DRAKE UNIVERSITY LAW SCHOOL
REAL ESTATE TRANSACTIONS
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Case Law

A. Hunter Landing, LLC v. City of Council Bluffs, Iowa

Iowa Court of Appeals No. 16-2138: Filed May 16, 2018

Hunter Landing, LLC owned property adjacent to the Missouri River near the City of Council Bluffs, Iowa. The property consisted of five houses, a duplex and a mobile home. In May of 2011 a flood inundated the area resulting in a disaster proclamation by the Governor and a proposed buyout of flooded properties by the City. In December, the City notified Gail Hunter a representative of Hunter Landing that they were going to condemn the property and remove all the structures. The City demolished the condemned structures, two appraisals were prepared by the City in anticipation of offering to buy the Hunter Landing property. The average of the two appraisals prior to the flood was $485,000 but because the property was subject to four, 100-year leases and all the lessees would not voluntarily terminate their leases, the buyout did not occur.

After the 2011 flood, the City amended its floodway ordinance and provided in part as follows:

> If any nonconforming use or structure is destroyed by any means, including flood, it shall not be reconstructed if the cost is more than fifty (50) percent of the market value of the structure before the damage occurred, unless it is reconstructed in conformity with the provisions of the Municipal floodway ordinance.
>
> This property was a nonconforming use.

Hunter Landing brought this action against the City for inverse condemnation. Proposed jury instructions were given to the jury. One of the jury instructions was inverse condemnation and the instructions stated as follows:

> Land-use regulation does not constitute inverse condemnation requiring compensation if it substantially advances a legitimate state interest. There are two exceptions. When the regulation (1) involves a permanent physical invasion of the property or (2) denies the owner all economically beneficial or productive use of the land, the State must pay just compensation.
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> Hunter Landing objected to this instruction stating that there is Iowa case law that indicates that even no matter how minor the invasion, the minor invasion by the government on a private property owner's land is still actionable and compensatory.

The Plaintiff believed this instruction was defective. The jury found no inverse condemnation and entered judgment for the City. The appeal alleged Instruction 15 is a misstatement of the law.

The Iowa Court of Appeals discussed inverse condemnation. "Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."

The Court relied upon Brakke v. Iowa Department of Natural Resources, 897 N.W.2d 522 (Iowa 2017), which listed the various types of takings by a government. The first type is direct government seizure of property that amounts to a practical ouster of the owner's possession. The second type is a regulatory taking which occurs when the government regulates the use of property through the exercise of its police power and the regulation goes too far. The Court indicated there are three types of regulatory takings:

> (1) a per se taking arising from a permanent physical invasion of property, (2) a per se taking arising from regulation that denies the owner all economically beneficial ownership, and (3) a regulatory taking based on the balance of the three Penn Central Transportation vs New York City, 438 U.S. 104 (1978) factors.

The three Penn Central factors are "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action."

The Iowa Court of Appeals found that the jury was not instructed on the third type of regulatory taking involving the Penn Central factors. The case was remanded for a new trial.

B. Vincent N. Mummau v. Estate of Beverly Kraus, et al.

Iowa Court of Appeals No. 17-0100: Filed February 7, 2018

Vincent Mummau was convicted of third-degree sexual abuse against a Beverly Krause. Beverly Kraus brought a civil action against Mummau seeking damages on the grounds of sexual battery and sexual abuse. At the civil trial Kraus was awarded $163,750. Mummau owned approximately 282 acres of farm land of which land 222 acres was being purchased on a real estate contract with a Mr. and Mrs. Hakert. There were encumbrances on the property in the approximate amount of $637,958. In 2014, Mummau signed an assignment of contract for collateral purposes only to Community Savings Bank which was to remain in effect until all of his debts and obligations to CSB were satisfied.

Kraus obtained a writ of general execution and levied on the farmland which was owned by Mummau. In 2015 there was a sheriff's sale of Mummau's property and a Hettinger purchased the property for $151,000 subject to encumbrances. Kraus died during the pendency of this action. In June of 2015, Mummau filed a petition to set aside the sheriff's sale stating that his interest in the property was only personal property in the 222 acres and that the sale price of the sheriff's sale was grossly inadequate as the value of the property was $1.2 million. In May of 2016 Mummau filed a motion seeking to extend the one-year redemption period noting the redemption period would soon expire. While the motion was pending the one-year period expired and on June 10, 2016 a sheriff's deed was issued to Hettinger. Both parties filed a motion for summary judgment. The Court granted the defendants' motion finding, "Even if the Court were to set aside the sheriff's sale, the Plaintiff would be without a right of redemption because the right expired earlier this year and it was not contested in accordance with Section 628.21 of the Code of Iowa." The Court granted the defendants' motion for summary judgment.

The issue before the court was whether or not the petition to set aside the sheriff's sale should be granted based upon the fact that he only had a personal property interest in the 222 acres. He also claimed that the 222 acres had been assigned to Community Savings Bank.

The Court went through an analysis of Iowa law and found that after a real estate contract is executed, the purchaser becomes the equitable owner of the property. The vendor retains merely a legal title to secure payment of the purchase price. In Iowa it's the ancient rule that a judgment is a lien upon the equitable interest of a debtor in real estate. Therefore, Mummau's equitable interest in the 222 acres was subject to the Kraus's judgment lien.

The Court also held that the assignment of contract for collateral purposes only did not change his equitable interest in the property as it was for only collateral purposes and not an outright assignment. The Court of Appeals therefore affirmed the district court finding no error in the district court's conclusion that Mummau had an equitable interest in the 222 acres which was subject to Krause's judgment lien and also finding that it was an equitable real property interest and had not been assigned outright to the bank. The issue as to whether or not the Court should set aside the sale due to inadequacies of the price has been determined by the Supreme Court in the past. It has always been held that mere inadequacy of price will not justify an interference by a court of equity within the operation of this statute.

The Court found that the right to redeem had expired and the court could not resurrect the right of redemption.

