

A06-215
STATE OF MINNESOTA
IN SUPREME COURT

John Wesley Hebert, et al.,

Respondents,

v.

City of Fifty Lakes,

Appellant.

AMICUS CURIAE BUILDERS ASSOCIATION OF MINNESOTA'S BRIEF

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INTRODUCTION

Amicus Curiae Builders Association of Minnesota ("BAM") respectfully submits this brief in support of affirming the Court of Appeals' Opinion in the instant proceedings.¹

The Builders Association of Minnesota was established in 1974, and now serves more than 4,850 homebuilding and remodeling industry professionals in affiliation with fifteen local associations throughout the State of Minnesota. BAM's members include developers who acquire and hold property for eventual development in the future. BAM's members also include property owners who acquire real estate for immediate and current development and construction, upon which members construct improvements and/or remodel existing structures for eventual sale to homeowners.

BAM works to provide high quality builder education, effective state lobbying, leadership toward sensible code reform, and research to enhance the viability of the industry and the success and professionalism of its members. BAM's members are engaged in building and remodeling homes throughout Minnesota and, in total, employ more than 500,000 Minnesotans. BAM serves its membership by developing and promoting programs and services to enhance its members' abilities to successfully conduct their businesses with integrity and competence, and to promote quality construction techniques thereby benefiting the home-buying public.

¹ Pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, BAM hereby certifies that its undersigned counsel have authored this brief in whole, and that no other person or entity, other than BAM, its members, and its counsel, have made a monetary contribution to the preparation or submission of this brief.

In the instant appeal, Appellant City of Fifty Lakes (“City”) has taken the position that it acquired ownership of real property owned by Respondents John Wesley Hebert, Linda W. Hebert, John Wallace Hebert, Jennifer E. Arbuckle, Brian J. Arbuckle, William F. Schoenwetter, Barbara Schoenwetter, Lewis J. Schoenwetter, Claire Schoenwetter, and Helen H. Weber (collectively, “Respondents”) by virtue of its powers of eminent domain. However, rather than obtaining title in accordance with constitutional requirements and protections and through the statutory procedures that have been mandated by the Minnesota Legislature, the City argues that it instead acquired ownership of the subject property by means of a “de facto taking.” Specifically, the City claims that it acquired title to Respondents’ registered property when it unintentionally installed the gravel road. The City further claims that it is now too late for Respondents to do anything about it because the statute of limitations has expired.

The City’s theory of de facto takings is fundamentally flawed. First and foremost, there is no authority under Minnesota law that would enable the City or any other governmental unit to exercise the power of eminent domain to acquire title and ownership of private property through such means. On the contrary, the Minnesota Legislature has expressly mandated statutory procedures that are exclusive and must be followed whenever the government exercises the power of eminent domain to acquire ownership of private property. Minn. Stat. § 117.011 (2005); *Id.* at § 117.012, subd. 1 (2006). A theory of de facto taking cannot be reconciled with the legislative edict that the power of eminent domain can only be exercised using the formal procedures set out in the eminent domain statute.

Furthermore, there is an irreconcilable disconnect between the City's statute of limitations defense and its strident claim to have acquired title and ownership of Respondents' registered property when it inadvertently placed the gravel road on the subject property. This fundamental flaw in the City's logic is attributable to the mistaken and erroneous contention that a "de facto taking" or any other sort of "taking," that may permit a private property owner to petition for mandamus relief under the doctrine of inverse condemnation, necessarily establishes that title and ownership of the private property in question has actually been acquired by the governmental entity, and that it is just a matter of whether the government must provide the property owner with just compensation. This is false. Interference with the use and enjoyment of property and improper possession of private property by the government may constitute a "taking" or a "de facto taking" that could entitle a private property owner to seek recovery of just compensation. However, such governmental "takings" that may give rise to the right on the part of private property owners to recover compensation do not constitute an acquisition of ownership—unless and until a condemnation proceeding is commenced in accordance with the statutory procedures, and title to the property is actually transferred within the course of those legal proceedings.

