COURT OF APPEALS
DECISION
DATED AND RELEASED

August 3, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-0660
94-0735

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV
No. 94-0660

OZGA ENTERPRISES, INC.,

Plaintiff-Respondent-Cross Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES AND WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Defendants-Appellants-Cross Respondents,

GEORGE MEYER, SAM ROCKWEILER, SUSAN G. JOSHEFF AND JAMES B. QUINLAN,

Defendants.

No. 94-0735

OZGA ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

**WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
WISCONSIN DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,
GEORGE MEYER,
SAM ROCKWEILER,
SUSAN G. JOSHEFF,
JAMES QUINLAN,
MARQUETTE COUNTY,**

Defendants-Respondents.

APPEAL and CROSS-APPEAL from orders of the circuit court for Marquette County: RICHARD REHM, Judge. *Affirmed in part and reversed in part.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

VERGERONT, J. This case arises out of the efforts of Ozga Enterprises, Inc. (Ozga) to develop its property in Marquette County. Ozga appeals from an order dismissing all but one of its claims against the Wisconsin Department of Natural Resources (DNR), two DNR employees, the Wisconsin Department of Industry, Labor and Human Relations (DILHR), and two DILHR employees. Ozga also appeals from an order granting summary judgment to Marquette County on all of its claims against Marquette County. We granted

leave to the two state agencies to appeal from a non-final order denying their motion to dismiss Ozga's procedural due process claim against them.[1]

We conclude that Ozga's amended complaint does not state a claim against the state agencies or the state employees for a taking of property without just compensation. Ozga's claims for money damages for violations of substantive and procedural due process against the state agencies are barred by the doctrine of sovereign immunity. Ozga's amended complaint does not state a claim against the state employees for either a substantive or procedural due process violation, or under 42 U.S.C. § 1983. Finally, the initial complaint was properly dismissed against Marquette County because that complaint failed to state any claim against Marquette County.

BACKGROUND

Ozga's first complaint named Marquette County and the two state agencies as defendants. The factual allegations were as follows.

Ozga's property is adjacent to a dam that created Mason Lake in Marquette County. Ozga obtained authority from DNR pursuant to § 31.12, STATS.,[2] to build a penstock and powerhouse on its property. Ozga then received a variance from the County's shoreland zoning ordinance to allow construction of a house and condominium with a reduced setback. Ozga began construction of the condominium on September 1, 1986, and the County ordered Ozga to cease construction the next day.

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[1] Ozga filed a cross-appeal in the state agencies' appeal. Because of our disposition of the issues on appeal, we need not address Ozga's cross-appeal.

[2] Chapter 31, STATS., gives the DNR the authority to regulate dams and bridges. Section 31.05, STATS., requires permits from the DNR for the construction of dams. Section 31.07, STATS., requires permits from the DNR for the operation and maintenance of existing dams.

Ozga then filed applications with DILHR for the issuance of a private sewage system permit and to develop in a floodplain. DNR refused to sign the application to develop in a floodplain because it disagreed with Ozga on the original flood elevation and flood zone designation. DNR informed Ozga of this on November 13, 1986. In December 1986, the County refused Ozga's application for a zoning permit, stating that the entire property was in a floodplain. Also in December 1986, DNR filed a suit against Ozga alleging a violation of § 31.12, STATS., with respect to the construction of the penstock and powerhouse. That suit resulted in a stipulation to an injunction prohibiting further construction, but permitting Ozga to provide for security and maintenance of existing improvements.

The complaint also alleged that DNR filed a second lawsuit against Ozga on March 11, 1988, for a violation of WIS. ADM. CODE ch. NR 116 for building within a floodplain.[3] On January 31, 1991, this court reversed the trial court order in this second enforcement action and reinstated the jury verdict. The jury had found that DNR's determination of flood elevation was not reasonable.[4]

The complaint alleged that in 1989, before the trial, Ozga filed additional applications with DILHR for permission to develop in a floodplain and for a private sewage system. These were denied or refused further processing. Because of DILHR's denials, the County refused to issue a sanitary permit or a building permit, preventing completion of the project and depriving Ozga of all economic use of its property and causing other damages. The County adopted a floodplain ordinance on September 11, 1991, which renders

[3] WIS. ADM. CODE ch. NR 116 deals with Wisconsin's floodplain management program and requires municipalities to adopt, administer and enforce floodplain zoning ordinances that meet certain criteria. If a county fails to adopt a floodplain ordinance, DNR must adopt one for the county. Section 87.30(1), STATS. WIS. ADM. CODE § NR 116.22(4)(b) and (c) requires DNR to aid municipalities in floodplain enforcement, specifically permitting it to seek an injunction to stop construction in a floodplain until an adequate floodplain ordinance is adopted and approved and to stop construction where it violates an approved ordinance or the provisions of WIS. ADM. CODE ch. NR 116.

