

MUNICIPAL CORPORATIONS

SUPREME COURT REVIEW

POWER OF EMINENT DOMAIN

In *Suhr v. City of Seward*,¹ the Nebraska Supreme Court elaborated upon the requirement that condemning authorities must conduct good faith negotiations with a landowner as to the amount of damages the owner should receive in an eminent domain proceeding.² In this case the condemner, after obtaining the estimates of two different appraisers, made an offer to the landowner and continued to negotiate until receiving a letter stating the landowner's refusal to negotiate further.³ The landowner contended in his letter that the amendment of a county zoning ordinance was needed before damage negotiations could proceed.⁴ The county court nonetheless awarded damages based on the estimates of its own appraisers. The landowners appealed this award to the district court, alleging a lack of good faith negotiations as required by statute, and obtained a jury verdict in their favor.⁵

On appeal by the condemner to the Nebraska Supreme Court, the landowners again alleged that there had not been good faith negotiations between the parties.⁶ The court reaffirmed its prior rule that the burden is upon the condemner to allege and prove good faith negotiations as to damages,⁷ but, after reviewing the evidence, refused to hold that the condemner had failed to negotiate in good faith.⁸ The court further noted that the requirement of good faith negotiation is a condition precedent to the right to con-

1. 201 Neb. 51, 266 N.W.2d 190 (1978).

2. In their petition the plaintiffs alleged that good faith negotiations between the parties as to condemnation damages were required by NEB. REV. STAT. §§ 76-702 and 76-704 (Reissue 1976). The court did not dispute this contention. This requirement of good faith negotiation was apparently embodied into these statutory provisions by the decision in *Higgins v. Loup River Pub. Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953). There the court stated that sections 76-702 and 76-704, then newly-enacted, were subject to "the requirement that an attempt to contact the owner of the lands . . . which the condemner desires to acquire . . . with reference to the subject of damages . . . be made before [the] condemner proceeds to condemn the lands." *Id.* at 658, 61 N.W.2d at 217. On a second appeal, the court expanded this requirement to mandate negotiations made in good faith. *Higgins v. Loup River Pub. Power Dist.*, 159 Neb. 549, 550, 68 N.W.2d 170, 172 (1955).

3. 201 Neb. at 52-53, 266 N.W.2d at 191-92.

4. *Id.* at 53, 266 N.W.2d at 192.

5. *Id.* at 51-52, 266 N.W.2d at 191.

6. *Id.* at 52, 266 N.W.2d at 191.

7. *Id.*; *Higgins v. Loup River Pub. Power Dist.*, 159 Neb. 549, 550, 68 N.W.2d 170, 171 (1955).

8. 201 Neb. at 54-55, 266 N.W.2d at 192-93.

demn,⁹ and that this requirement is satisfied by proof of a good faith offer accompanied by a reasonable effort to induce the landowner's acceptance.¹⁰ In this case, the condemner's offers were found to be adequate and in good faith,¹¹ and the plaintiff's letter refusing further negotiations was deemed to have excused the condemner from any further attempt to negotiate.¹² The district court's verdict was therefore reversed and the case remanded.¹³

The power of eminent domain held by a state natural resources district was significantly restricted in *Krauter v. Lower Big Blue Natural Resources District*.¹⁴ In this case the natural resources district sought to condemn 320 acres of farmland in order to build and operate a flood-control dam.¹⁵ The district court, however, had found that the dam required only 140.68 acres, and that the evidence introduced did not establish a reasonable need to acquire fee title to this reduced acreage rather than an easement.¹⁶

On appeal by the condemner to the Nebraska Supreme Court, the evidence was undisputed that only 140.68 acres of land, and not the 320 acres sought by the natural resources district, was needed for the dam.¹⁷ The natural resources district alleged, however, that the excess land was being acquired for possible future public use.¹⁸ It argued that its power to condemn exists where there is a probability, or even a possibility, that the affected property might be needed and used for a public purpose in the future.¹⁹ The condemner failed, however, to prove any specific public purpose for which the excess land was being condemned.²⁰

The court rejected these arguments and held that a natural resources district, in exercising the power of eminent domain, is required by state statutes²¹ to have a present plan and present

9. *Id.* at 52, 266 N.W.2d at 191.

10. *Id.* See also *Higgins v. Loup River Pub. Power Dist.*, 159 Neb. 549, 550, 68 N.W.2d 170, 171 (1955).

11. 201 Neb. at 54-55, 266 N.W.2d at 192-93.

12. *Id.* at 53, 266 N.W.2d at 192.

13. *Id.* at 55, 266 N.W.2d at 193.

14. 199 Neb. 431, 259 N.W.2d 472 (1977).

