

NO. A09-1894

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State of Minnesota  
**In Supreme Court**

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Richard Lepak,

*Appellant,*

v.

State of Minnesota, by its Commissioner of Transportation,

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

On August 12, 2009, the Cook County District Court issued an order approving the condemnation of a 110-foot wide portion of Appellant Richard Lepak's ("Lepak") property in connection with the planned reconstruction of Trunk Highway 61. Approximately 35 feet of this land was condemned for the purpose of restoring a neighboring parcel's existing private access to the highway which will be eliminated by the reconstruction project.

The order granting the condemnation petition was entered in clear error. First, this proposed taking of Lepak's property, to restore a neighboring parcel's private access, is not for a public use or public purpose and, therefore, is not allowed under Minnesota law. Further, the condemnation petition fails because MnDOT has not demonstrated that it is reasonably necessary to take this 35-foot wide strip of Lepak's property to fulfill any public use or public purpose. Because the proposed taking is not authorized by law, the district court's August 12, 2009 order granting the condemnation petition must be reversed as it relates to the 35-foot wide portion of Lepak's property.

## II. ARGUMENT

### A. **RESTORING PARCEL 14'S PRIVATE ACCESS TO HIGHWAY 61 IS NOT A PUBLIC USE OR PUBLIC PURPOSE.**

From the beginning, Lepak has taken the position that MnDOT is seeking to condemn his property to address a purely private problem – the elimination of his neighbor's driveway – caused by the reconstruction of Trunk Highway 61. *See e.g.*, App. 73-74. The fact that Lepak's land is being taken to serve a private, rather than public,

purpose is the self-evident: the access runs directly from Highway 61 to the existing garage of the private residence on Parcel 14;<sup>1</sup> the access will serve, at most, three private parcels;<sup>2</sup> and the state repeatedly asserts that the access is “absolutely necessary” for Parcel 14.<sup>3</sup> What’s more, MnDOT has a substantial financial incentive to use Lepak’s land to restore Parcel 14’s private access to Highway 61.

Under Minnesota law, a property owner has a right of access to a public road abutting his property. *C and R Stacy, LLC v. County of Chisago*, 742 N.W. 2d 447, 457 (Minn. Ct. App. 2007) (citing *Finke v. State of Minnesota*, 521 N.W.2d 371 (Minn. Ct. App. 1994)). Where the State cuts off the property owner’s “reasonably convenient and suitable access,” it must provide adequate compensation for the loss. *Id.* (citing *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978)). In this case, MnDOT chose to mitigate the damages to Parcel 14 by condemning Lepak’s land to restore the private access rather than compensating the owners for the lost access to Highway 61.

In its Response Brief, MnDOT all but concedes that it condemned Lepak’s property to restore the private access because it was cheaper than compensating the owners of Parcel 14 for the “economic destruction” of their property. After admonishing

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<sup>1</sup> App. 140.

<sup>2</sup> App. 57.

<sup>3</sup> App. 116; Resp. Brf. at 5-7 (“The road is absolutely necessary for Parcel 14 because that parcel’s sole access in the pre-condemnation situation is by a driveway directly onto TH 61 that will be eliminated by the Project.”).

that “it should hardly be forgotten that Lepak is not the only member of the public whose property interests are at stake,” MnDOT states:

Lepak would have this Court declare that MnDOT had no right to condemn property for the construction of the new access road. Yet absent the new road, the owners of Parcel 14 would no longer have access to TH 61, because MnDOT’s Project requires elimination of their pre-existing access. The owners of Parcel 14 would therefore be landlocked, in essence depriving them of the value of their property. It must not be forgotten that Parcel 14 is the sole property among the three interested parcels that has been improved. In other words, Lepak would have this Court invalidate a taking that affects just a small portion of his unimproved property, which in turn would result in the economic destruction of his neighbor’s improved property. Such a result would hardly be fair or just.

Resp. Brf. at 18.

There can no longer be any serious doubt that MnDOT condemned Lepak’s land to avoid landlocking Parcel 14 and to obviate the need to compensate the owners for the “economic destruction” of their property.<sup>4</sup> The only remaining question is whether such a condemnation is authorized under Minnesota law. It is not.

