

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0473**

ExteNet Systems, LLC,
Respondent,

vs.

Sherman Associates, Inc.,
Appellant.

**Filed December 23, 2024
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CV-22-15439

Cory D. Olson, Kathryn E. Campbell, Anthony Ostlund Louwagie Dressen & Boylan P.A.,
Minneapolis, Minnesota (for respondent)

Patrick B. Steinhoff, Thomas F. DeVincke, Malkerson Gunn Martin LLP, Minneapolis,
Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Bentley, Judge; and Kirk,
Judge.*

SYLLABUS

A private party that, on its own initiative, develops real property with improvements
that require utility equipment to be relocated bears the cost of the relocation.

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

OPINION

WORKE, Judge

Appellant real-estate developer challenges the district court’s summary-judgment order requiring it to bear the cost of relocating small wireless facilities (SWFs) that the City of Minneapolis (city) removed as part of appellant’s redevelopment project. We affirm.

FACTS

Respondent ExteNet Systems, LLC builds and installs fiber-optic cables and SWFs. SWFs provide enhanced wireless services on structures located within the public right-of-way, including streetlights. Pursuant to a collocation agreement with the city, ExteNet installed SWFs on two streetlights located on Washington Avenue South (site 122) and 3rd Street South (site 131) in Minneapolis.¹

Appellant Sherman Associates, Inc. is a private real-estate developer based in Minnesota. Following ExteNet’s installation of SWFs at site 122 and site 131, Sherman commenced work on a redevelopment project that involved (1) building a luxury apartment building with commercial space, (2) replacing an existing fire station with an apartment building, and (3) building a new fire station. Sherman contracted with the city in an agreement that provided for the sale of the existing fire station to Sherman, which was located on the site where Sherman planned to build a 90-unit apartment building, and Sherman’s promise to build and sell a new fire station to the city.

¹ To collocate means to “install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit.” Minneapolis, Minn., Code of Ordinances (MCO) § 451.10(a)(14) (2024).

Shortly after construction began, the city informed ExteNet that it removed, without prior notice to either party, the streetlight to which the site 131 SWF was attached to “make way” for the redevelopment project. *See* Minneapolis, Minn., City of Minneapolis Street Lighting Policy 15, 20 (2015), <https://www2.minneapolismn.gov/media/content-assets/www2-documents/departments/wcms1p-151087.pdf> [<https://perma.cc/8L6K-EMKQ>] (requiring replacement of all lighting abutting the public right-of-way in connection with development projects occurring in the Central Business District). The city subsequently removed the streetlight to which the site 122 SWF was attached.

ExteNet sued Sherman, raising claims including (1) declaratory judgment that Sherman is liable for the costs of relocating the SWFs, and (2) unjust enrichment based on Sherman’s profit from completing the development while failing to reimburse ExteNet for the cost of relocating the SWFs. The parties filed cross-motions for summary judgment, providing the district court with stipulated facts and exhibits. The district court granted ExteNet’s motion for summary judgment on the declaratory-judgment and unjust-enrichment claims, and awarded ExteNet the stipulated relocation cost of \$136,983.65 and prejudgment interest calculated from October 12, 2021.

This appeal followed.

ISSUE

Did the district court err by granting summary judgment in favor of ExteNet?

ANALYSIS

A. Relocation costs

Sherman argues that the district court erred by determining that (1) the common law requires Sherman to bear the costs of relocating the SWFs, and (2) the city's ordinances do not require ExteNet to bear the relocation costs. We disagree.

Appellate courts “review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). Because the parties stipulated to the facts upon which the district court based its summary-judgment ruling, we review only whether the district court erred in its application of the law.

The common law

The traditional common-law rule requires utilities “to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities.” *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983). The rationale for this rule is that a municipality, by allowing a utility to use a public right-of-way, does not give up control over the right-of-way nor does the utility gain the right to inconvenience the municipality's exercise of its local functions. *New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 459 (1905). Minnesota courts have adopted this common-law approach. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 570 n.2 (Minn. 2000) (“If a road project requires

alteration of the public right-of-way, utilities whose equipment is within the right-of-way pay the cost of relocation.”).

