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CHIEF CLERK'S OFFICE

DEPARTMENT OF TRANSPORTATION,)
STATE OF ILLINOIS,)
)
Petitioner,) No. 00-0207
)
vs.) Parcel 19G 0038-A
) Parcel 19G 0038-B
NORTH SHORE GAS COMPANY,)
)
Respondent.)

**RESPONSE OF DEPARTMENT OF TRANSPORTATION, PETITIONER,
TO MOTION TO DISMISS**

NOW COMES THE PETITIONER, Department of Transportation, State of Illinois, by JAMES E. RYAN, Attorney General of the State of Illinois, and John T. Kennedy, Special Assistant Attorney General, and for its Response to Motion to Dismiss states as follows:

1. Petitioner's Motion to Dismiss is apparently brought pursuant to 735 ILCS 5/2-615, Motions with respect to pleadings.

2. Petitioner has properly pled the elements for condemnation as required by statute, 735 ILCS 5/7-102 and 5/7-103, and has properly plead that Petitioner seeks leave to proceed to eminent domain proceedings where the subject property belongs to a utility subject to the jurisdiction of the Illinois Commerce Commission.

3. Respondent would have Petitioner plead matters that are not required to be plead by the Eminent Domain Statute, sections 735 ILCS 5/7-102 and 5/7-103.

4. Respondent relies upon Department of Conservation v. Chicago & North Western Transportation Company, 59 Ill.App.3d 89, 91, 375 N.E.2d 168 (2nd Dist. 1978), which contains a statement as to the general purpose of requiring Commerce Commission approval prior to the taking of property belonging to a utility subject to the jurisdiction of the Commerce Commission. A copy of that case is attached.

5. Department of Conservation v. Chicago & North Western Transportation Company, 59 Ill.App.3d 89, 91, 375 N.E.2d 168 does not address the issue of sufficiency of the pleadings under 735 ILCS 5/2-615, Motions with respect to pleadings, and does not state the elements to be plead in a Petition before the Commerce Commission.

6. In seeking to interject a requirement of pleading a negative in a Petition for Approval to Take Property, (namely, a claim that the property is not necessary for utility purposes) Respondent would have Petitioner plead and prove a negative, something that cannot be proven, thus guaranteeing that Respondent would never suffer an adverse ruling from the Commerce Commission.

WHEREFORE, Petitioner prays for the entry of an order denying Respondent's Motion to Dismiss.

Respectfully submitted,

John T. Kennedy
Attorney for Petitioner

John T. Kennedy
Special Assistant Attorney General
Attorney for Petitioner
500 Davis Street, Suite 701
Evanston, Illinois 60201
(847) 425-1115

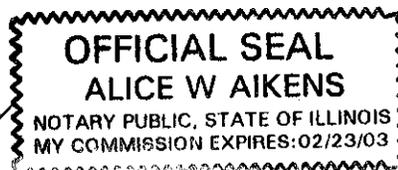
State of Illinois)
) SS
County of Cook)

I, John T. Kennedy, being first duly sworn, depose and state that I am a Special Assistant Attorney General for the State of Illinois, that I have read the above and foregoing Response by me subscribed, have knowledge of the contents thereof, and that on information and belief the contents are true in substance and in fact.

John T. Kennedy
John T. Kennedy, Special
Assistant Attorney General

Subscribed and sworn to
before me this 28 day of
April, 2000.

Alice W. Aikens
Notary Public



375 N.E.2d 168

Cite as, App., 16 Ill.Dec. 537, 375 N.E.2d 168

"[C]ompensation * * * measured not in terms of 'value' but by the loss to the community occasioned by the condemnation." (506 F.2d 796-800)

So it was said:

"Fair indemnification in such circumstances requires compensation sufficient to provide a substitution for the unique facilities so that the functions carried out by or on behalf of members of the community may be continued. Depreciated replacement cost often will not permit continuation of such functions." (506 F.2d 796-799, 800)

My colleagues express concern that the Association may be enriched by obtaining a new improvement or that there will be claim for enlarged or additional facilities. The objective to be obtained in providing a substitute facility is to provide the "functional equivalent" of the facility presently available. (*United States v. Certain Property In The Borough of Manhattan* (1968), 403 F.2d 800-3.) There is no requirement of exact duplication. (1975 *Duke Law Journal*, 1133-36.) Each of the asserted hazards may be controlled by the court upon the evidence presented and the issues raised by counsel. Such method is more likely to achieve fairness in procuring the survival of the community use than a predetermined formula constructed without consideration of any facts which are relevant to the issue.

I would affirm the determination of the trial court that defendant's property functions as a special use and that just compensation requires an award sufficient to provide substitute facilities. I would reverse in so far as the trial court's order may be interpreted to fix compensation as the cost of replacing the existing brick building.

