IN THE COURT OF APPEALS
AT KNOXVILLE

FILED
December 17, 1998
Cecil Crowson, Jr.
Appellate Court
Clerk

CITY OF CHATTANOOGA, TENNESSEE and HAMILTON COUNTY, TENNESSEE	)	HAMILTON COUNTY 03A01-9712-CV-00552
Petitioners-Appellees	)	
v.	)	HON. ROBERT M. SUMMITT, JUDGE
CLASSIC REFINERY, INC., GARY FILLERS, and THE UNITED STATES OF AMERICA/INTERNAL REVENUE SERVICE	)	
Respondents-Appellants	)	REVERSED AND REMANDED

HAROLD L. NORTH, JR., OF CHATTANOOGA FOR CLASSIC REFINERY, INC., AND GARY FILLERS

M. KENT ANDERSON, Assistant U.S. Attorney, OF CHATTANOOGA FOR INTERNAL REVENUE SERVICE

DOUGLAS M. COX OF CHATTANOOGA FOR CITY OF CHATTANOOGA and HAMILTON COUNTY

O P I N I O N

Goddard, P.J.

Classic Refinery Inc., and Gary Fillers, the sole stockholder of Classic, appeal an order of taking rendered by the Circuit Court of Hamilton County in favor of the City of Chattanooga, and Hamilton County, Tennessee. This order awarded the City and County fee

simple title in property owned by Classic and located adjacent to the Finley Stadium Project in downtown Chattanooga.

By its appeal, Classic contends that the Trial Court erred in granting the motion of the City and County to take the subject property by eminent domain. More specifically, Classic alleges that the order for taking violates Tennessee law because the City and County refused to designate the use to which the property would be put and failed to show at the hearing on the Motion for Taking that this property is necessary and essential for the stadium project. Additionally, Classic asserts that the Circuit Court abused its discretion by not adhering to the Local Rules of Practice concerning the late submittal of the order of taking.

I. Facts

In December 1995, the Chattanooga City Council and the Hamilton County Board of Commissioners passed identical resolutions declaring the need to construct and provide for the operation of a public stadium facility in Chattanooga.[1] Both resolutions set-forth: 1) the public purpose of the Finley Stadium Project, 2) the necessity to acquire real property for the project, and 3) the authorization of the Chattanooga Housing Authority to serve as agent for the acquisition of property for the stadium project. The resolutions included a schedule of properties the Chattanooga Housing Authority "deemed necessary and essential for the expeditious development of the Stadium project . . . ." Classic's property was included on that schedule of properties.

The subject property, known as Parkway Towers, is a four-story commercial building located at 1823 Carter Street in Chattanooga. Classic acquired this property in 1986 for the cost of $250,000. The Hamilton County Assessor of Property appraised the 1997 value of the

[1]Hamilton County Board of Commissioners Resolution Number 1295-13; City of Chattanooga Resolution Number 20884.

property at $195,100. At the time the City and County commenced this action for taking, Classic was leasing Parkway Towers to SMP, Inc.,a corporation in the business of refining and smelting precious metals. SMP, Inc., has since moved from the property.

On May 30, 1997, the City and County filed a Petition for Condemnation with the Circuit Court of Hamilton County for the taking of Parkway Towers. The City and County filed an Amended Petition for Condemnation on July 3, 1997, in order to include as defendant the Internal Revenue Service which claimed a federal tax lien on the property amounting to $50,201.70.[2]

Pursuant to TCA 29-17-802, the City and County deposited $77,100 with the Circuit Court Clerk's Office as the amount of payment they determined Classic was entitled to for the taking of Parkway Towers. The City and County also requested relief under TCA 29-17-803. This "quick take" provision required Classic to respond to the notice of petition in five days; otherwise the court could grant an order giving the City and County immediate possession of the property. Classic filed its Objection to the Petition for Condemnation on June 3, 1997, and the Motion for an Order of Taking was heard July 25, 1997.

At the motion, Richard T. Linio, Executive Director of the Stadium Corporation, testified that Parkway Towers, once acquired by the City and County, would be razed and replaced with a parking lot. The cost for the demolition of the building would be $250,000; whereas, the cost of a possible refurbishment of the building for another use would cost approximately $2,000,000. Other possible uses for the building the Housing Authority had considered included office space, equipment storage, or use as a commissary for the

[2]The IRS takes no position on the issues raised in this condemnation action because its interest in this property will be determined in a separate case No.1:97-CV-500 by the United States District Court for the Eastern District of Tennessee at Chattanooga.

concessionaire. According to Mr. Linio, these alternate plans are no longer under consideration by the Housing Authority.

