl seed, and may lead to

reduced crop production and income in future years. (A-4: Findings of Fact, ¶ 12; 1/17/08 Transcript, p. 38.) Mr. Kvam and the City have had legal disputes in the past over land taken by eminent domain involving the City's airport expansion project. (A-3: Findings of Fact, ¶ 7.)

Based on the access provided pursuant to the Court order, the City's appraiser prepared appraisal reports with respect to each of the parcels to be taken ("Right of Way Parcels") in which he estimated the damages which will be caused by the City's takings. (*Trial Exh. BB.*) Contrary to the Appellants' assertion, the appraiser estimated damages for taking the property in fee simple. (*See id.*)

III. THE TAKINGS

On October 15, 2007, the City Council resolved that it was necessary and for a public purpose for the City to acquire the subject property in fee simple and directed legal counsel to commence eminent domain proceedings. (RA-8, 55-77, 78-86: Holmes Aff., *Exhs. O and Q.*) The width of the Right of Way Parcels is based upon the opinion of engineer Craig Holmes, Program Manager for the Project, concerning the width of right-of-way necessary to construct, repair, maintain, operate and reconstruct the improvements, including areas for access and storage of materials and equipment. (RA-11: *Id.*, ¶ 34.)

Mr. Holmes recommended, and the City Council found it necessary and convenient, that the City acquire fee simple title for several reasons, including the following:

- a. The cost of acquiring the Right of Way Parcels in fee simple is estimated by the City's real estate appraisers and legal counsel to potentially be similar in amount to the cost of instead acquiring permanent and temporary utility easements burdening the same tracts.

- b. If the City were to acquire easements burdening the Right of Way Parcels instead of acquiring the tracts in fee simple, at some time in the future the City would likely be required to again acquire temporary easements for repair or reconstruction of the City's Project improvements and this is unlikely to be necessary if the City initially instead were to acquire the required areas in fee simple.
- c. If the City acquires the Right of Way Parcels in fee simple, the City will be less likely to be subjected to claims by the fee owner or tenants (e.g. such as for crop loss, soil contamination, infestation by pests, or other perceived sources of injury to surface uses) which the City is more likely to be exposed to if the City instead acquires the Right of Way Parcels by means of a combination of permanent and temporary easements which preserve the right of surface use of the easement tracts by the fee owner.
- d. If the City acquires the Right of Way Parcels in fee simple, the City will maintain greater control over non-City uses which may occur within the Right of Way Parcels which could potentially be damaging to City Project improvements if the non-City use were to occur without City control (e.g. if the City were to hold only a permanent easement which entitled the fee owner to retain surface use of the Right of Way Parcels).
- e. If the City acquires the Right of Way Parcels in fee simple, it is more likely to be able to restrict use of the real estate acquired by the City to only City use (subject to any easements in favor of the owner as provided in the First Amended Petition).
- f. In general, Mr. Holmes believed that City acquisition of the Right of Way Parcels in fee simple was necessary to avoid future disputes and better protect and preserve the City's ability to carry out the purposes of the taking.

(A-5-6: Findings of Fact, ¶ 18; RA-11-12, 55-77: Holmes Aff., ¶ 35 and *Exh. O.*)

As the trial court found, the cost of acquiring a permanent easement is typically around 50 percent of the appraised value of the fee, and temporary easements typically cost 10 percent of the fee value per year. (A-4: Findings of Fact, ¶ 13.) Thus, if the project takes three years to complete, the City could pay approximately 80 percent of the appraised value of the fee for

only permanent and temporary easements. (*Id.*) Further by acquiring title in fee simple, the City can control all aspects of the property and allow others to use the property only as it permits, including leasing the property and collecting rents therefrom. (*Id.*, ¶ 14.)

Additionally, access to the pipeline for inspection and maintenance is faster and more convenient if the pipeline manholes and clean out structures are above ground rather than buried. (*Id.*, ¶ 15.) These above ground pipeline structures affect surface use by reducing the available surface use area and requiring the surface user to work around the above ground structures, subjecting the structures and equipment used around them to potential damage. (A-5: Findings of Fact, ¶ 16.)

