

IN THE COURT OF APPEALS OF IOWA

No. 3-077 / 92-833

FILED

SEP 02 1993

CLERK SUPREME COURT

DEALERS WAREHOUSE CO., INC.,

Appellant,

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vs.

CITY OF NEWTON, IOWA; DONALD COSTANZO,
FRED DIMON, CORRINE HADLEY, MARY MULLIN,
MARVIN SHAWVER and TERRY TOWNSEND, Not
As Individuals but as Members of the City
Council of the City of Newton, Iowa;
AL BORCHERS, Not as an Individual but as
Mayor of the City of Newton, Iowa,

Appellees.

Appeal from the Iowa District Court for Jasper County,
Michael Streit, Judge.

Dealers Warehouse Company appeals a judgment entered in
the defendant's favor following the district court's
dismissal of Dealers' mandamus action. **AFFIRMED.**

Douglas A. Fulton and William J. Lillis of Connolly,
O'Malley, Lillis, Hansen & Olson, Des Moines, for
appellant.

Ivan T. Webber and Steven K. Gaer of Ahlers, Cooney,
Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, for
appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J. 000170

Dealers Warehouse Company (Dealers) appeals a judgment entered in defendants' favor following the district court's dismissal of Dealers' mandamus action. Dealers contends the district court erred in: (1) failing to apply the proper legal standards to the defendants' motion to dismiss; (2) dismissing Dealers' inverse condemnation claim since the combined actions of the defendants constituted a taking of its property; and (3) failing to find the city of Newton was not contractually bound to purchase its property.

In December of 1987 the city of Newton (City) adopted an urban renewal plan. In order to make the plan more palatable, the City and the city administrator, Gerald Pecinovsky, agreed to implement a voluntary purchase plan. The voluntary purchase plan permitted property owners within the urban renewal zone to sell their property to the City for a negotiated price.

In March of 1988 the City began acquiring property under the voluntary purchase plan. In May of 1988 CGB Printing Company representatives approached Gary Bagnell, the president of Dealers, about purchasing Dealers' property. CGB indicated it was looking for a new location because its property was scheduled for acquisition by the City.

Mr. Bagnell then met with Gerald Pecinovsky and discovered that Dealers also had property within the urban

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renewal zone. Bagnell and city officials then discussed the possible purchase of Dealers' Newton property. Bagnell hired an appraiser who arrived at a property value of \$360,000. The city officials then executed an offer to buy, signed by Pecinovsky, for the appraised price. Section twenty-one of the offer provided, "APPROVAL: This offer shall be valid only upon approval by the Newton City Council." Upon Bagnell's inquiry, city officials indicated that council approval was routine.

The city council, however, rejected the offer to buy the Dealers Warehouse property. The City then refused to give Dealers any assurances that the property would not be acquired and condemned. In addition, the City indicated that Dealers would have to vacate the premises within ninety days if condemnation occurred. Dealers then purchased property in Ankeny and left Newton in January of 1989.

When the City failed to acquire or condemn the property, Dealers filed a five-count petition against the City, alleging breach of contract, breach of implied duties of good faith and fair dealing and inverse condemnation. Dealers later amended its petition to add a sixth count, seeking to compel the City to institute eminent domain proceedings against Dealers' Newton property. The district court entered an order scheduling trial on the mandamus issue only.

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Following Dealers' case in chief, the district court granted the City's motion to dismiss based on Dealers' failure to show either a valid contract or inverse condemnation. Dealers appealed.

The supreme court treated Dealers' notice of appeal as an application for interlocutory appeal and denied it. Dealers then dismissed count five of its petition and induced the district court to enter judgment on the remaining counts. Dealers now appeals, and we affirm.

Although an action of mandamus is, by statute, to be tried as an equitable action, see Iowa Code § 661.3, this action was originally filed and tried as a law action. Our scope of review is governed by how the case was tried in district court. Grinnell Mut. Reins. Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). Accordingly, our scope of review is for errors of law.

