

STATE OF MAINE
CUMBERLAND, ss

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CLERK'S OFFICE

SUPERIOR COURT
CIVIL ACTION
Docket No. RE-05-85

2007 SEP 13 P 12:35

TED-CUM-9/13/2007 ✓

THE PORTLAND COMPANY,

Plaintiff,

v.

DECISION AND ORDER

THE CITY OF PORTLAND,

Defendant.

DONALD L. GARRETT
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JAN 15 2008

I. BACKGROUND

The Portland Company (POCO) alleges that it is the owner of certain private rights to maintain railroad tracks on a piece of property along Portland's eastern waterfront and that the City of Portland (City) unlawfully exercised statutory eminent domain authority to take plaintiff's private rights and to use a portion of POCO's property to promote and assist private development in the nearby area, including that where POCO's track rights are located.

POCO contests the lawfulness of the taking, including the lack of any "public exigency;" that the taking of the property is for private development, not public use; that the City obtained the property to turn over to private parties; that the taking interfered with plaintiff's contract rights; and, that the taking is arbitrary, capricious, and abuse of discretion and illegal.

In the alternative, POCO alleges that the City has not provided fair and adequate compensation for the taking and has asked for a jury trial to establish appropriate compensation.

As an initial proceeding, the court held a jury-waived trial concerning the purpose and method of the taking to determine whether the City's action is justified.

II. DISCUSSION

A. Exigent Circumstances

The eastern waterfront area was historically used to support a working waterfront. The area was dominated by railroad yards, two large grain elevators, a classic old architectural treasure of a building used as a passenger terminal by the Grand Trunk Railway and deep water docks for sea transport of goods to and from domestic and foreign ports. That historic use has long since disappeared and is likely to return only in the dreams of historians. In its place, even though the area has not been formally designated as blighted or slum, the City is developing the area in a manner that is unlikely to succeed without public participation.

It is well established in Maine that, without the consent of the owner, the government may only exercise the power of eminent domain to obtain private property when the property is to be put to public use and when a public exigency requires it. ME. CONST., at I, § 21. See *Blanchard v. Dept. of Transp.*, 2002 ME 6, ¶¶ 27 and 28, 798 A.2d 1119, 1126 and also in the dissent, ¶ 41 and at 1128.

The appropriateness of the taking here depends upon the individual facts of this case.

In *Blanchard*, the Law Court approved the taking of private land for use as a parking lot by customers of a privately owned ferry company. The ferry company does not transport cars; however, it is the primary means of access to Chebeague Island which is not served by a bridge. The Department of Transportation (DOT) determined that the availability of convenient parking adjacent to the wharf on Cousins Island

was essential for the operation of a ferry transportation system connecting Chebeague Island residents with their jobs, schools, hospitals, health care providers, food stores and other essential mainland services.

Blanchard, ¶ 5, at 1122.

After the taking DOT leased the parking lot to the Town of Yarmouth (Town) which in turn leased it to the ferry company. The leases by DOT and the Town contained provisions to protect the public use in the event problems developed with the ferry service.

It is necessary that there be both exigent circumstances to warrant the taking and a dedication to public use. Notwithstanding the position of the dissenting justices in *Blanchard* questioning the existence of any public exigency, they recognized that the court must give due deference to the determination of the legislative body and that the court review “is limited to determining whether there is any rational basis to support a finding of public exigency.” *Id.* at ¶ 43, 1129, citing *Ace Ambulance Service Inc. v. City of Augusta*, 337 A.2d 661, 663 (Me. 1975).

In this case, the City is actively promoting the redevelopment of the eastern waterfront area which includes the so-called Riverwalk Project that is at the core of this taking.¹

In its Order of Condemnation, plaintiff’s exhibit 23, the City set out a Declaration of Purpose to acquire the property rights of POCO relative to its authority to maintain a rail connection and railroad tracks in the area of development.

To support its purpose, the City made detailed and specific findings. The development of the area includes construction of a parking garage, a street (Hancock Street Extension) and a large building for residential and retail use to be constructed by Riverwalk. The City maintains that any transfer of property to Riverwalk must be free and clear any rights possessed by POCO. In essence, the City has determined that the

¹ The Riverwalk Project is in conjunction with the Ocean Gateway Project, but separate and distinct from other development proposals in the area.

Riverwalk Project cannot go forward if POCO's rights are not obtained. The evidence at trial and in the record sufficiently supports the City's determination of exigent circumstances as to this area of development ("A-1" and "A-2") and the court does not find that to be in error.

