
NO. A06-0215

State of Minnesota
In Supreme Court

John Wesley Hebert, Linda W. Hebert, John Wallace Hebert,
 Jennifer E. Arbuckle, Brian J. Arbuckle, William F. Schoenwetter,
 Lewis J. Schoenwetter, Claire Schoenwetter, and
 Helen F. Weber by Roger M. Weber, her Attorney in Fact,
Respondents,

vs.

City of Fifty Lakes,

Appellant.

REPLY BRIEF OF APPELLANT CITY OF FIFTY LAKES

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INTRODUCTION

This Court's determination of the appropriate statute of limitations has broad statewide impact, as the construction, operation and maintenance of public roads represents one of the most important functions of all municipalities. There are over 123,000 miles of local roads in Minnesota, the majority of which are gravel. As the Amicus Curiae League of Minnesota Cities ("LMC") points out, "it is likely that surveys of the 70,000 miles of local gravel roads would reveal that a significant number of them have deviated from their platted path to a certain extent because of engineering decisions, accommodations made for the natural terrain, or human error." *LMC Brief* p. 3. Public policy favors the timely resolution of claims so that the cost of public improvement projects can be ascertained with reasonable certainty and resources properly allocated.

This Court should recognize a statute of limitations for claims stemming from the construction of a long-established public road on private property, regardless of whether or not the property is registered as Torrens. Where property is physically taken for a public purpose, an action for the recovery of the property should be subject to the 15-year statute of limitations set forth in Minnesota Statutes Section 541.02 (2006). Moreover, this Court should also clarify the user statute, which provides for a shorter six-year limitation period for public roads, is applicable to the unplatted portions of a city street that have deviated from the platted path. *See* Minn. Stat. § 160.05 (2006). Under either analysis, Respondents' claims are time-barred.

ARGUMENT

I. THE STATUTE LIMITING THE TIME TO BRING AN ACTION FOR THE RECOVERY OF REAL PROPERTY IS APPLICABLE TO ALL PROPERTY TAKEN FOR A PUBLIC PURPOSE, INCLUDING REGISTERED TORRENS PROPERTY.

Respondents and the Amici Curiae Builders Association of Minnesota (“BAM”) and Minnesota Eminent Domain Institute (“MEDI”) advocate for the imposition of absolutely no statute of limitations for any claims stemming from the construction of a public road on registered Torrens property. However, Respondents and their amici disregard the clear and unambiguous language of the Torrens statute, which provides that Torrens property is still subject to the same “burdens and incidents which attach by law to unregistered land.” Minn. Stat. § 508.02 (2006). While the Torrens statute provides that Torrens property cannot be acquired by “prescription or adverse possession,” it does not immunize landowners from a taking or provide an unlimited amount of time to seek relief against a municipality stemming from the construction of a public road on their private property.

In *Beer v. Minn. Power & Light Co.*, 400 N.W.2d 732, 736 (Minn. 1987), this Court rejected the contention no statute of limitations should apply to a claim for compensation from the owner of property appropriated to public use. This Court reasoned, “[i]t has long been established that a claim for compensation by the owner of property appropriated for public use may be barred by the lapse of time.” *Id.*; see also *Shinneman v. Arago Twp.*, 288 N.W.2d 239, 243-44 (Minn. 1980) (“so long as a reasonable time and method exist for obtaining compensation or other appropriate relief

. . . an affected property owner has no complaint if his request for relief is held barred by long acquiescence and laches or by the running of a statute of limitations”).¹ In particular, this Court explained when property is actually taken and retained for public use without compensation, “it is clear that the owner can maintain an action for the recovery of the property within the time limited by statute for the recovery of real property.” *Beer*, 400 N.W.2d at 736 (quoting *Forsythe v. City of South St. Paul*, 225 N.W. 816 (Minn. 1929)). The statute for the recovery of real estate provides for a 15-year statute of limitations:

541.02 RECOVERY OF REAL ESTATE, 15 YEARS.

No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff’s ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the action.

Minn. Stat. § 541.02. In *Beer*, this Court expressly held this limitation period “is applicable in cases in which there has been an actual taking of property.” *Beer*, 400 N.W.2d at 736.

¹ See, e.g., *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 280 (1891) (The Supreme Court provided the following analogy: “[I]f a railway company, without condemnation proceedings, took possession of a lot of land for its track and ran its trains over it for [over 25 years] in error, it would scarcely be claimed that the owner could enter upon the land, tear up the rails, and throw his fences across the road-bed.”).