C. Ronald Kunde v. Estate of Bowman

Iowa Court of Appeals No. 17-0791: Filed February 21, 2018

Ronald Kunde claimed neighbor Arthur Bowman now deceased granted him an oral option to purchase his farm for approximately $3,000 an acre at an unspecified time in the future. Kunde leased the Bowman farm and made substantial improvements to the property which he alleges is consideration for the option to purchase. Bowman sold the property to a third person after the grant of the option to purchase. Kunde claimed promissory estoppel, quantum meruit, and unjust enrichment. The case had been to the Iowa Court of Appeals previously and was sent back to the court for further proceedings. The district court in this matter granted Bowman's motion for summary judgment on all claims. The issue before the Iowa Court of Appeals was whether or not Kunde's claim for promissory estoppel was subject to the motion for summary judgment or whether there were fact issues that needed to be addressed by the Iowa District Court. Kunde claimed that Bowman should be estopped for denying the option to purchase the leased property and further contends he is entitled to expectation damages relating to the lost opportunity to purchase the property. Unlike Kunde's other claims the existence of the written farm lease agreement does not preclude recovery as it did with the theories of unjust enrichment and quantum meruit. The Iowa Court of Appeals went through what the elements were for promissory estoppel. The Miller case from 1954 states that the elements are (1) a clear and definitive oral agreement; (2) that Plaintiff acted to his detriment solely in reliance on said agreement; and (3) that a weighing of all the equities entitled plaintiff to an equitable relief of estoppel. Since the Miller case the Schoff case from 1999 states that the elements of promissory estoppel are (1) a clear and definite promise; (2) the promise was made with the promisors clear understanding that the promisee is seeking an assurance upon which the promise could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise. The Iowa Court of Appeals in this three-judge panel determined that the Schoff elements were the most appropriate and binding on the court and therefore did not require a definitive agreement but only a clear and definitive promise. Therefore, the Court reversed the district court and sent it back for further proceedings because there was an issue of fact in dispute. A dissent by one of the judges stated that the Iowa Supreme Court recently affirmed the Miller case in a case entitled McKee v. Isle of Capri Casinos, Inc., 864 N.W.2d 518 (Iowa 2015) in which the elements of the theory are (1) a clear and definitive oral agreement; (2) proof that the plaintiff acted to his detriment in reliance hereon; and (3) finding that the equities entitled the plaintiff to the relief of estoppel. There was no clear and definitive agreement and dissenting judge found that the summary judgment was appropriate.

D. Wells Fargo Bank, NA v. Estate of Donald Leonard Morrison
Iowa Court of Appeals No. 17-0365: Filed March 7, 2018

Wells Fargo loaned funds to Donald Morrison to purchase a home in Cedar Rapids, Iowa. The note was secured by a mortgage. After Morrison died, Wells Fargo filed a petition to foreclose without redemption. The executors of Morrison's estate filed

an answer and raised affirmative defenses based upon absence of proper notice, fraud and bad faith. Wells Fargo moved for summary judgment. The estate filed a resistance without supporting affidavits. The district court found an evidentiary hearing unnecessary. The court granted Wells Fargo's motion reasoning as follows:

> The Executors do not dispute that the note is in default, or that Wells Fargo is entitled to foreclose on the mortgage in the event of a default on the note. The Executors have made several generalized allegations regarding their treatment by Wells Fargo, but the Executors have not set forth any specific evidentiary fact showing the existence of a genuine issue of material fact as to the claim stated by Wells Fargo in the Petition. The Executors have not submitted any affidavit to support the allegations set forth in their Resistance. Therefore, there are no disputed facts to show unclean hands on the part of Wells Fargo related to its actions in this matter.

On appeal the executors contend that there were facts indicating unclean hands. The Iowa Court of Appeals went through an analysis of summary judgment where it is appropriate only when a moving party has demonstrated there is no genuine issue as to any material fact and that a moving party is entitled to judgment as a matter of law. Iowa Rules of Civil Procedure 1.981(3) states "a party resisting a motion shall include a statement of disputed facts, if any, and a memorandum of authorities supporting the resistance." Here the Executors failed to file a statement of disputed facts. The summary judgment granted by the district court was appropriate. The district court action was affirmed.

E. Bloom v. Oniayekan

Iowa Court of Appeals No. 16-1444: Filed March 7, 2018

This is a breach of contract case brought by the sellers of certain property against the buyers. The parties entered into agreement for the purchase and sale of certain property located in Davenport, Iowa. At that time the Plaintiffs in this action completed a seller's disclosure statement. They left blank the question regarding any easements or encroachments but later amended the disclosure and statements with the answer "no". In September of 2014, the seller was sent a certified letter by the City Public Works Department requesting a meeting to discuss a permanent recreational trail easement and a temporary construction easement. The seller then forwarded that information on to his agent who in turn sent it to the buyer's agent. In October of 2014, the buyer's agent informed the listing agent that the buyers were terminating the contract. They terminated the contract based upon the fact that the City of Davenport was taking part of the land they intended to use for their small child to play safely. The City never took title of the land and did not record the easements until approximately one year after the buyers terminated the contract. The buyers failed to appear at the closing in November 2014. Several months later the seller sold the property to another purchaser. The sellers

brought this action for breach of contract seeking certain damages against the buyers for not performing under the contract. The buyers raised the defense of mutual mistake. The buyers alleged that this mutual lack of knowledge of a material issue leads to avoidance of the contract based upon mutual mistake regarding the easements. This issue was not preserved but parties consented to addressing this issue by the Court. The Court of Appeals determined that a mistake is a belief that is not in accord with the facts. Here at the time of the contract none of the parties could have made a mistake about the easement because the easements were not in existence. The easements did not come in to existence until approximately one year after the time the parties were supposed to close the transaction. The Iowa Court of Appeals affirmed the District Court's finding there was no mutual mistake even though there were planning sessions going on by the City regarding a potential for these easements but neither Bloom nor the buyer knew of the existence of these easements. Therefore, the defense of mutual mistake was not a valid defense. There was also an issue regarding attorney's fees. The District Court awarded $8,000 in attorney's fees even though the Plaintiffs requested $19,000 pursuant to the terms of the contract. The Iowa Court of Appeals reiterated the general rule that the District Court's awarding of attorney's fees will not be disturbed unless the court abuses this discretion. The Court of Appels found that there was no abuse by the District Court.

