

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

DAVE LAMB & ERIN LAMB.)
)
Plaintiffs,)
)
vs.)
)
BUILD-WORK PROPERTIES, LLC)
& BUILD, INC., *et al.*)
)
Defendants,)

Cause No: 18SL-CC04584
Division: 18

**DEFENDANT CITY OF TOWN AND COUNTRY, MISSOURI, MOTION TO DISMISS
OR IN THE ALTERNATE FOR MORE DEFINITE STATEMENT**

COMES NOW Defendant City of Town and Country, Missouri, (“the City”) by and through the undersigned counsel, pursuant to Rule 55.27 and for its motion to dismiss, or in the alternative for more definite statement, states as follows:

Introduction

1. Plaintiffs Dave and Erin Lamb (“the Lambs”) have filed a 12 count First Amended Petition (“Petition”), of which only one count (Count XI – Inverse Condemnation) seeks relief from the City.

2. The gravamen of the Lambs’ claims is that the construction of a new home at 601 Greenwich Green Lane, located within the City’s boundaries, has resulted in increased water flow problems to the Lambs’ property which is located at 603 Greenwich.

3. The Lambs primary complaint with respect to the City is that the City “inspected and subsequently approved the work completed to redevelop 601 Greenwich despite non-compliance with the City’s ordinances and codes related to erosion control and residential lot requirements.” <Petition at ¶176>.

4. The Lambs allege that the City's actions amount to "a wrongful appropriation of 601 Greenwich for which no compensation has been given. . . ." <Petition at ¶179>.

5. With respect to the plat for 601 Greenwich, the Lambs allege that "the approved Plot Plans indicated that the redevelopment of 601 Greenwich would comply with the City's ordinance governing, among other things, controlled runoff and discharge; and lot coverage requirements related to setbacks and greenspace." <Petition at ¶46>.

6. For the reasons set forth herein, the Petition fails to allege facts that would support a claim of inverse condemnation against the City.

Motion to Dismiss Standard

7. "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *State ex rel. Henley v. Bickel*, 285 S.W.327, 329 (Mo. banc 2009). It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *Id.* "[T]he petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause of action that might be adopted in that case." *Id.*

Discussion – Motion to Dismiss

8. "Inverse condemnation is the exclusive remedy when private property is taken or damaged without compensation as a result of a nuisance operated by an entity that has the power of eminent domain." *Miller v. City of Wentzville*, 371 S.W.3d 54, 57 (Mo. App. E.D. 2012). (Emphasis added).

9. "Nuisance is the unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his or her property." *Id.* (Emphasis added - quoting *Basham v. City of Cuba*, 257 S.W.3d 650, 653 (Mo. App. 2008)).

10. The Petition fails to establish that the City was using its property to create the nuisance complained of by the Lambs.

11. Instead, accepting the Lambs' allegations as true for purposes of the pending motion only, the damages resulted from the water runoff caused by improvements made to 601 Greenwich.

12. Courts have recognized that where "as a result of a public works project, private property is damaged by an unreasonable diversion of surface waters, whether by design or by mistake, the owner may bring an action for inverse condemnation." *See e.g. Heins Implement Co. v. Mo. Highway & Transp. Comm.*, 859 S.W.2d 681, 691 (Mo. banc 1993) (abrogated on other grounds by *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008).

13. However, unlike in *Heins*, the project in the case at bar was not a public works project but instead the development of private property.

14. In distinguishing *Heins* the Missouri Supreme Court, considering an inverse condemnation claim stemming from a city's approval of a plat, in *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, (Mo. banc 2008), stated

Here, however, it was not the City, but the private developer whose improvements to the land are alleged to have contributed to the Stevenses' damages. The developers are the parties most comparable to the [Missouri Highway and Transportation Commission] in *Heins*, and the Stevenses have sued them on this very basis. The City, by contrast, merely approved a plat that was in compliance with the City's code; it did not itself design the plat or own land or undertake any improvements that resulted in the water being diverted, as in *Heins*.

Id. at 371

15. The Lambs expressly allege that the "approved Plot Plans indicated that the redevelopment of 601 Greenwich would comply with the City's ordinances governing, among

other things, controlled runoff and discharge; and lot coverage requirements related to setbacks and greenspace.” <Petition at ¶46>.