Two architects also testified at the motion hearing regarding Parkway Towers. Mr. William H. Wilkerson, the architect representing the Stadium Corporation, testified that he was in charge of designating the properties deemed necessary in the City and County resolutions for the so-called "footprint" of the stadium, i.e., the actual physical structure. Mr. Wilkerson testified that at the beginning of the project it was not certain exactly where the stadium would rest. Thus, it was necessary to designate a minimum amount of land necessary for the construction of the stadium, so-called "core properties." This minimum designation did not include Classic's property; instead, Classic's property was listed as an "additional property." Mr. Wilkerson testified that the "additional properties" were necessary for the overall stadium project, but not specifically for the stadium.

The other architect, Mr. Henry Bledsoe, was called as an expert-witness by Classic. The gist of Mr. Bledsoe's testimony was that the proposed parking lot would be too expensive to build, and, therefore, cost prohibitive to the City and County. His estimated total cost for the project was $750,000 to acquire and convert the property into a parking lot containing 63 spaces. As to that fact, Mr. Wilkerson testified it was his belief that 85 spaces could be created.

Also at the motion hearing, the attomey for Classic attempted to introduce into evidence two newspaper articles describing a wide variety of uses for Parkway Towers that were mentioned by Stadium Corporation officials.[3] These articles were excluded from the evidence as hearsay by the Circuit Court. While this Court does take note of the articles as part of the record,

[3]Jefferson George, Stadium Snag: City, Property Owner at Odds Over Worth of Parkway Towers, The Chattanooga Times, June 18, 1997; Mike Pare, Officials Ask Razing of Parkway Towers, Chattanooga Free Press, July 15, 1997 at A1.

we make no determination as to their admissibility because the lower court's ruling is not challenged in this appeal. Additionally, these articles serve no role in the Court's determination of the matter.

The Circuit Court of Hamilton County issued its Order of Taking in favor of the City and County on September 5, 1997. The Circuit Court ruled that "by virtue of the power of eminent domain and of the laws of the State of Tennessee, the petitioner be placed in immediate, quiet and full possession of the property being condemned in the above-entitled suit for the purpose of the Finley Stadium Project . . . ." The Court divested Classic of any interest in the property and awarded the City and County full title to the property in fee simple.

Local Rule of Practice 18.04 for Hamilton County Circuit Court requires the attorney responsible for drawing an order to do so within 14 days of the Court's ruling on a matter. In this case, the 14 day rule was violated by the attorney for the City and County. Apparently during the elapsed time, the Circuit Court was on vacation. Classic moved the Circuit Court to follow the language of Rule 18.04 requiring dismissal of the case as a penalty against the City and County for not submitting the order within the 14 days allotted. The Circuit Court denied this request on September 8, 1997, pursuant to Local Rule of Practice 1.02 which allows the court to suspend the rules when justice so requires.

On September 29, 1997, Classic moved the Court for a new trial. This motion was denied on November 19, 1997; subsequently, Classic filed its notice of appeal on December 1, 1997.

Even though protracted litigation has kept Parkway Towers firmly in place at its Carter Street location, the City and County were able to go forth with the construction of the stadium because Classic's property was never incorporated architecturally into the stadium's

physical structure. Beginning in October of 1997, Finley Stadium opened its doors to the public. At this time, the stadium stands complete and ready for use. In fact, Finley Stadium has already served as host for several events.

II. The Law of Eminent Domain

There is no dispute that the power of eminent domain is an inherent right afforded state government through the Tennessee Constitution. Section 21 of Article 1 provides:

