

IN THE CIRCUIT COURT OF COUNTY OF ST. LOUIS
STATE OF MISSOURI

DAVE LAMB and ERIN LAMB,)	
)	
Plaintiffs,)	
)	
v.)	Cause No. 18SL-CC04584
)	
BUILD-WORK PROPERTIES, LLC,)	Division: 18
KOEHNEMANN KONSTRUCTION, LLC)	
d/b/a K-BUILD, WORK HORSE CUSTOM)	
CONCRETE, LLC, DAN SMITH)	
PLUMBING, INC., STEPHEN C. HOSACK)	
d/b/a SC HOSACK PLUMBING AND)	
EXCAVATION, and CITY OF TOWN AND)	
COUNTRY, MISSOURI,)	
)	
Defendants.)	

**PLAINTIFFS’ RESPONSE TO DEFENDANT CITY OF TOWN AND COUNTRY’S
MOTION TO DISMISS PLAINTIFFS’ FIRST AMENDED PETITION**

COME NOW Plaintiffs Dave Lamb and Erin Lamb (“Plaintiffs”), and for their Response to the Motion to Dismiss Plaintiffs’ First Amended Petition filed by Defendant City of Town and Country (“the City”), state as follows:

INTRODUCTION

1. On May 29, 2020, Plaintiffs filed their Amended Petition (“Petition”) to assert, among other things, claims of inverse condemnation against the City and negligence and trespass claims against a multitude of other defendants.

2. The operative facts in this case are straightforward. Plaintiffs own property that is next door to 601 Greenwich Green Lane, Town and Country, Missouri 63017 (“601 Greenwich”). Beginning in 2017, as a direct result of the re-development of 601 Greenwich, changes were made to the grading as well as the sewer and water drainage systems, among other things. Such changes have resulted in the diversion of water directly onto the Plaintiffs’ property, causing extensive

damage to their home. Prior to this re-development, Plaintiffs had no issues with water intrusion and flooding.

3. As soon as Plaintiffs heard about the potential redevelopment, they immediately raised concerns with the City. In fact, during the City's Architectural Review Board meeting where the application for the necessary building permits for 601 Greenwich was discussed, Plaintiffs specifically informed the Review Board about the excess water runoff they had *already* experienced as a result of the early construction. (Pet., at ¶ 49) (emphasis added). Despite being aware of Plaintiffs' concerns, the City nonetheless authorized the issuance of a building permit. (*Id.*, at ¶ 52).

4. Over the next 16 months, Plaintiffs repeatedly informed the City about the continuing damage that their property was experiencing due the ongoing construction at 601 Greenwich. (*Id.*, at ¶ 52). During this time, the City acknowledged that the construction violated the City's ordinances and code and assured Plaintiffs that it would not approve the completed work until 601 Greenwich was brought into compliance of the same. (*Id.*, at ¶¶ 56-57). Despite these assurances, the City nonetheless subsequently approved the work to be completed and granted occupancy permits even though 601 Greenwich still failed to comply with the City's ordinances and codes related to erosion control and residential lot requirements. (*Id.*, at ¶¶ 47-48).

5. The City seeks to dismiss Plaintiffs' claim for inverse condemnation on grounds that Plaintiffs cannot state such a claim. For the reasons stated below, the City's Motion to Dismiss should be denied.

STANDARD

6. A motion to dismiss under Missouri Rule of Civil Procedure 55.27(a)(6) should only be granted where it is clear upon the face of the petition that the plaintiff fails to state a cause

of action under the law or fails to state facts that would entitle him to relief. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993); *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993). When determining if dismissal is warranted, courts will accept as true all properly pleaded facts, giving the pleadings their broadest interpretation. *Bosch v. St. Louis Healthcare Net*, 41 S.W.3d 462, 464 (Mo. banc 2001) (internal citations omitted); *Dibrill v. Normandy Assocs., Inc.*, 383 S.W.3d 77, 83 (Mo. App. 2012). If the petition sets forth any set of facts that, if proven, would entitle the moving party to relief, then the petition states a claim. *Metro St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 915 (Mo. 2016).