The City's contention that government can acquire title and ownership of private property through de facto takings is not only devoid of any source or authority under Minnesota law, but is also ill-conceived and undesirable as a matter of policy and practice from the standpoints of both private property owners and the government. Private property owners ought not be constantly threatened by the prospect that there may

be some latent governmental claim of ownership to their property always lurking in the background and waiting to be asserted. Such a situation would interfere with private development and investment-backed expectations. Likewise, under the City's theory, there may well be situations in which a governmental unit would automatically acquire property that it neither wants nor is able to afford. It is far more preferable (as the Minnesota Legislature has determined) to limit the government's acquisition of property through the power of eminent domain to only those instances where government intends to acquire private property and does so through the procedures set forth by statute.

Finally, the City's theory of acquiring title and ownership of private property through de facto takings and the expiration of statutes of limitations is particularly ill-suited and problematic in situations involving registered property, such as the private property at issue in this case. It is well settled that the purpose and intention of the Torrens property system is to induce reliance upon the certificate of title as actual evidence of title and ownership to the exclusion of other sources of evidence—particularly any interest that does not appear on the certificate of title. See Hersh Props., LLC v. McDonald's Corp., 588 N.W.2d 728, 734 (Minn. 1999). Consistent with this purpose and objective, and as an express part of the registered property statutory scheme, owners and purchasers of Torrens property need not ever be concerned with competing claims of ownership based upon prescription or adverse possession that are alleged to arise after the property has been registered and the certificate of ownership has been issued. Minn. Stat. § 508.02 (2006). Thus, notice that another party is in “possession” of Torrens property—whether by actual, implied, or constructive notice—will not trigger

the running of any statute of limitations because such possession cannot be the basis upon which to challenge the Torrens property owner's interest in said property. The City's theory of de facto takings, if accepted, would effectively gut these specific statutory protections and undermine Torrens property owners' ability to rely on their certificates of title as evidence of ownership, thus greatly destabilizing the expectations of such property owners.

If accepted, a de facto taking method of acquiring title and ownership of private property would effectively provide the City and other governmental entities vested with the power of eminent domain with a method to avoid the constitutional requirements and protections and the statutory procedures and limitations that the law imposes on condemnors who would use their powers of eminent domain to acquire title and ownership of private property. In particular, if accepted, the City's theory of de facto takings would impose hardships upon BAM's members who acquire property for development, improvement, and resale. The certainty of their ownership rights in such property will be undermined and the investment-backed expectations of BAM's members, as well as the investment-backed expectations of third-party lenders and investors in the secondary mortgage market, will be jeopardized by claims of latent ownership interests that governmental entities such as the City may assert at any time and without warning through the offensive assertion of claims of de facto takings.

I. MINNESOTA LAW DOES NOT AUTHORIZE “DE FACTO TAKINGS” AS A METHOD FOR GOVERNMENT TO ACQUIRE TITLE AND OWNERSHIP OF PRIVATE PROPERTY THROUGH THE POWER OF EMINENT DOMAIN.

The City has claimed that it acquired title and ownership of the subject property through the exercise of its power of eminent domain by virtue of a “de facto taking.” The City’s argument in this regard is fundamentally flawed because Minnesota law does not authorize de facto takings as an appropriate method through which government may acquire title and ownership of private property under the power of eminent domain. The City’s argument betrays a fundamental misunderstanding or misapplication of the meaning of a “taking” under Minnesota law. The City’s theory of acquiring title and ownership of the subject property pursuant to a de facto taking must be rejected as a matter of law.

A. The Manner By Which Government May Exercise The Power Of Eminent Domain Is Strictly Circumscribed By Statute.

The government can acquire private property through a variety of means. For example, like any party who wishes to acquire land, governmental entities can, of course, acquire title and ownership of property by negotiating a purchase and sale agreement with the private property owner. Further, the government, arguably, may even be able to acquire title and ownership of abstract property under the doctrine of adverse possession. See B.W. & Leo Harris Co. v. City of Hastings, 59 N.W.2d 813, 817 (Minn. 1953) (evaluating whether the City of Hastings satisfied the elements of adverse possession); But see Minn. Stat. § 465.013 (2006) (“No city of the first class . . . shall hereafter obtain or acquire title to real property . . . by prescription or adverse possession.”). However, in

the event government seeks to acquire the involuntary transfer of private property using its power of eminent domain, there is only one way to accomplish such an acquisition and that is by complying with the specific procedures and requirements set forth in Minnesota's eminent domain statute. See Minn. Stat. § 117.012, subd. 1 (2006).

