

CASE NO. A04-1045

**STATE OF MINNESOTA
IN SUPREME COURT**

Cooperative Power Association, a Minnesota cooperative corporation,

Respondent,

v.

Danny O. Lundell and Mary E. Lundell, husband and wife,

Appellants,

and

County of Goodhue,

Respondent.

BRIEF OF RESPONDENT COOPERATIVE POWER ASSOCIATION

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STATEMENT OF THE CASE

In connection with its electrical power system operations, Respondent Cooperative Power Association (“CPA”) uses a telecommunications tower that is located in Goodhue County on property that CPA initially leased from the predecessors in title to Appellants Danny O. and Mary E. Lundell (the “Lundells”). Shortly after the Lundells became the owners of the property, controversies developed between them and CPA regarding the terms of CPA’s lease and, eventually, regarding whether the parties had agreed to amend the lease. When the parties could not resolve their differences, the Lundells gave notice of default and threatened to evict. CPA thereafter commenced this eminent domain action, pursuant to Minn. Stat. Ch. 117, to acquire ownership of fee title to the tower site.

CPA requested an order finding public purpose and necessity for the taking, granting title and possession under Minn. Stat. § 117.042 (a quick take), and appointing commissioners to determine the amount of damages to be paid to the Lundells. Following a hearing at which the parties were given the opportunity to present evidence, the district court found that the taking was necessary for a public purpose, granted CPA’s condemnation petition and quick take motion, and appointed commissioners. CPA then paid the quick take amount into court, and ownership of fee title transferred to CPA.

The commissioners subsequently held hearings and awarded damages in an amount in excess of the amount to which the Lundells testified. Judgment was then entered by stipulation, after which the Lundells deposited the award into court and commenced the present appeal.

The Minnesota Court of Appeals affirmed the decision of the district court.

STATEMENT OF THE ISSUES

Whether the district court's findings that CPA's condemnation of the Cannon Falls Tower site serves a public purpose is clearly erroneous?

Court of Appeals held in the negative.

City of Duluth v. State, 390 N.W.2d 757, 763 (Minn. 1986)
Housing & Redev. Auth. v. Minneapolis Metro. Co., 259 Minn. 1, 104 N.W.2d 864 (1960)
Port Auth. v. Groppoli, 295 Minn. 1, 202 N.W.2d 371 (Minn. 1972)
Minn. Stat. § 308A.201, subd. 13 (2002)

Whether the district court's findings that CPA's condemnation of the Cannon Falls Tower site is necessary is clearly erroneous?

Court of Appeals held in the negative.

City of Pipestone v. Halbersma, 294 N.W.2d 271, 274 (Minn. 1980)
Village of St. Louis Park v. Minneapolis, N & S. Ry. Co., 156 Minn. 164, 194 N.W. 327 (Minn. 1923)
City of Freeman v. Salis, 630 N.W.2d 699 (S.D. 2001)
City of Marietta v. Edwards, 519 S.E.2d 217 (Ga. 1999)

Whether the district court erred in applying the quick take statute (Minn. Stat. § 117.042) and, if so, whether any such error was more than harmless?

Court of Appeals held in the negative.

Minn. Stat. § 117.042 (2002)
City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980)

STATEMENT OF FACTS

CPA is a cooperative corporation organized and existing under the laws of the State of Minnesota. (A.A. 33).¹ CPA is engaged in the business of providing electricity to the public. (*Id.*). Great River Energy (“GRE”) is also a cooperative corporation organized and existing under the laws of the State of Minnesota and, like CPA, is engaged in the business of providing electricity to the public. (A.A. 32). GRE has the authority to act on behalf of CPA pursuant to the Management Service Agreement between GRE and CPA effective as of January 1, 1999. (A.A. 33).

GRE, on its own and through affiliated member cooperatives such as CPA, generates, distributes, and sells electricity for power, light, heat and other purposes through member electric distribution cooperatives, which, in turn, sell and distribute the electricity to their respective members, who are the public. (A.A. 32). In connection with those activities, GRE and CPA own and operate telecommunications towers that are used to manage electrical power transmission and distribution systems, by, among other things, communicating with electrical substations to monitor and manage electrical flow and to operate load management programs for local customers. (A.A. 33). The towers also provide mobile radio capability for service operations. (*Id.*).

The Board of Directors of GRE (the “Board”) has found that it is necessary to acquire real property for telecommunications towers and to own the property in fee simple. (A.A. 37 and 40). In that regard, it is GRE’s policy to acquire fee title to tower

¹ References to documents in Appellants’ Appendix are in the form (A.A. __).

sites that GRE currently occupies by lease and to acquire new sites by purchasing fee title to them rather than by leasing them. (A.A. 37 and 74). In accordance with that policy, GRE has purchased fee title to several other tower sites that it previously occupied as a lessee. (A.A. 74).²

CPA owns and operates transmission lines and associated facilities in Goodhue County, Minnesota (the "CPA Facilities") for the transmission and distribution of electricity to the public. (A.A. 33). CPA owns and maintains a telecommunications tower in Goodhue County near Cannon Falls (the "Cannon Falls Tower") for use with the CPA Facilities. (A.A. 34). The Cannon Falls Tower is located on the piece of land that is the subject of this condemnation proceeding and that is referred to in this proceeding as the Tower Site. (*Id.*). CPA leased a 4.5 acre parcel of land (the "Leased Premises") at that location under a lease agreement dated April 29, 1980 (the "Lease") between CPA and Howard A. and Luella M. McKinley. (*Id.*). The Lease provides that CPA may

² The Lundells suggest that GRE did not have such a policy, but they have never presented any sworn evidence to contradict the evidence presented by CPA. The "circumstantial evidence" allegations in the Lundells' brief are not supported by either of the affidavits that the Lundells submitted in the district court (A.A. 18 and 154) and do not account for the uncontroverted evidence that GRE has acted on its policy by purchasing fee title to tower sites that it previously leased. CPA does not wish to unnecessarily supplement the record. However, if the Lundells persist in questioning the veracity of the sworn statements of GRE's Manager of Technology Services, James Goodin, CPA is prepared to bring a motion to introduce public records that document the actual tower site conversions to which Mr. Goodin was referring in paragraph 5 of his Supplemental Affidavit (A.A. 74). See *In re Objections and Defenses to Real Property Taxes for the 1980 Assessment*, 335 N.W.2d 717, 718 n. 3 (Minn. 1983) (recognizing that "documentary evidence of a conclusive nature" that was not introduced in the lower court but which "supports the result obtained in the lower court" may be considered on appeal).

extend the term until 2030, at which time the Lease would expire without any further right to extend. (*Id.*)³

Following the execution of the Lease, CPA erected the Cannon Falls Tower on the Tower Site and occupied that site for more than twenty years without incident or interference from the McKinleys. Pursuant to the terms of the Lease, CPA paid rent to the McKinleys during this period in the amount of \$450 per year (\$100 per acre) -- although that figure was scheduled to start increasing by ten percent every five years beginning in 2005. (A.A. 24).

