

NO. A11-644, A11-1471

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State of Minnesota  
**In Court of Appeals**

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Roger Anda, Elizabeth J. Anda  
and James H. Martin, LLC,

*Appellants,*

v.

City of Brainerd, a Minnesota municipal corporation,

*Respondent.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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

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## STATEMENT OF THE ISSUES

**I. Whether the District Court properly found that the City met the requirements necessary to use eminent domain under Minn. Stat. § 117.**

By Order dated March 17, 2011, the District Court found that the City satisfied the statutory requirements and granted the City's petition for eminent domain and quick take of property involved in a public improvement project.

Most apposite authority: Minn. Stat. §§ 117.055, 117.075

**II. Whether the District Court correctly concluded that the State of Minnesota is an "owner" of property under the plain language of Minn. Stat. § 429.031 and thus can be counted toward the thirty-five percent requirement for petitions for special assessments.**

In a separate case, by Order dated July 22, 2011, the District Court found in favor of the City on cross-motions for summary judgment. The District Court determined that, under the plain language of the statute, Central Lakes College (an instrumentality of the State) is the "owner" of more than thirty-five percent of the affected real property frontage of the project area and, as a result, Central Lakes College's petition for the public improvements is valid.

Most apposite authority: Minn. Stat. § 429.031

## STATEMENT OF THE CASE

The parties to this appeal are involved in two separate cases originating in Crow Wing County District Court. Both cases were decided in the City's favor. This case, No. A11-644 (the "Chapter 117 Case"), involves a challenge to the District Court's Order granting the City's eminent domain petition and quick take filed March 17, 2011. Appellants' Add. 1-5. In that Order, the District Court found based on a hearing and the contents of the file that (1) the proposed taking is "necessary" and for a "lawful purpose;" and (2) the proceeding was duly authorized by the City Council and a Certified Copy of the Council's Resolution is on file. Appellants' Add. 2. The District Court's Order appointed commissioners under Minn. Stat. § 117.075, set their first meeting and rate of compensation, and granted the City's request for early possession of the various properties in accordance with the quick take provisions of Minn. Stat. § 117.042. Appellants' Add. 3-4. Appellants do not appear to challenge that the properties are "necessary" to the project or that the public improvements (roads and associated facilities) are a "lawful purpose." Rather, Appellants filed this appeal to seek to overturn the District Court's March 17, 2011 Order based on the contention that the City did not have proper authority to commence eminent domain proceedings in this instance at all.<sup>1</sup>

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<sup>1</sup> In their brief, Appellants state that they are also challenging the District Court's March 8, 2011 determination that they would not be allowed to submit evidence as to issues outside the scope of a public purpose hearing. See Appellants' Brief, p. 3. However, neither of Appellants' Notices of Appeal in these two cases cites that Order as a subject of either appeal. The Notice of Appeal in this matter cites only the District Court's March 17, 2011 Order granting the City's eminent domain petition and quick take. See Notice of Appeal, April 6, 2011 (A. 45-56). Appellants' Notice of Appeal in the other case, A11-1471, identifies only the District Court's July 22, 2011 Order (with judgment entry on

In the other case, A11-1471 (the “Chapter 429 Case”), Appellants challenge the City’s procedures for undertaking a special assessment to finance the City’s portion of a reconstruction and improvement project involving a segment of College Drive in the City. Appellants seek to reverse the City’s determination under Minn. Stat. § 429.031, subd. 1(f) that a petition for those public improvements, submitted by Central Lakes College as the owner of more than thirty-five percent of the affected real property frontage of that area, is valid. Appellants asserted that an instrumentality of the state was not an “owner” under the statute. The District Court applied a plain meaning analysis to the statute and found that Central Lakes College was, in fact, the owner of more than thirty-five percent of the affected real property and that the City’s procedures (i.e. authorizing the special assessment by a vote of the majority of the City Council members) were lawful. By Order dated July 22, 2011, the District Court granted the City’s motion for summary judgment, denied Appellants’ motion for summary judgment, and dismissed Appellants’ claims in their entirety. See A. 7-24. Judgment on that order was entered August 16, 2011. See Order for Judgment and Judgment, August 16, 2011. Appellants filed an appeal the following day, August 17, 2011. See Notice of Appeal, August 17, 2011.

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August 16, 2011) on the parties’ cross-motions for summary judgment. See Notice of Appeal (in Case A11-1471), August 17, 2011. The Appellants’ respective Statements of the Case identify the same two orders, and not the March 8, 2011 order. The appeal period set by Minn. R. Civ. App. P. 104.01, subd. 1 on the District Court’s March 8, 2011 order has expired and that order is no longer appealable. The Court of Appeals is without jurisdiction to consider it and argument related to that Order contained in Appellants’ brief should be disregarded. See *Wise v. Bix*, 434 N.W.2d 502, 503 (Minn. Ct. App.