In Minnesota, the power of eminent domain “may only be used for a public use or public purpose.” Minn. Stat. § 117.012, subd. 2. The terms “public use” and “public purpose” are defined narrowly and exclusively as:

- (1) the possession, occupation, ownership, and enjoyment of the land by the general public or by public agencies;

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<sup>4</sup> Of course, it is MnDOT’s reconstruction project, not Lepak’s decision to challenge the unauthorized condemnation of his property, that “would result in the economic destruction of [Lepak’s] neighbor’s improved property.”

- (2) the creation and function of a public service corporation; or
- (3) mitigation of a blighter area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.

Minn. Stat. §117.025, subd. 11(a). Nothing in this statute authorizes the condemnation of private property for the purpose of mitigating the damages to another private party which result from actions undertaken by the State.

Nonetheless, MnDOT asserts that the restored private access “falls within the meaning of subdivision 11(a)(1) of that statute because it includes ‘possession, occupation, ownership, and enjoyment of land by public agencies.’” Resp. Brf. at 19. According to MnDOT, the first three requirements (possession, occupation, and ownership) are satisfied simply by virtue of the fact that the condemnation petition seeks “an order transferring title and possession of the parcels described therein to MnDOT.” *Id.* While it is true that the Order granting the petition granted MnDOT the right of possessing, and title to, Lepak’s property, this does not mean that MnDOT will, in fact, possess and occupy the land. Indeed, as is explained in Lepak’s opening brief, the land is being taken to construct a private access for the use and benefit of private parties;<sup>5</sup> MnDOT will not possess and occupy the land.

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<sup>5</sup> MnDOT accuses Lepak of citing “nothing in the record” to support the conclusion that the access road is a private road. Resp. Brf. at 16. This is false. Lepak’s opening brief includes multiple references to the record which illustrate the private nature of the restored access to Parcel 14. *See* Opening Brief at 9. MnDOT’s accusation is curious given its own failure to cite any authority for its countervailing assertion that “[i]t is the

MnDOT asserts that the condemnation of Lepak's property satisfies the final requirement, that it will enjoy the land, because MnDOT is expressly authorized and required to restore the access to Parcel 14. Resp. Brf. at 19-21 (*citing* Minn. Stat. §§ 160.18, subd. 2; 161.24, subd. 4). The referenced statutes cannot sustain the burden MnDOT places upon them.

Minnesota Statutes, Section 160.18, subd. 2 provides:

Except when the easement of access has been acquired, the road authorities in laying out and constructing a new highway or in relocating or reconstructing an old highway shall construct suitable approaches thereto within the limits of the right-of-way where the approaches are reasonably necessary and practicable, so as to provide abutting owners a reasonable means of access to such highway.

Minn. Stat. § 160.18, subd. 2. This is nothing new. This section of Minnesota law was addressed by the Court of Appeals in *C and R Stacy, LLC* where the Court concluded that the exercise of the State's authority to regulate a roadway under Section 160.18, including the authority to regulate access to a roadway, may result in a compensable taking. *C and R. Stacy, LLC*, 742 N.W.2d at 456-58; *see also, State by Mondale v. Widen*, 128 N.W.2d 755, 757 (Minn. 1964) (noting that if a property becomes completely

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right of travel by public, and not the exercise of the right, that constitutes a public roadway." Resp. Brf. at 14.

Further, as explained in Lepak's Opening Brief, the record indicates that MnDOT intends to require Lepak and his neighbors to pay the costs of maintaining the the access; further supporting the conclusion that the restored access is not a public roadway. Opening Brief at 9-10. MnDOT responds by asserting that the Court should disregard this portion of the record. However, MnDOT *never* disavows the notion that it intends to require Lepak and his neighbors to bear the maintenance costs despite having numerous opportunities to do so after the November 18, 2008 hearing.

landlocked as the result of a highway reconstruction project, the owner would be entitled to seek damages). MnDOT's reliance on Section 160.18, subd. 2 simply reinforces what Lepak has been asserting all along: MnDOT condemned Lepak's property for the purpose of satisfying its obligation to either restore the private access or compensate the owners of Parcel 14 for the value of the lost access. This is a transparent effort to take private property for the purpose of conferring a private benefit and is prohibited by Minnesota law. Minn. Stat. § 117.012, subd. 2 (The power of eminent domain "may only be used for a public use or public purpose.").

