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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-589

Gregory L. Wilmes,
Appellant,

vs.

City of St. Paul,
Respondent.

Filed January 23, 2012
Affirmed
Halbrooks, Judge
Dissenting, Stoneburner, Judge

Ramsey County District Court
File No. 62-CV-10-7303

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Sara R. Grewing, St. Paul City Attorney, Portia Hampton-Flowers, Deputy City Attorney, St. Paul, Minnesota (for respondent)

Robert P. Thavis, Marc D. Simpson, Leonard, Street and Deinard, Minneapolis, Minnesota (for amicus curiae The Minnesota Free Market Institute)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's dismissal of his lawsuit based on failure to state a claim under Minn. R. Civ. P. 12.02(e). Because we conclude that appellant has not stated a claim that he is entitled to a permit or to compensation, we affirm.

FACTS

Appellant Gregory Wilmes purchased a triangularly shaped parcel of land in St. Paul in February 2009 with the intent to plant a garden; he subsequently planted an assortment of berries, fruit trees, and vegetables. About nine months later, Wilmes sought to remove a maple tree on the boulevard because it limits the sunlight available to his garden. Because the tree is located within the City of St. Paul's right-of-way, Wilmes applied to the Department of Parks and Recreation for a permit to remove it as required by St. Paul, Minn., Code of Ordinances, Part II, Title XVII (SPCO) § 178.02 (2011).

The city denied his request, stating that "city policy does not allow for removing of this healthy and beneficial tree for the reasons you cite in your letter, basically to remove any shade that may encroach on your gardens." Wilmes appealed directly to the director of Parks and Recreation, who also denied the application, noting that, so long as the tree is not diseased or dangerous, city policy is to leave it intact.

Pursuant to Minn. Stat. §§ 555.02, 559.01 (2010), Wilmes filed a complaint against the city in district court asking for multiple declaratory judgments which can be summarized as follows: (1) that he is entitled to a permit as a matter of law under Minn. Stat. § 15.99, subd. 2; (2) that he owns the tree; (3) that he has the right to determine the

types of trees, if any, to grow on the boulevard; (4) that he is entitled to a permit to remove the tree; or, in the alternative, (5) that he is entitled to compensation from the city for taking his tree. Wilmes attached to his complaint his certificate of title to the parcel of land, which indicates that he owns the land on which the tree is located, subject to various laws and to "[a]ll rights in public highways upon the land." Wilmes withdrew the first request shortly after it was made.

The city moved to dismiss Wilmes's complaint for failure to state a claim under Minn. R. Civ. P. 12.02(e). In doing so, the city provided the district court with public records, including a copy of the city's 1978 and 2010 Street Tree Master Plans, the city charter, and sections of the city's administrative and legislative codes. The city asserted that Wilmes failed to state a claim that he is entitled to a permit because the city's denial of the permit was within the city's authority as expressed in its charter, state statutes, and city ordinances. The city further asserted that Wilmes failed to state a claim that he is entitled to compensation because, so long as the city acts within its rights under its easement, it is not required to compensate landowners for taking trees that are located within it.

The district court granted the city's motion and dismissed the complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. Wilmes appeals. At oral argument before this court, the parties agreed that Wilmes owns the tree and that the city has the power to determine which trees, if any, may be planted within the city's right of way. Therefore, the only two claims that Wilmes now asserts are that he is entitled to a permit to remove the tree or, in the alternative, to

compensation. We therefore need only address whether the district court erred by dismissing those two claims for failure to state a claim upon which relief may be granted.

DECISION

When reviewing a case dismissed under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief may be granted, this court reviews de novo "whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). In doing so, we must "consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Id.*

I.

We first address Wilmes's action for a declaratory judgment that he is entitled to the tree-removal permit. The district court implicitly found that Wilmes failed to state a claim of entitlement because the city has discretion to deny him a permit. Wilmes challenges that finding by arguing that (a) the ordinance under which the permit was denied does not vest the city with discretion to deny the permit and (b) the ordinance, if it does vest the city with discretion to deny the permit, is unconstitutional. We address these arguments in turn.

A.

"The interpretation and application of a city ordinance is a question of law, which we review de novo." *Cannon v. Minneapolis Police Dep't*, 783 N.W.2d 182, 192 (Minn. App. 2010). "The rules governing statutory interpretation are applicable to the interpretation of city ordinances." *Id.* at 192-93. "Therefore, when construing an

ordinance, we first determine whether the language is reasonably subject to more than one interpretation." *Id.* at 193. "If the language is unambiguous, we must give effect to the unambiguous text because the letter of the law shall not be disregarded under the pretext of pursuing the spirit." *Id.* (quotation omitted).

SPCO § 178.02, under which Wilmes sought the permit, states: "No person shall trim or remove any tree bordering on any public street or highway without making application, in the manner provided in section 178.01, and receiving a permit therefor from said director." Section 178.01 states:

> Any person desiring to plant trees bordering any public street or highway shall make application to the director of the department of parks and recreation for permission so to do, on blanks prepared by the city forester under the direction of said director, and if said forester finds and so reports that the location and trees selected by said applicant are suitable, said director shall issue a permit therefor specifying the number and kind of trees and the places where the same shall be planted.