On the same date, Appellants sought to consolidate this second appeal, involving the summary judgment order addressing Minn. Stat. Chapter 429, with their original appeal of the District Court's determination under Minn. Stat. Chapter 117. By order dated September 8, 2011, this Court granted that motion, but maintained separate briefing in the two cases.<sup>2</sup>

### STATEMENT OF THE FACTS

After consideration of alternatives for reconstruction of a portion of College Drive within the City, on February 2, 2009, the City chose from among several options. R. 4-6. The project involves the reconstruction of the College Drive corridor from the intersection of County State Aid Highway ("CSAH") 48 to the intersection of South 5<sup>th</sup> and Quince ("Project"). R. 33. That portion of College Drive is presently configured as a two-lane road with a center turn lane. Following completion of the Project, it will be a four-lane divided road with a center median. Additionally, the Project will provide control features for key intersections, improve safety, include paths for pedestrian and bicycle access, and upgrade storm water systems, lighting, and landscaping in the immediate area. Id.

Central Lakes College, a state institution, owns a substantial portion of the property in the Project area. By letter dated December 17, 2009, Central Lakes College indicated in response to an inquiry from the City that it "intends to pay the special

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1989) (referencing 1983 Comment to Rule 103.01 indicating that a notice of appeal must be timely served *and* filed "in order to vest jurisdiction in the Court of Appeals").

assessments for the College Drive Project”—as it had done following previous public infrastructure work relating to College Drive in 1986 (R. 44-47)—but Central Lakes College first sought the “full financial picture of the impact of the project.” R. 18.

On September 15, 2010, the City Engineer completed a feasibility report for the Project, including a breakdown of proposed funding. R. 36-37. The overall cost of the Project was estimated at \$6.9 million, including engineering, right of way, and construction costs. Id. The “Local Share” of those Project costs—to be repaid by special assessments—was estimated at \$621,200.<sup>3</sup> Id.

On October 18, 2010, Central Lakes College’s Vice President of Administrative Services, knowing the estimated costs, sent a memo to the City in which Central Lakes College again committed to paying special assessments: “The primary driver for this project is safety, and that is the reason why Central Lakes College is willing to pay assessments for this project.” R. 22.

On November 15, 2010, the City received correspondence from Central Lakes College formally petitioning the City to reconstruct College Drive in accordance with the plan previously selected by the City Council pursuant to Minn. Stat. § 429.035. R. 16.

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<sup>2</sup> Though the consolidation of the two appeals by this Court’s order dated September 8, 2011 allowed for separate briefing, this response brief contains arguments on both issues because Appellants’ initial brief in this case did so.

<sup>3</sup> The estimated \$6.9 million cost of the Project is to be funded as follows:

|                  |             |
|------------------|-------------|
| Federal          | \$2,234,300 |
| State Aid        | \$3,809,918 |
| BPU              | \$193,700   |
| Crow Wing County | \$40,882    |
| Local Cost share | \$621,200   |

(“Petition”). The City Council, via Resolution No. 55:10, determined that the Petition met the required percentage<sup>4</sup> of owners of property affected by the improvement and special assessment in order to proceed with the Project funded in part by special assessments. R. 43. On December 6, 2010, the City Council held a public hearing and approved the Project, by a 4-3 vote on Resolution 58:10, and ordered that the Project should proceed. R. 48-62. The other appeal involving these parties, Case No. A11-1471, involves a challenge to the City’s application of Minn. Stat. Chapter 429 procedures.

Appellants submitted a Notice of Appeal to the City dated December 14, 2010, challenging the City’s decision that the petition is valid and seeking an injunction to stop the Project. A. 1-4. In a separate litigation by petition dated January 7, 2011, the City commenced eminent domain proceedings under Minn. Stat. § 117.042 to acquire temporary construction easements and permanent right-of-way and drainage and utility easements to accommodate the Project. The District Court held the requisite public purpose hearing on March 16, 2011. During that hearing, counsel for the City, Thomas A. Fitzpatrick, presented evidence from other owners of the properties involved indicating that they did not object to either the eminent domain petition or the quick take. See Transcript, March 16, 2011, pp. 4-6. The City presented evidence of the City’s statutory authority to utilize eminent domain. Id., p. 7. The City also presented testimony from its

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The amount of the Local Cost share (i.e. the special assessments) is approximately *nine percent* of the total project funding. R. 36-37.

<sup>4</sup> City staff calculated the percentage ownership of abutting properties based on the existing right of way in the area encompassed by the Project. Central Lakes College owns 4,867.72 feet, or 39.98 percent, of the total 12,174.71 feet of right of way frontage involved in the Project. R. 63.

City Engineer, Jeff Hulsether, identifying the Project, the location of improvements, and the property to be taken, as well as explaining the public necessity for the Project. Id., pp. 8-35.

The District Court granted the City's petition by order dated March 17, 2011. See Appellants' Add. 1-5. This appeal, Case No. A11-644, arises from that Minn. Stat. Chapter 117 proceeding.