Further, over the 50-year design life of the Project, the City will need to inspect and maintain the system and possibly repair or replace it. (*Id.*, ¶ 17.) These activities will affect the surface of the land and subject the City to future claims for lost income, crop loss and diminished land productivity if the City holds only an easement. (*Id.*) While these future claims can be reduced or eliminated in a negotiated easement, it would cost the City additional money up front to induce the surface owner to forego such claims. (*Id.*)

In an attempt to mitigate the damages caused to the remainder portions of the properties, the City proposed to take fee title subject to various easements in favor of the owners of the remainders. (RA-12: Holmes Aff., ¶ 36.) The City twice amended the description of the property it petitioned to take. (A-6: Findings of Fact, ¶ 19.) Each amendment proposed to increase benefits to the Appellants and increased burdens on the fee simple absolute title the City proposed. (*Id.*) The easements:

- a. preserve the ability of the owners to drain the remainder of their adjacent property (“Remainder”) if any, for agricultural purposes;
- b. obligate the City to restore the functionality of a pre-existing drain tile connection, if any, which is disturbed by the City’s construction activities;
- c. preserve the right of the owner to install and operate a connection for its drain tile system from the owner’s Remainder to Kandiyohi County Ditch No. 46;
- d. preserve the right of the owner to maintain an access driveway across the City’s taking area where the owner’s property is divided by the City’s taking; and
- e. the abutting owners have a non-exclusive driveway easement “along the Right of Way Parcels” (i.e., permitting a haul road within the right-of-way).

(A-17-18: *Third Amended Exhibit A.*)

IV. THE TRIAL COURT’S FINDINGS AND CONCLUSIONS

The trial court found that the City had shown that taking a fee simple was reasonably necessary or convenient to accomplish the public use or public purpose. (A-6-7: Findings of Fact, ¶ 20.) The trial court found that the reasons the City cited for the taking were not arbitrary or unreasonable. (*Id.*)

SUMMARY OF THE ARGUMENT

A condemning authority need only determine the underlying necessity to use the property in order to further its public purpose. It is conceded in this case that the City had a public purpose and necessity to acquire Appellants’ property to construct sewer pipelines for the WWTF. Therefore, as a matter of law, the City is entitled to take the fee. The City may not be compelled to justify its taking in a tiered fashion, demonstrating the necessity of each additional interest.

Even if the City's decision to take the fee, instead of just an easement, were subject to further evaluation, the trial court found that the City's reasons were not manifestly arbitrary or unreasonable. This Court has held that a city may consider the fact that the costs of an easement are similar to the costs of the fee as a reason to acquire the fee. Further, the trial court found credible the City's concerns about the prospects of future claims with the Appellants if they were to embark on shared ownership of the property. This Court is not reviewing a broad policy decision to take farmland in fee, but only the decision to take a fee in this case, on its peculiar facts and circumstances. The trial court's finding that the City's reasons in this case were not manifestly arbitrary or unreasonable is not clearly erroneous.

Appellants' arguments regarding the construction of Minnesota Statute section 465.01 and the application of certain environmental requirements were not raised below, should not be considered here, and are meritless. Regardless of how Appellant would like to limit the construction of section 465.02, the City has the independent authority to take the subject property in fee pursuant to section 412.211. The environmental statute upon which Appellant relies, Minnesota Statutes section 17.82, does not apply by its own terms.

