FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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BESSIE HORAK BURES and FRANCIS L. BURES,

Appellants,

vs.

IOWA ELECTRIC LIGHT AND POWER COMPANY and LINN COUNTY, IOWA, and IOWA STATE HIGHWAY COMMISSION,

Appellees.

Filed November 10, 1977

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2-59446

Appeal from Linn District Court - Robert Osmundson, Judge.

Interlocutory appeal by plaintiffs-condemnees from adverse ruling by district court on their Motion to Strike portions of the Answer and Amendment filed by the defendant-condemnor in the condemnees' appeal to district court from condemnation award.

REVERSED.

John D. Randall and Ronald W. Wendt, of Cedar Rapids, counsel for appellants.

Richard C. Turner, Attorney General of Iowa, Asher E. Schroeder, Special Assistant Attorney General and counsel for Iowa State Highway Commission/Iowa Department of Transportation Highway Division, and Forrest W. Rosser, of Cedar Rapids, counsel for appellees.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

The plaintiffs-condemnees bring this interlocutory appeal from an adverse ruling by the district court on their Motion to Strike portions of the Answer and Amendment to Condemnation filed by the defendant-condemnor in the condemnees' appeal to district court from a condemnation award.[1] See § 472.21, The Code; rule 332, Rules of Civil Procedure (now rule 2, Rules of Appellate Procedure). On November 6, 1972, defendant-highway commission filed a Notice of Condemnation directed to the plaintiffs-Bessie and Francis Bures, which indicated that the State wished to condemn nine acres of their farm which bordered on its southern boundary with U. S. Highway 30. The State desired to condemn this land along the Highway 30 right-of-way in order to upgrade the highway from a two-lane to a four-lane divided road.

According to the provisions of the Notice of Condemnation, plaintiffs were to have temporary access to Highway 30 at a road being built at Station 204 plus 96. That Notice also specified:

> "... It is further provided that the temporary right of access shall terminate if and when the permanent access from Union Drive easterly to the subject property is constructed."

Pursuant to the Notice of Condemnation, the Compensation Commission met on November 30, 1972, and determined that this taking resulted in $25,600 in damages to the Bureses' property. On December 19, 1972, the Bureses appealed this award to district court, and on October 9, 1975, at the pretrial conference, the case was set for trial on March 15, 1976.

On March 12, 1976, three days before the trial date, defendant filed an Application to Amend Condemnation, which alleged that the proposed amendment would result in a diminished taking. Defendant claimed that the amendment was made necessary by a stipulation entered into by the parties and a change in the Bureses' right of access to Highway 30. That stipulation, also filed the same day, approved the substitution of a different temporary easement for construction for the temporary easement originally included in the Notice of Condemnation.

[1] Although both Linn County, Iowa and the Iowa Electric Light & Power Company are parties defendants to this action, for purposes of this opinion, only the Iowa State Highway Commission will be referred to as defendant.

When plaintiffs learned that defendant intended to attempt to modify the original condemnation, they moved to continue the trial date. After the continuance was granted, plaintiffs filed their Resistance to the defendant's Application and defendant responded thereto. By way of an Amendment to Application for Leave to Amend Condemnation, the highway commission attempted to delete the Highway 30 access provisions contained in the original Notice and replace it with the provision that the Bureses were to have permanent access to Highway 30 on a road being constructed at Station 204 plus 98.

On April 2, 1976, the trial court permitted defendant to file the Amendment to Condemnation, and on April 14, the Bureses moved to strike portions in defendant's Answer and Amendment to Condemnation. This motion was overruled on April 29, and subsequently the present appeal was authorized.

