5-13-1977

City of Thornton, Acting By and Through Utilities Bd. v. Farmers Reservoir & Irr. Co.

No. 27462

IN THE SUPREME COURT

OF THE STATE OF COLORADO

CITY OF THORNTON, COLORADO, a municipal corporation of the State of Colorado, acting by and through its Utilities Board	)	
Petitioner-Appellant,	)	Appeal from the District Court of Jefferson County
VS.	)	
THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a mutual ditch company organized pursuant to the corporation laws of the State of Colorado; et al.,	)	Honorable Roscoe Pile, Judge
Respondents-Appellees.	)	

BRIEF FOR AMICUS CURIAE FARMERS HIGH LINE CANAL AND RESERVOIR COMPANY and LOWER CLEAR CREEK DITCH COMPANY

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STATEMENT OF THE ISSUES

The issues to be determined on this appeal have been set out and agreed to in the Report of Pre-Argument Conference approved by this Court on the 22nd day of March, 1977.

STATEMENT OF THE CASE

Farmers High Line Canal and Reservoir Company and Lower Clear Creek Ditch Company adopt the Statement of the Case appearing in the brief of Farmers Reservoir and Irrigation Company.

STATEMENT OF FACTS

Farmers High Line Canal and Reservoir Company and Lower Clear Creek Ditch Company adopt the Statement of Facts appearing in the brief of Farmers Reservoir and Irrigation Company.

SUMMARY OF ARGUMENT

Farmers High Line Canal and Reservoir Company and Lower Clear Creek Ditch Company adopt the Summary of Arguments set forth in the Answer Brief of Victor L. Jacobucci and will limit their argument to those matters they feel are materially pertinent to the decision of the Court in this case.

ARGUMENT

A. SECTIONS 38-6-201, et seq., C.R.S. (1976 Supp.) ARE FACIALLY CONSTITUTIONAL.

This matter comes on for hearing before this Court after dismissal in the District Court upon granting of Respondent Farmers Reservoir and Irrigation Company's motion for failure of Thornton to comply with C.R.S. 38-6-201, et seq. 1973 (1976 Supp.). The Respondents in this matter by way of agreed cross-appeal have alleged error in the District Court in that the failure to agree provisions of C.R.S. 38-1-102, 1973, as amended, were not met together with other matters on cross-appeal.

The City of Thornton argues by its brief that the Water Rights Condemnation Act hereinabove referred to as C.R.S. 38-6-201, et seq. 1973 (1976 Supp.) is facially unconstitutional, and further that the Water Rights Condemnation Act,

hereinafter referred to as WRCA, adopted by the Colorado State Legislature does not apply to the City of Thornton in any action here on appeal.

Thornton primarily complains by its brief that the WRCA constitutes a usurpation of the authority of elected officials of the City of Thornton to determine whether the exercise of eminent domain is necessary. The city, however, seemingly fails to perceive the fact that the determination of necessity as contained in the 1975 WRCA is not substantively changed from prior law. Under statutory and case law, a municipal condemning authority has been required to show to the Court the necessity for condemnation prior to the successful implementation of an eminent domain proceeding. Kern v. Minekime, 45 Colo. 378, 101 Pac. 341 (1909), Pine Master Mining Co. v Empire Zinc Co., 90 Colo. 529, 11 P.2d 221 (1932).

Thornton cannot now be heard to complain that the requirements for condemnation with regard to necessity have changed by citing Greeley Police Union vs. City Council of Greeley, Colorado, _____ Colo. _____ 553 P2d 790 (1976), because the cited case is simply not on point with the matters here before the Court. In Greeley Police Union supra, this Court struck down a provision in the city charter providing for compulsory binding arbitration in labor disputes arising from collective bargaining. The WRCA as enacted by the state legislature does not meet the test of Greeley Police Union because the decision of the three appointed commissioners under the act is not binding, but is subject to review by the courts. This differentiating characteristic between the two situations cited by the City of Thornton proves fatal to their somewhat tenuous argument in that the three appointed commissioners under the WRCA have not usurped the authority of the City of Thornton nor of the District Court, but instead make available the benefits of individual expertise in a complex area which is thereafter subject to review by the courts.

B. SECTIONS 38-6-201 et seq., C.R.S. 1973 (1976 Supp.) APPLY TO THE CITY OF THORNTON.

City of Thornton also argues that the WRCA does not apply to the City of Thornton, a home rule city. C.R.S. 38-6-201. 1973, (1976 Supp.) provides as follows:

> "This part too shall apply to any water right which is to be condemned by a town, city, city and county, or municipal corporation having the power of condemnation referred to in this part 2 as a 'municipality'."