> That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

The theory of eminent domain is grounded in the belief that sometimes it becomes necessary for the state to take private property for public use, even against the objections and protests of the owner. Harper v. Trenton Hous. Auth., 38 Tenn.App. 396, 409-10, 274 S.W.2d 635, 641 (1954); see also City of Knoxville v. Heth, 186 Tenn. 321, 210 S.W.2d 326 (1948); Southern Ry. Co. v. City of Memphis, 126 Tenn. 267, 148 S.W. 662 (1912); City of Maryville v. Edmondson, 931 S.W.2d 932 (Tenn.Ct.App.1996); County Highway Comm'n v. Smith, 61 Tenn.App. 292, 454 S.W.2d 124 (1969). The possibility that one's property may be taken for public purposes is a limitation upon every citizen's ownership of his or her property. Harper, 38 Tenn.App. at 410, 274 S.W.2d at 641. The counties and municipalities of Tennessee also maintain the right to take private property through eminent domain as a power delegated by the General Assembly. T.C.A. 7-34-104; 29-17-801; see also City of Knoxville v. Heth, 186 Tenn. 321, 210 S.W.2d 326 (1948); City of Chattanooga v. State, 151 Tenn. 691, 272 S.W. 432 (1925); Harper v. Trenton Hous. Auth., 38 Tenn.App. 396, 274 S.W.2d 635 (1954).

The role of the judiciary in a condemnation proceeding was eloquently described in an oft-quoted decision by the Tennessee Supreme Court in 1912:

> When the government was ordained and established, the people agreed among themselves in a written Constitution that no man's property should be taken from him and given to another for his private use, either with or without compensation.

> And whether an attempted taking of a citizen's property is for a private or a public use is a judicial question, confided by the people to their courts, to insure a practical enforcement of this constitutional guaranty to the citizen. But where the taking is for a public use, the only remaining restriction on the sovereign power is to pay the fair and reasonable value of the property taken, generally denominated "just compensation." This includes an adequate and sufficient procedure to be provided by the sovereign to ascertain the fair value of the property to be taken, and payment in cash, or a good and solvent bond to secure the payment, at the time the property is taken. And, like the purpose of the taking, these are judicial questions.

Southern Ry. Co., 126 Tenn. at 281-82, 148 S.W. at 665.

This Court agrees with Southern Railway in that a proper judicial determination of a condemnation proceeding must include an analysis of the purpose of the taking. Normally this analysis is limited to whether the taking was for a public or private use; however, in a case like the one facing this Court, where the facts indicate that the purpose for the taking may no longer exist, we find it necessary to analyze the necessity of the taking as well. See Duck River Elec. Membership Corp. v. City of Manchester, 529 S.W.2d 202, 204 (Tenn.1975); Clouse v. Garfinkle, 190 Tenn. 677, 682-83, 231 S.W.2d 345, 348 (1950); Edmondson, 931 S.W.2d at 935; County Highway Comm'n, 61 Tenn.App. at 298, 454 S.W.2d at 127; Harper, 38 Tenn.App. at 411, 274 S.W.2d at 641.

A. Public Purpose

The first phase of a judicial analysis in a condemnation proceeding traditionally focuses on the issue of whether the proposed property will be used for a public purpose. Heth, 186 Tenn. at 326, 210 S.W.2d at 328; Southern Ry. Co., 126 Tenn. at 281, 148 S.W. at 665; Edmondson, 931 S.W.2d at 934. In doing so, this Court affords great weight to a municipality's determination of public use. Heth, 186 Tenn. at 326, 210 S.W.2d at 328. The City and County have made it abundantly clear through their respective resolutions and their petition for taking that Finley Stadium does serve a public purpose. Additionally, We note that the Tennessee General Assembly has spoken in favor of the need for stadium construction and the designation of such construction as a public work. See T.C.A. 7-67-102; 9-21-101; 9-21-105(20)(A). This court is confident in its view that the purpose of Finley Stadium is for a public use. The stadium

will undoubtedly enhance the community and its residents by providing a venue for sporting events, concerts, and the like. In fact, the stadium has already been used for such purposes.

B. Necessity of the Taking

The necessity of the taking forms the more complicated matter to be addressed by this Court. The judicial role in a determination of necessity is well established under Tennessee law. In Duck River Elec. Membership Corp., 529 S.W.2d at 204, the Tennessee Supreme Court wrote:

> The determination by a condemning authority of the necessity for the taking is not a question for resolution by the judiciary and, absent a clear and palpable abuse of power, or fraudulent, arbitrary or capricious action, it is conclusive upon the courts.