F. City of Des Moines v. Mark Ogden

Iowa Supreme Court No. 16-1080: Filed March 16, 2018

This case deals with a mobile home park that was a nonconforming use in the early 1950s. The question before the court was whether or not the owner of the property exceeded its legal nonconforming use and whether or not the continued operation of the mobile home park should be enjoined for the safety of life or property. The property in question is located on Indianola Avenue in Des Moines, Iowa. It was being used as a mobile home park at the time of the enactment of the City's zoning ordinance. In 1955 the owner was granted a certificate of occupancy from the City that allowed the operation of a mobile home park as a nonconforming use. This use was allowed through 2014. Apparently, the City received certain complaints regarding the mobile home park. The Iowa District Court, as well as the Iowa Court of Appeals determined that the nonconforming use under the 1955 certificate of occupancy should be discontinued for the safety of life or property and that the use of the property by the owner had intensified beyond acceptable limitations. This matter was then appealed to the Iowa Supreme Court on further review. Three arguments were made by the owner of the property. The Defendant argued: (1) the actions of the city to enjoin his use of the mobile home park amounted to an unconstitutional taking; (2) the findings of the district court and the court of appeals that found it was necessary for Ogden to discontinue his legal nonconforming use of the property as a mobile home park for the safety of life and property was incorrect; and (3) that he had expanded the legal nonconforming use of the property beyond its authorized nonconforming use was in error.

The Iowa Supreme Court went through an analysis of the law of nonconforming use. A nonconforming use is one that lawfully existed prior to the time a zoning ordinance is enacted or changed, and continues after the enactment of the ordinance even though the use fails to comply with the restrictions of the ordinance. This lawfully existing prior use of the property creates a vested right in the continuation of nonconforming use once the ordinance takes effect unless the nonconforming use is legally abandoned, enlarged, or extended. The Des Moines Municipal Code states that, "Nothing in this division shall prevent the continuance of a nonconforming use as authorized unless a discontinuance is necessary for the safety of life or property." The discontinuance of nonconforming use for the safety of life of property must be established as an invasion of a right that substantial injury or damage will result unless the request for an injunction is granted. There is no adequate legal remedy available. In a nonconformity use defense which is being asserted by the owner, the court employs a burden shifting analysis to determine whether the property owner asserts a valid defense claiming that the challenged zoning violation is an authorized nonconforming use. First the zoning entity has the burden of proving existence of a current zoning violation. If the zoning entity meets this burden, the burden shifts to the property owner to establish the lawful and continued existence of the use by a preponderance of the evidence. The burden then shifts back to the zoning entity to establish the violation of the ordinance by exceeding the established nonconforming use if the owner establishes a lawful preexisting use. Here the court found that (1) a certificate of occupancy was issued in 1955 for the mobile home park; (2) Ogden's use of the property violates several zoning ordinances that were also in effect in 1955; (3) a 1963 photograph of the mobile home park shows many of the same zoning violations. The court also indicated that intensification of a nonconforming use is permissible so long as its nature and character to use is unchanged and substantially the same facilities are used. Here the court found that the city did not proved Ogden had lost the vested right he had in the operation of the mobile home park as a legal nonconforming use. The Supreme Court vacated the Court of Appeals' decision and reversed the judgment of the district court.

G. Galway Homes, Inc. v. Antonia Manolidis and Tom Manolidis

Iowa Court of Appeals No. 16-0949: Filed May 2, 2018

This case deals with an interpretation of an option agreement. The option agreement was for certain land located in Johnston, Iowa. The agreement included a purchase price of $235,000 and a requirement that Galway, the purchaser, place $5,000 of earnest money into its attorney's trust account. It also gave the purchaser following the date of full execution of the purchase agreement 90 days to perform and complete due diligence on the property. It also stated that if Galway had not purchased all of the land on or before August 30 at 5:00 p.m. the agreement would automatically terminate. The Purchaser, Galway, attempted to rezone the property on numerous occasions and had the option extended on several occasions to November 21, December 12, January 12 and finally on January 10 the parties extended the option to January 27, 2014. The last option agreement extension provided:

"In the event Purchaser has not purchased all of the Land on or by Date of Closing 1-27-14, at 5:00 p.m., then this Agreement will automatically terminate. "

The parties did not close the transaction on January 27, 2014. This action was commenced by Galway against Manolidises. The court went through an analysis of contract interpretation to determine the party's intent at the time they executed the contract. Here the court found that the original option agreement and the extensions failed to outline the manner in which the option was to be exercised. Instead, the agreement contained language as to time but not method. "In the event purchaser has not purchased all of the land by date certain then this agreement will automatically terminate." The agreement was silent regarding the manner in which the option was to be exercised, therefore, anything amounting to an unqualified manifestation of an optionee's determination to accept is sufficient unless the option agreement provides otherwise. It is clear to the court that there was no such manifestation made by Galway during the period of the option to exercise the option and therefore the agreement terminated on its own. The issue regarding earnest money was found not to be addressed in the option agreement and therefore Galway was entitled to the earnest money. Neither party was awarded attorney's fees because the agreements were so ambiguous there was no really meeting of the minds regarding any attorney's fees to be awarded.

H. Paul J. Burroughs, et al. v. City of Davenport Zoning Board of Adjustment
Iowa Supreme Court No. 17-0752: Filed May 25, 2018

A property located in Davenport, Iowa, had been granted a special use permit from the Davenport Zoning Board of Adjustment in March of 2014 to operate a daycare center. This daycare center was leased from the landowner and it closed its doors in December of 2014. In July of 2016, another daycare center opened at the same location. There were more children supervised and it was opened for longer hours. The zoning administrator determined the special use permit ran with the land. The following month a nearby resident, Kenneth Burroughs, wrote the zoning administrator challenging the daycare's right to operate. The zoning ordinance administrator stated that the special use permit runs with the land and he also stated that they could appeal his decision to the board of adjustment. The homeowners did appeal his decision to the board of adjustment. The city board of adjustment affirmed the zoning administrative decision that the special use permit ran with the land and this meeting was in October and the minutes were posted on October 13. Approval of the minutes appeared on October 27 on the city's website. They were also advised that they could file a petition to revoke the special use permit of the daycare operator. On November 14, the homeowners filed a petition to revoke the daycare operator's special use permit. The public hearing was on December 8. Following discussion the board of adjustment unanimously voted against revoking the special use permit. The minutes from the December 8 meeting were then posted at the website on December 19 and became finalized on December 22. The final