CPA's lengthy period of quiet enjoyment of the Tower Site ended soon after the McKinleys conveyed their interest in the Leased Premises and surrounding land (including the portion of the Tower Site that is not within the Leased Premises) to the Lundells in December 2001. (*Id.*). Within months of acquiring the McKinleys' interest in the Leased Premises, the Lundells contended, through counsel, that CPA was violating the terms of the Lease. (A.A. 34-35, 77-78). CPA had subleased space on the Cannon Falls Tower to a telecommunications company (Sprint), and the Lundells, through counsel, disputed CPA's right to do so. (*Id.*). The Lundells demanded additional rent for the claimed additional use of the Leased Premises, including the construction of additional service buildings on the property. (A.A. 35, 81-83).

³ The precise legal description of the Tower Site is set forth in Exhibit A to the Condemnation Petition. (A.A. 9). As discussed later in this brief, the Tower Site encompasses an area somewhat larger than the Leased Premises, which is readily apparent when one compares the legal description of the Leased Premises (A.A. 23) to the legal description of the Tower Site (A.A. 9).

GRE (on behalf of CPA) attempted to persuade the Lundells that there was no breach of the Lease because CPA had the right to sublease space on the Cannon Falls Tower and otherwise assign its interest in the Leased Premises. (A.A. 35). When the Lundells persisted in their objections, GRE attempted to resolve the issues through negotiation. (*Id.*). Unfortunately, those efforts failed and the Lundells threatened litigation, with termination of the Lease as a possible outcome. (*Id.*).

The dispute between CPA and the Lundells included a disagreement as to whether the parties, during their efforts to resolve the matter, amended the Lease to substantially increase the amount of rent owed by CPA. (*Id.*). The Lundells sought to raise the rent to \$750 per month, a more than twenty-fold increase over the \$450 *per year* figure set forth in the Lease. (A.A. 74). CPA was willing to increase the rent to \$750 *per year*, not \$750 per month. (*Id.*)

Although an unfortunate mistake on the part of CPA regarding a proposed Lease amendment that the parties were trying to negotiate apparently caused the Lundells to believe that their demand for a more than twenty-fold rent increase would be met, no amendment was ever signed by both parties. (A.A. 74 and 85).⁴

⁴ The Lundells' counsel has characterized what occurred as "a unilateral mistake on the part of [CPA]." (A.A. 85).

When CPA did not pay the increased rent to which the Lundells claimed they were entitled, the Lundells gave CPA notice of default and threatened eviction. (A.A. 35 and 89-90). At that point, GRE attempted to purchase the Leased Premises, but the Lundells refused to sell. (A.A. 36).

In the face of the ongoing disputes with the Lundells (and GRE's existing policy of owning tower sites), the Board found and determined that GRE/CPA should own (not lease) the Tower Site, in order to permanently have and use the Tower Site without the risk, uncertainty, and eventual termination of the Lease. (A.A. 34, 36-37 and 40-41).⁵ Additionally, because the Tower Site needs to be larger than the Leased Premises to permit guy wires and supports in proper and appropriate locations, CPA needed immediate possession of the Tower Site to avoid the disruptions that could proceed from further disputes and potential litigation regarding the Tower Site. (A.A. 36). Accordingly, the Board authorized condemnation to acquire fee title to the entire Tower Site and CPA promptly filed a condemnation petition to that effect. (A.A. 37 and 3).

The district court received briefs and affidavits and held a hearing concerning a request by CPA for an order (1) finding public purpose and necessity for the taking by CPA, (2) granting title and possession under Minn. Stat. § 117.042 (a quick take) to CPA, and (3) appointing commissioners to determine the Lundells' damages. (A.A. 13-162 and 172-73). Finding that CPA's taking of the Tower Site was necessary and for a public

⁵ GRE's need to "permanently" own the Tower Site is a reflection of the fact that "GRE expects and plans to have a tower at the Tower Site well beyond 2030 [*i.e.*, the date the Lease expires without any further right to extend]." (A.A. 36).

purpose, the district court issued Findings of Fact, Conclusions of Law and Order, dated August 11, 2003, in which the district court granted the condemnation petition and quick take motion, and appointed commissioners to determine damages. (A.A. 172-80).

After the commissioners heard testimony and issued an award in the amount of \$150,800 (a sum that exceeds the amount to which the Lundells testified during the hearings), the parties stipulated to the entry of a final judgment and the Lundells promptly commenced the present appeal. (A.A. 181-85 and 1).

SCOPE AND STANDARD OF REVIEW

The appellate courts of Minnesota have repeatedly held that the scope of review in a condemnation case is “very narrow.” *City of Duluth v. State*, 390 N.W.2d 757, 763 (Minn. 1986).

Great weight must be given to the determination of the condemning authority, and *the scope of review is narrowly limited. 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.* * * * The court is precluded from substituting its own judgment for that of the [public body] as to what may be necessary and proper to carry out the purpose of the plan.

Id. (quoting *Housing & Redev. Auth. v. Minneapolis Metro. Co.*, 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960)).

Under this limited “scope of review,” a condemnor’s decision to condemn may only be overturned “if it [is] ‘arbitrary, unreasonable, or capricious, or [if] *the evidence against necessity or public use is overwhelming.*’” *City of Duluth*, 390 N.W.2d at 764

(quoting *Minneapolis Metro. Co.* , 259 Minn. at 16, 104 N.W.2d at 875) (emphasis in original).

Furthermore, a similarly deferential standard of review is applicable to a district court's determinations regarding "public purpose" and "necessity" for a condemnation. Specifically, the issues of public purpose and necessity are treated as issues of fact and a district court's resolution of those issues will not be reversed on appeal unless that resolution is determined to be *clearly erroneous*. See *City of New Prague v. Hendricks*, 286 N.W.2d 696, 702 (Minn. 1979); *County of Blue Earth v. Stauffenberg*, 264 N.W.2d 647, 651 (Minn. 1978). See also Minn. R. Civ. P. 52.01 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous").

"Findings of fact are clearly erroneous only if the reviewing court is 'left with the definite and firm conviction that a mistake has been made.'" *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quoting *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987)). If there is "reasonable evidence" to support the trial court's factual determinations, the reviewing court should not disturb those determinations. See *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS THAT THE TAKING WAS NECESSARY AND FOR A PUBLIC PURPOSE ARE SUPPORTED BY EVIDENCE IN THE RECORD AND, THEREFORE, ARE NOT CLEARLY ERRONEOUS.

CPA has the authority pursuant to Minn. Stat. §§ 116C.62, subd. 2, 300.03, 300.04, 308A.201, subd. 13, and Chapter 117 to acquire real property by the exercise of eminent domain.⁶ CPA properly exercised that statutory power, and the district court's findings that the taking was for a public purpose and that CPA needed to own the Tower Site in fee simple are supported by evidence in the record and, therefore, are not clearly erroneous. Accordingly, this Court should affirm the decision of the Court of Appeals.