The City's action to take plaintiff's rights includes immediate development of sections "A-1" and "A-2". Section "A-3" is not included in the immediate plan; however, its projected use as a parking lot to support commercial retail and general public use of the area is not a change from its present use and no exigency has been demonstrated as to "A-3". Possible future use for parking or other undesignated development does not fall within "exigent" circumstances. Inclusion of plaintiff's rights in "A-3" within the taking is not appropriate; however, the court does not find that the City's action to take "A-3" was in bad faith. That portion of the taking is void and plaintiff is entitled to restoration of all rights therein.

B. Public Use

The issue of whether the taking is for one of public use, however, is a question of law for the court. *Blanchard*, ¶ 26, at 1126.

Each section of the remaining parcel in question ("A1" and "A2"), which includes plaintiff's track rights, has a proposed different use.

"A-1" is being developed as a new public street that is designated to provide direct public access by vehicle and foot to Ocean Gate, a public dock for passenger and vehicle traffic for boats, ferries and ships.

"A-2", known as "Riverwalk" is a private development, that will include a large multi-story building with a combination of residential and commercial/retail use open to the public. This private venture will be supported by the construction of a large, multi-story parking garage on the opposite side of Fore Street. Although the garage is

not located on the area in question, its construction is relevant and necessary to support the public use of the other development.

C. Violation of 23 M.R.S.A. § 153-B

Prior to the formal taking by the City, POCO had been involved in negotiations with Riverwalk for the private transfer of its rights. POCO alleges that the negotiations included discussion of a sale for several hundred thousand dollars.

POCO alleges that the City violated 23 M.R.S.A § 154-B by initiating the eminent domain in a manner that interfered with the private negotiations. Section 154-B provides

Coercive action

In no event shall the [City] either advance the time of condemnation, or defer negotiations or condemnation or take any other action coercive in nature, in order to compel an agreement on the price to be paid for property or property rights.

The timing of the City's taking is at least curious. Although there were negotiations between Riverwalk and POCO, there is evidence that the City unilaterally inserted itself into the process, most likely out of frustration over the seemingly lack of progress or finality.

Section 154-B does not provide a specific remedy or measure of damages and there is no case law on point. Because the court has separately determined that the taking of "A-1" and "A-2" was proper, issues concerning coercion "in order to compel an agreement on the price to be paid" are properly admissible at trial as relevant to the manner in which the City set the amount to be paid for the taking and the amount accepted by plaintiff.

D. Attorneys' Fees

The court reserves the issue of attorneys' fees until the conclusion of all trial proceedings.

III. DECISION AND ORDER

The clerk shall make the following entries as the Decision and Order of the court:

- A. The taking of plaintiff's track rights on parcels "A-1" and "A-2" by statutory eminent domain proceedings was for exigent circumstances and public use.
- B. The taking of plaintiff's track rights on parcel "A-3" by statutory eminent domain proceedings was not under exigent circumstances and is void. All rights previously vested in plaintiff to "A-3" are restored.
- C. Action by the City that is alleged as coercive to negotiations or to compel an agreement is relevant and admissible at trial.
- D. The issue of attorneys' fees is reserved.


SO ORDERED.

DATED: September 13, 2007


A handwritten signature in black ink, appearing to read 'T. Delahanty II', written over a horizontal line.

Thomas E. Delahanty II
Justice, Superior Court

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TED -Cum-9242007 ✓

THE PORTLAND COMPANY,

Plaintiff,

v.

THE CITY OF PORTLAND,

Defendant.

DECISION AND ORDER ON
DEFENDANT'S MOTION
IN LIMINE

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Prior to trial and subsequent to the court's decision on pending issues, the defendant filed a Motion *in Limine* to exclude several issues for trial, including a jury determination of compensation for the taking of plaintiff's track rights in parcels A-1 and A-2 and any damages that may be found for a violation of 23 M.R.S.A. § 154-B (coercive action compelling an agreement on price). The City now maintains that the only viable claim for plaintiff is damages for the City's temporary taking of parcel A-3.¹

The City's motion is based on a Stipulation and Agreement between the parties that was executed shortly after this action was commenced.²

The Agreement provided for a payment of \$100,000 to plaintiff in exchange for the release of plaintiffs' rail connection rights to parcels A-1 and A-2.³

The effect of the Agreement allows the Riverwalk Development Project to take place and for plaintiff's lawsuit and claims to continue. It was agreed in the Stipulation that the City would "not allege or plead"

¹ In its prior decision, the court found that exigent circumstances warranting the taking by eminent domain did not exist as to parcel A-3. The taking was voided and plaintiff's rights were reinstated.

² The complaint was filed on July 7, 2005. The Stipulation and Agreement is dated August 16, 2005.

³ The Agreement refers to parcels A, B, and C. It is agreed by the parties that for purposes of this case they are correspondingly designated as A-1, A-2, and A-3.