59 Ill.App.3d 89

375 N.E.2d 168

DEPARTMENT OF CONSERVATION of
the State of Illinois for and on Behalf of
the PEOPLE of the State of Illinois,
Petitioner-Appellant,

v.

CHICAGO & NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant-Appellee.

No. 77-71.

Appellate Court of Illinois,
Second District.

April 14, 1978.

Appeal was taken by the Department of Conservation from an order of the Circuit Court, Jo Daviess County, F. L. Lenz, J., dismissing petition by the Department to condemn 19 miles of abandoned right-of-way owned by the railroad. The Appellate Court, Boyle, J., held that petition by Department of Conservation to condemn 19 miles of abandoned right-of-way owned by railroad was not subject to being dismissed on grounds that title to right-of-way was in dispute and that prior approval of Illinois Commerce Commission was not obtained where purported sale to adjacent landowners was void and, hence, railroad was sole owner of right-of-way on date petition was filed, and statutory requirement of obtaining Commission approval was satisfied with filing of order allowing Department to commence eminent domain proceedings.

Reversed and remanded with directions.

1. Eminent Domain ⇐ 169

Petition by Department of Conservation to condemn 19 miles of abandoned right-of-way owned by railroad was not subject to being dismissed on grounds that title to right-of-way was in dispute and that prior approval of Illinois Commerce Commission was not obtained, where purported sale to adjacent landowners was void and, hence, railroad was sole owner of right-of-way on date petition was filed, and statuto-



ry requirement of obtaining Commission approval was satisfied with filing of order allowing Department to commence eminent domain proceedings. S.H.A. ch. 47, § 2; ch. 111½, § 27.

2. Eminent Domain ⇐169

Basic function of statutory requirement that approval of Illinois Commerce Commission be obtained before instituting eminent domain proceedings against property owned by a utility is to insure that property necessary for utility purposes is not taken. S.H.A. ch. 47, § 2; ch. 111½ § 27.

3. Eminent Domain ⇐174

It was unnecessary to delay filing of petition for condemnation of abandoned railroad right-of-way until all appeals of order of Illinois Commerce Commission allowing Department of Conservation to file petition had been exhausted, where only effect of delay would be to delay date for fixing just compensation, and if order of Commission was reversed, filing of petition would become a nullity, and if order was affirmed, public would reap benefit of obtaining property at its earlier, and presumably lower, cost. S.H.A. ch. 47, § 2; ch. 111½, § 27.

William J. Scott, Atty. Gen., Springfield,
Karl Yost, Sp. Asst. Atty. Gen., Morrison,
for petitioner-appellant.

George M. Hollander, Michael W. Payette,
Chicago, for defendant-appellee.

BOYLE, Justice.

The Department of Conservation, petitioner-appellant, hereafter the Department, appeals from an order of the circuit court of Jo Daviess County dismissing the Department's petition for condemnation of 19 miles of abandoned railroad right-of-way owned by the defendant-appellee, Chicago & North Western Transportation Company, hereafter the North Western. The circuit court dismissed the petition for condemnation on the grounds that the title to the right-of-way was in dispute and because the

Department had not gotten the prior approval of the Illinois Commerce Commission, hereafter the Commission, to take the right-of-way by eminent domain as is required by section 2 of "AN ACT to provide for the exercise of the right of eminent domain" (Ill.Rev.Stat.1973, ch. 47, par. 2) (hereinafter cited as the Eminent Domain Act).

After reviewing the record and weighing the arguments presented, we are of the opinion that the judgment of the circuit court of Jo Daviess County should be reversed.

This case arises out of the same set of facts that is found in our recent opinion of *Klopf v. Illinois Commerce Commission* (1977), 54 Ill.App.3d 491, 12 Ill.Dec. 199, 369 N.E.2d 906. Hence the facts here will be set out only to the extent necessary for the disposition of the case at hand.

This controversy commenced when the North Western contracted to sell 32 miles of abandoned right-of-way to a group of adjacent landowners. The North Western petitioned the Commission for approval of the sale as is required by section 27 of "An Act concerning public utilities" (Ill.Rev.Stat.1973, ch. 111½, par. 27) (hereinafter cited as the Public Utilities Act). While this petition was pending before the Commission, the Department announced its interest in acquiring 19 of the 32 miles of right-of-way for use as a nature trail. The Department filed a petition seeking permission to take the right-of-way by eminent domain, as is required by section 2 of the Eminent Domain Act (Ill.Rev.Stat.1973, ch. 47, par. 2) on November 15, 1973. Some time prior to that date, and with its petition for approval of the sale still pending before the Commission, the North Western deeded the right-of-way to the adjacent landowners. The Commission then had two petitions concerning the same stretch of right-of-way before it. The Commission consolidated the petitions and rendered an order disposing of them on May 15, 1975. That order voided the sale to the adjacent landowners and gave the Department permission to take the 19 miles of right-of-way by