The City and Central Lakes College executed a final agreement for the City's purchase of easements from Central Lakes College and memorializing the prior agreement to pay special assessments of Central Lakes College's property for the Project. R. 83-111. Under that Agreement, Central Lakes College confirmed its previous agreement to pay special assessments for the Project. R. 84-85. "[T]he Petition represents the College's agreement to pay an assessment in the Assessment Amount (defined below) with respect to the property described...." R. 84. The Assessment Amount totals \$359,882.80, including \$207,882.80 for street improvements and \$152,000 for sidewalk and pedestrian improvements. R. 85. Central Lakes College specifically agreed that "the proposed improvement to College Drive is a special benefit to the College... and that the assessment as agreed to in [Central Lakes College's letter to the City dated December 17, 2009] is fairly assessed in consideration of the benefit received pursuant to Minn. Stat. § 3.754." Central Lakes College further agreed that it budgeted for the payment of the assessment pursuant to Minn. Stat. § 435.19, subd. 2 and has

waived its right to challenge the assessment as excessive or demand hearings under Minn. Stat. Chapter 429.<sup>5</sup> R. 84, 86.

In a letter dated March 25, 2011, Gerald W. Von Korff, counsel for Appellants in this matter, complained to Derrell Turner, Federal Highway Administrator (Minnesota Division), and Kevin Howieson, MnDOT District 3 Area Engineer, about the City's "unlawful" actions in the eminent domain and special assessment proceedings in connection with the reconstruction of College Drive. ("Von Korff Letter"). R. 77-80. The Von Korff Letter contains the same arguments advanced in this lawsuit and in Appellants' unsuccessful attempt to prevent the City's quick take of property required for the Project. R. 38-42; Add. 1-5. MnDOT personnel reviewed the condemnation proceedings and documents in this litigation and indicated that the Project should proceed with its planned funding intact. R. 81-82.

The following Minnesota statutes and City Charter provisions are relevant to this Court's consideration of Appellants' two appeals in this matter and are reproduced here for the Court's convenience:

**Minn. Stat. § 117.055. Petition and notice**

**Subd. 1. Petition.** In all cases a petition, describing the desired land, stating by whom and for what purposes it is proposed to be taken, and giving the names of all persons appearing of record or known to the petitioner to be the owners thereof shall be presented to the district court of the county in which the land is situated praying for the appointment of commissioners to appraise the damages which may be occasioned by such taking.

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<sup>5</sup> The parties' agreement states that the Recitals "are a material part of this Agreement and are incorporated herein." R. 9, ¶ 1.

**Subd. 2. Notice.**

(a) Notice of the objects of the petition and of the time and place of presenting the same shall be served at least 20 days before such time of presentation upon all persons named in the petition as owners as defined in section 117.025, subdivision 3, and upon all occupants of such land in the same manner as a summons in a civil action.

(b) The notice must state that:

(1) a party wishing to challenge the public use or public purpose, necessity, or authority for a taking must appear at the court hearing and state the objection or must appeal within 60 days of a court order; and

(2) a court order approving the public use or public purpose, necessity, and authority for the taking is final unless an appeal is brought within 60 days after service of the order on the party.

...

**Minn. Stat. § 117.075. Hearing; commissioners; order for taking**

**Subd. 1. Hearing on taking; evidentiary standard.**

(a) Upon proof being filed of the service of such notice, the court, at the time and place therein fixed or to which the hearing may be adjourned, shall hear all competent evidence offered for or against the granting of the petition, regulating the order of proof as it may deem best.

...

**Minn. Stat. § 429.031. Preliminary plans, hearings**

**Subd. 1. Preparation of plans, notice of hearing**

...

(f) The hearing may be adjourned from time to time, and a resolution ordering the improvement may be adopted at any time within six months after the date of the hearing by vote of a majority of all members of the council when the improvement has been petitioned for by the owners of not less than 35 percent in frontage of the real property abutting on the streets named in the petition as the location of the improvement. When there has been no such petition, the resolution may be adopted only by vote of four-fifths of all members of the council; provided that if the mayor of the municipality is a member of the council but has no vote or votes only in

case of a tie, the mayor is not deemed to be a member for the purpose of determining a four-fifths majority vote.

...

**Minn. Stat. § 429.035. Improvements, petition**

When any petition for the making of any improvement in any statutory city, town, or city of the second, third, or fourth class, however organized, for the cost of which special assessments may be, in whole or in part, levied therefor, is presented to the governing body of the municipality, this body shall, by resolution, determine whether or not the petition has been signed by the required percentage of owners of property affected thereby.

**Minn. Stat. § 429.036. Appeal from determination of legality of petition**

Any person, being aggrieved by this determination, may appeal to the district court of the county in which the property is located by serving upon the clerk of the municipality, within 30 days after the adoption and publication of the resolution, a notice of appeal briefly stating the grounds of appeal and giving a bond in the penal sum of \$250, in which the municipality shall be named as obligee, to be approved by the clerk of the municipality, conditioned that the appellant will duly prosecute the appeal, pay all costs and disbursements which may be adjudged against the appellant, and abide by the order of the court. The clerk shall furnish the appellant a certified copy of the petition, or any part thereof, on being paid by appellant of the proper charges therefor. The appeal shall be placed upon the calendar of the next general term commencing more than 30 days after the date of serving the notice and filing the bond and shall be tried as are other appeals in such cases. Unless reversed upon the appeal, the determination of the governing body as to the sufficiency of the petition shall be final and conclusive.

