

FILED

AUG 31 1978

CLERK SUPREME COURT

328

IN THE COURT OF APPEALS OF IOWA

IOWA LAND AND BUILDING COMPANY,	)	
Appellant,	)	Filed August 31, 1978
vs.	)	
IOWA STATE HIGHWAY COMMISSION and	)	456
IOWA STATE DEPARTMENT OF TRANSPORTATION,	)	2-59821
Appellees.	)	

Appeal from Linn District Court - John L. Hyland, Judge.

Plaintiff appeals from award made by condemnation jury claiming errors in the admission of evidence. - Reversed and remanded.

William M. Dallas, of Lynch, Dallas, Smith & Harman, Cedar Rapids, John F. Gaston and Joe A. Greenlief, Cedar Rapids, for Appellant.

Forrest W. Rosser, Cedar Rapids, and Asher E. Schroeder, Office of Attorney General of Iowa, for Appellees.

Heard by Donielson, Acting C.J., Snell and Oxberger, JJ. Carter, J., takes no part.

PER CURIAM

Plaintiff, Iowa Land and Building Company, appeals from the overruling of its motion for new trial following a jury verdict in its favor for \$101,250 for land condemned by defendant for highway purposes. Iowa Land claims errors in admission of evidence and in instructions.

At the time of the condemnation in 1974, Iowa Land owned 187.04 acres located within the city limits of Cedar Rapids. The property lies on the north side of U.S. Highway 30 and is separated into two parcels by a public street known as "C" Street S.W. Prior to the condemnation there was unobstructed and direct access to U.S. Highway 30. On the east it was bounded by the main line of the Rock Island Railroad and the right-of-way of the Cedar Rapids and Iowa City Railroad terminated at the northwest corner. The land was zoned "I. Industrial Park District".

The commission condemned 24.53 acres in fee simple. That land extended the full distance of the property adjoining Highway 30. It also condemned permanent easements covering 2.04 acres and temporary easements covering 10.5 acres for securing materials for road purposes. Lastly, the commission condemned all right of direct access from the land onto Highway 30 and also from some areas onto "C" Street.

Iowa Land claims the court erred in admitting evidence of an option to purchase it had given I.F.M. Founders Inc., on which to build a steel mill. The written agreement was admitted over objections and recited a purchase price of \$1500 per acre. Objection was made that the option was irrelevant and immaterial, misleading and improper because it was unexecuted and subject to several conditions, restrictions and reservations. One was that the price would be changed based on whether land was condemned by the commission. Another condition was that if less than 126.36 acres was purchased, none of it could include land fronting on Highway 30. Further, in the event of sale of any part fronting on Highway 30, Iowa Land had the right of first refusal. The agreement also contained a recapture provision in the event preconditions for building a steel mill were not accomplished.

Evidence was presented that \$1500 per acre was not representative of fair market value because the low price was made to encourage the building of the steel

mill. The parent company of Iowa Land, Iowa Electric Light and Power Company, would profit by providing electric power and railroad services of its subsidiary, Crandic.

Fair and reasonable market value at the time of taking is the issue. Where a sales contract calls for other than cash payments it may be so unrepresentative of fair market value that the evidence is inadmissible. *Redfield v. Iowa State Highway Commission*, 252 Iowa 1256, 1262-65, 110 N.W.2d 397 (1961). An option, even though paid for, may have been acquired for speculative purposes and be for a price well under the market. The point is made in *United States v. Smith*, 355 F.2d 807, 812 (5th Cir. 1966):

Indeed in this case it appears that the options were obtained in the hope of attracting industry into an otherwise agricultural area. They thus retain the taint expressed by the supreme court in *Sharp v. United States*, 1903, 191 U.S. 341, 348, 24 S.Ct. 114, 115, that 'Pure speculation may have induced it, a willingness to take chances that some new use of the land might, in the end, prove profitable.'

In the case at bar, the option was given only in expectation that a steel mill would be erected from which Iowa Land would profit by providing electric power and railroad service. There is no way to know how much consideration in determining the option price these factors received. Cf: *Iris v. Town of Hingham*, 303 Mass. 401, 22 N.E.2d 13 (1939) (Evidence of prior transfer was inadmissible where the actual consideration could not be stated in terms of money or its equivalent.)

In addition, the option contained a recapture clause, a right of first refusal and an excising of highway footage if the purchaser bought less than 126.36 acres. All of these restrictions and conditions, even though pointed out, made the option so lacking in probative value and pertinency as to be inadmissible. Prejudice is presumed when error appears unless the contrary is affirmatively established. *Vine Street Corp. v. City of Council Bluffs*, 220 N.W.2d 860, 863 (Iowa 1974). We find nothing that establishes the contrary in this record.

Iowa Land also assigns error to the admission of exhibit "L" which is a topographical map showing contours and the proposed final shape of the borrow area. Objection was made that plans as to what the condemnor might do is not indicative of what it has a right to do which is determined by the application for condemnation.

In *Henderson v. Iowa State Highway Commission*, 260 Iowa 891, 897, 151 N.W.2d 473 (1967), the court stated: "In assessing damages it is not what the condemnor intends

to do but what it acquires the right to do that determines the quantum of damages." Easement rights may be limited by a voluntary relinquishing of rights included in the application. *Fanning v. Mateo, Inc.*, 181 N.W.2d 190 (Iowa 1970). However, such was not the case here. The commission was not bound to follow its plan as shown by exhibit "L" and could have totally deviated from it after the damages had been determined by the jury.

"What one holds by the grace or favor of another he holds by a tenure too uncertain to give it any value whatever." *Moran v. Iowa State Highway Commission*, 223 Iowa 936, 941, 274 N.W. 59 (1937). See also *De Pinning v. Iowa Power and Light Company*, 239 Iowa 950, 955, 33 N.W.2d 503 (1948). "Likewise mere permissive privileges to the landowner subject to revocation at will cannot be considered in reduction of damages." *De Pinning*, supra.

There is no evidence in the record indicating this evidence was without prejudice to Iowa Land. Prejudice is presumed from the introduction of exhibit "L".

Vine Street Corp., supra.

We hold that errors occurred in the introduction of evidence regarding the option to purchase and exhibit "L". Reversed and remanded.