

SC No. 88475

IN THE MISSOURI SUPREME COURT

**STATE OF MISSOURI ex rel.
CITY OF BLUE SPRINGS, MISSOURI,**

Relator,

vs.

**THE HONORABLE W. STEPHEN NIXON,
Circuit Court Judge,**

Respondent.

PETITION FOR WRIT OF PROHIBITION

**Sixteenth Judicial Circuit
The Honorable W. Stephen Nixon
No. 04CV212577**

RELATOR'S REPLY BRIEF

James H. Ensz	MO# 23465
Brandon D. Mizner	MO# 46515
Matthew J. Gist	MO# 54732
ENSZ & JESTER, P.C.	
2121 City Center Square	
1100 Main Street	
Kansas City, Missouri 64105-5181	
Telephone: (816) 474-8010	
Facsimile: (816) 471-7910	
ATTORNEYS FOR DEFENDANT/RELATOR	
CITY OF BLUE SPRINGS, MISSOURI	

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES.....iii

ARGUMENT..... 1

 I. Respondent has conceded there is no negligence claim against
 Blue Springs. 1

 II. Relator Blue Springs is entitled to an order prohibiting
 Respondent from taking any further action other than granting
 Blue Springs’ Motion for Summary Judgment on the inverse
 condemnation claim because Blue Springs took no affirmative
 act to inversely condemn the Stevens’ property in that voting to
 approve a plat submitted by a private property owner is not an
 affirmative act that inversely condemns a subsequent purchaser’s
 property rights. 1

 A. The developer’s plat complied with the City’s Unified
 Development Code and Blue Springs had to approve it. 3

 B. The Stevens could have ascertained that water runs
 downhill..... 5

 C. Inverse condemnation is different than a constitution
 taking..... 7

III. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs’ Motion for Summary Judgment on the inverse condemnation claim because the Stevens had no property interest that could be taken in that the vote to approve the plat pre-dated any property interests the Stevens had and thus they had no property interest that could be inversely condemned.....	8
IV. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs’ Motion for Summary Judgment on the claim for equitable relief because a city has the right to condemn property subject only to paying for the value of the property taken in that an individual citizen cannot compel a public entity to condemn the property of other citizens instead.	9
CONCLUSION	10
CERTIFICATE OF WORD PROCESSING PROGRAM.....	12
CERTIFICATE OF COMPLIANCE	12
CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES

CASES

<i>Carr v. Anding</i> , 793 S.W.2d 148, 150 (Mo. App. E.D. 1990)	5
<i>Harris v. Kansas City</i> , 759 S.W.2d 236, 238 (Mo. App. W.D. 1988)	4
<i>Jordan v. Willens</i> , 937 S.W.2d 291, 294 (Mo. App. W.D. 1996)	6
<i>Moses v. County of Jefferson</i> , 910 S.W.2d 735, 736 (Mo. App. E.D. 1995)	4
<i>State ex rel. Schaefer v. Cleveland</i> , 847 S.W.2d 867, 873 (Mo. App. E.D. 1992)	3
<i>Taylor v. Klund</i> , 739 S.W.2d 592 (Mo. App. E.D. 1987)	4
<i>Westside Development Co. v. Weatherby Lake</i> , 935 S.W.2d 634, 639 (Mo. App. W.D. 1996)	3
<i>Williamson County Regional Planning Comm'n. v. Hamilton Bank</i> , 473 U.S. 172, 194-96, 105 S. Ct. 3108, 87 L. Ed. 2d 127 (1985)	7

ARGUMENT

Respondent has conceded there is no negligence claim against Relator Blue Springs. Unfortunately, Respondent argues that the same facts can support a separate claim against Blue Springs simply because it has been titled inverse condemnation. But the title given to this claim is irrelevant. Instead, the factual basis of the inverse condemnation claim rests entirely on the act of approving a plat. The vote to approve a plat did nothing to take the Stevens' property. Especially when the Stevens had no property interest of any kind at the time of the vote. Even if inverse condemnation had occurred, it cannot be enjoined because a city has the right to take property subject only to paying reasonable compensation. In any event, there was no affirmative act that inversely condemned the Stevens' property and summary judgment should be granted in favor of Blue Springs.