The law is well-settled that it is permissible for a condemnor to diminish or lessen a taking of private property after an award is made by the Compensation Commission, even as late as the trial itself, De Penning v. Iowa Power & Light Co., 239 Iowa 950, 954-960, 33 N.W.2d 503 (1948); Wilson v. Iowa State Highway Comm., 249 Iowa 994, 1003-1004, 90 N.W.2d 161 (1958); Henderson v. Iowa State Highway Comm., 260 Iowa 891, 897, 151 N.W.2d 473 (1967); Fanning v. Mapco, Inc., 181 N.W.2d 190, 194-195 (Iowa 1970); and that chapter 472, The Code, dealing with eminent domain, is to be strictly complied with and restricted to its expression and intention. Bourjaily v. Johnson County, 167 N.W.2d 630, 633 (Iowa 1969); State v. Johann, 207 N.W.2d 21, 24 (Iowa 1973). Furthermore, the "time of taking" in a condemnation proceeding is the date upon which the Condemnation Commission views the premises and fixes the damages to which the condemnees are entitled. Heldenbrand v. Executive Council of Iowa, State, 218 N.W.2d 628, 634 (Iowa 1974).

Plaintiffs acknowledge these points, but argue that it is improper for a condemnor to modify or change the taking after an award is made by the Compensation Commission. They assert that the condemnor may subsequently waive or abandon its right to "take" all or part of the property subject to the original Notice of Condemnation, but may not "take" property not previously condemned.

Plaintiffs object to the Amendment because, according to its terms, they would be (1) deprived of potential permanent access to Union Drive, a quiet city street, and would be subjected to permanent access to Highway 30, a busy four-lane divided highway; (2) deprived of the potential future use as farm land of the land on which the temporary access road to Highway 30 was to be built; and (3) subjected to an additional taking because, under the Amendment, defendant has encroached on property two feet east of the land condemned in the original Notice of Condemnation. In essence, plaintiffs assert that the highway commission has abandoned nothing by virtue of this Amendment, and has simply imposed a trade-off--permanent access for temporary access--and made an additional taking of property. Defendant counters by arguing that it was diminishing the taking because it granted permanent access to Highway 30 in place of temporary access thereto, and because defendant's appraisers had, as a result of the Amendment, reduced their appraisal of damages by $5,000.

Although we are not persuaded that the wording of the relevant provisions of the original Notice of Condemnation regarding the potentiality of access to Union Drive affect the character or extent of rights acquired by the plaintiffs, Henderson v. Iowa State Highway Commission, supra, at 896-897, we are convinced that, as a consequence of the right of permanent access granted in the Amendment, a different and modified taking results. We cannot accept defendant's assumption that the grant of permanent access instead of temporary access necessarily constitutes a diminishment in taking. Plaintiffs were perhaps not guaranteed permanent access to Union Drive under the original Notice of Condemnation. However, they were guaranteed access to Highway 30 until such time as they did receive permanent access to Union Drive. This conceivably could be forever. The problem which is presented is that the access to Highway 30 which was guaranteed in the original Notice of Condemnation in the event Union Drive access was not provided, was to go partially across the property of an adjoining landowner. The taking now proposed by the defendant, with access to the highway entirely across plaintiffs' property, leaves them with fewer useable acres. The change in the taking involved in this case may well be de minimis, but we have no way of knowing what effect, if any, it might have on plaintiffs' right to just compensation from

a compensation commission. Plaintiffs are entitled to have that commission pass upon such compensation in the first instance rather than having a new and different taking evaluated for the first time by the district court. [2] We conclude that the two-feet change in location resulting from the Amendment constitutes a change in taking, not a diminishment thereof.

The authorities relied upon by the defendant do not lend support to its position in the instant case. We are aware of no authority which sanctions the type of change in or substitution of property involved in the present taking. This Amendment constitutes a diminishment in taking in the eyes of the condemnor only, and we are not disposed to broaden the rules of condemnation to authorize such action. State v. Johann, supra, at 24. Furthermore, any assessment as to the damages incurred by the plaintiffs is inherently subjective in nature, and the condemnor should not be permitted to circumvent the procedures set forth in chapter 472, The Code, for the evaluation of conflicting claims as to damages.

Since we now hold that the defendant should not have been permitted to amend the original Notice of Condemnation, we reverse the district court. This leaves to defendant the option of proceeding in accordance with the original Notice of Condemnation or beginning the condemnation anew.

REVERSED.

[2] We wish to note at this juncture that we are not unmindful of the fact that the plaintiffs voluntarily, and for a valuable consideration of $900, stipulated to the substitution of a different temporary easement for construction for the one included in the original Notice. However, we believe that this was only a temporary change during the period of construction and did not permanently change the access provisions in the original Notice of Condemnation.