

SUPREME COURT OF IOWA

**Kingsway Cathedral v. Iowa Department of Transportation and City
of Des Moines**

No. 14 / 03-2066 (Iowa Mar. 10, 2006) · No. No. 14 / 03-2066 · Decided March 10, 2006

OPINION

PER CURIAM.

IN THE SUPREME COURT OF IOWA No. 14 / 03-2066 Filed March 10, 2006 KINGSWAY CATHEDRAL, Appellee, vs. IOWA DEPARTMENT OF TRANSPORTATION and CITY OF DES MOINES, IOWA, Appellants. Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge. Interlocutory appeal of district court’s ruling denying defendants’ motions to dismiss petition for inverse condemnation.

REVERSED AND CASE REMANDED. Mark Godwin, Deputy City Attorney, Des Moines, for appellant City of Des Moines. Stephen D. Hardy and Lisa R. Perdue of Grefe & Sidney, P.L.C., Des Moines, for appellant Iowa Department of Transportation. Theodore F. Sporer and Glenna K. Frank of Sporer & Ilic, P.C., Des Moines, for appellee. LAVORATO, Chief Justice.

The defendants, the Iowa Department of Transportation (IDOT) and the City of Des Moines (City), sought interlocutory appeal from a district court ruling denying their motions to dismiss a recasted petition filed by the plaintiff, Kingsway Cathedral (Kingsway), for inverse condemnation. Kingsway alleged that work on two construction projects over which the IDOT and the City have jurisdiction and control produced vibrations that caused damage to Kingsway’s church building resulting in a “taking” under the Federal and Iowa Constitutions.

We granted the appeal. Because the recasted petition on its face demonstrates that there was no taking, we reverse the district court ruling and remand for an order granting the defendants’ motions to dismiss the petition.

I. Scope of Review. Iowa Rule of Civil Procedure 1.421(1)(f) governs motions to dismiss for failure to state a claim upon which any relief may be granted. Our review of a district court ruling on a motion to dismiss is for correction of errors at law. *Stotts v. Eveleth*, 688 N.W.2d 803, 807 (Iowa 2004). A motion to dismiss a petition should only be granted if there is no state of facts conceivable under which a plaintiff might show a right of recovery.

Smith v. Smith, 513 N.W.2d 728, 730 (Iowa 1994). A motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions. *Bervid v. Iowa State Tax Comm’n*, 247 Iowa 1333, 1339, 78 N.W.2d 812, 816 (1956). II. Facts and Conclusion.

On April 28, 2003, Kingsway filed a petition naming the IDOT and the City as defendants. Following the district court's ruling granting Kingsway's motion to amend, Kingsway filed a recasted petition. The recasted petition alleges the following facts that we take as true for the purposes of determining whether the district court correctly overruled the motions to dismiss.

Kingsway owns a church building and property located at 900 18th Street in Des Moines, Iowa. The IDOT is an agency of the State of Iowa. The City is a municipal corporation in Polk County, Iowa. The IDOT and the State of Iowa, by and through the IDOT, have jurisdiction and control over the I-235 project in the vicinity of Kingsway.

The City and the State of Iowa, by and through the City, have jurisdiction and control over the Martin Luther King Jr. Parkway project in the vicinity of Kingsway. Work on the two projects produced vibrations that have caused substantial damage to Kingsway's building.

Because of the damage, the City notified Kingsway that the condition of the building was unsafe, creating a hazard that threatened the health and safety of the public. The City further notified Kingsway to vacate immediately all portions of the building and that the building was to remain unoccupied unless repaired.

The fair market value of the building before the damage was \$580,000. To restore the building would cost at least \$3.9 million, and it is not economically feasible to restore it. Kingsway has permanently lost the substantial use and enjoyment of the building.

The IDOT and the City have refused Kingsway's demand to either repair and restore the building or condemn the property. The recasted petition concludes that the actions of the IDOT and the City constitute a taking under the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution, a conclusion that is not admitted by the filing of the motions to dismiss.