15. *Id.* at 432, 259 N.W.2d at 473.

16. *Id.* at 432-33, 259 N.W.2d at 473.

17. *Id.* at 435, 259 N.W.2d at 474.

18. *Id.*

19. *Id.* at 437, 259 N.W.2d at 475.

20. See 199 Neb. at 438, 259 N.W.2d at 476.

21. NEB. REV. STAT. § 2-3229 (Reissue 1977) provides in relevant part:

The purposes of natural resources districts shall be to develop and execute, through the exercise of powers and authorities contained in this act, plans, facilities, works and programs relating to (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood

public purpose for the use of the affected property.²² The possibility that the condemner at some future time may adopt a plan to use the property for a public purpose was held not enough to justify a present condemnation.²³ The court further declared that here, as in any condemnation proceeding, the condemner must allege the specific public purposes for which the property is sought.²⁴ The natural resource district's condemnation of excess lands was thus prohibited, and the trial court's findings were affirmed.²⁵

ZONING

In *Holmgren v. City of Lincoln*,²⁶ the Nebraska Supreme Court was called upon to construe a statutory limitation upon a city's zoning authority. In this case the appellants challenged a Lincoln amendatory ordinance which changed the zoning of a 4.6 acre-tract from a single-family to a multiple-dwelling classification.²⁷ The appellants argued that the amendatory zoning ordinance was not "in accordance with a comprehensive plan" as required by statute,²⁸ and that it resulted in unconstitutional "spot zoning."²⁹

prevention and control, . . . (5) water supply for any beneficial uses . . . , (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities All such plans and programs are to be in conformance with the goals, criteria and policies of the state water plan as developed by the Nebraska Natural Resources Commission

Id. NEB. REV. STAT. § 2-3234 (Reissue 1977) provides in part:

Each [natural resources] district shall have the power and authority to exercise the power of eminent domain when necessary to carry out the purposes of this act within the limits of the district or outside its boundaries. Exercise of eminent domain shall be governed by the provisions of sections 76-704 to 76-724

Id. NEB. REV. STAT. § 76-714 (Reissue 1976) provides:

The interest in the property acquired by the condemner shall be such title, easement, right-of-way, or use as is expressly specified in or necessarily contemplated by the law granting to the condemner the right to exercise the power of eminent domain. The condemner shall not dispossess the condemnee until the condemner is ready to devote the property to a public use, and such title or interest as the condemner seeks to acquire shall not be complete until the property is put to the public use for which taken.

Id.

22. 199 Neb. at 438, 259 N.W.2d at 475.

23. *Id.* at 438, 259 N.W.2d at 475-76.

24. *Id.* at 439, 259 N.W.2d at 476.

25. *Id.* at 440, 259 N.W.2d at 476.

26. 199 Neb. 178, 256 N.W.2d 686 (1977).

27. *Id.* at 179, 256 N.W.2d at 688.

28. *Id.* NEB. REV. STAT. § 15-902 (Reissue 1977) provides that zoning regulations promulgated by cities of the primary class

shall be designed to secure safety from fire, flood and other dangers and to promote the public health, safety and general welfare, and shall be made with consideration having been given to the character of the various parts

Finding no helpful judicial precedents, the court examined the history and scheme of pertinent zoning statutes³⁰ to conclude that the statutory phrase "a comprehensive plan"³¹ was intended to mean "a general guide" for community development, rather than a specific instrument of land-use control.³² Viewing the amendatory zoning ordinance in the light of the evidence presented, the court concluded that although the amendment would permit a higher population concentration, it would not alter the use of the property for residential purposes as contemplated by the city's general zoning plan.³³ As such the amendatory zoning was "in accordance with a comprehensive plan" and did not violate section 15-902.³⁴ Similarly, the court examined various factors surrounding the zoning amendment³⁵ to conclude that no unconstitutional

of the area zoned and their peculiar suitability for particular uses and types of development, and with a view to conserving property values and encouraging the most appropriate use of land throughout the area zoned, *in accordance with a comprehensive plan.*

Id. (emphasis added).

29. 199 Neb. at 179, 256 N.W.2d at 688. "Spot zoning" has been defined generally by the court as "the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and the other owners therein." *Weber v. City of Grand Island*, 165 Neb. 827, 832, 87 N.W.2d 575, 579 (1958). *See also* D. Hagman, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 93 (1971).

30. The court examined sections 19-901 and 15-1102 in construing the phrase "a comprehensive plan" found in section 15-902. 199 Neb. at 181-83, 256 N.W.2d at 689-90.

31. The phrase "in accordance with a comprehensive plan" is found in the zoning statutes of many states, and state courts have interpreted this term in a variety of ways. *See Haar, In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); D. Hagman, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 93 (1971).