**Minn. Stat. § 435.19. Assessment on public property; exception; sue to be paid**

**Subd 1. By city or town.** Any city, however organized, or any town having authority to levy special assessments may levy special assessments against the property of a governmental unit benefited by an improvement to the same extent as if such property were privately owned, but no such assessments, except for storm sewers and drain systems, shall be levied against a governmental unit for properties used or to be used for highway rights-of-way. A “governmental unit” means a county, city, town, public

corporation, a school district and any other political subdivision, except a city of the first class operating under a home rule charter and the school district, park board or other board or department of such city operating under such charter. If the amount of any such assessment, except one against property of the state, is not paid when due, it may be recovered in a civil action brought by the city or such town against the governmental unit owning the property so assessed

**Subd. 2. State property.** In the case of property owned by the state or any instrumentality thereof, the governing body of the city or town may determine the amount that would have been assessed had the land been privately owned. Such determination shall be made only after the governing body has held a hearing on the proposed assessment after at least two weeks' notice of the hearing has been given by registered or certified mail to the head of the instrumentality, department or agency having jurisdiction over the property. The amount thus determined may be paid by the instrumentality, department or agency from available funds. If no funds are available and such instrumentality, department or agency is supported in whole or in part by appropriations from the general fund, then it shall include in its next budget request the amount thus determined. No instrumentality, department or agency shall be bound by the determination of the governing body and may pay from available funds or recommend payment in such lesser amount as it determines is the measure of the benefit received by the land from the improvement.

...

#### **Minn. Stat. § 465.01. Power of eminent domain**

All cities may exercise the power of eminent domain for the purpose of acquiring private property within or without the corporate limits thereof for any purpose for which it is authorized by law to take or hold the same by purchase or gift and may exercise the power of eminent domain for the purpose of acquiring a right-of-way for sewerage or drainage purposes and an outlet for sewerage or drainage within or without the corporate limits thereof. The procedure in the event of condemnation shall be that prescribed by chapter 117, or that prescribed by the charter of such city.

#### **Minn. Stat. § 645.08. Canons of construction**

In construing the statutes of this state, the following canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute:

(1) words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition

...

**Minn. Stat. § 645.16. Legislative intent controls**

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

...

**BRAINERD CITY CHARTER - CHAPTER SIX**

**STREETS**

**SECTION 70.** The City Council shall have the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the City, and may lay out and open new streets and alleys, and extend, widen and straighten the same, and may build, maintain and repair bridges across streams or railway tracks, may provide for the pavement of gutters or the road-bed of any street or alley. R. 113.

## STANDARD OF REVIEW

Appellants do not address the standard of review that would be applicable in either of their appeals. The Chapter 117 Case involves this Court’s review of the District Court’s decision following a hearing at which evidence was presented to determine whether the eminent domain petition and quick take were authorized by law, necessary, and for a lawful purpose. “From the nineteenth century to the present, the judiciary’s review of condemnation proceedings has remained ‘very narrow.’” State ex rel. Simpson v. Rapp, 38 N.W. 926, 928 (Minn. 1888). This Court reaffirmed that very limited scope of review in a 1998 case:

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.

Matter of Condemnation by Minneapolis Cmty. Dev. Agency (“MCDA”), 582 N.W.2d 596, 598 (Minn. Ct. App. 1998). Public purpose and necessity are questions of fact, only reversed on appeal where they are clearly erroneous. State by Humphrey v. Byers, 545 N.W.2d 669, 672 (Minn. Ct. App. 1996).<sup>6</sup>

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<sup>6</sup> Much of Appellants’ Brief is directed at arguing that the District Court made an erroneous evidentiary ruling in its March 8, 2011 order in this matter. As noted, that order is not the subject of either appeal involved in this matter, thus this Court has no jurisdiction over those issues and the same should not be part of this case. However, if this Court is inclined to consider those issues, evidentiary rulings are subject to reversal only where there is an abuse of discretion. Gross v. Victoria Station Farms, Inc., 578 N.W.2d 757, 761 (Minn. 1998). As argued herein, the District Court correctly concluded that a public purpose hearing in a Minn. Stat. § 117 case is appropriately limited to a

The Chapter 429 Case involves application of a statute to undisputed facts. This Court need not give deference to the District Court in such circumstances. Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

## ARGUMENT

**I. The District Court properly found that the City met the requirements necessary to use eminent domain under Minn. Stat. § 117.**

Appellants make no argument regarding the District Court's findings that the Project is necessary and that it was undertaken for a lawful purpose, conceding that those questions were correctly decided. Instead, Appellants focus exclusively on the idea that the petition for eminent domain, which the District Court approved, should be overturned because, according to Appellants, the City had no "authority for the taking." See Appellants' Brief, pp. 30-37. Contrary to Appellants' argument, the necessary "authority for the taking" references the statutory authority available to the City to use eminent domain and the even more basic idea that the goal of the project to be undertaken can be lawfully accomplished. During the public purpose hearing on March 16, 2011, counsel for the City provided the District Court with citations to that authority, to wit, Minn. Stat. § 465.01, and there can be no serious question that road and infrastructure improvements are within the City's legal purview.

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discussion of whether the project at issue has a public purpose and whether the taking is necessary to it. City of Duluth v. State of Minnesota, 390 N.W.2d 757, 763 (Minn. 1986).

Appellants’ attempt to use case law to support their argument is equally unavailing. Appellants cite a hornbook referencing a 1914 case<sup>7</sup> for the proposition that the District Court should not approve a taking when a project violates state or federal law. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 148 N.W. 561, 562 (Minn. 1914). But that case involves a situation where *the project itself*, a diversion of waters in a manner that would impair navigability, violated Minnesota law. While the court recognized that “the propriety and expediency of condemning private property for public use is a purely legislative question”, it was charged with determining “whether the taking of the designated property is necessary for the purposes of the proposed enterprise, *and whether such property may lawfully be taken for such purposes.*” Id. (emphasis added). The condemnor in Minnesota Canal & Power proposed a project that was illegal, and it could not accomplish its purpose in any legal way regardless of the means employed. Id. at 563. Unless Appellants intend to argue that the City’s plans to expand and improve College Drive are somehow inherently illegal, Appellants’ argument simply does not parallel the issue in the case on which they rely.

Appellants also claim to have examined in “considerable detail” two other cases that the City cited before the District Court. Appellants’ Brief, p. 32. But this searching examination Appellants conducted failed to recognize long-standing Minnesota law regarding the “very narrow” scope of review in Chapter 117 cases: “We review only

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<sup>7</sup> Appellants’ Brief, p. 31, conflates the citations to two different Minnesota Canal & Power cases, one decided in 1907 and one decided in 1914. Those cases (plus one additional one from 1906) are referenced in later case law as the Minnesota Canal trilogy.

whether the taking serves a public purpose and is necessary.” City of Duluth v. State of Minnesota, 390 N.W.2d 757, 763 (Minn. 1986). See also MCDA, 582 N.W.2d 596 (Minn. Ct. App. 1998) (holding that where the record contains *some* evidence of public purpose, “there is nothing left for courts to pass upon.”). In any event, neither case supports Appellants’ argument.

City of Duluth is a somewhat factually convoluted case, but it involves three straight-forward questions: (1) whether the city’s project had a “public purpose;” (2) whether the condemnation was “necessary” for the project; and (3) whether the city complied with statutory procedures in conducting the condemnation. 390 N.W.2d at 760. Appellants again offer no argument regarding the public purpose or necessity of the condemnation, but focus on the third issue in City of Duluth. See Appellants’ Brief, pp. 35-38. Appellants claim that the court’s detailed analysis of the third question proves that they should have been allowed to argue during the public purpose hearing in this matter whether the City complied with statutory requirements under Chapter 429. That argument goes to an evidentiary ruling at the District Court that Appellants did not appeal<sup>8</sup> and has no bearing on the Orders under review in either of the two appeals Appellants did take. In any case, and regardless of the lengthy analysis it provided, the

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See MCDA, 582 N.W.2d at 600. They stand for the basic proposition that a condemning authority cannot undertake a public project if the project itself is not permitted by law.

<sup>8</sup> As noted, neither of Appellants’ appeals (now consolidated by order of this Court dated September 8, 2011) addresses the District Court’s March 8, 2011 order. It was in that order that the District Court excluded evidence outside the proper scope of a public purpose hearing. Appellants submitted Notices of Appeal addressing the District Court’s order of March 17, 2011 (granting the City’s petition for eminent domain and quick take

City of Duluth case recognized the critical distinction that Appellants do not: “while compliance with Chapters 458 and 472A is a prerequisite to the exercise of financing and tax advantages contained therein, it is unnecessary to the exercise of the power of eminent domain.” 390 N.W.2d at 768. The same distinction must be drawn in the instant case: while compliance with Chapter 429 is a prerequisite to conducting a special assessment to finance the City’s share of the project, it is unnecessary to the exercise of the power of eminent domain. Appellants’ reliance on City of Duluth is not only misplaced, the case plainly undermines Appellants’ entire argument.

Similarly, MCDA cuts directly against Appellants. First, as noted, the MCDA court recognized that courts in condemnation proceedings “review *only* whether the taking serves a public purpose and is necessary.” Id. (emphasis added). MCDA involved a proposed development in the south Nicollet Mall area that would use eminent domain to take two parcels from one developer, Opus, and give them to another, Ryan, in order to have a Target store and parking facility in that location downtown. Opus, as the property owner, challenged the city’s use of eminent domain to transfer the property and its compliance with tax increment financing (“TIF”) requirements for failure to file an affirmative action plan. 582 N.W.2d at 598.

Appellants correctly identify the heart of the matter in MCDA (see Appellants’ Brief, p. 33), i.e. the legality of the City’s condemnation action, but entirely miss the point of the court’s discussion of that issue. Appellants in this case largely parrot the

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in the Chapter 117 Case) and July 22, 2011 (granting the City’s motion for summary judgment in the Chapter 429 Case).

same losing argument that Opus advanced in MCDA: the condemnation is “illegal” because the city failed to comply with some separate statutory requirement. In MCDA, those requirements related to TIF. Here, the complaint concerns a special assessment. Opus relied on the Minnesota Canal cases (incidentally, the same cases Appellants’ hornbook referenced) for its argument that legal defects under the TIF statutes and city code rendered the condemnation illegal. MCDA, 582 N.W.2d at 600-01. The MCDA court dismissed that argument, explaining that “[t]he Minnesota Canal trilogy stands for the proposition that a condemning authority cannot undertake a public project if the project itself is not permitted by law.” Id. at 600. In this case, too, the condemnation (obtaining property for expansion and improvement of College Drive) is a project which is obviously authorized by law. See Brainerd City Charter, Section 70. R. 113. As with the claim in MCDA concerning the affirmative action plan, the claim that an ancillary matter related to project financing was somehow deficient has no bearing on the propriety of the underlying condemnation action.

Appellants’ bold-faced quote at page 35 of their brief relates to the MCDA decision’s rejection of *Opus’ TIF arguments*, not to its challenge to the condemnation. Under an unbroken line of Minnesota case law stretching from the 1800s to today, the *only* questions at issue in a condemnation proceeding (provided the underlying project is legal) are whether the taking serves a public purpose and is necessary. Id. at 598 (citing

City of Duluth, 390 N.W.2d at 763). The District Court’s decision to grant the City’s petition for eminent domain and a quick take should be upheld.<sup>9</sup>

**II. The District Court correctly concluded that the State of Minnesota is an “owner” of property under the plain language of Minn. Stat. § 429.031 and so can be counted toward the thirty-five percent requirement for a petition for special assessments.**

Appellants do not quarrel with the Project’s parameters or details, the City’s general authority to make special assessments for public improvements, or the hearing and approval process followed in this particular instance. Neither do Appellants contend that Central Lakes College does not *in fact* own more than thirty-five percent of real property frontage abutting on College Drive in the Project area, leaving only the issue whether Central Lakes College, as the undisputed owner, can be a petitioner under Minn. Stat. § 429.031. In this case, the City, under Minn. Stat. § 429.035, must determine that a petition has been signed by at least thirty-five percent of the owners of the project frontage. Pursuant to Minn. Stat. § 429.036, Appellants submitted their appeal, claiming that Central Lakes College’s Petition is invalid because Central Lakes College cannot be an “owner” under the statute and the City cannot lawfully proceed with the Project based

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<sup>9</sup> As noted previously, this Court’s order consolidating the two appeals allows for separate briefing for the two matters. This case, No. A11-644, pertains to the Chapter 117 Case and should be limited in scope to those issues. However, Appellants initial brief is devoted in substantial part to argument on the Chapter 429 Case (particularly to an evidentiary ruling within that case that they did not appeal). While those issues are not the proper subject of consideration by this Court in this set of briefs (both because this brief should relate to the Chapter 117 Case and because this Court lacks jurisdiction to review the evidentiary order around which Appellants’ contentions are built), the City has responded fully to Appellants’ arguments for the sake of clarity and completeness.

on the Central Lakes College Petition. A. 1-4. Appellants' argument fails and it was properly dismissed as a matter of law by the District Court in this case.

*A. Central Lakes College is the "owner" of over thirty-five percent of the real property abutting the Project.*

In the context of this statute, the term "owner" seems to require little if any explanation. The object of statutory interpretation is to ascertain and effectuate legislative intent. Minn. Stat. § 645.16. Minnesota courts presume that plain and unambiguous statutory language manifests legislative intent. See Lenz v. Coon Creek Watershed Dist., 153 N.W.2d 209, 216 (Minn. 1967). "The principal method of determining the legislature's intent is to rely on the plain meaning of the statute." State v. Thompson, 754 N.W.2d 352, 355 (Minn. 2008). If statutory language is plain and unambiguous, the court must give it its plain meaning. Phelps v. Commonwealth Land Title Ins. Co., 537 N.W.2d 271, 274 (Minn.1995); Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 726 (Minn. 2010). A statute's plain meaning is to be cast aside "only in rare cases where the plain meaning 'utterly confounds a clear legislative purpose.'" Hyatt v. Anoka Police Dep't, 691 N.W.2d 824, 827 (Minn. 2005). Further, the legislature, in adopting a statute, is presumed to have intended the "common and approved usage" of words and phrases unless it separately defines them. Minn. Stat. § 645.08(1). The statute at issue contains a definitions section (Minn. Stat. § 429.011), but "owner" is not separately defined. Dictionary definitions match up with common understanding of the term: an "owner" is "one who has the right to possess, use, and convey something."<sup>10</sup> "Ownership" means

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<sup>10</sup> See Black's Law Dictionary (7th ed. 1999), 1130.

“the collection of rights allowing one to use and enjoy property, including the right to convey it to others.”<sup>11</sup> The term “owner” has an apparent, noncontroversial, and ready-to-apply meaning.

Because it is undisputed that Central Lakes College is the record owner of 39.98% of the real property frontage abutting on College Drive in the Project area (see R. 63), Central Lakes College’s Petition meets the statutory criteria of Minn. Stat. § 429.031, subd. 1(f). This Court should uphold the District Court’s rejection of Appellants’ challenge to the Project. No additional analysis is needed or permissible.

