

NO. 14068

IN THE SUPREME COURT OF THE STATE OF HAWAII

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CLERK SUPREME COURT

H. C. CORNUELLE, INC., P. R.)
CASSIDAY, INC., W. H. McVAY, INC.,)
F. E. TROTTER, INC., Trustees)
Under the Will and of the Estate)
of James Campbell, Deceased;)
JAMES W. AUSTIN, CARL E. YORK,)
JR. and RICHARD F. LERT,)
Trustees of the Ariana A.)
Fairbanks Trust dated April 28,)
1978, ROBERT O. BULLARD, JR. and)
CARL E. YORK, JR., Successor)
Trustees of the 1976 Austin)
Revocable Trust dated)
December 11, 1976,)

Plaintiffs-Appellees,)

vs.)

THE CITY AND COUNTY OF HONOLULU,)
a municipal corporation,)

Defendant-Appellant.)

CIV. NO. 86-3534

APPEAL FROM THE 1) FINDINGS
OF FACT AND CONCLUSIONS OF
LAW, FILED ON AUGUST 11,
1989 and 2) JUDGMENT, FILED
ON OCTOBER 20, 1989

FIRST CIRCUIT COURT

HONORABLE SIMEON ACOBA
HONORABLE RICHARD M.C. LUM
HONORABLE FRANK TAKAO
HONORABLE ROBERT G. KLEIN
HONORABLE PHILIP T. CHUN
HONORABLE RONALD MOON
HONORABLE PATRICK K. YIM
Judges

MEMORANDUM OPINION

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)	HONORABLE PHILIP T. CHUN
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)	HONORABLE PATRICK K. YIM
vs.)	Judges
)	
THE CITY AND COUNTY OF HONOLULU,)	
a municipal corporation,)	
)	
Defendant-Appellant.)	

MEMORANDUM OPINION

The City and County of Honolulu (City) appeals from a judgment against it in a suit brought by the Campbell Estate and the Austin Trusts (the landowners) based on the City's actions with respect to the twenty foot setback on the King Street side of the downtown Liberty House store. The trial court held for the landowners on the basis of: (1) an inverse condemnation remedy for an unconstitutional taking; (2) a contract between the City and landowners; and (3) promissory estoppel. We affirm based on (1), the taking claim.

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I.

Landowners are the owners of land on the mauka side of King Street in downtown Honolulu. Their lots are subject to the Primary Urban Center Development Plan, which envisions a widening of King Street and designates a twenty foot setback. The Comprehensive Zoning Code of the City prohibits new structures within the setback. The City intends eventually to acquire the setback to widen the street.

Until December of 1978, the landowners maintained a commercial building, the old Liberty House Store, on the property. In 1976 and early 1977, the landowners negotiated with Liberty House for a new lease under which the old Liberty House building would be demolished and a new building with attached garage constructed. The landowners submitted a plan for the new store which called for building the new structure up to the property line. The City rejected this plan.

In April of 1977, the Austin Trusts' attorney wrote to the City Council asking if the City would agree to condemn the land in the not too distant future before the landowners began the planned improvements. Although the City initially refused to buy the land, the City eventually began to negotiate with the landowners to buy the setback.

On March 8, 1978, the City Council prohibited use of the land. The Committees on Planning and Finance issued their joint report, which provided that: (1) the initial refusal to buy the land be rescinded; (2) the 20-foot widening of King

Street between Alakea and Nuuanu Avenue be retained; and (3) the administration be requested to reflect within the 6-year Capital Improvements Plan the future acquisition of the setback. This report was unanimously adopted by the Council.

Seeking a zoning variance from the City's Zoning Board of Appeal was, after March 8, 1978, no longer a viable alternative.

In 1979, the ordinance that required the City to pay the total cost of acquisition of any street setback area was amended to require the owner to dedicate to the City at no cost to the City any setback required for streets. The owner would receive permission to construct with additional density as a trade-off. The Austin Trusts' attorney sought and received assurances that the change in the law would not affect their property.

The setback area had been rendered valueless by the owners inability to build on it. No credible alternative use for the setback area was put forward during the trial.

II.

The trial court held that the setback area had been unconstitutionally taken. The City appeals arguing, inter alia, that there was no unconstitutional taking because the restriction on the use of the land serves a legitimate interest and leaves value in the Liberty House lot taken as a whole. The City also argues that the landowners' remedies are barred by the statute of limitations. We disagree with these arguments.

