

No. A09-1894

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,
by its Commissioner of Transportation,

Respondent,

vs.

Gary William Kettleson, et al.,

Respondents Below,

and

Richard Lepak,

Appellant.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES

1. Whether the district court clearly erred in finding that MnDOT's proposed taking of a portion of Lepak's property to construct an access road for Lepak's parcel and the properties on either side of his parcel -- just one minor aspect of a MnDOT project to improve and widen Trunk Highway 61 in Cook County -- was for a public purpose and public use?

How the Issue was Raised in the Trial Court:

At the November 18, 2008, hearing on petition, appellant Lepak's counsel objected to that portion of the taking from Lepak's property to be used for construction of the disputed access road on the basis that no public purpose or public use supported that taking. Lepak's counsel conceded that the overall highway project has a public purpose and use, but asserted that the access road must be separately scrutinized for public purpose and use.

The Trial Court's Ruling:

The trial court concluded that only the overall project must have a public purpose and use, and that discrete aspects of the project, including the access road, need not be separately analyzed. Accordingly, the court concluded there was a public purpose and use for the access road.

How the Issue was Preserved for Appeal:

Lepak timely appealed the August 12, 2009 Order.

Most Apposite Cases:

Lundell v. Coop. Power Ass'n, 707 N.W.2d 376 (Minn. 2006)

Most Apposite Statutory or Constitutional Provisions:

Minn. Stat. § 117.025, subd. 11 (2008)

Minn. Stat. § 117.055, subd. 2(b) (2008)

Minn. Stat. § 117.075, subd. 1(a) & 1(c) (2008)

Minn. Stat. § 160.18, subd. 2 (2008)

Minn. Stat. § 161.24, subd. 4 (2008)

2. Whether the district court clearly erred in finding that MnDOT's proposed taking from Lepak's property to construct the disputed access road was reasonably necessary to accomplish MnDOT's project?

How the Issue was Raised in the Trial Court:

The issue was not properly raised in the trial court. Lepak's counsel failed to object to necessity at the November 18, 2008 hearing on petition and thereby waived any right to challenge the taking on that basis.

The Trial Court's Ruling:

The trial court found that Lepak did not object to the taking on the basis of lack of necessity but, at any rate, concluded that MnDOT established that the access road was reasonably necessary to fulfill the public purpose of improving and widening Trunk Highway 61.

How the Issue was Preserved for Appeal:

Lepak timely appealed the August 12, 2009 Order, but the State asserts that Lepak waived the issue by failing to object to necessity at the hearing on petition.

Most Apposite Cases:

State v. Wren, 146 N.W.2d 547 (Minn. 1966)

Lundell v. Coop. Power Ass'n, 707 N.W.2d 376 (Minn. 2006)

Itasca County v. Carpenter, 602 N.W.2d 887 (Minn. Ct. App. 1999)

Most Apposite Statutory or Constitutional Provisions:

Minn. Stat. § 161.20, subd. 2 (2008)

STATEMENT OF THE CASE

The Commissioner of the Minnesota Department of Transportation (“MnDOT” or “State”) commenced this condemnation action pursuant to Minnesota Statutes chapter 117. MnDOT petitioned the Cook County District Court for an order transferring title and possession of certain real property, including a parcel owned by appellant Richard Lepak, to the State in connection with a project to improve Trunk Highway (“TH”) 61 in Cook County, Minnesota. Lepak, through counsel, appeared at the November 18, 2008 hearing on petition and objected to part of the proposed taking from his property. The district court granted MnDOT’s petition by Order dated November 25, 2008. Lepak appealed to the Minnesota Court of Appeals which, by Order filed March 3, 2009, dismissed Lepak’s appeal without prejudice and remanded the matter to the district court for findings and an order on Lepak’s objection to the taking. On remand, the parties submitted proposed findings of fact, conclusions of law, and an order with supporting legal memoranda. By Order filed August 12, 2009, the district court again overruled Lepak’s objection to the State’s taking. A divided Court of Appeals affirmed and this Court granted discretionary review.

STATEMENT OF FACTS

The State, through MnDOT, has determined that certain improvements and upgrades are required on TH 61 in Cook County, Minnesota. Appellant’s Appendix (“App.”) 39. MnDOT has also determined that, to implement these improvements and upgrades, it must acquire private property from adjacent landowners. *Id.* at 5-6. To that effect, MnDOT filed a condemnation petition and commenced these proceedings.

At the November 18, 2008, hearing on petition, MnDOT presented evidence and arguments to the district court regarding the proposed takings. This included testimony from MnDOT district land management engineer Roberta Dwyer. *Id.* at 54. Dwyer, as a MnDOT project manager for land management, has responsibilities for both right-of-way and surveys. *Id.* As of the hearing date, Dwyer had been an engineer for 26 years. *Id.*

The Project and Lepak's Property

The properties at issue, including Parcel 15 owned by appellant Lepak, are being acquired for use as part of MnDOT's transportation project S.P. 1601-48 to improve and widen a 3.5 mile long portion of TH 61 in Cook County ("Project"). *Id.* at 39. The Project extends from approximately one mile south of the Onion River to approximately a half-mile north of County Road 34. *Id.* The Project includes road improvements for pavement surface and safety, including widening of the shoulders to ten feet and adding turn and bypass lanes. *Id.* The Project also includes a bike trail on the lake side of TH 61. *Id.* No respondent at the hearing on petition disputed that improving and widening TH 61 is a public purpose and public use.