A. The construction of North Mitchell Lake Road represented a taking.

The construction of North Mitchell Lake Road on a portion of Respondents' property in 1971 represented a taking and not a "temporary" intrusion.² *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 920 (Minn. 1975) (discussing de facto takings and noting such takings create in the condemnor a protectable legal interest in the property, equivalent to title by condemnation); *Spaeth v. City of Plymouth*, 344 N.W.2d 815 (Minn. 1984) (holding continual flooding on landowner's property constituted a taking by the city); *see also* Minn. Stat. § 117.025, subd. 2 (2006) (defining a taking as "every interference . . . with the possession, enjoyment, or value of private property"); *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978) (a taking can occur either as a result of the physical appropriation of property or as the result of interference with the ownership, possession, enjoyment or value of property).

² BAM argues the gravel road is not permanent in nature asserting it is "unrebutted and undisputed" it would cost only \$18,000 to move it. *BAM Br.* p. 21. There is absolutely nothing in the record before this Court to support such a statement. This appeal stems from the district court's grant of a Rule 12 Motion for Dismissal. As a result, only the allegations in the complaint are at issue. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2002) ("In reviewing cases involving dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e), the question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief."). Although Respondents' counsel at oral argument before the district court speculated as to the cost, it is disingenuous to suggest this comment has any validity whatsoever. There are no allegations in the complaint concerning the cost of moving the road. In fact, the allegations in the complaint underscore the significance of the interference with Respondents' property rights. *See* Appellant's Appendix, A4-A5 (*Compl.* ¶¶ 13, 21) (the road "significantly and detrimentally" affects the value of their property). Regardless of the nature and extent of the resources necessary to move a public road, the City has deprived the Respondents of the use and enjoyment of that portion of their property since construction of the road in 1971. Moreover, an over 30-year physical appropriation of private land for a public road is hardly "temporary."

Respondents attempt to distinguish *Brooks v. City of Bloomington*, arguing it is not controlling because the City of Bloomington ultimately initiated eminent domain proceedings under Chapter 117. However, in *Brooks*, this Court clearly recognized the construction of a portion of a public road on a 30-foot strip of private property, before the initiation of formal condemnation proceedings, represented a taking:

[A] substantial interference with [the land owner's] property, so as to constitute a taking in the constitutional sense, occurred when the city built a street across his property. His use and enjoyment of that part of his property over which the street was built were, for all practical purposes, lost and destroyed.

232 N.W.2d at 920-21; *see also Eyherabide v. United States*, 345 F.2d 565, 567 (Ct. Cl. 1965) (“[f]ederal law recognizes that, although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion of private property rights that a constitutional taking must be implied”). This reasoning and analysis is equally applicable to the present situation. Accordingly, the construction of North Mitchell Lake Road on a portion of Respondents’ property in 1971, constituted a taking of Respondents’ property, which triggered the beginning of the 15-year statute of limitations for Respondents to seek either the recovery of the property or compensation. *See* Minn. Stat. § 541.02. When the 15-year statute of limitations expired in 1986, Respondents lost their ability to seek recovery of the property and eject the City.

B. Torrens property is subject to the same statute of limitations as unregistered property when property is taken for a public purpose.

The Torrens system was designed to simplify the transfer of real property by eliminating the need for repeated examinations of land titles upon the sale of the land.

See Lucas v. Indep. School Dist. No. 284, 433 N.W.2d 94, 96 (Minn. 1988) (stating “[p]rior to 1901, all real property in Minnesota was abstract property”). Torrens registration provides a means to determine the state of title through the inspection of a single document, the certificate of title. However, as previously noted above, Torrens property is subject to the same “burdens and incidents which attach by law to unregistered land.” Minn. Stat. § 508.02 (2006); *see also* Minn. Stat. § 508.25(4) (2006) (Torrens registration subject to “all rights in public highways upon the land”); *Mill City Heating & Air Cond. Co. v. Nelson*, 351 N.W.2d 362, 364-65 (Minn. 1984). One of these “burdens and incidents” is a taking for a public road by a municipality. To follow Respondents’ and their amici’s theory and allow for no statute of limitations for claims stemming from the taking of Torrens property, improperly expands the breadth of exceptions for Torrens property and will hinder municipalities’ (and any other governmental entity’s) ability to plan for road projects, as potential liabilities for past projects will never be foreclosed. Such a holding runs completely counter to the public policy goal of finality which is one of the underlying purposes for all statutes of limitations. *See Finnegan v. Gunn*, 292 N.W. 22 (Minn. 1940) (courts apply principles of equity when a result under the Torrens Act violates notions of justice and good faith); *In the Matter of the Petition of Joshua S. Collier*, 726 N.W.2d 799 (Minn. 2007) (actual knowledge undermines subsequent purchaser’s ability to claim Torrens immunity).

