STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2263

William Konze, et al., petitioners,
Appellants,

vs.

The City of Onamia,
Respondent.

Filed September 24, 2012
Reversed and remanded
Peterson, Judge

Mille Lacs County District Court
File No. 48-CV-10-2077

Kirk A. Schnitker, Jon W. Morphew, Schnitker Law Office, P.A., Spring Lake Park, Minnesota (for appellants)

Paul D. Reuvers, Jason J. Kuboushek, Jon K. Iverson, Iverson Reuvers, LLC, Bloomington, Minnesota (for respondent)

Susan L. Naughton, League of Minnesota Cities, St. Paul, Minnesota (amicus)

Bradley J. Gunn, Malkerson, Gunn & Martin, LLP, Minneapolis, Minnesota (amicus)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this inverse-condemnation dispute, appellant-property owners argue that (a) the district court erred when it concluded that, because respondent-city had no intent to take appellants' property, no taking occurred; and (b) a taking occurred when appellant's property was physically appropriated and put to public use. Because we conclude that the physical appropriation of appellants' property for a public use constitutes a de facto taking, we reverse and remand.

FACTS

Appellants are the fee owners of real property in the City of Onamia. A city street, 357th Street, runs along the southern boundary of the property. The city never obtained an easement for road purposes across appellants' property and has acquired by statutory dedication only the portion of appellants' property that it has maintained and that has been used by the public as a roadway. *See* Minn. Stat. § 160.05 (2010) (deeming dedicated to the public "any road or portion of a road [that] has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority").

In June 2008, the city entered into a Planned Unit Development Agreement with Nexus Diversified Community Services. The project included road, sewer, water, and other public infrastructure improvements. Portions of these improvements were located along 357th Street. The final plans for the project included a water line down the center of the street and street improvements that included re-grading, reshaping, widening, and

creating side slopes and ditches to handle water runoff. In August 2008, the city approved the final plans, conditioned on the developer staying within the established road right-of-way, which the final plans indicated was 66 feet wide.

The city relied on its agreement with Nexus to stay within the established right-of-way and did not survey the street or investigate to determine what portion of appellants' property was deemed dedicated to the public under Minn. Stat. § 160.05. At the city-council meeting where the final project plan was approved, the city noted that the street would be 22 feet wide.

During construction, work was done on appellants' property outside the area obtained by use and maintenance. The work included widening the street and creating side slopes and ditches.[1] Nexus also removed trees from appellants' property and installed two fire hydrants on it.

The city council passed a resolution finding that "work was performed by [Nexus] outside of the public right-of-way without the knowledge or permission of the city," and stating that the city "does not accept" the work performed outside the right-of-way. The resolution required Nexus to restore the area around the street to its condition before construction. Nexus did not perform the work. The city passed two additional resolutions, one directing the city engineer to prepare plans and specifications for the

[1] The extent to which the work encroached on appellants' property is unclear. The parties agreed that work "was done on [appellants' property]" but "reserve[d] the right to have the amount of the current road outside the use and maintenance area determined by the Court." Appellants commissioned a survey, and the surveyor and the city engineer testified. Several drawings were admitted into evidence. The district court did not make findings regarding the extent of the encroachment.

restoration work and the other authorizing the city engineer to seek quotes for the planned work. The restoration work was not completed. The public continues to use the street.

Appellants petitioned for a writ of mandamus compelling the city to commence condemnation proceedings. Following a trial, the district court denied appellant's petition, concluding that no taking occurred because the city did not intend to take the property. The district court explained:

> In this case, [the city] may have approved Nexus' plans, but [the city] played no role whatsoever in the formulation or implementation of those plans. [The city] made no financial contribution to the project, no city employee participated in the project, and [the city] assumed no supervisory role over the project. When it learned of the taking, [the city] took steps to have Nexus make immediate amends. The necessary element of 'intent' was altogether lacking. Without that intent, there was no taking within the meaning of Minn. Const. art. I § 13.

This appeal followed.