Before any taking, Parcel 15 consists of 104,544 square feet. *Id.* at 55. The taking from Parcel 15 includes two components: a permanent fee taking and a temporary easement. *Id.* at 55, 141. The fee taking consists of a 110-foot deep swath of land north of and immediately adjacent to TH 61, a portion of which is to be used for the construction of the proposed access road. *Id.* at 55-56. The fee taking totals 9,027 square feet, approximately nine percent of Parcel 15's total area. *Id.* The temporary easement

taking consists of a 20-foot deep swath of land north of and immediately adjacent to the fee taking. *Id.* at 55, 141.

Proposed Access Road

Before the Project, Parcel 14 had a driveway directly onto TH 61. *Id.* at 140. MnDOT is eliminating that driveway as part of the Project. *Id.* MnDOT decided to provide replacement access to Parcel 14 by constructing a new access road.¹ *Id.* The road will not only provide Parcel 14 with access to TH 61 but, as Roberta Dwyer testified, it will provide highway access to multiple properties. *Id.* at 57; *see generally id.* at 55-60. MnDOT's taking from Parcel 15 is necessary to build the new road. *Id.* at 56. The access road will serve Parcel 15, as well as Parcel 14 immediately to the west of Parcel 15, and Parcel 16 immediately to the east of Parcel 15. *Id.* The access road will connect with TH 61 on Parcel 16 and then wind across Parcels 15 and 14. *Id.* at 60-61.

The record establishes that MnDOT chose the proposed location for the access road based, at least in part, on safety and convenience reasons. Dwyer testified that MnDOT's concerns included the steep grade in the area and the rocky terrain. Because of the steep grade, a longer road was necessary to provide suitable access for the three parcels. *Id.* at 56-57. No evidence contradicting Dwyer's testimony was introduced.

The road is absolutely necessary for Parcel 14 because that parcel's sole access in the pre-condemnation situation is by a driveway directly onto TH 61 that will be

¹ At the hearing on petition, the challenged road was referred to as an "access road." *See, e.g.,* App. 56-58. The State has used both that term as well as the term "service road," as it regards the two as interchangeable. There do not appear to be any Minnesota cases that treat the terms differently. For consistency, the State herein refers to the road as an "access road."

eliminated by the Project. *Id.* at 56, 77. Absent a new access road, Parcel 14 -- the only one of the three properties that has been improved -- would be landlocked. *Id.* at 56, 60, 140, 141. And because neither Parcel 15 nor Parcel 16 had access in their pre-condemnation condition, the new road cures their landlocked status as well. “[The new road] is not just for [Parcel] fourteen. All three of these properties will be serviced. We can’t leave them landlocked. They’ve got to have access.”²

Moreover, the legislature has expressly mandated that MnDOT provide the owner of Parcel 14 with reasonable access to TH 61 in these circumstances. Minn. Stat. § 160.18, subd. 2 (2008), provides:

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

(Italics added). Again, the Project involves the reconstruction of an existing highway -- namely, the widening and improving of TH 61.³ Parcel 14 abuts TH 61 and, absent the new access road, the property would have no access to the highway. Consequently, § 160.18, subd. 2, requires that MnDOT provide the owners of Parcel 14 a “reasonable means of access” and MnDOT will do so by means of the new access road. The road,

² Lepak misleadingly quotes a portion of this passage to support his claim that “the primary rationale for constructing the access is to replace Parcel 14’s existing driveway.” App.’s Br. at 9 and n.3. As the full quote makes clear, however, Dwyer’s “landlocked” comment was made in reference to all three parcels.

³ Lepak expressly acknowledges, in the very first sentence of the Statement of Facts in his brief to this Court, that the Project involves the reconstruction of TH 61. Appellant’s Opening Brief (“App.’s Br.”) at 5.

from where it intersects with TH 61 to the point where it reaches the property line dividing Parcels 14 and 15, lies entirely within the highway right-of-way. App. 140-41. This satisfies the requirement in § 160.18, subd. 2, that the road be situated “within the limits of the right-of-way.”

MnDOT’s planned access road will be built across all three parcels because the rocks and very steep grades along TH 61 necessitate a longer access road. *Id.* Parcel 15 did not have a driveway leading directly onto TH 61 before the proposed taking, but will be able to use the proposed access road to TH 61. *Id.* at 56-57. The taking from Parcel 15 is reasonably necessary and convenient to serve the public purpose of widening TH 61. *Id.* at 58; Appellant’s Addendum (“Add.”) 4.