Citing Harper v. Trenton Hous. Auth., 38 Tenn.App. 396, 274 S.W.2d 635 (1954); City of Knoxville v. Heth, 186 Tenn. 321, 210 S.W.2d 326 (1948); see also City of Maryville v. Edmondson, 931 S.W.2d 932 (Tenn.Ct.App.1996). The City and County clearly allege the necessity for this taking from Classic in their petition for condemnation: "It is essential and necessary that fee simple title to this tract of land described in paragraph II of this Petition for Condemnation be condemned and taken over in the public interest of the citizens of the City of Chattanooga and Hamilton County, Tennessee . . . ." The petition continues, however, by specifically addressing the reason the City and County desire to take this action: "for the purpose of construction and maintenance of a public facility, specifically a stadium."

The facts of this case do not support the claim of necessity asserted by the City and County for the purpose of construction and maintenance of a stadium. As already mentioned, Finley Stadium is complete; and while it is recognized that the necessity for a taking is normally a political question; Duck River Elec. Membership Corp., 529 S.W.2d at 204; Southern Ry. Co., 126 Tenn. 282-83, 148 S.W. at 665; Williamson County v. Franklin & Spring Hill Turnpike Co., 143 Tenn. 628, 647, 228 S.W. 714, 719 (1921), this Court cannot see past the basic fact that the City and County were able to finish the stadium without encroaching upon

Classic's property whatsoever. This Court does not act without precedent by questioning the proposed necessity of the taking. In County Highway Comm'n, 61 Tenn.App. 298, 454 S.W.2d at 127, the Middle Section of the Court of Appeals wrote:

> When the facilities of the courts are employed to exercise or restrain the power of eminent domain, the courts must determine whether the property sought by the public authority is "necessary" for the previously determined "public use," and if so, how much of the private property is required.

Likewise, in Clouse, 190 Tenn. at 682-83, 231 S.W.2d at 348, the Tennessee Supreme Court stated that as a general rule, "the sovereign or its delegate has the right to take only so much property as may be necessary for the public improvement in hand . . . ." We find this general rule to be equally applicable to the case before this Court.

To hold in favor of the City and County for the taking of Parkway Towers "for the purpose of construction and maintenance of a public facility, specifically a stadium," would in this Court's view be both arbitrary and capricious. Duck River Elec. Membership Corp., 529 S.W.2d at 204; citing City of Knoxville v. Heth, 186 Tenn. 321, 210 S.W.2d 326 (1948); Harper v. Trenton Hous. Auth., 38 Tenn.App. 396, 274 S.W.2d 635 (1954); see also Edmondson, 931 S.W.2d at 935.

A taking of property is arbitrary and capricious when it can be characterized as a "willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." Black's Law Dictionary 105 (6th ed. 1990). In its pursuit for Parkway Towers, the City and County have willfully and unreasonably acted in total disregard to the fact that the stadium is complete. Hence, allowing the City and County to condemn Parkway Towers based on the necessity of Finley Stadium is both arbitrary and capricious because the property is not needed for the stadium; the stadium was built elsewhere. We cannot allow the City and County to operate in total disregard of these facts. The property was not listed in the City and County Resolutions as a "core property" per Mr. Wilkerson's definition; instead, Classic's property was listed as an "additional property" needed for the stadium project. It is important to

note that as the representatives of the people the selection of the site for Finley Stadium was totally within the discretion of the City and County, Webb v. Knox County Transmission Co., 143 Tenn. 423, 439, 225 S.W. 1046, 1050 (1920); however, the City and County simply chose to use other property for the construction of Finley Stadium.

C. Basic Elements of Eminent Domain

The City and County urge this Court to uphold the order of taking against Classic because even though Finley Stadium does not encroach upon Classic's land, the real purpose of procuring Classic's land is for the overall "Stadium Project" as described in the City and County resolutions. This argument implies that it does not matter for what purpose Classic's property will be taken, but only that it falls within the rubric of "The Stadium Project." However, the City and County fail to realize that a municipality's power to take property through eminent domain is not unlimited. The City and County are not authorized, carte blanche, to take whatever portion of downtown Chattanooga they so desire under the guise of "the Finley Stadium Project." In Rogers v. City of Knoxville, 40 Tenn.App. 170, 177, 289 S.W.2d 868, 871 (1955), this Court wrote:

> The power of eminent domain being a grant of sovereign power and in derogation of private property rights will not pass by implication but is limited, both as to the exercise of the power and quantum of property or estate acquired . . . .