The recasted petition requests the court to enter an order requiring the defendants to institute proceedings to condemn the church building. III. Issue. The issue on appeal is whether the district court correctly overruled the defendants' motions to dismiss. That question turns on whether there is any conceivable state of facts under which Kingsway might show a right of recovery.

Ordinarily, under our notice pleading rule, only a rare case will not survive a motion to dismiss for failure to state a claim upon which any relief can be granted. *Smith*, 513 N.W.2d at 730. However, here, Kingsway has alleged enough facts to enable us to conclude that Kingsway has failed to state such a claim. IV. Analysis.

The defendants contend, as they did in the district court, that construction damages like Kingsway has suffered do not rise to the level of constitutional takings. In support of this contention, the

defendants argue construction projects are temporary in nature, while the intrusions that constitute takings are permanent in nature.

The Fifth Amendment to the Federal Constitution provides in relevant part that “[n]o person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Fourteenth Amendment to the Federal Constitution makes the Fifth Amendment applicable to the states and their political subdivisions.

Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233-34, 17 S. Ct. 581, 583, 41 L. Ed. 979, 983-84 (1897). Article I, section 18 of the Iowa Constitution similarly provides in relevant part that “[p]rivate property shall not be taken for public use without just compensation.” Because of this similarity regarding takings, we consider federal cases interpreting the federal provision persuasive in our interpretation of the state provision.

Harms v. City of Sibley, 702 N.W.2d 91, 97 (Iowa 2005). Such cases however are not binding on us regarding our interpretation of the state provision. *Id.* Kingsway has not asserted a basis to distinguish the protections afforded by the Iowa Constitution from those afforded by the Federal Constitution under the facts of this case. Nor have we found such a basis.

For those reasons, our analysis applies equally to both the state and federal grounds. See *id.* Kingsway’s takings claim is grounded on inverse condemnation. Inverse condemnation is “ ‘a generic description applicable to all actions in which a property owner, in the absence of a formal condemnation proceeding, seeks to recover from a governmental entity for the appropriation of his property interest.’ ” *Id.* (citation omitted).

We employ the following framework of analysis in determining whether a taking has occurred: (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been “taken” by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?

Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 315 (Iowa 1998). We noted in *Bormann* that “[p]roperty for just compensation purposes means ‘the group of rights inhering in the citizens’ relation to the physical thing, as the right to possess, use and dispose of it.’ ” *Id.* at 315.

We further noted that state law determines what constitutes a property right. *Id.* The recasted petition alleges that Kingsway is the owner of the building that was damaged. The petition therefore alleges a property interest for just compensation purposes.

The critical question, however, is whether that property interest has been taken. A taking, we said in *Bormann*, “ ‘does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.’ ” *Id.* at 321 (citation omitted).

In *Bormann*, we recognized the difference between a regulatory taking and one in which the government entity acting in an enterprise capacity has appropriated private property: “The term ‘regulatory taking’ refers to situations in which the government exercises its ‘police powers’ to restrict the use of land or other forms of property. This is often accomplished through implementation of land use planning, zoning and building codes.

In contrast, a governmental entity exercises its eminent domain power or acts in an ‘enterprise capacity, where it takes unto itself private resources and uses them for the common good.’ Where the private landowner will not sell the land, the government entity seeks condemnation of the property and pays a fair purchase price to be determined in court.

On the other hand, an inverse condemnation claim is sought by a landowner when the government fails to seek a condemnation action in court.” *Id.* at 317 (citation omitted). Here, the recasted petition alleges the defendants were acting in an enterprise capacity when the damage to the building occurred from the vibrations of the two projects.

In either case—regulatory taking or enterprise capacity taking—the government must compensate the owner “without any further inquiry into additional factors” when the action of the governmental entity results in a permanent physical invasion of the property. *Id.* at 316. *Loretto v. Teleprompter Manhattan CATV Corp.* is an example of a regulatory taking. 458 U.S. 419, 102 S. Ct.

