

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF DETROIT,

Plaintiff-Appellee,

v

CROWN ENTERPRISES, INC.,

Defendant-Appellant.

UNPUBLISHED
February 19, 2002

No. 232451
Wayne Circuit Court
LC No. 00-012666-CC

Before: Neff, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted from a trial court order denying its motion for summary disposition and granting plaintiff's motion for summary disposition regarding the necessity of the taking¹ in this condemnation action. We affirm.

This Court will not reverse the findings and conclusions of the trial court in a condemnation action unless they are clearly erroneous. *Nelson Drainage Dist v Filippis*, 174 Mich App 400, 403; 436 NW2d 682 (1989). A finding of fact is clearly erroneous when the reviewing court, after reviewing the entire record, is left with a definite and firm conviction that a mistake has been committed. *Precopio v Detroit*, 415 Mich 457, 462; 330 NW2d 802 (1982).

I

This case involves the construction of a sewage overflow basin in the City of Detroit. Plaintiff adopted a Resolution of Necessity which included a finding that it was necessary to take defendant's property for the use and benefit of the public to construct the overflow basin and then filed a complaint for condemnation to acquire defendant's property for that purpose. MCL 213.52. Defendant responded, in part, by filing a Motion to Review Necessity pursuant to MCL 213.56, requesting in that motion that an evidentiary hearing be scheduled to determine the necessity of the acquisition of defendant's property. Several months later and after a period of discovery, the trial court entered an order which indicates that both parties "acknowledged" that the case is appropriate for summary disposition consideration. The order is approved as to form by counsel for both parties.

¹ Defendant also raised a jurisdictional challenge in the trial court which was resolved in plaintiff's favor. That issue is not before us on appeal.

Both parties filed motions for summary disposition claiming entitlement to judgment on the issue of necessity as a matter of law. Oral argument was heard on the cross motions for summary disposition during which the issue of necessity was fully aired. The trial court, by written opinion, denied defendant's motion for summary disposition, addressing all of the arguments raised by defendant in its claim that plaintiff had failed, as a matter of law, to establish necessity for the taking. The trial court went on to grant plaintiff's motion for summary disposition, finding that plaintiff established, as a matter of law, that it did not abuse its discretion in the finding of necessity. Our review of the extensive record in this case, as well as the briefs and voluminous appendices filed by the parties and the amicus curiae and the relevant case law, leads us to the same conclusion as set out in the well-reasoned opinion of the trial judge.

Initially, we note that the trial court applied the appropriate standard in evaluating plaintiff's act of condemnation, that is, whether plaintiff's action constituted an abuse of discretion, fraud or an error of law. MCL 213.56(2); see also *Nelson Drainage, supra*. Contrary to defendant's position, analyzing this case under the de novo standards generally applicable to summary disposition motions and viewing the evidence in a light most favorable to the nonmoving party wholly ignores the deferential treatment that is afforded a condemning authority's actions. In a condemnation action, the plaintiff's resolution of necessity is prima facie evidence of necessity and fulfills the plaintiff's initial burden of proof. *Nelson Drainage, supra* at 404, 408. The burden is then on the defendant to come forward with evidence to support its claim that the plaintiff abused its discretion. *Id.*

In this case the trial court's ruling clearly indicates that it found that defendant failed to meet its burden of establishing an abuse of discretion on plaintiff's part. The court clearly concluded that plaintiff's decision to locate the facility on the subject property did not constitute an abuse of discretion, as a matter of law. The trial court also correctly referred to the burden of proofs in its conclusions of law by indicating that defendant failed to adduce a sufficient factual basis to challenge plaintiff's decision to locate the facility on the subject property. As such, it is apparent from the findings and conclusions of the trial court, and the cases cited by the trial court, that it properly understood the parties' respective burdens. Accordingly, in analyzing defendant's challenge to necessity on appeal, we shall employ the appropriate standards for reviewing condemnation actions.

II

A. Trial Court's Review of the Determination of Public Necessity

MCL 117.35 provides that a home rule city may acquire by condemnation proceedings any lands within or without its corporate limits necessary for disposing of sewage . . ." See also MCL 324.4301. The Uniform Condemnation Procedures Act, MCL 213.56 *et. seq.*, governs challenges to the necessity of public acquisitions. After a condemning authority files a complaint, the defendant may file a motion challenging the necessity of the acquisition of the property, asking that the necessity of the taking be reviewed. MCL 213.56(1). "With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court *in the absence of* a showing of fraud, error of law, or abuse of discretion." MCL 213.56(2) (emphasis added); see also *Nelson Drainage, supra* at 404. In reviewing a condemning agency's decision for an abuse of discretion, this Court considers whether the

decision is violative of fact and logic. *Id.* “The flexibility of condemnation review standards recognizes the deference paid to the agency’s statutory authority and the uniqueness of each factual situation.” *Id.* This Court must also be sensitive to the fact that the agency’s power is balanced with the need to protect the individual property owners’ rights. *Id.* at 404-405.

