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IN THE COURT OF APPEALS OF INDIANA

Duke Energy Indiana, LLC,
Appellant-Defendant,

v.

Bellwether Properties, LLC, individually and on behalf of all others similarly situated,
Appellee-Plaintiff.

August 3, 2022

Court of Appeals Case No.
21A-CT-1848

Appeal from the
Monroe Circuit Court

The Honorable
Geoffrey J. Bradley, Judge

Trial Court Case No.
53C01-1506-CT-1172

Shepard, Senior Judge.

[1] Bellwether Properties, LLC, planned to build a warehouse on its property, but Duke Energy, Indiana, LLC, informed Bellwether that the design violated

electrical safety codes adopted by the Indiana Utility Regulatory Commission. Bellwether built a slightly smaller warehouse and sued Duke, claiming Duke had effectively taken part of its land without compensation.

[2] In this interlocutory appeal, Duke challenges the trial court's denial of its motion for summary judgment. We reverse, concluding as a matter of law that Duke did not take Bellwether's land.[1]

Issue

[3] We address one dispositive issue: whether the trial court erred in concluding Duke was not entitled to summary judgment on the question of whether a taking occurred.[2]

Facts and Procedural History

[4] In 2002, the Indiana Utility Regulatory Commission ("IURC") revised Indiana's utility regulations to incorporate by reference the 2002 edition of the National Electric Safety Code ("NESC"). 170 IAC § 4-1-26 (2002). The IURC adopted the NESC to govern electrical utilities' "overhead and underground construction practice[s]." *Id*. In prior years, the IURC had incorporated by reference into its regulations previous editions of the NESC.

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[1] On June 13, 2022, we held oral argument in our courtroom in Indianapolis. We thank the parties for their skilled presentations.

[2] Duke also argues Bellwether lacks standing to raise its takings claim, but we do not need to address that issue.

[5] The provisions of the National Electric Safety Code are incorporated into Indiana's Administrative Code but are not set forth in the Code. Instead, members of the public may access the NESC by going to the IURC's office to view and copy the NESC, or by obtaining a copy from the Institute of Electrical and Electronics Engineers, Inc., a not-for-profit entity that issues the NESC. *Id*.

[6] Among other requirements, the NESC provides that if someone wants to build a certain size building near an electrical transmission line of a given voltage, the builder must ensure there is twelve and a half feet of horizontal clearance between the line and the building.

[7] In 2004, Bellwether purchased a 1.17-acre parcel of land in Bloomington, Indiana. A prior owner had built a warehouse there. The land was subject to a perpetual utility easement that a prior landowner had granted to Duke's predecessor-in-interest. An electrical transmission line ran through the property, in accordance with the easement, and also provided electricity to the warehouse. The easement is ten feet wide, centered on the line. At the time of the purchase, Bellwether was aware of the utility easement but was unaware of the NESC's requirements. Bellwether had no plans at that time to construct any other buildings on the property.

[8] Almost a decade later, Bellwether decided to build another warehouse. Bellwether hired an architectural firm to design the building, and the architect ultimately planned a 3,200 square foot warehouse. The architect was unaware of the NESC's horizontal clearance requirements and did not incorporate them into the plan. As

a result, the planned warehouse would not have intruded upon the easement but would have been inside the NESC-mandated horizonal clearance zone.

[9] In July 2013, a representative of Bellwether, Kevin Potter, met with Jack Urrutia of Duke to discuss the proposed warehouse. Urrutia indicated the warehouse could not be built as then designed because the building would encroach upon the NESC horizontal clearance zone. He explained the building would need to be redesigned or moved.

[10] Bellwether's architect revised the warehouse plans to avoid encroaching on the line. As a result, the warehouse's footprint shrank by approximately 150 square feet, reducing the number of storage racks in the warehouse from thirty to twenty-nine. Bellwether's architect apologized to Bellwether for failing to note the NESC's requirements "during the design phase of the project" and did not charge Bellwether for the revision. Appellant's App. Vol. II, p. 135.

[11] In June 2015, Bellwether filed a proposed class action complaint against Duke. It alleged Duke had engaged in inverse condemnation of its property and properties owned by other similarly situated landowners by telling Bellwether its proposed warehouse would have to be redesigned or moved to comply with NESC clearance requirements. Duke moved to dismiss the complaint, alleging it was untimely. The trial court granted the motion to dismiss, and Bellwether appealed. A panel of this Court reversed the trial court. *Bellwether Props. v. Duke Energy Ind.*, 59 N.E.3d 1037 (Ind. Ct. App. 2016), *vacated on transfer*. On transfer, the Indiana Supreme

Court also reversed the trial court's dismissal of the complaint, but on different grounds. *Bellwether Props. v. Duke Energy Ind.*, 87 N.E.3d 462 (Ind. 2017).