3164, 73 L. Ed. 2d 868 (1982). In that case, a state law provided that a landlord must permit a cable television company to install its cable facilities upon the landlord’s property. The Court held that a permanent physical invasion authorized by state law constituted a taking. *Id.* at 421, 432 n.9, 102 S. Ct. at 3168, 3174 n.9, 73 L. Ed. 2d at 873, 880 n.9.

United States v. Causby is an example of an enterprise capacity taking. 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). In *Causby*, the federal government permitted its airplanes to fly so low over the plaintiffs’ land, which adjoined a municipal airport leased by the federal government, as to deprive the plaintiffs of the use and enjoyment of their land for the purpose of raising chickens.

The Court held that such action constituted a taking. *Id.* at 265-67, 66 S. Ct. at 1068, 90 L. Ed. at 1212-13. “If some physical invasion is in fact demonstrated, there is no de minimis rule.” *Fitzgerald v. City of Iowa City*, 492 N.W.2d 659, 664 (Iowa 1992); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 812 (1992) (“[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasion].”).

What must be compensated is diminishment of the value of the land. *Fitzgerald*, 492 N.W.2d at 663. Such takings are referred to as “per se” takings. *Bormann*, 584 N.W.2d at 316. Whether a

taking has occurred is determined by the character of the invasion and not by the amount of damages. See, e.g., *Schaller v. State*, 537 N.W.2d 738, 743 (Iowa 1995).

For example, some acts done by government agencies that could be deemed nuisances and which affected but did not destroy or prevent all use of the affected property have been held to be takings under the Fifth Amendment to the Federal Constitution.

The continuance or permanency of the government action sufficient to support the finding of a creation of a servitude has been the determining factor for a finding of a taking. See *Causby*, 328 U.S. at 265-67, 66 S. Ct. at 1068, 90 L. Ed. at 1212-13 (holding that repeated flights of military planes so low as to destroy use of land for chicken farm constituted a servitude on the land requiring just compensation and diminution in value of property was the basis for compensation); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30, 43 S. Ct.

135, 136-37, 67 L. Ed. 287, 289-90 (1922) (holding that firing, and imminent threat of firing, of navy coastal guns over plaintiff's property imposed a servitude upon the plaintiff's land and thus amounted to a taking of some interest for public use). A servitude has been defined as "a right to the limited use of a piece of land or other immovable property without the possession of it." *Black's Law Dictionary* 1400 (8th ed.

2004). Servitudes include, among other things, easements. *Id.*; see *Causby*, 328 U.S. at 265-67, 66 S. Ct. at 1068, 90 L. Ed. at 1212-13; *Portsmouth Harbor*, 260 U.S. at 329-30, 43 S. Ct. at 136-37, 67 L. Ed. at 289-90. Absence of such continuance or permanency leaves the property owner with nothing but an action in tort. *Sullivan v. Massachusetts*, 142 N.E.2d 347, 352-53 (Mass.

1957) (holding that damages to petitioners' house resulting from rock blasting in construction of aqueduct for metropolitan water district provided no eminent domain remedy for taking and was nothing more than a tort).

In rejecting the inverse condemnation claim, the court in *Sullivan* said: Even though here the risk of injury by blasting to some property was necessary to the improvement and the possibility of injury to some property located on the rock stratum might have been foreseen, there was no deliberate act in respect of the petitioners' property, and no basis for inferring an actual intention to withdraw the property from their use for any length of time.

There was no act with known result from which, and the repetition of like acts thereafter, an implication of such intention could arise. There is no basis for a claim under [the state constitutional takings provision] that a servitude has been imposed on the petitioners' land. *Id.* at 353 (emphasis added) (citation omitted) (footnote omitted); accord *Ohio ex rel.*

Fejes v. City of Akron, 213 N.E.2d 353, 354 (Ohio 1966) (trial court sustained a demurrer (motion to dismiss) to a petition in which the plaintiff alleged that earth tremors caused by use of heavy

equipment by a municipality in nearby construction work damaged her residence and thereby constituted a taking; upholding ruling on appeal, court noted that it was apparent from the petition that “there was no direct or immediate physical contact with relator’s property in the construction work, but that vibrations of temporary duration originating off the property incident to the construction were responsible for the claimed damages”); *Arvo Van Alstyne, Inverse Condemnation: Unintended Physical Damage*, 20 Hastings L.J.

