

IN THE COURT OF APPEALS OF IOWA

No. 1-436 / 90-1845

DEAN A. FITZGARRALD and PHYLLIS FITZGARRALD,

Appellants,

vs.

THE CITY OF IOWA CITY, IOWA and JOHNSON COUNTY, IOWA,

Appellees.

FILED

DEC 31 1991

CLERK SUPREME COURT

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Appeal from the Iowa District Court for Johnson County,
L. Vern Robinson, Judge.

Plaintiffs appeal the district court denial of mandamus
relief. **WRIT DENIED.**

William L. Meardon of Meardon, Sueppel, Downer & Hayes,
Iowa City, for appellants.

David E. Brown of Hayek, Hayek, Holland & Brown,
Iowa City, for appellee City of Iowa City.

J. Patrick White, County Attorney, for appellee Johnson
County.

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

SACKETT, J.

Plaintiffs-appellants Dean A. Fitzgarrauld and Phyllis Fitzgarrauld own ten acres of land immediately south of the Iowa City Municipal Airport. Iowa City enacted a zoning ordinance imposing height restrictions on plaintiffs' land. Plaintiffs contended the city in enacting the ordinance took an easement across their property without compensating them for the taking. Plaintiffs filed a petition for a writ of mandamus to compel defendants-appellees City of Iowa City and County of Johnson to initiate eminent domain proceedings to condemn the airway. The trial court found there had not been a taking and denied plaintiffs relief.

Plaintiffs have appealed, contending (1) the zoning ordinance was a taking of their property, and (2) the city should be directed to condemn their property and pay them damages.

A mandamus is an equitable action, and our review is de novo. Nowlin v. Scurr, 331 N.W.2d 394, 396 (Iowa 1983); Osborn v. City of Cedar Rapids, 324 N.W.2d 471, 474 (Iowa 1982).

Plaintiffs purchased the ten-acre tract located in Johnson County and southwest of the corporate limits of Iowa City in the 1940s. The Iowa City Airport was operating at its current location. The plaintiffs' personal residence is located on the ten-acre tract, as is

a mobile home park. Plaintiffs' property is zoned by Johnson County as residential. The mobile home park operates as a nonconforming use.

In 1984, Iowa City sought to expand the runway northeast of plaintiffs' property. Originally, the runway was to be extended 1,000 feet. Ultimately the runway was only extended 335 feet.

In 1984, Iowa City and Johnson County enacted "Airport Zoning," establishing airport overlay zones in which airport hazards and incompatible uses were prohibited. The ordinance which changed the restrictions on the use of plaintiffs' land provided for a clear zone at the end of the runway. The ordinance placed plaintiffs' entire ten-acre tract in the clear zone and provided for an approach slope of 34:1, meaning for every thirty-four feet horizontally from the end of the runway, the approach slope is one foot vertically. Several mobile homes and the plaintiffs' personal residence were within the approach slope.

In 1987, when Iowa City was contemplating extending the runway 1,000 feet, they sought to condemn an aviation easement over 5.02 acres of plaintiffs' land. Plaintiffs moved to set aside or vacate the condemnation proceedings because the condemnation notice did not sufficiently describe what the city intended to condemn. On November 9, 1988, the trial court found the condemnation could include

more than the acres included in the notice, the notice was jurisdictionally defective, and the proceeding was null and void.

The 1,000-foot extension was never completed, but the runway was extended 355 feet. Then, in 1990, the ordinance was amended to reduce the height restrictions affecting the plaintiffs' property. The amendment conformed to FAA regulations. After the condemnation was vacated, the city had decided it was not necessary to condemn to comply with FAA regulations, because they could comply with FAA regulations by zoning.

The plaintiffs then filed this action, contending the amendment to the 1990 ordinance constituted a taking.

The first issue is whether the 1990 zoning ordinance putting additional restrictions on the height of structures plaintiffs can build on their property was a taking without just compensation.

The plaintiffs introduced evidence that since the runway expansion the noise from air traffic has increased, mobile home park tenants have moved because of the noise, the noise vibrates items in their home, and during the fall of 1990, a large freight airplane in landing flew so low the pilot could be seen from beneath the awning of a second-floor window of their home.

Plaintiffs also produced evidence the height restrictions lowered the value of their property.

The defendants argue there was no taking because the plaintiffs are entitled to maintain the current uses of their property despite the restriction of the ordinance, the plaintiffs have made no application to develop their property for any other use or to perform any new construction, and plaintiffs have not sought a special exception or variance from the application of the airport zoning regulations.

I.

Plaintiffs contend the trial court should have found the restriction imposed on their property by the zoning ordinance was an easement in the airport's favor and defendant should be forced to pay for an easement at a price established through a condemnation.

