STATE OF MINNESOTA
IN COURT OF APPEALS
A09-329

Douglas Paul Sik and Kathryn Marie Sik,
d/b/a Doug's Auto Body, D & K RV Sales, LLC,
Appellants,

vs.

Verhelst Brothers, et al.,
Respondents,

Bill Flaten, as Yellow Medicine County Sheriff, et al.,
Respondents.

Filed December 8, 2009
Affirmed
Worke, Judge

Yellow Medicine County District Court
File No. 87-CV-08-402

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Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellants challenge the district court's grant of summary judgment in favor of respondent county, arguing that the district court applied the incorrect legal standard to appellants' inverse-condemnation claim. We affirm.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment is appropriately granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). We will affirm the judgment if it can be sustained on any grounds. *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978).

Appellants Douglas Paul and Kathryn Marie Sik (Siks) brought suit alleging four claims: three tort claims against respondents Verhelst Brothers, Robert Will and Michael Verhelst (Verhelsts); and an inverse-condemnation claim against respondents Yellow Medicine County, Bill Flaten as Yellow Medicine County Sheriff, and Randy Jacobson as Yellow Medicine County Zoning Administrator (county). The Siks alleged that the Verhelsts created a nuisance on the Siks' property by grinding hay in violation of their county-issued conditional-use permit (CUP), and that the county's failure to enforce the

CUP constituted a taking. The district court granted summary judgment in favor of the county, holding that the Siks' inverse-condemnation claim failed as a matter of law.

The Minnesota Constitution requires the government to compensate a property owner when the government takes the owner's property. Minn. Const. art. I, § 13. A property owner has a cause of action for inverse condemnation when the government has taken private property without formally using its eminent-domain power. *N. States. Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 487 n.2 (Minn. 2004). The government effects a per se taking by actually taking title or permanently physically invading the subject property, and it effects a regulatory taking when it "goes too far" in its regulation of the property. *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998) (quotation omitted). The language of the Takings Clause in the Minnesota Constitution is similar to the language of the Takings Clause in the U.S. Constitution; thus, the Minnesota Supreme Court has relied on cases interpreting the U.S. Constitution in interpreting the Minnesota Constitution. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631-32 (Minn. 2007). Our supreme court has applied the *Penn Central* balancing test to regulatory-takings cases in which the property owner does not contend that the case requires the court to interpret the Minnesota Constitution more broadly than the U.S. Constitution. *Id.* at 632-33 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978)).

The district court applied the *Penn Central* test, but the Siks argue that the court erred in not applying the *Alevizos* test because it is more factually similar to the case at hand. *Alevizos v. Metro. Airports Comm'n of Minneapolis & St. Paul*, 298 Minn. 471,

473, 216 N.W.2d 651, 655 (1974) (*Alevizos I*). We disagree. *Alevizos* involved property near an airport and landowners whose use and enjoyment was adversely affected by airplane noise. *Id.* The supreme court discussed the various cases addressing inverse condemnation on nuisance, trespass, and modified nuisance or trespass theories before deciding to create a new test: a property owner must show "a direct and substantial invasion of his property rights of such a magnitude [that] he is deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property." *Id.* at 487, 216 N.W.2d at 662. The property owner must also show "that these invasions of property rights are not of an occasional nature, but are repeated and aggravated, and that there is a reasonable probability that they will be continued in the future." *Id.* at 488, 216 N.W.2d at 662. But the supreme court later described the *Alevizos* takings test as applying to "unique airport noise cases." *Alevizos v. Metro. Airports Comm'n*, 317 N.W.2d 352, 360 (Minn. 1982) (*Alevizos II*). Because *Alevizos II* suggests that airport-noise cases are sui generis, we conclude the district court did not err in analyzing the Siks' takings case under the *Penn Central* balancing test.

In *Penn Central*, the Supreme Court held that New York City's historic-landmark designation of Grand Central Terminal, and resultant denial of the property owner's applications to build an office building on top of the terminal, did not effect a taking of the property by the government. 438 U.S. at 116-17, 138, 98 S. Ct. at 2655, 2666. Applying *Penn Central* to a case involving a regulatory taking, the Minnesota Supreme Court explained:

> Anything less than a complete taking of property requires the balancing test set forth in *Penn Central*. This test requires the court to consider: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; (3) the character of the government regulation.

Johnson v. City of Minneapolis, 667 N.W.2d 109, 114-15 (Minn. 2003) (citation omitted).

But despite the district court's analysis, we conclude that this case does not require analysis under any takings standard when the Siks have not claimed that there has been any physical government activity on their property or that the government has regulated their property. *See Brecht*, 266 N.W.2d at 520 (appellate court may affirm district court's decision on any grounds). The crux of the Siks' argument is that the county was required to, but failed to, enforce the CUP conditions. Indeed, the Siks' sole argument is based on nonenforcement. They argue that the noise and debris affecting their property are caused by the county's failure to enforce the conditions of the Verhelsts' CUP. We note that there is no evidence in the record indicating that the Verhelsts were violating any CUP provisions, or that the county failed to enforce any of them. More importantly, the Siks cite no authority for the proposition that county officials have a mandatory duty to enforce CUP conditions, or that the officials were permitted no discretion in their exercise of that duty. If true, and if the Siks possessed no other adequate remedy at law, the appropriate action would be to obtain a writ of mandamus. *See* Minn. Stat. §§ 586.01-.03 (2008) (mandamus is available to compel mandatory, non-discretionary acts for which there is no other legal remedy).

We are not aware of any cases in which a government's failure to enforce land-use regulations has resulted in a taking imputed to the government because of the government's failure to prevent a third party's nuisance or trespass from injuring a landowner. It is not this court's role to extend existing law; thus, we decline to expand takings law by holding that the county's alleged failure to enforce CUP conditions constitutes a governmental taking of the Siks' property. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (the task of extending existing law belongs to the supreme court or the legislature), *review denied* (Minn. Dec. 18, 1987).

We acknowledge the real-world implications of living and operating a business next to a feedlot and farm, and we sympathize with people whose lives are affected by intrusive noise, odor, dust, and debris. But the proper vehicle for addressing the alleged torts of the Verhelsts against the Siks is a tort action against the Verhelsts, not an inverse-condemnation action against the county.

Affirmed.