A. The Taking Of The Tower Site Was For A Public Purpose.

The Lundells do not directly dispute the district court's finding that the taking of the Tower Site was for a public purpose. Indeed, at no point in this matter have the Lundells actively questioned whether the taking was in furtherance of the public purpose

⁶ Minn. Stat. § 308A.101 (2002) authorizes the incorporation of cooperatives such as CPA, and Minn. Stat. § 308A.201, subd. 13 (2002) provides that a "cooperative that is engaged in the electrical, heat, light, power, or telephone business may exercise the power of eminent domain" Minn. Stat. § 300.03 (2002) sets forth the purpose of public service corporations, and pursuant to Minn. Stat. § 300.04 (2002), the corporation may exercise the right of eminent domain. Minn. Stat. § 116C.62, subd. 2 (2002) provides that "[i]n eminent domain proceedings by a utility for the acquisition of real property proposed for construction of a route or a site, the proceedings shall be conducted in the manner prescribed in chapter 117" Minn. Stat. § 116C.52 (2002) defines "utility" to include cooperatively owned utilities that engage in "the generation, transmission or distribution of electric energy"

stated by CPA and GRE – *i.e.*, supplying a safe and uninterrupted flow of electrical energy to the public. That is because the Lundells cannot reasonably do so.⁷

Courts give “[g]reat weight . . . to the condemning authority’s determination that a public purpose is involved.” *Port Auth. v. Groppoli*, 295 Minn. 1, 8, 202 N.W.2d 371, 375 (Minn. 1972). Property taken by eminent domain is presumed to be taken for the stated purpose of the condemning authority. *Id.* “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.” *City of Duluth*, 390 N.W.2d at 763 (quoting *Minneapolis Metro. Co.*, 259 Minn. at 15, 104 N.W.2d at 874).

The district court found that the taking was for a public purpose. (A.A. 178). Because the facts in the record plainly support the district court’s finding, the Court of Appeals properly affirmed the district court decision. (A.A. 199). Indeed, it is undisputed that GRE and its member cooperatives, including CPA, are in the business of supplying electricity to the public and that CPA uses the Cannon Falls Tower to monitor and manage electrical flow and for mobile communications for the maintenance and operation of the CPA Facilities. (A.A. 32-33). Under the circumstances, there can be no question that the operation of the Cannon Falls Tower is a public use. *See City of*

⁷ Rather than openly conceding that CPA’s public utility operations satisfy the public purpose requirement, the Lundells try to merge that requirement and the necessity requirement into a single requirement in an effort to rely on a so-called bad faith defense that heretofore has only been discussed by this Court in a very small number of cases and *only in the context of the public purpose requirement*. As discussed *infra* at pp. 24-36, this Court should reject the Lundells’ inappropriate arguments in that regard.

Shakopee v. Minnesota Valley Elec. Coop., 303 N.W.2d 58, 60 (Minn. 1981) (supplying of electrical power determined to be a public use for which the exercise of condemnation authority was appropriate); *Dairyland Power Coop. v. Brennan*, 248 Minn. 556, 563-69, 82 N.W.2d 56, 62-65 (1957) (same). Therefore, acquisition of the Tower Site by eminent domain pursuant to Minnesota Chapter 117 is for a public purpose, and the district court's finding to that effect was not clearly erroneous.

B. The District Court's Finding That The Taking Was Necessary Is Not Clearly Erroneous.

Unlike the issue of whether the condemnation of the Tower Site is for a public purpose, the issue of whether the condemnation of the Tower Site is necessary was actually disputed by the Lundells. Nevertheless, because there is ample evidence to support the district court's finding that the taking was necessary, the end result is the same. This Court must affirm the condemnation rulings of the lower courts.

1. *The record adequately establishes that the taking was reasonably necessary and convenient.*

On numerous occasions, this Court has explained that a condemning authority is not required to "show an absolute or indispensable necessity, but only that the proposed taking is *reasonably necessary or convenient for the furtherance of a public purpose.*" See *City of Pipestone v. Halbersma*, 294 N.W.2d 271, 274 (Minn. 1980) (quoting *Kelmar Corp. v. District Court of Fourth Judicial Dist.*, 269 Minn. 137, 142, 130 N.W.2d 228, 232 (1964)) (emphasis added); see also *City of Duluth*, 390 N.W.2d at 764-65.

Giving appropriate deference to the condemning authority's decision concerning the necessity of the taking, the district court found that CPA "needs to own the Tower Site in fee simple . . . to enable [CPA] to maintain and have the Cannon Falls Tower Site without dispute or uncertainty as to use rights, responsibility for real estate taxes, termination and continuity of use, and the terms and conditions of use and occupancy, and to economically have and maintain the Cannon Falls Tower." (A.A. 175). The record before the district court includes numerous undisputed facts that support this determination, including:

- Beginning very soon after they acquired an interest in the land that CPA had leased without incident for more than twenty years, the Lundells alleged, through counsel, that CPA was violating the terms of the Lease by subleasing space on the Tower. (A.A. 34-35). GRE (on behalf of CPA) was unsuccessful in its attempt to persuade the Lundells that there was no breach of the Lease because CPA had the right to sublease space on the Cannon Falls Tower to third parties. (A.A. 35 and 79-82).
- The Lundells demanded that CPA pay increased rent due to the presence of a sublessee on the Leased Premises. (A.A. 35).
- The parties disputed whether the Lease was amended to substantially increase the amount of rent owed by CPA. (A.A. 35 and 74). The Lease provided for rent of \$450 per year, but the Lundells sought to increase the rent to \$750 per month (\$9,000 per year). (A.A. 74). Although no amendment was ever signed by both parties, the Lundells claimed that the rent had increased and that CPA was in default for failing to pay the increased amount. (A.A. 74 and 89).
- When efforts to negotiate a resolution to the disputes concerning the sublease and the alleged amendment to the Lease failed, the Lundells threatened litigation, with termination of the lease as a possible outcome. (A.A. 35).
- CPA's operations require more space than the Lease permitted. (A.A. 34, 36 and 39-40). Specifically, to permit guy wires and supports in proper and appropriate locations, the Tower Site needs to be larger than the Leased Premises. (*Id.*). The Lundells have questioned CPA's need for additional land

(A.A. 20), but have not offered any evidence to contradict the above-cited sworn statements submitted by CPA.

- In the face of the ongoing disputes with the Lundells, the Board found and determined that CPA should own, not lease, the Tower Site, in order to ensure continued use and operation of the Cannon Falls Tower and to permanently have and use the Tower Site without the risk, uncertainty, and eventual termination of the Lease. (A.A. 34, 36-37 and 40-41).

In addition to the foregoing undisputed evidence, CPA has introduced other persuasive evidence of necessity that the Lundells have at least nominally disputed. Specifically, CPA has introduced sworn evidence (1) that GRE has a policy of acquiring fee title to its tower sites, (2) that, pursuant to that policy, GRE has purchased a number of tower sites that it previously leased, and (3) that GRE expects to have a tower at the Tower Site well beyond the date on which the Lease expires without any further right to extend. (A.A. 36, 37 and 74). The Lundells vigorously dispute the existence of GRE's policy of acquiring fee title to tower sites and the expectation that GRE will still need a tower at the Tower Site after 2030, but they have not presented any sworn evidence to contradict the sworn evidence presented by CPA concerning those points. Instead, the Lundells rely on unsupported speculation and unsworn "circumstantial evidence."