minutes were then posted on the City's website on January 6, 2017. On January 25, Burroughs and neighbors filed a petition for a writ of Certiorari to the Iowa District Court for Scott challenging the October 13, 2016 and December 8, 2016 decisions. The City filed a motion to dismiss asserting the petitions were untimely because they were not filed within 30 days of the challenged decision. The homeowners argued that a decision with factual findings were necessary to trigger the 30-day deadline for seeking cert review. The City argued that actual constructive knowledge of the board decision starts the 30-day clock running. The homeowners view was that the findings had to both signed and contain sufficient findings of fact. The Iowa Supreme Court went through an analysis of the various cases interpreting Iowa Code § 414.15 and determined that the party having actual knowledge or was charged with knowledge of a decision does not mean the 30-day period starts. The "Iowa Supreme Court determined that the minutes that were filed could be considered a decision that would start the 30-day period but that it only would begin once the minutes have been approved and posted on the city's website which in this case was in January of 2014." Therefore, their petition for writ was sufficient and within a 30-day period. The decision of the district court was both affirmed in part and reversed in part as to the December meeting it was reversed and to the October meeting it was affirmed.

I. TSB Holdings, LLC v. Board of Adjustment for Iowa City

Iowa Supreme Court No. 15-1373/16-0988: Filed June 1, 2018

In this case, TSB Holdings, LLC bought a property that was the subject matter of the order in the Kempf decision. The Kempf decision was from 1987 and dealt with the property in question as to whether or not the city could rezone in such a manner as to deprive the owner of their intended use of the property for apartments. The decree in question from 1987 stated that

> "The owner or owners of said properties, and their successors and assigns, shall be permitted to develop those property with multiple dwellings (apartments) in accordance with the provisions applicable to the R3B zone in effect on May 30, 1978, prior to the rezoning of said real estate, which was finalized on June 28, 1978.
>
> . . . The City is and shall be enjoined from interfering with development of those properties as herein provided.
>
> Once a use has been developed or established on any of the above-described properties, further development or redevelopment of that property shall be subject to the zoning ordinances in effect at the time such further development or redevelopment is undertaken.

TSB bought the properties from an entity that was not Kempf and wanted to develop the property into apartments. The property had previously been rezoned for a

single-family or duplex development and the issue before the court was whether or not the statute of limitations under Iowa Code §614.1(6) prohibited the developer from relying upon that judgment decree. Iowa Code §614.1(6) provides:

> "Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specifically declared:
>
> 6. Judgments of courts of record. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years, except that a time period limitation shall not apply to an action to recover a judgment for child support, spousal support, or a judgment of distribution of marital assets."

The Court had previously indicated in the case of Dakota, Minnesota & Eastern Railroad v. Iowa District Court, 898 N.W.2d 127 (Iowa 2017) that a 1977 injunction was barred in a contempt proceeding because it was rendered more than 20 years in violation of Iowa Code §614.16. The Iowa Supreme Court reversed itself in this action holding that they should have focused on the term of the statute that says after their cause accrues. The Court in this case found that the cause accrued in this case at the time the city refused to allow the developer in this case to develop the property for apartments. The Court therefore determined that the judgment was still valid and that the city had to comply by the terms of the judgment and allow the property to be developed into apartments.

J. Des Moines RHF Housing, Inc. v. Alvin Spencer

Iowa Court of Appeals No. 17-1465: Filed June 20, 2018

Des Moines RHF Housing, Inc. sent a notice of nonpayment of rent, notice of termination of lease and notice to quit on May 15, 2017 to Mr. Spencer. The notice stated that if the April and May rent were not paid in full by May 22 then the lease agreement would terminate on June 21, 2017. An FED action was filed on June 22, 2017, with an allegation that the landlord terminated Defendant's lease effective June 21 for nonpayment of rent. The magistrate as well as the lower court determined that the landlord violated Iowa Code §614.18 thirty days peaceable possession because of the fact that the notice in question had the April rent included in the notice and the date that the cause of action accrued was more than 30 days. The Iowa Court of Appeals reversed the district as well as the magistrate court holding that the cause of action did not accrue until June 21 because the lease had been terminated and the FED Petition was based upon a lease that had been terminated and a holdover tenant not for nonpayment of rent had been. The court held that the district court erred in recasting RHF Housing's petition that had been filed as a petition for a holdover tenant pursuant to Iowa Code §648.12. The district court treated it as if it was a nonpayment of rent issue under See Iowa Code

§648.15. Second, the district court erred in holding the peaceable possession defense barred RHF Housing's use of the summary remedy as they can use FED for a tenant holding over. The 30 days did not begin to run until June 21, 2017, and therefore Spencer did not have peaceable possession of the property for 30 days after the accrual of the cause of action. The peaceable possession defense is not applicable.

K. US Bank National Association v. Michael Parrott, et al
Iowa Court of Appeals No. 17-0513: Filed July 18, 2018

The action involved a familiar circumstance in the foreclosure context: The Borrower passed away, the loan went into default and the bank sought to foreclose the mortgage against the property and all known and unknown heirs and creditors of the borrower without an estate having been opened for the deceased borrower. The district court denied the bank's motion for default judgment finding it had no jurisdiction because available parties of interest could not be identified without an estate being opened. The Iowa Court of Appeals, noting that the Iowa Supreme Court has instructed that Courts are to give "serious consideration" to the Iowa Land Title Standards, which supported the ability to foreclose without opening an estate, reversed the district court ruling. The court noted that the bank filed the notice requirements set forth in Title Standards 7.8(4) to name as defendants and serve notice upon all known persons reasonably believed to have the right to inherit the property and also all unknown persons with an interest in the estate. It further noted that such persons were served notice the foreclosure action the same as they would be served in probate. Accordingly, it found proper service upon the Defendants whom need to open an estate. The Iowa Court of Appeals reversed the district court and remanded for further proceedings.

