5-2-1977

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

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

No. 27462

CITY OF THORNTON, COLORADO, a Municipal corporation of the State of Colorado, acting by and through its Utilities Board, Petitioner-Appellant, vs. THE FARMERS RESERVIOR AND IRRIGATION DISTRICT, a Mutual Ditch Company, organized pursuant to the corporation laws of the State of Colorado, et al., Respondent-Appellees.	From the District Court of the County of Jefferson State of Colorado Honorable Roscoe Pile, Judge

ANSWER BRIEF OF

APPELLEE, ROCKY MOUNTAIN FUEL CO.

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER

Joseph M. Montano

1200 American National Bank Building
Denver, Colorado 80202
893-1000

Attorneys for Appellee,
Rocky Mountain Fuel Co.

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STATEMENT OF ISSUES

The issues crystalized in the brief of the Appellant the City of Thornton, hereinafter referred to as "Thornton", are amply set forth therein and there is no need for the Appellee Rocky Mountain Fuel Co., hereinafter referred to as "Rocky Mountain", to add anything further either as a statement of the case or as a statement of the issues.

Not all the issues set forth in the brief of Thornton apply to Rocky Mountain. Therefore, this brief will only deal with such issues as Rocky Mountain feels are applicable to it.

Further, since extensive briefing has been done by other Appellees concerning the same issues as are applicable to Rocky Mountain, Rocky Mountain will not herein necessarily cover all matters, but will adopt such legal arguments as made by the other Appellees in their briefs.

THE COLORADO WATER RIGHTS CONDEMNATION ACT, I.E. 38-6-201 ET SEQ. C.R.S. 1973 AS AMENDED, IS CONSTITUTIONAL AND APPLICABLE TO THE CITY OF THORNTON.

Thornton's position that the Colorado Water Rights Condemnation Act, i.e. §38-6-201, et seq. is unconstitutional or does not apply to it is without merit.

Thornton contends that the Colorado Water Rights Condemnation Act, C.R.S. 1973, §38-6-201, et seq., is unconstitutional vis-a-vis home rule cities because it requires that the issue of necessity be determined by a commission, rather than the condemnor. This can only be true if:

1. Thornton has reserved the right to determine the issue of necessity solely unto itself;

2. The determination of the issue of necessity by a commission deprives Thornton of substantive legal rights.

Thornton fails to point out any charter provisions or ordinances by which it has reserved exclusively unto itself the right to determine the issue of necessity. Thornton's charter relative to eminent domain provides:

> "16.7 EMINENT DOMAIN. In carrying out the powers and duties imposed upon it by this charter or by the General Statutes, the City shall have power to acquire within or without its corporate limits, lands, buildings, water, water rights and water storage rights, water and sewer properties, and other properties, and any interest in land and air rights over land, and may take the same upon paying just compensation to the owner as provided by law." (Emphasis added)

While a determination as to the necessity of a particular taking may be an inherent part of the exercise of the power of eminent domain, the persons or entities entitled to make such a determination are not. Neither the charter of the City of Thornton, or ordinances enacted thereunder, nor Article XX set forth who shall be entitled to make this decision. Indeed, the language "as provided by law" contained

in the charter would seem to indicate that the state law, rather than local legislation, should prevail.

Thornton's charter would seem to indicate that the exercise of its power of eminent domain shall be in accordance with state and not local law. The fact, if it be a fact, that Thornton has the power to reserve unto itself the right to determine the issue of necessity and thus preempt the field is not enough. Paragraph (h), Sec. 6 of Article XX provides, inter alia:

> "[T]he statutes of the State of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

Thus, even though the power be delegated, unless there are local enactments preempting the field there are no conflicts between the state statute and local legislation, and, therefore, the state statute controls. Rabinoff v. District Court, 145 Colo. 225, 360 P.2d 114 (1961).

In the absence of local legislation, the state may adopt the uniform, statewide legislative program, even though its program has a local or municipal charters. Stokes v. Newton, 106 Colo. 61, 101 P.2d 21 (1940). This is the obvious purpose of the Colorado Water Condemnation Act. By definition, it applies to any town, city, city and county, or municipal corporation having the powers of condemnation. The legislature clearly saw no conflict between the statute and the powers of condemnation. The application of the statute to any "municipal corporation" and any "city and county" leaves no room for doubt that the legislature intended to include home rule cities. It is, thus, clear that the legislature, at least, considered the issue and saw no impediment to the application of the Act to home rule cities having the powers of condemnation.

