STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1894

State of Minnesota,
by its Commissioner of Transportation, petitioner,
Respondent,

vs.

Gary William Kettleson, et al.,
Respondents Below,

Richard Lepak,
Appellant.

Filed July 20, 2010
Affirmed
Kalitowski, Judge
Dissenting, Ross, Judge

Cook County District Court
File No. 16-CV-08-379

Lori Swanson, Attorney General, Steven P. LaPierre, Assistant Attorney General, St. Paul, Minnesota (for respondent State of Minnesota)

Charles N. Nauen, David J. Zoll, Lockridge Grindal Nauen P.L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Richard Lepak challenges the district court order upholding the Minnesota Department of Transportation's taking of his land for the improvement and widening of trunk highway 61. Appellant argues that the state did not show a valid public purpose for the taking because part of his land was used to build a private road to mitigate damages to a neighboring parcel. We affirm.

D E C I S I O N

"Before condemning private land, a condemning authority . . . must determine that there is a public use for the land and that the taking is reasonably necessary or convenient for the furtherance of that public use." *Lundell v. Coop. Power Ass'n*, 707 N.W.2d 376, 380 (Minn. 2006). Although questions of public use and necessity are judicial questions, "the scope of judicial review of the condemning authority's determination of these questions is actually narrower than that characterization might imply." *Id.* at 380-81. We will overturn the determinations of a condemning authority only when they are "manifestly arbitrary or unreasonable." *Id.* at 381 (quotation omitted). In condemnation cases, the district court defers to the condemning authority's legislative determination of public purpose and necessity, and appellate courts defer to the district court's findings unless they are clearly erroneous. *Id.*

We construe public purpose broadly. *City of Duluth v. State*, 390 N.W.2d 757, 763 (Minn. 1986). "[T]he standard for overturning a [condemning authority's] decision on public purpose grounds is very strict." *City of Minneapolis v. Wurtele*, 291 N.W.2d

386, 390 (Minn. 1980); *see also City of Granite Falls v. Soo Line R. Co.*, 742 N.W.2d 690, 697 (Minn. App. 2007) ("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." (quoting *Housing & Redev. Auth. v. Minneapolis Metro. Co.*, 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960)).

The 2006 Statutory Amendments

Although not argued to the district court, appellant relies on 2006 amendments to Minnesota's eminent domain statutes that define public use and public purpose. *See* 2006 Minn. Laws ch. 214, § 2, at 197. Following the 2006 amendments, Minn. Stat. § 117.025, subd. 11 (2008), provides that 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.

Again, for the first time on appeal, appellant argues that caselaw relating to eminent domain and takings, such as *Lundell* and *City of Duluth*, no longer applies because those cases were decided under a prior, broader interpretation of public use and public purpose. We disagree. Since the 2006 amendments, those cases continue to be cited positively by this court and the supreme court. *See, e.g.*, *City of Granite Falls*, 742 N.W.2d at 697 (citing *Lundell* for the scope of review courts should apply in reviewing a condemning authority's public use/public purpose determination);

City of Willmar v. Kvam, 769 N.W.2d 775, 780 (Minn. App. 2009) (citing *City of Duluth* for the proposition that a condemning authority's takings decision based on public purpose is legislative and reviewed only to determine whether it was arbitrary, capricious, or unreasonable).

Thus, although this court is required to apply the statutory definition of public use and public purpose in the current version of the statute, appellant has not shown that these earlier cases are not good law that instruct our analysis and provide our standard of review.

Public Use/Public Purpose

The district court determined that the Minnesota Department of Transportation (MnDOT) provided a legitimate public purpose for its trunk highway 61 project as a whole, and that MnDOT did not need to show a public use or purpose for every individual aspect of its plans for the project, including the challenged access road. Instead, the court reasoned, once MnDOT establishes a broad public purpose, it need only prove that a challenged aspect of the project is reasonably necessary to further that purpose. The court concluded that the proposed taking of a part of appellant's property to provide an access road for three parcels of land that abutted the highway was reasonably necessary to serve the legitimate public purpose of improving and widening trunk highway 61.

