

**IN THE COURT OF APPEALS OF IOWA**

No. 9-1048 / 09-0442  
Filed February 24, 2010

**JOHN W. BERDO, THE CARRIE W.  
BERDO TRUST, and BERDO FARMS,**  
Plaintiffs-Appellants,

**vs.**

**THE CITY OF WASHINGTON, IOWA,  
and WASHINGTON COUNTY, IOWA,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Washington County, Dan F. Morrison, Judge.

Plaintiffs John W. Berdo, the Carrie W. Berdo Trust, and Berdo Farms, Inc. appeal from the district court's denial of the motion to tax attorney/appraisal fees and costs incurred in their appeal to the district court from the compensation commission's award in a condemnation proceeding. **AFFIRMED.**

Charles Meardon and Anne E. Daniels of Meardon, Sueppel & Downer, P.L.C., Iowa City, for appellants.

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for appellees.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**POTTERFIELD, J.**

Plaintiffs John W. Berdo, the Carrie W. Berdo Trust, and Berdo Farms, Inc. appeal from the district court's denial of the motion to tax attorney/appraisal fees and costs incurred in their appeal to the district court from the compensation commission's award in a condemnation proceeding. Berdo has filed a motion for limited remand in this appeal. We deny the motion for limited remand and affirm the district court's denial of the motion to tax attorney/appraisal fees and costs sought pursuant to Iowa Code section 6B.34.<sup>1</sup>

**I. Background Facts & Proceedings.**

The City of Washington, Iowa (City), owns and operates an airport southeast of property owned by Berdo and rented to Berdo Farms, Inc. The City is seeking to acquire a portion of Berdo's parcel for a runway extension project, funding for which is partially provided by a grant from the Federal Aviation Administration.

On October 6, 2006, the City filed an application for condemnation.

On November 6, 2006, the application for condemnation was indexed with the Washington County Recorder.

On June 27, 2007, the Compensation Commission met, held a hearing, and made an award of \$600,000 to Berdo. No evidence was presented about the value of the tenant interest of Berdo Farms, Inc. and the commission did not assess damages for the tenant interest.

On July 10, 2007, Berdo and Berdo Farms filed a petition in district court appealing the condemnation award (EQEQ 004549).

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<sup>1</sup> All citations herein are to the 2007 Iowa Code.

On July 26, 2007, Berdo and Berdo Farms filed a petition for writ of certiorari in district court (EQEQ 004558).

On November 20, 2007, in the writ proceeding (EQEQ 004558), the district court concluded Berdo and Berdo Farms were entitled to judgment on the pleadings because the compensation commission had met outside the time authorized by statute for making an appraisal. See Iowa Code § 6B.3(3).<sup>2</sup> The court concluded “the violation of the statute renders the condemnation of the property at issue void.” The district court ruled:

[Berdo and Berdo Farms’] Motion for Judgment on the Pleadings is hereby GRANTED. [City’s] condemnation proceedings are terminated and all rights and interests of the [City] arising out of the application for condemnation are terminated and void.

On November 27, 2007, Berdo and Berdo Farms thereafter filed a “Motion to Enlarge Ruling Pursuant to IRCP 1.904” requesting the court to direct the City to abandon the condemnation proceedings as the condemnation acts as a slander of title. The City resisted, noting that it intended to proceed with

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<sup>2</sup> Iowa Code section 6B.3(3) sets out the procedure concerning an application for condemnation and provides in relevant part,

When indexed, the proceeding is considered pending so as to charge all persons not having an interest in the property with notice of its pendency, and while pending no interest can be acquired by the third parties in the property against the rights of the applicant. *If the appraisal of damages by the commission . . . is not made within one hundred twenty days of indexing, the proceedings instituted under this section are terminated and all rights and interests of the applicant arising out of the application for condemnation terminate.* The applicant may reinstitute a new condemnation proceeding at any time. The reinstated proceedings are entirely new proceedings and not a revival of the terminated proceeding.

(Emphasis added.)

condemnation in a new action, and plaintiffs' intent in filing the motion was to be able to invoke section 6B.34, which will be set forth below.

On April 4, 2008, in the condemnation appeal (EQEQ 004549), Berdo requested a taxation of costs to recover attorney/appraisal fees and costs incurred as a result of the City's failed condemnation. Berdo argued the City "abandoned" the condemnation proceedings within the meaning of Iowa Code section 6B.34, Iowa Administrative Code rule 761-111.107(1), 42 U.S.C. § 4654,<sup>3</sup> 49 Code of Federal Regulations 24.107,<sup>4</sup> and Airport Order 5100.37B.

On January 7, 2009, the district court overruled the motion for taxation of fees and costs, rejecting Berdo's argument that the City abandoned the condemnation for purposes of section 6B.34. The court noted that the City denied it abandoned the condemnation and had in fact reinstated condemnation as permitted by 6B.3(3). The court concluded:

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<sup>3</sup> 42 U.S.C. § 4654:

**(a) Judgment for owner or abandonment of proceedings**

The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

.....  
**(2)** the proceeding is abandoned by the United States.

<sup>4</sup> 49 C.F.R. § 24.107

**Certain litigation expenses.**

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

.....  
 (b) The condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement[.]

Following the dismissal of the condemnation proceedings the City decided not to appeal the ruling of this court and began new proceedings to condemn the Berdo property. The court can find no authority supporting Berdo's position that the City had to appeal the court's ruling to avoid a finding of abandonment of the proceedings. There have been changes in description and access to the property since the dismissed condemnation but the land being condemned remains the same, with minor changes, and the purpose of the condemnation remains the same.