Even if it should be held that local legislation has preempted the field, contrary to respondent's contentions, the state statute would not abridge Article XX of the Colorado Constitution unless Thornton is deprived of substantive legal rights, as opposed to the mere procedural application of those rights.

Prior to the Water Condemnation Act, the determination by a duly authorized condemnor as to the necessity of its taking was conclusive, in the absence of bad faith or fraud. Colo. State Board of Land Commissioners v. District Court, 163 Colo. 338, 430 P.2d 619 (1967).

Procedurally, the issue of fraud or bad faith had to be affirmatively pleaded with particularity. Rule 9(b), Colorado Rules of Civil Procedure, Colo. State Board of Land Commissioners v. District Court, supra. Once the issue of fraud or bad faith was properly raised, however, it would be determined by the court in limine. Ariz.-Colo. Land and Cattle Co. v. District Court, 183 Colo. 44, 511 P.2d 23 (1973).

In making its determination, factors tending to indicate that the taking would entail a great loss to the landowner which might readily be avoided are clearly relevant. Id. Any evidence tending to indicate that the determination of necessity by the condemnor was in bad faith or fraud would also be admissible.

Therefore, no substantive right has been abridged by the Colorado Water Condemnation Act vis-a-vis home rule cities. The Act is merely procedure, because it simply places in issue, without the necessity of formal pleadings, the issue of fraud or bad faith and vests with a commission, rather than the district court, the right to determine whether or not the taking is necessary. These are procedural, not substantive, changes.

PETITIONER HAS NO AUTHORITY TO CONDEMN BECAUSE IT HAS FAILED TO COMPLY WITH 38-6-201, ET SEQ. C.R.S. 1973--RELATING TO CONDEMNATION OF WATER RIGHTS BY MUNICIPALITY.

Section 38-6-201 et seq. C.R.S. 1973 was adopted by the State Legislature in 1975. This section imposes certain conditions upon municipalities which must be satisfied before condemnation proceedings can be maintained. Thornton has admitted that it has not satisfied any of the requirements of this statute, therefore, Thornton has no authority to condemn.

THE CITY OF THORNTON DID NOT COMPLY WITH THE JURISDICTIONAL REQUIREMENTS OF NEGOTIATION OR WITH THE FAILURE TO AGREE PROVISION OF 38-1-102 C.R.S. 1973.

The right of Thornton to condemn was challenged by Rocky Mountain for a lack of compliance with the failure to agree provision of 38-1-102, C.R.S. 1973. The burden of proof was therefore upon Thornton to maintain its right to condemn. Mulford v. Farmers Reservoir and Irrigation Co., 62 Colo. 167, 161 P. 301 (1916); Stalford v. Board of County Commissioners, 128 Colo. 441, 263 P.2d 436 (1953); Old Timers Baseball Assoc. v. Housing Authority, 122 Colo. 597, 224 P.2d 219 (1950); Vivian v. Board of Trustees, 152 Colo. 556, 383 P.2d 801 (19). The trial Court erred when it ruled that Thornton had complied with the provisions of 38-1-102. This Court is now asked to reverse that ruling of the trial Court.

The original Petition in Condemnation was filed on or about November 15, 1973. At that time Rocky Mountain was not named as a party nor had any negotiation been undertaken with it as required by 38-1-102 and as set forth in case law interpreting that section. Obviously, at that time, the trial Court had no jurisdiction over Rocky Mountain.

It was not until after the decision of this Court in Jacobucci v. District Court, ____ Colo. _____, 541 P.2d 667 (1975) that an offer was made to Rocky Mountain. This offer was made on October 24, 1975. In early 1976, Rocky Mountain was named as a party in an Amended Petition.

Adding Rocky Mountain as a new party in the Amended Petition did not cure any jurisdictional defect and the trial Court was in error in its ruling that Thornton had satisfied the negotiation provision of the statute.