In the instant case, the City does not claim to have acquired title and ownership of the subject property by virtue of an arm's-length business transaction. The City also cannot assert a claim for ownership by means of prescription or adverse possession since the property in question is Torrens property which cannot be acquired by prescription or adverse possession. See Minn. Stat. § 508.02 (2006). Here, the City claims to have acquired title and ownership of Respondents' property by virtue of its power of eminent domain.

Where the government intends to exercise its power of eminent domain in order to take private property, the government *must* strictly adhere to the statutory requirements set forth in the State's eminent domain statute—Minnesota Statutes Chapter 117—which mandate a showing of public purpose and ensure property owners and other interested parties receive their constitutional right to due process and just compensation. Minn. Stat. § 117.011 (2005), repealed and replaced by Minn. Stat. § 117.012, subd. 1 (2006). The Minnesota Legislature has, at all relevant times herein, been quite explicit in providing that the procedures laid out in Chapter 117 are the exclusive means by which the government may acquire property through the exercise of its power of eminent domain. Specifically, Chapter 117 expressly states that:

[n]otwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, all condemning authorities, including home rule charter cities and all other political subdivisions of the state, must exercise the power of eminent domain in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations.

Minn. Stat. § 117.012, subd. 1 (2006). While the language of the statute has changed over time, the substance of that particular legislative edict has long been a central part of the eminent domain statute. See, e.g., Minn. Stat. § 117.011 (2005) (“All bodies, public or private, who have the right of eminent domain, when exercising the right, shall do so in the manner prescribed in this chapter. . . .”).² See also City of Duluth v. State, 390 N.W.2d 757, 764 (Minn. 1986) (citing Minn. Stat. § 117.011).

Thus, while the government has the power of eminent domain through which to acquire private property, the Minnesota Legislature has determined that the manner by which that power of eminent domain may be exercised shall strictly adhere to the provisions and procedures contained in the eminent domain statute.

There is nothing in the eminent domain statute that allows the City to freelance and improvise its own methods for acquiring property through the power of eminent domain. For example, there are no provisions in Chapter 117 that permit the government to exercise the power of eminent domain to acquire property involuntarily from a private property owner without commencing condemnation proceedings that adhere to the procedures set forth by statute, much less allow the government to ignore the

² Even when there were exceptions for the taking of property under laws relating to drainage or town roads, the Legislature nonetheless expressly required such takings to be statutorily authorized and that the government had to follow established procedures. Id.

constitutional requirements of establishing a public purpose, providing due process, and paying of just compensation. The judiciary cannot condone what is constitutionally prohibited. On the contrary, the exclusive and mandatory nature of Chapter 117 is quite clear in expressing the Minnesota Legislature's position that the government shall not exercise the power of eminent domain to involuntarily take ownership of private property in any de facto manner that fails to comply with the statutorily imposed procedures.

B. "De Facto Takings" That Give Rise To A Property Owner's Right To Seek A Remedy For Inverse Condemnation Do Not, In And Of Themselves, Constitute The Government's Acquisition Of Title And Ownership Of Private Property.

It is well established under Minnesota law that there can be instances where the government's actions may interfere with a private property owner's use, enjoyment, and possession of private property to the point where the interference and/or possession would rise to the level of a "taking" or a "de facto taking" for which the private property owner may be entitled to receive just compensation. See, e.g., Alevizos v. Metro. Airports Comm'n, 216 N.W.2d 651, 656 (Minn. 1974) (airplane noise interfered with property owners' use and enjoyment to such an extent that it amounted to a "taking"); Spaeth v. City of Plymouth, 344 N.W.2d 815, 821 (Minn. 1984) (flooding on private property caused by actions of the city amounted to a "taking"). However, the fact of such interference and/or possession by government, and the corresponding right by a property owner to seek just compensation as a consequence thereof, *does not* translate into the automatic acquisition of title and ownership of the private property by the government. See id. Indeed, there is no suggestion in the case law that government acquires title and

ownership of private property as a result of “de facto takings.” Instead, private property owners who have traditionally brought inverse condemnation proceedings in order to recover compensation for “de facto takings” allege that the government’s interference or possession has diminished the value of their private property, as opposed to claiming the government has actually taken fee title to that private property. Respondents’ Brief at 24-25 (discussion of inverse condemnation cases).

