IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 9, 2009 Session

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY v. THE ALLEN FAMILY TRUST ET AL.

Appeal from the Circuit Court for Davidson County
No. 05C-843 Barbara Haynes, Judge

No. M2008-00886-COA-R3-CV - Filed March 27, 2009

Metropolitan government instituted condemnation proceedings against property owners to acquire an easement for the construction of a sewer line. The trial court granted Metro's request for an order of possession. On appeal, property owners challenge the trial court's determination that the power of eminent domain was being exercised for a public use. We affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Winston S. Evans, Nashville, Tennessee, for the appellants, Allen Family Trust, Dean R. Allen and Shirlee A. Allen, Trustees.

James Earl Robinson and Philip Daniel Baltz, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

OPINION

Dean R. Allen and Shirlee A. Allen, as trustees of the Allen Family Trust, own a rural tract of land, approximately 20 acres in size, on Hamilton Church Road in Antioch, Tennessee. For purposes of this opinion, we will refer to the property owners as "the Allens." A developer, Global Development ("Global"), purchased land adjoining the Allen property in order to build a housing subdivision. A Global representative contacted the Allens in February 2004 about the company's desire to purchase an easement across the rear of their property to construct sewer lines.

The planning commission of the Metropolitan Government of Nashville and Davidson County ("Metro") approved the easements for condemnation in May 2004, and an ordinance authorizing the easement plan was passed by the Metro council and signed by the mayor in October 2004.

Negotiations between the Allens and Global concerning the easement were not successful. In November 2004, Gene King of Metro's Department of Water and Sewerage Services sent the Allens a letter stating that Metro was now assisting Global in acquiring the necessary easements and including a proposed easement deed. The Allens responded in February 2005, stating that they would accept the offer only with certain changes, including a condition that they receive four sewer taps for their property. The changes were not acceptable to Global.

Metro initiated the present suit for condemnation on March 21, 2005, and the Allens were served on March 25, 2005. Metro's condemnation action was brought pursuant to Tenn. Code Ann. § 29-17-801 *et seq.*, which included "quick take" procedures that have since been eliminated. *See* 2006 Tenn. Pub. Acts ch. 863. The Allens hired an attorney, who contacted Metro's attorney beginning on April 7, 2005 requesting an extension of time to answer the petition and stating that the Allens intended to contest Metro's right to take. On April 14, 2005, the Allens filed an objection to taking. At the same time, the Allens filed a motion for an extension of time and to continue the hearing set for April 18, 2005. The hearing was continued until April 25, 2005. In the intervening week, the Allens deposed three employees of Metro's water and sewer department.

At the hearing on April 25, 2005, the Allens requested a "ruling that we are to be given–that time has been extended because we did and have filed a notice that we do challenge the right to take." The Allens further argued that the sewer for which the easement was sought would "serve only the property of Global Development" and would not serve the Allens or anyone else in the community. The court heard arguments and proof concerning two main issues: (1) whether the Allens received adequate notice of the condemnation proceedings and preserved their right to challenge Metro's right to take; and (2) whether the proposed easement was for a public use.

Metro called as a witness Ronald Sweeney, a property manager for Metro's water and sewer department. Mr. Sweeney testified as follows when asked about the purpose of the project that necessitated the easement:

> The purpose of the project is a development of housing. We were attempting to secure the easements here in order that the project could be completed on this particular alignment. It would save the city the trouble of building a second pump station. And the pump station is something that once a developer has constructed, it is deeded over to Metro, and they will be responsible for maintaining the pump station and the line and the infrastructure of the sewers from then on. . . . [The project] will provide sanitary sewer service to a development in the area, expanding the–again, expanding the infrastructure where there is currently no service available.
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> . . . [A]s [developers] develop their subdivisions, they have to construct sewer services. Once these services are constructed, they're then deeded over to Metro in order that we might receive the revenues off of this as it expands the infrastructure of the utility.

