IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-CT-140

624 Broadway, LLC,

Appellant (Plaintiff below),

–v–

Gary Housing Authority,

Appellee (Defendant below).

Argued: June 9, 2022 | Decided: August 29, 2022

Appeal from the Lake Superior Court
No. 45D05-1910-CT-1085
The Honorable Stephen E. Scheele, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 21A-CT-653

Opinion by Justice Massa

Rush, C.J., and David, Slaughter, and Goff, JJ., concur.

Massa, Justice.

The Gary Housing Authority acquired 624 Broadway, LLC's property through an administrative taking. It only provided notice of its taking and hearings by publication, despite knowing how to contact 624 Broadway. And it refused to postpone its final meeting—when it awarded damages—to allow 624 Broadway to obtain an appraisal. 624 Broadway alleges the notice was constitutionally deficient. Because we agree and cannot deem it harmless, we reverse and remand.

Facts and Procedural History

624 Broadway owned commercial property in downtown Gary. The Housing Authority wanted the property as part of its plan to redevelop the area for mixed residential (i.e., affordable housing) and commercial uses. In March 2019, it sued 624 Broadway to acquire the property but soon successfully moved to dismiss the suit. It then initiated an administrative taking under Indiana Code chapter 32-24-2. An administrative taking—an alternative to the "traditional" lawsuit route—occurs when an authorized governmental body condemns property and awards damages through resolutions. *See* Ind. Code § 36-7-18-28(a)(2) (2019); I.C. §§ 32-24-2-6, -10. Under the statutes then in effect, a non-resident owner like 624 Broadway, located in nearby Schererville, was entitled only to notice by publication.[1] *See* I.C. §§ 32-24-2-6(b), -8(c).

On August 15, the Housing Authority adopted a resolution to acquire the property and set September 19 as the day to receive and hear remonstrances.[2] It twice published notice of the resolution and upcoming meeting in two area newspapers of general circulation. Around September

[1] The statutes were subsequently amended to require that all owners receive, at a minimum, notice by mail during an administrative taking. *See* Ind. Code §§ 32-24-2-6(b), -8(b) (2020).

[2] Remonstrance is defined as "[a] formal protest against governmental policy, actions, or officials." *Black's Law Dictionary* 1486–87 (10th ed. 2014).

9, John Allen, 624 Broadway's registered agent, learned of the upcoming meeting from a reporter. He attended and spoke at it. During the meeting, the Housing Authority adopted resolutions confirming the taking, assessing $75,000 in damages, and setting a meeting on written remonstrances for October 17. Again, it only provided notice by publication. When Allen learned of the upcoming meeting, he and 624 Broadway submitted written remonstrances.

624 Broadway unsuccessfully requested the Housing Authority postpone the meeting so 624 Broadway's appraiser could assess the property. On October 16, it sued the Housing Authority and sought a temporary restraining order preventing the meeting. The trial court denied its request, and the Housing Authority proceeded to award $75,000 in damages. One day after the meeting, the appraiser inspected the property. He issued his report on October 28, valuing the property at $325,000.

624 Broadway later amended its complaint and alleged, among other things, that the Housing Authority's decision to only provide notice by publication violated its federal due process rights and deprived it of the ability to adequately prepare for the hearings. Both parties moved for summary judgment; the trial court granted it for the Housing Authority and denied it for 624 Broadway. 624 Broadway appealed.

The Court of Appeals affirmed in part, reversed in part, and remanded. Although it rejected most of 624 Broadway's arguments, it found the notice was constitutionally deficient because it "was not reasonably calculated to reach Allen." *624 Broadway, LLC v. Gary Hous. Auth.*, 181 N.E.3d 1013, 1024 (Ind. Ct. App. 2021). And this deficient notice was not harmless error because it "contributed to 624 Broadway's inability to obtain its own appraisal of the property expediently, which in turn contributed to 624 Broadway's inability to present competing evidence of its damages." *Id.* at 1025. The panel remanded with instructions to enter summary judgment for 624 Broadway and vacate the taking. *Id.*

The Housing Authority petitioned for transfer, which we granted.[3] *624 Broadway, LLC v. Gary Hous. Auth.*, 188 N.E.3d 842 (Ind. 2022).

Standard of Review

We review summary judgment decisions de novo, applying the same standard as the trial court. *Serv. Steel Warehouse Co., L.P. v. U.S. Steel Corp.*, 182 N.E.3d 840, 842 (Ind. 2022). Summary judgment is appropriate only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). Constitutional claims are questions of law, which we review de novo. *See Larkin v. State*, 173 N.E.3d 662, 667 (Ind. 2021).

Discussion and Decision

The federal Constitution establishes important limits on the government's ability to take private property for public use: It must provide just compensation, a hearing on just compensation, and sufficient notice. *See* U.S. CONST. amend. V; *id.* XIV, § 1; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Housing Authority only provided notice of the taking and its hearings by publication—even though it knew how to provide personal notice. Its deficient notice deprived 624 Broadway of a meaningful damages hearing.

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[3] We address only 624 Broadway's constitutional due process claim. We otherwise summarily affirm the Court of Appeals. *See* Ind. Appellate Rule 58(A)(2).

I. The Housing Authority provided constitutionally deficient notice to 624 Broadway, which was prejudicial.

The government can only take property through eminent domain if it provides "just compensation" and "due process of law." U.S. Const. amend. V; *id.* XIV, § 1. This means "an owner whose property is taken for public use must be given a hearing in determining just compensation." *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956); *see also Bragg v. Weaver*, 251 U.S. 57, 59 (1919) ("[I]t is essential to due process that the mode of determining the compensation . . . afford the owner an opportunity to be heard."). Because "[t]he right to a hearing is meaningless without notice," the government must provide notice "reasonably calculated to inform" a property owner of the proceeding. *Walker*, 352 U.S. at 115; *see also Mullane*, 339 U.S. at 314.

