2018 IL App (3d) 170250-U

Order filed May 8, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE COUNTY OF WILL,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	
	)	Appeal No. 3-17-0250
DIANA PETERSON, as Trustee under a Trust	)	Circuit No. 16-ED-09
Agreement dated July 24, 2014 known as the	)	
DIANA PETERSON TRUST, UNKNOWN	)	
OWNERS and NON-RECORD CLAIMANTS,	)	
	)	Honorable Raymond E. Rossi,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly found that the proposed taking was not necessary for either the present or reasonably anticipated future needs of the County.

¶ 2 Plaintiff, the County of Will (the County), attempted to acquire a portion of land owned by the defendant, Diana Peterson, by exercising the power of eminent domain. Peterson filed a traverse and motion to dismiss on the grounds that the County's proposed taking was excessive

and unnecessary. The trial court granted Peterson's motion and dismissed the case. The County appeals. We affirm.

¶ 3 FACTS

¶ 4 On March 4, 2016, the Will County Board adopted a plan to replace a two-lane bridge with a five-lane bridge at the point where Cedar Road crosses over Spring Creek. The plan approved by Resolution 16-36 stated that the taking of the properties was "for the public purpose of improving certain county highway" but that the County was unable to reach an agreement regarding the fair market value of the properties with the current owners.

¶ 5 In order to carry out its proposed bridge-widening project, the County authorized the taking of 0.447 acres of Peterson's property by dedication. In addition, the County authorized a five-year temporary construction easement on Peterson's property consisting of 0.073 acres. According to the County's appraisal report, as a result of the proposed taking, Peterson's property would become more nonconforming with respect to the setback from the center line of the roadway. The proximity of the Peterson residence to the right-of-way line would be reduced from about 45 feet to 20.71 feet. The County's appraiser concluded the loss of distance from the residence to the right-of-way line would reduce the appeal of the Peterson's property.

¶ 6 On March 16, 2016, the County filed a complaint for eminent domain in Will County case No. 16-ED-09, against Peterson. On May 11, 2016, Peterson filed a traverse and motion to dismiss, arguing that the County's proposed taking of her land was both unnecessary and excessive. According to Peterson's motion, the surrounding rural area, with scattered residences, would continue to be adequately served by the existing two-lane Cedar Road and the existing two-lane bridge. Peterson argued that a five-lane bridge for an existing two-lane road was

unnecessary and excessive. Further, Peterson argued that the proposed temporary easement also constituted an excessive taking.

¶ 7 The court held an evidentiary hearing on March 10, 2017. Following opening statements, the parties, by stipulation, admitted the following into evidence: (1) a copy of the transcript of the discovery deposition of Bruce Gould, the County engineer and director of transportation for Will County Division of Transportation; (2) copies of the County's 2030 and 2040 transportation plans; and (3) the County's March 4, 2016, resolution.

¶ 8 In his deposition, Gould testified that the proposed taking would allow the County to create the approach that is needed to tie into the new bridge structure. Gould also testified that the Cedar Road bridge was built in 1957 and "absolutely has to be replaced." Gould continued:

> "because we have to get in there and replace that structure, we know that Cedar Road is going to be a four-lane facility eventually. Can I say when that will be absolutely, no, I cannot. But as I said in my deposition, there are some big-zoned parcels of land south of there, commercial and residential.
>
> Let's say the economy picks up tomorrow and New Leonx says we've got somebody that wants to develop that. All of a sudden the impact of Cedar Road is going to change significantly and that could make this unconstrained jump into the constrained and we have – we have things like that happen in Will County all the time because of the growth that is going on in Will County."

¶ 9 Gould admitted that the widening of Cedar Road was not listed as a priority for the County in the "Will Connects 2040 Long Range Transportation" plan. Gould testified that the Cedar Road project only appears on the list of "unconstrained" projects in the County's 2040 transportation plan, which he stated is considered a County "wish list." Gould explained,

"Unconstrained would mean if we had an unlimited pocketbook and we could build everything that is required in the county, we'd build it. No constraint on funding." Finally, Gould testified that the impact of replacing the existing two-lane bridge with another two-lane bridge would be considerably less on the neighboring properties than replacing the two-lane bridge with a five-lane bridge.

¶ 10 The "Will Connects 2040 County Plan" states, "Investment priorities for county roadways are 'fiscally constrained,' which means that they are based on reasonably anticipated revenue and expenditures through 2040." Further, the plan indicates, "Projects that do not have funding identified are classified as 'unconstrained,' but remain as part of Will Connects 2040 for future consideration." The Cedar Road project was not contained on the list of investment priorities in the 2040 County Plan. Instead, the widening of Cedar Road to four lanes was contained on the "Unconstrained List of County Needs" in the 2040 County Plan.