While it is certain that Finley Stadium itself serves a public purpose, there are many uses for the property falling under the Stadium Project umbrella that could run afoul of the law of eminent domain in Tennessee. One such example is the taking of private property from one individual to give to another individual for purely private use. See generally Knoxville's Community Dev. Corp. v. Wright, 600 S.W.2d 745, 749 (Tenn.Ct.App.1980). In order to make a proper review of a taking by eminent domain, a court must be able to determine as follows: 1) that the property will serve a public purpose, see e.g., Duck River Elec. Membership Corp., 529 S.W.2d at 204; and 2) that the condemner, in this case the City and County, has asserted that the

property is necessary and essential for the purpose proposed. Clouse, 190 Tenn. at 682-83, 231 S.W.2d at 348; Noell v. Tennessee Eastern Power Co., 130 Tenn. 245, 250-51, 169 S.W. 1169, 1170 (1914); County Highway Comm'n, 61 Tenn.App. at 298, 454 S.W.2d at 127; see generally Harper v. Trenton Hous. Auth., 38 Tenn.App. 396, 274 S.W.2d 635 (1954); City of Maryville v. Edmondson, 931 S.W.2d 932 (Tenn.Ct.App.1996). Both events must occur before the court orders the property delivered to the condemner. We find these two elements to be basic requirements under the law of eminent domain for any condemnation proceeding. The City and County, however, are attempting to thwart these elements; first by condemning the property under the broad definition of a public project, and second, by deciding upon its public purpose later without ever asserting the necessity of the taking; the law of eminent domain simply does not allow this method of condemnation. T.C.A. 29-17-803 (requiring a description of the project to be constructed included within the petition for condemnation); Noell v. Tennessee Eastern Power Co., 130 Tenn. 245, 250-51, 169 S.W. 1169, 1170 (1914)(construing a petition as insufficient to show the intention of the condemner).

Presently, the City and County argue that once they have possession of Classic's property, they will raze Parkway Towers and begin construction of a parking lot. Richard Linio's testimony was offered to serve as proof of this fact. However, no where in the Petition for Taking is the public purpose of the parking lot mentioned nor is the necessity for the taking asserted by the City and County. The City and County Resolutions also fail to mention such a use of the property as a parking lot, much less to assert the necessity of this taking for that particular purpose. Under Tennessee law the power of eminent domain is to be strictly construed by courts against the condemner. Clouse, 190 Tenn. at 685-86, 231 S.W.2d at 348; City of Chattanooga, 151 Tenn. 698, 272 S.W. at 434. Construing the petition for taking strictly we find that neither a showing of public purpose nor an assertion of necessity have been made by the City and County for the purpose of constructing a parking lot on Classic's property.

We hold, therefore, that the Order for Taking should be reversed because the taking of the property for the public purpose asserted, a stadium, would be both arbitrary and capricious under the facts of this case. Additionally, We find the City and County may not move forward with this condemnation proceeding for the purpose of a parking lot until the basic elements of eminent domain have been satisfied; i.e., the showing of a public purpose for the parking lot, and an assertion of the necessity for the taking. We do, however, believe it appropriate that upon remand the governing bodies be permitted to amend the complaint to meet the requirements heretofore set out.

III. Local Rules of Practice

Classic's second issue for appellate review contends that the Circuit Court abused its discretion by not requiring adherence to the Local Rules of Practice for the Hamilton County Circuit Court when it accepted the delayed submittal of the Order for Taking of the Property from the attorney for the City and County. In deciding the issue, this Court prefers to follow the rule applied in Killinger v. Perry, 620 S.W.2d 525, 525 (Tenn.Ct.App.1981), in which the Court of Appeals for the Middle Section held:

> The Trial Court has authority to make its own rules and accordingly may waive or abolish them if it chooses. This Court will not reverse a Trial Judge for waiving a local rule absent the clearest showing of an abuse of discretion and that such waiver was the clear cause of a miscarriage of justice.

Following this rule, we find no abuse of discretion by the Circuit Court, and point out that Local Rule of Practice 1.02 specifically allows the Circuit Court to suspend the local rules when justice requires.

For the foregoing reasons the order of the Trial Court authorizing the taking of the property is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Costs of the appeal are adjudged against the City and County.

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Houston M. Goddard, P.J.

CONCUR:

_____
Don T. McMurray, J.

_____
Charles D. Susano, Jr., J.