There has been a distinction made between height restriction zoning, recognized as a valid exercise of police power, and air easements to protect the approaches to airports. See 13 Hastings Law Journal 397, Airport Zoning and Height Restrictions. There is a difference between interference with use and enjoyment of property by physical government activity and a regulation of property use through zoning. See McShane v. City of Faribault, 292 N.W.2d 253, 257 (Minn. 1980). Where a government activity causes a definite and measurable decrease in the value of a plaintiff's property and interferes with the current practical enjoyment of the property, a compensable taking

may have occurred. Id. See, e.g. Alevizons v. Metropolitan Airports Comm's, 298 Mo. 471, 216 N.W.2d 651 (1974). Regulation that goes too far can be viewed as a taking. See Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L. Ed. 2d 126, 138 (1985). A public desire to improve public condition is not enough to warrant achieving the desire by a shorter cut rather than the constitutional way of paying for the change. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 395, 415-16, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922); Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 382 (Iowa 1975).

A determination a governmental action constitutes a taking is a determination the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Agins v. Tiburon, 447 U.S. 255, 262, 100 S. Ct. 2138, 2142, 65 L. Ed. 2d 106, 112 (1980). Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. Id. However, the right to use property as one wishes is subject to and limited by the proper exercise of police power in the regulation of land use. Regulation does not constitute a compensable taking unless it deprives the property owner of all reasonable use. See McShane, 292 N.W.2d at 257. Every landowner who is in some way limited or inconvenienced by

such regulation is not necessarily entitled to compensation.

Property owners cannot have the advantages of the convenience and be paid for the undesirable effects created by the convenience, unless the effects adversely affect his or her property so directly and so substantially that it is manifestly unfair to require them to sustain measurable loss in market value which the property-owning public in general does not suffer. See McShane, 292 N.W.2d at 259.

The ordinance here was not an ordinance arbitrating competing land uses. The ordinance was a regulation for the benefit of a governmental enterprise--the Iowa City Airport. Where the burden of governmental activity falls on persons such as the plaintiffs, and the public receives the advantage of the property rights without payment, there is support for the proposition the public should pay for the diminution in value. See Sax, Takings and the Police Power, 74 Yale L. Rev. 36 (1964); Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), cert. dismissed, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963) (said while height restriction zoning had been recognized as a valid exercise of police power, there was a reluctance to extend this reasoning to zoning for the protection of approaches to airports--instead air easements with payment of

compensation appeared to be the more acceptable method of protecting approach zones); Roark v. Caldwell, 87 Idaho 557, 394 P.2d 641 (1964) (public benefit in maintenance of unencumbered approaches to an airport not sufficient reason to justify uncompensated takings of private property). See generally Thompson v. City of Osage, 421 N.W.2d 529, 533 (Iowa 1988) (court citing Dolezal v. City of Cedar Rapids, 209 N.W.2d 84 (Iowa 1973), (court recognized the condemnation of clearance or obstruction easements to provide a clear zone approach to airports).

The trial court concluded there had been no taking. We disagree with the trial court and determine the ordinance as now written is a taking. Extensive and repeated low flying, caused annoyance to the plaintiffs. Such activities have been recognized as substantial interference with the enjoyment of property. Anderson v. Souze, 38 Cal. 2d 825, 243 P.2d 497 (1952).

Plaintiffs' land is in a prime location for development. Any development will be substantially curtailed by the height restriction. The clearance is from a low of ten feet at the westerly side of plaintiffs' land to a high of thirty feet at the easterly side of their land. Plaintiffs' house penetrates the approach slope by 6.9 feet. The zoning ordinance does not benefit the plaintiffs as well as the public. See Agins, 447 U.S. at 262, 100 S. Ct. at 2142, 65 L. Ed. 2d at 113.

The regulation is so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. See Williamson, 473 U.S. at 199, 105 S. Ct. at 3123, 87 L. Ed. 2d at 147. The zoning regulations are so limiting as to constitute a taking.

II.

The second question is whether a writ of mandamus should issue. The granting to airport authorities of condemnation powers gives the airport authority the authority and the responsibility to acquire adequate easements. See generally Greater Westchester Homeowners Ass'n v. Los Angeles, 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979).

Defendants agree mandamus will lie to compel condemnation where there has been a taking of private property for public use within the constitutional sense without compensating the owners. See Hammer v. County of Ida, 231 N.W.2d 896, 902 (Iowa 1975). Mandamus is a summary and extraordinary writ, and it will be issued in doubtful cases, but only where the rights and duties are clear and there is no other speedy and adequate remedy in the ordinary course of the law. Reed v. Gaylord, 216 N.W.2d 327, 328 (Iowa 1974). Mandamus is a remedy to be applied only in exceptional circumstances. See Hewitt v. Ryan, 356 N.W.2d 230, 233 (Iowa 1984).

A claim that the application of government regulations effects a taking of a property interest is not ripe until the government charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue. Williamson, 473 U.S. at 186, 105 S. Ct. at 3116, 87 L. Ed. at 139; Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 296, 101 S. Ct. 2352, 2370, 69 L. Ed. 2d 1, 28, (1981).

Furthermore, plaintiffs have not sought to change the use of the property. The city advances the zoning ordinance provides for variances. The matter is not ripe until a variance has been denied. The city also has the authority to repeal or modify the ordinance. The trial court was correct in dismissing plaintiffs' action.

Costs on appeal are taxed one-half to each party.

WRIT DENIED.