



IN THE COURT OF APPEALS OF IOWA

ROBERT W. STEVENS,	)	
	)	
Plaintiff-Appellee,	)	
Cross-Appellant,	)	Filed June 24, 1980
	)	
vs.	)	
	)	
CITY OF IOWA CITY, IOWA	)	0-88
	)	<u>2-63605</u>
Defendant-Appellant,	)	
Cross-Appellee.	)	

Appeal from Johnson District Court - Louis W. Schultz, Judge.

Defendant appeals award of damages to plaintiff in action to recover damages for vacation of a road fronting plaintiff's property. Plaintiff cross-appeals trial court's denial of his request in the same action for injunctive relief to prevent runoff of water onto plaintiff's land from adjoining subdivisions approved by defendant. Affirmed in part, reversed in part, and remanded for entry of appropriate order.

Angela Ryan, Assistant City Attorney, Iowa City, for defendant-appellant.

William L. Meardon and Thomas D. Hobart of Meardon, Sueppel, Downer & Hayes, Iowa City, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Iowa City, appeals award of damages to plaintiff, Robert W. Stevens, in action to recover damages for vacation of a road fronting plaintiff's property. City contends the trial court erred in holding Stevens was entitled to compensation for closure of the street. Stevens cross-appeals trial court's denial of his request in the same action for injunctive relief to prevent runoff of water onto his property from adjoining subdivisions approved by defendant. Stevens asserts trial court erred in finding the City had not substantially damaged his property by approving the adjoining subdivisions that increased water runoff onto his land. We affirm the trial court on the damages award, but reverse its denial of injunctive relief and remand this case for an order requiring the City to develop a proper drainage system to drain water from its streets and adjoining property without damaging Stevens' property.

I.

On May 5, 1975, Stevens filed a petition seeking damages of \$45,000 for the closing of Lower West Branch Road that caused a loss of frontage to Stevens' farm and seeking to enjoin the City from collecting and diverting water onto his property or to require the City to install a drainage system to prevent damage to that land. The City answered, denying the material allegations of the petition. After trial of the case to the court, the court entered judgment on April 30, 1979, ruling Stevens was entitled to \$31,007.50 for the damages resulting from the vacation of the road, but not to injunctive relief on his water drainage claim. The City appealed the damages award and Stevens cross-appealed on the trial court's failure to award interest at an annual rate of seven percent prior to the judgment in order to award damages of at least \$39,000 and to award injunctive relief on its drainage issue claim. Stevens has failed to argue the interest issue and we do not address that issue.

Stevens owns a twenty-seven acre farm within the Iowa City limits. The north boundary line of the farm is coincidental with the middle of Rochester Avenue and Lower West Branch Road. In 1974 the City vacated a portion of Lower West Branch Road abutting Stevens' property, allegedly for safety purposes. As a result of this closing, Stevens lost approximately half of the frontage on the northern boundary of his property. Stevens' access to his home, however, was not affected by the closing since he uses a driveway from Rochester Road to reach it.

Stevens' property is servient to property north and east of it. Prior to the development of adjoining property, a watershed of 43.11 acres drained from the adjoining properties onto the southeastern portion of Stevens' property. One natural drainageway on his land drained toward the southwest into a pond of about one acre in size.

In 1971 the City approved the development of property to the east of Stevens' property and improvements were made during 1973. In connection with this development, the City approved the installation of two storm sewers that collected water from the adjoining property and directed it to the drainageway on Stevens' property. The actions increased the size of the watershed to 44.07 acres and increased the amount of water entering Stevens' property. Within a year after the installation of the two sewer lines, the spillway for a dam and a tile line on Stevens' land were washed out and erosion problems on Stevens' property developed.

II.

The City asserts the trial court erred in holding Stevens is entitled to compensation as a result of the vacation of Lower West Branch Road. The basis of the City's argument is that Stevens failed to prove reasonable access to his property was eliminated or interfered with or that he suffered any compensable damages because of the road closing. We find access to the Stevens property was sufficiently impaired to constitute a taking that resulted in compensable, special damages to Stevens.

It is a well settled rule that the right of free and convenient access to property may not be taken away or unreasonably interfered with unless just compensation is paid. Stom v. City of Council Bluffs, 189 N.W.2d 522, 525 (Iowa 1971); Iowa State Highway Commission v. Smith, 248 Iowa 869, 874-75, 82 N.W.2d 755, 758 (1957); Gates v. City of Bloomfield, 243 Iowa 671, 675, 53 N.W.2d 279, 281 (1952); Liddick v. City of Council Bluffs, 232 Iowa 197, 232, 5 N.W.2d 361, 379 (1942); Hubbell v. City of Des Moines, 173 Iowa 55, 63, 154 N.W. 337, 340 (1915); Long v. Wilson, 119 Iowa 267, 268, 93 N.W. 282, 283 (1903). The landowner is not, however, entitled, as against the public, to access to the property at all points between it and the highway. Simpkins v. City of Davenport, 232 N.W.2d 561, 564 (Iowa 1975); Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1233, 150 N.W.2d 642, 646-47 (1967) (quoting from Smith, 248 Iowa at 874-76, 82 N.W.2d at 759); Jones v. Iowa State Highway Commission, 259 Iowa 616, 623, 144 N.W.2d