In accordance with the statutory purpose behind public service corporations like GRE and CPA, the Board has a duty to member cooperatives (including CPA) and their members, the public, to make sure that adequate electrical power is consistently available and that the future of its facilities (including the Cannon Falls Tower) has been adequately secured. *See* Minn. Stat. § 300.03 (2002). As the above-described evidence demonstrates, the public purpose served by the Cannon Falls Tower is not secure as long

as CPA's interest in the land remains merely a leasehold interest that is subject to future termination and is for less than the full Tower Site. In short, there are ample facts in the record to support the district court's finding that CPA needed to acquire fee ownership of the entire Tower Site. Hence, the district court's finding is not clearly erroneous.

In fact, as the Court of Appeals expressly recognized (A.A. 195), the Board's formal resolution that the taking is necessary to ensure operation of the Cannon Falls Tower, is, by itself, *prima facie* evidence of public use and necessity. *See City of Pipestone*, 294 N.W.2d at 274 (when considering the issue of necessity, the court recognized that the city council had determined, by resolution, that the taking was necessary to expand the airport, and thus that "the resolution [was] *prima facie* evidence of public use and the issue of taking as a means reasonably necessary to accomplish that use"). Thus, absent "*overwhelming*" evidence to contradict the Board's determination, the district court's finding of public use and necessity cannot be clearly erroneous. *See City of Duluth*, 390 N.W.2d at 764 (quoting *Minneapolis Metro. Co.*, 259 Minn. at 16, 104 N.W.2d at 875) (emphasis in original). The record contains no such "*overwhelming*" evidence.

The Lundells mistakenly argue that CPA had no need to condemn because the Lease term could be extended through 2030. As the record demonstrates, the ongoing disputes between the parties placed CPA's right to possession of the Tower Site in

jeopardy.⁸ The Lundells threatened litigation, with termination of the Lease as a possible outcome, and, later, gave CPA notice of default and threatened eviction when CPA refused to pay the increased rent to which the Lundells claimed they were entitled.

The notice of default that the Lundells served on or about March 27, 2002 pursuant to Minn. Stat. § 504B.291 contains the following express threat of eviction:

YOU ARE FURTHER NOTIFIED THAT IF THE AMOUNTS . . . SET FORTH IN THIS NOTICE ARE NOT PAID WITHIN 30 DAYS, *THE LESSOR MAY EVICT YOU AT THE EXPIRATION OF SAID 30 DAYS.*

(A.A. 90) (capitals in original; italics added for emphasis). Thus, the Lundells were expressly threatening to interrupt CPA's use of the Leased Premises.

The Lundells could have simply made a contractual claim for money damages, but they opted to threaten eviction under the summary eviction statute. At that point, the only ways that CPA could completely avoid the threat of eviction were (1) to pay the increased rent that the Lundells were claiming under the proposed lease amendment that CPA never signed (including more than \$9,000 in back rent that the Lundells were seeking) or (2) to condemn the property. In light of its policy of owning tower sites, its

⁸ Whether due to the current dispute, an unforeseen future dispute, or the inevitable termination of the Lease, the property rights and contractual terms of the Lease create uncertainty concerning CPA's possession of the Tower Site. The mere fact that the Lease has twenty-six more years to run does not control this analysis. If anything, the long (but not perpetual) term of the Lease provides all the more reason for CPA to condemn. CPA does not want to be saddled with another twenty-six years of litigation and threats concerning possession of the Tower Site and rights under the Lease.

need for more space than provided in the Lease, and the history of disputes with the Lundells, CPA chose the second option.

The Lundells would have this Court rule that the availability of the distasteful and inconvenient option of kowtowing to a landlord's disputed demands precludes a finding that a condemnation is necessary. In short, the Lundells are asking the Court to adopt an "absolute necessity" standard. That request ignores the fact that "[n]umerous cases have declared that the requisite necessity is *not* absolute necessity." *See City of Duluth*, 390 N.W.2d at 764 (emphasis added). Again, this Court has repeatedly held that a condemnor need only show that a proposed taking is "reasonably necessary or convenient." *Id.* at 764-65. As the district court and the Court of Appeals properly recognized, the taking of the Tower Site easily satisfies that relatively modest standard.

Furthermore, the Lundells' absolute necessity argument completely ignores the undisputed fact that the Tower Site is actually larger than the Leased Premises. (A.A. 34, 36 and 39-40). Even if it is assumed for the sake of argument that paying the disputed rent amount would have actually provided absolute protection against a loss of use of the Leased Premises, pursuing that option would not offer any protection against a loss of use of the rest of the Tower Site. The Lundells could still seek to force CPA and GRE to remove the supporting portions of the Cannon Falls Tower that are located on the portions of the Tower Site that are outside the boundaries of the Leased Premises. Given the ongoing disputes between the parties, CPA and GRE could scarcely rely on the Lundells to overlook the use of property beyond the boundaries of the Leased Premises. Thus, upon learning that the Tower Site exceeds the boundaries of the Leased Premises,

the only way for CPA and GRE to completely assure the continuous, uninterrupted and safe operation of the Cannon Falls Tower was to condemn the entire Tower Site.

Finally, the Lundells' argument requires the Court to ignore the sworn evidence in the record that GRE has adopted a policy of owning its tower sites and that GRE plans to have a tower at the Tower Site long after the 2030 termination date of the Lease. As noted above, the Lundells rely entirely upon unsupported "circumstantial evidence" and unsworn speculation to dispute the sworn evidence contained in the record on those points. Such unsworn and speculative assertions do not constitute the type of "overwhelming evidence" needed to overcome the Board's finding of necessity, especially in view of the ample additional evidence of necessity. Accordingly, as the Court of Appeals correctly concluded, the district court's finding of necessity was not clearly erroneous.

2. *The existence of a contract between the parties does not affect a condemning authority's eminent domain powers.*

Although the Lundells assert that they are not trying to use the mere existence of the Lease to prevent the condemnation of the Tower Site, a common sense examination of the Lundells' arguments suggests otherwise. The Lundells' central position is that CPA cannot condemn the Tower Site so long as the Lease gives CPA the right to use the Leased Premises. The fact that the Lundells have now dressed that argument in slightly different clothes does not change the main thrust of the argument – *i.e.*, that a condemning authority's right to exercise its powers of eminent domain can be limited by contract. That is not the law; nor should it be the law.

