

IN THE SUPREME COURT OF MISSOURI
EN BANC

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| STATE OF MISSOURI, ex rel. |) | |
| VELMA P. JACKSON and |) | |
| ALICIA D. SEABAUGH, |) | |
| |) | |
| Relators, |) | |
| |) | |
| vs. |) | No. SC92717 |
| |) | |
| HON. DAVID A. DOLAN, |) | |
| |) | |
| Respondent. |) | |

An Original Proceeding In Prohibition

Reply Brief Of Relators
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Table of Contents

| | |
|---|----|
| Table of Contents | i |
| Table of Cases and Other Authorities | ii |
| Argument | 1 |
| | |
| I. Relators Are Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had No Power To Condemn Relators’ Property Under § 523.271, R.S.Mo., In That The Proposed Use Of The Property Was Solely For Economic Development. | 1 |
| | |
| II. Relators Are Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had No Power To Condemn Relators’ Property Under Art. I, § 28 Of The Constitution, In That The Proposed Use Is Private, Not Public. | 3 |
| | |
| Conclusion | 6 |
| Certificate of Compliance | 7 |
| Certificate of Service | 8 |

Table of Cases and Other Authorities

| | |
|---|--------|
| <u>Board of County Com’rs of Muskogee County v. Lowery,</u> | |
| 136 P.3d 639 (Okla. 2006)..... | 2 |
| <u>City of Kansas City v. Hon,</u> | |
| 972 S.W.2d 407 (Mo. App. 1998) | 4-5 |
| <u>State ex rel. Wagner v. St. Louis County Port Auth.,</u> | |
| 604 S.W.2d 592 (Mo. banc 1980)..... | 4 |
| <u>Statutes and Other Authorities</u> | |
| Mo. Const. Art. I § 28 | 3-4 |
| § 68.025(17), R.S.Mo..... | 4 |
| § 523.271, R.S.Mo | 1, 5-6 |

Argument

I. Relators Are Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had No Power To Condemn Relators' Property Under § 523.271, R.S.Mo., In That The Proposed Use Of The Property Was Solely For Economic Development.

As Relators explained in their opening brief, the Port Authority's executive director, Daniel Overby, expressly conceded that the sole purpose for this taking was economic development. Respondent's finding that it would promote private investment, improve river commerce, and improve transportation facilities merely describes aspects of economic development and thus does not support the ruling.

Respondent first suggests that the Court should defer to his factual findings. Br. at 4. As the opening brief explained, the facts here are undisputed, leaving only the legal question of whether promoting private investment, river commerce and transportation are "economic development" as defined in § 523.271. Moreover, Respondent was not free to disregard Mr. Overby's unambiguous admission that the purpose of this taking was economic development.

Respondent next argues that the purpose of the taking is to construct a loop track, thereby improving transportation. Br. at 5-9. As Relators explained in their opening brief, the Port Authority is not taking the property in order to erect a railroad on it; it is taking the property in the hopes that third parties will erect the railroad on property other than the condemned tract.

In Board of County Com'rs of Muskogee County v. Lowery, 136 P.3d 639, 647 (Okla. 2006) the Supreme Court of Oklahoma rejected a similar effort to bootstrap a public use onto a purely private taking. The County proposed to condemn right-of-way easements for three water lines, two of which exclusively served a private electrical generating facility. The third line would serve the public water district. The generating facility agreed to pay for all three.

Its obligation to complete the third line, however, was entirely contingent on its ability to obtain the two private lines. The Court held that this sort of contingent public use did not satisfy the public purpose provision of the Oklahoma Constitution:

If we were to find the public purpose test satisfied on these facts, we would essentially be first permitting the taking of private property for a private use in order to give rise to a private, non-party's contractual obligation to construct a pipeline that would ultimately satisfy the public purposes requirement. The law does not support such a cart-before-the-horse type extension of the County's general eminent domain power.

136 P.3d at 647 n.14.

The connection here is even more attenuated. In Lowery, the generating facility was under a binding contractual obligation to pay for the water district's pipeline, once the first two pipelines were in place. Here, there is no evidence of any binding obligation to build the railroad, only the Port Authority's hopes that third parties will do so.