The trial court may review the necessity of acquiring the property involved by considering whether the subject property is “reasonably suitable and necessary for the contemplated project and whether the agency needs to take this particular property.” *Id.* at 404, citing *State Hwy Comm v Vanderkloot*, 392 Mich 159, 175-176; 220 NW2d 416 (1974). In reviewing whether a taking is necessary, the consideration is not the advantage to the public, but whether the project needs the property involved. *City of Troy v Barnard*, 183 Mich App 565, 572; 455 NW2d 378 (1990); *Nelson Drainage, supra*, at 406. The word “necessity” means a “necessity now existing or which will exist in the near future, not an indefinite, remote or speculative future necessity.” *Barnard, supra*.

The burden of proof in a condemnation action is described in *Nelson Drainage, supra* at 408:

In general, the plaintiff has the burden of proving its claim. In the condemnation context, plaintiff’s resolution of necessity is prima facie evidence of necessity and fulfills its initial burden of proof. Defendants, as the moving party asking for review of the finding of necessity, had the burden of coming forward with evidence to support their claim of abuse of discretion. This is consistent with the general rule regarding presumptions and the opposing party’s duty to go forward with evidence to rebut or meet the presumption. [Citations omitted.]

If the defendants do come forward with sufficient proof to indicate an abuse of discretion, the plaintiffs are under no duty to respond, but if the plaintiffs do not rebut or respond to the defendants’ proofs, the trial court may determine that the plaintiffs “failed to maintain a record to support the presumption of necessity.” *Id.* at 408-409. In other words, the plaintiff has the ultimate burden of proof, and “plaintiff’s resolution of necessity is sufficient only in the absence of evidence to the contrary.” *Id.* at 408.

B. Necessity of the Taking

With regard to defendant’s specific claims, it first argues that, as a matter of law, because plaintiff owned nearby public land on which the facility could have been built, the taking of its land was not necessary and therefore was an abuse of discretion. In making this argument, defendant points to the fact that the 1998 Basis of Design Report and the 1999 Project Plan recommended placing the facility entirely within the city-owned Conner Creek, and finding that such a placement was “feasible.”

With regard to this argument, we first note that defendant’s reliance on *In re Acquisition of Land for Recreational Purposes*, 319 Mich 212; 29 NW2d 146 (1947), is misplaced because that case does not stand for the proposition that, as a matter of law, a city’s ownership of other land precludes a finding of necessity. *Id.* at 220. As the trial court noted, simply because the facility could have been located entirely within the creek is not conclusive evidence that

plaintiff's acquisition of the subject property amounts to an abuse of discretion. In fact, having reviewed the evidence, we find that the position asserted in defendant's brief is somewhat disingenuous. The evidence showed that the subject property has always been considered the more suitable location for the facility, and that locating the facility within the city-owned Conner Creek was not the preferable option, and instead, was described as the "worst case" scenario. In fact, throughout defendant's argument on its motion for summary disposition, counsel acknowledged that the recommendation to build the facility on city-owned property of Conner Creek was recommended *only if* defendant's property could not be obtained.

In the 1998 Basis of Design Report, the environmental engineers actually listed three options, as opposed to two as defendant asserts in its brief: (1) Maheras Park; (2) Conner Creek; and (3) obtaining defendant's property. Maheras Park and Conner Creek are both owned by plaintiff. In the report, the engineers noted that defendant's property was not currently available and, thus, they based their report on the two existing available properties, i.e., Maheras Park and Conner Creek. The report stated:

Obtaining the approximately 300-foot wide vacant property owned by Crown Enterprises paralleling Conner Creek and west of the Canal Street right-of-way *would give the creek site more flexibility. This additional property would allow the facility layout to be optimized and future lateral expansion of the facility, if needed.*

* * *

Conner Creek was identified as a potential site primarily because it is the most hydraulically efficient location . . . *The downside of this site alternative is the loss of open waterway and State and Federal permitting requirements associated with construction a major facility in a "water of the State" and a "navigable waterway."*

The property to the west of Conner Creek that is owned by Crown Enterprises has been identified as a potential site and preliminary discussion between Crown and DWSD have begun . . . *Acquisition of this property by DWSD would provide significant flexibility both in facility layout optimization and facility expansion provisions.* [Emphasis added.]