Respondents argue “ownership” of the property is the dispositive issue and the City cannot acquire any interest in their property absent formal condemnation proceedings. When the City built the road in 1971, however, it acquired a “protectable

legal interest” in the property in the nature of a road easement for the benefit of the public. *See Brooks*, 232 N.W.2d at 920. As this Court explained in *Brooks*:

At the time that it built [the city street] across the property, the city acquired an interest in the property equivalent to an easement over the strip upon which the street lay. Though formal legal title in the city may not have been confirmed until the condemnation proceedings were brought, *Brooks*, in effect, took the property subject to the city’s street easement.

Id. at 920-21. In *Brooks*, the landowner timely commenced an inverse condemnation claim to compel compensation for the easement and, in response, the city voluntarily initiated condemnation proceedings. In the present case, Respondents failed to timely seek compensation or other appropriate relief concerning the long-existing public road. Consequently, the underlying ownership or registration of the property is not dispositive; rather, the failure to take any action before the expiration of the 15-year statute of limitations is dispositive.

C. **When there is an uncompensated taking, a landowner has the right to pursue inverse condemnation.**

The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.” As its text makes plain, the *Takings Clause* does not prohibit the taking of private property, but instead places a condition on the exercise of that power – just compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The United States Supreme Court undeniably recognizes common law takings; i.e., a taking that occurs prior to the institution of formal eminent domain proceedings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (“[w]here real estate is

actually invaded by superinduced additions of water, earth, sand or other material, or by having an artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution”).

The Minnesota Constitution follows the United States Constitution and also provides for just compensation when the taking of private property occurs. Specifically, it provides, “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation.” Minn. Const. art. I, § 13. The law undeniably requires a municipality to compensate a landowner when it takes land for a public purpose. *County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334 (Minn. 1997). In turn, landowners who believe their property has been taken without the institution of eminent domain proceedings may petition the district court for a writ of mandamus to compel the municipality to initiate such proceedings under Chapter 117 of the Minnesota Statutes, which is commonly referred to as inverse condemnation. *Grossman Invs. v. State by Humphrey*, 571 N.W.2d 47, 50 (Minn. App. 1997), *review denied*, (Minn. Jan. 28, 1998). The ability to assert a claim for inverse condemnation protects landowners whose property becomes affected by adverse government action, whether physical possession or other non-physical interferences. Consequently, Respondents and any citizen whose property has been taken by a governmental entity have a remedy. The time to assert this remedy, however, is not unlimited. As discussed above, Respondents have no more than 15 years to pursue a claim for compensation or recovery of the property.

D. The election of remedies doctrine does not preclude the application of the statute of limitations.

The purpose of the election-of-remedies doctrine is to prevent double redress for a single wrong. *Nw. State Bank v. Foss*, 197 N.W.2d 662, 666 (Minn. 1972). The doctrine of election of remedies requires that a party adopt one of two or more coexisting and inconsistent remedies. *Christensen v. Eggen*, 577 N.W.2d 221, 224 (Minn. 1998). “Generally, a party is not bound by an election unless he has pursued the chosen course to a determinative conclusion or has procured advantage therefrom, or has thereby subjected his adversary to injury.” *Kosbau v. Dress*, 400 N.W.2d 106, 110 (Minn. App. 1987) (quotation omitted).