MnDOT's reliance upon Minnesota Statutes, Section 161.24 to support its assertion that it will "enjoy" the land is similarly unavailing. The statute provides, in pertinent part, that the State "may in mitigation of damages or in the interest of public safety and convenient public travel, construct a road . . . connecting [a highway, street, private road, or entrance closed off by the reconstruction of a trunk highway] with another public highway" and may acquire all necessary lands "by purchase, gift, or condemnation." MnDOT asserts that "the record demonstrates that MnDOT chose to [condemn Lepak's land to restore Parcel 14's access] for public safety and convenience . . . when providing that road will fulfill MnDOT's express statutory obligation under § 160.18, subd. 2 . . . ." Resp. Brf. at 21. As noted above, MnDOT's reliance on the "express statutory obligation" of Minnesota Statutes, Section 160.18, subd. 2 indicates that Lepak's land was condemned for the purpose of mitigating the damages to Parcel 14

as a result of the reconstruction of Highway 61.<sup>6</sup> It certainly does nothing to demonstrate that MnDOT chose to use Lepak's land to reconstruct the private access in the interest of public safety and convenience. The only other evidence MnDOT cites regarding public safety relates to the reasons MnDOT did not construct the access along a different alignment and is inapposite to the question of whether the decision to condemn Lepak's land was motivated by a desire to improve public safety in connection with the reconstruction of Highway 61. *See* Resp. Brf. at 22 (*citing* App. 56-57).

MnDOT will not possess, occupy, own and enjoy the portion of Lepak's property which has been condemned for the purpose of restoring the private access to Parcel 14. The taking is not for a "public use" or "public purpose" as those terms are defined in Minnesota Statutes, Section 117.025, subd. 11, and the August 12, 2009 Order granting MnDOT's petition for condemnation must be reversed as it relates to this taking.

**B. THE CONDEMNATION OF THE 35-FOOT WIDE PORTION OF LEPAK'S PROPERTY IS NOT REASONABLY NECESSARY TO ACCOMPLISH RECONSTRUCTION OF HIGHWAY 61 AND, THEREFORE, MUST INDEPENDENTLY SATISFY THE REQUIREMENTS OF MINNESOTA'S EMINENT DOMAIN LAWS.**

MnDOT asserts that it is not required to demonstrate that the taking to reconstruct the private access to Parcel 14 is for a public use or public purpose because it has established the Public Purpose of the larger project of reconstructing Trunk Highway 61.

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<sup>6</sup> As noted in Lepak's opening brief, the provision in Minnesota Statutes, Section 161.24, subd. 4 authorizing MnDOT to condemn property for the purpose of mitigating damages is preempted by the 2006 amendments to Minnesota's eminent domain laws. *See* Opening Brief at 12.

For support, MnDOT relies upon this Court's 2006 decision holding that, where a project has been proven to have a public purpose or public use, the only remaining issue is whether the contemplated taking is reasonably necessary to further the public purpose. Resp. Br. at 11 (*citing Lundell v. Cooperative Power Association*, 707 N.W.2d 376, 380-81 (Minn. 2006)). According to MnDOT, the decision of whether it is necessary to condemn Lepak's land to restore access to Parcel 14 in connection with the reconstruction of Highway 61 is entitled to deference because it is a decision regarding the details involved in road construction which is left to the judgment of the condemning authority. Resp. Brf. at 11 (*citing Housing & Redevelopment Authority in and for the City of Minneapolis v. Minneapolis Metro, Co.*, 104 N.W.2d 864, 874 (Minn. 1960); *City of Granite Falls v. Soo Line R.R. Co.*, 742 N.W.2d 690, 697 (Minn. Ct. App. 2007)).

Unlike the plaintiff's in *Lundell* and other similar cases, Lepak is not challenging a decision regarding one of the myriad details involved in the reconstruction of Highway 61; he is challenging MnDOT's attempt to justify the condemnation of his property by conflating the need to restore his neighbor's private access with the public purpose of reconstructing Highway 61. The two projects are not one and the same. There is nothing in the record to support the assertion that MnDOT elected to condemn the additional 35-foot wide strip of Lepak's land to address the details involved in road construction. Rather, as noted above and evidenced in MnDOT's arguments to this Court, MnDOT chose to condemn Lepak's property to avoid the necessity of compensating the owners of Parcel 14.