431, 478 (1969) (“In jurisdictions that recognize inverse liability only for a ‘taking,’ structural damage as the result of vibrations from heavy equipment (e.g., a pile driver) or from shock waves caused by blasting, ordinarily is held to be noncompensable.” (Footnotes omitted.)); cf. *Kelley v. Story County Sheriff*, 611 N.W.2d 475, 477, 482 (Iowa 2000) (holding that damage to private property that occurred when officers made forcible entry in order to execute an arrest warrant was in the nature of a tort rather than a permanent deprivation of property or creation of a permanent property interest and for that reason was not a taking).

A better understanding of the necessity for permanency of the invasion is found in this discussion of “consequential damages” in *Nichols on Eminent Domain*: “Consequential damage” has become a term of art in addressing an issue rather than a term of accurate definition. Whatever occurs to a remainder after a taking that factually would not have been likely to occur but for the taking, is logically in consequence of the taking.

Such a factual linkage does not always provide the right to a damage claim against the taking authority. The term “consequential damage” has justly been described as ambiguous, irrelevant, equivocal and a deterrent to any hope of a clear understanding of the issue at hand. It is often used as an exclusionary term, particularly in cases where flood follows a “taking” upon completion of the project.

A clearer understanding of the term is found by analyzing these “flooding” cases. When the flooding results from a sovereign project, the flooding has been held compensable if there is “a permanent condition of continual overflow” or a permanent “liability to intermittent but inevitably recurring overflows.” This is true even if substantial enjoyment remains in the owner, in which case there is a “partial instead of a total divesting.” If the invasion does not reach this level and is “but a temporary invasion of the land” and merely “the consequential result of or incidental to” the sovereign activities, the invasion is recoverable only upon principles of tort, not as a Fifth Amendment taking.

This is the only view where “consequential damages are generally not compensable.” 4A Julius L. Sackman, *Nichols on Eminent Domain* § 14.01[2], at 14-4 to 14-7 (rev. 3d ed. 2005) (footnotes omitted); accord *Dugan v. Rank*, 372 U.S. 609, 625-26, 83 S. Ct. 999, 1009, 10 L. Ed. 2d 15, 26-27 (1963) (characterizing government’s action of subordinating rights of riparian owners to beneficial use of waters of a river to uses of a water reclamation project, whenever the

government saw fit, as an imposition of such a servitude as constituting a taking); *Phelps v. Bd. of Supervisors*, 211 N.W.2d 274, 276 (Iowa 1973) (holding that the character of the invasion at issue was the increased flooding to plaintiff's land caused by a road construction project which flooding was certain and inevitable to occur).

Here, the recasted petition alleges that the damage to the building was caused by vibrations from the demolition and construction activities. We agree with the defendants that the only reasonable inference from this allegation is that the damage was done because of vibrations that were of a temporary nature. Obviously, the construction projects have a beginning and an end.

Unlike the invasion from continual overflow in the flooding cases, the vibrations will not reoccur once the construction activities have ceased. Therefore, no servitude results from these activities. In these circumstances, any damages resulting from the construction activities is nothing more than “ ‘the consequential result of or incidental to’ ” the defendants' activities.

See 4A Sackman, *Nichols on Eminent Domain* § 14.01[2], at 14-6 (citation omitted). Therefore, Kingsway's recovery, if any, must be based on tort and not on a constitutional taking. V. Disposition. The recasted petition on its face demonstrates that Kingsway's private property interest has not been taken for public use.

Therefore, we conclude there is no state of facts conceivable under which Kingsway might show a right of recovery based on a takings claim. Rather, Kingsway's recovery, if any, must be based on tort. Consequently, the district court erred in overruling the defendants' motions to dismiss.

We therefore reverse and remand the case to the district court for an order granting the defendants' motions to dismiss. REVERSED AND CASE REMANDED. [pic]