ARGUMENT

I. STANDARD OF REVIEW.

Before condemning private land, a condemning authority must determine that there is a public use for the land and that the taking is reasonably necessary or convenient for the furtherance of that public use. *Lundell v. Cooperative Power Association*, 707 N.W.2d 376, 380 (Minn. 2006). The determinations of the condemning authority are legislative decisions

which must be given deference and may be overturned only when manifestly arbitrary or unreasonable. *Id.* at 381. The scope of review is “narrowly limited.” *City of Pipestone v. Halbersma*, 294 N.W.2d 271, 273 (Minn. 1980). The Supreme Court has repeatedly directed that “great weight” must be given to the condemnor’s determination, and that the court is “precluded from substituting its own judgment for that of the condemnor.” *City of Duluth v. State*, 390 N.W.2d 757, 764 (Minn. 1986) (quoting *Housing and Redevelopment Authority v. Minneapolis Metropolitan Co.*, 104 N.W.2d 864 (Minn. 1960)); *Halbersma*, 294 N.W.2d at 274. The scope of review is so limited that the court should overturn the condemnor’s decision only if it is “arbitrary, unreasonable, or capricious, or the evidence against the necessity or public use is overwhelming.” *Minneapolis Metro. Co.*, 104 N.W.2d at 875. Additionally, the appellate courts give deference to the district court’s finding, applying the clearly erroneous standard of review. *Lundell*, 707 N.W.2d at 381. “Thus, there are two levels of deference paid to condemnation decisions[.]” *Id.*

II. THE TRIAL COURT’S FINDING – AFFIRMING THE CITY COUNCIL’S DETERMINATION THAT THE TAKING WAS REASONABLY CONVENIENT AND NECESSARY – WAS NOT CLEARLY ERRONEOUS

Ignoring the apposite cases upon which the trial court properly relied and offering the standard of review little more than a passing glance, Appellants raise new arguments for the first time on appeal. Appellants argue that it would be bad policy to permit fee takings, despite controlling authority that vests such policy determinations with the legislative body. Giving one statute a cramped and limited construction, Appellants wholly ignore other apposite authority in which the legislature has granted cities the broad discretion to take in

fee. And substituting argument for a statement of facts, Appellants eschew any pretense of fairness and candor required by Rule 128.02.

This Court should affirm because: (a) once the underlying necessity for the land for a public purpose is established – conceded in this case – the condemnor is not required to take an interest less than fee title; and, (b) the trial court’s finding that City’s determination to take the fee was not manifestly arbitrary or unreasonable was not clearly erroneous.

A. The law does not require the City to present its condemnation in a tiered fashion, justifying lesser interests and fee interest separately.

It is well established that “[i]n matters of condemnation, what land to take is a legislative question.” *City of New Ulm v. Schultz*, 356 N.W.2d 846, 850 (Minn. Ct. App. 1984). A city need not show “absolute or indispensable necessity,” but rather only that the proposed taking is reasonably necessary or convenient. *Id.* at 848. “If it appears that the record contains some evidence, however informal, that the taking serves a public purpose, there is nothing left for the courts to pass upon.” *Halbersma*, 294 N.W.2d at 273. Once a city demonstrates the property is needed for a public use, the owner may not compel the city to take an interest less than fee title. *See Lundell*, 707 N.W.2d at 382 n.3. The “legislature has *not* enacted” a requirement that the city “take only the smallest property interest” necessary to serve the public purpose. *Id.* (emphasis added); *see also id.* (“A condemning authority is free to take fee title even though it could serve the public purpose with a leasehold interest, so long as it can demonstrate that its use of the property is necessary to support the public purpose.”); *Schultz*, 356 N.W.2d at 848-49.

In *Lundell*, a power cooperative with condemning authority leased a telecommunications tower from the Lundells. 707 N.W.2d at 379. When negotiations for the renewal of the lease grew difficult, the power cooperative exercised its power of eminent domain to take title in fee. *Id.* at 379-80. The Lundells argued that the power cooperative failed to demonstrate necessity because it already had a leasehold interest that accomplished the public purpose. *Id.* at 382. The Supreme Court rejected the Lundells' argument, holding that the only question is the underlying necessity for the property:

Whether or not a condemning authority has a present interest in the land less than fee title, the determination of necessity to support the taking of fee title by eminent domain is the same. The authority *need only determine the underlying necessity to use the property* in order to further its public purpose.

Id. (emphasis added).