Although Lepak (through counsel) communicated to MnDOT prior to the hearing on petition that he preferred the access road be built further to the west and mainly on Parcel 14, Dwyer testified that proposed alternative is not viable. App. 57. According to MnDOT’s design manual, the applicable road grade percentage for residential property is no more than 15 percent. *Id.* at 56-57. Building the access road further to the west of Parcel 15 would create a grade in excess of the allowable 15 percent. *Id.* at 57. Dwyer further testified that a curve in the road to the west of his property would make Lepak’s proposal unsafe. *Id.* Finally, she testified that Lepak’s proposal would conflict with a turn lane to a wayside rest area. *Id.*

Although no one appeared at the hearing on petition on behalf of the owners of Parcel 16, Dwyer testified about their response to the proposed access road. Because the road is public, the owners of Parcels 14, 15, and 16 are all required to submit a permit

application requesting access onto the road. *Id.* at 58. At the time of the hearing on petition, the Barsnesses -- the owners of Parcel 16 -- had *already submitted* a permit application for such access. *Id.* at 60.

Lepak's Challenge

At the hearing, Lepak's counsel asserted challenges to the public purpose and public use of the proposed access road that will run across his property and the properties directly to the east and west of his property. *Id.* at 41, 73-76. As the district court expressly found, Lepak's counsel did not object at the hearing on the grounds that the access road is not reasonably necessary to further the public purpose and public use of improving and widening TH 61. Add. 4; *see generally* App. 31-90.

Lepak did not testify or appear personally. Add. 1; *see generally* App. 31-90. Neither did he have any witnesses -- such as neighboring owners, engineers, realtors, or developers -- appear to offer testimony or other evidence regarding his challenge to the State's taking. *See generally* App. 31-90. Lepak did appear through counsel, David Zoll. Zoll, however, offered no evidence beyond asking four questions of Dwyer during cross-examination. *Id.* at 59-60. Those questions related to (1) the grade of that portion of the access road serving Parcel 16; (2) the road's overall grade; (3) whether Parcel 16 is a residential or commercial property; and (4) the length of Parcel 16's lake frontage. *Id.*

ARGUMENT

I. STANDARD OF REVIEW.

Prior to taking private property, condemning authorities such as MnDOT must first determine that there is a public purpose or public use for the property, and that the acquisition is reasonably necessary or convenient to further that public purpose or public use. *Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 380 (Minn. 2006) (citing *City of Duluth v. State*, 390 N.W.2d 757, 762-65 (Minn. 1986)).

Although public purpose and necessity have been termed “‘judicial questions,’” judicial review of a condemning authority’s determination of those questions is actually narrower than that characterization might suggest because “determinations of the condemning authority are regarded as legislative decisions which will be overturned only when they are ‘manifestly arbitrary or unreasonable.’” *Lundell*, 707 N.W.2d at 380-81 (citations omitted).

Thus, there are *two levels of deference* paid to condemnation decisions: the *district court gives deference* to the legislative determination of public purpose and necessity of the condemning authority and the *appellate courts give deference* to the findings of the district court, using the *clearly erroneous* standard.

Id. at 381 (emphasis added) (citing *City of Duluth*, 390 N.W.2d at 762); *see also Hous. and Redevelopment Auth. in and for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 666 (Minn. Ct. App. 2001), *aff'd* 641 N.W.2d 885 (Minn. Apr. 18, 2002) (court of appeals’ scope of review in condemnation matters is “‘very narrow’”) (citation omitted); *County of Stearns v. Voller*, 584 N.W.2d 800, 802 (Minn. Ct. App. 1988) (same).

II. THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN CONCLUDING THAT THE DISPUTED TAKING FROM LEPAK'S PROPERTY IS FOR A PUBLIC PURPOSE AND PUBLIC USE.

A. The Project Constitutes A Valid Public Purpose And Public Use.

It is beyond question that the taking of property for a road project is for a public purpose and public use. *State v. Voll*, 192 N.W. 188, 189 (Minn. 1923) (“the taking of a strip of land for a roadway . . . must be conceded to be a public necessity, and for a public use”). Lepak has never disputed that the widening and improving of TH 61 constitutes a public purpose and a public use. Instead, his sole objection at the hearing on petition was that there is no public purpose or public use in the proposed access road. App.’s Br. at 7.

Lepak’s public purpose and public use arguments regarding the access road are misguided and appear to stem from a fundamentally flawed view of the law on public purpose. He apparently believes that MnDOT must establish not only public purpose for the Project taken as a whole, but for each individual aspect as well. That is not the case. For many years, this Court has followed the same two-step, public purpose and necessity analysis in reviewing the propriety of governmental takings. *See, e.g., City of Pipestone v. Halbersma*, 294 N.W.2d 271, 274 (Minn.1980) (quoting *The Kelmar Corp. v. District Court of Fourth Judicial District*, 130 N.W.2d 228, 232 (Minn. 1964)); *City of Duluth*, 390 N.W.2d at 764-65.

