IN THE COURT OF APPEALS OF IOWA

No. 2-054 / 91-1117

FILED
MAR 24 1992
CLERK SUPREME COURT

FISCHER REALTY COMPANY,

Appellant,

vs.

97

DUBUQUE COUNTY, IOWA,

Appellee.

Appeal from the Iowa District Court for Dubuque County, L. John Degnan, Judge.

Fischer Realty appeals a district court decision refusing to enjoin Dubuque County's condemnation procedure of its property. **AFFIRMED.**

Allan J Carew and Gregg L. Owens of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Fred H. McCaw, County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

The plaintiff, Fischer Realty, owns several lots directly behind and east of the Dubuque County courthouse. Several of these lots are used for parking for county and state employees. Fischer leases the spaces to the county, and the county in turn leases spaces to individual government employees. Adjacent to these lots are three other lots which were purchased by the county in 1989.

In September 1989 the Dubuque County Board of Supervisors adopted its resolution initiating formal action of condemnation of the lots owned by Fischer. Fischer petitioned the district court to enjoin the proceedings. A temporary injunction issued October 31, 1989.

After trial the district court rejected Fischer's argument for an injunction. Fischer's motion for enlarged findings was denied. Fischer appealed. We affirm.

Fischer argues the resolution passed by the Dubuque Board of Supervisors is in violation of Iowa Code section 471.4(1) (1989) and the Iowa Constitution. It maintains the condemnation of property is not necessary. Fischer also points out there are no current plans to expand the courthouse, and therefore there is no need for an increase in parking spaces. Fischer believes the county is merely trying to buy the property for the purpose of gaining access to additional land not currently in use as parking lots.

Fischer also sets forth due process and equal protection claims. It alleges the resolution is an attempt by the county to take private property used for parking by private individuals, including county employees. Fischer maintains such a use is not a public use. It also argues 42 U.S.C. section 1983 is applicable to the present case, since the resolution attempts to deprive an individual of property without due process under the color of state law.

As this action is in equity, our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially concerning credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Judicial Review of Condemnation Proceedings.

The Iowa Supreme Court has stated

> that the determination of the necessity for taking property for public use is a legislative and not a judicial function. It is held that the discretion of the condemning body may not on appeal be reviewed by the court when such body acts within authority given and this determination is fairly made without fraud or oppression. The court in such cases, however, will act to prevent abuse of power or its exercise beyond the requirements of public use.

Porter v. Board of Supervisors of Monona County, 238 Iowa 1399, 1403, 28 N.W.2d 841, 843 (1947)(citations omitted)(emphasis added).

Condemnation proceedings generally are legislative determinations. The courts have no power to control the manner in which legislative bodies seek to exercise their

condemnation powers, in the absence of fraud, bad faith, or arbitrary abuse of that power. Harvey v. Iowa State Highway Comm'n, 256 Iowa 1229, 1231, 130 N.W.2d 725, 727 (1964).

II. Analysis.

The Dubuque County Board of Supervisors set forth the reasons for its condemnation action. Its resolution stated, in pertinent part:

> [T]he described property is needed for all the following public purposes:
>
> 1. To provide parking for county and court employees and for persons having business in county offices.
>
> 2. To secure the property for future use for parking and for expansion of county facilities.
>
> 3. To allow the county to construct improvements to the property for the safety and convenience of county and court employees and the public.

Fischer's major objection appears to hinge on the argument that excess parking is presently available to meet the county's needs. It also contends the county has no present plans to expand its courthouse facility. Fischer Realty makes no allegations of fraud.

The Iowa Supreme Court has stated:

> [I]t shall be plaintiff's burden to prove by a preponderance of the evidence that defendant cannot reasonably expect to achieve its public purpose. If the trial court determines plaintiffs have sustained this burden, the court shall issue an injunction restraining defendant from condemning their property.

Mann v. City of Marshalltown, 265 N.W.2d 307, 315 (Iowa 1978).

In this case, the district court found Fischer Realty failed to carry its burden of proof to show Dubuque County cannot reasonably expect to achieve its public purpose. We agree. We have no problem deciding providing parking near county or state facilities to be a public purpose. Further, the fact that the county has no present plans for expansion of its facilities does not foreclose that possibility in the future.

Fischer Realty argues a county building was recently leased for the period of ninety-nine years for purposes other than county offices. However, the propriety of Dubuque County's leasing of that building is not an issue before this court. Although it might be argued that such action bears on the question of need and reasonable expectation to achieve a public purpose, we do not believe it is of such weight, even when considered with the other factors asserted, to enable Fischer to meet and carry its burden of proof.

III. Constitutional Issues.

Fischer Realty further argues it was deprived of its property without due process or (possibly) just compensation. It contends the fifth-amendment requirement of the United States Constitution has been extended to the states by the fourteenth amendment.

Exactly what aspect of due process or equal protection has been violated is not clear from Fischer Realty's arguments. There is nothing in the record to indicate

Dubuque County intends to appropriate the property in question without following statutory procedures or without providing Fischer Realty with just and adequate compensation. Nor does Fischer Realty contend Dubuque County is unwilling or does not have the resources to pay for the taking.

From our reading of Fischer Realty's argument relating to the due process and equal protection clause, it appears it is reiterating its earlier arguments that the taking in this case is unnecessary. We have already determined Fischer Realty has failed to carry its burden of proof in this matter. We determine Fischer Realty has failed to show any violation of its constitutional rights under either the due process or equal protection clauses of the fourteenth amendment.

Finally, Fischer Realty argues its constitutional rights have been violated and therefore there exists a cause of action under 42 U.S.C. § 1983. It claims it is being deprived of federally-protected rights by persons acting under color of state law. These arguments once again are premised apparently on the same grounds as previous arguments. We determine this assignment of error to be without merit.

IV. Conclusion.

After reviewing the evidence, we agree with the district court's final order in this case. Fischer Realty has failed to carry its burden to show Dubuque County has

acted in fraud or in bad faith. It has further failed to carry its burden to show that the use of the land as either a parking lot or for future expansion of the public facilities cannot reasonably be expected to be carried out. In addition, Fischer Realty has failed to show any violation of its due process or equal protection rights under either the fifth amendment or the fourteenth amendment of the United States Constitution. It has failed to show any of its federally-granted constitutional or statutory rights have been violated, thus failing to state a claim under 42 U.S.C. § 1983. Fischer Realty further has not shown the use of this land for public parking or other such item outlined in the county's resolution is unnecessary.

We affirm the trial court in all respects.

AFFIRMED.