As to the necessity of the particular easement across the Allens' property, Mr. Sweeney's testimony was as follows:

> A. Because of the manner in which the topography of the ground and things of this nature, we are utilizing a gravity sewer crossing Mr. Allen's property. It will then go to a pump station and then be–under pressure be pumped out of this basin.
>
> Q. And what is the significance of having this one easement as it relates to a pump station, if any?
>
> A. . . . [W]e are depending on gravity to provide this service. If we do not stay with this alignment, a second pump station may have to be constructed and, again, we have to maintain it.
> . . . .
>
> Q. Is there an additional expense in the installation of a second pump station in the system?
>
> A. Yes.
>
> Q. Is there an inconvenience concerning odor or any other unpleasant circumstances associated with a pump station?
>
> A. Yes. Unfortunately, we are pumping waste water. When these pump stations go down, it is critical that we respond as quick as possible to continue to provide services. In some cases there is odors, and they are considered a liability.

The Allens declined to cross-examine Mr. Sweeney, choosing instead to offer into evidence designated portions of Mr. Sweeney's deposition testimony. In addition, the Allens introduced into evidence portions of the testimony of Mike Morris, an engineer with Metro's water and sewer department, and Gene King, a negotiator with the department.

Mr. Allen testified on behalf of the Allens and stated that neither Global nor Metro had agreed to allow the Allens to connect their property to the proposed sewer system for which the easement was being requested.

The trial court took the matter under advisement and issued an order on May 6, 2005, granting Metro the right to take possession of the property rights at issue. The court concluded that Metro's petition represented "a lawful exercise of [the] power of eminent domain" and found "no evidence that the enactment of the [ordinance] was arbitrary, capricious or fraudulent in its issuance or conception." The trial court also found that the Allens had failed to comply with Tenn. Code Ann. § 29-17-803(b) and (c) in that they did not question the right to take within five days of receiving notice. The Allens appealed the May 6, 2005 order, but their appeal was dismissed by this Court for

lack of a final judgment. On March 29, 2008, the trial court entered an agreed final order awarding the Allens $2,500 for the sewer easement. The present appeal followed.

On appeal, the Allens raise two issues: (1) Whether the trial court abused its discretion in failing to grant the Allens an extension of time to question the right to take; and (2) whether Metro's exercise of the power of eminent domain was proper.

TENN. CODE ANN. § 29-17-803

When Metro filed its petition for condemnation, Tenn. Code Ann. § 29-17-803(b) (2000) provided that "[n]otice of the filing of such petition shall be given the owner of the property or property rights at least five (5) days prior to the taking of any additional steps in the case." Pursuant to Tenn. Code Ann. § 29-17-803(c) (2000), if the condemner's right to take was not questioned "[a]fter the expiration of five (5) days from the date of the giving of such notice," the condemner had "the right to take possession of the property or property rights sought to be condemned."[1] The Allens received notice of Metro's petition on March 25, 2005. The notice cited Tenn. Code Ann. § 29-17-803 but did not specifically state that there was a five-day deadline for objecting to the taking. The notice stated that the petition for condemnation was set to be heard on April 19, 2005. The Allens hired an attorney, who first contacted Metro on April 7, 2005, already past the five-day deadline. The Allens filed an objection to the taking on April 14, 2005. At the Allens' request, the trial court moved the hearing originally set for April 19, 2005 to April 25, 2005, thereby allowing the Allens to take discovery depositions.

The Allens argue that their failure to question the right to take within five days of service of the petition was the result of excusable neglect and that the trial court abused its discretion in failing to grant them an extension of time within which to question the right to take, as authorized under Tenn. R. Civ. P. 6.02.[2] They further assert that, by failing to grant them additional time, the trial court essentially granted a default judgment against them. We cannot agree. While the trial court noted in its order that the Allens had not complied with the requirements of Tenn. Code Ann. § 29-17-803, the trial court held a hearing on Metro's right to take and determined that Metro had acted lawfully in condemning the easement. The Allens were afforded the opportunity to cross-examine Metro's witness and to put on their own witnesses, although they opted to introduce deposition testimony instead. If the trial court had held the Allens to the strict requirements of Tenn. Code Ann. § 29-17-803(c), it would have allowed Metro to take immediate possession of the property rights at the initial hearing date.