16. Therefore, to the extent the Lambs allege that anything built in compliance with the approved plans has caused damage, such claims are precluded. As the Court noted in *City of Blue Springs*:

The Stevenses have not identified any legal authority for the duty they allege the City breached. While the Stevenses may be correct that “as a matter of good government” cities *should not* approve plats unless developers prevent rainwater from running on [an]other property, they simply fail to cite any authority for finding inverse condemnation occurred where the municipality does approve them. A failure to meet aspirational goals does not result in liability. There are few designs that cannot be improved; to accept the Stevenses’ argument would in effect force the City to take on the role of unpaid expert for those developing property within its boundaries or risk being held liable as an insurer in inverse condemnation for unseen problems. The Court declines to adopt such an extreme extension of the law governing inverse condemnation.

Id. at 372-373 (italicized in original)

17. To the extent the Lambs are alleging that the City failed to identify non-conformities between the approved plans and what was actually constructed or installed, the Lambs’ claim is really in the nature of a negligence claim, and such claims are precluded by the doctrine of sovereign immunity. *See e.g. State ex rel. City of Nevada v. Bickel*, 267 S.W.3d 780 (Mo. App. W.D. 2008) (Doctrine of sovereign immunity protected city from liability for a claim that the inspector had been negligent in performing an electrical inspection, brought by widow of a man who was electrocuted); and *State ex re. City of Lee’s Summit v. Garrett*, 568 S.W.3d 515 (Mo. App. W.D. 2019) (Doctrine of sovereign immunity protected city from negligence claim related to injuries suffered by a pedestrian that fell from an unguarded retaining wall, where it was alleged the city had failed to inspect plans and insure compliance with applicable codes).

18. The Lambs have not pled any facts that would show that the doctrine of sovereign immunity would be inapplicable in this case, nor could such facts be pled as the claims stem from the City's alleged performance (or non-performance) of governmental functions, i.e. approval of plans and inspection of property. *See e.g. City of Lee's Summit, supra* at 519-521.

19. Furthermore, the Petition fails to assert facts that establish causation with respect to the City, i.e. that but for the City's actions the injuries alleged by the Lambs would not have occurred. *See e.g. Poage v. Crane Co.*, 523 S.W.3d 496, 508 (Mo. App. E.D. 2017)

Discussion – Motion for More Definite Statement

20. In the alternative to the motion to dismiss, City respectfully requests that this Court order the Lambs to provide a more definitive statement.

21. The Petition alleges that the property was constructed in “non-compliance with the City's ordinances and codes related to erosion control and residential lot requirements.” <Petition at ¶176>. However, the Petition does not allege which specific provisions of “ordinances and codes” have been allegedly violated. Without knowing what ordinances and codes are alleged to have been violated, the City is unable to adequately respond.

22. The Petition alleges that the “City acknowledged that construction of the New Home, including but not limited to, the installation of the PVC pipe onto the Lambs' Home, violated the City's ordinances and code.” <Petition at ¶¶ 56 & 174>. However, the Petition does not allege when or by whom such acknowledgment was allegedly made. The City is a political subdivision comprised of multiple boards and commissions, as well as officials (both elected and appointed). Without knowing when or by whom such acknowledgments were allegedly made, the City is unable to adequately respond.

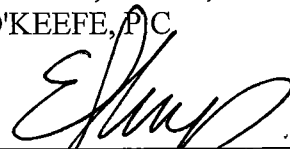
23. The Petition alleges that the City “assured the Lambs that 601 Greenwich would be brought into compliance with the City’s ordinances before it approved the work completed on the New Home site.” <Petition at ¶¶ 57 & 175>. Again, the Petition does provide detail as to when, and by whom, such assurances were allegedly made, rendering the City unable to adequately respond to the allegation.

24. Accordingly, in the event that the claim against the City is not dismissed, the City requires that the Lambs provide a more definite statement as to the allegations pertaining to the City so that it may fully and adequately respond to the Petition.

WHEREFORE, the City respectfully requests that this Court grant the pending motion to dismiss, and award any and all further relief that this Court deems just and proper under the premises. In the alternate, the City respectfully requests that this Court order Plaintiffs to provide a more definite statement as to the allegations against the City.

Respectfully submitted,

CURTIS, HEINZ, GARRETT &
O'KEEFE, P.C.



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CERTIFICATE OF SERVICE

A copy of the above and foregoing was electronically filed on the Missouri Case.net system this 14th day of January, 2021, and served by the same upon all attorneys of record.

/s/ Edward J. Sluys _____