From the very wording of the foregoing section, it is evident that the General Assembly desired that the WRCA apply to all municipalities, statutory and home rule, within the State of Colorado. Not only did the General Assembly refer to towns and cities, but also to any city and county, of which there is one within the State of Colorado, or any municipal corporation having any powers of condemnation under the statutory laws of the State of Colorado. It is apparent that the legislature intended this act to be all inclusive and to apply equally to all municipal condemning authorities within the State of Colorado.

Article XX, Section 1, of the Colorado State Constitution by its very language incorporates whatever statutes concerning eminent domain have been enacted by the legislature and requires that these be followed by home rule cities in putting into force the authority to condemn. Thornton relies upon the foregoing constitutional provision as the basis of its authority to proceed with condemnation actions, however, Thornton has also determined that this constitutional authority gives them the same powers as the state legislature and additionally all of the condemnation powers of non-home rule cities specifically granted by constitution or statute. There is little doubt that the Colorado law authorizes a home rule city greater latitude than statutory cities and towns in the decision making process with regard to matters of local concern. City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). However, this writer has been unable through research to determine that Article XX of the Colorado Constitution confers upon all Colorado home rule cities every power possessed by the legislature to authorize municipalities to

exercise eminent domain.

If in fact Article XX of the Colorado Constitution confers upon home rule cities the powers proclaimed by Thornton, every home rule city within the State of Colorado, of which there are many, would thereafter have the ability to rewrite its city charter with regard to eminent domain proceedings and the courts of this state thereafter would then not only be taxed with the interpretation and implementation of the laws as passed by the General Assembly, but of the charters of each of the many home rule cities within the state. This cannot be the intent of the legislature, nor could it be the intent of the framers of our Constitution. To infuse such a purpose upon Article XX of the Colorado Constitution would be to invite societal chaos within the boundaries of our state with regard to eminent domain proceedings and particularly water condemnation matters.

The fact that water condemnation proceedings are not matters of local concern have been adequately covered in other briefs, therefore, it will only be stated here in furtherance of the argument against Thornton's statement of a constitutional grant of legislative power, that even had the constitutional framers intended a chaotic result, which Farmers and Lower Clear Creek denies, the matters before this Court are matters of statewide concern, and are therefore reserved solely for the control of the state legislature and not for each of the home rule cities located within this state. City and County of Denver v. Sweet, supra.

The City of Thornton's own charter indicates that they may exercise a right of eminent domain "as provided by law", thereby indicating a self-imposed limitation upon that city to abide by the tenets and mandates of the Colorado State Legislature. The charter of the City of Thornton under the provisions of the Colorado Home Rule Statutes may limit the powers of the city as well as grant those powers.

C. THE CITY OF THORNTON DID NOT SATISFY THE "FAILURE TO AGREE" PROVISION PRIOR TO FILING ITS CONDEMNATION PETITION.

The District Court in Jefferson County at the conclusion of a non-evidentiary hearing entered findings that Thornton had complied with the good faith negotiation provisions of C.R.S. 38-1-102, 1973 as amended, with regard to FRICO. All parties to this action agree and concede that the satisfaction of the failure to agree requirement is jurisdictional to this proceeding and that negotiations are required between the condemning authority and the property owner before submission of the matter to the court. Old Timers Baseball Association vs. Housing Authority, 122 Colo. 597, 224 P.2d 219 (1950); Stalford vs. Board of County Commissioners, 128 Colo. 441, 263 P.2d 436 (1953). Even if Thornton did comply with the jurisdictional failure to agree requirement with regard to FRICO, which fact Farmers High Line and Lower Clear Creek doubt because no full evidentiary hearing has been held with regard to this matter, the Jefferson County District Court's finding of such a failure to agree with regard to FRICO does not resolve the problem concerning the shareholders. This court's determination in Jacobucci vs. District Court in and for the County of Jefferson, _____ Colo. _____, 541 P.2d 667 (1975), specifically stated that the right to the use of waters under the decreed rights held in the name of FRICO belonged individually to the shareholders, further that each water owner-user must be joined in any eminent domain proceeding because of the individualized concerns and problems attendant to the loss of such water rights by the shareholders. The decision of the District Court finding that the failure to agree requirement had been met with regard to FRICO does not resolve the problem of the jurisdictional requirement of a failure to agree with each and every individualized shareholder, for this Court said at page 675 of Jacobucci in the amended opinion.

> "Provided the City of Thornton establishes by competent evidence a failure to agree upon the compensation to be paid for the rights sought to be taken, the joinder of these shareholders will not deprive the District Court of Jurisdiction." (Emphasis added.)