Appellant does not challenge the determination that the trunk highway project as a whole has a legitimate public use or public purpose under the amended statute. Rather, he asserts that the construction of the access road is not supported by that public purpose,

because it is a taking to construct a private access road to mitigate damages to neighboring Parcel 14. We disagree.

Appellant, the owner of Parcel 15, provided no evidence at the district court to support his assertion that the challenged access road is a private road. Although appellant asserts that the owners of Parcels 14, 15, and 16 will have to pay for road maintenance, there is no evidence supporting this assertion in the record, the district court did not address this issue, and no party cites any caselaw or statute regarding private road maintenance. Moreover, at the November 18, 2008 district court hearing, MnDOT's project manager Roberta Dwyer testified under oath that the proposed access road would provide highway access to all three affected parcels of land. At the district court, appellant made 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. But appellant failed to provide any evidence to support these claims. And Dwyer testified that the owners of Parcel 16 had already submitted a permit application requesting access to the road. Thus, MnDOT provided evidence that the road was necessary to keep Parcel 14 from being landlocked, and that the road will be enjoyed by more than one owner. Appellant provided nothing to refute that evidence. We are not a fact-finding court. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). And we may not rely on unsubstantiated assertions of fact raised for the first time on appeal to grant appellant the relief he seeks.

Public purpose is defined as "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) (2008). MnDOT is a public agency seeking to possess and occupy the land for purposes of creating a public-highway access road for use and enjoyment by the owners of three adjacent parcels of land. We conclude that appellant's contention that the access road is a private driveway for Parcel 14 is without support in the record.

Reasonable Necessity

Appellant asserts that the district court erred by determining that the access road was necessary to support the public purpose of improving and widening trunk highway 61. We disagree. The district court's reasoning is consistent with relevant caselaw. It is beyond question that the taking of property for a trunk highway project is a valid public purpose. *State v. Voll*, 155 Minn. 72, 73-76, 192 N.W. 188, 189-90 (1923). And once a court determines that a project has a legitimate public purpose, the question is whether the contemplated takings are necessary to further that public purpose. *Lundell*, 707 N.W.2d at 380-81; *see also City of Duluth*, 390 N.W.2d at 764 ("As long as the predominant purpose being furthered is a public one, the condemnation is constitutional . . . ."). A condemning authority need not determine that there is absolute necessity, only that the taking is "reasonably necessary or convenient for the furtherance of the end in view." *N. States Power Co. v. Oslund*, 236 Minn. 135, 137, 51 N.W.2d 808, 809 (1952) (emphasis omitted). To overcome a condemning authority's finding of necessity there must be overwhelming evidence that the taking is not necessary. *City of Duluth*, 390 N.W.2d at 764. "The mere suggestions of possible alternatives . . . will not in itself

support a finding of arbitrariness." *City of Pipestone v. Halbersma*, 294 N.W.2d 271, 274 (Minn. 1980).

The district court's finding of reasonable necessity of MnDOT's taking is supported by statute: the commissioner of MnDOT is authorized to acquire "by eminent domain proceedings . . . , 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). Thus, MnDOT has the authority to determine what land is reasonably necessary for the trunk highway system; that determination is prima facie evidence of reasonable necessity. *City of New Ulm v. Schultz*, 356 N.W.2d 846, 849 (Minn. App. 1984) ("[A] city council resolution that a taking of the fee was necessary to accomplish the expansion [is] prima facie evidence of . . . the taking as reasonably necessary to accomplish that [public] use.").

Here, MnDOT determined that the taking of land for the access road was reasonably necessary and convenient to serve the public purpose of widening highway 61. Thus, the burden shifts to appellant to establish the lack of necessity with overwhelming evidence, or to show that the state's actions are arbitrary or unreasonable. *See City of Duluth*, 390 N.W.2d at 764.

We conclude, based on this record, that appellant has not shown that MnDOT's decision was arbitrary or capricious, nor has he provided overwhelming evidence that the taking of his land is not reasonably necessary in furtherance of the legitimate public purpose of the highway improvement project. *See City of Duluth*, 390 N.W.2d at 764.