32. 199 Neb. at 183, 256 N.W.2d at 690. Here the court drew upon a prior statement made in the different context of *Stones v. Plattsmouth Airport Authority*, 193 Neb. 552, 228 N.W.2d 129 (1975), wherein the court stated: "A comprehensive plan is a guide to community development rather than an instrument of land-use control." *Id.* at 554, 228 N.W.2d at 131.

33. 199 Neb. at 184, 256 N.W.2d at 690.

34. *Id.*

35. The following factors were held to support the reasonableness of the city's zoning amendment:

- (1) The tract itself and the land to the east and west is largely vacant;
- (2) The change from the original proposed uses is not radical, that is, it is from one type of residential use to another type of residential use;
- (3) There is conflicting expert testimony as to whether the zone change is in the public interest;
- (4) There is competent, conflicting evidence to the effect that the tract of which the area in question is a part, does not, because of natural and man-made boundaries, lend itself to extensive single-family development; and
- (5) The land in question and the larger vacant tracts of which it is a part are in diverse ownership and this fact supports the conclusion that the rezoning was not for the special benefit of one single landowner to the detriment of the others.

"spot zoning" had occurred.³⁶

IRRIGATION DISTRICTS

The liability of an irrigation district for seepage damage was significantly expanded in *Halstead v. Farmers Irrigation District*.³⁷ In this case the plaintiff brought an action to recover damages for a portion of his crops which were destroyed by seepage from an irrigation canal owned and operated by the defendant irrigation district.³⁸ The plaintiff, whose lands were located within the boundaries of the defendant district, did not allege any negligence on the part of the district.³⁹

On appeal from a dismissal of the plaintiff's action below, the Nebraska Supreme Court was presented with the question of whether an irrigation district organized under Nebraska law⁴⁰ is liable for seepage damage to land within its boundaries in the absence of negligence.⁴¹ The court held that under article I, section 21 of the Nebraska Constitution, which prohibits the taking or damaging of private property for public use without just compensation,⁴² state-organized irrigation districts are liable for seepage damage without regard to negligence.⁴³ In so holding the court expressly overruled *Spurrier v. Mitchell Irrigation District*,⁴⁴ decided in 1930, which had conditioned irrigation canal seepage liability upon the negligence of the owner-operator,⁴⁵ and which had specifically rejected the contention that irrigation districts are liable for seepage damage under article I, section 21 of the state constitution.⁴⁶ The court's holding also reconciled a line of prior decisions which stood in conflict with *Spurrier*,⁴⁷ and brought Nebraska into line with a number of other jurisdictions on the question of an irrigation district's liability for non-negligent seepage damage on the

199 Neb. at 185, 256 N.W.2d at 691.

36. *Id.* at 186, 256 N.W.2d at 691.

37. 200 Neb. 314, 263 N.W.2d 475 (1978).

38. *Id.* at 315, 263 N.W.2d at 476.

39. *Id.*

40. The defendant irrigation district was organized under the provisions of NEB. REV. STAT. §§ 46-101 to 46-1026 (Reissue 1974).

41. 200 Neb. at 315, 263 N.W.2d at 476.

42. NEB. CONST. art. 1, § 21 provides that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor." *Id.*

43. 200 Neb. at 318-19, 263 N.W.2d at 478.

44. 119 Neb. 401, 229 N.W. 273 (1930).

45. *Id.* at 408, 229 N.W. at 276.

46. *Id.* at 413, 229 N.W. at 278.

47. These cases included: *Hooker v. Farmers Irr. Dist.*, 272 F. 600 (8th Cir. 1921); *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960); *Snyder v. Platte Valley Pub. Power Irr. Dist.*, 144 Neb. 308, 13 N.W.2d 160 (1944); *Gledhill v. State*, 123 Neb. 726, 243 N.W. 909 (1932).

basis of state constitutional provisions.⁴⁸

LEGISLATION

EMINENT DOMAIN

L.B. 917¹ contained several statutory amendments regarding eminent domain proceedings. The required notice period prior to condemnation was reduced to forty-five days, and additional information is now required on the condemnation notice.² The amount of interest payable to condemnees on the successful appeal of a damage award was increased from six to nine per cent.³

CITIES AND VILLAGES

A number of bills affecting cities and municipal corporations were passed by the Unicameral. L.B. 386⁴ contains changes in liquor licensing requirements. L.B. 394⁵ requires an incorporated municipality to hold an election on the question of imposing a sales and use tax, and also provides for an initiative on such question.⁶ L.B. 591⁷ provides for the election of a temporary city or village council chairperson in the absence of the council president and vice-president.⁸ L.B. 632⁹ contains numerous amendments regarding initiative and referendum procedures;¹⁰ filing provisions for incumbents and other candidates for municipal office;¹¹ and appointment and election of county officials.¹² L.B. 830¹³ authorizes municipalities to enforce a policy of not employing both husband