Where the government takes actions that unintentionally and inadvertently interfere with the rights of a property owner so as to arguably constitute a “taking,” then property owners *may* assert claims for relief under the doctrine of inverse condemnation. However, BAM is not aware of any cases or statutes that have imposed a requirement that private property owners *must* seek such relief. Indeed, there may be good and sufficient economic and other practical reasons why property owners would not necessarily want to expend their resources and/or incur the enmity of state and local officials by commencing an action for inverse condemnation in order to recover just compensation for governmental actions that may constitute a “taking.” If those property owners decline to pursue relief under the doctrine of inverse condemnation, they may jeopardize and even waive rights they might otherwise have to recover just compensation for the devaluation of their property arising from such “takings.” However, there is no authority under Minnesota law that a private property owner’s decision not to initiate an inverse condemnation action and petition for a writ of mandamus to compel the initiation of condemnation proceedings will result in a loss of title and ownership of their property.

The availability of relief under the doctrine of inverse condemnation is narrowly circumscribed to those instances in which a property owner chooses to seek such relief and can meet the burdens necessary to establish a right to such a remedy. Notably, the right to seek relief under the doctrine of inverse condemnation is not available where the private property owner has other adequate legal remedies. Lowry Hill Props., Inc. v. State, 200 N.W.2d 295, 296 (Minn. 1972); Minneapolis Bd. of Park Comm'rs v. Johnson, 144 N.W.2d 770, 772 (Minn. 1966); Collins v. Vill. of Richfield, 55 N.W.2d 628, 629 (Minn. 1952). Moreover, a private property owner seeking a writ of mandamus to compel inverse condemnation has the burden of proof to establish that an unconstitutional taking has occurred and that there has been a substantial invasion of property rights which results in a definite and measurable diminution of the market value of the property. Vern Reynolds Constr. v. City of Champlin, 539 N.W.2d 614, 617-18 (Minn. Ct. App. 1995), Stenger v. State, 449 N.W.2d 483, 485 (Minn. Ct. App. 1989). Further, while a property owner may assert a variety of alternative claims against a governmental entity for interference with its property rights—such as negligence, nuisance, trespass, and/or inverse condemnation—the remedy of inverse condemnation is not available unless expressly asserted and pleaded by the property owner. See Wilson v. Ramacher, 352 N.W.2d 389, 394 (Minn. 1984) (citations omitted). Finally, the remedy provided by the doctrine of inverse condemnation belongs to the property owner, rather than the government. Nolan & Nolan v. City of Eagan, 673 N.W.2d 487, 492 (Minn. Ct. App. 2003) (“When the government has taken property without formally using its eminent

domain powers, *the property owner has a cause of action for inverse condemnation.*”) (citations omitted & emphasis added).

BAM is not aware of any Minnesota court cases, or any other decisions involving the application of Minnesota law, which have held that a property owner’s failure to bring an inverse condemnation action has allowed government to acquire title and ownership of that private property owner’s property under a theory of “de facto taking” without invoking and complying with well recognized constitutional requirements and protections and the statutorily mandated framework of procedures applicable to any exercise of the power of eminent domain. Indeed, such a proposition does not even make sense because, by statute, government cannot achieve the involuntary transfer of title and ownership of private property under the power of eminent domain unless and until government institutes and completes the statutorily prescribed requirements for a condemnation proceeding. Minn. Stat. § 117.012, subd. 1 (2006); Minn. Stat. § 117.011 (2005). The fact that a private property owner has not affirmatively petitioned for mandamus relief to force the government to initiate such condemnation proceedings is irrelevant as to the status of title and ownership in the subject property. The only material fact as to whether title has been involuntarily transferred from the private owner to the government is whether statutory condemnation procedures have been followed.