Appellant's Proposed Alternatives

On appeal, appellant suggests two possible alternatives to MnDOT's proposed access road. But MnDOT specifically addressed and dismissed one of those alternatives at the hearing. Appellant claims that the owner of Parcel 14, using only his own land, could construct a private access road at a grade that exceeds federal and state standards. But Dwyer testified that the alternative driveway that appellant proposes is not feasible and may be unsafe given the steep grade and rocky terrain. Appellant did not call an expert witness to testify that his proposed alternative was viable, and provided no evidence to refute Dwyer's assertions at trial. In addition, any proposed access road requires a permit from MnDOT. Minn. R. 8810.4400 (2009); Minn. Stat. § 160.18, subd. 3 (2008). And appellant has made no showing that MnDOT would grant a permit for Parcel 14 to build an access road on the steep grade. Appellant's other alternative, that MnDOT construct the access road using only state-owned property, was not presented to the district court and thus, is without any evidentiary support.

Moreover, we note that "mere suggestions of possible alternatives to the condemning authority's plan will not in itself support a finding of arbitrariness." *City of Pipestone*, 294 N.W.2d at 274. Appellant has done nothing more than suggest possible alternatives; he has not shown overwhelming evidence that the proposed access road is not reasonably necessary to further the public purpose of improving trunk highway 61; and he has not shown that MnDOT's decision to take his property for the proposed access road is arbitrary and capricious.

On this record, we cannot conclude that the district court erred in upholding the taking of appellant's land, where the state provided a valid public purpose for the highway project and showed that the taking was reasonably necessary to further that purpose, and where appellant has provided no evidence to support his assertions that the taking was to build a "private road."

Affirmed.

ROSS, Judge (dissenting)

The weak record makes this a close case, but I respectfully dissent. I would hold that the state's taking of Richard Lepak's private land is not for the public purpose of "laying out, constructing, maintaining and improving the trunk highway system" under Minnesota Statutes section 161.20, subdivision (2)(a)(1) (2008), which would constitute a taking for public use under the strict and plain limitations of chapter 117. Rather, it is a taking for private use to allow only three private parcels access to a public highway.

I agree with the majority that the state's taking of a portion of Lepak's land to expand trunk highway 61 is within the state's statutory authority because expanding a highway for public use expressly complies with sections 117.012, subdivision 2 (2008) and 117.025, subdivision 11 (2008). But the state has decided that, additionally, it will single out Lepak to fix a separate purely private problem that the state's public highway-expansion project created—the elimination of an existing private driveway. I do not believe that this additional taking for a private purpose can be justified on its own or as a component of the highway expansion project.

The challenged taking is not on its face for a public use or public purpose. Even on the thin factual record that Richard Lepak made in the district court, I believe that the state's taking is designed to create a private driveway connecting the private lot of one of Lepak's neighbors with trunk highway 61 for use by Lepak and two neighbors. Providing three private parties with private access to a public highway from their private lots is not a "public use or public purpose" under a new statutory regime that strictly

defines the state's authority to take private property: "Eminent domain may only be used for a public use or public purpose." Minn. Stat. § 117.012, subd. 2.

The majority observes that no "evidence" exists in the record supporting Lepak's claim on appeal that the state intends to require the three private lot owners, rather than the public, to pay to maintain the access road. But I do not think we can dismiss the issue so neatly. Although no party testified on the matter at the hearing before the district court, counsel for Lepak, David Zoll, represented to the district court that counsel for the Commissioner of Transportation, Leanne Litfin, had expressly informed his office that "the . . . State has indicated [that] Mr. Lepak and his neighbors will have to share the responsibility for maintaining the driveway." Litfin was present at the hearing and asked to "comment on Mr. Zoll's argument." She did so, correcting "an error there in his statement to the Court." Her correction explained factually why putting the driveway somewhere other than on Lepak's property would be improper. And she added that "[a]ll three of these properties will be serviced" by the driveway. But Litfin left uncorrected Zoll's representation to the court that Litfin had informed Lepak through counsel of the state's intent to require Lepak and his two neighbors to maintain the supposedly public driveway between their three properties and the highway.

