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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1334**

County of Winona, petitioner,  
Respondent,

vs.

Kelley McCullough O'Neill, et al.,  
Appellants.

**Filed June 2, 2014  
Affirmed  
Ross, Judge**

Winona County District Court  
File No. 85-CV-13-56

Beau J. Van Beek, Bernatz & Van Beek, Winona, Minnesota (for respondent)

Kelley McCullough O'Neill, Cynthia O'Neill, Rushford, Minnesota (pro se appellants)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

**UNPUBLISHED OPINION**

**ROSS**, Judge

Winona County petitioned the district court to condemn a section of Kelley O'Neill's rural land for a bridge and road realignment project aimed at flood control. O'Neill challenged the petition, asserting that both the new bridge and the road realignment would serve no public purpose and were unnecessary, and he offered as

evidence a video recording of a county board meeting discussing the project. The district court declined to view the recording and granted Winona County's condemnation petition. Because the district court did not abuse its discretion when it declined to view the recording, and because there is some evidence that condemning O'Neill's land is necessary to achieve a public purpose, we affirm.

### **FACTS**

Record flooding in 2007 prompted the Winona County Highway Department to propose a series of road improvement projects in 2009 to reduce the risk of future flood damage. The county board of commissioners authorized the highway department to obtain the necessary right of way, using eminent domain if necessary. One of these projects targeted County Highway 19 where it crosses Money Creek. The commissioners eventually approved a plan to build a new bridge on Highway 19, again authorizing the use of eminent domain. The Highway 19 project is partly on Kelley O'Neill's land. Winona County petitioned the district court to condemn the land.

O'Neill contested the condemnation, representing himself at the hearing. David Kramer, a civil engineer and head of the highway department, testified for the county. He explained that the Minnesota Department of Transportation had made funds available to repair and improve roads damaged by flooding. The highway department commissioned a consultant to produce alternate designs for a new bridge over Money Creek, met with members of the public and county commissioners, and discussed the project at public meetings. The county commissioners, state department of transportation, and state department of natural resources all approved the project.

Kramer testified that the project involves a bridge structure consisting of a pair of concrete box culverts. The road surface would overlay these culverts. Kramer testified that the project was necessary because the road floods often because the existing culverts are too small. He described flooding at the project site as a recurring problem, noting that it was one of only two places in the county road system overcome by a 2010 flood and was the only spot inundated in a 2013 flood. He listed safety concerns, such as cars being swept off the road and emergency vehicles being unable to pass.

Kramer testified that a department of transportation manual dictated the size of the new culverts. The administrative manual classifies roads based on traffic volume and specifies the storm severity each category of road should be designed to withstand. Highway 19 had a traffic volume of 75 vehicles per day, which, according to the manual, meant it should be built to withstand a “ten-year storm.” The proposed culverts would have 4.7 times the drainage capacity of the existing culverts. Kramer opined that the increased capacity likely would have prevented water from overflowing the road during the 2010 flood and would have reduced the depth and duration of any flooding that did occur. He conceded that the proposed culverts would not have prevented the 2007 flood from overflowing the road, but he explained that they would have reduced the volume of the flood and the damage it caused. He testified that it would be prohibitively expensive to build a bridge that could withstand a record storm like the one in 2007.

Kramer added that the project would realign the road, which curves at the project site. The current curve is so sharp that it allows only a 20-mile-per-hour speed limit, while the proposed curve would be less extreme, allowing a 30-mile-per-hour limit.

Kramer testified that the relaxed curve would make the road safer because the current sharper curve “catches drivers off guard.” He added that the state department of transportation regarded the existing curve as “deficient” and refused to fund the culvert project unless the county changed it. He added that the county decided, at O’Neill’s urging, to install a guardrail on the outside edge of the new curve to keep cars from going off the road.

James Maybach, a retired mechanical engineer with experience excavating along waterways, testified for O’Neill. He spoke of distinctions between the estimated high water marks from the 2007 flood and the estimated height of the new roadbed, stating that the new road would sit above the ten-year flood level but below the 2007 level. Maybach testified that water would likely overflow the proposed road eventually but agreed that precipitation from a ten-year storm would not and that the proposed culverts would “[d]efinitely” reduce flooding.

O’Neill also testified. He opined that flooding would increase because of increased runoff, that the proposed project would not eliminate flooding or road closures, and that the new curve would make the road more dangerous. He asserted that the existing, tight curve was safe because it forces drivers to slow down. O’Neill offered a video recording of a meeting where the county commissioners discussed the project, because he said the minutes were unavailable. Winona County’s counsel had not seen the recording, so the district court said it would receive the evidence if the county attorney viewed it and agreed to its joint submission. The record suggests that that did not happen, and the district court found the recording duplicative and unnecessary and did not view it.

The district court found that the existing culverts are undersized and that the proposed culverts would conform to safety standards. It found that the project would serve a public purpose by making the road safer and more available to the public even though the culverts might not prevent all flooding. The district court concluded that taking the identified segment of O’Neill’s land was reasonably necessary to achieve that purpose.

O’Neill appeals.