The question arises whether the common law requires a different result when a private developer’s project causes the removal of a utility. Minnesota courts have not yet ruled on this issue. Several other jurisdictions have held developers liable for utility-relocation costs incurred in private projects. The California Court of Appeal, for example, concluded that a developer should bear the utility-relocation costs when, on its own initiative, it develops a parcel of land and “thereby creates or aggravates a need for public improvement which requires the relocation of existing utility equipment.” *Pac. Gas & Elec. Co. v. Damé Constr. Co.*, 236 Cal. Rptr. 351, 357 (Cal. Ct. App. 1987). The Maryland Court of Appeals adopted the same rule, writing: “We find no legal basis, and certainly no equitable one, for requiring a utility’s rate-paying customers to bear a cost triggered and made necessary by a private developer’s project and thus, in effect, to subsidize the cost of the development.” *Potomac Elec. Power Co. v. Classic Cmty. Corp.*, 856 A.2d 660, 669 (Md. 2004); *see also Whisenhunt v. Sw. Bell Tel.*, 573 F.3d 565, 568-69 (8th Cir. 2009) (applying Arkansas law and holding that common-law rule requiring utility to bear relocation costs does not apply when actions of private developer require utility relocation).

In its thorough, well-reasoned order, the district court noted that “[t]he common-law principles articulated in cases such as *Whisenhunt*, *Damé*, and *Potomac Electric* comport to common sense.” We agree. A private party’s development project that requires the relocation of a right-of-way does not implicate the traditional common-law rule’s concern for protecting a municipality from bearing relocation costs when, while carrying

out its public functions, it must relocate a utility. *See New Orleans Gaslight Co.*, 197 U.S. at 459. Indeed, there is no equitable basis for requiring the utility to bear this cost when a private, rather than public, project spurs the utility relocation or removal.

Therefore, we hold that when a private party, on its own initiative and not that of the government, develops property and thereby creates or aggravates a need for public improvement necessitating the relocation of existing utility equipment, the private party shall bear the relocation costs.

Public versus private projects

Having concluded that a private party must bear the cost of relocating a utility when its project spurs a public improvement that requires the relocation of an existing utility, we next evaluate whether Sherman's redevelopment project is public or private. Sherman's project involves building a luxury apartment building replete with commercial space, replacing a fire station with an apartment building, and building a new fire station. Sherman argues that, because building a new fire station benefits the public, the project is a public project.

The question arises as to the effect, if any, that the building of a new fire station has on whether Sherman's project in its entirety is public or private. Because Minnesota caselaw and statutes do not conclusively define what constitutes private and public projects, we again turn to authority from other jurisdictions. In *Whisenhunt*, the Eighth Circuit held that, although the public benefits from road improvements required as a condition for city approval of a broader development project, these improvements do not

convert a project from private to public because “there was no foreseeable, and certainly no imminent construction intended by the city.” 573 F.3d at 569.

Similarly here, there is no indication in the record that the city approached Sherman to build the fire station independent of Sherman’s existing redevelopment. Indeed, Sherman announced the redevelopment project in 2018 but did not finalize the fire station portion of the project until May 2021. Further, Sherman owned the land upon which it constructed the fire station and only promised to convey the fire station after its completion. Therefore, assuming that it was proper to disaggregate the fire station construction from the broader redevelopment project, we conclude that, like in *Whisenhunt*, the fire station project is akin to a condition that the city imposed as part of the broader redevelopment project rather than a project that the city would have undertaken absent Sherman’s redevelopment project. Though Sherman is correct that the new fire station benefits the public, the fact that an otherwise private project benefits the public does not make it a public project. *See Pac. Gas & Elec. Co.*, 236 Cal. Rptr. at 356 (reasoning that, although “the general public would also benefit from the road widening, the primary beneficiary of the work was *Damé*, which would not have been permitted to develop its land without agreeing to widen the adjacent boulevard”).