[II] (a) that the Company's Rights are without value because a portion of those Rights as they affect Parcels [A-1] and [A-2] have been released either to the City or to Riverwalk; and

[II] (b) that for purposes of the Company's contention that the City's taking of the Rights by eminent domain is invalid as a matter of law, the conveyance of the Rights to Riverwalk and/or its designee over Parcels A and B shall be deemed not to have occurred.

It was further agreed that payment for the release would not affect the valuation of any rights remaining in A-3, *see* paragraph III (a), and that if the plaintiff ultimately received un-apportioned damages as to the three parcels, the City would receive a credit for the amount received from Riverwalk. *See* paragraph III(c).

The City argues that the plaintiff waived "any claim for damages or other payment or relief" with respect to A-1 and A-2.

III. The Company and the City further stipulate that with respect to the price paid by Riverwalk to the Company for the Rights over Parcels [A-1] and [A-2] as follows:

* * *

(b) that the Company acknowledges that by releasing its rights in Parcels [A-1] and [A-2] to Riverwalk and/or the City, it *waives any claim to receive damages or other payment or relief* with respect to those parcels in this proceeding. (emphasis added)⁴

The City claims that this provision in the Stipulation encompasses any additional claim of compensation for property rights and damages for the alleged coercion.

Plaintiff's original complaint, which has not been amended, included allegations of a violation of 23 M.R.S.A. § 154-B (Count IV). It alleges

61. By virtue of the foregoing, the City's actions in taking The Track Rights from POCO constitute a violation of 23 M.R.S.A. § 154-B, have deprived POCO of rights guaranteed by said statute, and render the City's taking of The Track Rights illegal and void.

⁴ The City does agree that the stipulation is not applicable as to plaintiff's claim that the taking is invalid. The court previously ruled in favor of the City on that issue as to Parcels A-1 and A-2.

In support of its section 154-B claim, POCO alleged in the complaint⁵ that it had a valid contract with Riverwalk in the form of an Option to Purchase for a sum of up to \$2 million to be determined by appraisal, subject only to Riverwalk obtaining necessary permits for the development. POCO further alleges that

The City's taking of The Track Rights from POCO, if upheld, serves to destroy POCO's ability to close on its option contract with Riverwalk, as POCO will no longer own and be able to sell The Track Rights to Riverwalk.

See, plaintiff's complaint ¶ 41.

POCO argues that, even though it asserted a section 154-B claim in the complaint, the factual basis and evidence to support its claim was unveiled during the discovery process and there was no intent by plaintiff to include the claim as part of the Stipulation or limit its remedy under section 154-B.

Paragraph III (b) of the Agreement is unambiguous. It "waives any claim . . . with respect to those parcels [A-1 and A2] in this proceeding." Other portions of the Stipulation specifically exclude its application to parcel A-3 (*see*, ¶ III (a)), use as a defense to valuation of A-1 and A-2 (*see* ¶ II (a)), and the lawfulness or validity of the taking. (*see*, ¶ II (b))

Whether the language of ¶ III (b) is ambiguous is a question of law. *American Protection Insurance Co. v. Acadia Insurance Co.*, 2003 ME 6, ¶ 11, 814 A.2d 989, 993. If the language is "reasonably susceptible of different interpretations" it is considered ambiguous. *Id.* If the court finds that the language is unambiguous, "its interpretation is also a question of law," and the court will look at the "plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence." *Id.* The Law Court also stated:

⁵ See paragraphs 26 through 41 inclusive.

[Any contract] is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be considered together that it may be seen if and how one clause is explained, modified, limited or controlled by others.

Id., citations within omitted.

Reading the Stipulation as a whole, it is clear that it serves the intentions of both parties: Riverwalk and/or the City get POCO's track rights to A-1 and A-2 that interfered with the development; and, POCO gets compensation almost twenty times the amount provided in the City's condemnation, albeit substantially less than the claimed valuation of \$2 million, the right to continue to challenge the validity of the taking for all three parcels and just compensation for A-3 if the taking is upheld.


POCO's section 154-B claims had already been alleged in the complaint. Any additional facts to support the claim that developed during discovery could, at best, enhance and support the claim but did not give rise to a new claim not known or alleged. Plaintiff's waiver of "any claim to receive damages" operates as a bar to all remaining claims except damages relative to a temporary taking of parcel A-3.

The clerk will make the following entry as the Decision and Order of the court:

- Defendant's Motion *in Limine* is granted.
- Plaintiff's only remaining claims are damages for the temporary taking of parcel A-3 and its claim for attorney's fees and costs.

SO ORDERED.

DATED: September 24, 2007


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