L. Nicholas S. Bussanmas, L.L.C. v. The City Council of the City of Des Moines
Iowa Court of Appeals No. 17-1498: Filed July 18, 2018

Bussanmas purchased 2.34 acres of land located at 3816 John Lynde Road in Des Moines, Iowa in 2015. The property had a one-family dwelling and some undeveloped timberland along a ravine. Prior to purchasing the property, he contacted the City to see whether this property could be subdivided and a city employee told him it could be subdivided into four lots if the council granted a variance to subdivide the property. After purchasing the property the four-lot subdivision plat was prepared. Bussanmas applied for the approval as well as a necessary variance concerning the lots proposed frontages. Neighbors of the property received notice and opposed this plan. The zoning board of adjustments denied the four-lot plan in October 2015. Bussanmas then came back to the City with a three-lot subdivision plan which would not require a variance to accommodate frontage requirements. He presented this plat called Winterfell to the City's Planning and Zoning Commission. Neighbors continued to object and the commission by a vote of 11 to 1 recommended denial of the plat at its June 2016 meeting.

They indicated that the plat would create a burden on the City's storm water management system. The land is not consistent with the purpose in the City's subdivision ordinance to protect and provide for the public health, safety and general welfare of the city, to secure safety from flooding and to provide due consideration to be given to the preservation of canopied areas and mature trees and to provide for the mitigation of canopied areas and mature trees which are removed for development. Bussanmas appealed this matter after the city council refused to approve the application to district court. The district court affirmed the city council. Iowa Code §354 governs platting and subdivision of land and it was enacted to provide for a balance between the review and regulation authority of governmental agencies concerning the division and subdivision of land and the rights of land owners. See Iowa Code §354.1. In Iowa Code 354.8(1)(2) it states that the governing body "shall determine whether the subdivision conforms to its comprehensive plan and shall give consideration of the possible burden on public improvements and to a balance of interests between the proprietor, future purchasers, and the public interest in the subdivision." The Supreme Court in previous cases stated that they are inclined toward a reasonable liberal reading of subdivision legislation subject to the watchful eyes of the courts under their de novo review. At the same time the court stated that councils must not approve or disapprove subdivisions on a whim. Bussanmas asserted that there was no room for difference of opinion among reasonable minds and the decision to deny the Winterfell plat was contrary to the evidence, arbitrary and without any regard to reasonable standards or the right of Bussanmas to safely development the subject property. The district court disagreed stating that while the court cannot substitute its judgment for that of the council, the court must still view the facts anew. The Court again may not substitute its judgment for that of the council. The Iowa Court of Appeals found that there was room for a difference of opinion among reasonable minds. Stated another way a reasonable mind could accept the record evidence as adequate to reach the same findings as the council. The council clearly considered all the relevant evidence and balanced that evidence is required by Iowa Code § 354.8(1). The District Court's decision was affirmed.

M. Sibley State Bank v. Dale W. Braaksma, et al
Iowa Court of Appeals No. 17-1021: Filed July 18, 2018

This matter concerns a foreclosure of a farm by Sibley State Bank against the Braaksma family. The Braaksma family owned about 800 acres of farmland in Osceola County. They obtained numerous loans from Sibley State Bank. In early 2016 they missed payments on their promissory notes. All of the notes were in default and the Braaksma's owed the bank approximately $1.5 million. A notice of right to cure as required under the Iowa statute regarding agricultural loans was sent and 45 days had lapsed without payment. Mediation was held and the mediation release was requested by the bank in August of 2016. In February of 2017 the bank asked to be appointed as the receiver under the terms of the Braaksmas' mortgages. The mortgage in question provided as follows:

> "Upon a default by the Mortgagor, the lender may take possession of the property itself or through a court appointed receiver, without regard to the solvency or insolvency of the Mortgagor, the value of the property, the adequacy of the Lender's security, or the existence of any deficiency judgment, and may operate the Property and collect the rents and apply them to the costs of operating the Property and/or to the unpaid debt."

The District Court as well as the Iowa Court of Appeals found that this is not a mandatory receiver clause but did require that the elements in Iowa Code §680.1 had to be reviewed. The court found that the bank had a probable right to, or interest in the property and that the property, or its rents or profits, were in danger of being lost or materially injured or impaired, and therefore all parties interests would be promoted and the substantial rights would not be duly infringed if the Bank was appointed receiver. The district court appointed a receiver and the Court of Appeals affirmed that appointment.

The Braaksmas also challenged the foreclosure based upon a denial of a continuance request filed by the Braaksmas. Iowa Code §654.15 dealing with agricultural loans provides as follows:

> "In all actions for the foreclosure of real estate mortgages . . . when the owner enters an appearance and files an answer admitting some indebtedness and breach of the terms of the designated instrument . . . the owner may apply for a continuance of the foreclosure action if the default is mainly due or brought about by reason of drought, flood, heat, hail, storm, or other climatic conditions. The application must be in writing and filed at or before final decree. If the court finds that the application is made in good faith and is supported by competent evidence showing that default in payment or inability to pay is due to drought, fraud, heat, hail, storm, or other climatic conditions or due to infestation of pests, the court may continue the foreclosure proceedings."

The Iowa District Court found that the evidence did not show that the default was mainly due to climatic conditions. The defendants tried to argue that there was a very wet, nasty spring in 2016 which prevented timely planting and that spring was the root of their financial turmoil. The Court, however, found that the defaults occurred in early 2016 before the wet spring. The Court therefore denied the motion for continuance.

The last objection raised by the Defendants was their interpretation of a debtor's right to cure a default in a foreclosure action on agricultural land under Iowa Code §654.2A(1) and (4).

Under Iowa Code §654.2A(4)(b) after the 45-day notice is given it states as follows:

> "Until the expiration of forty-five days after notice is given, the borrower may cure the default by tendering either the amount of all unpaid installments due at the time of tender, without acceleration, plus a delinquency charge of the scheduled annual interest rate plus five percent per annum for the period between the giving of the notice of right to cure and the tender, or the amount stated in the notice of right to cure, whichever is less, or by tendering any performance necessary to cure a default other than nonpayment of amounts due, which is described in the notice of right to cure."

The Braaksmas tried to argue that they had proposed some other performance which included assignment of their expected crop insurance payment and liquidation of "old crop" grain on hand to the bank and they felt that offer was tendering a performance necessary to cure default other than nonpayment of the amounts due. The bank insisted the Braaksmas were misreading the last phrase and offers an alternative interpretation:

> "The Code contemplates two situations, which may or may not both be in play in a given case. One situation is a debtor defaulting by failing to make a payment due, which is the Braaksma situation. Another situation is the debtor defaulting by violating some other agreement with the creditor, e.g. by failing to pay real estate taxes, or failing to insure collateral as required in loan agreements."