D E C I S I O N

"Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. I, § 13, *accord* U.S. Const. Amend. V. A "taking" includes "every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property." Minn. Stat. § 117.025, subd. 2 (2010). Whether a taking has occurred is a question of law that this court reviews de novo. *Alevizos v. Metro. Airports Comm'n.*, 298 Minn. 471, 484, 216 N.W.2d 651, 660-61 (1974).

> [A]lthough 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. The interference with use or possession may be so substantial and of such a character that it cannot be done without compensation under [the government's] regulatory and executive powers. Where these factors exist and a constitutional taking is implied, it is assumed that [the government] has acquired a definite interest in the property, permanent or temporary, such as fee title[,] an easement, a servitude, or leasehold.

Brooks Inv. Co. v. City of Bloomington, 305 Minn. 305, 318-319, 232 N.W.2d 911, 920 (1975) (citation and quotation omitted). In *Brooks*, the supreme court determined that

> it seems clear that a substantial interference with [the] property, so as to constitute a taking in the constitutional sense, occurred when the city built a street across [the] property. [The] use and enjoyment of that part of [the] property over which the street was built were, for all practical purposes, lost and destroyed.

Id. at 319, 232 N.W.2d at 920.

A de facto taking is a "taking in which an entity clothed with eminent-domain power substantially interferes with an owner's use, possession, or enjoyment of property." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (quotation omitted). De facto takings occur when "a governmental authority . . . acquire[s] an interest in property by physical appropriation." *Id*. A de facto taking "does not require 'an official intention to acquire any property interest.'" *Id* (quoting *Brooks* 232 N.W.2d at 920).

The parties stipulated that work was done on appellants' property outside the right-of-way and that trees were cut down and fire hydrants were installed on appellants' property. The fire hydrants remain in place, and the public continues to use the street as

constructed. Because appellant's property has been physically appropriated for public use, a de facto taking has occurred for which appellants are due just compensation.

Citing *Chenoweth v. City of New Brighton*. 655 N.W.2d 821, 824-25 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003), the city argues that no taking has occurred because there has not been a government action. But *Chenoweth* is significantly different from this case. In *Chenoweth*, this court addressed whether "private development of property" was "so entwined with government action as to constitute state action necessary to a claim of inverse condemnation." 655 N.W.2d at 824. The government action included substantial facilitation of a private project by the city; the city approved the project plans, condemned land and sold it to the developer "on very favorable terms," paid for some site improvements, and constructed "necessary public improvements without assessing [the developer] for [the] costs." *Id*. at 823-824. When constructed, the private project (a warehouse) blocked air flow and sunlight to the Chenoweth's greenhouse, "essentially destroy[ing] their business." *Id*. at 824. This court held that the city's involvement in the project was not sufficient to constitute government action entitling the Chenoweths to prevail on an inverse-condemnation claim. *Id*. at 826. Unlike the alleged taking in *Chenoweth*, which resulted from the presence of a private warehouse on property adjacent to the Chenoweth's property, the taking here resulted from the presence of city infrastructure on appellants' property.[2]

[2]The city argues that "[a]ppellants characterize the use of the road as physical appropriation but there is no evidence the public is using any portion of the road beyond the previous right-of-way. For example, including the areas of the right-of-way used for snow plowing, the widened travel surface visible in Appellants photographs does not

Amicus League of Minnesota Cities argues that appellants are asking this court to change the law such that municipalities have a "new duty" to "supervise the work of private developers and contractors to ensure that they do not damage or encroach onto private property whenever they work on a public right-of-way for a private project." But appellants do not claim only that they suffered damage because Nexus went onto their property during construction; they claim that the city has acquired an interest in their property by physical appropriation, which is a de facto taking. *Hebert*, 744 N.W.2d at 229. Because no intent is required for a de facto taking, the district court erred in dismissing appellants' petition for lack of intent. Accordingly, we reverse and remand for further proceedings.

Reversed and remanded.

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necessarily exceed the portion retained by the city via statutory dedication." But the district court found that Nexus

> apparently encroached upon the subject property. Nexus' actions included, among other things, the removal of trees, an expansion of the roadway, the creation of slopes and ditches, and the installation of two fire hydrants. This expansion of the project beyond [the city's] existing right-of-way was not contemplated by [the city], who neither authorized it nor intended it to happen.