At this point, the Court's attention is invited to page 32 through 36 of the

Answer Brief of Farmers Reservoir and Irrigation Company concerning the chronology of events in the institution of these proceedings and particularly with regard to the good faith negotiations and time frames involved with FRICO. Thornton, upon the ruling of this Court in Jacobucci, supra, forwarded one demand letter to the shareholders in the FRICO Standley Lake Division and thereafter joined those shareholders alleging that the failure to agree provisions of the statutes had been met. Even if Thornton's October 22, 1975, demand letter could be considered as a good faith negotiation which Farmers High Line and Lower Clear Creek deny, the Colorado cases have consistently held that the negotiation with the condemnee-owner must precede the filing of any petition in condemnation. The chronology of events set out in the FRICO Answer Brief clearly shows, and Thornton does not deny, that the filing of the petition in this matter was in November, 1973. How can Thornton here then say that good faith negotiations with each of the Standley Lake Division shareholders failed prior to the institution of eminent domain proceedings or condemnation proceedings in the courts. Stalford vs. Board of County Commissioners, supra.

D. THE CITY OF THORNTON FAILED TO SATISFY THE REQUIREMENTS OF SECTIONS 38-1-121. C.R.S. 1973 (1976 Supp.).

Farmers High Line and Lower Clear Creek would additionally invite the court's attention to the fact that the provisions of C.R.S. 38-1-121, 1973 (1976 Supp.) have also not been complied with by Thornton with regard to the separate shareholders.

In this regard Thornton has yet another problem with the present condemnation action. The foregoing section requires a condemnor to provide notice to the condemnee-owners of property in order that such owners can secure an appraisal of their property within the statutory ninety day period of time. Thereafter, the condemnee may submit the appraisal to the condemnor and such appraisal together with any appraisal of the condemnor may then be utilized by

the parties in good faith negotiations prior to the implementation of any condemnation proceeding.

As previously stated in this brief, Thornton's only contact with the individual shareholders subsequent to the Jacobucci decision was the October 22, 1975 letter. Because of the manner in which Thornton has proceeded, the individual shareholders have been denied the statutory protection available to them under the provisions of C.R.S. 38-1-121, 1973, as amended, in direct contravention of the Jacobucci decision of this Court.

The pertinent portions of this statute have been heretofore set out in other briefs and will not hereinafter be repeated, however, upon reading of the statute it is apparent that Thornton has failed to comply with the jurisdictional prerequisite of this particular statutory provision and for that reason also the decision of the District Court must be affirmed.

CONCLUSION

The issues to be considered on this appeal and established by the Report of Pre-Argument Conference entered in this cause on March 22, 1977, by Justice Groves, included many more issues than have been touched upon here by the Farmers High Line and Lower Clear Creek Ditch Companies. We have attempted, however, as an Amicus to emphasize those particular areas of controversy deemed most important to this appeal, particularly when the chronology of events leading to this appeal is fully analyzed. It is apparent that this Court must decide whether the Water Rights Condemnation Act of 1975 is constitutional and applies to the City of Thornton. Farmers High Line Canal and Reservoir Company and Lower Clear Creek Ditch Company would urge the Court based upon the briefs previously submitted and the foregoing argument to affirm the District Court in that regard.

Additionally on cross-appeal, Farmers High Line and Lower Clear Creek Ditch Companies would urge a reversal of the District Court's opinion and find that Thornton did not satisfy the condition precedent requirement, failure to agree prior to the commencement of this action against the individual shareholders

of FRICO, and further and more specifically that Thornton did not comply with the provisions of C.R.S. 38-1-121, 1973, as amended. Thornton will in no way be aggrieved by this Court upholding the District Court's dismissal of this action because Thornton thereafter may in compliance with the law reinstitute these proceedings if it so desires.

This Amicus would urge that the shareholders of FRICO and all other similarly situated water owner-users within the State of Colorado are entitled to exercise the rights provided by the General Assembly. This would include the right to secure their own appraisal, to enter into good faith negotiations, seek to resolve the conflict, and to be assured that an agency of the government would not be allowed to take their private property in derogation of the common law with no proven necessity or higher use as a basis for the taking.

Farmers High Line and Lower Clear Creek Ditch Companies would further state that if thousands of acres of irrigated farm lands within the State of Colorado and particularly on the eastern slope are to be converted to dry land, this matter should be accomplished only in accordance with the clear procedures previously established by the General Assembly, the elected representative of the people.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAILING

I hereby certify that on May 12, 1977, the foregoing BRIEF FOR AMICUS CURIAE OF THE FARMERS HIGH LINE CANAL AND RESERVOIR COMPANY and LOWER CLEAR CREEK DITCH COMPANY was served on all other parties to this action by mailing a copy to their respective counsel at the addresses below:

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