

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, ex rel.)
VELMA P. JACKSON and)
ALICIA D. SEABAUGH,)
)
Relators,)
)
HON. DAVID A. DOLAN,)
)
Respondent.)

No. SC92717

An Original Proceeding in Prohibition

Brief of Respondent,
the Hon. David A. Dolan

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Table of Contents

Table of Contents	i	
Table of Cases and Other Authorities	iii	
Statement of Facts	1	
Points Relied On	3	
Argument	4	
I. Relators Are Not Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had Power To Condemn Relators’ Property Under § 523.271 RSMo, In That The Proposed Use Of The Property Was Not Solely For Economic Development		4
Standard of Review	4	
Argument	4	
II. Relators Are Not Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had The Power To Condemn Relators’ Property Under Article I, § 28 Of The Constitution In That The Proposed Use Is A Public Use		12

Standard of Review	12
Argument	12
Conclusion	17
Certificate of Compliance	18
Certificate of Service	19

Table of Cases and Other Authorities

<u>Arata v. Monsanto Chem. Co.,</u>	
351 S.W.2d 717 (Mo. 1961)	14
<u>Baycol, Inc. v. Downtown Development Authority,</u>	
315 So.2d 451 (Fla. 1975)	10-11
<u>Centene Plaza Dev. Corp. v. Mint Properties,</u>	
225 S.W. 3d 431 (Mo. banc 2007)	11
<u>City of Kansas City v. Hon,</u>	
972 S.W.2d 407 (Mo. App. W.D. 1998)	16
<u>City of Smithville v. St. Luke’s Northland Hosp. Corp.,</u>	
972 S.W.2d 416 (Mo.App. 1998)	13-14
<u>In re Condemnation by the Redevelopment Authority of</u>	
<u>Lawrence County,</u>	
962 A.2d 1257 (Pa. Cmwlth 2008)	10
<u>Kelo v. City of New London,</u>	
545 U.S. 469 (2005)	4-5
<u>Ladue Group, L.C. v. Level 3 Communications, L.L.C.,</u>	
111 S.W.3d 492 (Mo. App. E.D. 2003)	15
<u>Murphy v. Carron,</u>	
536 S.W.2d 30 (Mo. banc 1976)	4

<u>Schoemehl v. Treasurer,</u>	
217 S.W.3d 900 (Mo. banc 2007)	10
<u>Spradin v. City of Fulton,</u>	
982 S.W.2d 255 (Mo. banc 1989)	9
<u>State ex rel. Gove v. Tate,</u>	
422 S.W.2d 541 (Mo. banc 1969)	15
<u>State ex rel Missouri Public Defender Com’n v. Pratt,</u>	
298 S.W.3d, 870 (Mo. 2009)	12
<u>Tierney v. Planned Indus. Expansion Auth.,</u>	
742 S.W.2d 146 (Mo. banc 1987)	4
<u>Wolff Shoe Co. v. Director of Revenue,</u>	
762 S.W.2d 29 (Mo. banc 1988)	9

Statutes and Other Authorities

Mo. Const. Art. I § 28	3, 12
§ 68.025(17)	1
93 rd General Assembly, SCS House Bill No. 1944	3, 9-10
§ 523.271 RSMo	3-5, 9-11

Statement of Facts

The Southeast Missouri Regional Port Authority (“Port Authority”) is a Political Subdivision organized pursuant to Chapter 68 RSMo. Pursuant to § 68.025(17), the Port Authority is granted authority to acquire property necessary for its purposes through the right of eminent domain. Respondent’s Appendix A-1¹.

Pursuant to its statutory authority, the Port Authority seeks to acquire a 30.65 acre parcel of undeveloped land in Scott County owned by Relators, in their capacity as Trustees of the Lambert Family Trust. APP.19.

On June 7, 2012, Respondent held an evidentiary hearing on the Port Authority’s Petition for Condemnation. APP. 16-36.