In *Schultz*, this Court reviewed the city's decision to take farmland in fee instead of taking an easement for airport clear zones and transitional zones. 356 N.W.2d at 847. The farmers argued that a permanent use restriction would suffice and that a fee taking was unnecessary. *Id.* The resulting farms would be odd-shaped, some with triangular outlots and some with inaccessible outlots, making them more difficult and uneconomical to farm. *Id.* After taking the property, the city planned to lease the land to farmers on a bid basis. *Id.* The district court granted the petition approving the condemnation of the fee and this Court affirmed. *See id.* at 850.

The unpublished decision in *Metropolitan Airports Commission v. Brandon Square III*, 2007 WL 1322320 (Minn. Ct. App., May 8, 2007) (unpublished) (copy attached pursuant to Minn. Stat. § 480A.08), is illustrative. In *Brandon Square*, the Metropolitan Airports

Commission (“MAC”) approved the acquisition of residential properties because of safety-zone concerns and excessive noise levels relating to the newly constructed runway. *Brandon Square III*, 2007 WL 1322320 at *1. Non-residential and undeveloped properties in the area were not taken. *Id.* Brandon Square III owned a multi-unit apartment complex and argued that the MAC had no necessity to acquire the property in fee. *Id.* Rather, Brandon Square III argued that if the MAC took only the apartment complex, the undeveloped remainder property (a) would satisfy all existing land use requirements and (b) would be indistinguishable from adjacent vacant or commercial properties that the MAC did not take. *Id.*

Rejecting the owner’s arguments, the Court of Appeals affirmed the district court’s finding of necessity. *Id.* at 5. Citing *Lundell*, the Court of Appeals in *Brandon Square* recognized that the law does not require that a condemning authority take only the smallest interest in property that is necessary to serve the public purpose. *Id.* The Court of Appeals held:

Because the MAC’s condemnation is necessary for airport improvement, the MAC is not required to present its condemnation in a tiered fashion, justifying lesser interests and fee interest separately. And because the MAC’s necessity for condemnation need only be reasonable or convenient, condemnation of Brandon Square’s land is permissible.

Id. Here, as in *Brandon Square*, the City’s determination to take fee title should not be disturbed.

Appellants concede the public purpose and use of the property for the WWTF project. Appellants concede that the City may route the sewer lines through the

subject properties. Thus, the City has established, in the words of *Lundell*, “the underlying necessity to use the property.” Though Appellants argue that taking the fee is unjustified, the law does *not* require justifying lesser and fee interests separately. The necessity test in Minnesota applies to the underlying need for the property – conceded in this case; it explicitly does *not* require a condemning authority to “take only the smallest interest” arguably needed for the project. *Lundell*, 707 N.W.2d at 382; *see also Brandon Square III*, 2007 WL 1322320 at *5 (“[T]he MAC is not required to present its condemnation in a tiered fashion, justifying lesser interests and fee interest separately.”).

On January 5, 2006, the Supreme Court published its opinion in the *Lundell* case, declaring unequivocally: “The authority need only determine the underlying necessity to use the property in order to further its public purpose.” *Lundell*, 707 N.W.2d at 382. The Supreme Court explained that any question about the wisdom of this rule was within the province of the legislature, not the courts: “Although some public policy arguments might be made to support a requirement that a condemning authority take only the smallest interest in property that is necessary to serve the public purpose, the legislature has not enacted that requirement.” *Id.* n.3.

As if on cue, in 2006 the Legislature took up historical and sweeping amendments to the eminent domain statutes. On May 17, 2006, the Legislature presented the bill to the Governor, and the Governor signed it two days later. *See* 2006 Minn. Laws, ch. 214. The amendments address many policy and technical

aspects of Minnesota Statutes chapter 117 – ranging from blight and redevelopment, to appraisal, negotiation, and attorney fee rights, to loss of going concern and relocation expenses, to legal non-conforming uses, and the list goes on. Along the way, the Legislature even modified the very definition of public use and public purpose. The Legislature did not, however, see fit to add a new “smallest-interest-necessary” taking requirement. Nowhere in this comprehensive overhaul of Chapter 117 did the Legislature respond to the *Lundell* court’s ruling by enacting a new tiered-necessity requirement.