MnDOT asserts that the forgoing analysis regarding the applicability of the deferential standard of review set out in *Lundell* “is of no significance” because MnDOT only cites *Lundell* for three “well-settled propositions that (1) public purpose and necessity must be established for the taking; (2) that determinations of a condemning authority may be overturned if they are ‘manifestly arbitrary or unreasonable’; and (3) that a condemning authority’s finding of necessity can only be overcome by overwhelming evidence.” Resp. Brf. at 25-26, n. 6. MnDOT asserts that “[n]one of these propositions are open to challenge.” *Id.* It is not so simple.

Prior to 2006, when reviewing a condemning authority’s exercise of its delegated power to determine whether a taking was reasonably necessary to accomplish a proper public purpose, Minnesota courts construed the terms “public use” and “public purpose” broadly. This, in turn, led to the broad deference to the condemning authority’s “legislative determinations” which supported this Court’s decision in *Lundell*. In 2006, the Minnesota legislature sharply constrained the definition of “public use” and “public purpose” and narrowed the scope of the authority delegated to condemning authorities. Now, any determination by a condemning authority which is inconsistent with the narrowed definition is manifestly unreasonable and not entitled to deference. *County of Stearns v. Voller*, 584 N.W.2d 800, 802 (Minn. Ct. App. 1998). Simply stated, condemning authorities no longer enjoy broad discretion to make “legislative determinations” regarding whether a taking is reasonably necessary to accomplish a proper public purpose.

MnDOT cannot justify its decision to condemn Lepak's property to restore the access to Parcel 14 by relying upon the public purpose of the reconstruction of Highway 61.<sup>7</sup> They are two separate projects serving two distinct purposes. Without the supposed nexus between the two projects, MnDOT cannot establish that the condemnation for the purpose of restoring the private access is reasonably necessary to accomplish a proper public purpose.

Finally, contrary to MnDOT's assertion, Lepak has not waived the argument that the taking of the 35-foot wide portion of his property is not necessary to accomplish a proper public use or public purpose. At the November 18, 2008 hearing on MnDOT's condemnation petition, Lepak objected to the taking of his property to restore the private access to the neighboring parcel on the ground that it was not for a public use or public purpose. Because the taking was not for a public use or public purpose, it a fortiori was not necessary to accomplish a public use or public purpose. Moreover, Lepak specifically addressed this issue in his July 28, 2009, brief in support of his proposed findings of fact and conclusions of law that the state had not demonstrated adequately

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<sup>7</sup> MnDOT's constitutional and statutory authority to determine what land is necessary for the trunk highway system does not affect the result. *See* Resp. Brf. at 23-24. Minnesota Statutes, Section 161.20, subd. 2(a)(1), simply provides that MnDOT is authorized to exercise the power of eminent domain to acquire property which the commissioner deems necessary to lay out, construct, maintain and improve the trunk highway system. This merely restates the well established rule that the State may condemn property which is necessary to fulfill a public use or public purpose, such as the maintenance of the trunk highway system. It does authorize MnDOT to take property without first establishing that it is necessary to take the property to accomplish a public use or public purpose or grant MnDOT any other special condemnation authority.

that the taking of his property to restore his neighbor's access to Highway 61 was necessary to accomplish a "public use" or "public purpose."

The district court did not address this argument in its August 12, 2009 Order. Instead, it adopted the MnDOT's proposed findings of fact and conclusions of law verbatim. *Compare* Add. 1-6; App. 109-114. This makes it impossible for this Court to determine whether the district court considered and rejected the argument or simply ignored it altogether. In any event, the argument was raised and presented to the district court.

Because MnDOT failed to meet its burden of demonstrating that it is necessary to take the 35-foot wide portion of Lepak's property to accomplish a proper public use or public purpose, the August 12, 2009 Order granting MnDOT's petition for condemnation must be reversed as it relates to this portion of Lepak's property.

### III. CONCLUSION

For all of the foregoing reasons, Appellant Richard Lepak respectfully requests that the Supreme Court issue an order reversing the district court's August 12, 2009, Order granting the State's condemnation petition as it relates to the 35-foot wide portion of Lepak's property which is proposed to be taken for the purpose of constructing a private access to Parcel 14.

Dated: December 14, 2010

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