This Court has previously recognized that the existence of a contract between the parties to a condemnation proceeding does not affect the condemning authority's right to exercise its eminent domain powers. *See Village of St. Louis Park v. Minneapolis, N. & S. Ry. Co.*, 156 Minn. 164, 169, 194 N.W. 327, 329 (Minn. 1923). Numerous other courts, including the United States Supreme Court, have reached the same conclusion. *See, e.g., Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685, 688-89 (1897); *United States v. 6.74 Acres of Land*, 148 F.2d 618, 620 (5th Cir. 1945); *Central Hanover Bank & Trust Co. v Pan America Airways*, 188 So. 820, 824-25 (Fla. 1939); *Russell v. Trustees of Purdue Univ.*, 178 N.E.2d 180 (Ind. 1931); *New York and Harlem RR. Co. v. Kip*, 46 N.Y. 546, 554-55 (1871); *Houston North Shore Ry. Co. v. Tyrrell*, 98 S.W.2d 786, 793-95 (Tex. 1936); *Bear Creek Dev. Corp. v. Dyer*, 790 P.2d 897, 898 (Colo. App. 1990).⁹

⁹ The Lundells superficially attempt to distinguish several of these cases. *See* App. Br., pp. 17-18. However, most of their comments are quite misleading. For example, contrary to the Lundells' suggestion, the *Long Island Water Supply Co.* case did not involve a dramatic change in the public use. Rather, the condemnor simply sought to *own* the water facilities in question rather than continuing to *rent* them under a contract that had twenty years more to run. 166 U.S. at 688-89. Similarly, with regard to the *Village of St. Louis Park* case, the Lundells' fail to note that the use of steam powered trains was precluded by the existing contract, was *not* a technological advance, and was strongly opposed by the plaintiff-condemnee. 156 Minn. at 165-66, 194 N.W. at 328. Thus, the Lundells' broad assertion that the use of such trains was "desired" is not entirely accurate. Finally, the Lundells' attempt to distinguish the *Bear Creek Dev. Corp.* case makes no sense. The only purpose that was served by the condemnation in that case was the resolution of an ongoing dispute over the value of the easement sought by the condemnor. 790 P.2d at 898.

In *Village of St. Louis Park*, the village enacted an ordinance at the railway company's request permitting the railway company to operate electric trains in the village. 156 Minn. at 165; 194 N.W. at 328. Several years later, the railway wanted to change to operating steam engine train lines throughout the village. *Id.* at 166, 194 N.W. at 328. The village refused the railway's request and sued the railway. *Id.* The district court granted the village's motion for an injunction to prevent the railway from operating in a manner differently from that allowed by the ordinance. *Id.* However, the court stayed the injunction to enable the railway to initiate condemnation proceedings to acquire the rights the railway determined necessary for its operation. *Id.*

This Court found that the ordinance operated as a contract, binding upon the railway, but nevertheless affirmed the district court's decision to stay the injunction, stating:

[A] contract of the kind now in question though valid, especially when authorized by statute as this one is, *cannot prevent the subsequent acquisition by condemnation, for public purposes and adequate compensation, of property and rights inconsistent with or expressly denied by such contract.*

Id. at 169, 194 N.W. at 329 (emphasis added). The Court also emphasized the policy behind its conclusion:

Public service corporations hold the powers of eminent domain which the state has granted to them for the public interest which requires that such powers remain unfettered by the contracts of the holders.

Id.

The Court concluded that the railway had the authority to use its condemnation authority to acquire broader rights than those provided in its contract with the village. *Id.* Even where a court had granted an injunction to enforce the provisions of a contract, a condemning authority could use eminent domain to eliminate the contractual limits on the condemning authority's use of the property. *Id.*

The rule set forth in the *Village of St. Louis Park* case serves the purpose behind condemnation. Although a contract establishes a legal relationship between the condemning authority and the property owner, contractual terms cannot and should not override the broader authority the legislature granted the condemning authority to acquire by eminent domain property rights that the condemning authority reasonably determines to be necessary for a public purpose. *See Village of St. Louis Park*, 156 Minn. at 169, 194 N.W. at 330 (“[I]t is beyond the powers of public and private corporations effectually to contract that in the future no resort shall be had to the power of eminent domain to enlarge the rights given by contract”); *see also City of Milwaukee v. Schomberg*, 52 N.W.2d 151, 152 (Wis. 1952) (“The power of eminent domain is inalienable and cannot be surrendered”). Otherwise, eminent domain authority would be undermined.

Like the railway company in *Village of St. Louis Park*, CPA is a party to a contract (the Lease) that does not provide CPA with the property interest or rights that CPA has determined it needs for a public use. The district court found that CPA needs to own the Tower Site in fee simple. For the reasons previously discussed, this finding is not clearly erroneous. Insofar as the Lundells claim that CPA and GRE should not be able to use their powers of eminent domain to increase their existing property rights, they make the

same argument that failed in *Village of St. Louis Park*. Accordingly, the Court of Appeals properly held that the district court did not abuse its discretion by granting the condemnation petition.

The decision of the lower courts in this case is also supported by the decision of the United States Supreme Court in the *Long Island Water Supply Co.* case. In that case, the town of New Lots entered into a contract with Long Island Water Supply Company whereby the town agreed to pay a specified sum per year for 25 years for hydrants furnished and supplied by the company. 166 U.S. at 685. Because the town was annexed into the City of Brooklyn five years after entering the contract, the City sought to condemn the water supply system and the contract. *Id.* The Supreme Court permitted the condemnation to proceed. *Id.* at 689-90. In so doing, the court expressly refused to adopt the position that “the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain.” *Id.*

Courts in the other cases listed above on page 19 have similarly upheld a condemning authority’s right to condemn property that was already the subject of a lease between the condemning authority and the landowner. For example, in *Central Hanover Bank & Trust Co.*, the Florida Supreme Court permitted an airline to proceed with the condemnation of the fee interest in land that the airline occupied under a renewable lease that could be extended for *fifty years*:

The fact that the [condemnor] may be occupying the property under a lease, renewable from term to term until the year 1980, and is, therefore, secure in the use of it by virtue of

that instrument, would not, in our opinion, defeat the condemnation of the fee simple title to the property.

188 So. at 824. *See also Tyrrell*, 98 S.W.2d at 793-95 (though condemning railroad already had right to operate over subject property pursuant to a conditional deed, court upheld railroad's petition to acquire an unconditional permanent easement).

Indeed, as the Colorado appellate court noted in the *Bear Creek Dev. Co.* case, “[v]irtually every court which has addressed this issue has determined that a leasehold arrangement between owners of property does not preclude an action for eminent domain.” 790 P.2d at 898; *see also Lay v. Pi Beta Phi, Inc.*, 207 S.W.2d 4, 6 (Tenn. Ct. App. 1947), *review denied* (Tenn. Dec. 4, 1947) (noting that cases “uniformly” hold that “the fact that the condemnor already owns some interest in the property is not a bar to his acquisition under the right of eminent domain of the fee title, or of some other additional or increased interest”).

Because this Court, the United States Supreme Court, and courts in numerous other jurisdictions have each determined that a condemning authority may exercise its power of eminent domain to acquire greater rights than the condemning authority enjoys under an existing long-term contract or lease, the existence of the Lease (and/or the proposed amendment to the Lease) in this case did not render the condemnation manifestly arbitrary or unreasonable. Accordingly, this Court should affirm the decisions of the district court and the Court of Appeals.

II. THERE IS NO MERIT TO THE LUNDELLS' RELATED "GOOD CAUSE" AND "BAD FAITH" CONTENTIONS.

Minn. Stat. § 308A.201, subd. 13, authorizes CPA to acquire land by the exercise of eminent domain pursuant to Minnesota Statutes Chapter 117. As discussed above, the taking of fee title to the Tower Site was for a public purpose and was necessary. Acting on CPA's behalf, GRE carefully considered the need for a condemnation of the land, as is evidenced by the resolution passed by the Board. (A.A. at 10-11). Like each of the lower courts, this Court should refrain from substituting its judgment for that of CPA and GRE. *See Minneapolis Metro. Co.*, 259 Minn. at 16, 104 N.W.2d at 875 (recognizing that it is improper for a court to substitute its judgment for that of the condemning authority"). Furthermore, as set forth in the following portions of this brief, the Court should reject the Lundells' invitation to impose additional and/or expanded requirements on condemning authorities.