The bank contends it is unreasonable to interpret the right-to-cure statute as allowing a debtor to cure a default by the promise of a future payment. The district court, as well as the Iowa Court of Appeals agreed and affirmed the district court's decision that the notice to cure was given properly.

N. Betty Andrews v. Alice Carter, Anthony Carter, et al.
Iowa Court of Appeals No. 17-1396: Filed September 12, 2018

Betty Andrews and Alice Carter were the daughters of Ruby and Charlie Smiley. Ruby and Charlie obtained a deed to their property at 1530 16th Street in Des Moines, Iowa in 1999. There were several letters written by Ruby stating that when she died she wanted the property proceeds to be split between Betty and Alice. On March 30, 2007, Ruby and Charlie transferred their property to Alice for no consideration by a quit claim deed. On August 14, 2008, Alice signed a quit claim deed placing the property in her name and that of Ruby, again for no consideration. Apparently, this transfer was to enable Ruby to obtain certain financing on the property. Charlie died in 2010. Ruby died in 2011. On June 14, 2013, Alice transferred her interest in the property to Cassius and Dena Robinson by a quit claim deed for the sum of $12,500. On January 28, 2016, Betty filed a petition to quiet title, claiming that Ruby transferred title of the property to Alice to facilitate management of her assets but intended for the house to be sold at Ruby's death and the proceeds divided equally between Betty and Alice. Betty claimed Alice

held the property in a constructive trust. Betty asked the court to set aside the transfer from Ruby to Alice. The district court found that Alice was a primary care giver for Ruby for many years prior to the conveyance of the house to Alice. The court found Ruby's action in placing other assets in the names of Alice and Betty "does little to shed light on Ruby's intent in executing the 2007 quit claim deed." The court concluded a constructive trust was not warranted and title to the property should be quieted in Alice.

On appeal the court went through an analysis of whether or not the transfer in 2007 was a valid transfer. The court stated that "to effectuate transfer of title under a deed, there must be deliver, actual or symbolical, accompanied with the intention of the grantor to transfer title without any reservation of control." The court found that there was no reservation of control over the property when it was transferred to Alice and the court also found that there was no evidence of a constructive trust. A constructive trust is a creature of equity defined as a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest. There are three categories of constructive trusts: (1) those arising from actual fraud; (2) those arising from constructive fraud; and (3) those based on equitable principles other than fraud. The right to a constructive trust must be established by clear, convincing and satisfactory evidence.

The court found that Alice had not met that burden of proof and affirmed the district court.

O. LM Construction v. HGIK Hospitality, LLC

Iowa Court of Appeals No. 17-1255: Filed August 1, 2018

HGIK owned real estate in Ames, Iowa, and entered into a contract with DDG a general contractor to build a commercial hotel on the property. DDG subsequently hired ESC to work as a subcontractor on the project. ESC then contracted with LM to put up drywall in the hotel including providing labor and materials. In the contract between ESC and LM, ESC is listed as a general contractor and LM as a subcontractor. ESC was subsequently fired from the project. ESC paid LM for work up until the time it was fired. LM claims DDG managers approached LM and requested that the work be completed and promised to pay according to the ESC contract. LM completed the work at a cost of an additional $96,915. LM submitted an invoice which DDG did not pay. LM then filed a mechanic's lien pursuant to Iowa Code §§572.2 and 572.8. The lien was filed on the Iowa Mechanic's Notice and Lien Registry. LM then filed a Petition to foreclose on a mechanic's lien against HGIK and DDG in Polk County. The case was amended and the claim was then dropped against DDG and only continued against HGIK. The lower court through a summary judgment determined that the lien of LM was not valid.

Under Iowa Mechanic's Lien law a subcontract is only entitled to a lien if it notifies a general contractor in writing. See Iowa Code §572.33. LM claims it was a subcontractor hired by DDG following the departure of ESC. Error was not preserved on

that issue. Alternatively, LM claims either that ESC was a general contractor when LM began work or that HGIK is an owner-builder and the notice sent to HGIK fulfills the notice requirements of Section 572.33 which requires notice to a principal contractor that the subcontractor is working on the project. This notice is not provided by LM to DDG and therefore the claim of LM was not allowed under the Iowa Mechanic's Lien Law.

P. Rauen & Rauen Development, LLC, et al. v. City of Farley, Iowa
Iowa Court of Appeals No. 17-0866: Filed November 21, 2018

The City of Farley specially assessed certain property owners for the costs of road and storm sewer improvements made in the City's industrial-business district. The project included widening the road, adding a paved shoulder and curb to the roadway and improving the storm sewer along the roadway. The City specially assessed the property owners abutting the property at a rate of $55 per linear foot of property running along the improved roadway. Some of the property owners challenged the special assessment in district court. The district court found the property owners had been assessed in excess of the special benefits received from the project and reduced the assessments. The City timely filed this appeal.

Iowa Code §384.61 requires "the total cost of a public improvement … be assessed against all lots within the assessment district in accordance with the special benefits conferred upon the property, and not in excess of such benefits." An assessment is capped at 25% of the value of the land improved.

Challenges to special assessments are reviewed de novo. Appellate courts will give weight to but are not bound by the district court's findings. The court also presumes assessments are correct and do not exceed the special benefits received by the assessed parties. The property owners bear the burden of showing the special assessment is excessive. The court found that from the outset, according to the evidence, the project was ill-conceived. The industrial business district is isolated on the outskirts of the City. The City did not initiate the project in response to any professional studies such as a water drainage study or traffic study. Instead, the City initiated the project because of some concern the roadway was deteriorating. The City widened the road and added a curb and gutter to match a small segment of the roadway in front of one of the businesses in the industrial business area. The project generated very little if any benefit for the assessed property owners. The property owners testified that the project failed to give them any meaningful improvements and the property owners' testimony was bolstered by their expert witness, Harold Smith, a former city engineer of the City of Des Moines. He stated that the owners received only a de minimis benefit from the project. The project did not reduce noise, reduce roadway dust, improve police or fire access, improve the ability to remove snow or ice, improve water drainage, reduce ditch maintenance, or improve street parking. Smith did testify that the property owners received a minimal special benefit in the form of increased market value of the properties due to the aesthetic improvement from the added curb and gutter.