A.

The trial court was correct in its conclusion that the City's actions constituted an unconstitutional taking of the landowners' property. A governmental restriction on the use of land results in an unconstitutional taking under the Hawaii and United States Constitutions if it: (1) does not substantially advance a legitimate state police power interest such as public health, safety or welfare (including aesthetic values), or (2) denies the owner all economically viable use of the land. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 107 S. Ct. 3141, 3146, 97 L. Ed. 2d 677, 687 (1987). The City was engaged in a "land banking" operation, prohibiting the use of the property until it eventually acquired ownership. Such land banking is not a legitimate state police power purpose. Gordon v. City of Warren Planning and Urban Renewal Comm'n, 388 Mich. 82, 199 N.W.2d 465, (1972).

Having found a taking we need not face the claims of error relating to whether to look to the entire parcel or just the setback area to determine if any economic use or value remains of the property.

In addition, we hold that the acts of the City on taking was final. Recourse to the Zoning Board was not a viable alternative available to the landowners.

B.

Under the facts of this case, the trial court did not commit reversible error in deciding that the taking claims of both the Campbell Estate and the Austin Trusts were not barred by the statute of limitations.

The trial court determined that the taking occurred as of March 8, 1978. The applicable limitations period of Hawaii Revised Statutes § 657-1 (1985) is six years. The Austin Trusts filed their federal suit January 12, 1984. The Campbell Estate filed the present suit September 17, 1986. After the federal suit was dismissed, the Austin Trusts were added to the present state court case by stipulation effective June 20, 1988.

1.

For the Campbell Estate, the trial court relied on the precedent of Basque v. Yuk Lin Liau, 50 Haw. 397, 441 P.2d 636 (1968). In Basque, this court held that the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care, should have discovered that an actionable wrong has been committed against his property.

The trial court found that the landowners had detrimentally relied on the City's representations that it would buy the property through negotiation or condemnation. The City knew at all times that its promise to pay would induce the landowners not to contest the taking. The landowners had no reason to know that the City did not intend to perform until the September 18, 1980, letter of City Land Acquisition Officer

Robert Ho that purchase would be years away, if ever. The trial court implicitly found that until the September 18, 1980 letter, the landowners didn't know and would not have in the exercise of reasonable care discovered that an actionable wrong, either in the form of a taking without compensation or in the form of a breach of promise, had been committed against them. The City challenges this finding relying on a letter (Exhibit 147) in which Campbell Estate agent Oswald Stender expresses his concern over the Mayor's political position in regard to buying the setback. However, giving proper deference to the trier of fact to determine the weight of the evidence, the trial court's finding is not clearly erroneous.

2.

For the Austin Trusts, the trial court concluded that the statute of limitations was equitably tolled. Equitable tolling requires: (1) timely notice to the defendants in filing the first claim; (2) lack of prejudice to defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim. Addison v. State of California, 146 Cal. Rptr. 224, 578 P.2d 941, 21 Cal. 3d 313 (1978). Cf. Mauian Hotel, Inc. v. Maui Pineapple Co., 52 Haw. 563, 569-71, 481 P.2d 310, 314-315 (1971) (applying the equitable doctrine of estoppel to preclude a statute of limitations defense).

The Austin Trusts have met the elements of equitable tolling. First, their federal action was timely. Second, the

facts underlying the two claims are identical. The City had full notice of the Austin Trusts' claims from the federal suit, which put it in a position to fairly defend this case. Third, as soon as the federal case was dismissed, the Austin Trusts joined in this case, which had already been on file for two years.

We find no error in the trial court's application of equitable tolling.

III.

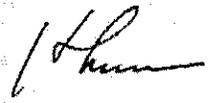
Because we affirm on the basis of an unconstitutional taking, issues involving the trial court's alternate reasoning of contract and of promissory estoppel need not be reached.

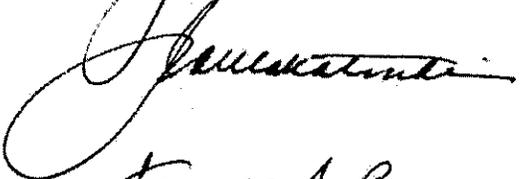
The judgment of the trial court is affirmed.

DATED: Honolulu, Hawaii, July 17, 1990.

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