The evidence at that hearing demonstrated that the Port Authority derives its income from two (2) sources, the lease of unimproved land to prospective tenants, and the operation of a short line railroad that provides commercial enterprises in the area with access to two (2) separate rail carriers, the Union Pacific and the Burlington Northern Santa Fe. APP.22. These port facilities provide businesses in the area with the ability to transfer freight, rail to barge. One of the current deficiencies of the Port Authority is, that it does not have facilities to handle unit trains, trains of one hundred (100) cars or more,

¹ References herein to “App” refer to the Appendix of Exhibits filed with Relators’ Petition for Writ of Prohibition; “A” refers to Relators’ Appendix to Relators’ Brief; and Respondent’s Appendix refers to Respondent’s Appendix to Respondent’s Brief.

that would reduce freight rates for businesses and shippers in the area. APP.22. The Port Authority will lease the parcel, for which condemnation is sought, to a tenant to be used for the construction of tanks to handle liquid products to be transloaded from rail to barge. APP. 23. A lease has been negotiated with the prospective tenant that, subject to the acquisition of this site, would provide funds for the construction by the Port Authority of a loop track to handle unit trains, and would provide for payment of rentals to the Port Authority. APP.23. Other prospective tenants would use the same parcel for shipment of bulk and solid commodities. These prospective tenants have also committed to provide funds for the construction of the loop track. APP.23. These business ventures would have no need of a loop track, without adequate storage facilities to store commodities to be shipped on or unloaded from an entire train hauling the same commodity.

Based upon the evidence adduced, and the Exhibits received, the Respondent found, in his Judgment and Order of Condemnation of June 29, 2012, that the condemnation did serve a public purpose, and any aid provided to private corporations would be merely incidental to such purpose. APP.39. The Court further found, based upon the evidence adduced and the Exhibits received, that the Port Authority's condemnation was not solely for economic development, but was to promote private investment in the Port Authority, improve river commerce and improve the Port Authority's transportation facilities. APP.40. The Court further found that the acquisition of the subject property to facilitate construction of a loop track to handle unit trains, to greatly expand and enhance the transportation facilities at the Port Authority, and to

improve river commerce, placed the Port Authority's action beyond the "solely for economic development" limitation of § 532.271. APP.40.

Points Relied On

I. Relators Are Not Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had Power To Condemn Relators' Property Under § 523.271 RSMo, In That The Proposed Use Of The Property Was Not Solely For Economic Development.

§ 523.271 RSMo

Spradin v. City of Fulton, 982 S.W.2d 255, 258

(Mo. banc 1989)

93rd General Assembly, SCS House Bill No. 1944

Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31

(Mo. banc 1988)

II. Relators Are Not Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had The Power To Condemn Relators' Property Under Article I, § 28 Of The Constitution In That The Proposed Use Is A Public Use.

City of Kansas City v. Hon., 972 S.W.2d 407

(Mo. App. W.D. 1998)

Arata v. Monsanto Chem. Co., 351 S.W.2d 717 (Mo. 1961)

City of Smithville v. St. Luke's Northland Hosp. Corp.,

972 S.W.2d 416 (Mo.App. 1998)

Argument

I. Relators Are Not Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had Power To Condemn Relators' Property Under § 523.271 RSMo, In That The Proposed Use Of The Property Was Not Solely For Economic Development.

Standard of Review

The standard of review in a court-tried case is the familiar Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). The Court should affirm the judgment of the Trial Court “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” Id. at 32.

Where, as in the case at bar, the Respondent has made a factual finding based upon competent evidence that the taking was not solely for economic development purposes, this Court should consider the matter with due deference to the Trial Judge’s authority to resolve factual issues. Tierney v. Planned Indus. Expansion Auth., 742 S.W.2d 146, 150 (Mo. banc 1987).

Argument

In response to the United States Supreme Court’s decision in Kelo v. City of New London, 545 U.S. 469, 484 (2005), holding that economic development was a permissible public purpose for which a taking was allowed, Missouri, and other states, enacted legislation.

The Missouri legislature enacted § 523.271 RSMo, prohibiting takings “solely for economic development” except in the context of blighting, that is not an issue in this case.

In Respondent’s Judgment and Order of Condemnation, the Respondent specifically found that the condemnation sought by Port was not “solely for economic development purposes”. A. 3-4. The evidence before the Court clearly supported that finding.

At the evidentiary hearing, Mr. Dan Overbey, the Port Authority’s Executive Director, testified, in material part, as follows:

Q. The revenues the port derives are kind of two-pronged, are they not?

A. That is correct.

Q. We lease unimproved land to perspective tenants. Is that a fair statement?

A. Yes.

Q. We also operation a short-line railroad that provides access to two separate carriers; is that correct?

A. Yes.

.....

Q. I wonder if you would be kind enough to tell the Court the direction the port would like to go in that manner?

A. Certainly. The port, as you mentioned, owns six-mile railroad, switching railroad, that connects with the Union Pacific and the Burlington Northern Santa Fe. We have the harbor. We have land around the harbor. Our primary purpose is to move freight.