## D E C I S I O N

### I

O’Neill asks us to reverse the district court’s condemnation order. The state and federal constitutions allow the government to condemn private property and put it to public use. *See* U.S. Const. amend. V; Minn. Const. art. I, § 13. The county board is an authority empowered to condemn land to acquire a roadway right-of-way. *See* Minn. Stat. §§ 160.02, subd. 25, 163.02, subd. 2 (2012). The condemning authority may condemn land if it finds that the land will serve a public purpose and that taking it is reasonably necessary to achieve that purpose. *Lundell v. Coop. Power Ass’n*, 707 N.W.2d 376, 380 (Minn. 2006). Our review is quite narrow. *State ex rel. Comm’r of Transp. v. Kettleison*, 801 N.W.2d 160, 165 (Minn. 2011). Condemnation decisions by a proper authority are legislative acts entitled to “[g]reat weight.” *Housing & Redev. Auth. of Minneapolis v. Minneapolis Metro. Co.*, 259 Minn. 1, 14–15, 104 N.W.2d 864, 873–74 (1960). The district court should defer to the condemning authority’s public-purpose determination if there is “some evidence, however informal, that the taking serves a public purpose,” and

will reverse only “manifestly arbitrary or unreasonable” decisions. *Id.* at 15, 104 N.W.2d at 874. We review the district court’s findings on the issues of public purpose and necessity for clear error only. *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986).

### ***Public Purpose***

We first decide whether the district court had a sufficient basis to find that Winona County would use O’Neill’s land for a public purpose. Public purpose is “the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies.” Minn. Stat. § 117.025, subd. 11(a)(1) (2012). We use the phrases “public use” and “public purpose” interchangeably and construe them broadly. *City of Duluth*, 390 N.W.2d at 763. The district court found that the county’s project would serve a public purpose, and evidence in the record supports that finding. The public purpose requirement is satisfied when the condemning authority condemns land to remedy problems caused by flooding in ditches along a road. *State ex rel. Humphrey v. Byers*, 545 N.W.2d 669, 674 (Minn. App. 1996) (affirming state’s decision to condemn flowage easement over land subject to regular flooding rather than pay recurring damages). Both testifying engineers said that the proposed culverts would make the road safer, less flood-prone, and more accessible to drivers. The realignment is not only a condition to obtain funding for the culverts; making the curve safer for drivers independently qualifies the project as meeting a public purpose. Even if realignment were largely tangential, the result would be the same because projects that, as a whole, serve a public purpose satisfy the condemnation requirements. *See Kettleison*, 801 N.W.2d at 167. The district court had an adequate factual basis to conclude that the project will serve a public purpose.

## *Necessity*

The district court also did not clearly err by finding that condemning O'Neill's land was necessary to achieve the public purpose. We will reverse a necessity finding only if it is arbitrary or unreasonable or if overwhelming evidence contradicts it. *Lundell*, 707 N.W.2d at 381. The proposed condemnation need not be *absolutely* necessary. *Id.* A finding of necessity is justified if the taking is *reasonably* necessary or convenient to accomplish a public purpose. *City of Pipestone v. Halbersma*, 294 N.W.2d 271, 274 (Minn. 1980). We will not overturn a finding of necessity when an opponent merely suggests alternatives to the proposed project. *Id.*

O'Neill contends that the new culverts are unnecessary because the road will continue to wash out. He claims that the county engineer misled the county into believing that installing new culverts will eliminate the possibility that water will ever swamp the road. His argument misstates the evidence and misunderstands the degree of necessity the county had to demonstrate. The county produced evidence that the existing culverts are inadequate. It targeted the only spot in the county road system to flood in each of two recent storms. Two engineers (including O'Neill's witness) testified that the road would not likely flood during a ten-year storm once the proposed culverts are installed, which is the amount of water the project is designed to handle. Kramer acknowledged that the road would likely flood in a storm with precipitation as great as the record storm of 2007, but he testified that the amount of traffic does not justify the expense necessary to build a larger bridge that would protect the road during every conceivable storm. Kramer opined that the road would flood less severely in extreme storms, suffering less damage and

posing less risk and inconvenience to drivers. And the safety risk is not merely hypothetical; Kramer testified that five people died when floodwaters swept their vehicles off inundated Winona County roads in the 2007 flood. All this evidence supports the finding that the proposed culverts are reasonably necessary to achieve the public purposes of reducing flooding and making the road safer.

O'Neill argues that realigning the road is not necessary to achieve the project's flood-control goals. This is only partly true. O'Neill is likely correct that the county could, as a matter of engineering, install the proposed culverts and obtain the same flood control with or without realigning the road. But the proposition is practically false because the state department of transportation requires the road realignment before it will fund the project. So no realignment, no culverts; no culverts, no flood reduction.

We conclude that the district court did not clearly err by endorsing the county's decision to condemn O'Neill's land to complete the project.

## II

O'Neill argues that the district court erred by refusing to consider the video evidence of the meeting of the county commissioners. O'Neill does not specify what the video recording would have added to the trial testimony or how it might have impacted the board's recommendations. But we will not consider the arguments on the merits. We do not address alleged evidentiary errors unless the challenging party first raised them in a motion for a new trial. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 660

(Minn. 1987). O'Neill did not move for a new trial after the district court refused to consider the video recording. We decline to review the alleged evidentiary error.

**Affirmed.**