II. THE CITY'S STATUTE OF LIMITATIONS DEFENSE DOES NOT PROVIDE AUTHORITY TO ESTABLISH THAT GOVERNMENT CAN ACQUIRE TITLE AND OWNERSHIP OF PRIVATE PROPERTY THROUGH DE FACTO TAKINGS.

The City argues that, to the extent Respondents have any claims upon which it could seek relief for the City's interference with and possession of the subject property, any and all such claims are barred by the fifteen-year statute of limitations contained in Minnesota Statutes Section 541.02. Appellant's Brief at 11-12. While BAM would not necessarily agree with the City that the limitations period contained in Section 541.02 applies to the various causes of action that Respondents could bring if they so elected, such a debate is irrelevant to the fundamental question of whether the City actually has a right to continue to interfere with and possess the property in question in the future. In order to establish the right to remain on Respondents' property, the City must demonstrate that it actually acquired title and ownership in the property. The City cannot make such a showing.

This is not a case in which the property owners have failed to promptly take action to evict the City before title and ownership vested in the government by operation of the doctrine of adverse possession. Indeed, the City is not claiming to have acquired title and ownership by virtue of the doctrine of adverse possession, nor would the City be able to make such a claim because title and ownership of Torrens property cannot be acquired by operation of the doctrine of adverse possession. Minn. Stat. § 508.02 (2006). Thus, there is no statute of limitations that is relevant to the outcome of this appeal because there are

no causes of action or remedies that Respondents were required to assert in the instant case in order to prevent the City from acquiring title and ownership in the property.

As demonstrated above, the City cannot and did not acquire title and ownership of the property based on a theory of “de facto taking” of the property. De facto takings are not a recognized or authorized method by and through which the government can obtain the involuntary transfer of title and ownership of private property under the power of eminent domain. Furthermore, it is undisputed that the City has never initiated condemnation proceedings pursuant to Chapter 117 which, by its terms, provides the exclusive method and manner by which the government may obtain the involuntary transfer of title and ownership of private property under the power of eminent domain. Therefore, the City has not acquired title and ownership of the property.

The question of whether particular statutes of limitations apply to causes of action for which a private property owner might recover damages or other relief for governmental interference with and possession of private property in the past, is wholly unrelated to the question of whether title and ownership of the subject property has been acquired by and transferred to the City. The fact that Respondents may or may not be barred from seeking damages or other relief from the government in those prior activities does not relate to whether title and ownership of the subject property has passed to the City.

III. THE CITY'S THEORY OF ACQUIRING TITLE AND OWNERSHIP OF PRIVATE PROPERTY UNDER THE POWER OF EMINENT DOMAIN THROUGH "DE FACTO TAKINGS" AND THE EXPIRATION OF LIMITATION PERIODS ON A PROPERTY OWNER'S CAUSES OF ACTION IS ILL-ADVISED AND UNDESIRABLE FROM A POLICY STANDPOINT.

To a certain extent, any policy discussion regarding the City's theory of acquiring title and ownership of private property through "de facto takings" is moot because the Minnesota Legislature has already spoken on the subject. Specifically, the Legislature expressly determined to mandate the exclusive use of the procedures set forth in Chapter 117 as the only way by and through which government can accomplish the involuntary transfer of title and ownership of private property using its power of eminent domain. See Minn. Stat. § 117.012, subd. 1 (2006) ("[n]otwithstanding any other provision of law . . . all condemning authorities . . . and all other political subdivisions of the state, *must* exercise the power of eminent domain in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations.") (emphasis added). By enacting legislation that imposed and mandated such exclusivity as to the exercise of the power of eminent domain, the Legislature is presumed to have considered, weighed, and decided the most appropriate manner in which to balance any competing relevant policy considerations.