¶ 11 At the hearing, the County called Brian Gieski, the assistant county engineer, as a witness. Gieski testified that he played a role in developing plans for the replacement of the Cedar Road bridge. Gieski testified that the County determined that the existing two-lane bridge should be replaced with a bridge able to hold five lanes of traffic. Gieski testified that the useful life of a two-lane bridge at this particular location would be between about 30 to 50 years. Gieski agreed that a five-lane bridge structure was only needed if the County reasonably anticipated widening Cedar Road from a two-lane to a four or five-lane road. Gieski testified he was not aware of any funding that has ever been secured for the widening of Cedar Road. Gieski testified that the County has never adopted a resolution approving the widening of Cedar Road from two lanes to four lanes in the relevant location. Gieski testified that if the County decided to widen Cedar Road in the future, the County would go through a formal three-phase procedure. Gieski

admitted that with respect to the widening of Cedar Road, phase one has not begun. Gieski testified that no federal funding has been allocated for the acquisition of the land rights that are needed for the widening of Cedar Road.

¶ 12 Gieski testified that if a developer became interested in developing the nearby area, the developers would be expected to study the transportation needs of the area and make their own determination whether Cedar Road should be widened and at which locations the expansion would occur. The developer's proposal would be reviewed and approved by Gieski's office.

¶ 13 Peterson testified on her behalf during the evidentiary hearing and stated she has owned and resided on the property for 31 years. She lived in the home at that location with her husband until he passed away. Thereafter, Peterson's son lived at the home until his marriage. Peterson testified that she would lose some of her 100-year old oak trees if the two lane bridge became a five lane bridge for vehicular traffic. Peterson described the area as a rural area with farmland. Peterson explained that a creek runs across her property and goes under Cedar Road.

¶ 14 During the evidentiary hearing, Judge Raymond Rossi observed, "It's my understanding of these traverse hearings that when the plaintiff municipality introduces a valid ordinance for the taking, the burden then shifts to the defendant to prove excessive taking."

¶ 15 After closing arguments, the trial court found that the evidence established that there was not a current need for a five-lane bridge so long as Cedar Road remains two lanes. Further, the court found that the evidence shows that no one knows if and when Cedar Road will ever be widened to five lanes. The court found that the widening of Cedar Road is only on the County's "wish list." The court noted that "the impact of replacing the two-lane bridge would be considerably less than the whole taking of the five lanes." The court found that the evidence revealed that there is no present need for the widening, and if it takes 25 years to develop the

surrounding area, then one-half of the bridge life will have been exhausted. The court also noted that if the area is going to be developed, developers may dictate that the bridge be moved to some other location. The court continued:

> "Simply stated, if Cedar is not improved, it doesn't do any good to have a five-lane bridge, and there hasn't been any testimony as to when and if this Cedar Road is to be improved. I don't believe that the taking would fairly anticipate the need in the future and for that reason I am granting the traverse."

¶ 16 On March 10, 2017, the trial court issued a final written order granting Peterson's traverse and dismissing the case. On April 7, 2017, the County filed a notice of appeal from the final order.

¶ 17 ANALYSIS

¶ 18 On appeal, the County argues that this court should reverse the trial court's decision because the trial court's ruling that "the burden of proof had not shifted from the Plaintiff to the Defendant upon the showing of the Plaintiff's *prima facie* case" was erroneous as a matter of law. Conversely, Peterson argues that any findings recited in the resolution were clearly and convincingly overcome by evidence that the proposed taking was excessive and unnecessary. Peterson disputes the County's assertion that the trial court determined, as a matter of law, that the introduction of the resolution into evidence was insufficient to establish a *prima facie* case for the County, thereby shifting the burden of proof to the property owner.

¶ 19 It is well settled that where the legislature has delegated the authority to exercise the power of eminent domain, such power includes the authority to determine the necessity of exercising the right. *City of Chicago v. Vaccarro*, 408 Ill. 587, 597 (1951). Our supreme court has held that whether "the exercise of the power of eminent domain is necessary or expedient to

accomplish an authorized purpose is not a question within the province of the court to determine." *Southwestern Illinois Development Authority v. National City Environmental,* 199 Ill. 2d 225, 265 (2002). However, the court has also recognized "it is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question." *Id*. at 237. Therefore, an entity's determination that it is necessary to exercise the power of eminent domain may be set aside where there is a judicial determination that the proposed taking resulted from a "clear abuse of the power granted." *Vaccarro*, 408 Ill. at 597.