A. The Court Should Reject The Lundells' Request For A Rule That Would Impose A "Good Cause" Requirement Upon Condemnors Who Seek Increased Property Rights.

This Court should reject the Lundells' request for a new rule that would require a condemning authority to show "good cause" (and/or an absence of "bad faith") as a separate, additional condition of obtaining an increased interest in property in which the condemning authority already possesses an interest. The request is unsupported by any legal authority, does not stand up to critical analysis, and would lead to absurd results in the present case.

The Lundells cannot point to any condemnation decision in which this Court has applied a separate “good cause” requirement in addition to the two standard condemnation requirements that the courts of this State have repeatedly recognized (*i.e.*, public purpose and necessity). Instead, the Lundells rely upon *four words* contained in a 1945 decision that have never been cited by this Court for the proposition for which the Lundells now cite them. *See In re Petition of Burnquist*, 220 Minn. 48, 54, 19 N.W.2d 394, 398 (1945). The words – “upon good cause shown” – appear in the middle of a lengthy quotation from a legal encyclopedia. *Id.* at 54, 19 N.W.2d at 397-98 (quoting 18 Am. Jur. *Eminent Domain* § 88). They are not explained in the quotation, in any other part of the *Burnquist* decision or in any subsequent decision of this Court. Moreover, the words do not appear to be of any consequence to the Court’s holding in *Burnquist*. In fact, a careful reading of the *Burnquist* decision suggests that, if the words in question are anything more than inconsequential legal pabulum, they are a shorthand reference to the normal requirements for obtaining condemnation.¹⁰

The foregoing interpretation of the *Burnquist* decision also comports with the previously discussed principle that a condemning authority cannot contract away its power of eminent domain. *See Argument supra* at p. 25. That principle would be

¹⁰ Since the quotation in which the reference to “good cause” appears is from a legal encyclopedia (American Jurisprudence) that was intended to broadly describe the law of all of the United States, viewing the reference as merely a generic acknowledgement that the normal condemnation requirements must be satisfied makes sense. Because the condemnation requirements differ from state to state, the legal encyclopedia could not be expected to set forth the requirements with much specificity.

significantly undermined if the existence of a lease or other contract was deemed to place additional limits on a condemning authority's condemnation powers .

In addition to lacking legal support, the Lundells' request for the imposition of a "good cause" requirement does not stand up to critical analysis. The Lundells cannot explain why it should be harder for a condemning authority to condemn property in which the condemning authority already possesses an interest than it is to condemn property in which the condemning authority does not yet possess an interest. Indeed, the Lundells' argument is counter-intuitive. Why should the standard for condemning property in which the condemning authority already has an interest be higher than it is for condemning property in which the condemning authority has never previously sought an interest? When the condemning authority already has an interest in the property, a condemnation will normally be less intrusive than when the condemning authority has had no previous interest in the property. Thus, if anything, it would seem that the standard for condemnation should be *lower* when the condemning authority already possesses an interest in the subject property.

Furthermore, the "good cause" rule that the Lundells seek to impose would tend to discourage condemning authorities from initially agreeing to obtain only so much of an interest in property as is absolutely necessary to meet current needs. If the standard for condemnation is higher where a condemning authority seeks to increase a property interest rather than to initially obtain such an interest, parties with condemnation authority will simply seek to condemn all of the property interests from the start. Where there is any chance that fee title to the property may be needed in the future, a party that

has the power to condemn will be disinclined to enter into a lease arrangement like the one that worked well in the present case for more than twenty years.

Finally, the Lundells' proposed rule could lead to absurd results in the present case. Because CPA's condemnation petition is not limited to the Leased Premises --i.e., it also seeks property beyond the area described in the Lease -- different rules would apply to different parts of the subject property. CPA would have to satisfy the Lundells' proposed "good cause" requirement with respect to the property described in the Lease, but no "good cause" inquiry would be appropriate as to those portions of the Tower Site that are not covered by the Lease. Thus, CPA might theoretically be able to condemn the land outside the boundaries of the Leased Premises, while simultaneously being unable to condemn the Leased Premises. That result would be absurd.

The fact that CPA (or any other similarly situated condemnor) could avoid the separate "good cause" inquiry proposed by the Lundells by simply terminating the leasehold interest before condemning the property leads to an equally bizarre result. Here, the Lease authorizes CPA to terminate without cause, upon one year's notice. A.A. 25. As of the date of termination, CPA would no longer have an interest in the property. CPA could then condemn the property without the need for a separate "good cause" inquiry. Thus, the Lundells' proposed "good cause" rule might preclude a condemnation in the short term, but not if CPA opted first to terminate the Lease. Such a result seems absurd and would be economically inefficient.

For all of these reasons, the Court should reject the Lundells' request for the imposition of a new -- "good cause" -- requirement.

B. The Court Should Reject The Lundells' Contention That The Lower Courts Erred By Failing To Find That CPA Acted With The Type Of Bad Faith Necessary To Set Aside A Condemnation In Minnesota.

In rejecting the Lundells' pleas for the imposition of a separate "good cause" requirement, the Court should likewise reject the Lundells' related contention that CPA acted with the type of "bad faith" necessary to defeat a condemnation in Minnesota. The Lundells' argument regarding "bad faith" is not supported by the law or the facts.

1. *The only Minnesota condemnation decisions that have addressed "bad faith" have focused upon the public purpose issue.*

No Minnesota appellate decision has ever held that a condemnation petition that will result in a purely public use of the condemned property can be defeated by allegations of a "bad faith" motive on the part of the condemning authority. Rather, the only Minnesota condemnation decisions that have even discussed the concept of "bad faith" (before rejecting it) have involved allegations that the condemning authority's actions were improperly intended to favor private parties. *See, e.g., City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 390 (Minn. 1980); *Housing & Redev. Auth. v. Schapiro*, 297 Minn. 103, 105-108, 210 N.W.2d 211, 213-14 (1973).

In *Wurtele*, the Court analyzed the condemning authority's motives as part of the "public purpose" equation where the objecting parties claimed that the condemnation was intended to benefit private interests rather than the public. 291 N.W.2d at 390-91. *See also State ex rel. Hunt v. City of Montevideo*, 142 Minn. 157, 162, 171 N.W. 314, 316 (1919) ("The motives of the members of the [condemning authority] are immaterial and not open to judicial inquiry, except perhaps in a case of fraud and collusion with private

interests.”). The Court ultimately concluded that the “ambiguous and speculative” evidence introduced by the objecting parties was not sufficient to require a reversal of the lower court’s finding that the condemnation was for a public purpose. *Wurtele*, 291 N.W.2d at 390.