The fact asserted about the private landowners' duty to maintain was uncontradicted and, I believe, sufficiently preserved for our consideration even without formal testimony. The courtroom exchange on the record between officers of the court about one party's key communication made through counsel, who was also present and participating fully in the hearing, should not be disregarded. That Lepak and his

neighbors would be required to privately maintain the road that the majority is holding to be public was simply not disputed in the district court.

And the uncontradicted fact is significant. The state's intent to require Lepak (and the owners of the two other benefited properties) to pay for the ongoing maintenance of the driveway rather than to finance its maintenance with public funds proves that this project is not for the public's benefit. When the state builds a road to serve the public by connecting public roadways, the public pays to maintain the road. Minn. Stat. § 161.24, subd. 5 (2008) ("Any road so constructed outside the limits of the trunk highway shall be maintained by the road authority having jurisdiction over the highway or street closed off."). But when the state builds a road intended to serve private parties rather than the general public, the state may then require the benefited private property owner served by the private road to maintain the road. *See id*. ("Any private road constructed outside the limits of the trunk highway connecting the private road with a public highway shall be the responsibility of the property owners or owners *served thereby*." (emphasis added)). The only legal basis for the state to require Lepak and the benefited neighbors to pay for the maintenance of this driveway is that the driveway serves only the three private parcels, not the general public. So under section 161.24, the driveway is private, not public.

I would also reject the state's argument that section 164.24 "provides authority for MnDot to acquire via condemnation property from Lepak even if doing so would serve only . . . Lepak's neighbor." Although governing bodies formerly were authorized to take private land to create private roads and driveways under chapter 161, that chapter

can no longer justify the taking for private use because the legislature has retracted that authority. On its face, section 161.24 seems to empower the state to acquire Lepak's land by condemnation to build a private access road connecting to the highway. But this authority was curtailed in 2006 when the legislature narrowed the definition of public purpose and simultaneously preempted existing conflicting statutes, such as section 161.24, that allowed a broader reach: "**Preemption**. Notwithstanding any other provision of law, including any . . . statute, . . . all condemning authorities . . . must exercise the power of eminent domain in accordance with the provisions of this chapter, including all . . . definitions . . . and limitations." Minn. Stat. § 117.012, subd. 1 (2008); 2006 Minn. Laws ch. 214, § 1 at 195.

I would similarly reject the state's only remaining argument. The state contends that because the highway expansion serves a public purpose and using the contested part of Lepak's parcel to construct a driveway is reasonably necessary to further the public purpose, the taking is authorized. There are two difficulties with this argument. First, I believe older caselaw offered to suggest that the state may take private property for private use when that taking is reasonably necessary to fulfill the larger public purpose must be limited by the more current legislative restrictions on takings. Otherwise, the statute's plain restriction allowing the taking of land "only" to benefit the general public might be rendered illusory.

Second, the state does not provide persuasive caselaw in support of its contention that access only by private parcels is a matter that is reasonably necessary to advance the public's objective to expand the highway. I will concede that the private driveway is

related to the public highway project. Given their nature, *all* private driveways are related to the public roads they access; but creating private access to a public highway is not a public purpose. The law recognizes that a private lot's suitable access to a public road is a private property right that cannot be taken without compensation. *Hendrickson v. State*, 267 Minn. 436, 446–47, 127 N.W.2d 165, 173 (1964). But I am aware of no caselaw for the broad proposition that constructing private access roads is reasonably necessary to the construction of public roadways. The state's urging that we treat the construction of the two types of roads—one public and one private—as a single project with a public purpose to justify the separable private-use project would invite the kind of mischief the supreme court rejected 95 years ago. *See State ex rel. Ford Motor Co. v. District Court*, 133 Minn. 221, 227, 158 N.W. 240, 243 (1916) ("[I]t is the duty of the courts to intervene for the protection of the property owner whenever it clearly appears that under the guise of taking his property for a proper [public] purpose, it is in fact being taken for an improper [private] purpose.").