277, 281 (1966); Warren v. Iowa State Highway Commission, 250 Iowa 473, 481-84, 93 N.W.2d 60, 63 (1958). Whether free and convenient access has been denied is usually a question of fact to be determined from the evidence in each particular case. Jones, 259 Iowa at 623, 144 N.W.2d at 281. However, the landowner to recover must show special damages different in kind from that suffered by the public generally from the vacation of a public street. See Stom, 189 N.W.2d at 529. The City contends the vacation of the Lower West Branch Road did not interfere with the free and convenient access to Stevens' property. Noting that Stevens has access to Rochester Road by way of a driveway to his house, and the location of Lake Forest and Westminster Streets, which terminate at the eastern and southern property lines of the property, the City argues Stevens has the same access to his property as he had prior to the closing. This argument incorrectly assumes, however, that a landowner is limited to compensation for losses based on the existing use of the property, not the highest and best use.

The correct assessment of damages caused by a taking is the difference between the fair market value of the property affected immediately before and after the taking. See Dolezal v. City of Cedar Rapids, 209 N.W.2d 84, 88 (Iowa 1973). Any factor that would impress a willing buyer to purchase the property is both material and relevant for this purpose. See Dolezal, 209 N.W.2d at 88; Jones, 259 Iowa at 625-26, 144 N.W.2d at 282-83. Future possible uses that are reflected in the fair market value may be introduced; the landowner need not be bound to existing uses, but rather may recover for the highest and best use. See Jones, 259 Iowa at 625-26, 144 N.W.2d at 282-83.

Here, Stevens sought to prove the highest and best use of his property was to subdivide the land and sell the lots. He introduced evidence to show the land abutting the road could most easily and cheaply be developed through utilizing the Lower West Branch Road and its closing would cause certain substantial development costs to be incurred. In particular, a new access road would have to be built; before the closing at least eight lots could have been developed without any additional road building. Under these circumstances, we find the City's vacating of the Lower West Branch Road abutting Stevens' land eliminated any reasonable access to that land, and Stevens is entitled to just compensation for this taking.

The City raises a similar argument to the valuation of Stevens' damages. Since the land is not being sold nor is it even formally platted or surveyed, the City argues, the measure of damages should be based on the property's existing use, not its highest and best use. This is not the proper measure of damages; fair market value, which reflects the property's highest and best use, is the correct standard. See Heidenbrand v. Executive Council of Iowa, 218 N.W.2d 628, 632 (Iowa 1974); Jones, 259 Iowa at 621-22, 625-26, 144 N.W.2d at 280-83. While the City correctly points out it would have final approval of any new subdivisions and has a policy of limiting access to secondary streets, this consideration does not make an award of the fair market value wholly speculative, but rather is one factor affecting the fair market price. We find the court's award of \$31,007.50 was within the testimonial range of the evidence presented at trial and affirm the award.

III.

Stevens cross-appeals the trial court's failure to enjoin the City from continuing to drain water from neighboring subdivisions onto his property without adequately preventing damage. The City contends it may hasten and increase the flow of water on the higher land onto Stevens' servient property, so long as it does not divert the water from its natural course. Further, City asserts, Stevens failed to prove any substantial injuries warranting the granting of injunctive relief. We find Stevens is entitled to equitable relief from the City's actions.

Iowa recognizes a servitude of natural drainage between adjoining lands. The general rule is that the dominant owner is entitled to drain surface water in a natural watercourse from his or her land onto the servient owner's land, which the servient owner must accept. Braverman v. Eicher, 238 N.W.2d 331, 334 (Iowa 1976); Ditch v. Hess, 212 N.W.2d 442, 448 (Iowa 1973); Rosendahl Levy v. Iowa State Highway Commission, 171 N.W.2d 530, 536-37 (Iowa 1969), quoted in Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 745 (Iowa 1977). However, if the volume of water is substantially increased or if the manner or method of drainage is substantially changed and actual damage results, the servient owner is entitled to relief. Rosendahl, 171 N.W.2d at 745; see Woods v. Incorporated Town of State Centre, 249 Iowa 38, 45, 85 N.W.2d 519, 524 (1957). A corollary to this is that one must exercise ordinary care in the

use of property so as not to injure the rights of neighboring landowners. Oak Leaf Country Club, Inc., 257 N.W.2d at 745.

After reviewing the record, we find Stevens proved the amount of water draining onto his land was substantially increased and the method of drainage was substantially changed by the City's actions in approving the subdivision bordering Stevens' property on the east and its drainage system. The size of the watershed was increased by about one acre. More importantly, the paving of roads and construction of improvements and houses substantially increased the amount of impervious area to the north and east of Stevens' property.