¶ 20 A landowner's traverse and motion to dismiss challenges the authority to acquire the landowner's property by exercising the power of eminent domain. *Lake County Forest Preserve District v. First National Bank of Waukegan,* 154 Ill. App. 3d 45, 49 (1987). When such a motion is filed, the party exercising the power of eminent domain bears the initial burden of making a *prima facie* showing of the necessity to compel the landowner to surrender the property in question. *City of Chicago v. First Bank of Oak Park*, 178 Ill. App. 3d 321, 327 (1988). A *prima facie* showing of the necessity of a proposed taking is fulfilled "by introducing a resolution or ordinance of the governing body which makes a finding that the condemnation is necessary." *Lake County Forest Preserve District*, 154 Ill. App. 3d at 51. However, a self-serving recitation of necessity within a legislative enactment is not conclusive. See *People ex rel. Director of Finance v. Young Women's Christian Association of Springfield*, 86 Ill. 2d 219, 238 (1981); *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 354 (1972).

¶ 21 Here, the County seeks reversal because the trial court applied the incorrect legal standard concerning the shifting burdens of proof. However, the court recited the applicable legal standard when he stated, "It's my understanding of these traverse hearings that when the plaintiff

municipality introduces a valid ordinance for the taking, the burden then shifts to the defendant to prove excessive taking." This statement contradicts the County's view. Regardless, based on this record, we agree the County made a *prima facie* showing by introducing the resolution into evidence and shifted the burden of proof to Peterson in order to preclude the exercise of the powers of eminent domain.

¶ 22 Here, the court determined Peterson's evidence rebutted the presumption in favor of the County. Under this circumstance, the "bubble bursts," the presumption in favor of the use of the power of eminent domain vanishes, and the benefits of any prior presumption evaporates. See *Reed-Custer Community Unit School District No. 255-U v. City of Wilmington*, 253 Ill. App. 3d 503, 508 (1993). Once the presumption vanishes, the court must evaluate evidence provided to the court from both parties during the evidentiary phase as if no presumption of necessity had ever existed. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460 (1983).

¶ 23 The Illinois Supreme Court has defined "necessity" in the context of eminent domain to mean "expedient," "reasonably convenient," or "useful to the public," and not limited to an absolute physical necessity. *Department of Public Works & Buildings v. Lewis*, 411 Ill. 242, 245 (1952). A condemning authority has a right to and should consider not only the present needs of the public, but also those which may be "fairly anticipated in the future." *Vaccarro*, 408 Ill. at 598. However, courts must intervene if the amount taken is excessive. *Young Women's Christian Association of Springfield*, 86 Ill. 2d at 239. Our supreme court has emphasized that "[f]uture needs cannot excuse the taking of an excessive amount of property." *Id*. Thus, where the facts establish that the petitioner had "no ascertainable public need or plan, current or future for the land," the condemnee should prevail. *Alsip Park District v. D & M Partnership*, 252 Ill. App. 3d 277, 284 (1993).

¶ 24 When reviewing a trial court's ruling on a traverse and motion to dismiss, we must determine whether the court's order was against the manifest weight of the evidence. *Trotter v. Spezio*, 349 Ill. App. 3d 959, 963 (2004). The court's order is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *MCI WorldCom Communications, Inc. v. Metra Commuter Rail Division of the Regional Transportation Authority*, 337 Ill. App. 3d 576, 580 (2003).We may affirm a trial court's dismissal on any proper basis found in the record. *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 47.

¶ 25 Here, at the hearing on the traverse and motion to dismiss, the County introduced a copy of the resolution containing a legislative finding that the proposed taking was necessary for public purpose. We agree that the admission of the resolution into evidence was sufficient to establish a *prima facie* case for the necessity of the condemnation. Thereafter, we agree the burden shifted to Peterson to show that the County abused its discretion because the County had no ascertainable public need or plan, current or future, for the land to be acquired against the wishes of the landowner. See *Alsip Park District*, 252 Ill. App. 3d at 284.

¶ 26 Obviously, a landowner has an interest in retaining possession of her property as long as possible, and the exercise of the power of eminent domain is premature if the anticipated public need will not come to fruition within a reasonable time frame from the proposed taking. Here, we agree with the trial court's finding of fact that Peterson established the County does not need a five-lane bridge while Cedar Road remains a two-lane roadway. The evidence presented at the traverse hearing overwhelmingly demonstrated that the County did not have concrete plans to widen Cedar Road either at the present time or through at least 2065. No funding had been secured for the widening of Cedar Road. In addition, there are no known plans for development of the land, which is rural in nature, now or in the near future. The County's assertion that

Peterson's property must be condemned now to accommodate the mere possibility of growth and development in the area in the distant future is simply too speculative and remote to justify the present taking. Thus, we concluded the trial court properly determined that the County's exercise of eminent domain constituted a clear abuse of discretion in the case at bar. Similarly, we agree a five-year temporary construction easement is not necessary until the County develops a plan to expand the two-lane roadway into five lanes. Consequently, we conclude that the trial court's order granting the traverse and dismissing the case was not against the manifest weight of the evidence.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.