Along with that we do some industrial development. Some port facilities have large amounts of land and can focus primarily as an industrial park. In our case we have a limited amount of land. And are focused on handling freight, rail to barge.

What we need to do, what we have established as our next objective in terms of general development, is the creation of a loop track. That will allow handling unit trains.

Normal train service is separate cars grouped together handled from one destination to another, mix and match situation. Unit trains represent an entire train from one shipper to one destination. Typically it is 100 cars, sometimes 75, sometimes 125, 135 cars.

What we have seen over the years is a need to handle unit trains which we cannot do at the present time. Our track is not adequate. It is not large enough to do that. In

order to get the lowest rates, the lowest railroad rates are on unit trains, solid trains, entire train load. That would be allow combining that with the economic efficiency of barge transportation, which is typically the lowest cost of movement of goods and products there.

Q. And has the port been negotiating with one of more tenants that would facilitate that loop track or a partial loop track?

A. Yes.

.....

Q. And would that involve the particular industry that we are negotiating with, would that involve them providing the funds to construct a loop track or a partial loop track?

A. Construct the first phase of it. Yes. That is correct.

Q. Which would facilitate movement of freight for the port for existing tenants and future tenants; is that correct?

A. That is correct, yes.

Q. Now, the prospective tenant would use that loop track for what purpose?

Q. And the prospective tenant that is going to facilitate construction of a loop track, is in need of further facilities In the port; is that correct?

A. Yes.

Q. Is one of those dry storage for products that can be transloaded from rail to barge?

A. This tenant it is liquid storage is their product.

Q. The other tenants we have negotiated with are for bulk and solids commodities as well?

A. Yes.

.....

Q. Is our lease with that prospective tenant, again, so we don't have any misunderstanding, is it conditioned upon acquiring the Lambert parcel for those purposes?

A. Yes. The lease that we are discussing that we have in negotiations but is not signed, yes, it includes that.

Q. And would other tenants that are willing to facilitate the loop track also require that type of dry storage?

A. Yes. We have had several different tenants along those same lines.

Q. Are there other suitable facilities in the port for dry storage?

A. No.

App. 22 and 23.

Based upon this evidence, and other evidence received by the Court, the Court quite properly found that the condemnation in this case was not solely for economic development.

The condemnation was not solely for the purpose of leasing the parcel for a tank farm or other storage facilities, but, more importantly, was for purposes of constructing a loop track, and improving transportation facilities in the area. Without the parcel sought to be condemned, to be used for dry storage of commodities, the loop track, and the resulting reduced freight rates, will not become a reality.

The language of § 523.271 RSMo is straight-forward in its wording. It provides that a condemning authority cannot condemn “solely for economic development”. This Court has repeatedly held that words in a statute should be given their plain and ordinary meaning whenever possible, and the Courts will look elsewhere for interpretation only when the meaning is “ambiguous or would lead to an illogical result”. Spradin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. banc 1989); Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). Under the clear and unambiguous language of this provision, condemnation is prohibited only when the condemnation is for no reason other than economic development.

If the Court determines that the language is in need of construction, the Court need only look to the legislative history to reach the same construction. The Senate Committee on Pensions, Veterans’ Affairs and General Laws proposed a substitute to the original House Bill No. 1944, which provided in § 523.271, that no condemning authority could acquire property by eminent domain for “predominantly economic

development purposes”. 93rd General Assembly, SCS House Bill No. 1944. Respondent’s Appendix A-12. This language was ultimately rejected by the Legislature, in favor of the present provision. It is clear, therefore, that the Legislature did not intend to prohibit condemnation if there were multiple purposes, even if economic development was one of those purposes.

It is true as asserted by Relators, that “words in a statute are presumed to have meaning, and any interpretation rendering statutory language superfluous is not favored. Schoemehl v. Treasurer, 217 S.W.3d 900, 902 (Mo. banc 2007). Contrary to Relators’ position, however, prohibiting condemnation when one of several purposes for the taking is economic development, would render the statutory reference to “solely for economic development” superfluous.

No Missouri Court has interpreted § 523.271, nor it appears has any Court in any other jurisdiction construed or applied the same or a similar statutory restriction in this context.

