IN THE COURT OF APPEALS OF IOWA

No. 6-256 / 05-1533
Filed May 24, 2006

CITY OF CUMMING, IOWA,
Plaintiff-Appellant,

vs.

CHRISTOPHER R. SMITH and KELLY L. SMITH,
Defendant-Appellees.

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

The City of Cumming appeals the district court's ruling, which concluded the City lacked authority to require the Smiths remove two brick lampposts situated on a public right-of-way. **REVERSED AND REMANDED.**

James E. Nervig of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellant.

David A. Morse of Rosenberg, Stowers & Morse, Des Moines, for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

We must decide whether the City of Cumming has authority to remove two brick lampposts situated on a public right-of-way. The district court concluded the city lacked the authority to do so. We disagree.

I. Background Facts and Proceedings

Christopher and Kelly Smith built a home in Cumming, Iowa. On the public right-of-way adjacent to their driveway, they constructed two brick lampposts, one of which housed a mailbox. Each lamppost was approximately four feet high and two feet wide. After the structures were erected, a man identifying himself as the mayor of Cumming told Mr. Smith that the lampposts violated city ordinances. The city subsequently notified the Smiths that the city council would address the claimed violation at a public meeting. Following the meeting, the city council ordered the Smiths to remove the lampposts. The Smiths refused to comply with the order.

The City of Cumming subsequently sued for a declaration that the lampposts were a public nuisance and for an order directing the Smiths to immediately remove the structures. Following trial, the district court concluded that the lampposts were not a public nuisance and the Smiths would be permitted to retain them.[1] This appeal followed.

II. Standard of Review

The parties disagree on our standard of review, with the city contending it is for errors of law and the Smiths arguing it is de novo. A nuisance action may

[1] The district court ruling also contains a discussion of takings law. The City points out, and we agree, that there cannot be a taking on a public right-of-way.

be brought in law or in equity. *Woody v. Machin*, 380 N.W.2d 727, 731 (Iowa 1986). This case was tried in equity.[2] Therefore, our review is de novo.

III. Analysis

Iowa Code section 364.12(2) (2005) requires cities to "keep all public grounds, streets, . . . public ways . . . open, in repair, and free from nuisance." A "nuisance" includes "[t]he obstructing or encumbering by fences, buildings or otherwise the public roads, private ways, streets, alleys, commons, landing places, or burying grounds." Iowa Code § 657.2(5).

The City of Cumming municipal code defines nuisance in the same way.[3] The municipal code also declares that no portion of a public right-of-way may be used for any purpose that would obstruct the use or maintenance of the public right-of-way. Municipal Code of the City of Cumming, § 6-7.213.5.[4]

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[2] The district court admitted an exhibit subject to the objection, a hallmark of an equity case. *Wilker v. Wilker,* 630 N.W.2d 590, 597 (Iowa 2001).

[3] 3-1.0101.1 "Nuisance": shall mean whatever is injurious to health, indecent or offensive to the senses or an obstacle to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property. The following are declared to be nuisances:

* * *

E. Blocking Public and Private Ways. The obstructing or encumbering by fences, buildings or otherwise the public roads, private ways, streets, alleys, commons, landing places or burying grounds.

3-1.0102 NUISANCES PROHIBITED
The creation and maintenance of a nuisance is prohibited, and a nuisance, public or private, may be abated in the manner provided for in this Chapter or State law.

[4] 6-7.0213.5 Use of Public Right-of-way:
No portion of the public road, street, or alley right-of-way shall be used, or be occupied by an abutting use of land or structure for storage or display purposes, . . . or for any other purpose that would obstruct the use or maintenance of the public right-of-way.

There is no dispute that the lampposts were on a public right-of-way. There is also little, if any, dispute that the lampposts obstructed the public right-of-way. *See* Black's Law Dictionary 1107 (8th ed. 2004) (defining an obstruction as "something that impedes or hinders, as in a street, river, or design; an obstacle"). The dispute centers on whether the city was required to show a risk of accidents or danger to the public as a predicate to having the structures declared a nuisance. The Iowa supreme court has answered no to this question.

In *Lacy v. City of Oskaloosa*, 143 Iowa 704, 706, 121 N.W. 542, 543 (1909), business owners abutting a public square installed hitching posts and racks between the square and the street. The city ordered them removed and litigation ensued. *Lacy*, 143 Iowa at 707, 121 N.W. at 543. The Iowa supreme court noted that the legislature gave the city exclusive authority to keep streets open and free from nuisances, including authority to remove obstructions "which in any degree" detracted from, hindered, or prevented "its free use as a public way." *Id.* at 709, 121 N.W. at 544. The court concluded the city could order the hitching posts and racks removed. *Id.* The court emphasized that the obstruction

> need not necessarily be unclean or offensive to the senses and need not in fact prevent or interfere with public travel along the trodden or improved path. It is the right of the city to insist that the street shall be kept clear for public use and passage throughout its entire width.

Id. at 716, 121 N.W. at 546.

In *Incorporated Town of Lamoni v. Smith*, 217 Iowa 264, 265, 251 N.W. 706, 707 (1933), another set of Smiths placed a row of oil pumps between a curb and a sidewalk. The City of Lamoni demanded the immediate removal of the

pumps, asserting they were an obstruction and a nuisance. *Incorporated Town of Lamoni,* 217 Iowa at 265-66, 251 N.W. at 707. The Smiths argued that it was not enough for the city to prove an obstruction. *Id*. at 267, 251 N.W. at 708. In their view, the city also had to prove that "such obstruction is, in fact, a nuisance." *Id*. The Iowa supreme court rejected this argument, reasoning that precedent did not require a showing that the city was damaged by the obstruction. *Id*. at 267-68, 251 N.W. at 708.

The court reached a similar conclusion in *Midwest Inv. Co. v. City of Chariton*, 248 Iowa 407, 80 N.W.2d 906 (1957). In that case, a company sued the city to enjoin the removal of a private water hydrant installed in the street adjacent to its property. *Midwest Inv. Co.*, 248 Iowa at 409, 80 N.W.2d at 907. The court had no trouble concluding that the hydrant was an unlawful obstruction and a nuisance. *Id*. at 410, 80 N.W.2d at 907. The court stated "the limited extent of the obstruction is immaterial as affecting the right of the city to remove it." *Id*. at 410-11, 80 N.W.2d at 908.

The court reaffirmed this principle in *Town of Marne v. Goeken*, 259 Iowa 1375, 147 N.W.2d 218 (1966). There, the city brought an action to abate a nuisance caused by the encroachment of a garage on the street and alley. *Town of Marne*, 259 Iowa at 1377, 147 N.W.2d at 220. The garage owners argued, "where the encroachment causes little or no damage and the cost of removal is great defendants should not in equity be required to move the garage." *Id*. at 1383, 147 N.W.2d at 224. The court rejected this argument, noting that even where damage was "theoretical or at least minimal," cities were entitled to an unrestricted right of possession and control of their streets. *Id.*

Based on this precedent, we conclude the city had the authority to declare the lampposts a nuisance without a showing of harm or danger to the public. We find it unnecessary to address the city's remaining arguments in support of reversal or the Smiths' arguments in support of affirmance.

We reverse and remand for entry of an order consistent with this opinion.

REVERSED AND REMANDED.