1-23-2014

Bremer v. East Greenacres Irrigation Dist. Petition For Review Dckt. 39942

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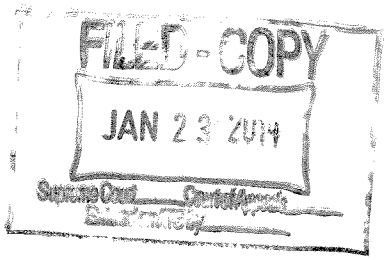

IN THE SUPREME COURT OF THE STATE OF IDAHO

BREMER, LLC, an Idaho limited liability company, and KGG PARTNERSHIP, Appellant/Plaintiff, vs. EAST GREENACRES IRRIGATION DISTRICT, Respondent/Defendants.	Supreme Court Docket: 39942-2012 Kootenai County Case No. CV11-1921 APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

1. **The Court should clarify the law pertaining to what steps a landowner must take to preserve its right to challenge an illegal condition of approval.**

This case is about a private landowner challenging a condition required to approve development of its property after the landowner had already agreed to the condition in an effort to reasonably mitigate the landowners potential damages. *KMST, LLC v. County of Ada,* 138 Idaho 577, 67 P3.rd 56 (2003) and *Buckskin Properties, Inc. v. Valley Cnty.,* 154 Idaho 486, 492, 300 P.3d 18(2013) are cases involving the same issue. In *KMST*, the landowner proposed the condition without any input from the regulatory body. Id at 582, 61. In *Buckskin*, the regulatory body required the condition, as it did in this case, but the landowner raised no objection.

> There is no evidence in the record indicating that Buckskin was strong-armed into signing the CCA or RDA; that it voiced any objection to anyone, at any time, to making the payment required under either agreement; or that it did not, as the County avers, benefit from the agreement by virtue of the road improvements facilitated by its payments.
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> *Buckskin Properties, Inc. v. Valley Cnty.*, 154 Idaho 486, 492, 300 P.3d 18, 24 (2013).

In this case, however, the landowner raised objection as specifically found by this Court. "Schlotthauer then met with Ron Wilson, EGID's manager. Wilson told Schlotthauer that Bremer would not get water until they agreed to build the extension, citing EGID's by-laws as the legal authority." (Opinion at 2) "Schlotthauer then advised Bremer that although the extension may be illegal, the costs to the business meant the 'only logical course was to capitulate to the demand, and then institute suit after the fact.'" (Opinion at 3)

So the real issue is whether or not a landowner who decides to capitulate rather than litigate can recoup the cost of an illegal condition later. This is the question in the footnote from the *KMST* case and it is vitally important that the Idaho Bar understand the answer to that question.

> We express no opinion as to whether a developer who contends that a condition of approval amounts to an unconstitutional taking of property must litigate that issue before proceeding with the development.
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> *KMST, LLC v. Cnty. of Ada*, 138 Idaho 577, 582, 67 P.3d 56, 61 (2003).

The language of the Court's opinion seems to indicate that the answer to the question is "no", the landowner cannot agree to an illegal condition and later try to recoup the cost. "The attorney felt the requirement was illegal, but advised that the 'logical course' was to build the

extension anyway given the money invested and the time it would take to litigate. This is yet another indication that Bremer chose to build the extension." (Opinion at 6)

If the Court is saying that a landowner cannot accede to an illegal condition of approval imposed upon it and then later try to recoup the costs, then this Court should be clear as the holding has huge implications for private landowners wishing to develop their property. In this case, Bremer's only other option would have been to file suit at the inception of the requested condition and be faced with the lack of water to its production facility for an indefinite time - possibly for the same amount of time this litigation has taken which has been years. Such a ruling will permit regulatory bodies to bully private landowners, allowing them to cross the limits of Constitutionality when imposing conditions, comfortable in the knowledge that unless what they are requiring is way out of line, odds are, the private landowner will simply have to surrender. Most land developers do not have the ability to wait out a two or three year lawsuit to finish a project.

If the Court is not saying that landowners are required to file suit when faced with an illegal condition of improvement, then the Court should provide guidance on what is required of a private landowner in order to preserve their rights when faced with an illegal condition of improvement. Here, as this Court found, it is clear that Bremer objected to the condition, but was not enough to take Bremer out of the confines of the *Buckskin* case. This Court should announce a rule setting forth how a landowner can preserve its rights when it is forced to accede to an illegal condition of improvement. A rule requiring written notice that the condition is agreed to under protest may be an example of such rue. This would put the regulatory body on notice that it may get the condition it wants now, but may have to pay for it later.

2. **If this Court is ruling that EGID had the authority to impose this agreement on Bremer, then it should reconsider that decision as a material question of fact exists pertaining to that issue.**

As found by this Court, "Wilson told Schlotthauer that Bremer would not get water until they agreed to build the extension, citing EGID's by-laws as the legal authority." (Opinion at 2) If EGID had the legal ability to force Bremer to construct the extension, or could have constructed it itself and given Bremer the bill, then it is of no consequence to Bremer that EGID threatened to withhold water.

However, limits exist on a regulatory body's ability to impose conditions to approve private landowners' uses of their property.

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.
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> *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 2317, 129 L. Ed. 2d 304 (1994).

EGID forced Bremer, under threat of not providing water, to agree to its demands. Some limit must exist on EGID's power to force such an agreement; otherwise, EGID could extract whatever it requested from any landowner anytime a landowner wanted to utilize EGID's system. In this case, in order for I.C. 43-330A to be read as Constitutional, some limit to EGID's ability to require an agreement pursuant to that statute must exist. The limit is this case is in the statute itself. The statute conveys that the system installed must be for "...the proper distribution of irrigation water." I.C.§ 43-330A (West).

In this case, a water distribution system already existed and conflicting evidence existed on summary judgment pertaining to whether that system provided proper distribution of water to Bremer's parcel. (R. at 145,¶11) This Court found that the system required of Bremer was necessary for fire flow purposes (Opinion at 11), but acknowledges that evidence was in the record that proved the existing system on Bremer's property was sufficient for fire flow purposes. "Bremer later submitted Bob Skelton's affidavit, which stated that Bremer's fire suppression system did not require an extension from Hayden Avenue." (Opinion at 4) This creates a question of fact and it was not proper for it to be resolved in EGID's favor on summary judgment.

CONCLUSION

The subject matter of this appeal is of great importance to private landowners. This Court should clarify its ruling regarding the steps a private landowner must take to preserve its rights to challenge an illegal condition of approval that has been imposed upon it.

If the ruling rests on EGID's statutory right to impose this agreement on Bremer, a material question of fact exists on that issue and summary judgment was not proper.

DATED this 21st day of January, 2014.

ARTHUR M. BISTLINE
Attorney for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2014, I served a true and correct copy of the following APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEAIRNG by the method indicated below, and addressed to the following:

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JENNIFER JENKINS