[1] The "quick take" revisions were eliminated by chapter 863 of the Tennessee Public Acts of 2006. The new provisions, found at Tenn. Code Ann. § 29-17-903, require 30 days' notice of a petition for condemnation.

[2] Tenn. R. Civ. P. 6.02 provides: "When by statute. . . an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, . . . upon motion made after expiration of the specified period permit the act to be done, where the failure to act was the result of excusable neglect."

We have concluded that, while not expressly granting the Allens an extension of the statutory time in which to question the right to take, the trial court afforded them a full hearing on the issue of Metro's right to take. The Allens have not identified any inadequacies in the hearing provided, and the trial court expressly ruled on the issue of Metro's right to take.

METRO'S USE OF THE POWER OF EMINENT DOMAIN

The Allens argue that Metro's exercise of the power of eminent domain in this case is not for a public use but rather for the benefit of a single real estate developer. In making this argument, the Allens focus upon the fact that Metro has not agreed to allow the Allens or other property owners outside Global's development to tap onto the proposed sewer line.

It is important to note that the present case is not about the Allens' right to tap onto the proposed sewer line. Metro filed a condemnation petition to obtain an easement for the sewer project at issue. While testimony from Metro employees strongly suggests that the Allens will not be permitted to tap onto the line at issue, this appeal is not a review of any official action by Metro on a request by the Allens for sewer taps.

There is no dispute that Tennessee law gives Metro a general power of eminent domain. *See* Tenn. Code Ann. § 29-17-801 *et seq.* To determine the validity of the exercise of that power in a particular case, courts engage in a two-prong analysis: (1) whether the taking is for a public use; and (2) whether the taking is a necessity. *Pickler v. Parr*, 138 S.W.3d 210, 213 (Tenn. Ct. App. 2003). We review such questions of law de novo with no presumption of correctness afforded the trial court's conclusions. *Id.*

Public use

The Takings Clause of the Fifth Amendment to the United States Constitution[3] and Article I, Section 21 of the Tennessee Constitution[4] require that any taking of private property by a government be for a public use. The Allens assert that the taking of the easement across their property in this case violates these constitutional limitations.

Determining whether a proposed taking is for 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.'" *City of Knoxville v. Heth*, 210 S.W.2d 326, 328 (Tenn. 1948) (quoting *S. Ry. Co. v. City of Memphis*, 148 S.W. 662, 665 (Tenn. 1912)). Courts afford "great weight" to a municipality's

[3]The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This clause is made applicable to the states by the Fourteenth Amendment. *See Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005).

[4]Article I, Section 29 of the Tennessee Constitution states: "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."

determination of public use. *Id.*; *see also City of Chattanooga v. Classic Refinery, Inc.*, No. 03A01-9712-CV-00552, 1998 WL 881862, *4 (Tenn. Ct. App. Dec. 17, 1998). It has been stated that "[t]he condemnation of property for public sewers and drains, or works for the disposition of sewage, is so manifestly for public use that it has been seldom questioned and never denied." 11 Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 32.60 (3d. ed. 1999). In *Town of Greeneville v. Hardin*, this court upheld the taking of property to provide a sanitary sewer line for an airport and rental property owned by a public airport authority as being for a public use. *Hardin*, No. E2000-00827-COA-R3-CV, 2001 WL 125950, *3 (Tenn. Ct. App. Feb. 15, 2001). Courts in other states have generally recognized the provision of sanitary sewer service to an area as promoting the general health and safety of the community, even where a private entity also benefits. *See Hoffman Family, L.L.C. v. City of Alexandria*, 634 S.E.2d 722, 729-30 (Va. 2006) (taking property for sewers and utilities for subdivision did not lose public character because project would directly benefit private developer); *Town of Steilacoom v. Thompson*, 419 P.2d 989, 992 (Wash. 1966) ("That a private developer stands to derive a direct benefit from the sewer extension does not change the public character of this sewer project nor deprive it of its essence as one for a public benefit and convenience."); *Mark IV Constr. Co., Inc. v. Town of Perinton*, 537 N.Y.S.2d 401, 402 (N.Y. App. Div. 1989) ("The fact that a private developer will derive an incidental benefit from this taking does not vitiate its public purpose."); *Twp. of Upper St. Clair v. Fryer*, 587 A.2d 907, 909 (Pa. Commw. Ct. 1991).

