

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1989

CLERK SUPREME COURT

ARTHUR KONEN,)
Plaintiff-Appellee,)
vs.)
IOWA DEPARTMENT OF)
TRANSPORTATION, STATE OF IOWA,)
Defendants-Appellants,)

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ORVILLE DEAN BARNES and)
JEAN ANN BARNES,)
Intervenors/Plaintiffs-)
Appellees,)
vs.)
ARTHUR KONEN and IOWA)
DEPARTMENT OF TRANSPORTATION,)
STATE OF IOWA,)
Defendants.)

8-129
87-579

Appeal from the Iowa District Court for Winneshiek County (No. 21215), John Bauercamper, Judge.

The Iowa Department of Transportation challenges the trial court's order in mandamus compelling the department to bring eminent domain proceedings to compel condemnation. **AFFIRMED.**

Thomas J. Miller, Attorney General, and David A. Ferree, Assistant Attorney General, for defendant-appellant.

Mark B. Anderson, Cresco, for plaintiff-appellee.

Donald H. Gloe of Miller, Pearson, Gloe, Burns, Beatty & Cowee, P.C., Decorah, for intervenors/plaintiffs-appellees.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

The appellant, Iowa Department of Transportation, challenges the trial court's order in mandamus compelling the department to bring eminent domain proceedings against plaintiffs' roller skating rink which became subject to water damage after the department changed the grade on Highway 52. The department asserts that eminent domain proceedings were not proper as there was no taking and indispensable parties were omitted from the proceedings. A mandamus action is equitable in nature; therefore, our scope of review is de novo. See Iowa Code § 661.3 (1987); Iowa R. App. P. 4; Schrader v. State, 213 N.W.2d 539, 540 (Iowa 1973). We affirm the trial court.

The roller rink is located three-fourths of a mile east of Ossian in Winneshiek County, Iowa. Orville and Jean Barnes are the record titleholders. They had operated this roller rink until June 1, 1981, at which time they sold the property on an installment contract to Robert and Helen Siegfried. In December 1981, the Siegfrieds assigned their interest to Arthur and Nancy Konen, who then owned and operated the roller rink until February 1986. In January 1985, the Barnes instituted forfeiture proceedings and regained possession of the premises in late February 1986.

The roller rink building was constructed in about 1950. The main rink is a wood-framed building with a metal finish and an asphalt roof. It contains a cement block

lobby addition. The building is slightly elevated off the ground and rests on reinforced concrete piers. The skating floor inside the floor is maple, and the bathrooms and lobby area are carpeted.

The building is adjacent to U.S. Highway 52, sitting approximately 33 feet from the south edge of the pavement. It runs parallel with the highway. The general elevation of the land is such that the building sits lower than the highway.

From 1966 until the reconstruction during 1984, Highway 52 was 18 feet wide, with curbs and narrow 18-inch to 4-foot-wide shoulders. The pavement was crowned so precipitation ran off both to the south and to the north. There were ditches on both sides of the highway, and the south ditch was much deeper than the rink. There were culverts and tile lines such that no water was ever observed standing near the building prior to 1984.

The reconstruction of Highway 52 began in the spring of 1984. It added six feet of pavement. It made a banked curve which extended from the roller rink's west driveway halfway down the roller rink's length so that all surface water drained toward the building. The entire paved portion of the highway slanted toward the building. The ditches, both north and south of the highway, were filled in, leaving a straight slope from the railroad tracks north to the highway to the bank of the roller rink. This left a

steeper slope all the way down towards the building. Grading destroyed a tile line protecting the rink.

After the highway reconstruction, severe drainage and moisture problems allegedly resulted on the rink's site. Snow plows would throw snow, salt, and gravel onto the rink's roof. The roof began leaking extensively and water ran down the walls inside the building, cracking its walls and warping the floor. By the winter of 1985, the building was impossible to operate as a roller rink and was considered unsafe for storage.