The first argument that Dealers advances on appeal is that the district court failed to apply the proper legal standard in dismissing Dealers' cause of action. Our review of the district court's findings and order, following the defendants' motion to dismiss, reveals that Dealers' contention is without merit. A trial court, when considering a motion to dismiss in a nonjury case, is to apply the same legal standard of review of the plaintiff's evidence as with a motion for directed verdict in a jury case:

In ruling on a motion for directed verdict or an equivalent motion to dismiss during trial, a trial

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court must view the evidence in its light most favorable to the adverse party, here the plaintiff. The movant is considered to have admitted the truth of all evidence offered by his adversary and every favorable inference which may fairly and reasonably be deduced from it. When a plaintiff had adduced substantial evidence in support of each element of his cause of action, the motion should be overruled.

Wernimont v. State, 312 N.W.2d 568, 570 (Iowa 1981) (citing Brown v. Ellison, 304 N.W.2d 197, 202 (Iowa 1981)).

Ruling from the bench, the court complied with this standard by stating in its order:

THE COURT: Upon consideration of the motions, Court makes the following finding and order: Court is required to construe the motion in the light most favorable to the opposer. There is a certain troubling procedural aspect to my ruling here. I'm going to grant the City's motion for a directed verdict -- or a motion to dismiss at the close of Plaintiff's case. In all honesty I would say if I was weighing the testimony you don't even have to bother to put on any more evidence. I don't know who you'd be calling.

* * *

THE COURT: But if I was judging, weighing the evidence, I'd rule this way, but even looking at the evidence in the light most favorable to Dealers Warehouse the Court is going to grant the motion to dismiss for the following reasons:

* * *

More broadly speaking, from hearing the evidence here and construing it in the light most favorable to the Plaintiffs there's been no showing of any conduct here by the City which would rise to a level of contract. . . . I'm moving on to the taking aspect of it. There's been no showing of any substantial evidence sufficient enough to allow this trial to go forward of any conduct by the City that amounted to a taking. . . . For those reasons the motion for directed verdict on Plaintiff's part is denied. Motion for dismissal is sustained.

(Emphasis added.) The underlined portions of the court's order clearly evidence the fact the court applied the proper legal standard when considering--and ruling on--the defendants' motion to dismiss.

Secondly, Dealers contends the district court erred in dismissing Dealers' land purchase contract claim against the City. We find this contention to be equally without merit. In essence, Dealers argues that the city administrator, Gerald Pecinovsky, acting as agent for the City, bound the City in contract to purchase Dealers' property. This conclusion is not in accordance with Iowa law.

Under Iowa law, "[a] power of a city is vested in the city council except as otherwise provided by a state law." Iowa Code § 364.2(1). "A city council shall exercise a power only by the passage of a motion, a resolution, an amendment or an ordinance." Iowa Code § 364.3(1). In Baird v. Webster City, 256 Iowa 1097, 120 N.W.2d 432 (1964), the supreme court stated:

Unless otherwise required by statute, when a municipality exercises its powers to make an improvement or contract it acts through its council by ordinance or resolution.

Id. at 436.

In Scheckel v. Jackson County, 467 N.W.2d 286 (Iowa App. 1991), we recognized:

Those that enter into business transactions with a municipality are presumed to know the statutory requirements that the municipality must follow in order to make the transaction a legally binding one. Our supreme court has addressed this issue stating:

We have held that one who contracts with a municipality or a political subdivision is bound at its peril to take cognizance of statutory limitations upon the authority of the government agency. Recovery is denied under the firm public policy that taxpayers should be protected from evasion of statutory prerequisites by the public body and from the opportunity for fraud or collusion between public officials and contracting parties.

Thompson v. L.J. Voldahl, Inc., 188 N.W.2d 377, 380 (Iowa 1971).

Scheckel, 467 N.W.2d at 289.

Our supreme court has recently reaffirmed this rule, stating:

One who contracts with a city is bound at his peril to know the authority of the officers with whom he deals, and a contract unlawful for lack of authority, although entered in good faith, creates no liability on the part of the city to pay for it, even in quantum merit.