The threshold issue is whether a project has a valid public purpose or public use. Minnesota courts have applied this analysis to projects taken as a whole. *See, e.g., Itasca County v. Carpenter*, 602 N.W.2d 887, 889 (Minn. 1999) (“The record clearly establishes that respondent’s land is necessary for appellant to accomplish its road project.”);

Halbersma, 294 N.W.2d at 273 (referring to acquisition of 91.4 acres from various owners as “necessary to effectuate a public purpose, the airport improvement project”); *Coop. Power Ass’n v. Eaton*, 284 N.W.2d 395, 397 (Minn. 1979) (“the landowners should be able to litigate the limited issue of whether the specific interest in a particular piece of property is necessary to accomplish the general project”).

Once a court determines that a project has a public purpose or public use, the analysis shifts to whether the contemplated takings are reasonably necessary to further that public purpose. *Lundell*, 707 N.W.2d at 380-81. The myriad details involved in road construction, such as the depths and slopes of adjacent ditches, the size of drainage pipes or how deep they should be buried, the location and size of holding ponds, the type and quantity of aggregate underneath the roadway surface -- even where to locate access roads such as the road involved here -- are details relating to *necessity* that are subject to limited judicial review. *See Hous. & Redevelopment Auth. in and for the City of Minneapolis v. Minneapolis Metro. Co.*, 104 N.W.2d 864, 874 (Minn. 1960) (court may not substitute its own judgment for that of condemning authority “as to what may be necessary and proper to carry out the purpose of the plan”); *City of Granite Falls v. Soo Line R.R. Co.*, 742 N.W.2d 690, 697 (Minn. Ct. App. 2007) (“court gives deference to the determinations of the condemning authority, which are regarded as legislative actions”).

For his part, Lepak provides no rationale for why the access road must be individually scrutinized for public purpose and public use. He cites no supporting decisional law. And while he references Minn. Stat. §§ 117.025 and 117.012, neither statute contains any language suggesting that the legislature intended to alter, much less

drastically alter, the two-step public purpose and necessity analysis that Minnesota courts have historically followed. Perhaps most telling, the legislature declined to create a definition for necessity, under the definitional provisions of § 117.025 or elsewhere.

Other portions of chapter 117 further demonstrate that the legislature did not intend to alter the traditional public purpose and necessity analysis. The combination of “public use,” “public purpose,” and “necessity” appears in only two sections of chapter 117: Minn. Stat. §§ 117.055 and 117.075 (2008).⁴ Section 117.055 sets forth requirements for the condemnation petition and notice. Particularly relevant here is subdivision 2(b) which provides:

(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.

§ 117.055, subd. 2(b) (emphasis added).

Section 117.075, in turn, relates to the hearing on petition and evidence. Particularly relevant here is subdivision 1(c) which provides as follows: “(c) 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.”

§ 117.075, subd. 1(c) (emphasis added).

⁴ The term “necessity” also appears by itself in Minn. Stat. § 117.40 (2008). That statute permits municipalities to contest necessity and is irrelevant to this analysis.

Both §§ 117.055 and 117.075 expressly refer to public use, public purpose, and necessity. Neither statute contains any language suggesting that the legislature intended to alter the public purpose and necessity analysis under case law. Moreover, all of the foregoing language from the two statutes was actually added by the legislature as part of the 2006 amendments. Laws of Minnesota 2006, chapter 214, sections 7 and 8.

In other words, the 2006 legislature created a new definition for public use and public purpose, but declined to create a new definition for necessity. The 2006 legislature further enacted multiple provisions expressly referencing the public use, public purpose, and necessity requirements, but again declined to add any language altering or affecting those requirements. If anything, the legislature's 2006 amendments demonstrate that the legislature intended to leave both the definition of necessity, and the public purpose and necessity analysis, intact.

Lepak has failed to cite any supporting statutes or case law. He has failed to address the two provisions of chapter 117 -- §§ 117.055 and 117.075 -- that expressly address public use, public purpose, and necessity. And he has failed to offer any rationale for why individual components of the Project must be separately scrutinized for public purpose and public use. Instead, he merely assumes that to be the case and argues that the proposed access road lacks a public purpose or public use. But even if Lepak's assumption is correct and the access road must be viewed in isolation for purposes of determining public purpose and public use, his challenge fails, as explained below.

B. Lepak's Public Purpose/Public Use Challenge To The Access road Fails Because No Facts Supporting the Challenge Were Introduced Into Evidence.

The crux of Lepak's argument is, of course, that the challenged access road is a private road rather than a public road, and that it therefore lacks the requisite public purpose and public use. Lepak repeatedly characterizes the access road in his brief as a "private access," App.'s Br. at 6-8, 10, 13-17, or a "private road," *id.* at 12. The glaring defect in Lepak's argument is that there is no evidence in the record to support a conclusion that the road is a private road.