However, even if this were not the case and it were up to this Court to conduct such an evaluation of policy considerations, the City's theory of acquiring title and ownership of private property through "de facto takings" would be disadvantageous for a number of policy reasons. First, such a theory gives rise to the obvious potential for

abuse by incentivizing and encouraging government to ignore constitutional requirements and protections and disregard statutory provisions and procedures relating to the exercise of the power of eminent domain. Second, the City's theory of acquiring title and ownership of private property through de facto takings would unfairly impose substantial burdens on private property owners who would be required to take action in order to protect against rogue government entities engaging in de facto takings. Third, the City's theory of acquiring title and ownership of private property through de facto takings could, at least in some situations, impose unwanted burdens and hardships on government by saddling the public with ownership of property it neither wanted nor could afford. Finally, as the facts in this case illustrate, the City's theory of acquiring title and ownership of property through de facto takings gives rise to practical problems in terms of determining when, in fact, the government is engaging in a de facto taking so as to acquire title and ownership of private property.

A. De Facto Takings Would Give Rise To Potential For Governmental Abuse That Would Undercut Constitutional And Statutory Mandates.

Allowing the government to utilize a doctrine of "de facto takings" to acquire title and ownership of private property, in lieu of complying with the requirements and procedures set forth in Chapter 117, would threaten to circumvent the constitutional requirements and protections imposed with respect to the power of eminent domain, and would likely give rise to widespread abuses.

If the City's doctrine of de facto takings were adopted, the government would not be required to establish a public purpose, afford due process, or provide just

compensation—unless and until a given property owner has petitioned for mandamus relief and has been successful in obtaining a writ of mandamus to require the commencement of eminent domain proceedings. Not all property owners would be motivated or have sufficient resources to commence legal proceedings to challenge such de facto takings. In those instances where there is no challenge to the de facto taking, the government would be able to use this unauthorized practice to acquire title and ownership of property to which it might not otherwise be entitled and without payment of any compensation to the property owner.

Thus, the government would be motivated to ignore the constitutional requirements and statutorily imposed procedures, and simply take property without adhering to any particular process or procedure because, in some instances, it would not later be compelled to adhere to any such due process procedures or satisfy any financial requirements.

B. The City's Theory Of De Facto Takings Would Unfairly Shift The Burden Of Eminent Domain From The Government To The Private Property Owner.

Under the Minnesota Constitution, and by statute, the government has the burden of initiating condemnation proceedings in the event it wishes to acquire private property through its power of eminent domain. Specifically, the government must initiate and prosecute condemnation proceedings pursuant to the specific provisions of Chapter 117 and, in so doing, must satisfy the constitutional requirements of providing due process, establishing a public purpose, and paying just compensation to property owners. See Minn. Stat. §§ 117.035 & 117.055 et seq. (2006). The City's theory of de facto takings

would completely shift the burden, which is currently imposed on the government, to private property owners who would be obliged to initiate legal proceedings, petition for mandamus relief, and establish the grounds for inverse condemnation in order to compel the government to comply with all of the requirements and procedures that the government is lawfully obligated to do under the Constitution and by statute.

In effect, under the City's de facto takings argument, the government can immediately take title and ownership of property without following any constitutional or statutory requirements whatsoever. Further, following the City's theory, the government shall retain such title and ownership unless and until the property owner initiates legal proceedings and is successful in either obtaining affirmative relief to attain the return of title and ownership of the subject property, or forcing the government to commence condemnation proceedings. Indeed, the City's theory of de facto takings goes even further insofar as the government would not even be required to provide the property owner with just compensation for acquiring title and ownership of the property unless and until the property owner commenced an action for an extraordinary writ and was successful in obtaining mandamus relief under the doctrine of inverse condemnation.

In short, under the de facto takings doctrine advocated by the City, private property owners would be responsible for ensuring that the government adheres to the law, including all of the provisions set forth by the Minnesota Legislature in Chapter 117, and, where private property owners fail to do so, the government would acquire title to private property and eventually enjoy complete immunity from any consequences of their unlawful actions.

C. The City's Position That De Facto Takings Result In Automatic Title And Ownership Of Private Property May Well Result In Unwanted And Unintended Hardships On The Government.

The City's theory of de facto takings—that is, the transfer of title and ownership under the power of eminent domain solely by virtue of governmental use and possession of private property, without complying with the statutory procedures and regardless of whether the private owner has sought the remedy of inverse condemnation—may also impose serious hardships upon the public where the government becomes saddled with unwanted property and substantial, unplanned-for, financial obligations to pay just compensation to property owners whose rights have been acquired through unintended de facto takings.