Despite the generally accepted idea that sanitary sewers are for a public use, the Allens assert that the taking of their property in this case is not for a public use based upon the following argument:

> If the acquisition of the sewer easement was for a public purpose, then not only the Allens but all others in the community would be permitted to use the sewer. Instead, the use of the sewer is limited to the lands of Global. The Allens will not be allowed to use the sewer even though it is their land which is being taken for the sewer. This fact alone conclusively demonstrates that the condemnation of the easement across the land of the Allens is *not* for a public purpose.

This reasoning is flawed. The United States Supreme Court has expressly rejected any requirement that the entire community must be able to directly enjoy or participate in an improvement in order for that improvement to be for a public use. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). Tennessee courts have applied similar analysis with respect to the exercise of eminent domain by municipalities:

> [W]hen a municipality seeks to acquire a parcel of land on which to carry on its governmental functions, or by means of which to directly enhance the safety, health or comfort of the community, there is no requirement of 'use by the public' in the sense that the individual members of the public must have the right to use the land so taken. It is stated that as long as the use is by the public through its officers or

> agents, or by its enjoyment of greater safety, health and comfort, eminent domain may unquestionably be employed. . . .

Johnson City v. Cloninger, 372 S.W.2d 281, 284 (Tenn. 1963). Thus, to be a public use, a municipal improvement does not have to be directly usable by the entire community.

The trial court aptly summarized the Allens' argument as follows: "It's for public use if [Mr. Allen] gets four sewer taps; but if he doesn't get four sewer tapes, it's a private use." We agree with the trial court that the provision of sewer service to those who live in the new development[5] qualifies as a public use, regardless of the fact that Global also benefits from the condemnation, and even if the Allens cannot tap onto the line.

We find the authorities cited by the Allens in support of their position to be unpersuasive and distinguishable. In *City of Statesville v. Roth*, 336 S.E.2d 142, 144 (N.C. App. 1985), the court found that an easement to provide water and sewer lines to a manufacturing plant was for a private, not a public, use. However, in a more recent opinion, the North Carolina appellate court noted that it had rejected the reasoning applied in *Roth* "that since the proposed condemnation would benefit only a single property owner, it is necessarily for a private purpose." *Tucker v. City of Kannapolis*, 582 S.E.2d 697, 700 (N.C. App. 2003).

Another case cited by the Allens is factually distinguishable in that the proposed condemnation was to provide additional parking for a privately owned automobile racetrack, with the alleged public purposes of fostering economic development, promoting public safety, and preventing blight. *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 8 (Ill. 2002). The court found the proposed condemnation unconstitutional because it "bestows a purely private benefit and lacks a showing of a supporting legislative purpose." *Sw. Ill. Dev. Auth.*, 768 N.E.2d at 10. In the present case, the proposed easement is for a legitimate public use with incidental benefits to Global.

Finally, the Allens cite *Alfred Phosphate Co. v. Duck River Phosphate Co.*, 113 S.W. 410, 413-14 (Tenn. 1907), a case involving the attempted condemnation by a phosphate mining company of another company's property to allow railway transport of phosphate. The court found no public purpose. *Alfred*, 113 S.W. at 414. As pointed out in a later case, the court's "public use" analysis in *Alfred* has no application in cases involving condemnation by a municipality rather than by a private company. *Cloninger*, 372 S.W.2d at 284.