As required by statute, the district court held a hearing on MnDOT's condemnation petition, with interested parties free to attend and to present "competent evidence offered for or against the granting of the petition." Minn. Stat. § 117.075, subd. 1(a) (2008). Again, Lepak did not appear personally, much less testify in support of his challenge to MnDOT's taking. Neither did he have any other persons appear to provide testimony or other evidence supporting his challenge. Although Lepak appeared through David Zoll, his lawyer, Zoll introduced no evidence beyond asking four inconsequential questions of MnDOT engineer Roberta Dwyer during cross-examination. *See* App. 59-60.

It is the right of travel by public, and not the exercise of the right, that constitutes a public roadway. The actual amount of travel should not be material -- if it is open to all who desire to use it, is a public roadway even though it may be used by only a limited portion of the traveling public, or even if it accommodates some individuals more than others.

The record is devoid of any evidence suggesting that members of the traveling public do not have an unfettered right to drive upon the access road. Nothing in Dwyer's testimony or other competent evidence offered at the hearing suggests that Lepak or the owners of Parcels 14 or 16 have the right to control traffic upon the access road. No evidence suggests that they can place a gate upon or barricade the road, or otherwise interfere with motorists who want to use the road. Likewise, nothing in the record suggests that Lepak or his neighbors have the right to remove the roadbed or in any way physically alter it. Finally, nothing in the record suggests that they have the right to park vehicles in the middle of the access road. Owners of truly private roads are of course entitled to do all of the foregoing, yet there is no evidence that Lepak or his neighbors possess such rights.

Despite his failure to present at the hearing any evidence in support of his challenge, Lepak argued to the district court and to the Court of Appeals that the access road was a private road because it would serve only Parcel 14. App. 143. But Lepak's only purported evidence was "unsupported claims that because neither he, nor the owners of Parcel 16 need or want access to the road, the road is a private road serving Parcel 14." *Id.* As the Court of Appeals noted, however, he "failed to present any evidence to support these claims." *Id.*

Before this Court, Lepak now alters his approach. He has apparently abandoned - or at least omits from his brief -- any claim that the access road will serve only Parcel

14.⁵ Nevertheless, as noted above, Lepak continues to characterize the road as a “private access” or “private road.” And instead of attempting to justify his conclusion that the access road is a private road based on unsupported assertions found in the record, he now cites *nothing* in the record to support that conclusion. In other words, Lepak has gone from relying upon *baseless* evidence to bolster his assertion that the access road is private, to relying upon *no* evidence. It goes without saying that his new tactic should fare no better than his last.

The one item from the record that Lepak cites -- and what the dissent from the Court of Appeals seized upon -- is the notion that the owners of Parcels 14, 15, and 16 are obligated to maintain the access road. No sworn testimony or other properly admitted evidence, however, was introduced at the hearing on petition. Instead, the only reference to maintenance were comments by Zoll to the district court regarding a statement made to unidentified colleagues of Zoll’s. App. 75-76. Those comments should not be considered.

Zoll’s comments were not made under oath by a competent witness with personal knowledge, and are thus irrelevant. Minn. R. Evid. 601, 602, 603. For the same reason, they violate the requirement in Minn. Stat. § 117.075, subd. 1(a), that “evidence offered for or against the granting of the petition” be competent. Finally, caselaw establishes that statements made by counsel do not constitute evidence. *State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010) (jury properly instructed that “statements of attorneys were not

⁵ Lepak appears to make a half-hearted concession on the issue, stating in his brief that the access road “will serve, at most, three private parties.” App.’s Br. at 9.

evidence”); *cf. Poston v. Colestock*, 540 N.W.2d 92, 94 (Minn. Ct. App. 1995), *review denied* (Minn. Jan. 25, 1996) (“An attorney may not introduce statements or conclusions unsupported by the evidence in closing argument.”) (citing *Hall v. Stokely-Van Camp, Inc.*, 106 N.W.2d 8, 10 (Minn. 1960)). In sum, as noted by the Court of Appeals, the record simply does not contain any evidence supporting the assertion that the owners of Parcels 14, 15, and 16 must pay for road maintenance. App. 143.

The dissent’s reliance on the fact that Litfin “left uncorrected Zoll’s representation to the court” regarding maintenance is misplaced. *Id.* The dissent posits it is the State’s burden to affirmatively disprove mere unsupported allegations made by opposing counsel, or run the risk of those unsupported allegations being elevated to the level of evidence on appeal. In fact, as the majority held, it should be Lepak who has the burden.

It was Lepak, through his counsel, who sought to challenge the taking at issue here. It was Lepak who raised the issue of maintenance as a basis to support his challenge. It was therefore the responsibility of Lepak to offer competent evidence on that issue. The State should not be penalized for failing to address unsupported allegations. This is particularly true when there was a witness present at the hearing -- MnDOT’s Roberta Dwyer -- whom Zoll could and should have questioned had he truly wanted to pursue the maintenance issue. Had Zoll questioned Dwyer regarding maintenance, the record before this Court would look quite different and that issue would be preserved so that it could be properly addressed on appeal. But Zoll failed to do so, and his client should not be rewarded on appeal for that failure.