Under Rule 15 of the Colorado Rules of Civil Procedure, amendments to a Petition in Condemnation relate back to the date of the original Petition, Stalford v. Board of County Commissioners, 128 Colo. 441, 263 P.2d 436 (1953). Any amendment would have to be considered as if in existence in November of 1973. At that time, no offer had been made, therefore, jurisdiction was lacking.

Petitioner has failed to negotiate in good faith as there was no basis given for the offer, even if made in time, a point which is not conceded. It appears to be an offer based upon an arbitrary amount and not on a bona fide appraisal.

THORNTON DID NOT COMPLY WITH THE PROVISIONS OF 38-1-121 C.R.S. 1973 AS AMENDED.

38-1-121 C.R.S. 1973 became effective July 18, 1975 before Rocky Mountain was named as a party in the Amended Petition. Therefore, it is obvious that this section was applicable as to Rocky Mountain and Thornton should have complied with it. But Thornton did not comply, in spite of its argument that it did.

While Rocky Mountain may have been advised that its property was going to be acquired, and while an offer may have been made to it, it was never advised that it had the opportunity to employ an appraiser and that Thornton would pay for an appraisal. Neither was Rocky Mountain advised of the 90 day notice provision. Since this is a statutory requirement imposing conditions precedent to filing of a condemnation suit, a failure to comply renders the Court without jurisdiction, the same as a failure to negotiate. Accordingly, the trial Court never had jurisdiction over Rocky Mountain.

CONCLUSION

For the foregoing reasons, the Order of the trial Court dismissing the action for Thornton's failure to comply with the Water Condemnation Act, i.e. 38-6-201 C.R.S. 1973, should be affirmed.

This Court, however, in order to avoid any further controversy, should reverse the trial Court's rulings with respect to all of the other issues contained in its Order Dismissing Action.

Respectfully submitted,

GORSUCH, KIRGIS, CAMPBELL, WALKER
AND GROVER

By Joseph M. Montano

Joseph M. Montano
1200 American National Bank Bldg.
Denver, Colorado 80202
893-1000

Attorneys for Respondent,
Rocky Mountain Fuel Co.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 2nd day of May, 1977 true and correct copies of the foregoing Answer Brief of Appellee, Rocky Mountain Fuel Co. were deposited in the U.S. mail, postage prepaid, addressed to the following:

Akolt, Dick and Akolt
1660 Lincoln Street
Denver, Colorado 80202
Attn: Robert Dick

Davis, Graham & Stubbs
915 Seventeenth Street
Denver, Colorado 80202
Attn: John M. Sayre

Welborn, Dufford, Cook & Brown
1518 United Bank Center
Denver, Colorado 80202
Attn: Robert F. Welborn
David W. Furgason
John F. Welborn

Berger & Rothstein, P.C.
7201 Monaco
Commerce City, Colorado 80022
Attn: Herman Rothstein

Feder & Morris, P.C.
1220 Western Federal Savings Bldg.
Denver, Colorado 80202
Attn: Harold A. Feder

Holland & Hart
500 Equitable Building
P.O. Box 8749
Denver, Colorado 80202
Attn: John U. Carlson
Charles M. Elliott

Mr. Melvin M. Dinner
630 Greeley National Plaza
Greeley, Colorado 80631

Moses, Wittemyer, Harrison
& Woodruff, P.C.
P.O. Box 1440
Boulder, Colorado 80302
Attn: Raphael J. Moses

Goldstein, Armour & Lonnquist, P.C.
1234 Bannock Street
Denver, Colorado 80204
Attn: Gilbert Goldstein
Alan A. Armour

Zarlengo, Zarlengo & Denison
595 Capitol Life Center
Denver, Colorado 80203
Attn: Spencer T. Denison

Mr. David J. Miller
804 Seventh Street
P.O. Box 1424
Greeley, Colorado 80631

Berenbaum, Berenbaum,
Weinberger & Susman
1507 United Bank Center
1700 Broadway
Denver, Colorado 80202
Attn: Michael L. Ehrlich

Joseph P. Constantine
911 Midland Savings Bldg.
Denver, Colorado 80202

Lynn A. Hammond
P.O. Box 701
Loveland, Colorado 80537

And On Attempted Intervenor, City
of Northglenn, To:

Vranesh and Musick
P.O. Box 871
Boulder, Colorado 80302
Attn: Wayne B. Schroeder

D. L. Scott