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This controversy commenced when the North Western contracted to sell 32 miles of abandoned right-of-way to a group of adjacent landowners. The North Western petitioned the Commission for approval of the sale as is required by section 27 of "An Act concerning public utilities" (Ill.Rev. Stat.1973, ch. 111½, par. 27) (hereinafter cited as the Public Utilities Act). While this petition was pending before the Commission, the Department announced its interest in acquiring 19 of the 32 miles of right-of-way for use as a nature trail. The Department filed a petition seeking permission to take the right-of-way by eminent domain, as is required by section 2 of the Eminent Domain Act (Ill.Rev.Stat.1973, ch. 47, par. 2) on November 15, 1973. Some time prior to that date, and with its petition for approval of the sale still pending before the Commission, the North Western deeded the right-of-way to the adjacent landowners. The Commission then had two petitions concerning the same stretch of right-of-way before it. The Commission consolidated the petitions and rendered an order disposing of them on May 15, 1975. That order voided the sale to the adjacent landowners and gave the Department permission to take the 19 miles of right-of-way by

Cite as, App., 16 Ill.Dec. 539, 375 N.E.2d 170

eminent domain. On June 3, 1975, the Department filed the petition for condemnation which is the subject of this appeal.

The Commission's order voiding the sale to the adjacent landowners was reversed by the circuit court, but in *Klopf v. Illinois Commerce Commission* (1977), 54 Ill.App.3d 491, 12 Ill.Dec. 199, 369 N.E.2d 906, this court reversed the circuit court and reinstated the Commission's order.

The first issue in this appeal is the question of whether or not the title to the right-of-way was in dispute at the time the petition for condemnation was filed. We find the *Klopf* case to be dispositive of this issue. There we affirmed the Commission's order voiding the purported sale to the adjacent landowners. The purported sale's being void, it had no effect. Therefore the North Western was the sole owner of the right-of-way on the date the petition for condemnation was filed.

Next we turn to the North Western's contention that a final, irreversible order must be entered before the requirements of section 2 of the Eminent Domain Act (Ill. Rev.Stat.1973, ch. 47, par. 2) are satisfied. We do not agree with the North Western's interpretation of the statute.

[1-3] The basic function of the requirement found in section 2 of the Eminent Domain Act, requiring Commission approval before eminent domain proceedings may be instituted against utility property, is to insure that property necessary for utility purposes is not taken. That statutory purpose was satisfied when the Commission order allowing the Department to commence eminent domain proceedings was filed. The only effect delaying the filing of the petition for condemnation until all appeals of the Commission's order have been exhausted would be to delay the date for fixing just compensation, which is the property's fair market value on the date the petition for condemnation is filed. (*Chicago Land Clearance Commission v. Darrow* (1957), 12 Ill.2d 365, 146 N.E.2d 1.) We find such a delay unnecessary. If the order allowing the use of eminent domain proceedings against the property is appealed,

the condemnation proceedings can be stayed. In the event the Commission is reversed, the filing of the petition would become a nullity. If the Commission is affirmed, the public reaps the benefit of obtaining the property at its earlier, and presumably lower, cost.

For the above reasons, the judgment of the circuit court of Jo Daviess County is reversed, and the cause is remanded with instructions to proceed with the condemnation proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

SEIDENFELD, P. J., and WOODWARD, J., concur.



59 Ill.App.3d 92

375 N.E.2d 170

CITY OF ELGIN, a Municipal Corporation,
Plaintiff-Appellant,

v.

Carl RIPPBERGER, Defendant-Appellee,

No. 76-539.

Appellate Court of Illinois,
Second District.

April 17, 1978.

Action was brought in which city sought injunctive relief against defendant's maintenance of multiple-family dwelling in zoning district wherein multiple uses were not permitted and in which city also sought imposition of a fine against defendant. The Circuit Court, Kane County, Paul W. Schnake, J., entered judgment for defendant, and city appealed. The Appellate Court, Second District, Nash, J., held that: (1) defendant's theories that equitable estoppel applied and that ordinance was invalid as applied to his property because enforcement of ordinance would be unrea-

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

DEPARTMENT OF TRANSPORTATION,
STATE OF ILLINOIS,

Petitioner,

vs.

Docket No. 00-0207

NORTH SHORE GAS COMPANY,
an Illinois corporation,

Parcels 19G 0038-A&B

Respondent.

NOTICE OF FILING

To:

SIMON B. HALFIN
Staff Counsel
PEOPLES GAS/
NORTH SHORE GAS COMPANY
130 East Randolph Drive
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on April 28, 2000, Petitioner's Response to Motion to Dismiss was sent for filing to the Illinois Commerce Commission, a copy of which is hereby served upon you.

DEPARTMENT OF TRANSPORTATION,
STATE OF ILLINOIS,

By John T. Kennedy
John T. Kennedy, Special
Assistant Attorney General
500 Davis Street, Suite 701
Evanston, IL 60201
(847) 425-1115