[12] On remand, Duke filed an answer to the complaint, followed by a motion for summary judgment and supporting brief. Bellwether filed a response in opposition. The trial court held a hearing on the motion and denied it, concluding there were disputes of material fact as to whether Duke's conduct amounted to a physical taking of Bellwether's property. The court further determined Bellwether had standing to bring its inverse condemnation claim. Next, Duke requested permission to pursue an interlocutory appeal. The trial court and a panel of this Court granted permission. This appeal followed.

Discussion

I. Standard of Review

[13] On appeal from a denial of summary judgment, our standard of review is similar to that of the trial court. *Tippecanoe Valley Sch. Corp. v. Landis*, 698 N.E.2d 1218 (Ind. Ct. App. 1998), *trans. denied*. Summary judgment is granted when the designated evidentiary matter shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing Ind. Trial Rule 56(C)). We will reverse the trial court if we determine it misapplied the law, but the party appealing the denial of summary judgment bears the burden of persuading us the trial court's decision was improper. *Id.* We do not reweigh the evidence, but we liberally construe all designated evidentiary material in the light

most favorable to the nonmoving party. *Metal Working Lubricants Co. v. Indianapolis Water Co.*, 746 N.E.2d 352 (Ind. Ct. App. 2001).

[14] Bellwether does not identify any disputes of material fact or contend that there are any. As a result, this appeal presents only questions of law.

II. Inverse Condemnation

[15] The core issue is whether Duke took a portion of Bellwether's land. Bellwether's claim is based on the Fifth Amendment, which provides private property shall not be taken for public use "without just compensation," and article 1, section 21 of the Indiana Constitution, which provides: "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." We review an alleged taking under both provisions using the same legal standard. *See State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206, 210 (Ind. 2009) ("the state and federal takings clauses are textually indistinguishable and are to be analyzed identically").

[16] In general, the state's exercise of its power to seize private property is governed by statute. *AAA Fed. Credit Union v. Ind. Dep't of Transp.*, 79 N.E.3d 401 (Ind. Ct. App. 2017) (citing Indiana Code § 32-24-1-1 *et seq*.), *trans. denied*. A landowner is authorized to pursue damages for an uncompensated seizure, also known as inverse condemnation, as follows: "A person having an interest in property that has been or may be acquired for a public use without the procedures of this article or any prior law followed is entitled to have the person's damages assessed under

this article substantially in the manner provided in this article." Ind. Code § 32-24-1-16 (2002).

[17] "An action for inverse condemnation requires: (1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation being paid; and (5) by a governmental entity that has not instituted formal proceedings." *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (internal quotation omitted). Whether a taking has occurred is a question of law. *State v. Dunn*, 888 N.E.2d 858 (Ind. Ct. App. 2008), *trans. denied*.

[18] Decisions in this field recognize two kinds of compensable takings. A physical taking occurs "whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321, 122 S. Ct. 1465, 1478, 152 L. Ed. 2d 517 (2002). In addition, "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and . . . such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle v. Chevron U.S.A.*, Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 2081, 161 L. Ed. 2d 876 (2005).

[19] Each case must be decided on its own facts, and the line between a physical taking and a regulatory taking can blur. *See, e.g., Cedar Point Nursery v. Hassid*, __ U.S. __, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) (enforcement of regulation requiring a farmer to allow union organizers to enter the farm to talk with workers resulted in

a compensable taking; the regulation effectively allowed the seizure of the farmer's land for a third party's use).

[20] Bellwether denies it has raised a regulatory taking claim. Instead, Bellwether argues Duke engaged in a physical taking of its land by telling Bellwether that its warehouse as originally designed was in violation of the NESC's horizontal clearance zone. By contrast, Duke claims that if any taking occurred here, it was regulatory in nature, deriving from the NESC's requirements rather than any physical imposition.