Here, the Housing Authority complied with the governing statutes when it provided notice by publication. *See* I.C. §§ 32-24-2-6(b), -8(c). Statutory requirements, however, are not necessarily "constitutionally sound." *Solarize Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 182 N.E.3d 212, 221 (Ind. 2022) (Slaughter, J., concurring in part and in the judgment). "[N]otice . . . that may technically comply with a state statute . . . does not necessarily comport with due process." *In re Adoption of L.D.*, 938 N.E.2d 666, 669 (Ind. 2010). Certainly, a statute can provide more protection than the Constitution. But when a statute provides less, the government must do more.[4]

Notice by publication may be sufficient "where it is not reasonably possible or practicable to give more adequate warning," like when the intended recipient is missing. *Mullane*, 339 U.S. at 317. But it "is not enough with respect to a person whose name and address are known or

[4] Contrary to what *Hagemann v. City of Mount Vernon*, 238 Ind. 613, 619–22, 154 N.E.2d 33, 36–37 (1958), may convey, notice by publication at a proceeding's outset is not adequate simply because the legislature deems it so or because personal notice will be given later. *See Schroeder v. City of New York*, 371 U.S. 208, 211–13 (1962).

very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder v. City of New York*, 371 U.S. 208, 212–13 (1962).

The Housing Authority admittedly knew the identity and address of 624 Broadway's registered agent. Indeed, its September 19 damages resolution included his address. 624 Broadway's articles of organization, filed with the Indiana Secretary of State, listed its registered agent, his address, and an email address for service. Further, the Housing Authority demonstrated its ability to successfully communicate with 624 Broadway during its eminent domain lawsuit. *See L.D.*, 938 N.E.2d at 671 (finding notice by publication insufficient when a party "had successfully given notice" in a previous case but "made no attempt to do so" in the instant case). Yet once it transitioned to an administrative taking, it apparently became incapable of sending a letter or email to 624 Broadway. An administrative taking may be a "streamlined procedure for taking private property," *Util. Ctr., Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 736 (Ind. 2013), but it cannot circumvent the Constitution. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. Because the Housing Authority knew how to provide personal notice, its notice by publication was a "mere gesture."

Despite the insufficient notice, 624 Broadway still learned of the Housing Authority's meetings, attended and spoke at them, and submitted written remonstrances. But we cannot say 624 Broadway was not prejudiced: under our harmless error standard, an error's "probable impact" is "sufficiently minor" if it did not "affect the substantial rights of the parties." Ind. Appellate Rule 66(A). The Housing Authority passed its first resolution on August 15. More than three weeks later, Allen learned of the September 19 meeting. Had the Housing Authority provided constitutionally sufficient notice at the outset, it is probable that 624 Broadway would have presented its appraisal before or at the final meeting. Instead, 624 Broadway's appraiser issued his report less than two weeks after that meeting. Ultimately, the Housing Authority must persuade us that the probable impact of its deficient notice was so minor that it did not affect 624 Broadway's substantial rights. But given the significant disparity between the owner's $325,000 appraisal, the Housing

Authority's $24,000 appraisal (which lacked an updated interior inspection), and the final $75,000 award, we are not confident that 624 Broadway's appraisal did not affect the Housing Authority's decision on just compensation. Thus, we decline to hold that the deficient notice was harmless.

II. 624 Broadway is entitled to a damages hearing.

When the Court of Appeals reversed, it ordered vacatur of the taking. *624 Broadway, LLC*, 181 N.E.3d at 1025. However, just compensation is generally the appropriate remedy when the government, duly authorized by law, takes property for a public purpose. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 732 (Ind. 2010); *cf. Dible v. City of Lafayette*, 713 N.E.2d 269, 274 (Ind. 1999) (acknowledging "injunctive relief may be necessary to remedy interference with landowner rights for a **private** purpose"). A court cannot enjoin or reverse a lawful taking when an adequate legal remedy—compensation—is available. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2167–68 (2019); *Murray*, 925 N.E.2d at 732; *United States v. Herring*, 750 F.2d 669, 674 (8th Cir. 1984).

The General Assembly authorized the Housing Authority to conduct administrative takings to provide affordable housing. *See* I.C. §§ 36-7-18-2, -28(a)(2). Here, the Housing Authority strictly followed the statutory procedures (to a fault in terms of notice) when it took 624 Broadway's property for community redevelopment that includes affordable housing—plainly a public purpose. *See Berman v. Parker*, 348 U.S. 26, 33–36 (1954); I.C. § 36-7-18-2. And nothing indicates the taking was "subterfuge . . . to convey private property to a private individual for private use" or that the Housing Authority acted arbitrarily and capriciously. *Derloshon v. City of Fort Wayne Dep't of Redevelopment*, 250 Ind. 163, 170–71, 234 N.E.2d 269, 273 (1968). To the contrary, it became interested in the property in 2017, and by the time it took 624 Broadway's property it had already acquired other land necessary for its redevelopment.

We cannot vacate the Housing Authority's taking—statutorily authorized and for a public purpose—simply because insufficient notice

may have impacted the damages award. 624 Broadway's sole remedy is just compensation, and it is entitled to a hearing on damages where it can present its appraisal and other pertinent evidence.

Conclusion

We reverse the trial court's entry of summary judgment for the Housing Authority on 624 Broadway's due process claim. We remand for it to enter summary judgment in favor of 624 Broadway on that claim and hold a damages hearing.

Rush, C.J., and David, Slaughter, and Goff, JJ., concur.

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