The state of the law is, therefore, precisely as *Lundell* pronounced it and *Brandon Square III* applied it: Once the underlying need to use the property for a public purpose is established, the condemning authority may take the fee. The Legislature declined to alter this rule. The condemning authority is not required to take a lesser interest and then separately justify the need for a fee interest. Because that is precisely what Appellants ask this Court to do, their argument must be rejected.

This Court’s conclusion in *Schultz* applies equally here: “To the extent that appellants’ arguments are an attempt to dispute whether the taking of the fee rather than an easement was required as a matter of public necessity, those arguments fail.” 346 N.W.2d at 849 (internal quotes omitted). “The existence of alternatives does not make the decision to take the fee arbitrary.” *Id.*

B. The trial court’s finding that the decision to take the fee was not manifestly arbitrary or unreasonable is not clearly erroneous.

Substituting their own judgment, Appellants argue that the City’s reasons for

taking the fee should be rejected. These arguments are without merit, questioning only the wisdom, not the lawfulness, of the City Council's determination. The trial court's finding – that the City's reasons for taking the fee were not manifestly arbitrary or unreasonable – is not clearly erroneous. Applying the two levels of deference due the City Council's determination, it is not a close call and this Court should affirm.

First, the City determined that it would cost almost as much to acquire easements as it does to acquire the fee. Where, as here, the public use and necessity for the property are established, taking the fee is within the City's discretion. The comparative costs of the fee and lesser interests are both common sense and legally permissible considerations. *See Schultz*, 356 N.W.2d at 848 (“The reason for acquiring the fee interest is that it costs almost as much to acquire such easements as it does to acquire the fee.”).

Second, Appellants challenge the resulting orientation and usability of the remainder parcels. This is not a challenge to the taking, but goes strictly to compensation. *See Schultz*, 356 N.W.2d at 850 (“The resulting awkward and uneconomical sizes of appellant's farms are matters which go to the amount of compensation to be paid, not to the propriety of the taking itself.”).

Third, the City Council was entitled to, and did, determine what was reasonable or convenient for *this* Project. It did not establish policies for other and varied uses across the state. The pre-existing contentious relationship between these

parties is a fact. Conflict previously occurred arising from to the City's previous taking for airport expansion purposes. Thereafter, Appellants required the City to get a court order to exercise its statutory right to enter the various properties for the present project, which has an undisputed public purpose. In view of these facts alone, the City's concern that required future access for maintaining this sewer line could also be contentious is legitimate.

Uninterrupted and reliable operation of the City's wastewater interceptor sewers is critical for public health and safety and protection of the environment. By acquiring fee title, the City can construct manholes and cleanouts so that they protrude above the surface in order to make the location of these structures more apparent and accessible to facilitate cleanout when needed. If the City were to instead acquire easements, the City would risk damage to the above ground facilities and claims by the surface user for damage to their machinery or crop loss due to every City entry for inspection and maintenance.

Over a century ago the Supreme Court explained that avoiding future disputes with the landowner is a sound reason for a condemnor to acquire an exclusive title. *Hopkins v. Chicago, St. P., M & O. RY. Co.*, 78 N.W. 969, 974-975 (Minn. 1899). In *Hopkins*, the railroad condemned certain land for the purpose of planting trees and erecting screen fences to protect its tracks from snow. *Id.* at 71. The landowner argued that the condemning railroad had only acquired an easement and that the landowners must be permitted to exercise every right not incompatible with the

railroad's use. *Id.* at 74. Rejecting the landowner's argument, the Supreme Court held that dividing the title in that manner "would produce interminable vexation litigation." *Id.* at 75. The Supreme Court's analysis is both instructive and binding, and merits quotation at length:

There are manifest reasons, founded on public policy and necessity, why the possession of land acquired for railroad purposes should ordinarily be exclusively in the company, and not concurrently in it and the former owner. If the contention of the plaintiffs should prevail, it would produce interminable vexatious litigation. The result would be that, every time a railway company attempted to take possession of property which it had acquired for a railroad purpose, it would be liable to be involved in a contest with the former landowner over the question whether such possession was presently needed for the purpose for which the property was acquired, or whether the continued possession and use of the land, or some part of it, by the landowner, was compatible with its use by the company for the purpose for which it was condemned.