Under the "Recommendations" section, on which defendant relies, the 1998 report indicated that based on the two available properties, Conner Creek was recommended. Significantly, however, the report stated: "*DWSD should proceed to acquire the parcel of land west of Conner Creek to ensure lateral expansion options.*" (Emphasis added.) In addition, in a June 15, 1999, memo from an environmental engineer for the project, he discussed the facility site considerations and the resulting impact of the facility design:

Although the Conner Creek site was the preferred alternative *it had a significant disadvantage in that the facility was as wide as the site. This led to an overall poor layout of the facility spaces and a very difficult space constrained construction sequence. Specific examples of the poor facility layout include . . .*

* * *

Although the Crown site was not included as a separate alternative, it was recognized during the study phase that the Crown site would need to be acquired by DWSD to demonstrate to MDEQ that the facility could be expanded in the future, as required by the NPDES Permit. Acquiring the Crown property would also allow for the optimization of the facility layout, allow for locating the facility so it would have a reduced impact on the Clairpointe subdivision, and allow for locating the facility so that a waiver from the Zoning Board would not be required. Additionally, the size and cost of the habitat mitigation project could be significantly reduced.

* * *

My larger concern is that Crown enterprises may not donate the property to DWSD and we will then have two choices: 1) design the facility to fit within the 250-wide City-owned property, or 2) acquire the property through condemnation.

The first choice will result in a poorly laid out facility, high-risk construction, and significant impacts to the residents, and increased habitat mitigation requirements. This choice will also require public comment and approval from the Zoning Board and the Historical Commission. Furthermore, we will not be able to demonstrate to MDEQ that the facility can be expanded in the future, as required by the NPDES Permit. [Emphasis added.]

An environmental consultant for the project also prepared a memo, indicating:

[I]t is essential that the CSO basin be placed on the Crown property to provide a reasonable setback and buffer from the Clairpointe development and other nearby residences. This site is also required to satisfy the NPDES permit requirement for a future expansion of the facility (if necessary) based on the post-project performance assessment. The creekbed site offers no room for future expansion. Also, the creekbed site is not viable unless we obtain a variance from the Zoning Board to waive the 20' setback from the property edge. Such a variance seems highly unlikely given the widespread opposition of nearby residents to placement of the facility in the creek. Also, approval of the creekbed by the MDEQ Land and Water management division can be issued only if there is no prudent and feasible location for the facility. For all of these reasons, I believe it is incumbent on DWSD to acquire the Crown property either by donation, purchase or condemnation. [Emphasis added.]

Also, the project design engineer testified during a deposition that, as an engineer, his opinion of the "best location" for the basin is utilizing defendant's property, and that his opinion that it was the best location has never changed. The environmental consultant, likewise, testified in a deposition that it was always his preference to build the basin on defendant's property, if it could be acquired.

Finally, the June 1999 DWSD Project Plan for CSO Control Facilities at Conner Creek stated the following:

The “worst case” condition would be encountered if the new CSO basin were to be constructed entirely within the creekbed, assuming that the vacant Crown property on the west bank cannot be acquired. [Emphasis added.]

Based on the above evidence, we hold that the trial court did not clearly err in concluding that the city-owned site was not uniformly recommended and that the mere availability of a feasible city-owned location for the facility is not, as a matter of law, conclusive on the issue of necessity. Further, defendant failed to produce any evidence that building the project entirely inside the city-owned creek would accomplish the project’s goals as well as building on their property, and the fact that plaintiff considered other options is not conclusive. Accordingly, the trial court did not clearly err in concluding that defendant failed to meet its burden of proving that plaintiff abused its discretion in determining that the subject property was “necessary” for the project.

C. Excess Taking

Defendant also argues that an abuse of discretion must be found where it is undisputed that plaintiff acquired more property than needed for the project because approximately seven of the nineteen acres were not needed for the actual construction of the facility, but rather, were acquired to accommodate a future expansion of the facility. A city abuses its discretion when it takes property in excess of what is needed. See *Barnard, supra* at 571-572. In *Nelson Drainage, supra* at 407, this Court explained:

In Michigan, the agency may acquire an entire parcel only if the practical value or utility of the remaining or excess portion of the parcel would be “destroyed” by a more limited acquisition. MCL 213.54, 213.365; MSA 8.265(4), 8.261(5). Our statutes are consistent with the “physical remnant theory” of condemnation which allows the agency to take the remaining fragments of land which because of their size or location would be of no use or value to the original owner.

Here, although the NPDES permit required plaintiff to consider future expansion, other reasons existed to support the taking of the entire parcel. As the trial court found, there was evidence that the seven remaining acres, which are of no immediate use for the project, are landlocked with no ascertainable value. Further, the taking of the entire parcel was justified by plaintiff as being a part of the project by providing a buffer zone to help minimize the impact of the facility on the surrounding parcels of land. Defendant has failed to present any evidence that the seven remaining acres would be of use or of ascertainable value if they were severed. Accordingly, the trial court did not clearly err in concluding that there was no excess taking.