SPCO § 178.01. Taking the context of the two ordinances as a whole, it is clear to us that the word "manner" in section 178.02 indicates both the manner in which the applicant makes the application ("on blanks prepared by the city forester"), and the manner by which the city responds to the merits of that application ("if . . . trees . . . are suitable"). To conclude otherwise leaves city foresters in the uncomfortable position of controlling which trees are suitable for planting, but not which trees are suitable for removal. Based on the plain language of the ordinances, we conclude that the city has discretion under section 178.02 to deny the permit.

B.

We next address Wilmes's argument that SPCO § 178.02, to the extent that it gives the city discretion to deny the permit, is unconstitutional. The district court did not directly address the constitutionality of section 178.02, but it implicitly found that the city's discretion to deny the permit was within the city's rights under its right-of-way easement. We review the question of whether an ordinance is constitutional de novo. *State v. Castellano*, 506 N.W.2d 641, 644 (Minn. App. 1993).

Wilmes essentially raises two constitutional challenges to SPCO § 178.02. First, he argues that the ordinance, to the extent that it permits denial of the permit, operates as an unconstitutional taking. Because this argument relates more directly to Wilmes's action for a declaratory judgment that he is entitled to compensation for the city's taking of his tree, we address the merits of this argument in section II.

Second, Wilmes argues that the city's denial of his permit violates his right, under the Minnesota Constitution, to control the amount of shade on his garden. This right, he says, is grounded in the allodial-lands and right-to-sell-product clauses of the Minnesota Constitution. The allodial-lands clause provides that "[a]ll lands within the state are allodial and feudal tenures of every description with all their incidents are prohibited." Minn. Const. art. I, § 15. The right-to-sell-product clause provides that "[a]ny person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor," Minn. Const. art. XIII, § 7. Wilmes's argument lacks merit. Neither the allodial-lands nor right-to-sell-product clauses apply. First, Wilmes's ownership of his land is undisputed. The city has only an easement. Second,

the right-to-sell-product clause addresses the state's inability to require a license to *sell* the products of a farm or garden. It does not apply to *growing* those products.

The city's ordinance is constitutional.

II.

We next address whether the district court erred by dismissing Wilmes's action for a declaratory judgment that he is entitled, under the Minnesota and United States constitutions, to compensation for the city's denial of his tree-removal permit. *See* Minn. Const. art. I, § 13 ("Private property shall not be taken, destroyed or damaged for public use without just compensation"); U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"). Whether a governmental regulation is a taking is a question of law, which this court reviews de novo. *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305 (Minn. 2011).

Wilmes claims that the city, by refusing to allow him to remove his tree, has created a regulation by which he is required to maintain property that is physically on his land. This, he says, is a taking under *Loretto*. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434, 102 S. Ct. 3164, 3175 (1982) (holding that any "permanent physical occupation" authorized by the government is a taking). Although Wilmes's assertion might be true if his tree were located outside of the city's right-of-way, it is not. The fact that the tree is located within the city's right-of-way triggers a different analysis. Further, the law denies compensation to property owners when property within a city's right-of-way is destroyed pursuant to the city's activities under its easement. *See Foote v. City of Crosby*, 306 N.W.2d 883, 886 (Minn. 1981) (holding that

the destruction of trees within the city's right-of-way is not a taking for which compensation is required).

We must therefore determine whether the city has the right to control the removal of trees located within its right-of-way easement. "An easement is an interest in land owned by another person, consisting in the right to use or control the land . . . for a specific limited purpose." *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010) (quotations omitted). Whether the city has the power under its easement to control the removal of trees depends on the scope of the easement. *See id.* at 704. Ordinarily, "[t]he written instrument creating the easement . . . defines the scope and extent [of that right]." *Id.* at 704. Here, the lack of a written easement does not end our analysis because, on review of a motion to dismiss for failure to state a claim, we will assume the facts as they are stated in the complaint. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

In his complaint, Wilmes states that the city has an easement over the property on which the tree is located. Case law informs us that "[m]unicipalities generally retain rights to trim or cut down trees in the interest of public safety, convenience, or health for such purposes as road improvement, convenience to travelers, and assisting the work of public utilities." *Miller-Largo v. N. States Power Co.*, 582 N.W.2d 550, 553 (Minn. 1998) (quotation omitted). Included in the scope of a city's right-of-way easement is the power to determine the "character of the street." *Kelty v. City of Minneapolis*, 157 Minn. 430, 431, 196 N.W. 487, 487 (1923). "What the municipality does in . . . determining [the street's] character is administrative or legislative." *Id.* at 431, 196 N.W. at 487.

Here, the city chose the character of the street on which the tree is located. This is evidenced by the city's adoption under Minn. Stat. §§ 462.351-.365 (2010) of a Street Tree Master Plan. As part of that plan, the city decided that the streets in St. Paul should be lined with trees. An ordinance permitting the city to deny a landowner a permit to remove a tree, which in the city's determination contributes to the city's chosen character of that street, is within the city's easement power. *See Kelty*, 157 Minn. at 431, 196 N.W. at 487.