48. 200 Neb. at 317-18, 263 N.W.2d at 477. The court noted that the California rule, which had been cited for support in *Spurrier*, had since been changed to impose liability upon irrigation districts for seepage damage without regard to negligence. See *Ketcham v. Modesto Irr. Dist.*, 135 Cal. App. 180, 26 P.2d 876 (1934). See also *Maricopa County Mun. Water Conv. Dist. No. 1 v. Warford*, 69 Ariz. 1, 206 P.2d 1168 (1949); *Middlekamp v. Bessemer Irrigating Ditch Co.*, 46 Colo. 102, 103 P. 280 (1909).

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1. L.B. 917, 1978 Neb. Laws 951.
 2. *Id.* § 2 at 952 (to be codified in NEB. REV. STAT. § 25-2503).
 3. *Id.* § 3 at 952-53 (to be codified in NEB. REV. STAT. § 76-711).
 4. L.B. 386, 1978 Neb. Laws 222.
 5. L.B. 394, 1978 Neb. Laws 235 (to be codified in NEB. REV. STAT. § 77-27,142).
 6. *Id.*
 7. L.B. 591, 1978 Neb. Laws 396 (to be codified in NEB. REV. STAT. § 19-617).
 8. *Id.*
 9. L.B. 632, 1978 Neb. Laws 436.
 10. *Id.* §§ 1 and 2 at 436-38 (to be codified in NEB. REV. STAT. §§ 18-102 and 19-639).
 11. *Id.* §§ 4 and 5 at 439-44 (to be codified in NEB. REV. STAT. §§ 32-503.01 and 32-504).
 12. *Id.* §§ 3 and 7 at 438, 447 (to be codified in NEB. REV. STAT. §§ 23-151 and 32-1040).
 13. L.B. 830, 1978 Neb. Laws 844 (to be codified in NEB. REV. STAT. § 18-1724).

and wife, if such policy is equally applied to both sexes.¹⁴ L.B. 902¹⁵ allows cities of the metropolitan class to add an additional one-half per cent sales tax either through a city council vote or a vote of the residents; such sales tax carries an automatic expiration date of January 1, 1980.¹⁶ L.B. 907¹⁷ authorizes the merger of a municipal fire department and a rural fire protection district according to a prescribed procedure.¹⁸

ZONING

In the area of planning and zoning exercised by political subdivisions, L.B. 186¹⁹ contained numerous amendatory provisions. These statutory changes involve provisions regarding the membership and terms of office for city and village planning commissions;²⁰ the issuance of special use permits by planning commissions, city councils, and county boards;²¹ and the membership and powers of boards of adjustment.²² L.B. 708²³ requires that a sanitary improvement district, in order to acquire property, must obtain the prior approval of the county or municipality having zoning jurisdiction over such property.²⁴ L.B. 807²⁵ expands the power of county boards to promulgate zoning regulations for safety purposes, including the regulation of junk and salvage yards.²⁶

Finally, L.B. 217²⁷ extends the application of provisions involving the control of runoff water within irrigation districts from a district-wide to a statewide basis.²⁸

14. *Id.*

15. L.B. 902, 1978 Neb. Laws 928 (to be codified in NEB. REV. STAT. § 77-27,142).

16. *Id.* § 1 at 928-29.

17. L.B. 907, 1978 Neb. Laws 936.

18. *Id.*

19. L.B. 186, 1978 Neb. Laws 93.

20. *Id.* §§ 3 and 8 at 95, 99-100 (to be codified in NEB. REV. STAT. §§ 18-1303 and 23-114.01).

21. *Id.* §§ 4 and 8 at 95-97, 99-100 (to be codified in NEB. REV. STAT. §§ 18-1306 and 23-114.01).

22. *Id.* §§ 6, 9, and 10 at 97, 101-03 (to be codified in NEB. REV. STAT. §§ 19-910, 23-168.01 and 23-168.03).

23. L.B. 708, 1978 Neb. Laws 620 (to be codified in NEB. REV. STAT. § 31-736).

24. *Id.*

25. L.B. 807, 1978 Neb. Laws 816 (to be codified in NEB. REV. STAT. § 23-174.10).

26. *Id.* § 1 at 816.

27. L.B. 217, 1978 Neb. Laws 120 (to be codified in NEB. REV. STAT. §§ 46-664 and 46-666).

28. *Id.*