LEGAL ARGUMENT

I. THE PETITION PROPERLY ALLEGES SUFFICIENT FACTS TO STATE A CLAIM AGAINST THE CITY OF TOWN AND COUNTRY.

7. The City argues that Plaintiffs cannot state a claim for inverse condemnation because (1) Plaintiffs fail to establish that the City was using its property to create the nuisance complained of; and (2) to the extent Plaintiffs are alleging the City failed to identify non-conformities between the approved plans and what was actually constructed, that is a negligence claim barred by the doctrine of sovereign immunity. In the alternative, the City asks for a more definite statement. However, Plaintiffs have sufficiently stated a claim for inverse condemnation with sufficient detail and as a result, the City's Motion should be denied.

8. "To establish a claim for inverse condemnation based on nuisance, Plaintiff's need allege only: (1) notice; (2) unreasonable operation in spite of that notice, (3) injury, (4) damage, and (5) causation. *Miller v. City of Wentzville*, 371 S.W.3d 54, 57 (Mo. App. 2012).

9. In their Petition, Plaintiffs allege that in March 2017, they informed the City of their concerns over excess water runoff caused by the re-development of 601 Greenwich Green during

the City's Architectural Review Board meeting (Pet., at ¶ 49). Moreover, between July 2017 and late 2018, Plaintiffs repeatedly voiced concerns to the City and other defendants about the continuing damage caused to the Plaintiffs' home by the ongoing construction. (*Id.*, at ¶ 53). In response, the City (and other defendants) repeatedly assured Plaintiffs that temporary and permanent measures would be taken to protect Plaintiffs' home from surface water being intentionally diverted directly onto their property. (*Id.*, at ¶55). Additionally, making matters worse, a PVC pipe was installed on Plaintiffs' property causing more water to be intentionally diverted onto Plaintiffs' property, further exacerbating the extensive flooding and damage to Plaintiffs' home. (*Id.*, at ¶¶ 32-33). After the Plaintiffs notified the City of the pipe and the substantial, ongoing damage their home continued to experience, the City acknowledged that the construction of 601 Greenwich and the installation of the PVC pipe violated the City's ordinances and code. (*Id.*, at ¶¶ 56; 174). The City further assured Plaintiffs that 601 Greenwich would be brought into compliance with the City's ordinances before it approved the work completed and issued an occupancy permit. (*Id.*, at ¶¶ 56-57; 175). Despite those assurances and the notice of the ongoing issues (as well as its obligation to approve plans and permits in accordance with its ordinances and code), the City inspected and subsequently approved the work completed on 601 Greenwich and issued occupancy permits even though the re-development failed to comply with the City's ordinances and code and in the face of the ongoing water issues that continue to damage the Plaintiffs' property to this day. (*Id.*, at ¶¶ 47-48; 177-178). As a direct result, Plaintiffs' home has been diminished in value and Plaintiffs have incurred and continue to incur additional damage to their home. (*Id.*, at ¶ 178).

10. The City admits that Courts have recognized that an owner may bring an action for inverse condemnation where private property is damaged by unreasonable diversion of surface

water. (Motion, at ¶ 12 citing *Heins Implement Co v. Mo Hwy & Transp. Comm*, 859 S.W.2d 681 (Mo banc. 2008). However, the City attempts to distinguish *Heins* by asserting that this is not a public works project. Yet, the City has not cited any authority to support its argument that an inverse condemnation claim can only be asserted for public works projects. Indeed, Plaintiffs have found no case that imposes such a limitation.

11. The Petition alleges that the City had repeated notice of Plaintiffs' concerns and issues related to the water runoff, and despite this notice, the City approved construction permits and ultimately issued an occupancy permit when 601 Greenwich clearly did not satisfy the City's code and ordinances. (*See* Pet., at ¶¶ 28; 46-48; 56-57; 175).

12. These allegations, taken as true, clearly establish that: 1) the City had notice of the issues; 2) despite that notice, it continues to operate in an unreasonable manner in refusing to ensure City code and ordinances were met before approving permits for work and occupancy permits; and 3) as a result, the Plaintiffs were damaged. For these reasons, Plaintiffs have sufficiently pled a claim for inverse condemnation.