In *Schapiro*, the allegations of “bad faith” were likewise closely tied to a condemnee’s contention that the condemning authority was serving private interests rather than those of the public. 297 Minn. at 105-108, 210 N.W.2d at 213-14. In fact, the only case cited in the “bad faith” portion of the *Schapiro* decision is a Pennsylvania case where the court overturned a condemnation that simply took the property of one private retailer for the sole purpose of giving it to another private retailer. *Redevelopment Auth. v. Owners or Parties in Interest*, 274 A.2d 244, 250-51 (Pa. Commw. Ct. 1971).

Since there has been no contention that the Tower Site is going to be put to anything other than a public use for the foreseeable future, the Court ought not even consider the Lundells’ allegations of a bad faith motive unless the Court is inclined to create new Minnesota law.

2. *The record does not require the Court to overturn the lower court determination that CPA did not act in bad faith.*

Even if this Court is inclined to accept the Lundells’ invitation to consider making new law in Minnesota on the subject of “bad faith” in condemnation proceedings, a review of the very few reported “bad faith” cases from other jurisdictions reveals that the present case is not a good one for undertaking that task. The so-called playing of a “trump” card by CPA to (among other things) avoid hotly disputed lease terms simply

does not amount to the type of bad faith that courts have held must be proven to defeat an otherwise proper condemnation petition.

A recent decision of the South Dakota Supreme Court cited by the Court of Appeals and the Lundells illustrates that dispute avoidance is a permissible goal for a condemning authority and does *not* amount to bad faith or an abuse of discretion. *See City of Freeman v. Salis*, 630 N.W.2d 699, 703-05 (S.D. 2001). In *Salis*, the South Dakota Supreme Court concluded that a condemning authority's decision to condemn to ensure finality and avoid protracted negotiations or litigation was neither "bad faith" nor an abuse of discretion. *Id.*¹¹ The case involved efforts by the city to remove trees from a ditch that ran along a section of the property owners' property. *Id.* at 700-01. The owners wanted to preserve the vegetation and wildlife. *Id.* at 701. The city and the owners eventually negotiated a "Memorandum of Understanding" concerning the removal of the trees. *Id.* However, when the city later attempted to remove trees from the ditch, the owners demanded that the city stop the removal and asserted that the city had breached the Memorandum. *Id.* After unsuccessfully attempting to negotiate with the owners, the city instituted condemnation proceedings. *Id.*

Rejecting the owners' argument that the city acted in bad faith by condemning the property, the court in *Salis* explained that "[a]n effort to avoid extended litigation or

¹¹ Unlike Minnesota law, South Dakota law expressly recognizes (by statute) a so-called "bad faith" defense to condemnation proceedings. *See Salis*, 630 N.W.2d at 702-03; *see also* S.D. Codified Laws § 21-35-10.1 (making condemnor's finding of necessity binding on all parties "unless based upon fraud, bad faith, or an abuse of discretion").

repeated negotiations with the same property owners may prove nothing more than fiscal prudence, rather than bad faith.” *Id.* at 703. The court similarly explained that it would be improper to overturn a condemnation on grounds of “bad faith” where the parties had a written agreement but could not agree on its terms. *Id.* at 704. In that regard, the court noted that “to hold otherwise suggests that cities can inadvertently contract away the right to condemn property.” *Id.*

As the court summarized:

To the Salises, the City could have cleared the ditch without resorting to condemnation if it had only continued to negotiate; therefore, the decision to condemn was an exercise of passion and anger instead of reason and logic. Yet it is clear that these parties could not agree on the meaning of the terms in the Memorandum.

* * *

Taking into account [the] differing interpretations, the City was concerned about “past and possibly future damages” if it attempted to proceed under the original Memorandum. The Mayor explained the City's need for finality as the reason for choosing condemnation: “We do not want to be here every other year discussing the Memorandum of Understanding We want to solve the problem.” *Avoiding protracted negotiation or litigation and concerns of expense and public safety assuredly fall within the range of government discretion. At best, any suggestion of abuse of discretion can be found only by supposing that anger or impatience animated council members after negotiated attempts to clear the ditch appeared time consuming and failed. These are not sufficient to constitute an abuse of discretion.*

Id. at 705 (emphasis added) (footnote and citations omitted).

Again, the only reason the issue of “bad faith” was discussed in *Salis* was because, unlike Minnesota, South Dakota expressly recognizes a separate, statutory “bad faith”

defense in condemnation cases. *See* Note 11 *supra*. Nevertheless, if the reasoning of *Salis* is applied to the present case, the Court must reject the Lundells' contentions that the condemnation by CPA was done in bad faith and was an abuse of discretion. Like the city in *Salis*, CPA was mired in an ongoing dispute with a property owner that involved efforts to reach a negotiated settlement and differing views concerning the parties' respective rights under a written agreement. Thus, like the city in *Salis*, CPA had a valid reason for condemning the fee interest of the land to avoid protracted negotiations and potential litigation over the terms of the Lease (and the alleged amendment) and to ensure finality of CPA's use of the land.

In an effort to avoid the impact of the *Salis* case and buttress their "bad faith" argument, the Lundells vigorously claim that CPA should not be allowed to start a dispute and then use the existence of the dispute as a basis for a condemnation. That argument implies a Machiavellian strategy on the part of CPA for which there is absolutely no proof and rewrites history. CPA did not start the dispute between the parties. On the contrary, the Lundells instigated the dispute by questioning CPA's legal right to sublease to other parties and demanding a dramatic rent increase. The Lundells would like the Court to believe that the dispute did not begin until CPA refused to perform as provided in the proposed lease amendment, but the dispute over the purported amendment is just a continuation of the ongoing dispute that began shortly after the Lundells acquired title to the subject property. Indeed, the only reason the parties discussed amending the Lease was to try to resolve their pre-existing dispute.

On the topic of bad faith, the Court should also be guided by *City of Marietta v. Edwards*, a decision in which the Georgia Supreme Court refused to find bad faith where the condemning authority exercised its powers to correct its negligent mistake. 519 S.E.2d 217, 218-19 (Ga. 1999). In that case, the city petitioned to condemn a portion of property that it had sold three months earlier because, shortly after accepting the purchasers' bid, the city determined that it mistakenly failed to retain a portion of the property for a right-of-way. *Id.* at 218. The court, emphasizing that the city was required to pay just and adequate compensation for the land condemned, concluded that the city did not act in bad faith. *Id.* at 218-19. The court distinguished between negligence and bad judgment on one hand and ill will on the other: “[B]ad faith’ in this context is to be distinguished from negligence and bad judgment. It is comparable to ‘conscious wrongdoing motivated by improper interest or ill will.’” *Id.* (quoting *Craven v. Ga. Power Co.*, 281 S.E.2d 568 (Ga. 1981)).

Even if the district court had accepted the Lundells' position that CPA exercised its eminent domain power to resolve the dispute concerning the purported lease amendment, that dispute arose out of a negligent mistake. As *City of Marietta* demonstrates, the condemning authority's decision to condemn to correct a negligent mistake is not an act taken in bad faith, absent evidence of ill will. There is simply no evidence in the record that CPA acted with any ill will or conscious wrongdoing. All evidence points to the contrary -- that CPA acted quickly and reasonably to address the disputed issues. Therefore, the district court did not clearly err when it implicitly found that CPA's decision to condemn was not arbitrary, capricious, or made in bad faith.