Given the lack of benefits from the project, Smith testified that the project was best classified as a curb and gutter installation. He relied upon the Flit formula in determining the special benefits associated with the project of this type. The appropriate formula according to Smith was 1 1/2 feet of curb and gutter times the lineal feet of the frontage from the property which gives you square feet divided by 9, gives you square yards times $44.50 a yard. This was the amount used by the court in making the assessment. The Iowa Court of Appeals affirmed the district court finding that there was no evidence that the City's work on the road was any special benefit to the homeowners to any significant degree and the Court of Appeals relied upon Smith's calculation of the amount of the assessment. The Court of Appeals found that the property owners successfully demonstrated the special assessments exceeded the resulting special benefits requiring a reduction of the special assessment.

Q. Ames 2304, LLC v. City of Ames, Zoning Board of Adjustment
Iowa Court of Appeals No. 17-1149: Filed October 10, 2018

Ames 2304, LLC owned certain property in Ames, Iowa, located at 2304 Knapp Street. The property is currently zoned as "Low Density Residential" which only permits one single-family residential dwelling per lot . The structure standing on the lot was built in 1910 as a single-family structure but was converted into an apartment building consisting of four one-bedroom apartments in 1928. The property was converted before the current zoning ordinance went into effect consisting of four one-bedroom apartments in 1928. Because the property was converted before the current zoning ordinance went into effect, it was allowed to continue as a legal nonconforming use.

In 2016, Ames 2304 applied for a permit to remodel the property's interior. The remodel would change the four one-bedroom units into two studio units, one two-bedroom unit and one three-bedroom unit. The property would have seven bedrooms. A zoning enforcement officer denied the permit after determining that the increase in the number of bedrooms increased the intensity of the nonconforming use. The board of adjustment affirmed the decision and on an action for writ of certiorari the district court affirmed the decision of the board of adjustment. The city stated that the increase in the number of bedrooms constituted an increase in the intensity of the nonconformance and correctly interpreted that provisions of the parking space ordinance as evidencing an increase in intensity of the nonconforming use. A certiorari action is a procedure to test whether an inferior board, tribunal, or court acted illegally. The property in question clearly is a nonconforming use. This lawfully existing prior use of the property creates a vested right in the continuation of the nonconforming use once the ordinance takes effect unless the nonconforming use is legally abandoned, enlarged or extended. The Ames ordinance states that a nonconforming use may not be increased in intensity and may not be enlarged, expanded or extended to occupy parts of another structure or portions of a lot that it did not occupy on the effective date of this ordinance. The zoning officer as well as the board of adjustment determined that going from four bedrooms to seven

bedrooms was an increase in intensity of the nonconformance and therefore was not allowed. The Iowa Court of Appeals on review found that the enlargement paragraph of the Ames Ordinance states that "a nonconformance use may not be increased in intensity and may not be enlarged, expanded or extended to occupy parts of another structure or portions of the lot that it did not occupy." The Court of Appeals found that the proposed remodel does not increase the number of dwelling units under our interpretation of the ordinance and the proposed remodel does not violate the ordinance prohibition against an increase in intensity of the nonconforming use. The Board correctly determined the ordinance concerning nonconforming uses prohibits it from approving a permit for an interior remodel that increases the intensity of the nonconforming use. But, in relying on its erroneous interpretation of section 29.307(2)(a), the Board acted illegally in denying Ames 2304 a permit for its proposed interior remodel. Therefore the judgment of the district court was reversed and remanded for an order sustaining the writ.

R. Farmers State Bank v. Richard Allen Wessels and Robb Wessels
Iowa Court of Appeals No. 17-1349: Filed October10, 2018

This case dals with a series of loans that were made by Farmers State Bank to Richard Wessels and Robb Wessels for the acquisition of a farm in Clayton County as well as a bar in Linn County. The mortgage that was in question that was initially placed on the Clayton County farm stated as follows: "all future obligations of Mortgagor to Lender under any promissory note, contract, guaranty, other evidence of debt existing now or executed after this Mortgage whether or not this mortgage is specifically referred to in the evidence of debt and whether or not such future advances or obligations are incurred for any purpose that was related or unrelated to the purpose of the Evidence of Debt and all obligations of Mortgagor owes to Lender which now exist or may later arise, to the extend not prohibited by law."

After the loan was made to acquire the Clayton County farm Wessels approached the bank about securing financing for a bar in Linn County. There was money loaned to secure the bar as well as money loaned to remodel the bar and they were all secured by a mortgage on the bar as well as the mortgage on the Clayton County farm. Payments were late and apparently the Clayton County farm was transferred to his son Robb. Payments continued to be late, there was a dispute between Wessels and his son Robb regarding Wessels' transferring the title to the property to Robb. This transfer was eventually set aside. The bank then brought this action to foreclose on the bar. They did foreclose and there was a deficiency judgment left on the amount due on the loan. This deficiency judgment was then utilized to seek foreclosure on the Clayton County farm. The district court allowed for the deficiency judgment to serve as the basis for the foreclosure on the Clayton County farm. The borrowers in this case objected arguing merger was applicable. Merger is a doctrine which provides when the plaintiff recovers a valid and final personal judgment such as the deficiency judgment in this Linn County action its original claim is extinguished and rights upon the judgment are substituted for the note. The judgment is there in place of the note. The court has pointed out that the doctrine of

merger is not relentless and destructive as it first might appear, especially when considering liens and mortgages. Specifically, even when a creditor obtains a personal judgment against the debtor, the creditor retains the right to enforce a lien or gain possession of property held as collateral for the debt. Simply stated if a creditor has a lien upon property of the debtor and obtains a judgment against him, the creditor does not thereby lose the benefit of the lien. Here the proceeds from the sheriff's sale of the bar failed to satisfy the note and the bank had a personal deficiency judgment against Wessels for the remaining judgment arising from the 2009 note. The mortgage on the Clayton County farm was security for that debt and even though the debt had been transformed from a note to a judgment the court found that the bank had the right to foreclose on the mortgage secured by the Clayton County farm. The decision of the district court was affirmed.