The trial court found for plaintiffs granting their request to compel condemnation. On appeal, the department maintains that the damage was not caused by the changes in the highway; rather the roof had always had occasional leaks in it and the building had been twice damaged by tornadoes. The department argues that the plaintiffs are servient owners in a drainage area larger than just the highway and that the highway, in fact, protects them from drainage to the north. The department further argues that there has been no showing of substantial interference with plaintiffs' property rights to deprive them of the use of the property, and thus condemnation is improper.

Section 18 of Article 1 of the Constitution of the State of Iowa provides: "Private property shall not be taken for public use without just compensation first being made." The Iowa courts have held a "taking" to be anything

which substantially deprives one of the use and enjoyment of his property or a portion thereof. Osborn v. City of Cedar Rapids, 324 N.W.2d 471, 474 (Iowa 1982); Phelps v. Board of Supervisors of Muscatine County, 211 N.W.2d 274, 276 (Iowa 1973). There may be a taking within the contemplation of the Constitution without an actual invasion or direct physical appropriation of private property. See Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 923, 38 N.W.2d 605, 608 (1949); Lage v. Pottawattamie County, 232 Iowa 944, 949, 5 N.W.2d 161, 164 (1942). See also Phelps v. Board of Supervisors of Muscatine County, 211 N.W.2d 274 (Iowa 1982) (construction of a bridge which caused greater flooding on adjoining property amounted to a "taking").

The State relies on the general rule that the dominant owner is entitled to drain surface water in a natural watercourse from his land over the servient owner's land, and if any damage results, the servient owner is without remedy. Rosendahl Levy v. Iowa State Highway Comm'n, 171 N.W.2d 530, 536 (Iowa 1969). However, this rule is not without exception for circumstances in which the volume of water is substantially increased or if the manner or method of drainage is substantially changed. Id. In Schwartz v. Wapello County, 208 Iowa 1229, 1230, 227 N.W. 91, 92, (1929) the Iowa Supreme Court said:

It has been the universal holding of this court that an easement exists for the drainage of the upper land,--the upper land being the dominant

estate, and the lower land the servient estate, --and that the dominant owner may, by discharging the water upon his own land into a natural watercourse, drain surface water upon the land of the servient owner, but cannot gather larger quantities of water out of the ordinary and natural course of drainage and discharge the same upon the servient estate, to its substantial damage, in largely increased quantities, or at a different place or in a different manner than it would usually and ordinarily have gone in the natural course of drainage.

The record reveals that prior to the reconstruction of Highway 52 in 1984, the roller rink was in good shape. After the highway reconstruction, there were drainage and moisture problems on the site. The changes which occurred in the drainage were due to a number of factors: the widening of the road provided more pavement for the drainage to run off rather than percolate as before; the crown in the highway and an elevated bank curve was constructed, changing the land's contour to tilt toward the building; the ditches on the north and south sides of the highway which had previously served to catch the water and to direct it away from plaintiffs' building were eliminated; and the tile line which carried the water under and away from the building was broken. The record also indicates that when the highway and shoulders were plowed after the widening, snow, salt, and gravel were thrown onto the roller rink roof. The result was that by 1985 the building was no longer able to be used as a roller rink or for storage.

The State argues that other factors caused the damage to the building. We find, however, that the reconstruction of Highway 52 changed the ordinary course of drainage and resulted in a substantial deprivation of the use and enjoyment of the property by its owners. We affirm the trial court's order compelling a condemnation proceeding.

The State also asserts that eminent domain proceedings were not proper as indispensable parties were omitted from the proceeding. An indispensable party is one whose interest adversely affected or prejudiced in his absence. Iowa R. Civ. P. 25(b).

Nancy Konen is the spouse of Arthur Konen. The Konens were assigned their interest in the property in question by the Siegfrieds, who bought the property on contract from the Barnes in 1981. In 1985, the Barnes instituted a forfeiture proceeding and regained possession in 1986.

While the parties may dispute each other's interest in said property and the amount of compensation due to each, that is an issue reserved for the condemnation proceeding. This action is an action to compel the State to condemn the property. As such, there has not been an indispensable party omitted from this proceeding.

AFFIRMED.