I. Respondent has conceded there is no negligence claim against Blue Springs.

Respondent has conceded the Stevens do not have a claim against Blue Springs for negligence. [Respondent's Brief at 3-4]. Thus, Blue Springs will not address this issue any further.

II. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the inverse condemnation claim because Blue Springs took no affirmative act to inversely condemn the Stevens' property in that voting to

approve a plat submitted by a private property owner is not an affirmative act that inversely condemns a subsequent purchaser's property rights.

The Stevens cannot bring a claim against Blue Springs for inverse condemnation. All Blue Springs did was approve the plat submitted to it by Damar Development, Inc. ("Damar") and Markirk Construction ("Markirk"). In making that decision, Blue Springs looks to see if the plat complies with the city ordinances – the Unified Development Code. If it complies then it is approved. The Stevens seem to contend that this approval process somehow transforms Blue Springs into an insurer of everything that could subsequently go wrong on the plat property. But a city cannot guarantee a development will be perfect just because the city has no legal reason to prohibit the development.

Blue Springs did not inversely condemn the Stevens' property when Blue Springs determined the developer's plat complied with Blue Springs' Unified Development Code. Moreover, the Stevens did not even own any property that could be condemned at the time of plat approval. Further, all the Stevens had to know in order to ascertain that water would run through their back yard when it rains is that water runs down hill, which they admittedly knew. In fact, the Stevens allegedly bargained with Markirk for better drainage as part of the purchase of their lot. Thus, the Stevens knew exactly what they were buying and Blue Springs has taken nothing from them.

A. The developer's plat complied with the City's Unified Development Code and Blue Springs had to approve it.

Respondent makes a point of the fact that the developer's plat "complied with the Uniform [sic] Development Code." [Respondent's Brief at 2]. Given this, it is hardly surprising that Blue Springs approved the developer's plat. In fact, failure to approve a plat that complies with a city's ordinances provides a developer a compelling argument against a city. For example, once it is "determined that a preliminary plat meets the requirements in the statutes and any applicable ordinances, the Board has no discretion to refuse to approve the proposed plat." *Westside Development Co. v. Weatherby Lake*, 935 S.W.2d 634, 639 (Mo. App. W.D. 1996) citing *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867, 873 (Mo. App. E.D. 1992). Respondent certainly does not argue that the plat failed to comply with the Unified Development Code in any way. Thus, Blue Springs had no alternative other than approving the developer's plat.

Given that Blue Springs had to approve the plat in this case then it seems incredibly unfair to say that Blue Springs is liable for all harm that might flow from plat approval. Indeed, it strains the limits of reason to say Blue Springs inversely condemned the Stevens' property when the Stevens had no property rights whatsoever at the time Blue Springs approved the developer's plat.

Respondent makes the completely unsupported argument that, "the City, through its engineers, must make sure that adequate storm water drainage is designed into all development to prevent flooding." [Respondent's Brief at 5]. There is absolutely no legal support for this overwhelming duty Respondent would foist upon Blue Springs and

Respondent cites none. Instead, Missouri law is clear that public entities are not liable for governmental actions. *See Taylor v. Klund*, 739 S.W.2d 592 (Mo. App. E.D. 1987)(decisions affecting a safe school environment are a purely governmental function). “Municipalities are, in general, not liable for torts arising out of the performance of governmental functions.” *Harris v. Kansas City*, 759 S.W.2d 236, 238 (Mo. App. W.D. 1988). Respondent’s argument, at its core, seems to be that Blue Springs was somehow negligent in enacting its ordinances governing plats. But Blue Springs has sovereign immunity from claims that it negligently enacted an ordinance.

