IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CLEAR CHANNEL OUTDOOR, INC.,	
Plaintiffs,	CV5961
vs.	
IOWA DEPARTMENT OF TRANSPORTATION,	ORDER ON MOTION TO DISMISS
Defendant,	

BE IT REMEMBERED that this matter came on before the court for hearing on the 12th day of April, 2006, on the Motion to Dismiss filed by the defendant herein. The plaintiff appeared by its counsel, Rebecca A. Brommel, and the defendant appeared by its counsel, Mark J. Schouten. The matter was submitted to the court on the motion, resistance and response to resistance. Both sides were given an opportunity to make further filings if they deemed it necessary to protect their record. Upon the written filings and arguments of counsel, the court makes the following findings and order.

Plaintiff's petition seeks a writ of mandamus directing the defendant to bring condemnation proceedings. Mandamus is an extraordinary remedy that is to be used only in exceptional circumstances.[1] Its purpose is to enforce existing rights, not establish new rights.[2] Mandamus will lie to force institution of condemnation proceedings if a taking has occurred.[3]

[1] Bellon v. Monroe County, 577 N.W.2d 877 (Iowa 1998)
[2] Id.
[3] Hunziker v. State, 519 N.W.2d 367 (Iowa 1994); Anderlik v. Iowa State Highway Commission 240 Iowa 919, 38 N.W.2d 605 (1949)

Defendant seeks to have the petition dismissed for failing to state a claim on which relief can be granted.[4] In considering a motion to dismiss, the court must accept as true all factual allegations of the petition but not the conclusions.[5] The motion should be granted only if there is no state of facts conceivable under which a plaintiff might show a right of recovery.[6] This court then should deny the motion to dismiss if plaintiff has established that it has an existing legal right to condemnation and that it has stated a set of facts that arguably would entitle it to pursue that legal right.

From the petition, the following facts appear. The plaintiff is the owner of real estate adjacent to the intersection of I-235 and Easton Boulevard in Des Moines. The property has two billboards located on it. The billboards are legal, non-conforming structures. The defendant as a part of a comprehensive reconstruction of I-235 has changed the elevation of the roadway in the vicinity of plaintiff's property in such a manner as to partially or entirely obstruct the view of the billboards from I-235. Plaintiff has inquired about raising the signs so that visibility would be improved. Because the area where the signs are located is not available for placement of off-premises advertising signs, defendant has advised plaintiff that the signs cannot be raised. The effect of this combination of circumstances will be to permanently deprive plaintiff of income from the signs and to reduce the value of the plaintiff's ownership interest in the property. Plaintiff alleges that these permanent effects constitute a taking within the meaning of the 5th and 14th Amendments to the United States Constitution and therefore entitle the plaintiff to damages for such taking. These damages would normally be assessed through the condemnation process but defendant has refused to initiate condemnation

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[4] Iowa Rule of Civil Procedure 1.421(1)(f).
[5] Kingsway Cathedral v. Iowa Dept. of Transp., 711 N.W.2d 6 (Iowa 2006).
[6] Id.

proceedings. It is this refusal to undertake condemnation that the plaintiff desires to cure by issuance of a mandamus writ directing that the defendant proceed with condemnation. The issue to be decided, then, is whether or not the taking of the view into plaintiff's property from the traveled roadway is a taking for which just compensation is to be paid. If it might be, then the motion to dismiss should be overruled. The court concludes that there is no right to a view into the plaintiff's property and that the petition therefore does not state a claim for which relief can be granted.

Initially, the court notes that Clear Channel has not alleged that the restrictions that render the billboards a non-conforming use amount to a taking.[7] Its only complaint is that the view of its billboards has been partially or completely obstructed. The court feels that this is analogous to cases dealing with decreased traffic flow past a property. In those cases, the courts have consistently held that there is no taking and that a property owner has no vested right in the flow of traffic by his or her property.[8] It would be incongruous to hold that the defendant could move the highway and completely deprive the plaintiff of any traffic viewing its billboards with no consequences yet hold that leaving the highway in place but obstructing the view of the billboards gives rise to consequences.

Clear Channel relies heavily on the Iowa Supreme Court case of Anderlik v. Iowa State Highway Commission.[9] That case involved, in part, a claim that the construction of a road embankment impaired the adjacent property owners' view from their property. But it involved much more than a bare claim of impaired view. The landowners also

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[7] Hunziker, *supra* note 2. ("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.")

[8] Grove & Burke, Inc. v. City of Fort Dodge 469 N.W.2d 703 (Iowa 1991).

[9] 240 Iowa 919, 38 N.W.2d 605 (1949).

contended, and the fact finder could have found, that the embankment also impaired air flow to the houses on the property, made the houses darker, and significantly impacted the access to the properties. The view involved was also the landowners view out of their properties, not the view of the general public into the landowners' properties.

More recently, the Iowa Supreme Court, in a nuisance claim for lost view, has held that such a claim is not cognizable under Iowa law.[10] The court noted:

> We recognize that while disavowing any cause of action for interference with light, air, and view unless granted by express contract, our prior cases have left unanswered the question whether such claim might be sustained under the doctrine of nuisance. ... Squarely confronted with the question, however, we are convinced that giving vitality to such a cause of action in nuisance would be the same thing as granting a prescriptive easement. In other words, recognizing a landowner's right to enforce a nuisance claim for intentional interference with light, air, or view would be indistinguishable from granting an unrecorded interest adjunct to that landowner's property rights for the same purpose.[11]

The court sees little logic in holding that a private landowner has no cause of action against a neighboring private landowner for deprivation of his view, yet holding that the same landowner does have a cause of action if the adjoining landowner is the State of Iowa. If the Anderlik case has any vitality remaining at all, the court concludes that it should be strictly limited to its facts and that it is inapposite to this case.

Plaintiff also argues that its billboards have but one purpose, being seen, whereas other businesses have other purposes than being seen. While true, the essential purpose of any sign is to be seen. It makes no difference whether the sign is attached to the business or on a location remote from the business. The fact is that if the sign cannot be seen, the business might as well be somewhere else. That plaintiff's sign is freestanding rather than attached to the building of the business it advertises is irrelevant. As a matter

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[10] Mohr v. Midas Realty Corp., 431 N.W.2d 380 (Iowa 1988).
[11] Id. at 382. (internal citations omitted)

of public policy, to hold that a right to be seen exists under state law would be to create a cause of action for every property owner whose sign is the least bit obscured by any road project. If such a right is to exist, it should be created by the legislature, not this court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss filed by the defendant herein be, and it is hereby, granted, and plaintiff's petition is dismissed. Costs are taxed to the plaintiff.

John D. Lloyd, Judge
Fifth Judicial District of Iowa

Original filed.

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