. . . Since the court terminated the original condemnation it was not a voluntary dismissal or abandonment of the proceedings. . . . This court cannot find statutory authority or case authority to support an award of attorney fees in this case.

Berdo and Berdo Farms filed a motion to enlarge, seeking specific findings, as well as rulings on whether attorney fees were proper under federal law or federal and state administrative rule. The City resisted. On February 17, 2009, the district court again stated, "The City did not abandon the condemnation project."

Berdo and Berdo Farms now appeal.

## **II. Analysis.**

We begin our discussion in light of the following principles. "[T]he constitutional right to 'just compensation' does not extend to compensation for ancillary items such as attorney fees or litigation costs." *Iowa Dep't of Transp. v. Soward*, 650 N.W.2d 569, 573 (Iowa 2002). Moreover, the district court lacks inherent power to tax court costs or attorney fees. *City of Ottumwa v. Taylor*, 251 Iowa 618, 621, 102 N.W.2d 376, 378 (1960); *see also Soward*, 650 N.W.2d at 572 (discussing *Taylor* and concluding the "analysis in *Taylor*" and principles related to taxation of costs "are valid today"). Attorney fees may be taxable if provided by statute, but such statutes are "generally strictly construed as in derogation of common law." *Taylor*, 251 Iowa at 621, 102 N.W.2d at 378. We

therefore look to whether a statute authorizes the taxation of costs and attorney fees in these condemnation proceedings.

Costs and attorney fees may be awarded in condemnation proceedings pursuant to either Iowa Code sections 6B.33 or 6B.34. See *Atherton v. State Conservation Comm'n*, 203 N.W.2d 620, 622 (Iowa 1973) (noting difference between 6B.33 [formerly section 472.33] and 6B.34 [472.34]). Acknowledging that such provisions are strictly construed, we also note that when confronted with the task of determining the meaning of a statute:

The goal of statutory construction is to determine legislative intent. *We determine legislative intent from the words chosen* by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge, or otherwise change the meaning of a statute.

*City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 248 (Iowa 2008) (citation omitted) (emphasis added).

The motion of Berdo and Berdo Farms for taxation of fees and costs rests upon section 6B.34, which provides:

Should the applicant decline, at any time after an appeal is taken as provided in section 6B.18 [appeal from compensation commission], to take the property and pay the damages awarded, the applicant shall pay, in addition to the costs and damages actually suffered by the landowner, reasonable attorney fees to be taxed by the court.

Berdo and Berdo Farms contend support for their attorney fee claim lies within case law interpreting abandonment. Our supreme court has recognized that, under section 6B.34, a condemner “may abandon the condemnation at any time,” and, if it does so, the condemnee is entitled to costs. See *Virginia Manor*,

*Inc. v. City of Sioux City*, 261 N.W.2d 510, 515 (Iowa 1978) (holding that once the condemner goes into possession, and in the absence of a good faith abandonment of the appeal, there arises a duty to make the statutory additional deposit). The court has stated the abandonment contemplated by the statute “is an abandonment in good faith of the entire proceedings and of the land for the purposes for which it was sought.” *Wheatley v. City of Fairfield*, 221 Iowa 66, 80, 264 N.W. 906, 913 (1936) (quoting *Robertson v. Hartenbower*, 120 Iowa 410, 412, 94 N.W. 857, 858 (1903)). Such an abandonment ordinarily includes two elements: first, an intention to abandon, and second, some external act to effectuate such intention. *Virginia Manor*, 261 N.W.2d at 515. The record here contradicts Berdo’s claim that the City has abandoned its efforts to condemn this land for purposes of the airport.

The motion for limited remand focuses on Berdo’s claim that there is newly discovered evidence from which the court could conclude the City voluntarily chose not to appeal—and therefore abandoned—the original condemnation action because reinstating the condemnation proceedings provided the City advantages with respect to the appraisal of the property at issue. Even if we accept the contention that the letters to which Berdo refers are newly discovered evidence, we conclude it is of no assistance to them. A plain reading of the statute excludes an award of fees and costs in this situation.

Here, the City did not “decline” to take the property at issue. The proceedings by which it might have taken the property were found to be void, a finding based on the expiration of the statutory time limit which is concededly obvious. Absent valid condemnation proceedings, the City has no right or ability

to take the plaintiffs' property. The City could not decline to do that which it had no right to do.<sup>5</sup> Consequently, the City's decision not to appeal is not an abandonment, and section 6B.34 does not come into play.

We therefore deny the motion for limited remand. We agree with the district court that there is no abandonment, express or implied, which would authorize an award of fees and costs. We affirm.

**AFFIRMED.**

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<sup>5</sup> Plaintiffs cite *Alta Bates Hospital v. Mertle*, 31 Cal. App. 3d 349, 353 (Cal. Ct. App. 1973) in support. In that case, the court held that the failure of the hospital to appeal the dismissal judgment was held as an implied, voluntary abandonment because the condemnor had a duty to prosecute the condemnation action to its completion. *But see Sorensen v. Lower Niobrara Res. Dist.*, 340 N.W.2d 164, 167 (Neb. 1983) (holding that the failure to appeal a dismissal for failure to comply with statutory grounds did not constitute an abandonment). Plaintiffs here candidly admit that they have found no Iowa authority that imposes such a duty upon the City.