The easement at issue is for a public use. The proposed sewer line, once completed by Global, will become Metro's property, thereby expanding its sewer infrastructure and providing sewer service to a group of Metro residents.

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[5] Mr. Morris testified in his deposition that the new development would include around 950 lots.

Necessity

The Allens also argue that Metro acted arbitrarily and capriciously in determining that the easement at issue was necessary for a public use.

Although determining whether private property is being taken for a public use is a judicial question, "'all other incidents of the taking are political questions, for the determination of the sovereign, and not judicial questions, for the determination of the courts.'" *Heth*, 210 S.W.2d at 331 (quoting *S. Ry. Co. v. Memphis*, 148 S.W. at 665). Deciding which property shall be taken, "'determining its suitableness for the use to which it is proposed to put it[sic], as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take.'" *Id.* A municipality's determination 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." *Duck River Elec. Membership Corp. v. City of Manchester*, 529 S.W.2d 202, 204 (Tenn. 1975). In the context of eminent domain, a taking is arbitrary and capricious if it "can be characterized as a 'willful and unreasonable action without consideration or in disregard of facts or law or without determining principle.'" *Classic Refinery*, 1998 WL 881862, at *6 (quoting BLACK'S LAW DICTIONARY 105 (6th ed. 1990)).

In a case similar to the present case, *City of Maryville v. Edmondson*, this court found that the city did not act arbitrarily or capriciously in seeking an easement to allow for the installation of a gravity system rather than a pump station. *Edmonson*, 931 S.W.2d 932, 935-36 (Tenn. Ct. App. 1996). Rejecting the landowners' argument that the city acted arbitrarily and capriciously in choosing a plan that saved money for the private developer, the court noted that "the majority of eminent domain decisions made by a sovereign will (and must) be at the expense of one citizen over another." *Id.* at 935. A city engineer testified that the gravity system was the preferred way to provide service to the area in question. *Id.* The court further stated that, "[a]lthough the City may have developed a better or less expensive sewer installation plan, it is not the function of this court to weigh the alternatives and consider which of them is best." *Id.* at 936.

We agree with the trial court's conclusion that Metro's decision to take the easement across the Allens' property in this case was not arbitrary and capricious. Testimony from Metro employees established that, because of the topography in the area, the easement on the Allens' property would prevent the need for another pump station to be built. Metro preferred to maintain a gravity sewer rather than a pump station for reasons of expense as well as the potential for problems with odors and unsanitary conditions associated with a pump station.

The Allens assert that the "pertinent question is whether it was necessary to exclude the Allens, as well as others in the immediate community, from the use of the sewer." We disagree with this statement of the issue. This appeal does not involve a review of any action taken by Metro on a request by the Allens to tap onto the sewer line. Rather, the relevant issue is whether Metro acted arbitrarily or capriciously in taking the easement at issue in order to provide sewer service to the new development. The record shows that Metro considered the alternatives and had reasons for selecting

the course of action it chose. As the Allens point out, Mr. Sweeney testified in his deposition that Metro policy required that an affected landowner be allowed to tie onto the new sewer line "if practical."[6] Metro's engineer, Mr. Morris, testified that, without upgrades, the system in question would not have sufficient capacity to service additional units outside the new development.

The Allens also argue that Metro's decision was arbitrary and capricious because it violated a new internal Metro policy. In his deposition, Mr. Morris stated that, in early 2005, his supervisor informed him of a new, more restrictive, policy regarding the use of eminent domain powers. Mr. Morris also testified, however, that he understood the policy was not retroactive to condemnation cases that were already in the pipeline. This testimony does not show that Metro's actions in proceeding with the condemnation of the Allens' property were arbitrary or capricious.

We affirm the decision of the trial court. Costs of appeal are assessed against the appellants.

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ANDY D. BENNETT, JUDGE

[6] Metro's written policy on condemnation for private development required the private developer "to prove that a good faith effort to acquire the easement has been made." According to Mr. Sweeney, the "good faith" requirement included permitting the landowner to tie onto the sewer "if possible."