Respondent complains Blue Springs’ staff “failed to recommend an easement to handle the surface water runoff.” [Respondent’s Brief at 6]. But a public entity “enjoys sovereign immunity against claims for the negligence of its employees.” *Moses v. County of Jefferson*, 910 S.W.2d 735, 736 (Mo. App. E.D. 1995). Further, the Missouri courts prevent cities from taking unnecessary easements. As discussed in Relator’s Brief, requiring exactions such as the unnecessary dedication of property may well constitute inverse condemnation of the developer’s property. [Relator’s Brief at 25]. Again, it seems incredibly unfair to say that anything less than a perfect balance of interests between a developer and an ultimate purchaser of property means a city must have inversely condemned the property of one or the other. In fact, this is not the law. Cities have no duty to guarantee rain water will never run through a citizen’s back yard. [Relator’s Brief at 26-27]. Keep in mind that rain water running through the Stevens’ back yard is the only alleged damage in this case.

It is important to keep this claim in perspective. The rain water that runs through the Stevens' back yard has never entered their house. And despite the imposing engineering terms such as surface water runoff that might be used to describe this, this is simply rain water that falls on a dozen residential lots uphill from the Stevens' lot that passes through the Stevens' back yard on its way to the next lot. There is no drainage ditch that this water flows through. Instead, it is the natural lay of the land. [Relator's Brief at 3-5]. This same thing happens to every lot in Missouri that is located on the side of a hill. Accordingly, the Stevens simply do not have a claim for inverse condemnation and summary judgment should be granted for Blue Springs.

B. The Stevens could have ascertained that water runs downhill.

Respondent argues that Blue Springs first inversely condemned the Stevens' property the first time it rained after the Stevens purchased their lot. [Respondent's Brief at 8-9]. Respondent's position is it could not be ascertained that rain water might run downhill through the Stevens' back yard until the Stevens actually watched it happen. [Respondent's Brief at 9]. Respondent's position is exactly the opposite of what the law states. "Damage is sustained or capable of ascertainment whenever it is such that it *can* be discovered or made known." *Carr v. Anding*, 793 S.W.2d 148, 150 (Mo. App. E.D. 1990)(citations omitted)(emphasis in original). The courts usually look at ascertainability in the context of the statute of limitations. "If the fact of damage is ascertainable, then the statute of limitations begins to run even if the precise amount of damage is not ascertainable or if some additional damages may occur in the future." *Jordan v. Willens*,

937 S.W.2d 291, 294 (Mo. App. W.D. 1996). Here, this is not a statute of limitations issue and the argument can be made that it does not matter if the Stevens could ascertain the alleged damage or not. Instead, the question is more appropriately whether Blue Springs' alleged act of approving the plat occurred before the Stevens purchased a lot. If so, then the alleged inverse condemnation occurred before the Stevens had a property interest and that inverse condemnation cannot pass to a subsequent grantee. [Respondent's Brief at 29-30].

In any event, the Stevens actually knew that rain water would be running downhill through their back yard. Shawn Stevens admitted at his deposition that he has always known that water flows downhill. [Relator's Appendix at A103, 67:3-10]. Further, the Stevens' independent builder told them they would be exacerbating rain water drainage if they built a house with a walkout basement. [Relator's Appendix at A51, SOF ¶ 38]. All of this was known when the Stevens were "looking for a lot" and prior to purchase. [Relator's Appendix at A106, 81:3-6]. The Stevens' builder, Ed Rockwell, explained the water drainage situation to the Stevens prior to their purchasing the lot. Shawn Stevens admitted at his deposition that Ed Rockwell "expressed some concern about water drainage with regards to, as mentioned earlier, the lots around, the surrounding area. Thus prompted my second meeting with [developer] Kirk Jones ... to specifically address water flowing across my lot or any water drainage issues." [Relator's Appendix at A106, 81:14-82:1]. Thus, the fact that rain water would drain downhill across the Stevens' lot was always known to the Stevens.

In fact, the Stevens have a fraudulent misrepresentation claim against Damar, Markirk and Kirk Jones for expressly representing there would not be any storm water drainage on their lot. [Relator's Appendix at A9, ¶ 43-54]. The Stevens could not have such a claim unless it was ascertainable to the developer that rain water would run downhill across the lot. It is immaterial to the claim against Blue Springs whether the Stevens' decision was based on the Stevens' poor judgment or if the developer misled them. What matters is that the condition existed before the Stevens purchased the lot. Thus, Blue Springs did not take anything from the Stevens.

C. Inverse condemnation is different than a constitution taking.

Respondent cites two cases from the United States Supreme Court in support of the argument that a constitutional taking has occurred. [Respondent's Brief at 7-8]. These cases have no applicability to the Stevens' inverse condemnation claim. Inverse condemnation is a state remedy. Thus, the Court does not judge this case by the United States Constitution and the cases cited by Respondent have no bearing on the outcome of this case. The United States Supreme Court has held a plaintiff cannot bring a constitutional taking claim when a state remedy such as inverse condemnation exists. *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172, 194-96, 105 S. Ct. 3108, 87 L. Ed. 2d 127 (1985)(property owner's claim was not ripe because property owner had not used state inverse condemnation procedure) *superseded by statute on another issue*. Thus, the cases cited by Respondent have no application to this inverse condemnation claim.

Even if these cases were considered, they are both completely different than the present situation. In *Loretto*, the public entity authorized a cable company to install wiring on private property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Here, Blue Springs has not authorized anyone to install anything on the Stevens' property. Instead, all Blue Springs did was let the prior owner develop this property exactly how it requested. The Respondent's position is not helped by the citation to *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). In *Causby*, the government was engaged in low altitude flights over property. *Id.* at 258. Here, Blue Springs is not operating aircraft or anything else that interferes with the Stevens' use of their property.

III. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the inverse condemnation claim because the Stevens had no property interest that could be taken in that the vote to approve the plat pre-dated any property interests the Stevens had and thus they had no property interest that could be inversely condemned.

Respondent acknowledges that the Stevens had no property interest until after Blue Springs approved the developer's plat. [Respondent's Brief at 8]. Respondent also acknowledges that a claim for inverse condemnation cannot pass to a subsequent grantee. [Respondent's Brief at 9]. If Blue Springs took this property then it would have to be when Blue Springs approved the developer's plat. After all, Blue Springs cannot control

when it rains. But it is impossible for Blue Springs to take property by doing exactly what the property owner (the developer) asks it to do – approve the plat. Thus, there was simply no taking in the first instance.

This is not a case where the Stevens already owned property and the adjoining property was developed after the Stevens purchased their property. In that situation a property owner might make a colorable argument that they were there first and the city allowed their neighbor to develop property in a way that hurt a pre-existing property interest. But here the Stevens could never purchase an individual lot until after the property was platted. Further, the plat would have to be recorded as a public record before the Stevens purchased their individual lot. The Stevens had to know they were buying one lot in a residential subdivision. Thus, the Stevens bought their property subject to the conditions that existed in the approved plat. Although the Stevens may not like those conditions now, there is certainly no property right that has been taken from them.

IV. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment on the claim for equitable relief because a city has the right to condemn property subject only to paying for the value of the property taken in that an individual citizen cannot compel a public entity to condemn the property of other citizens instead.

Respondent's argument on this point is premised on the fundamentally flawed misconception that Blue Springs is somehow operating a storm drain in the Stevens' back yard. There is no such storm drain. [Relator's Brief at 4-5]. These are simply a dozen back yards that rain water runs through on its way downhill. There is no physical city structure and absolutely nothing to be maintained. Instead, the Stevens want Blue Springs to go into their back yard (and their neighbors' back yards) and build a structure. [Relator's Appendix at A21-22 and A65, 39:2-24]. If this absence of Blue Springs' property were somehow construed as inverse condemnation then the Missouri Constitution certainly allows Blue Springs to inversely condemn the Stevens' property. [Relator's Brief at 27]. The Stevens do not have the privilege of telling a public entity it may not condemn their property, even if that means the Stevens have permanently lost the use of that property. Thus, summary judgment should be granted on the equitable claim.

CONCLUSION

Relator Blue Springs seeks an order prohibiting the Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment. Respondent has conceded Blue Springs is entitled to summary judgment on the negligence claim. Blue Springs is also entitled to summary judgment on the inverse condemnation claim because Blue Springs' only act was voting to approve a plat. Further, the Stevens owned no property when the plat was approved and had no property right that could be taken. Finally, the Stevens cannot bring an equitable claim to enjoin inverse condemnation because the Missouri Constitution grants Blue Springs the right to

condemn property. Accordingly, Respondent should be ordered to grant summary judgment for Blue Springs.

Respectfully submitted,

ENSZ & JESTER, P.C.

James H. Ensz	MO# 23465
Brandon D. Mizner	MO# 46515
Matthew J. Gist	MO# 54732

2121 City Center Square
1100 Main Street
Kansas City, Missouri 64105-5181
Telephone: (816) 474-8010
Facsimile: (816) 471-7910
ATTORNEYS FOR DEFENDANT/RELATOR
CITY OF BLUE SPRINGS, MISSOURI

CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that Relator’s Reply Brief was prepared on a computer, using Microsoft Word. A diskette containing the full text of Relator’s Reply Brief in Word/PDF format is provided herewith, and has been scanned for viruses and is believed to be virus-free.

ATTORNEYS FOR DEFENDANT/RELATOR
CITY OF BLUE SPRINGS, MISSOURI

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06(b). According to the word count of the word processing system used to prepare the Reply Brief, the Reply Brief contains 2,669 words.

ATTORNEYS FOR DEFENDANT/RELATOR
CITY OF BLUE SPRINGS, MISSOURI

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was mailed this 25th day of October, 2007, first class U.S. mail, postage prepaid, to the following:

The Honorable W. Stephen Nixon
Division 5, Second Floor
308 W. Kansas
Independence, MO 64050
Telephone: (816) 881-4405
Facsimile: (816) 881-4692
RESPONDENT

Jonathan A. Bortnick, Esq.
Bortnick, McKeon, Sakoulas & Schanker
1222 McGee
Kansas City, MO 64106
Telephone: (816) 221-2470
Facsimile: (816) 221-5706
ATTORNEYS FOR PLAINTIFFS

Beverly Weber, Esq.
Martin, Leigh, Laws & Fritzlen, PC
400 Peck's Plaza
1044 Main Street
Kansas City, MO 64105
Telephone: (816) 221-1430
Facsimile: (816) 221-1044
ATTORNEYS FOR DEFENDANT
WHITEHEAD CONSULTANTS
d/b/a WHITEHEAD ASSOCIATES

David R. Buchanan, Esq.
Michael Arnone, Esq.
Brown & James, PC
1900 City Center Square
1100 Main Street
Kansas City, MO 64105
Telephone: (816) 472-0800
Facsimile: (816) 421-1183
ATTORNEYS FOR DEFENDANTS
MARKIRK CONSTRUCTION, INC. and
KIRK JONES

Joseph S. Gall, Esq.
Humphrey, Farrington & McClain, P.C.
221 W. Lexington, Suite 400
P.O. Box 900
Independence, MO 64051
Telephone: (816) 836-5050
Facsimile: (816) 836-8966
ATTORNEYS FOR DEFENDANT
DAMAR DEVELOPMENT, INC.

ATTORNEYS FOR DEFENDANT/RELATOR
CITY OF BLUE SPRINGS, MISSOURI