The facts giving rise to the instant case help illustrate this potential problem. Apparently, the City mistakenly placed the gravel road on Respondents' property. Because it had no intention to take the property, the City presumably did not appropriate funds to provide Respondents with just compensation for the taking of their property. Faced with a similar situation, most potential condemners would want to engage in a cost-benefit analysis to evaluate whether it would be more fiscally appropriate to expend \$18,000 to reroute the gravel road so that it is no longer intruding on Respondents' property (Court of Appeals' Opinion at 2 n.1), as compared to having to appropriate a potentially greater amount of money to compensate Respondents for the taking of the property.

This is the type of cost-benefit analysis that any governmental body with the power of eminent domain should be entitled to make—and should, in fact, engage in—

before acquiring public ownership in private property for which it will be required to pay just compensation. However, under the City's theory of de facto takings, the City would have no ability to make such a cost-benefit analysis because it would not have any choice as to whether to take ownership of the property. Instead, the condemnor would have an absolute obligation to provide just compensation because it had already become the owner of property that it never intended to acquire and, from an economic standpoint, may not have wanted to acquire.

D. The City's Theory Of De Facto Takings Will Result In Problematic Situations Where, As Here, The Government's Actions Are Ambiguous And Do Not Clearly Demonstrate Either Intent Or Effect Of Acquiring Title And Ownership Of Private Property.

The City's theory of acquiring title and ownership through de facto takings, rather than statutory condemnation proceedings, creates practical problems as to how to discern whether, when, and under what circumstances the City and other similarly acting governmental entities should be deemed to be engaging in a "de facto taking" as a condemnor as opposed to engaging in continuing trespass. While the City would have the Court conclude this is a non-issue for purposes of this appeal, the facts in this case are actually far from clear on this point. Moreover, this would be a very troubling and difficult feature that could and would arise in a host of other situations in the future.

In this case, from 1971 through the present, there was no conclusive indication that the City would claim it actually acquired title to Respondents' property. It is important to point out that the City itself has never asserted that it intended to put this gravel road on the subject property. Thus, there was no indication on the part of the City

that it intended to exercise its authority of eminent domain so as to acquire title and ownership of Respondents' property. Indeed, the City presumably continued to tax Respondents on the entire property, including the portion with the gravel road, thus expressing a view that Respondents—not the City—owned all of the subject property. Further, as noted by the Court of Appeals, the City constructed a gravel road which is, by its very nature, temporary and relatively easy to relocate as contrasted to a permanent and more expensive paved road. Indeed, it is unrebutted and undisputed that it would only cost \$18,000 to move this gravel road (Court of Appeals' Opinion at 2 n.1), which further proves that the road is not permanent in nature. These characteristics of the City's actions—the lack of intent to take the property and its construction of a less permanent roadway—reflect the actions of a trespasser. Based on these undisputed facts, it would have been perfectly reasonable for Respondents to have concluded (as they apparently did) that the City was acting like a trespasser—wherein intent is not a requisite element—rather than a condemner that intended to acquire title and ownership of property.

Thus, to the extent any of the Respondents may have had notice that the City had actually placed the gravel road on their registered property, the City's actions reflected those of a trespasser. Certainly the Respondents, as owners of registered property, would not have had to be concerned that such a trespass could result in depriving them of title and ownership of their property. Minn. Stat. § 508.12 (2006). Finally, neither Respondents nor the City should have to guess that this was actually a “de facto taking” which had immediately divested them of their ownership of the property, nor should Respondents have been required to bring a petition for mandamus to compel the initiation

of condemnation in order to find out whether the City's unintended actions actually qualify for inverse condemnation relief.

IV. THE CITY'S THEORY OF ACQUIRING TITLE AND OWNERSHIP OF PRIVATE PROPERTY THROUGH DE FACTO TAKINGS IS PARTICULARLY TROUBLESOME AND PROBLEMATIC WITH RESPECT TO TORRENS PROPERTY.