Moreover, Mr. Overby testified that the purpose of the additional rail facilities is “to promote growth in jobs and commerce.” App. 22. That confirms his later admission under cross-examination that “the public purpose under which you are condemning the Lamberts’ property is for economic development.” App. 24. Not “a” purpose, but “the” purpose. The opening brief argued that Respondent was not free to disregard these unambiguous admissions and there is no response.

II. Relators Are Entitled To An Order Prohibiting Respondent From Entering His Order Of Condemnation, Because The Port Authority Had No Power To Condemn Relators’ Property Under Art. I, § 28 Of The Constitution, In That The Proposed Use Is Private, Not Public.

Relators’ opening brief established that, to satisfy Art. I § 28 of the Constitution, the public benefit of a taking must be direct and immediate, not remote and collateral. The only direct and immediate beneficiary of the taking here is the unknown private corporation.

Respondent does not dispute the legal proposition that indirect public benefits do not satisfy Art. I § 28. He does not dispute the factual proposition that the only direct beneficiary is the unknown corporation. Instead, Respondent claims that the taking will permit the corporation and other tenants to finance a loop railroad and that the railroad will produce substantial public benefit. Br. at 14-15.

There are two fundamental problems with this argument. First, “reduced freight rates, enhancing river commerce and opportunities for citizens in the area,” Br. at 15, is precisely the kind of economic development that, standing alone, cannot justify a taking. Second, these downstream effects, even if they come true, are remote and consequential public benefits, which do not satisfy Art. I § 28.

Respondent makes no effort to defend his reliance on State ex rel. Wagner v. St. Louis County Port Auth., 604 S.W.2d 592 (Mo. banc 1980). The only case he cites is City of Kansas City v. Hon, 972 S.W.2d 407 (Mo. App. 1998). Br. at 16.

In Hon, the City proposed to condemn several tracts of property to fill out the City’s airport to its natural contours. The objective was to prevent incompatible development and plan for the future development of the airport. The City argued that its proposed industrial and commercial uses, such as the manufacture of aircraft, were essential elements of operating a modern airport.

Hon is readily distinguishable. First, the legislature made a specific statutory finding that all property acquired by airports serves a public purpose. The Court held that such findings, while not determinative, were relevant to the issue of public benefit. 972 S.W.2d at 410. There is no comparable legislative finding in § 68.025(17), R.S.Mo., which grants eminent domain powers to port authorities.

Second, and more fundamentally, the benefit to the airport was direct. Acquisition of the property would permit the City to attract aviation-related

businesses which would “bring or keep industry in the City, and will provide a monetary base which can be used to provide funds for maintenance and improvement of terminals, runways, and so forth.” 972 S.W.2d at 412.

Here, all the public benefits are remote and indirect. Those benefits are not derived from the use of the condemned property; the only entity that directly benefits from the taking is the unknown private corporation that will lease the premises and build, own and operate storage facilities thereon. The only public benefit Respondent identifies is the indirect, downstream benefit of a rail loop.

In any event, Hon was decided in 1998, eight years before the legislature enacted § 523.271. Throughout its opinion, the Hon Court emphasized that the public benefit it identified was economic development:

- The City wanted the property “to plan for the future development of the airport.” 972 S.W.2d at 411.
- It wanted to “benefit the community through the creation of jobs.” Id.
- “[G]iven today’s business climate, to survive and thrive an airport also must be able to offer facilities for use as commercial or industrial, aviation-related development.” Id. at 412.
- “We apply this same type of rationale in legislation which permits private companies to redevelop ‘blighted’ land taken by eminent domain.” Id. at 414.

Under § 523.271, such public benefits, standing alone, do not permit the use of eminent domain for any purpose other than rectifying blight.

Conclusion

For these reasons, Relators respectfully pray that the Court grant its preliminary writ of prohibition and, after briefing and argument, its permanent writ prohibiting Respondent from taking any action in the case other than to dismiss it.

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 1,226 words exclusive of the sections exempted by Rule 84.06(b) based on the word count that is part of Microsoft Word 2010. The undersigned counsel further certifies that the electronic version of this brief has been scanned and is free of viruses.

/s/Mark G. Arnold
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th 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.

I hereby certify that some of the participants in the case are not Missouri eFiling System users. I hereby certify that on the 18th 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 3 calendar days, to the following:

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