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

C. The Access Road is Expressly Authorized Under the Recently Enacted Statutory Definition of Public Purpose and Public Use.

In 2006, the legislature amended Minnesota Statutes chapter 117. Among other changes, it provided a new statutory definition for public use and public purpose in Minn. Stat. § 117.025, subd. 11 (2008), which provides:

Subd. 11. **Public use; public purpose.** (a) "Public use" or "public purpose" means, exclusively:

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

(2) the creation or functioning of a public service corporation; or

(3) mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of a public nuisance.

(b) The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.

Id.

The access road at issue here falls within the meaning of subdivision 11(a)(1) of that statute because it includes possession, occupation, ownership, and enjoyment of land by public agencies. MnDOT is of course a public agency. Minn. Stat. § 174.01 (2008) (MnDOT is “the principal agency of the state for development, implementation, administration, consolidation, and coordination of state transportation policies, plans, and programs”). MnDOT’s condemnation petition does not seek to transfer any of Lepak’s property to a private party. To the contrary, the petition seeks from the district court an order transferring title and possession of the parcels described therein to MnDOT, thereby satisfying the “possession, occupation, and ownership” portions of the definition. App. 5-6; *see also* App. 1.

This leaves only the issue of enjoyment by MnDOT. Lepak apparently believes this to be the weak link in MnDOT’s argument: “Neither the general public nor MnDOT will possess, occupy, own, *and* enjoy the new access as is required to establish a ‘public use’ or ‘public purpose.’” App.’s Br. at 9 (emphasis in original). But Lepak’s belief is unfounded, as there are at least two statutorily-based reasons why MnDOT will enjoy the access road.

First, MnDOT is under an express statutory obligation to provide the access road. Again, Minn. Stat. § 160.18, subd. 2, provides:

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

(Emphasis added).

Here, although MnDOT eliminated Parcel 14's existing driveway, it did not acquire the easement of access from Parcel 14. *See* App. 13. MnDOT did not need to do so, as the new access road is designed to provide highway access for that parcel and also for Parcels 15 and 16. As required by § 160.18, subd. 2, the access road lies within the limits of the right-of-way and provides abutting owners -- of Parcels 14, 15, and 16 -- with a reasonable means of access to TH 61. It hardly seems open to debate that MnDOT will "enjoy" land acquired for the purpose of constructing an access road that it is statutorily obligated to provide.

And second, MnDOT is also expressly authorized to acquire property from Lepak for the proposed access road under Minn. Stat. § 161.24, subd. 4 (2008), which provides:

Subd. 4. Access to isolated property. When the establishment, construction, or reconstruction of a trunk highway closes off any other highway or street, including a city street, *private road, or entrance at the boundary of the trunk highway*, the commissioner may, in mitigation of damages *or in the interest of safety and convenient public travel*, construct a road either within or outside the limits of the trunk highway, connecting the closed-off highway, street, private road, or entrance with another public highway. In determining whether to build the road within or outside the limits of the trunk highway, the commissioner may take into consideration economy to the state and local traffic needs. The commissioner, in mitigation of damages, may connect the closed-off private road with the remaining portion of the private road or with another private road. *All lands necessary for connecting a highway, street, private road, or entrance to another public highway or for connecting a closed-off private road to the*

remaining portion of a private road or to another private road, *may be acquired by purchase, gift, or condemnation.*

(Emphasis added).

It can hardly be open to debate that the record demonstrates MnDOT chose to do so for public safety and convenience, and that MnDOT will enjoy the access road within the meaning of § 117.025, subd. 11(a)(1), when providing that road will fulfill MnDOT's express statutory obligation under § 160.18, subd. 2, and is further expressly authorized by § 161.24, subd. 4.

Finally, Lepak correctly notes that, under the preemption provisions in Minn. Stat. § 117.012, subd. 1 (2008), § 161.24 survives only to the extent that it is consistent with those provisions. Unfortunately, his analysis consists of nothing more than the following single paragraph:

A "private road" is, by its nature, private -- not public. Neither the general public nor public agencies possess, occupy, own, *and* enjoy a private road. As a result, the condemnation of private property to mitigate damages to the properties served by a private road which is cut off by the reconstruction of a trunk highway is no longer authorized because it is not a taking for a "public use" or "public purpose." Accordingly, Minnesota Statute, Section 161.24 is preempted by the 2006 Amendments to Minnesota's eminent domain laws to the extent it purports to authorize such a taking.

App.'s Br. at 12 (emphasis in original).

Lepak's argument is circular. It rests entirely on the flawed and unsupported assumption that the access road is a private road. Yet Lepak references no facts to support that assumption. He provides no citations to the record whatsoever. He fails to acknowledge, much less address, all of the evidence in the record that establishes that the

access road serves multiple properties and lies entirely within MnDOT's right-of-way for TH 61. In short, Lepak fails to offer even a single explanation for why § 161.24 is inconsistent with § 117.012.