*B. Appellants’ reliance on antiquated attorney general opinions is misplaced.*

Just as they did at the District Court, Appellants skip over consideration of the statute’s actual language. Instead, they rely on attorney general opinions and suggest that the District Court failed to honor “eighty years of consistent interpretation of Chapter 429.” See Appellants’ Brief, p. 20. This eighty years of “consistent interpretation” to which they refer is comprised of three attorney general opinions, all written prior to a significant amendment to the statute at issue. A. 25-34. Appellants offer no case law to support their argument.

As an initial matter, this Court should note that opinions of the attorney general are not binding on the courts. Star Tribune Co. v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274, 289 (Minn. 2004). Though Appellants have claimed otherwise in this litigation, such opinions do not “rule” on or “hold” anything. They are advisory; nothing

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<sup>11</sup> Id., 1131. See also Webster’s New World College Dictionary (4th ed. 2004), 1030 (defining “ownership” as “legal right of possession; lawful title”).

more, nothing less. Courts can and do disregard them when circumstances warrant. See, e.g., Id. at 289 (finding attorney general opinion “less than persuasive”); Billigmeier v. Hennepin County, 428 N.W.2d 79, 82 (Minn. 1988) (finding letter rulings “not particularly helpful” and “troubling” due to cursory and incomplete analysis); City of Granite Falls v. Soo Line R. Co., 742 N.W.2d 690, 699 (Minn. Ct. App. 2008) (finding reliance on a 49-year-old attorney general opinion “misplaced” because of changed circumstances in the law). This Court, faced with plain and unambiguous statutory language, need not look beyond the face of the statute.

In any event, the issues involved in the attorney general’s opinions are distinguishable from the instant case for several reasons. The most recent of the attorney general opinions, Op.Att’y.Gen. 408-c (Oct. 28, 1954), references and relies upon both of the others cited by Appellants. The opinion addressed two questions: (1) whether property owned by the state (MnDOT, in that case) and committed to public use could be subject to a special assessment absent statutory authority; and (2) whether such property could be included when calculating whether thirty-five percent of affected owners consented to the assessment. Id. The attorney general’s opinion answered both questions in the negative.

As to the first issue, the opinion is distinguishable because it contemplates state-owned property that is *devoted to public use*. In the instant case, the property is owned by a state instrumentality, but it is not open to the public at large. While neither the opinion nor any of the previous ones it relies upon offer extensive analysis of the issue, the force of logic behind barring assessments against property devoted to public use does not

translate directly, if at all, to barring assessments against property utilized only by a select few, regardless of its ownership. See Minn. Stat. § 136F.60, subd. 1 (entities under MnSCU are authorized to own and acquire property “necessary for the development of a state college or university”). Further, the attorney general opinion itself includes a caveat that even such public property could be subject to a special assessment if authorized by statutory authority. A. 33 (“property of the State devoted to public use may not be subjected to special assessment for an improvement *unless expressly made so by legislative enactment*”) (citations omitted) (emphasis added).

At the time the opinion was written in 1954, Minn. Stat. § 435.19 dealt only with authorizing special assessments against school district or county property. It did not address state-owned property. However, in 1957 (and after the attorney general's opinions on which Appellants rely were issued), the statute was amended significantly and Minn. Stat. § 435.19, subd. 2, authorizing assessments against state-owned property, was enacted. While the special assessments contemplated are subject to contingencies (i.e. the state instrumentality having funds available to pay them and consenting to the valuation of benefit of the improvement), it is nonetheless specific statutory authority for a special assessment.

As for the second issue in the 1954 attorney general opinion (finding that the city in that case could not count MnDOT among the consenting owners for purposes of reaching thirty-five percent), it too fails to hold up to scrutiny when the 1957 amendments to Minn. Stat. § 435.19 are considered. In 1954, the attorney general concluded that MnDOT was not an “owner of property to be taxed or assessed” because

it could not be subject to a tax or an assessment and so it could not be counted as part of the requisite thirty-five percent. However, after the new statutory language was enacted in 1957, property owned by a state instrumentality (Central Lakes College, in this case) may be subject to special assessment. See Minn. Stat. § 435.19, subd. 2. Central Lakes College is an “owner of property to be taxed or assessed” for purposes of Minn. Stat. § 429.031, subd. 1(f) if it consents to the assessment under Minn. Stat. § 435.19.

Due to distinguishing factors in this matter, and statutory changes since the opinion was issued in 1954, the attorney general’s opinion—even if this Court decides to rely on it—does not foreclose inclusion of a state instrumentality like Central Lakes College among the requisite thirty-five percent of “owners” under the statutory scheme.

*C. Central Lakes College has agreed to pay its proportional share of the special assessment.*

Central Lakes College has consistently supported the City’s efforts toward the planning and engineering of the College Drive reconstruction,<sup>12</sup> and committed early to paying a proportional share of special assessments for it.<sup>13</sup> The City selected design parameters from a number of alternatives at its meeting on December 2, 2009. R. 4-6. Just weeks later, December 17, 2009, in response to a direct inquiry from the City,

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<sup>12</sup> Central Lakes College communicated with the City about safety issues in connection with nascent plans for College Drive’s reconstruction since at least October 2006. By letter dated October 19, 2006, Central Lakes College expressed concerns about accidents and safe pedestrian crossings for its students. R. 70. Additional correspondence addressed the issue in March 2007, September 2009, and October 2010. R. 71-73.