While a party may plead multiple and inconsistent theories, the ability to do so does not preclude the application of the statute of limitations. In particular, the absence of a claim for inverse condemnation (which clearly involves a 15-year statute of limitations) does not prevent the application of the statute limiting the time to pursue the recovery of real property. Minn. Stat. § 541.02. This Court should recognize a maximum 15-year statute of limitations for all claims for compensation or seeking the recovery of public property taken for a public purpose, regardless of how the claims are

plead.³ In other words, a landowner must assert all potential claims for damages or for the recovery of the property before the expiration of the 15-year statute of limitations. Once this 15-year period has expired, no claims may be asserted against the municipality for the appropriation of private land for public use.⁴

This 15-year limitation period should also apply to any purported challenge to the public necessity and public purpose for the appropriation of private property for a public use. Respondents assert the taking of their property is unconstitutional because they were

³ Respondents also argue their trespass claims are not time-barred because the existence of the road on their property represents a continuing trespass. Minnesota Statutes Section 541.05, subdivision 1(3) (2006) places additional time limitations for bringing actions for trespass upon real property, limiting those claims to six years from the time the trespass occurs. Minn. Stat. § 541.05 (2006). This Court specifically has reviewed the issue of trespass involving road cases and municipalities. *Ziebarth v. Nye*, 44 N.W. 1027, 1028 (Minn. 1890). Specifically, this Court explained:

[T]he alleged trespass consisted of a single tortuous act upon the land of the plaintiff, the result of which will continue without change from any cause but human labor; and the plaintiff, having no means to compel the defendants to remove the cause of the injury, can only cause it to be done, if at all, by the expenditure of his own means. This constitutes a single trespass, for which there is only a single right of action.

* * *

[I]t is not at all probable that the grade of the street will ever be restored to the natural level of the land, and neither defendant nor plaintiff could lawfully go thereon and restore the same to its former condition.

Id. The same reasoning applies to North Mitchell Lake Road – the preparations, the grading and the initial construction all occurred in 1971, which represents a single trespass. Thus, any trespass claim by Respondents now would also be barred by Minnesota Statutes Section 541.05, subdivision 1(3).

⁴ As pointed out by amicus League of Minnesota Cities, the user statute provides a shorter six-year limitations period for public roads. *See* Minn. Stat. § 160.05.

not afforded an opportunity to challenge the public purpose or necessity for the project. Respondents, however, had 15 years from the time the City constructed the valuable public improvements on their property – a gravel road that provided access to their property and the surrounding area – to seek any appropriate relief. They failed to do so. Respondents advocate for an unlimited amount of time to challenge public improvement projects, which is contrary to the public policy underlying a statute of limitations. As a result, Respondents should not be afforded an unlimited amount of time to challenge the construction of the public road on their property in 1971 which, by their own admission, significantly and detrimentally affected the value of their property when built. *Id.* at A4-A5 (*Compl.* ¶¶ 13, 21). To allow otherwise would result in a lack of finality and subject very small municipalities like the City of Fifty Lakes (population 392) to unknown potential liabilities for actions that may have occurred decades ago.

Contrary to Respondents' assertions, the City does not assert Respondents have no remedy, but that the time to pursue any claims against the City has long-since expired under the applicable statute of limitations. This is a crucial distinction because Respondents and supporting amici seem to suggest, if the City's position is accepted, a municipality could ignore constitutional and statutory requirements and acquire private property with impunity and without recourse. This is simply not true nor a correct restatement of the law. The City agrees landowners may have various common law and statutory claims against a municipality when governmental conduct impacts private property rights, but the time to assert any such claims, however, is not unlimited. Respondents had the ability to seek compensation or other relief stemming from the

construction of the public road on their property, but their claims expired no later than 1986, 15 years after the construction of the road. Requiring the City to initiate eminent domain proceedings now, 36 years after the City built the road, is against the public policy behind the statute of limitations; i.e., the necessity of finality.

As a final matter, under the Court of Appeals' rationale, if a taking did not occur in 1971, present day values would be utilized in determining compensation, a result that could not have been contemplated when the road was built. This is significant because the determination of no statute of limitations would result in massive potential liabilities from roads constructed decades ago and provide an incentive to landowners to delay bringing claims while property values escalate. This Court has determined, however, "the constitutional taking which occurs at the entry must be considered the taking for all purposes." *Brooks*, 232 N.W.2d at 919; *see also United States v. Dow*, 357 U.S. 17, 24 (1958) ("it would certainly be bizarre to hold that there were two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other"). Consequently, this Court should limit the time to bring claims stemming from the construction of long-established public roads.

CONCLUSION

For the foregoing reasons, the City respectfully requests this Court affirm the district court's Rule 12 dismissal of this action and establish a statute of limitations for claims stemming from the construction of a long-established public road on private property, regardless of whether or not the property is registered as Torrens.

Respectfully submitted,

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Dated: August 9, 2007

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