Because Sherman’s private project required the relocation of ExteNet’s SWFs, we conclude that the common law requires that Sherman bear the costs of relocating the SWFs.

Minneapolis ordinances

We next address whether Minneapolis ordinances are inconsistent with our common-law rule and require that ExteNet bear the relocation costs. Pertinent here, the

city adopted the following ordinance which addresses the obligations of right-of-way users with respect to relocating facilities from a public right-of-way:

A right-of-way user shall promptly and at its own expense, with due regard for seasonal working conditions, permanently remove and relocate its facilities in the right-of-way when it is *necessary to prevent interference, and not merely for convenience of the city*, in connection with:

- (1) *A present or future city use of the right-of-way for a public project;*
- (2) The public health or safety; or
- (3) The safety and convenience of travel over the right-of-way.

Notwithstanding the foregoing, a right-of-way user is not required to remove or relocate its facilities from a right-of-way that has been vacated in favor of a nongovernmental entity unless and until the reasonable costs to do so are first paid to the right-of-way user.

MCO § 429.110 (2024) (emphases added).²

Key to evaluating the effect of MCO section 429.100 on the parties' obligations is whether the removal of SWFs was (1) necessary to prevent interference to the redevelopment project rather than merely for the city's convenience, and (2) in connection with a public project. If both questions are answered in the affirmative, then MCO section 429.100 requires ExteNet to bear this cost. Here, because the MCO does not define what constitutes a public project, we apply our above analysis in concluding that Sherman's redevelopment project was not a public project. Because the streetlight and SWFs removal

² This ordinance mirrors Minnesota Rule 7819.3100 (2023), as it must. *See* Minn. Stat. § 237.163, subd. 8(c) (2022) (precluding local unit of government from adopting ordinance contrary to a standard adopted under Minn. Stat. § 237.163, subd. 8(a)).

were not a necessary part of a public project, the MCO does not require that ExteNet bear the relocation costs.³

B. Unjust enrichment

Sherman argues that the district court erred by determining that it was unjustly enriched because Sherman did not receive anything of value to which it was not entitled or which would be unjust for it to retain. Sherman bases this argument on its assertion that the district court erred by determining that Sherman is responsible for the relocation costs. Because we have concluded that Sherman must bear these costs, we also conclude that Sherman has not established a basis for reversing the district court's grant of ExteNet's unjust-enrichment claim.

C. Prejudgment interest

Sherman argues that, assuming that it was proper for the district court to enter a judgment against Sherman, it erred by awarding ExteNet prejudgment interest because the

³ Sherman additionally argues that ExteNet's collocation agreement with the city requires ExteNet to bear the relocation costs. The agreement provides, in pertinent part:

Except in cases of emergency, prior to commencing work on City Owned Infrastructure with an attachment, the City will provide user with 24 hour prior notice thereof. Upon receiving such notice; it shall be the sole responsibility of the user to take adequate measures to remove or otherwise protect users Facilities from the consequences of such activities. If reasonably necessary, the City may require user to remove or power down any Attachments during the work.

Sherman's argument is unavailing because, as the district court noted, the city outright removed, rather than "commence[d] work on," the streetlights. Nor does this agreement address ExteNet's financial obligations when a city outright removes a structure with an attachment.

costs of relocating the SWFs had not been incurred when the parties moved for summary judgment. We conclude that Sherman forfeited this issue by failing to raise it to the district court after ExteNet requested prejudgment interest in its summary-judgment submissions, including through a proposed order that provided for the calculation of prejudgment interest from October 12, 2021. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.”) (quotation omitted)).

DECISION

Because Sherman, a private party, engaged in a private development project on its own initiative that required the relocation of ExteNet’s SWFs, Sherman must bear the costs of relocating these SWFs.

Affirmed.