S. Gustafson v. The Board of Adjustment of Buena Vista County, Iowa, and Mark Snyder

Iowa Court of Appeals No. 17-1665: Filed September 12, 2018

Snyder purchased a lot in Buena Vista County that had a cabin located on it near Storm Lake. The area was zoned R-2 residential. Single-family residential structures are permitted in this R-2 district under the zoning ordinance. The lot was nonconforming in that the lot was 4,600 square feet with a lot width of 40 feet and the zoning ordinance required the lot to be 8,500 square feet with a lot width minimum of 70 feet. Snyder demolished the cabin in June of 2016 and intended to move a new dwelling on to the property. Snyder submitted several applications for the board to review as well as the zoning administrator and his proposal was approved by the board. The neighbors of Gustafson filed the notice of appeal. The permit was stayed and hearing was held before the District Court in December. The Gustafsons advanced two legal theories why the permit should not have been granted: (1) under the ordinance no structure can be built on nonconforming lots, and (2) the lot proposed in the permit did not pre-exist the ordinance. The court went through an analysis of how a court will review a restriction the use of property. Iowa Courts strictly construe restrictions on the free use of property, resolving any ambiguity in favor of unrestricted use of the property. In this case the district court followed case law by choosing the less restrictive interpretation of the ordinance in question.

The ordinance in question provided as follows: "Nonconforming Lots: In any district in which single-family dwellings are permitted, notwithstanding limitations imposed by other provisions of this Ordinance, a single-family dwelling and customary accessory buildings may be erected on any single lot of record at the effective date of adoption or amendment of this Ordinance. This provision shall apply even though such lot fails to meet the requirements involving area or width, or both, of the lot; all shall conform to the regulations for the district in which the lot is located."

Gustafsons claims the above provision is modified by the intent subsequent of the ordinance to limit construction on nonconforming lots only to instances where either construction began prior to the adoption of the ordinance or the nonconforming lot was vacant at the time of the adoption.

The lower court as well as the board and the Court of Appeals disagreed with that interpretation. The Court of Appeals found nothing in the ordinance to suggest the county intended to divest lawful owners of a pre-existing lot of the right to erect a dwelling complying with all other ordinance requirements. The nonconforming lots ordinance does not exempt any dwelling or accessory building from conforming to other residential district ordinance requirements, including uses, height, setbacks, or side yards; nor does it permit the creation of any additional nonconforming use. The board's decision to uphold the zoning permit complies with the county ordinances.

T. Kunde v. Estate of Arthur D. Bowman

Iowa Court of Appeals No. 17-0791: Filed November 2, 2018

Kunde owned property in Jackson County that is adjacent to property owned by Bowman. Bowman and Kunde were neighbors and Bowman indicted that if Kunde rented the property from Bowman he would agree to sell the property to him at an agreed upon per acre price. The parties discussed the possibility of improvements to Bowman's property. Kunde agreed to make certain improvement to the property as part of the oral agreement that Kunde could exercise the option to purchase the Bowman land at $3,000 per acre. A written lease was entered into between the parties starting in 2008. A list of improvements to be made by Kunde was listed on the lease and those were then to be made permissive at the renter's expense and would be part of the real property. Kunde made many improvements to the property. He placed expensive fertilizer in the soil, excavated and leveled the property, installed drain tile, engaged in general cleanup, repaired and installed fences and created and redirected waterways. Kunde's work also converted twenty-three acres of nontillable acres to tillable acres and he incurred about $52,000 in costs for labor, equipment use and materials in making the improvements. In 2010, Kunde attempted to exercise the option to purchase the Bowman farm. He was told by Bowman's daughter that she had discovered a third-party right of first refusal on property. Bowman then was placed in a nursing home suffering from dementia. Kunde was served with a notice of termination of the farm lease and the farm was purchased by another party at public auction. Kunde brought this action to district court against Defendants and claimed Defendants breached an option to sell him the agricultural land. Alternatively, Kunde alleged equitable causes of action, including promissory estoppel, unjust enrichment and quantum meruit. The lower court agreed with Kunde and a jury awarded damages of $52,000 which was set aside by the district court finding that there was not evidence sufficient to prove the existence of a contract. Issues regarding the equitable arguments of promissory estoppel, unjust enrichment and quantum meruit were also reviewed by the district court and they were found not to exist due to the fact that there was a lease between the parties. These implied contracts were inconsistent. The

question for the Iowa Court of Appeals as well as the Iowa Supreme Court was whether or not the equitable claims survived a motion for summary judgment. The lower court, Court of Appeals and Iowa Supreme Court found that quantum meruit and unjust enrichment could not be utilized because an express contract and implied contract cannot coexist with the respect to the same subject matter. The parties entered into an express written agreement related to the farmland improvements and allocated the costs of any improvements. The existence of an express contract on these matters prevented Kunde from circumventing the agreement by seeking to use theories of unjust enrichment and quantum meruit to recover for improvements to which he plainly was not entitled under the terms of the agreement.

The issue regarding promissory estoppel deals with an interpretation by the Iowa Supreme Court of whether or not you can have a promissory estoppel argument when you don't have a clear agreement and only a promise. The Iowa Court of Appeals found that you could have promissory estoppel with just a mere promise relying upon the case of Schoff v. Combined Ins. Co. of America, 604 N.W.2d 43 (Iowa 1999) which states there are four elements of promissory estoppel: (1) a clear and definite promise (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promise could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise.

The Iowa Supreme Court affirmed the decision finding that with promissory estoppel you only need a clear and definitive promise not a clear and definitive oral agreement. The case was remanded to determine whether or not promissory estoppel was an available remedy for Kunde to pursue.

LEGISLATION

1. House File 2232 - Mortgage Releases

2. House File 2233 - Mechanic's Lien Revisions

3. House File 2234 - Foreclosure Amendments

4. House File 2318 - Redemption from Tax Sale by Individuals with Disabilities

5. Senate File 2139 - Power of Attorney

6. House File 2175 - Partition

7. House File 2229 - Mechanic's Lien Revisions

8. Senate File 2226 - Groundwater Hazard Statement

9. House File 2340 - Fence Viewers