Id. at 75; *see also Lundell*, 707 N.W.2d at 380 (affirming district court's grant of petition for condemnor to maintain and have the tower "without dispute or uncertainty as to use rights"); *Brandon Square III*, 2007 WL 1322320 at *4 ("Through condemning a fee interest, the MAC would not be faced with intractable negotiations or future nonconformity, even if such uses could be constructed only after obtaining variances from two entities[.]").

Here, as in *Hopkins*, every time the City needed possession of the property to construct, service or maintain the sewer line, "it would be liable to be involved in a contest with [Appellants] over the question of whether such possession was presently needed" or whether the Appellants' use of some part of the land was incompatible with the City's use. As the Supreme Court ruled in *Hopkins*, this concern alone would

justify taking fee title. Like any private party acquiring land, the City is entitled to reasonably determine what rights to acquire to minimize disputes with the former owners. The City should be spared from a future of vexatious litigation with the surface owners by being permitted to take the Right of Way Parcels in fee.

The old saying rings true: “Good fences make good neighbors.” It urges great caution before considering any acquisition that severs surface and subsurface ownership. Where a good fence is called for, shared ownership is certainly not. Agree or disagree, it was not clearly erroneous for the trial court to find that the City’s action was not manifestly arbitrary or unreasonable.

III. APPELLANTS’ NEW ARGUMENTS ON APPEAL SHOULD BE STRICKEN AND, IN ANY EVENT, DO NOT MERIT A DIFFERENT RESULT.

Appellants argue for the first time on appeal that Minnesota Statute section 465.01 should be construed to prohibit the City from taking a fee in this case. Appellants also argue for the first time on appeal that the City failed to complete appropriate environmental reviews. These arguments should be stricken and the City has separately filed a motion for that relief.¹ In any event, the statutory construction argument is meritless. The environmental review argument is far removed from the issues joined in the petition and there is no record and no findings on appeal for this Court to review on the subject.

A. The City has the statutory authority to take fee title to the Appellants’ property.

¹ A reviewing court must generally consider “only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The City provides its response here in the event that the Court should elect to consider these arguments.

Appellants contend that the City's authority pursuant to Minnesota Statutes Section 465.01 is limited to taking an easement interest in the Appellants' property. The statute provides, in pertinent part, that a city "may exercise the power of eminent domain for the purposes of acquiring private property . . . for any purpose for which it is authorized by law . . . and may exercise the power of eminent domain for the purpose of acquiring a right-of-way for sewerage or drainage purposes" Minn. Stat. 465.01 (2008). Appellants argue that this statute only gives the City the authority to take an easement interest in the property and not fee title because it states "for the purpose of acquiring a *right-of-way* for sewerage or drainage purposes . . ." and the definition of "right-of-way" that has been given by the courts in these circumstances is that it is an easement. Appellants throw down the gauntlet, stating: "The City must look to some other statutory authority if it wants to justify its decision to take beyond the fee."

Picking up the gauntlet without trepidation, the City need not quibble about the construction of section 465.01 because the City did, indeed, supply other statutory authority for its fee taking. In the City Council resolution and the petition to condemn, the City claimed authorization to acquire the property not only under section 465.01 but also under section 412.211.

Minnesota Statutes Section 412.211 unambiguously authorizes the City to take property in fee, providing in pertinent part:

Every city shall be a municipal corporation having the powers and rights and being subject to the duties of municipal corporations at common law. Each . . . *may acquire*, either within or without its

corporate limits, *such real and personal property as the purposes of the city may require* by purchase, gift, devise, *condemnation*, lease or otherwise, and may hold, manage, control, sell, convey, lease or otherwise dispose of such property as its interests require.