[4] By stipulation of the parties, only the floodplain elevation issue was tried.

Ozga's property practically and substantially useless for all reasonable purposes and precludes all development of the property.

Ozga asserted claims against all defendants for inverse condemnation, conspiracy and unconstitutional taking, conspiracy and deprivation of property without due process, conspiracy and violation of 42 U.S.C. § 1983, and a violation of § 134.01, STATS. The complaint requested monetary damages.

All defendants moved for summary judgment. On January 19, 1993, the trial court orally granted the County's motion entirely.[5] It also granted the state agencies' motion on all claims but the procedural due process claim.

Ozga amended its complaint on November 12, 1993. It added four individual defendants: George Meyer, the administrator of DNR's Division of Enforcement and alleged to be involved in the decision to bring enforcement actions against Ozga; Sam Rockweiler, the supervisor of DILHR's plan review unit and the person who denied Ozga's April 13, 1989 application for a private sewer system permit on the ground the construction was in a floodway; Susan Josheff, an environmental engineer employed by DNR who determined that the construction was in a floodway and who refused to sign the September 11, 1986 and April 17, 1989 applications for permission to build in a floodway; and James B. Quinlan, a DILHR plumbing inspector and plan reviewer.

The amended complaint contained substantially the same factual allegations as the initial complaint. New factual allegations of significance will be discussed below. The amended complaint requested monetary damages and asserted claims for deprivation of property without due process, taking of property without just compensation and without due process in violation of the state and federal constitutions, and a violation of 42 U.S.C. § 1983.

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[5] The trial court's written order granting the County's motion for summary judgment is, for some reason, dated January 1, 1993. The order was not entered until January 10, 1994.

All of the state defendants moved for dismissal of the amended complaint on the grounds of sovereign immunity and that the amended complaint failed to state a claim upon which relief can be granted. The court granted the motion on all claims against the state agencies, except for the claim regarding procedural due process. As to those claims against the state agencies other than the procedural due process claim, the court decided that the claims were in reality claims against the state and were barred by the doctrine of sovereign immunity and because the state cannot be sued under 42 U.S.C. § 1983. The court concluded that the claims against Meyer were against him in his official capacity and dismissed the claims against him. The other individuals had qualified immunity, the court held, and were also dismissed.

STATE AGENCIES

Whether a complaint states a claim is a question of law that we determine without deference to the trial court's decision. *See* ***Williams v. Security Sav. & Loan Ass'n***, 120 Wis.2d 480, 482, 355 N.W.2d 370, 372 (Ct. App. 1984).[6] In determining whether a complaint should be dismissed, the facts pleaded and all reasonable inferences from the pleadings are taken as true. ***Irby v. Macht***, 184 Wis.2d 831, 836, 522 N.W.2d 9, 11, *cert. denied*, 115 S. Ct. 590 (1994).

We first consider the state agencies' argument that sovereign immunity entitles them to a dismissal of all claims.[7] The State of Wisconsin has

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[6] Ozga apparently believes that we are to review the grant of summary judgment in favor of the state defendants. This is incorrect. Ozga did not appeal from the order granting summary judgment in favor of the state agencies on all claims in the initial complaint but the procedural due process claim. Rather, Ozga appealed from the order granting the motion of the state agencies and state employees to dismiss the amended complaint on all but the procedural due process claim. In deciding that motion, the trial court did not consider materials outside the pleadings. Therefore, as to the state defendants, we consider only the allegations of the amended complaint and not the materials submitted in connection with the state agencies' motion for summary judgment on the initial complaint.