Moreover, while Lepak mentions the "mitigation" aspect of § 161.24 in his circular argument, he completely ignores the language following immediately thereafter: "*or in the interest of safety and convenient public travel.*" § 161.24, subd. 4 (emphasis added). The record contains uncontroverted evidence that MnDOT chose, at least in part, to install the proposed access road across Parcels 14, 15, and 16 for public safety and convenience reasons. App. 56-57. And having a single outlet for all three properties onto TH 61 is safer and more convenient for the traveling public than having three separate driveways. Thus, § 161.24 expressly authorizes MnDOT to acquire property for the proposed access road on the independent basis of safe and convenient public travel.

Critically, § 161.24 provides authority for MnDOT to acquire via condemnation property from Lepak even if doing so would serve only Parcel 14, Lepak's neighbor. The statute refers in the singular to a "private road, or entrance at the boundary of the trunk highway" closed off by trunk highway reconstruction, and provides that MnDOT may construct a new road to connect such closed off "private road, or entrance with another public highway," and, of course, may do so by means of "condemnation." *Id.*

III. THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN CONCLUDING THAT THE DISPUTED TAKING FROM LEPAK'S PROPERTY IS REASONABLY NECESSARY.

A. Lepak Waived Any Objection To The Necessity Of The Disputed Taking.

The hearing on petition is “the *only* time provided for contesting the validity of the taking.” *State v. Wren*, 146 N.W.2d 547, 550 (Minn. 1966) (emphasis added); *see also City of Eagan v. O'Neil*, 437 N.W.2d 736, 737 (Minn. Ct. App.) *review denied* (Minn. June 9, 1989) (quoting *Wren*). As the district court expressly found, at no point during the hearing on petition did Lepak's counsel raise an objection based on a lack of necessity. Add. 4; *see generally* App. 31-90. In his brief, Lepak references only the objections he raised based on public use and public purpose. App.'s Br. at 5. Consequently, by failing to lodge a necessity objection at the hearing on petition, Lepak waived his right to challenge the taking on that basis.

B. Even If Lepak Did Not Waive A Challenge To Necessity, He Did Not Sustain His Heavy Burden Of Demonstrating That MnDOT Acted In A Manifestly Arbitrary Or Unreasonable Manner.

Although a condemning authority has an initial burden of establishing necessity, when the authority is MnDOT, it establishes its *prima facie* case, and thus meets this burden, by demonstrating that it ordered the taking for trunk highway purposes.

MnDOT is authorized under Minn. Const. art. 14, § 1, to “construct, improve and maintain public highways.” Article 14, section 2, establishes the trunk highway system. Authority to exercise this power has been delegated by the legislature to MnDOT in Minn. Stat. § 161.20, subd. 1 (2008), which provides that “[t]he commissioner shall carry

out the provisions of article 14, section 2 of the Constitution of the state of Minnesota.” To carry out these provisions, MnDOT is authorized by statute to acquire lands and properties for construction and maintenance of the trunk highway system. Specifically, the commissioner is authorized “to acquire by purchase, gift, or by eminent domain proceedings as provided by law, in fee or such lesser estate as *the commissioner deems necessary*, all lands and properties necessary in laying out, constructing, maintaining, and improving the trunk highway system.” Minn. Stat. § 161.20, subd. 2(a)(1) (2008) (emphasis added). Thus MnDOT, unlike other public condemners, has constitutional and statutory authority to determine what land is necessary for the trunk highway system.

MnDOT’s determination that particular parcels of property are necessary to implement the public project is *prima facie* evidence of that necessity. Normally, MnDOT’s determination of necessity shall be announced through official orders of the Commissioner of Transportation. *See* Minn. Stat. § 161.09, subd. 1 (2008). Those orders are then transcribed on plats and recorded with the county, as provided by Minn. Stat. § 160.085, subd. 1 (2008):

In order to facilitate the acquisition of right-of-way required for highways, state and county road authorities may file for record in the office of the county recorder or registrar of titles in the county in which right-of-way is to be acquired, such orders or resolutions, as required by law, in the form of maps or plats showing right-of-way by course distance, bearing and arc length, and other rights or interests in land to be acquired as the road authority determines necessary.

Official determinations of the condemner as to the necessity of the particular lands, as evidenced by orders, resolutions of the city council, ordinances, and similar official governmental acts, constitute *prima facie* evidence of the necessity of the taking.

City of New Ulm v. Schultz, 356 N.W.2d 846, 849 (Minn. Ct. App. 1984) (“a city council resolution that a taking of the fee was necessary to accomplish the expansion [is] prima facie evidence of public use and of the taking as reasonably necessary to accomplish that use”); see also *City of Duluth v. State*, 390 N.W.2d 757, 764-65 (Minn. 1986) (city resolution and, logically, the findings underlying that resolution are evidence to be considered by the district court).