Minn. Stat. § 412.211 (2007)(emphasis added).²

Nothing in section 412.211 restricts the City to taking only an easement interest in property. *See id.* Section 412.211 simply states that the city may acquire, condemn, hold, sell, lease or otherwise dispose of real property. *Id.* Thus, the City is authorized to condemn fee title. Furthermore, it has been stated that “no precise words are necessary in a statute to authorize condemnation of a fee simple absolute nor is it necessary that the authority to take a fee be given in express terms.” Nichols Law of Eminent Domain, Section 9.02 [3].

The Legislature amended section 465.01 to include the right-of-way language upon which Appellants rely in 1917. *See* Minn. Stat. § 465.01 (credits). Section 412.211’s broad grant of condemnation power was enacted over 30 years later, in 1949. *See* Minn. Stat. § 412.211 (credits). Thus, section 465.01, to the extent of any perceived inconsistency, cannot limit the broad power later granted in section 412.211.

Finally, Appellants errantly read section 465.01’s conjunctive language (“and may exercise the power”) as a limitation upon, rather than an addition to or exemplification of, the power conferred in the preceding language. Section 465.01 itself first grants the power to condemn within and without city limits for any lawful purpose. The statute does not proceed

² It should be noted that pursuant to Section 1.02 of its Charter, the City has “all of the powers, functions, rights and privileges possible for a city under the constitution and the laws of the State of Minnesota as fully and completely as though they were specifically enumerated in this Charter.” Therefore, pursuant to its Charter, the City has the powers

to limit this grant (e.g., “except that . . .”) but simply adds that a city may also acquire right of way.

B. Appellants’ criticism of the City’s environmental review of the Project is meritless.

Appellants state in their brief that the City evaded the Department of Agriculture review required by Minnesota Statutes Section 17.82. Appellants argue that, pursuant to this statute, when an agency has a project that adversely impacts more than ten acres of farmland, it must either submit the project to the Department of Agriculture for review or an environmental evaluation must be conducted pursuant to Minnesota Statutes Chapter 116D. Minnesota Statutes Section 17.82, however, is not applicable in this case for several reasons.

The statute provides:

Any agency action which the agency determines will affect ten acres or more of agricultural land shall be referred to the commissioner to be reviewed and acted up as provided in section 17.84. No agency shall take any action which adversely affects ten acres or more of agricultural land without first attempting to find alternative methods or locations for the action or otherwise attempting to reduce the adverse affects. If, after evaluating the alternatives, the agency determines that the benefit to the state from preserving the agricultural use of the land is less than the cost of implementing an alternative action, the agency shall inform the commissioner of that determination in writing. *An agency action is not subject to review under this section or section 17.84 if the action is reviewed as required by chapter 116D and the environmental review rules adopted under that chapter, or if a political subdivision is required by law to review and approve the action.*

Minn. Stat. § 17.82 (2007)(emphasis added). First, an “agency” is defined by the statute to mean certain departments of the State of Minnesota. Minn. Stat. § 17.81, Subd. 5; Minn.

of a statutory city that are set forth in Minnesota Statutes Section 412.211.

Stat. § 15.01. The City is not included in this definition; it is not an “agency.” *Id.* Second, the statute is inapplicable because it states that “an agency action is not subject to review under this section or section 17.84...if a political subdivision is required by law to review and approve the action.” Minn. Stat. § 17.82. Since the City is a political subdivision required to review and approve the subject action, the acquisition is not subject to review pursuant to the statute.

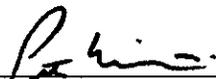
Moreover, none of the pleadings, record, or findings below placed compliance environmental statutory procedures in issue. Nor, on appeal, is the issue noted in Appellants’ Statement of Case. Even if this Court wanted to consider the argument, it has before it no record to review, no findings of fact or exhibits, and no legal analysis from the trial court.

CONCLUSION

Respondent City of Willmar respectfully requests that this Court affirm the district court's findings of fact, conclusions of law, and order granting the petition.

Respectfully submitted this 17th day of October, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Minn. R. App. Pro. 132.01, subs. 1 and 3, and contains 6,451 words and was prepared using *Microsoft Word* Version 5.1.

Dated this 17th day of October, 2008


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