The cases cited by Relators do not shed light on the issue at hand. In the Lawrence County case, the Pennsylvania Appellate Court simply construed a statute relating to blight, which is not an issue in this case, and determined that the fact the property sought to be condemned could be put to the use that was more economically profitable, did not make the present use of the lands “economically and socially undesirable”, within that state’s definition of blight. In re Condemnation by the Redevelopment Authority of Lawrence County, 962 A.2d 1257, 1263 (Pa. Cmwlth 2008). In Baycol, the Supreme Court of Florida was faced with a situation where a

shopping mall had already been erected and a subsequent condemnation was sought to erect a parking garage to support the mall. The Court held that the previous private development would not support the condemnation of a parcel to provide parking facilities without a showing of public necessity or public use. Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975). In the instant case, the condemnation that is sought is part and parcel of, and is necessary to obtain, the construction of improved transportation facilities in the Port.

In Centene Plaza, cited by Relators, this Court was faced solely with the issue of whether or not the property sought to be condemned was blighted. This Court held only that the ultimate goals could not serve as probative evidence of blight. Centene Plaza Dev. Corp. v. Mint Properties, 225 S.W.3d 431, 434 (Mo. banc 2007).

Under a reasonable statutory construction of § 523.271, the phrase “solely for economic development” means that condemnation is permissible if economic development is but one of several purposes of the condemnation. Based upon the testimony of the Port Authority’s Executive Director, Dan Overbey, it is clear that the purposes of this condemnation include not only economic development of a tank farm, but also the resulting construction of a railroad loop track and improvement of the infrastructure at the Port Authority. As a result, the Respondent’s finding that the condemnation was not solely for economic development was supported by the record before the Court.

II. Relators Are Not Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had The Power To Condemn Relators' Property Under Article I, § 28 Of The Constitution In That The Proposed Use Is A Public Use.

Standard of Review

Art. I § 28 provides that, when “an attempt is made to take private property for an use alleged to be public,” the Court shall determine “whether the contemplated use be public” without regard to any legislative determination. Id. Whether the Trial Court has exceeded its authority is a question of law, which this Court should review independently of the Trial Court’s action. State ex rel Missouri Public Defender Com’n v. Pratt, 298 S.W.3d, 870, 880 (Mo. 2009).

Argument

It is the position of Relators that, since the parcel for which condemnation is sought is to be leased to a private concern, no public use has been demonstrated, and that the parcel is being condemned solely for private use. The evidence presented at the Evidentiary Hearing on June 7, 2012, clearly does not support that assertion.

The evidence demonstrates that one of the missions of the Port Authority is to promote river-related commerce in the area APP.18. Although the Port Authority does some industrial development, it focuses primarily on the handling of freight rail-to-barge.

APP.19. To that end, the Port operates a short line railroad that provides shippers in the area access to two (2) separate common carriers, the Union Pacific and the Burlington Northern Santa Fe. APP.18-19. In order to enhance transportation facilities, the Port Authority needs a loop track to be constructed to handle unit trains, handling substantially longer trains with more rail cars from one shipper to one destination. APP. 19. If condemnation of the parcel in question is permitted, the tenant that will be constructing the tank farm on the condemned property has committed to provide funds for the Port Authority's construction of a portion of the loop track. APP. 20 – 23. Other tenants are similarly committed to provide funds to construct the loop track. APP. 23. Construction of the loop track would allow shippers in the area to receive lower freight rates on unit trains, which could be combined with the economic efficiency of barge transportation. APP.20.

Although the Port does propose to lease the property sought to be condemned to a private entity or entities, the Port Authority is not a commercial venture, but a public entity. As a result, the revenues derived from leasing the parcel in question will provide for enhanced maintenance or improved facilities at the Port Authority.

It is true, as asserted in Relators' Brief, that Missouri Courts have provided that the definition of public use is necessarily flexible and imprecise, and is dependent on the specific facts and circumstances of each case. In City of Smithville v. St. Luke's Northland Hosp. Corp., 972 S.W.2d 416 (Mo.App. 1998), the Court provided the following standard:

“Although the definition of public use is flexible and imprecise, there are some basic principles governing the court’s determination of whether a public use exists in this case. Under Missouri condemnation law, public use means public benefit. It should also be noted that ‘[i]n order to constitute public use, it is not necessary that the whole community or any large part of it should actually use or be benefited’ by the proposed use. Furthermore, private entities’ operations can be considered public uses if their operation constitutes a benefit to the public.” Id. at 420–421.

In Arata v. Monsanto Chem. Co., 351 S.W.2d 717 (Mo. 1961), this Court stated:

“In order to constitute public use, it is not necessary that the whole community or any large part of it should actually use or be benefited by a contemplated improvement. Benefit to any considerable number is sufficient. Nor does the mere fact that the advantage of a public improvement also inures to a particular individual or group of individuals deprive it of its public character”. Id. at 721.