[7] In its reply brief, Ozga argues that the state agencies waived their right to raise sovereign immunity as a defense because sovereign immunity goes to personal jurisdiction and the state agencies did not cite § 802.06(2)(a)3, STATS., in their motion to dismiss. There is no merit to this contention. The motion stated that the amended

sovereign immunity and may not be sued for monetary relief without its consent. ***Lister v. Board of Regents***, 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976). This immunity from suit extends to the agencies of the state. ***Id.*** DNR and DILHR are therefore immune from suit unless the state has consented to suit against them on the claims alleged in the amended complaint. The prohibition in the Wisconsin Constitution against taking property for a public purpose without just compensation[8] is a waiver of sovereign immunity for claims alleging a violation of that constitutional provision and seeking just compensation. ***Zinn v. State***, 112 Wis.2d 417, 436, 334 N.W.2d 67, 76 (1983). Ozga cites no authority for a waiver of sovereign immunity on its other claims against the state agencies except the dissent in ***Grall v. Bugher***, 181 Wis.2d 163, 511 N.W.2d 336 (Ct. App. 1993), *rev'd on other grounds*, ___ Wis.2d ___, 532 N.W.2d 122 (1995). However, the majority in ***Grall*** clearly affirmed the principle of sovereign immunity and the requirement that there be an express waiver, even if the claims allege state and federal constitutional violations and seek relief under 42 U.S.C. § 1983.

We conclude there is no express waiver of sovereign immunity for any claim asserted in the amended complaint except the claim of a taking without just compensation. The trial court therefore properly dismissed the substantive due process claim. It should have dismissed the procedural due process claim against the state agencies for the same reason.[9] The trial court should not have dismissed the claim of an unconstitutional taking against the

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complaint should be dismissed because it was barred by sovereign immunity, and both parties argued this issue before the trial court.

[8] WIS. CONST. art. I, § 13 provides:

> The property of no person shall be taken for public use without just compensation therefor.

The Fourteenth Amendment to the United States Constitution also entitles a property owner to just compensation if the state or one of its subdivisions takes the owner's land for a public purpose without just compensation. ***Gamble v. Eau Claire County***, 5 F.3d 285, 286 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1096 (1994).

[9] As Ozga concedes, DNR and DILHR are not "persons" amenable to suit under 42 U.S.C. § 1983. *See* ***Will v. Michigan Dep't of State Police***, 491 U.S. 58, 70 (1989) (state agencies are not "persons" within the meaning of 42 U.S.C. § 1983).

state agencies on the ground of sovereign immunity. However, we conclude that claim was properly dismissed because the amended complaint does not state a claim for a taking without just compensation.

The amended complaint alleges that Ozga was denied permits necessary to construct a condominium on its property and that the basis for the denials was a determination by DNR of the flood elevation that had no reasonable basis.[10] The amended complaint does not state the outcome of the second DNR enforcement action against Ozga after the determination of the flood elevation.[11] Liberally construing the amended complaint in Ozga's favor, we read it to allege that DNR's denial of Ozga's request to build in a floodplain was determined to be in error, as was the denial of the other applications insofar as they were based on DNR's erroneous determination of the flood elevation. Ozga argues that DNR's and DILHR's denials of its applications on an erroneous basis constitute an unconstitutional taking because they deprived it of all economically viable use of its property.

In the absence of physical occupancy or possession, private property can be taken for public use only by state, county or municipal action that imposes a legally enforceable restriction on the use of the property. ***Reel Enters. v. City of La Crosse***, 146 Wis.2d 662, 674, 431 N.W.2d 743, 749 (Ct. App.

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[10] Specifically, Ozga alleges in the amended complaint that its September 11, 1986 application for permission to develop in a floodplain identified the regional flood elevation as 796.0 feet above mean sea level; that at the time DNR and Josheff refused to sign it, the only available information was that the regional flood elevation immediately downstream from the property was 796.0 feet above mean sea level; that Josheff and DNR did not complete their calculations of the regional flood elevation at Ozga's property until sometime in October 1987, and did so without a public hearing; that the average lake level in Lake Mason since 1965 has been set at 798.4 feet above mean sea level; that the Park Service Commission and later the DNR have maintained the level of Lake Mason approximately one foot higher than the minimum level in order to avoid irritating riparian owners of property on Mason Lake, thereby raising the regional flood elevation.