The method of drainage was substantially altered by the City's approval of the subdivision's storm sewer system. The water from the north and east no longer flows in a diffused fashion onto the southeast portion of Stevens' land, but is directed through two storm sewer outlets on the east boundary line onto the land with an inadequate system of removal at the south end of the property.

The increased volume and concentration of water has substantially damaged Stevens' property. The spillway to a pond that was located on the southeast portion of the property was washed out within a year after the paving of Rochester Avenue and the installing of the City-approved improvements. The pond has also disappeared, leaving a marsh in its place. The loss of this pond, however, is not determinative of our decision since there exists some question as to whether Stevens was planning to drain this pond anyway because of possible liability problems. There has been substantial erosion in the area of the property where the two storm sewers now drain; the City has even been forced to riprap the area beneath the west end of Lake Forest Street to prevent any damage to the street. The City's action in approving the subdivision's drainage system so altered the natural system of drainage as to substantially increase the servient estate's burden. Braverman, 238 N.W.2d at 336; Cundiff v. Kopseiker, 245 Iowa 179, 185, 61 N.W.2d 443, 446 (1953).

There remains the issue of whether the City may be held liable for its act in approving the subdivision's drainage system. If the City had constructed the drainage system, its liability would be clear. Elledge v. City of Des Moines, 259 Iowa 284, 288-91, 144 N.W.2d 283, 285-88 (1966); Woods v. Incorporated Town of State Center, 249 Iowa 38, 44, 85 N.W.2d 519, 523-26 (1957). Here, we find the City's act of approving the plat

for the subdivision does not grant it immunity from liability. Section 613A.2, The Code 1977, provides "every municipality is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." Tort is defined to mean every civil wrong that results in injury to property or property rights for actions based on negligence, error, omission, or nuisance. § 613A.1(2), The Code. Liability is not imposed for "[a]ny claim based on an act or omission of an officer or employee, exercising due care, in the execution of a statute, ordinance, or officially adopted resolution, rule, or regulation of a governing body." § 613A.4(3), The Code.

The City was required in approving the subdivision plat to ascertain whether it provided an adequate drainage system. § 9.50.5C, Iowa City Code of Ordinances (1975). In this determination, City was obliged to exercise due care. §§ 613A.2, .4, The Code. However, it is somewhat anomalous to discuss due care in connection with the creation of a nuisance. A nuisance is a condition, not an act or failure to act by the party responsible for the condition, that among things interferes with the comfortable enjoyment of life or property. Sparks v. City of Pella, 258 Iowa 187, 189-91, 137 N.W.2d 909, 911 (1965). Proof of negligence is not required in all actions for nuisance, although negligence may create a nuisance. Id. Thus, the City was required here to act so as not to allow the creation of a nuisance. Accordingly, we hold the City is liable for the damages arising from the creation of this nuisance as a result of its approval of the subdivision's drainage system. See § 613A.2, The Code. See generally Damour v. Lyons City, 44 Iowa 276, 279-80 (1876) (City is liable for injuries caused to private property by a diversion of surface water thereon due to the construction of a street railway it had authorized to be built.).

Accordingly, we hold Stevens is entitled to relief from this increased burden on his property. After considering the adequacy of Stevens' remedy at law and the relative hardships to be incurred by both parties, we reverse the trial court's finding on this point and remand for entry of an order granting appropriate relief: requiring the City to develop a proper drainage system to drain water from its streets and adjoining property without damaging Stevens' property. See Woods, 249 Iowa at 50, 85 N.W.2d at 527. See also Green v. Advance Homes, Inc., No. 62657, slip op. at 5-8 (Iowa, filed June 18, 1980).

The City shall pay the costs of this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR ENTRY OF
APPROPRIATE ORDER.

Snell and Johnson, JJ. concur. Carter, J. and Oxberger, C.J. dissent.

While I concur in the result reached on the City's appeal, I dissent from the court's decision with respect to plaintiff's cross-appeal. Application of the rule of liability recognized in Lessinger v. City of Harlan, 184 Iowa 172, 168 N.W. 803 (1918), requires a balancing of interests. Much of the value of plaintiff's property, which forms the basis for the award approved in division II of the majority's decision, is a direct consequence of the adjacent residential development. This consideration, plus the fact that the area which gives rise to plaintiff's drainage complaints was always marsh land, leads to the conclusion that plaintiff's damage has been "slight" in terms of the Lessinger standard. I accordingly find that plaintiff has not established a right to any injunctive relief.

Moreover, even if some injunctive relief were appropriate, the majority's decision goes too far. It requires the city to develop "a proper drainage system to drain water from its streets and adjoining property without damaging [plaintiff's] property." If this mandate is carried out, plaintiff will be placed in a better position than the one he enjoyed prior to the development of the adjacent property. I would affirm all aspects of the trial court's decision and judgment.

Oxberger, C.J., joins in this dissent.