<sup>13</sup> Central Lakes College’s commitment to pay a proportional share of special assessments is consistent with its past practices. Central Lakes College paid special assessments totaling \$47,781.00 following completion of the 1986 construction project for College Drive. R. 44-47.

Central Lakes College specifically stated that it “intends to pay the special assessments for the College Drive Project,” noting that additional information would be needed.

Preliminary work on the Project progressed. On September 15, 2010, the City Engineer submitted to the Mayor and City Council a feasibility report discussing the necessity for the Project and outlining estimated costs. R. 36-37. On October 18, 2010, Central Lakes College’s Vice President of Administrative Services sent a memo to the City in which it again committed to paying special assessments. R. 20-22. On November 15, 2010, with this commitment in place, Central Lakes College filed its Petition urging the City to move forward with the Project. R. 16.

Consistent with this pledge to pay, Central Lakes College formalized its intention to pay the assessments by agreement with the City. R. 83-90. The agreement notes that the Petition by Central Lakes College stands as its commitment to pay special assessments: “[t]he Petition represents the College’s agreement to pay an assessment in the Assessment Amount (defined below) with respect to the property described....” R. 84. The agreement also acknowledges that the Project is a special benefit to Central Lakes College, sets forth the specific amounts to be paid for special assessments, and provides for the City’s acquisition of a portion of Central Lakes College’s real estate needed for the project. R. 84-86. Central Lakes College waives its right to hearings before the City and to contest the amount of the assessment. R. 88, ¶ 13. Central Lakes College also states that the assessment amount has been accounted for in its budget and represents less than five percent of its appropriation for repair and restoration, as required for an acceptable assessment under Minn. Stat. § 135A.131. R. 84. The agreement is

signed by all necessary parties and is designated as binding on them. R. 87, ¶ 10; R. 89-90.<sup>14</sup>

Central Lakes College has made itself subject to special assessments in this matter and thus is an “owner,” regardless of any extra-statutory requirements ascribed to the term, of more than thirty-five percent of the real property frontage subject to assessment for the Project. The City’s action in determining that the petition was valid under Minn. Stat. § 429.035 and ordering that the Project could proceed was lawful. The District Court’s decision should be affirmed.

### CONCLUSION

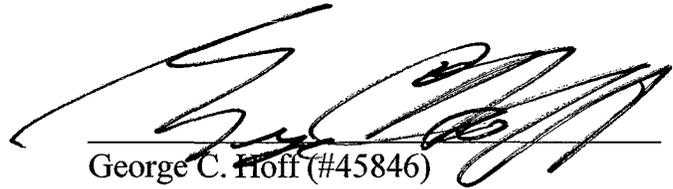
This matter involves two separate District Court cases related to the City’s efforts to improve and expand a segment of College Drive. In the first case, the District Court properly found that the City met the requirements necessary to use eminent domain for the project under Minn. Stat. § 117. Appellants’ argument that the use of eminent domain was not “authorized by law” is built around a misinterpretation of the straightforward statutory requirements and an unsupportable reading of clear Minnesota case law. The only issues subject to review by the courts in an eminent domain case are whether the project has a public purpose and the proposed taking is necessary to it. Even if this Court considers matters of compliance with Minn. Stat. § 429 requirements in the

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<sup>14</sup> Appellants seem to contend that the lack of a financial obligation to pay for the Project somehow strips Central Lakes College’s ownership interest in the property for purposes of petitioning for local improvements under Minn. Stat. § 429.031. But the State agreed to make payment at the time it filed its petition with the City. In short, like every property that is part of the Project, Central Lakes College has a financial stake in the Project, putting it on equal footing with other property owners in the project area.

context of eminent domain, the District Court correctly concluded in the second case that the State of Minnesota is an “owner” of property under the plain language of Minn. Stat. § 429.031 and so can be counted toward the thirty-five percent requirement for a petition for special assessments. The decisions in both of these matters should be affirmed.

Dated: September 12, 2011



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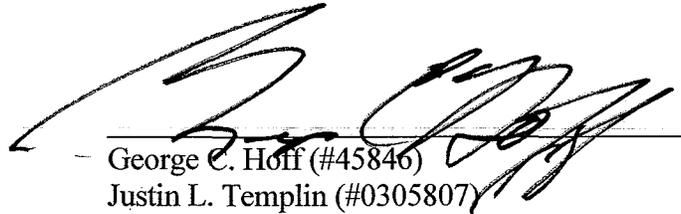
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**CERTIFICATE OF COMPLIANCE**

PURSUANT TO MINN. R. CIV. APP. P. 132.01, Subd. 3(a)

This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, Subd. 3(a) because this brief contains 7,797 words, excluding the parts of the brief exempted by Minn. R. Civ. App. P. 132.01, Subd. 3. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in Times New Roman with a 13 point font.

September 12, 2011



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