13. Moreover, the City confusingly argues that the Missouri Supreme Court's decision in *State ex rel. City of Blue Springs v. Nixon* provides it with blanket immunity for inverse condemnation claims "to the extent Plaintiffs are alleging that anything built in noncompliance with the approved plans has caused damage." (Motion, at ¶16 (citing, 250 S.W.3d 365, 371 (Mo. banc 2008)). However, the Court in *Blue Springs* did not conclude that the City of Blue Springs was not liable for inverse condemnation because it somehow adhered to all applicable code provisions. Instead, the Court found that the City of Blue Springs could not be liable "in the absence of an affirmative act." *Id.*, at 372. Because the Plaintiffs failed to allege any actions that the City of Blue Springs took (or did not take) to cause the damage or that the City of Blue Springs

had knowledge of the problem, the Court found that the plaintiff's claim for inverse condemnation failed as a matter of law. *Id.*; *See also, Miller*, 371 S.W.3d at 61 (Mo. App. 2012) (stating that *Blue Springs* and other cases "hold that a plaintiff cannot hold a city liable when the city has no notice of a problem without evidence of an affirmative act. They do not require proof of an affirmative act when the city has received notice."). As set forth above, the Plaintiffs' claim is based on the City's **knowledge** of issues related to the lack of water runoff and erosion control for 601 Greenwich and the City's unreasonable **affirmative acts**, including the issuance of work and occupancy permits, that allowed the construction on 601 Greenwich to continue despite the City's knowledge of the issues and without compliance with its code and ordinances. *See Miller*, 371 S.W.3d at 61 (reversing trial court's grant of summary judgment in favor of the City on an inverse condemnation claim because the City was given notice of the problem on at least three separate occasions.).

14. Next, the City argues that to the extent Plaintiffs are alleging that the City failed to identify nonconformities between the approved plans and what was constructed or installed, the Plaintiffs' claim is really in the nature of a negligence claim and therefore precluded by the doctrine of sovereign immunity. (Motion, at ¶17). However, Plaintiffs have not asserted a claim for negligence, they have asserted a claim for **inverse condemnation**. As set forth above, the claim is based on the City's knowledge of issues related to the lack of water runoff control for 601 Greenwich and the City's unreasonable acts despite this knowledge of issuing work and occupancy permits that allowed the construction on 601 Greenwich to continue without compliance with the City's code and ordinances. Thus, the City's argument clearly fails. *See Miller*, 371 S.W.3d at 61 (stating "it is the failure to correct or discontinue an unreasonable use after notice that gives rise to a nuisance" for purposes of inverse condemnation).

II. THE PETITION SUFFICIENTLY STATES ENOUGH DETAIL FOR THE CITY OF TOWN AND COUNTRY TO RESPOND.

15. In the alternative, the City requests that the Court order Plaintiffs to provide a more definite statement. As set forth above, Plaintiffs have pled each of the required elements of its claim against the City with sufficient detail to state a claim and for the City to respond.

16. Plaintiffs have satisfied the fact pleading requirements of stating a short and plain statement of the facts and why they are entitled to relief. This is not a fraud case with heightened pleadings standards. Moreover, discovery in this case is still at its infancy. No depositions other than Plaintiffs have taken place and the parties are still exchanging written discovery.

17. Further, the City is in the best possible position to answer these questions. *See State ex rel Koster v. Morningland of the Ozarks*, 384 S.W.3d 346, 351-52 (Mo. App. 2012) (affirming trial court's denial of a motion to strike where plaintiff had alleged sufficient facts to state a claim and the defendant was in the best position to determine the specific details requested).

CONCLUSION

WHEREFORE, Plaintiffs Dave Lamb and Erin Lamb, respectfully request that this Court deny Defendant City of Town and Country's Motion to Dismiss in its entirety, or in the alternative grant Plaintiffs leave to amend their Petition; and for such other and further relief as deemed appropriate by this Court.

Respectfully submitted,

CARMODY MacDONALD P.C.

By: /s/ Sarah J. Klebolt
Sarah J. Klebolt #60849
Patrick G. Carmody, # 62784
120 South Central Ave., Suite 1800
St. Louis, Missouri 63105
(314) 854-8600 Telephone
(314) 854-8660 Facsimile
sjk@carmodymacdonald.com
pgc@carmodymacdonald.com

*Attorneys for Plaintiffs Dave Lamb and
Erin Lamb*

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2021, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

 /s/ Sarah J. Klebolt
Sarah J. Klebolt