Because the city's easement includes the right to determine which trees may be planted or removed in its right of way, Wilmes has not stated a claim of entitlement to compensation for denial of his permit.

III.

In addition to dismissing Wilmes's complaint because he failed to state claims upon which relief may be granted, the district court also ruled that the city's decision to deny the permit was not arbitrary or capricious. On appeal, Wilmes challenges that determination, arguing that the city's decision was arbitrary and capricious. Because we are affirming the district court's conclusion that Wilmes failed to state claims upon which relief can be granted, we need not address this additional argument.

Affirmed.

STONEBURNER, Judge (dissenting)

I respectfully dissent and, under the standard of de novo review, would hold that appellant has stated a claim sufficient to survive respondent's Rule 12 motion that, under St. Paul, Minn., Code of Ordinances, Part II, Title XVII, § 178.02 (2011), he is entitled to a permit to remove a tree located on boulevard property that he owns.

Considering only the facts alleged in the complaint, accepting those facts as true, and construing all reasonable inferences in favor of appellant, appellant has established that: (1) he owns the tree that he wishes to remove and the property on which the tree is located; (2) the tree interferes with his permitted and reasonable use of his yard as a productive garden; and (3) he hopes to replace the offending tree with a variety of tree that produces less shade and also produces nuts, compatible with his use of his yard. The complaint also establishes that respondent city denied a permit to cut the offending tree by asserting (1) ownership of the tree; (2) that the tree could only be removed if diseased and/or dangerous; (3) that the tree is located in a public place; and (4) that city policy was designed to "protect valuable community assets."

On appeal, the city asserts that it can deny the permit as an exercise of its police power.[1] The city appropriately acknowledges that it has "only such powers as are *expressly* conferred upon it by statute or its charter, *or necessarily implied.*" *Borgelt v. City of Minneapolis*, 271 Minn. 249, 252, 135 N.W.2d 438, 440 (1965) (emphasis added). The city relies heavily on the "Street Tree Master Plan" of the city's comprehensive plan.

[1] On appeal, the city has abandoned its claim of ownership of the tree and its claim that a healthy tree cannot be removed, apparently having recognized that the limitations on the *city's* right to remove a boulevard tree do not restrict the owner's right to remove a tree.

The Street Tree Master Plan is a "comprehensive *guide* for selection, placement and proper maintenance of trees" in residential streets. (Emphasis added). The city also relies on section 178.01 of the city code, which gives the city forester discretion to deny a permit for *planting* a tree in the boulevard if the city forester finds that the location and/or the trees selected by the applicant are unsuitable.

But the owner of land abutting a street generally owns to the center of the street, subject to the public easement for travel, and the landowner may use his land for a purpose compatible with the free use of the public of its easement. *Kelty v. City of Minneapolis*, 157 Minn. 430, 431, 196 N.W. 487, 487 (1923); *Town of Glencoe v. Reed*, 93 Minn. 518, 522, 101 N.W. 956, 958 (1904) (noting that the public easement in a street permits authorities "to do all that is necessary to meet the public necessities, and make the highway efficient and safe in every respect; but this is the extent of their authority"); *Ellsworth v. Lord*, 40 Minn. 337, 339, 42 N.W. 389, 390 (1889) (describing such an easement as "a mere right of passage"). In this case, the city's easement is not in the record, and the city has not made any claim that appellant's desire to remove the offending tree (or his hope to replace it with another species of tree) is in any way incompatible with the free use of the public easement. Neither the district court nor the majority explain how a *guide* for selection, placement and maintenance of trees gives the city the authority to preclude an abutting owner's use of the boulevard in a manner that does not interfere with the city's easement.

Appellant does not dispute that he is required to obtain a permit to remove the tree under section 178.02 of the city's ordinance. But that section does not contain any

criteria for denial of a tree-removal permit properly applied for, strongly suggesting that the purpose of the permit is to ensure that the manner of removal does not interfere with the public easement. Section 178.02 directs that application for such a permit shall be made “in the manner provided in section 178.01.” The manner of application provided in section 178.01 is to “make application to the director of the department of parks and recreation for permission . . . on blanks prepared by the city forester under the direction of said director.” The majority holds that the reference to 178.01 to specify the manner of making application for a tree-removal permit necessarily incorporates the standards contained in that section for planting trees into section 178.02, giving the city the discretion and criteria for denying a tree-removal permit. I disagree: what does the suitability of location and species of trees selected for planting have to do with tree removal? Plainly section 178.01 does not, as the majority holds as a matter of law, confer on the city the discretion to deny a removal permit properly requested by the owner of a tree and the land on which it is located. Because the city has not established that, as a matter of law, it has authority under its easement or any other express or reasonably implied authority to deny appellant’s properly submitted application to remove a tree on his property, appellant is entitled to pursue his claim that the permitting process described in section 178.01 is ministerial and, like many provisions for standardless permitting, does not give the city discretion to deny a permit properly applied for. I would reverse and allow appellant to pursue his claim that he is entitled to a tree-removal permit.