[21] Under the facts presented here, Bellwether's claimed taking by Duke, if valid, is regulatory in nature rather than a direct physical taking. Duke's predecessor installed the transmission line on the land Bellwether now occupies.. In addition, the IURC's enactment of the 2002 edition of the NESC did not result in Duke physically intruding onto Bellwether's property or requiring Bellwether to allow another entity access to the property. The NESC's clearance requirements place some limits on Bellwether's power to build on a small portion of its land, but not all limits amount to a physical, rather than regulatory, taking. *See Town Council of New Harmony v. Parker*, 726 N.E.2d 1217 (Ind. 2000) (landowner's challenge to town's refusal to provide municipal utilities to undeveloped land was, in substance, claim of regulatory taking rather than physical taking, even though landowner's ability to develop land was impeded).

[22] Duke argues Bellwether's regulatory takings claim must fail because Bellwether must demonstrate Duke has deprived it of "'all or substantially all economic or

productive use of his or her property.'" Appellant's Br. p. 28 (quoting *Himsel v. Himsel*, 122 N.E.3d 935, 947 (Ind. Ct. App. 2019)). We ultimately agree with Duke, but we disagree with its reading of precedent. In *Lingle*, the United States Supreme Court identified two categories of regulatory action that are deemed per se takings: "where government requires an owner to suffer a permanent physical invasion of her property," and "regulations that completely deprive an owner of all economically beneficial use of her property." 544 U.S. at 538, 125 S. Ct. at 2081 (internal quotation omitted). Neither circumstance applies here, because: (1) Duke did not physically invade Bellwether's property; and (2) the NESC horizontal clearance requirement did not deprive Bellwether of all productive use of its land.

[23] Beyond these two "relatively narrow categories" of per se takings, regulatory takings claims are governed by the standard set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). *Lingle*, 544 U.S. at 538, 125 S. Ct. at 2081. In *Penn Central*, the owner of Grand Central Terminal in New York City challenged the city's historic preservation regulations, claiming the city had reduced the Terminal's value by rejecting its redevelopment proposals. The United States Supreme Court noted that determining whether a taking has occurred in a particular case is a fact-specific inquiry, but several factors are significant:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the

> governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124, 98 S. Ct. at 2659.

[24] In the current case, the record does not contain any calculations as to the economic impact of the NESC regulation on Bellwether's property, but the impact appears to be minimal. Bellwether shrunk the planned size of the warehouse by only 150 square feet and reduced the number of storage racks from thirty to twenty-nine. The 1.17-acre property continues to have ample economic value.

[25] In addition, we cannot conclude the enforcement of the NESC horizontal clearance regulation interfered with Bellwether's reasonable investment-backed expectations for the land. There was already a warehouse on the land at the time of purchase, and Bellwether had no plans to build another one. Further, Bellwether ultimately did build a second warehouse after the meeting with Duke, and it was only slightly smaller than planned. Further, the NESC horizontal clearance requirement had already been incorporated into the Indiana Administrative Code when Bellwether purchased the land in 2004. "Property owners are charged with knowledge of ordinances that affect their property." *Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1030 (Ind. 1998).

[26] Finally, the character of the regulation at issue weighs against determining a taking occurred. There appears to be no dispute that the NESC's horizontal clearance standard is intended to protect life and property from the risk of harm caused by

buildings being placed too close to electric transmission lines. In addition, the regulation applies to all properties located next to transmission lines, not merely to Bellwether's land. *See Town of Georgetown v. Sewell*, 786 N.E.2d 1132 (Ind. Ct. App. 2003) (town's issuance of stop work order on construction site was not a compensable regulatory taking; construction of home on site of former landfill posed a threat to human health, and town followed generally applicable regulations governing solid waste management).

[27] Bellwether argues the NESC regulates utilities rather than property owners, and Duke effectively transferred to Bellwether the costs of complying with the horizontal clearance regulation, thereby gaining a windfall. We disagree because Bellwether reasonably could have avoided the dispute by discovering the NESC's requirements. Bellwether was aware when it purchased the land in 2004 that an electrical transmission line ran across part of the property. Bellwether nevertheless failed to discover the NESC's requirements at the time of purchase or when its architect designed the warehouse. *See id.* at 1141 (purchasers of a former solid waste dump reasonably should have understood the nature of the land they purchased and all applicable regulations).

[28] Considering the factors set forth in the *Penn Central* case, we conclude Duke's enforcement of the NESC horizontal clearance regulation did not violate the Takings Clause or article 1, section 21 of the Indiana Constitution. Duke is entitled to summary judgment as a matter of law.

Conclusions

[29] For the reasons stated above, we reverse the judgment of the trial court and remand with instructions to grant Duke's motion for summary judgment.

[30] Reversed and remanded with instructions.

Bailey, J., and May, J., concur.