[11] The amended complaint does allege that on February 4, 1992, DILHR returned Ozga's application and 1989 request to build in a floodplain, indicating that any renewed submittal would be treated as a new application. But, although the amended complaint was filed on November 12, 1993, it does not allege what happened to Ozga's applications after February 4, 1992.

1988). A legally imposed restriction that the adopting agency later repeals, rescinds or amends may be a compensable temporary taking. ***Id.*** at 677, 431 N.W.2d at 749. *See also* ***Zinn***, 112 Wis.2d at 429, 334 N.W.2d at 73. But if a court reverses the agency's action that created the restriction, a legally imposed restriction does not exist and no taking has occurred. ***Reel Enters.***, 146 Wis.2d at 676-77, 431 N.W.2d at 749-50.

There is no allegation in the complaint that DNR or DILHR repealed, rescinded or amended its denials of Ozga's applications. The only reasonable inference we can draw from the allegations concerning the second enforcement action is that DNR's and DILHR's actions in denying Ozga's applications were invalid because they were based on an erroneous determination of flood elevation as found by the jury in that action. Those actions, therefore, were not legally imposed restrictions and the amended complaint does not state a claim for an unconstitutional taking.[12]

STATE EMPLOYEES

The amended complaint does not state a claim for an unconstitutional taking against the state employees. It is the state (or county or municipality) and its agencies that take property for public purposes, not the employees of the agencies. Moreover, since the amended complaint does not state a claim for an unconstitutional taking against the state agencies, it follows

[12] Ozga also argues in its brief that inverse condemnation has occurred. The initial complaint did assert a claim for inverse condemnation under § 32.10, STATS., as well as a claim for an unconstitutional taking. However, the amended complaint makes no reference to either § 32.10 or to inverse condemnation. Section 32.10 permits the owner of land that has been occupied by a person possessing the power of condemnation to institute condemnation proceedings by presenting a verified petition in circuit court asking that condemnation proceedings be commenced. Even if we were to read the amended complaint as attempting to assert a claim under § 32.10 for inverse condemnation, the amended complaint would not state a claim under § 32.10 for the same reason it does not state a claim for an unconstitutional taking. The requirement of a legally enforceable restriction applies to both claims. ***Reel Enters.***, 146 Wis.2d at 674-75, 431 N.W.2d at 749.

that the amended complaint does not state a claim against the employees who acted for those agencies.

We now consider Ozga's argument that the individual state employees deprived it of property without procedural due process.[13] We continue to limit our analysis to the allegations in the amended complaint. In addition to the allegations concerning the denials and refusals to approve Ozga's applications, the amended complaint alleges that no defendant provided Ozga with written notice of disapproval of its applications as required by WIS. ADM. CODE § ILHR 83.06(4),[14] and that Ozga exhausted all administrative remedies of which it had notice. The amended complaint also alleges that defendants failed to respond to Ozga's notices of claim, which it filed on June 29, 1989 and August 31, 1989. We conclude the amended complaint fails to state a claim against the state employees for a violation of Ozga's right to procedural due process.

The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. ***In re Christopher D.***, 191 Wis.2d 681, 702, 530 N.W.2d 34, 42 (Ct. App. 1995). Section 227.42(1)(a), STATS., provides that any person filing a written request with an agency for a hearing has the right to a hearing if a "substantial interest of the person is injured in fact or threatened with injury by agency action or inaction." The plain language of this provision indicates that Ozga could have requested a hearing on the denials or refusals of its applications by the state

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[13] We read the amended complaint to raise due process claims under both the state and federal constitutions. The state constitution's guarantee of due process is the functional equivalent of the federal constitutional guarantee. ***State v. McManus***, 152 Wis.2d 113, 130, 447 N.W.2d 654, 660 (1989).

[14] WIS. ADM. CODE § ILHR 83.06(4)(c) provides:

> *Written notice.* The county shall issue written notice to each applicant whose sanitary permit application is disapproved. Each notice shall state the specific reasons for disapproval and amendments to the application, if any, which render the application approvable. Each notice shall also give notice of the applicant's right to appeal and the procedures for conducting an appeal under ch. 68, Stats.

agencies. To the extent Ozga is complaining of delay, it could have requested a hearing based on agency inaction.