Although handling of the “bad faith” issue in *City of Marietta* plainly supports the conclusion of the Court of Appeals in the present case that bad faith on the part of CPA was not proven, the Lundells try to give the illusion that the case actually supports their position. The Lundells focus on the Georgia court’s statement that it “has found bad faith in the determination of public purpose only when the stated purpose was a *subterfuge*.” *City of Marietta*, 519 S.E.2d at 219 (emphasis added). In particular, the Lundells focus on the last word of that statement, without giving much attention to the court’s clear indication that the subterfuge in question must go to the issue of “public purpose.”

Contrary to the Lundells’ overblown assertions, there was no “subterfuge” in the present case – especially with regard to the issue of “public purpose.” CPA has never made a secret of the fact that one of the reasons that a condemnation was necessary was to avoid ongoing disputes with the Lundells. The condemnation petition contains a clear statement to that effect. (A.A. 5).

The Lundells’ “subterfuge” argument is itself a subterfuge. The Lundells want to dispute the district court’s finding that GRE has a policy of acquiring fee title to tower sites, so they act as if that was the sole basis for the district court’s finding of necessity. However, as discussed above at pages 12-18 of this brief, numerous other bases support that finding (including the need for more land than the Lease covered, the need to have use of the Tower Site beyond the remaining term of the Lease, and the need to avoid ongoing disputes). Thus, as the Court of Appeals appropriately noted in its decision, the conclusion that the condemnation of the Tower Site is necessary does not depend upon the existence of a policy of acquiring fee title to tower sites. (A.A. 195).

Furthermore, the Lundells' contention that GRE did not have a policy of acquiring fee title to tower sites rests entirely upon speculation and conjecture that is not supported by the Lundells' affidavits or by any other sworn evidence. As such, that contention is plainly not sufficient to require the Court to completely disregard the uncontradicted sworn statements of GRE's Manager of Technology Services that such a policy existed and that GRE has purchased fee title to other tower sites in furtherance of the policy. (A.A. 74). Because those uncontradicted sworn statements provide "reasonable evidence" to support the district court's findings concerning GRE's policy, the district court's findings must be affirmed. *See Rogers*, 603 N.W.2d at 656.

In addition, there is no allegation that CPA intends to use the Tower Site for some purpose other than the indisputably public purpose of facilitating the safe and uninterrupted distribution of electricity to the public. The property is already being utilized for that purpose and there is absolutely no evidence that CPA will not continue to use it for that purpose for the foreseeable future. By contrast, the tainted motive cases cited by the Lundells and by the court in *City of Marietta* (in support of the "subterfuge" language on which the Lundells focus in their brief) all involved allegations that the actual purpose for the condemnation was different from the stated public purpose and all involved property that the condemning authority had never previously shown an interest in utilizing. *See Pheasant Ridge Assoc. Ltd. Pshp. v. Town of Burlington*, 506 N.E.2d 1152, 1155-58 (Mass. 1987) (holding that condemnation was unlawful and void where condemnation was merely intended to block a development and the stated public purposes for which the property was taken "were not purposes for which the town

intended in good faith to take and use the property”); *Carroll County v. City of Bremen*, 347 S.E.2d 598, 599-600 (Ga. 1986) (holding that condemnation was improper where county’s true purpose for condemning property was not as stated but was to block city from using property to construct a sewage-treatment facility); *Earth Mgt., Inc. v. Heard County*, 283 S.E.2d 455, 459-61 (Ga. 1981) (concluding that county had condemned property for improper purpose of preventing the property from being used as a hazardous waste facility).

III. THE DISTRICT COURT’S CONCLUSION THAT CPA ESTABLISHED THE CONDITIONS REQUIRED UNDER THE QUICK TAKE STATUTE IS NOT CLEARLY ERRONEOUS.

Minn. Stat. § 117.042 provides for possession of the land pursuant to the so-called quick take statute.¹² A quick take may be used where a condemning authority “could reasonably determine that it needs the property before the commissioner’s award could be filed.” *Wurtele*, 291 N.W.2d at 396.

¹² Minn. Stat. § 117.042 provides, in pertinent part:

Whenever the petitioner shall require title and possession of all or part of the owner's property prior to the filing of an award by the court appointed commissioners, the petitioner shall, at least 90 days prior to the date on which possession is to be taken, notify the owner of the intent to possess by notice served by certified mail and before taking title and possession shall pay to the owner or deposit with the court an amount equal to petitioner's approved appraisal of value.

The district court's finding that CPA required early title and possession of the property so that CPA could maintain the Tower without dispute or uncertainty is supported by facts in the record. *See* Argument *supra* at pp. 12-18. The undisputed facts show that the Tower Site occupied an area somewhat larger than the Leased Premises, that the Lundells had previously notified GRE and CPA that the Lease was in default, that the Lundells had threatened to cancel the Lease, and that the parties had ongoing disputes concerning the sublease, payment of the real estate taxes, and the purported amendment to the Lease. *Compare Wurtele*, 291 N.W.2d at 396 (concluding that the city established that it required a quick take of the property at issue where the city found it necessary to resolve all disputes over the property to be taken and needed to assure itself of clear title before additional investments were made in the project). As the Court of Appeals appropriately concluded, there is ample evidence to support the district court's finding that CPA required immediate possession.

Furthermore, even if the quick take procedure was not appropriate, the Lundells have suffered no harm as a result of that procedure. Because the district court granted CPA's condemnation petition, CPA would have eventually taken title to the Tower Site. In the meantime, as the Lundells themselves have argued, the Lease gave CPA possession of the Tower Site, so no premature change of possession occurred as a result of the use of the quick take procedure. Moreover, the amount of compensation that the Lundells were awarded far exceeded the present value of the rent the Lundells would have received had the quick take or the condemnation not occurred, even if the rent was

increased to \$750 per month as the Lundells desired.¹³ For all of these reasons, any error associated with the district court's quick take order is harmless.

CONCLUSION

For all of the foregoing reasons, Respondent Cooperative Power Association respectfully requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

MOSS & BARNETT
A Professional Association

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¹³ The commissioners awarded the Lundells \$150,800. Using a reasonably standard commercial real estate discount rate of 10%, the present value of twenty-seven years of rent at the rate of \$750 per month is \$83,135. See *Thorndike Encyclopedia of Banking and Financial Tables*, 8-456 (3d ed. 1987). Even if a much more conservative discount rate is used, the amount awarded to the Lundells far exceeds the present value of twenty-seven years of rent at the rate of \$750 per month. For example, if the average judgment rate over the last twenty years of 6% is employed, the present value of the future monthly rental payments of \$750 is still only \$118,895. *Thorndike* at 8-440. The present value totals increase if the periodic escalators contained in the disputed amendment to the Lease are factored into the equation -- to approximately \$95,500 at 10% and approximately \$141,500 at 6% -- but those totals still do not equal the amount that the commissioners awarded the Lundells.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 10,848 words, exclusive of the cover page, table of contents, table of authorities, signature block and this certification, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: May 31, 2005.



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