In the instant case, MnDOT clearly met its low initial burden of showing that the taking was necessary or convenient by virtue of MnDOT’s determination that it needs to take the land described for trunk highway purposes. See *Voll*, 192 N.W. at 190. MnDOT introduced as exhibits at the hearing on petition a certified right of way map and seven certified plat maps, the latter of which contain orders from the Commissioner of Transportation. App. 40. Exhibit number 4 is MnDOT Plat No. 16-12 which pertains to Parcel 15. App. 40, 58, 141. The orders and plat maps establish that the Commissioner determined that it was necessary or convenient to take the described lands for the public purpose of improving a trunk highway. MnDOT, therefore, satisfied its *prima facie* case.

Once MnDOT establishes a *prima facie* case of necessity, a landowner has the heavy burden of proof to establish a lack of necessity. See *Itasca County v. Carpenter*, 602 N.W.2d 887, 889-90 (Minn. Ct. App. 1999). “To overcome a condemning authority’s finding of necessity there must be overwhelming evidence that the taking is not necessary.” *Lundell*, 707 N.W.2d at 381;⁶ see *Voller*, 584 N.W.2d at 802.

⁶ Lepak’s lengthy discussion of *Lundell* in his opening brief is of no significance. App.’s Br. at 14-15. He apparently is under the impression that the State finds factual

Speculative claims and broadside attacks do not satisfy the landowner's burden of proof. *City of New Prague v. Hendricks*, 286 N.W.2d 696 (Minn. 1979). Once a condemning authority's initial burden is met, "[c]ourts may interfere only when the Authority's actions are manifestly arbitrary or unreasonable." *Voller*, 584 N.W.2d at 802.

Where, as here, the condemning authority has been vested with legislative power in a particular area, this test is satisfied only when the condemning authority has acted "capriciously, irrationally, and without basis in law or under conditions which do not authorize or permit the exercise of the asserted power." *Id.* The Supreme Court has defined the term "arbitrary" as follows: "without adequate determining principle; [f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, decisive but unreasoned ...' Capricious is defined as 'apt to change suddenly; freakish; whimsical; humorsome.'" *United States v. Carmack*, 329 U.S. 230, 243, 67 S. Ct. 252, 258, n.14 (1946) (citations omitted).

When MnDOT takes land for a trunk highway purpose, the courts are not to substitute their judgment for that of MnDOT's. *State v. Christopher*, 170 N.W.2d 95, 100 (Minn. 1969). Again, MnDOT has been invested with the State's sovereign

similarities between that case and the dispute at hand. The State, however, has never taken that position. Instead, the State has merely cited *Lundell*, in this brief and to the lower courts, for the well-settled propositions that (1) public purpose and necessity must be established for a taking; (2) that determinations of a condemning authority may be overturned only when they are "manifestly arbitrary or unreasonable"; and (3) that a condemning authority's finding of necessity can only be overcome by overwhelming evidence. *Lundell*, 707 N.W.2d at 380-81. None of these propositions are open to challenge.

authority, and thus its power cannot be equated with that of other condemners. *Id.* at 99; *see also State v. Byers*, 545 N.W.2d 669, 673 (Minn. Ct. App. 1996).

Here, none of the claims made by Lepak at the hearing on petition provide a basis for disputing necessity. Counsel for Lepak claims that, because the owners of Parcels 14, 15, and 16 will be responsible for maintaining the proposed access road, Lepak and his neighbors are being forced into a “quasi-contractual obligation to maintain the driveway.” App. 75-76. Even if true, that does nothing to help Lepak sustain his heavy burden of showing that the proposed access road is arbitrary and capricious. Rather, it merely relates to the issue of compensation to the owners of Parcels 14, 15, and 16 for MnDOT’s takings, a matter to be properly addressed by the court-appointed commissioners. *See Schultz*, 356 N.W.2d at 849-50 (holding that where landowners’ remaining property would be inaccessible and uneconomical, such concerns went to the amount of compensation to be paid, not to the propriety of the taking itself).

The record shows that Lepak failed to sustain his heavy burden of producing overwhelming evidence proving that MnDOT’s actions were manifestly arbitrary and unreasonable. To the contrary, MnDOT’s actions are authorized by law, in that the Minnesota Constitution and Minnesota Statutes grant MnDOT authority over the trunk highway system. Rather than proving that MnDOT acted in an irrational manner, the record demonstrates that MnDOT exercised its authority reasonably. Because Lepak failed to meet his burden, the district court properly made the factual finding that “[t]he proposed taking from Parcel 15, in all of its aspects, is reasonably necessary to serve the public purpose of improving and widening TH 61,” Add. 4, and the conclusion of law

that MnDOT established that “the proposed access road is reasonably necessary to fulfill the public purpose of improving and widening TH 61, *id.* at 5. That finding and conclusion are not clearly erroneous, and instead find ample support in the record.

CONCLUSION

Lepak has failed to establish that the proposed access road lacks a public purpose and public use. He likewise has failed to prove that MnDOT acted in a manifestly arbitrarily or unreasonable manner. MnDOT therefore respectfully requests that this Court affirm the Court of Appeals’ decision.

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12/1/2010

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 8,513 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.



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