Macro Dev. Corp. v. City of Cedar Falls, 473 N.W.2d 41, 43 (Iowa 1991) (citing 56 Am. Jur. 2d Municipal Corporations § 503, at 554-56 (1971)). A long-standing rule under Iowa law provides that a local body may raise the lack of authority of an officer as a defense, stating the local body is not bound by acts in excess of authority. See Harrison County v. Ogden, 133 Iowa 9, 11, 110 N.W. 32, 33 (1906); Dively v. City of Cedar Falls, 21 Iowa 565, 569-70 (1866).

Applying the above principles to the present case reveals the city administrator lacked authority to legally bind the City to the offer to purchase real estate entered into with Dealers. The power of a city to enter into a

contract is legislative and vests in the city council, not in the city administrator upon whose commitment Dealers allegedly relied. The city council did not grant authority to the city administrator--by ordinance or otherwise--and, in the final analysis, the city council rejected the offer to purchase real estate entered into by Dealers and the city administrator. Accordingly, as a matter of law, no valid contract exists binding the City to purchase Dealers' property.

Finally, Dealers contends the acts of the City constitute a "taking" of Dealers' property and argues the district court erred in dismissing Dealers' claim of inverse condemnation. Having reviewed the record, we agree with the district court's conclusion that insufficient evidence exists concerning the City's actions to constitute a taking, and we therefore reject Dealers' argument.

In Howell Plaza, Inc. v. State Highway Com'n, 66 Wis. 2d 720, 226 N.W.2d 185 (Wis. 1975), the court accurately described the essence of cases such as the current one:

Long delays in actually acquiring property after the public improvements have been announced can result in substantial hardship to property owners, for which they ought in justice to receive compensation. We have no doubt that there can be a cause of action for inverse condemnation if the facts alleged are sufficient to show that property owners so situated have been deprived of all, or substantially all, of the beneficial use of their property. The petition in the instant case, however, does not allege facts sufficient to state that cause of action.

Id., 66 Wis. 2d at ___, 226 N.W.2d at 189. 000177

Article I, section 18 of the Iowa Constitution provides that "private property shall not be taken for public use without just compensation first being made." The applicable test to determine whether or not a taking has occurred was articulated in Phelps v. Board of Supervisors of Muscatine County, 211 N.W.2d 274, 276 (Iowa 1973): "a 'taking' . . . may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof."

The general rule is that exercise of urban renewal powers by a city which merely diminishes property values does not constitute a taking. "Diminuation in value, standing alone, does not establish a 'taking.'" Scott v. City of Sioux City, 736 F.2d 1207, 1217 (8th Cir. 1984) (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131, 98 S. Ct. 2646, 2662, 57 L. Ed. 2d 631, 653 (1978); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)).

In the present case, Dealers contends the actions of the City amounting to an unconstitutional taking transcend merely enacting such a plan. Dealers enumerates a number of other alleged actions of the City, arguing the City's actions establish an exercise of dominion and control of the property so pervasive that the City has deprived Dealers of the use of the property. Having carefully considered these enumerated actions, we conclude the record

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simply does not support Dealers' contention. The possibility of eventual condemnation has not destroyed Dealers' ability to derive a reasonable benefit from its property. We agree with the court's reasoning in Allen Family Corp. v. City of Kansas City, 525 F. Supp. 38, 41 (W.D. Mo. 1981):

To impose liability upon a city for mere planning activities would undoubtedly inhibit important and necessary governmental functions. In accordance with this line of reasoning, the Eighth Circuit has held that initial steps authorizing condemnation, even if such steps result in decline in land values, does not constitute a taking requiring compensation to be given to the land owner.

In the present case, the record does not support the contention that the City's actions substantially deprived Dealers of the use and enjoyment of its property or a portion thereof.

Accordingly, we affirm the district court's judgment entered in the defendants' favor following the dismissal of Dealers' mandamus action.

AFFIRMED.