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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1962**

American Family Insurance, et al.,
Appellants,

vs.

City of Minneapolis,
Respondent.

**Filed June 25, 2018
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CV-16-16920

Steven L. Theesfeld, Yost & Baill, LLP, Minneapolis, Minnesota (for appellants)

Susan L. Segal, Minneapolis City Attorney, Gregory P. Sautter, Assistant City Attorney,
Brian S. Carter, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

A Minneapolis water main ruptured and flooded several units of a residential condominium building. Liberty Mutual Insurance covered the claims of individual condominium owners, American Family Insurance covered the claim of the condominium association, and the City of Minneapolis reimbursed uninsured condominium owners. The

insurers sued the city. The district court dismissed the insurers' Minnesota takings claim, reasoning that the flooding lacked the frequency, regularity, and permanency to constitute a confiscatory taking by invasion and that a takings claim cannot rest solely on property damage. Although the Minnesota Constitution expressly contemplates takings based on property damage alone, a damage-only taking requires proof that the damage resulted from an intentional governmental act designed to achieve a public purpose. Because the insurers did not allege that the water-main rupture or the flooding resulted from the city's intentional act toward some public purpose, we affirm the dismissal.

FACTS

A Minneapolis water main under Portland Avenue ruptured in October 2013, flooding a nearby residential condominium building with three feet of water. The flood quickly receded but caused extensive property damage. Liberty Mutual Insurance insured two unit owners and paid them \$45,000 to cover their claims. American Family Insurance insured the condominium association and paid in excess of \$75,000 for its claim. The City of Minneapolis reimbursed uninsured condominium owners for their damages. The insurers then unsuccessfully requested the city to reimburse them for their payments to the insureds, and the companies initiated a subrogation action in state district court alleging negligence, trespass, and an equal-protection violation. The city removed the action to federal district court, where the insurers added takings claims under the federal and Minnesota Constitutions. *Am. Family Ins. v. City of Minneapolis*, 129 F. Supp. 3d 674, 677–78 (D. Minn. 2015).

The federal district court dismissed the trespass and equal-protection claims at summary judgment and held that it lacked subject-matter jurisdiction over the unripe takings claims because the insurers had not exhausted state-law remedies by bringing a takings claim under the Minnesota Constitution in state court. *Id.* at 679, 681–82. The Eighth Circuit affirmed. *Am. Family Ins. v. City of Minneapolis*, 836 F.3d 918, 920–24 (8th Cir. 2016).

The insurers filed another complaint in state court. In it, they asked the district court to order the city to commence inverse-condemnation proceedings and enter judgment against the city for just compensation for the alleged taking of the insureds’ property. They sought “compensatory damages, cost of repair damages, diminution in value damages, loss of use damages and other damages.” The city again removed the case to federal district court. The federal court dismissed the federal takings claim as unripe and remanded the case to the state district court to resolve the state takings claim.

Back in state court, the city successfully moved the district court to dismiss the state takings claim. The district court reasoned that the Minnesota Constitution allows a property owner to recover damages from a flood in a takings action only if the flooding is “of such frequency, regularity, and permanency as to constitute a taking” as an invasion, and it held that the record demonstrates that the flooding was instead merely a temporary invasion that ended within 12 hours. The district court also rejected the insurers’ argument that, even if the property owners suffered no permanent invasion, Minnesota law allows a takings claim to rest on damage to property alone.

The insurers appeal.

DECISION

Liberty Mutual and American Family challenge the district court's dismissal order. We review a district court's rule-12 dismissal de novo by determining whether the complaint presented a legally sufficient claim for relief. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). We accept as true the facts alleged in the complaint, construing all reasonable inferences to favor the nonmoving party, and we will affirm a dismissal if no facts could be introduced to achieve the relief sought. *Id.* Our de novo review here leads us to affirm.

The insurers reasonably concede that they have alleged only a temporary invasion rather than a permanent invasion or confiscation of property and that this temporary invasion cannot establish a taking under the state constitution in the usual confiscation or invasion sense of a "taking." A clear line of caselaw establishes that a flood can constitute a taking as an invasion only if the flooding is more or less permanent. The supreme court has said that "[w]hether occasional flooding is of such frequency, regularity, and permanency as to constitute a *taking* and not merely a temporary invasion . . . is a question of degree, and each case must stand on its own peculiar facts." *Nelson v. Wilson*, 239 Minn. 164, 172, 58 N.W.2d 330, 335 (1953); *see also Nolan and Nolan v. City of Eagan*, 673 N.W.2d 487, 493 (Minn. App. 2003) (observing that intermittent flooding does not constitute a "taking"), *review denied* (Minn. Mar. 16, 2001); *Blaine v. City of Sartell*, 865 N.W.2d 723, 729 (Minn. App. 2015) (holding that twice flooding a basement with up to seven feet of water is not of "such frequency, regularity, and permanency as to constitute

a taking”). The district court properly rejected the takings claim on the traditional invasion theory.

The insurers argue that the taking-by-flooding caselaw does not apply here because, unlike the plaintiffs in those cases, they are seeking compensation on the theory that the city’s actions caused a flood that damaged, rather than permanently invaded, the owners’ property. The language of the constitutional takings provision and the history behind it support the insurers’ argument.