The amended complaint does not allege that Ozga requested a hearing before either DILHR or DNR and was not given a hearing. It does not allege that the procedures for a hearing under ch. 227, STATS., were either unavailable to it or inadequate. The allegation that Ozga was not advised of its right to a hearing as required by WIS. ADM. CODE § ILHR 83.06(4) is not relevant to a procedural due process claim against the state employees because that provision applies, by its terms, to counties. The allegation that Ozga exhausted all administrative remedies of which it had notice is not a sufficient factual allegation to state a claim for a violation of procedural due process against the state employees in view of the availability of ch. 227. Ozga has not alleged in the amended complaint, or pointed out in its brief, any requirement that the individual state employees inform it of its right to request a hearing or of the availability of ch. 227. Finally, the allegation that the state employees failed to respond to the notices of claim Ozga filed does not state a claim against them. Section 893.82, STATS., does not require any state employee, much less the four state employees named as defendants in this action, to respond to a notice of claim.

Turning to the claim of substantive due process, we conclude the amended complaint fails to state such a claim against the state employees. Considering only the factual allegations and not the legal conclusions, the essence of the pertinent allegations is that the state employees did not have a reasonable basis for the calculation of the flood elevation on which they based the denials of Ozga's applications.

The cases Ozga cites do not support its argument that these allegations are sufficient to state a claim for a violation of substantive due process. These allegations do not, even liberally construed, constitute the type of government action where power is used for purposes of oppression, where there is an abuse of power that shocks the conscience or where government action is not sufficiently keyed to a legitimate state interest. *See* ***Polenz v. Parrott***, 883 F.2d 551, 558 (7th Cir. 1989). Nor do they show that the state employees acted without authority under state law, which the court in ***Brady v. Town of Colchester***, 863 F.2d 205, 215 (2d Cir. 1988), suggested could constitute

a violation of substantive due process in a zoning context.[15] Ozga had a procedural vehicle for challenging the inaction or erroneous action of the state employees involved in denying its applications but, based on the allegations in the amended complaint, Ozga did not use those procedures. The disputed issue was resolved favorably to Ozga in the second DNR enforcement action. We conclude the amended complaint does not state a claim for a violation of substantive due process.

Because the amended complaint does not state a claim against the state employees for any federal constitutional violation, it does not state a claim against them for a violation of 42 U.S.C. § 1983. *See* ***Riedy v. Sperry***, 83 Wis.2d 158, 163, 265 N.W.2d 475, 478 (1978) (a cognizable claim under 42 U.S.C. § 1983 requires a showing that the plaintiff has been deprived of a right secured by the federal constitution by a person acting under color of state law). We therefore do not reach the issue of whether the state employees had qualified immunity under § 1983, the issue which the trial court found dispositive.

MARQUETTE COUNTY

Our review of a grant of summary judgment is de novo and we apply the same standard as the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint to determine whether it states a claim. ***Id.*** If it does not, the defendant is entitled to a dismissal of the action and we need not examine the answer or any materials beyond the complaint.

The factual allegations of the initial complaint[16] with respect to the County are that because DILHR denied Ozga's application based on DNR's

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[15] We note that the United States Court of Appeals for the Seventh Circuit in ***New Burnham Prairie Homes, Inc. v. Village of Burnham***, 910 F.2d 1474, 1481 (7th Cir. 1990), disagreed with ***Brady v. Town of Colchester***, 863 F.2d 205, 215 (2d Cir. 1988), and held that, in addition to alleging that the decision was arbitrary and capricious, the plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies.

[16] We examine only the initial complaint because Ozga appeals from the trial court's

erroneous determination of flood elevation, the County refused to issue a sanitary permit or building permit and did so without notifying Ozga of its right to a hearing under WIS. ADM. CODE § ILHR 83.06(4). The County is also alleged to have adopted a floodplain ordinance that will prevent development of Ozga's property.

We conclude the complaint does not state a claim against the County for an unconstitutional taking. The County may not issue a building permit unless the property owner has a sanitary permit. Section 66.036(1), STATS. A county may not issue a sanitary permit for a holding tank without the approval of DILHR. WIS. ADM. CODE § ILHR 83.08(1)(b). We have already held that the actions of the state agencies alleged in the complaint did not constitute an unconstitutional taking. It follows that no taking claim is stated against the County for failing to issue permits that it was prohibited from issuing based on the state agencies' actions.