Applying the standard announced, to the particular facts and circumstances of this case, indicates that the condemnation sought is, in fact, for a public purpose. Although the parcel sought to be condemned will, in fact, be leased to one or more private individuals or entities for construction and operation of a tank farm, the primary purpose of the taking is not to promote that private use. Condemnation of the parcel in question will result in the construction of a loop track to facilitate unit trains. The availability of that loop track would further enhance river transportation opportunities for rail-to-barge

and barge-to-rail transshipment of commodities at reduced freight rates, enhancing river commerce and opportunities for citizens in the area. Such enhancements clearly would create a public benefit for a considerable number of individuals and entities in the area. These benefits derived by the members of the public, would be in addition to any benefits derived from more competitive pricing for commodities, shipped at reduced rates.

Relators cite two cases for the proposition that a condemning authority cannot condemn property, if that property will ultimately to be utilized by a private entity. A careful reading of those decisions, however, demonstrates that the holdings in those cases do not stand for the proposition cited. In Ladue Group, L.C. v. Level 3 Communications, L.L.C., 111 S.W.3d 492 (Mo. App. E.D. 2003), the contractor mistakenly located a conduit for fiber optic cable on the landowner's property, rather than an available road easement. The Court, based upon those limited facts, held that there was no public necessity because no fiber optic cable had been threaded through the conduit, an alternate easement was available, removal of the conduit would not result in a disruption of services available to the public, and the condemning authority would not suffer an undue burden as a result of removal of the conduit. In State ex rel. Gove v. Tate, 422 S.W.2d 541, (Mo. banc 1969), the City of Linn sought to run a private sewer line across the landowner's property solely to service his neighbor's residence. The Court held that the landowner could run the line over his own property, and that there was no necessity for a line to be run across the landowner's property solely to service his tract. The facts of the case before the Court are clearly distinguishable from the factual basis and limited holdings in those decisions. Here the Port Authority has no other parcel to facilitate the

expansion of its facilities, and failure of the proposed condemnation would defeat the planned expansion of its facilities. App. 23.

More directly on point is the Court of Appeals decision in City of Kansas City v. Hon, 972 S.W.2d 407 (Mo. App. W.D. 1998), that addressed just this type of contention, in a strikingly similar case. In that case, the City of Kansas City sought to condemn eight (8) separate parcels of land for future expansion of its runway and terminal facilities, and to attract aviation related facilities. The landowners argued that a use by aeronautical related companies was not a public use. In that case, the Court specifically held that the condemnation was proper notwithstanding that certain parcels might be used by private companies in aeronautical related industries. Id. at 413-414. The Court, therefore, presumably found that the condemnation of these parcels for use by private companies, would enhance the prospects for expansion of runways and other public facilities .

Relators suggest that the Port Authority has taken an “if you build it, they will come” approach which fails to meet the requirement that public benefit be “direct and immediate”. This is not like the situation where a governmental entity seeks to condemn a parcel, solely for purposes of a private developer owning and operating a shopping mall or high rise apartment complex. Here, the property is being condemned for construction of a tank farm that is an integral part of improving the infrastructure at the Port. A storage facility, to hold the capacity of an entire unit train, is not necessary without the loop track, and the loop track is not necessary without the storage facility with enough capacity to store a unit train full of a liquid.

The evidence in the record clearly demonstrates that condemnation of this parcel will result in the erection of the required loop track and the benefits to be derived by the public therefrom. APP.20-22.

Conclusion

For these reasons, Respondent respectfully requests that this Court quash the preliminary Writ issued on October 30, 2012 and deny any request for a Writ of Prohibition and enter such other relief as the Court deems proper.

Respectfully submitted,

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Certificate of Compliance

I hereby certify pursuant to Rule 84.06(c) that this Brief (1) contains the information required by Rule 55.03; (2) complies with the limitations of Rule 84.06(b); and (3) contains 3,857 words exclusive of the sections exempted by Rule 84.06(b) based on the word count that is part of Microsoft Word 2007. The undersigned counsel further certifies that the electronic version of this Brief has been scanned and is free of viruses.

/s/ James M. Hux

James M. Hux

Certificate of Service

I hereby certify that on the 11th day of January, 2013, I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Missouri by using the Missouri eFiling System. Participants in the case who are registered users will be served by the Missouri eFiling System, to-wit:

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I hereby certify that some of the participants in the case are not Missouri eFiling System users. I hereby certify that on the 11th day of January, 2013, I have mailed the foregoing document by first class mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within three (3) calendar days, to the following:

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