As noted and discussed above, the City's argument that government can acquire title and ownership of private property under the power of eminent domain through "de facto takings" rather than using the statutorily prescribed requirements gives rise to a host of problems. The City's theory is even more problematic and troubling to the extent it would be applied to Torrens or registered property.

Specifically, the City's theory of de facto takings to acquire title and ownership of private property would run counter to basic characteristics and objectives underlying the Torrens property system in Minnesota. Torrens property is intended to give rise to greater certainty on the part of property owners and purchasers in good faith of registered property. Hersh Props., 588 N.W.2d at 734 (Minn. 1999) ("The conclusive nature of certificates of title allows real property owners to rely on the certificate of title while disregarding most interests not evidenced on the current certificate of title."). See also Walther v. Lundberg, 654 N.W.2d 694, 698 (Minn. Ct. App. 2002). However, the City's proposed use of de facto means to acquire property would undercut reliance on registered title in Torrens property and inject uncertainty as to potential existence of governmental ownership interests that are not indicated in the certificate of title for registered property.

For example, by statute, the Minnesota Legislature has expressly provided that the doctrine of adverse possession shall not apply to Torrens property. Minn. Stat. § 508.02 (2006). Yet as a practical matter, the City's proposed acquisition of private property through de facto takings would circumvent the Legislature's prohibition on acquiring ownership by prescription or adverse possession by effectively providing the government with a method for obtaining title and ownership of Torrens property by prescription or adverse possession, i.e., gaining ownership through possession and/or use of the property without permission for more than 15 years. Indeed, in the case of "de facto takings" of registered property, the result of the City's theory would be even more nefarious in that title would transfer even though the government may not have intended to acquire the property and notwithstanding the property owner's reliance on the statute that provides that ownership of Torrens property cannot be divested by virtue of adverse possession.

BAM is mindful of the fact that the Court recently addressed the issue of actual knowledge and good faith purchasers of Torrens property earlier this year in In the Matter of the Petition of Joshua S. Collier, 726 N.W.2d 799 (Minn. 2007). In Collier, the Court held that actual knowledge could undermine a subsequent purchaser's ability to claim that they were purchasers in good faith of Torrens property for purposes of the statute. Id. at 809. BAM respectfully submits that Collier does not dispose of the issues before the Court in the instant case. First, the fact that the subject property in this case is Torrens property is just one of many factors that militate affirmance of the Court of Appeals decision and rejection of the City's theory of de facto takings. Secondly, at least some of the Respondents acquired the property before the City installed the gravel road.

As such, those Respondents relied upon the Torrens certificate of property, and there can be no issue as to whether they were bona fide purchasers in good faith. Further, it is axiomatic that any exceptions to ownership and reliance upon the Torrens system of registered property shall be narrowly construed and, therefore, any application of actual knowledge to determine whether a subsequent purchaser is anything other than a purchaser in good faith shall be strictly limited. Finally, actual knowledge of a competing interest in the same property is not the same as a mistake regarding the boundaries of the subject property. Torrens property owners are entitled to rely upon the information contained in the certificate of registration *to the exclusion* of obtaining a survey in order to ascertain the nature and extent of its rights in the registered property. However, if the City's argument that it acquired title and ownership of Torrens property through a de facto taking were to prevail, then Torrens property owners would have to obtain surveys in order to obtain certainty as to their rights in the property, thus defeating one of the essential intended benefits of Torrens property.

CONCLUSION

Based on the foregoing, the Builders Association of Minnesota respectfully requests the Court to reject the City's theory of de facto takings as legally unfounded, inequitable, and unwise, and to affirm the Court of Appeals decision in all respects.

Dated: July 27, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01 subd. 3, the undersigned hereby certifies, as counsel for Amicus Curiae Builders Association of Minnesota, that this brief complies with the type-volume limitation as there are 6,571 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2003.

Dated: July 21, 2007

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AFFIDAVIT OF PERSONAL SERVICE

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COUNTY OF HENNEPIN)

Wayne Marshall of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 27th day of July, 2007, he personally served two copies of Amicus Curiae Builders Association of Minnesota's Brief upon the offices of the individuals listed below:

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RE: John Wesley Hebert, et al. v. City of Fifty Lakes
Appeal File No.: A06-215