The allegation concerning the floodplain zoning ordinance adopted by the County is not sufficient to state a claim for an unconstitutional taking. According to the initial complaint, the County had not yet adopted an ordinance at the time the County refused to issue the permits. If there is other action or inaction of the County pursuant to the ordinance it adopted on September 11, 1991, that constitutes an unconstitutional taking, the initial complaint does not say what that is.

Because the County, in view of the state agencies' actions, did not have authority to issue the permits, the County's failure to do so does not state a claim for a denial of substantive due process by the County. Nor does the County's failure to give written notice of disapproval of Ozga's application for a sanitary permit constitute a denial of procedural due process. The action or inaction that Ozga is contesting is the refusal of the state agencies to approve its applications because of the dispute over the flood elevation. The County cannot grant the sanitary permit without the state agencies' approval. An appeal under ch. 68, STATS., the Municipal Administrative Procedure Act, of the County's

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order entered January 10, 1994, granting summary judgment to Marquette County on all of Ozga's claims in its first complaint against Marquette County.

failure to issue the permit does not provide a meaningful opportunity for Ozga to contest the action that is allegedly depriving it of the use of its property--the refusal of the state agencies to approve Ozga's applications. The failure of the County to give Ozga notice of that procedure is therefore not a violation of its right to procedural due process.

As we explained above, in the absence of any viable claims against the County for a violation of federal constitutional rights, the initial complaint does not state a claim against the County under 42 U.S.C. § 1983.

By the Court.—Orders affirmed in part and reversed in part.

Not recommended for publication in the official reports.

Nos. 94-0660(D)
94-0735(D)

SUNDBY, J. (*dissenting*). Ozga presents seven issues. I limit my dissent solely to the following issue:

> In an action which alleges a taking of private property for public use without just compensation, are the state agencies protected under the doctrine of sovereign immunity when the state impliedly consents to suit under the terms of the state constitution?

The just compensation clause, article I, § 13 of the Wisconsin Constitution, is a partial surrender of the state's sovereign immunity. Nonetheless, the state argues that even if the amended complaint contains the essential elements of a claim for inverse condemnation, "[w]e state unequivocally that the trial court's order dismissing all state defendants because they are immune from this suit is correct and must be affirmed." ***Zinn v. State***, 112 Wis.2d 417, 334 N.W.2d 67 (1983), is perhaps the most cited decision interpreting the just compensation clause. In that case, the court said that:

> Art. I, sec. 13 of the Wisconsin Constitution is self-executing and needs no express statutory provision for its enforcement. This is because just compensation following a taking "is a constitutional necessity rather than a legislative dole." The "waiver" to the doctrine of sovereign immunity is found in the constitution itself and thus no legislative direction pursuant to Art. IV, sec. 27 is necessary.

Id. at 436, 334 N.W.2d at 76 (citation omitted).

The majority recognizes that the state and its agencies may not erect the defense of sovereign immunity to avoid liability for a taking. However, the majority concludes that Ozga's "taking" claim was properly dismissed because "the amended complaint makes no reference to either § 32.10 or to inverse condemnation." Maj. Op. at 12 n.12.

As in ***Zinn***, this review comes before this court on a motion to dismiss.

> Thus the sole issue before the court is whether the plaintiff's complaint states a claim upon which relief can be granted. In determining whether the complaint was properly dismissed by the court of appeals, "we apply the familiar test that the pleadings are to be liberally construed to do substantial justice between the parties, and the complaint should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations."

Zinn, 112 Wis.2d at 423, 334 N.W.2d at 70 (quoting ***Strid v. Converse***, 111 Wis.2d 418, 422, 331 N.W.2d 350, 353 (1983)).

Ozga's complaint details the denials of permits by defendants which it claims have deprived it of the opportunity to develop its property. Ozga alleges that:

> 58. Defendants' actions have deprived [Ozga] Enterprises of all economically viable use of the property.
> 59. Defendants' actions have prevented Enterprises from realizing its investment expectation with respect to the [p]roperty.
> 60. Enterprises has not been compensated for the loss of viable economic use of the property nor for the diminution in value.

Clearly, the complaint states a claim for the taking of its property without just compensation.

For these reasons, I respectfully dissent.