C. Resolution of Necessity

Defendant also argues that several genuine issues of material facts exist regarding whether plaintiff abused its discretion in its process of obtaining adoption of the Resolution of

Necessity where it failed to engage in good faith and judicious consideration of its decision to take defendant's property. We disagree.

Defendant claims that plaintiff did not advise the Board of Water Commissioners or the Detroit City Council that there was city-owned property that was evaluated and found to be a feasible and recommended site for the facility. Rather, defendant argues, plaintiff misleadingly indicated that two sites were considered, i.e., Maheras Park and defendant's property. However, the evidence does not support defendant's claim that a scheme to keep information from the Board of Water Commissioners or the City Council occurred in this case. The Board of Water Commissioners had been involved in the evaluation and investigation, and the Board reviewed DWSD's 1999 Project Plan, which considered constructing the facility in Conner Creek. It is apparent from the language of the resolution that the City Council would be relying, at least in part, on the Board of Water Commissioner's approval of the location. In addition, the resolution refers to the 1999 Project Plan. Accordingly, this argument is unpersuasive.

Defendant also argues that the condemnation of its land was an abuse of discretion because it occurred in response to city residents, who had expressed concerns over the placement of the facility inside the creek, and to benefit the pecuniary interest of private parties, i.e., to assist Windham Realty in selling homes in a nearby subdivision. Private property may not be taken for a private purpose. *Shizas v Detroit*, 333 Mich 44, 50; 52 NW2d 589 (1952). In *Poletown Neighborhood Council v Detroit*, 410 Mich 616, 632; 304 NW2d 455 (1981), our Supreme Court explained:

There is no dispute about the law. All agree that condemnation for a public use or purpose is permitted. All agree that condemnation for a private use or purpose is forbidden. Similarly, condemnation for a private use cannot be authorized whatever its incidental public benefit and *condemnation for a public purpose cannot be forbidden whatever the incidental private gain*. The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user. [Emphasis added.]

The evidence clearly shows that the public is the predominant interest served by the location of the project on the subject property. The decision to locate the facility on defendant's property was evaluated by engineers and other consultants, and determined to be the most suitable location. Further, the preference of using defendant's property was listed in the June 1998 Basis for Design, which was one year before the public hearing occurred. In addition, pursuant to the Michigan Department of Environmental Quality Rule 323.952(8)(a)-(e), plaintiff was required to consider public concerns in order to receive funding from the State Revolving Fund. As such, plaintiff did not act improperly by considering the residents' opinions regarding the location of the facility. Moreover, it is apparent from reading the documents that the public concern was merely one of several factors considered. Further, while the evidence shows that a Windham Realty representative stated that building the facility in Conner Creek would impair his ability to sell homes, the environmental consultant for the project testified at deposition that he did not consider this statement in forming his decision to recommend locating the facility on defendant's property.

Defendant also challenges the validity of a cost analysis done to support the necessity of plaintiff's taking. While economic considerations alone are not sufficient justification, economic

considerations may be relevant in acquisition decisions. *Barnard, supra* at 569-570; *Nelson Drainage*, at 406-407. In this case, we agree with the trial court's finding that the evidence does not support a conclusion that economic considerations alone motivated plaintiff's decision to acquire the subject property. Rather, it was one of several factors considered by plaintiff's engineers and consultants in making its determination of necessity. Further, the project's environmental consultant testified during his deposition that he did not have a personal opinion regarding the costs of building in the creek versus on defendant's property. He further testified that the recommendation to build the facility using defendant's property was based on a combination of factors, including "constructability and risk followed by implementability," and expandability. We also find that there is simply insufficient evidence to support defendant's claims that the cost analysis was contrived.

Finally, we note that defendant expends several pages of its brief arguing that plaintiff's process was inappropriate. However, these arguments must fail in light of defendant's failure to present any evidence, beyond mere speculation, that plaintiff's processes were flawed. We also note that, while defendant cites to several condemnation cases where an abuse of discretion or error of law was found, it fails to cite any authority mirroring the circumstances of this case. A party may not leave it to this Court to search for authority to sustain or reject its position. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 95; 572 NW2d 246 (1997).

We conclude that defendant failed to carry its burden of proving that plaintiff's determination of necessity constituted fraud, an abuse of discretion, or an error of law. Therefore, the trial court's conclusion that plaintiff's decision to locate the facility on the subject property is neither violative of fact nor logic, and thus neither an abuse of discretion nor illegal, is not clearly erroneous. Accordingly, the trial court properly concluded that, under MCL 213.56(2), plaintiff's determination of public necessity must be sustained.

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly