

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

RESPONDENT'S BRIEF

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ADDITIONAL STATEMENT OF FACTS

Plaintiffs petition sets forth the basis of their inverse condemnation claim that the City has taken a flowage easement over their lot.¹ John Harshbarger was the City Engineer for the City of Blue Springs from April or May 1998 through July 2001. He reviewed the preliminary and final plat of the 18th plat of StoneCreek Subdivision to determine if it was in compliance with the Unified Development Code.² His duties as City Engineer included review of plats to determine whether or not the storm water sewers were in compliance with the Unified Development Code.³ Furthermore, he reviewed improvement plans to determine general compliance as far as establishing drainage areas and the conveyance of the storm

¹Relator's Appendix at 20 c 104(d)

²Respondent's Appendix at 3-4 (Harshbarger Depo, Pages 1-10)

³Respondent's Appendix at 4 (Harshbarger Depo, Page 11)

water in terms of how it was collected through a development.⁴ Mr. Harshbarger worked on the commercial development to the east of the 18th plat.⁵ Storm water runoff from the 17th plat discharges into the 18th plat.^{6,7}

⁴Respondent's Appendix at 5 (Harshbarger Depo, Page 16)

⁵Respondent's Appendix at 5-6 (Harshbarger Depo, Pages 16-17)

⁶Respondent's Appendix at 6 (Harshbarger Depo, Page 17)

⁷Respondent's Appendix at 15 (Harshbarger Depo, Page 56)

The Uniform Development Code Chapter 406 states that the City is to encourage the developer to locate and design streets, blocks, lots, parks and open spaces in such a manner as to reduce the velocity of overland flow; allow the maximum opportunity for infiltration of storm water into the ground; and to preserve existing streams, channels, detention basins and flood plain areas as open space. Furthermore, Chapter 406 of the UDC requires the City to secure adequate provisions for water, drainage [and] sanitary sewer facilities based upon city, state, and federal requirements.⁸ Mr. Harshbarger signed the final plat indicating that it complied with the Uniform Development Code.⁹

He states that part of his review process included determining storm water runoff. He believes that prior to final approval of the 18th plat, he determined that the storm water surface routing went through the Stevens' backyard as well as their neighbors backyards. He does not have an opinion on whether or not prior to approval of the final plat an easement should have been taken for the same surface water runoff routing. Part of his duty as an engineer is to make recommendations on the plat as to where an easement should be taken for surface water runoff.¹⁰

⁸Relator's Appendix, at 17, c89(a)(b)

⁹Respondent's Appendix at 17 (Harshbarger Depo, Page 21)

¹⁰Respondent's Appendix at 16 (Harshbarger Depo, Page 57)

Mr. Harshbarger acknowledged under questioning by counsel for the City of Blue Springs that prior to approval of any plat, the City Engineer would address any concerns he had concerning the plat to the developer or their engineers. The developer would have to satisfy the City Engineer's concerns to proceed with approval of the plat.¹¹ Kirk Jones was the developer of the 18th plat. He was unaware of any easements taken to deal with overland flow in the 18th plat. He testified that he would rely on the City to determine where easements would occur on the plat.¹²

ARGUMENT

I. Relator Blue Springs is entitled to an order prohibiting Respondent from taking any further action other than granting Blue Springs' Motion for Summary Judgment because Blue Springs has sovereign immunity from negligence claims in that Blue Springs does not own any property contributing to the alleged rain water damage.

A. Argument

Respondent acknowledges after review of the case law and evidence that negligence is not a proper vehicle to address damages against the City of Blue Springs, Missouri, in this case. Inverse condemnation is the proper remedy as further set forth in the argument portion

¹¹Respondent's Appendix at 18-19 (Harshberger Depo, Pages 68, 69)

¹²Respondent's Appendix at 33 (Jones Depo, Page 32).

of this brief. Respondent makes no argument with respect to Point One of Relator's Brief.

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 because Blue Springs has sovereign immunity from negligence claims in that Blue Springs has not waived sovereign immunity by purchasing insurance and this issue was never raised by Stevens in the summary judgment briefing.

A. Argument

Respondent acknowledges after review of the case law and evidence that negligence is not a proper vehicle to address damages against the City of Blue Springs, Missouri, in this case. Inverse condemnation is the proper remedy as further set forth in the argument portion of this brief. Respondent makes no argument with respect to Point Two of Relator's Brief.

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 because Blue Springs has sovereign immunity from negligence claims in that the Stevens claim is for property damage only and the exclusive remedy for property damage caused by a public entity is inverse condemnation.

A. Argument

Respondent acknowledges after review of the case law and evidence that negligence is not a proper vehicle to address damages against the City of Blue Springs, Missouri, in this case. Inverse condemnation is the proper remedy as further set forth in the argument portion of this brief. Respondent makes no argument with respect to Point Three of Relator's Brief.

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 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 property owner is not an affirmative act that inversely condemns a subsequent purchaser's property rights.

A. Argument

Relator seeks to frame Plaintiff's claim for inverse condemnation as based solely on the City's action in voting to approve the plat. Furthermore, they claim that their role in approval of the 18th plat was solely to allow the property owner to develop it's own private property. (Relator's Brief, Page 24). The City argues that private developers should be allowed to develop their property as they wish, within reason, and if the resulting development is less than perfect, then the market will reflect such imperfections. (Relator's Brief, Page 25). However, the reality is that the City, through its engineers, must make sure that adequate storm water drainage is designed into all development to prevent flooding.

The City Engineer, John Harshbarger, detailed in his testimony some of the involvement of the City in development of the 18th plat. The City does not sit back and allow developers to do as they wish. A detailed review process takes place with the City Engineer. The process includes review of the preliminary and final plats and determination of easements for utilities and drainage. Specifically, John Harshbarger reviewed and

determined that the overland routing of water flow would travel through the Stevens' backyard.

Mr. Harsbarger failed to recommend an easement to handle the surface water runoff. The storm water surface route drains through contiguous plats. The uphill 17th plat with its commercial property drains water through the 18th plat including Mr. Stevens' yard and his neighbors yards. By necessity, the City engineer must determine the overland flow of surface water through contiguous subdivisions to ensure proper drainage throughout the City, both residential and commercial.

Kirk Jones, the developer of the 18th plat, testified that he relied on the City to determine where easements were necessary in the plat. John Harshbarger testified that his role included the determination of placement of easements. Clearly, the City in this case not only voted to approve the plat, but they actively participated in the design which routed storm water runoff from the 17th and 18th plats through the plaintiffs' backyard.

The City's intentional design and approval of the drainage route through Plaintiffs' backyard constitutes an affirmative act which they must be held accountable. Relator would have this Court believe that municipalities owe their residents no duty when determining how and where surface water runoff will drain across the City.

The Uniform Development Code requires adequate provisions to handle storm water drainage. The City's argument taken a step further would allow developers to do as they wish, which may lead to the cheapest and least effective system to drain storm water. Water would simply be drained through residential and commercial areas according to the forces of

gravity and areas where flooding occurred would be worth less money.

Although plaintiffs have clearly demonstrated that a taking has occurred due to the purposeful actions of the City as set forth above, government approval or regulation can form the basis of a claim for inverse condemnation. A physical entry into plaintiffs' property by the City is not necessary. The seminal case of *Loretto vs. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) underscores Plaintiffs' position. In *Loretto*, the Supreme Court found that a physical taking occurred as a result of a New York statute that permitted cable television companies to install their facilities on roof tops without payment. *Id.* at 438. Based on the authority of the state statute and a City franchise license, a cable company installed very small equipment onto the side and top of Plaintiff *Loretto's* property. Although it was not the government which installed and operated the cable equipment on *Loretto's* building, the Supreme Court nonetheless found that a physical taking occurred, holding the government cannot authorize permanent occupation of property by a third party. *Id.* at 440. *Loretta* did not challenge the regulation itself or allege the government physically invaded her property, but the regulation and actions of the government led to the physical invasion.

Similarly, in the instant matter, the City reviewed and approved the infrastructure improvements in the plat pursuant to its own regulations that authorize the construction of such improvements, that, in turn, caused the flooding of storm water on the Plaintiffs' property. The City authorized the occupation of Plaintiffs' property by approving plans that route storm water through their backyard without an easement. The City's actions, and lack thereof, to fix the flooding problems have caused the physical invasion of Plaintiffs' property.

Finally, the case of *U.S. vs. Causby*, 328 U.S. 256 (1946) enforces the notion that a physical invasion of property is not necessary for a case in eminent domain. Noise and disturbances caused by overhead flights from airplanes approaching a runway were sufficient to constitute a taking and that the government had taken an easement over the property. *Id.* at 259, 268.

V. 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 predated any property interest the Stevens had and thus they had no property that could be inversely condemned.

A. Argument

Defendant's argument concerning lack of standing is inapplicable in the instant case. Although plaintiffs did not purchase the property in question until after the City gave approval to the development of StoneCreek, the taking did not occur until the damages from storm water crossing plaintiffs' property were ascertainable. Defendants had concerns about drainage on the property prior to the completion of the subdivision but were assured by the developer that there would be no problem when the subdivision was completed.

Plaintiffs were not aware of the taking until their house was built and the subdivision was completed and they witnessed a storm water deluge after a rain. Every time it rains, the

City takes plaintiffs' property. Plaintiffs did not purchase the property at a discounted price due to a perceived drainage problem. They were never told that the surface water route was drained across their land. Although damages suffered as a result of a taking do not pass to subsequent grantees of land, the taking in this case was not ascertainable until after Plaintiffs possession and construction of their residence. A cause of action for inverse condemnation occurs when the damages suffered as a result of the condemnation become ascertainable. *Crede vs. City of Oak Grove*, 979 S.W.2d 529 (Mo. App. W.D. 1988). The damages in this case were not ascertainable until after Plaintiff bought his property and, therefore, they have standing.

VI. 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 the 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.

A. Argument

Plaintiffs are requesting the City to correct its improper maintenance and operation of the infrastructure improvements. Specifically, the City maintains the drainage way through Plaintiffs' property. See *McIntosh vs. City of Joplin*, 486 S.W.2d 287 (Mo. App. 1972) (Court directed City to institute proceedings to appropriate private sewer system or to remove connections to the system). The City currently owns and controls the infrastructure

improvements in the 18th plat of StoneCreek and, as such, is responsible to Plaintiffs. See *O Neil, for and on behalf of O Neil vs. ADM Growmark River Systems, Inc.*, 871 S.W.2d 54 (Mo. App. 1993). (Municipality is responsible to repair highways and street infrastructure).

Although Plaintiffs seek monetary damages against the City for inverse condemnation, they have no adequate remedy at law for future flooding and damage and destruction to their property without injunctive relief. Furthermore, should the Court determine that Plaintiffs have no legal cause of action against the City for monetary damages, the only relief available to Plaintiffs would be an injunction.

CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that Respondent's Brief was prepared on a computer, using Word Perfect. A diskette containing the full text of Respondent's Brief and Appendix Index in Word Perfect format is provided herewith, and has been scanned for viruses and is believed to be virus-free.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this 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 Brief, the Brief contains 3,231 words.

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

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