The operative clause provides, “Private property shall not be taken, *destroyed or damaged* for public use without just compensation therefor, first paid or secured.” Minn. Const. art. I, § 13 (emphasis added). The phrase “destroyed or damaged” was not in either the republican or democratic version of the original constitution. Before 1896, the just-compensation clause read only, “Private property shall not be taken for public use without just compensation therefor, first paid or secured.” Minn. Const. art. I, § 13 (1857). Based on that original provision, a plaintiff owning land that abutted a public street lost his claim to just compensation for an alleged taking. *Henderson v. City of Minneapolis*, 32 Minn. 319, 20 N.W. 322 (1884). The Minneapolis city council had authorized the railroad to erect a bridge to carry a city street over railroad tracks. 32 Minn. at 321, 20 N.W. at 322. The resulting construction raised the street 15 feet, making the plaintiff’s abutting property inaccessible. *Id.* The supreme court rejected the plaintiff’s just-compensation claim, however, reasoning that his now-inaccessible property had not been *physically* taken. *Id.* at 323, 20 N.W. at 323–24.

About a decade after the supreme court's decision in *Henderson*, the state amended the takings provision to add the "destroyed or damaged" language that remains today. The supreme court recognized that the added "destroyed or damaged" phrase directly responded to its decision in *Henderson*:

When this amendment was proposed by the legislature, and when adopted by the people, it was well known that the rule which had been laid down by this court [in *Henderson*] . . . respecting damages to lot owners arising from a change of grade, had caused great hardships, and was an exceedingly unfair and unjust rule. No man was safe, when improving his property, by building in conformity with an established grade line, for he was at the mercy of the city authorities, who might practically confiscate his property by raising or lowering the surface or grade line of the street. In such cases, while there was no taking of property for public use, as the fundamental law was construed, there was a taking in fact, amounting, in many cases, to complete destruction and confiscation.

Dickerman v. City of Duluth, 88 Minn. 288, 293, 92 N.W. 1119, 1120 (1903). And the supreme court has explained that the "damaged or destroyed" language means what it says, clarifying, "The purpose of the constitutional amendment was to give a landowner the right to compensation if his land was damaged, even though there was no physical invasion or appropriation of the land." *In re Hull*, 163 Minn. 439, 451, 204 N.W. 534, 539 (1925). A party may therefore bring a "takings" claim without asserting an actual "taking" under the Minnesota Constitution, based only on property damage.

A 1991 supreme court decision implicitly answered the next question of whether a compensatory taking can arise from a purely temporary intrusion or act that causes property damage, rather than from a permanent or nearly permanent intrusion or obstruction that continually damages the property. In *Wegner v. Milwaukee Mut. Ins. Co.*, the supreme court

addressed a takings claim brought by a family whose home was severely damaged by concussion grenades and tear-gas canisters that police discharged in their home to extract a fugitive intruder who had barricaded himself inside. 479 N.W.2d 38, 38–40 (Minn. 1991). The *Wegner* court held “that where an innocent third party’s property is damaged by the police in the course of apprehending a suspect, that property is damaged within the meaning of the constitution.” *Id.* at 41–42. But in this case, the district court seems to have interpreted the disjunctive “or” in the just-compensation clause as conjunctive, saying “that ‘taken, destroyed, or damaged,’ all describe what must be done to a property to constitute a taking.” In other words, the district court treated the phrase “taken, destroyed or damaged” to mean “taken, destroyed, *and* damaged.” This is not the law. We are satisfied that a compensatory “taking” can arise from a purely temporary intrusion or act that causes only property damage.

Although a compensatory taking can arise from a purely temporary intrusion or act that causes only property damage, we nevertheless affirm here because the allegations fall short on a different element. An act constitutes a compensable taking under the property-damage theory only if it resulted from an intentional action that the government took to meet a public purpose. The *Wegner* court held that the damage must result from an intentional act designed to achieve some public purpose, concluding, in that case, that it was “undisputed [that] the police intentionally fired tear gas and concussion grenades into the Wegner house” and “that the damage inflicted by the police in the course of capturing a dangerous suspect was for a public use within the meaning of the constitution.” *Wegner*, 479 N.W.2d at 41; *see also State ex rel. Youngquist v. Hall*, 195 Minn. 79, 85, 261 N.W.

874, 877 (1935) (explaining that the “most that can be said against the state’s bridge” that caused the plaintiff’s property to flood periodically during seasons of high water “is that it is a negligent piece of construction,” which is not beyond remedy, but the “state should not be compelled to buy what is neither needed nor wanted”). The insurers’ complaint falls short here. It alleges only that the water main ruptured “as a direct or indirect result of action or inaction on the part of the City.” The insurers have not alleged that the city intentionally caused the rupture or the flooding, let alone that the rupture or flooding was implemented to further some governmental purpose. Nor does the pleading reasonably imply the missing allegations. The omission is fatal to the takings claim.

The parties also dispute whether the insurers properly styled their suit as a mandamus action. *See Wolfram v. State by Burnquist*, 246 Minn. 264, 267 n.1, 74 N.W.2d 510, 512 n.1 (1956) (“When the state, as distinguished from a city or a county, has taken, destroyed, or damaged private property without just compensation, the proper procedure is mandamus”). We need not reach this issue because, regardless of how it was styled, the complaint plainly lacks the allegations necessary to state a claim on a property-damage takings theory.

Affirmed.