

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000348-MR  
AND  
NO. 2000-CA-000575-MR

JAMES CALVIN BARNETT AND  
JANICE K. BARNETT

APPELLANTS

v. APPEALS FROM CALLOWAY CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 99-CI-00041

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS, AND  
COMMONWEALTH OF KENTUCKY,  
NATURAL RESOURCES AND ENVIRONMENTAL  
PROTECTION CABINET

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: DYCHE, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: This is a consolidated appeal by James Calvin Barnett and Janice Barnett from the findings of fact, conclusions of law and judgment entered on January 14, 2000 (Appeal 2000-CA-000348-MR), and an interlocutory order and judgment entered on February 15, 2000 (Appeal 2000-CA-000575-MR), by the Calloway Circuit Court in a condemnation action filed by the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways. The Barnetts assert that the Transportation Cabinet acted in bad

faith and abused its discretion under KRS<sup>1</sup> 177.081 in deciding to build a four-lane roadway through their hog farm. The trial court ruled that the Transportation Cabinet had the right and authority to condemn the property and that it did not abuse its discretion or act in bad faith in making the proposed roadway alignment. Having concluded that the trial court's findings are not clearly erroneous, we affirm.

For a number of years prior to the filing of the petition seeking condemnation, the Barnetts have owned a farm now totaling approximately 276 acres in rural Calloway County. Since 1978, the Barnetts have operated the property as a confined swine farm, which now consists of four swine barns and two large sewage lagoons holding approximately 13 million gallons of swine waste. In the fall of 1993, the Barnetts became aware of the Transportation Cabinet's interest in locating a four-lane highway through their farm. The Barnetts took various steps in opposition to the location of the highway at that time, including having their attorney send a letter to the Secretary of the Transportation Cabinet. The Secretary responded that the Barnetts' concerns regarding the roadway's impact on their swine operation would be considered before the final alignment of the highway was made.

The Transportation Cabinet ultimately decided to locate the highway through the Barnetts' farm, resulting in the farm being divided in half. The highway was routed to within approximately 150 to 200 feet of the Barnetts' two swine sewage

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<sup>1</sup>Kentucky Revised Statutes.

lagoons. The placement of the highway bisected the farm; and upon completion of the highway, the Barnetts would have to cross the highway to apply the sewage to the one-half of the farm that will be located across the highway.

On January 29, 1999, the Transportation Cabinet filed a petition pursuant to KRS 416.540 - 416.670 and KRS 177.081 in Calloway Circuit Court seeking to condemn approximately 18.6 acres of the Barnetts' hog farm along the proposed highway route. In addition to the Barnetts, the petition named as a defendant Jackson Purchase Agricultural Credit Association, which holds two liens on the subject property. On February 5, 1999, the Barnetts filed an answer objecting to the condemnation. Following a motion by the Barnetts, on May 25, 1999, the trial court entered an order naming the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, Department for Environmental Protection as a party on the basis that the highway might impact permits issued by that agency in conjunction with the Barnetts' hog farm operations.

A bench trial was held on October 18 and October 29, 1999. On January 14, 2000, the trial court entered its findings of fact, conclusions of law and judgment rejecting the Barnetts' objection to the condemnation and ordering that the Transportation Cabinet had the right to condemn the property. On February 4, 2000, the Barnetts filed their notice of appeal of the January 14, 2000, order in Case No. 2000-CA-000348-MR. On February 15, 2000, the trial court entered an interlocutory order and judgment pursuant to KRS 416.610 requiring the Barnetts to

vacate and deliver possession of the condemned property to the Transportation Cabinet. On March 7, 2000, the Barnetts filed their notice of appeal in Case No. 2000-CA-000575-MR. On April 28, 2000, this Court entered an order granting the Barnetts' motion to consolidate Case No. 2000-CA-000348-MR and Case No. 2000-CA-000575-MR.

The Barnetts contend that the trial court erred in determining that the Transportation Cabinet did not act in bad faith or abuse its discretion in choosing to locate the proposed roadway through their property. We disagree, and hence, affirm its judgments.

KRS 177.081(1) grants the Transportation Cabinet broad discretion to determine necessity for acquisition of land to build highways.<sup>2</sup> The statute provides in pertinent part:

The official order [designating the route or location of a highway] of the Department of Highways shall be conclusive of the public use of the condemned property and the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion.

With respect to the statute's public interest prong, it is clear that the official order authorizing the taking of the property is to be considered conclusive on the element of public use. This determination cannot be overturned unless the discretion that was exercised in making the decision was so grossly inadequate as to constitute an arbitrary or capricious act and to allow the decision to stand would amount to a

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<sup>2</sup>Commonwealth, Transportation Cabinet, Dept. of Highways v. Taub, Ky., 766 S.W.2d 49, 54 (1988).

violation of Section 2 of the Kentucky Constitution.<sup>3</sup> The public use in the case before us is not in dispute.

Once public use has been established, the Transportation Cabinet must show the necessity of taking the property. Its decision to condemn will not be restrained absent fraud, bad faith or abuse of discretion.<sup>4</sup> Necessity is established through official orders of the Transportation Cabinet, as in this case.<sup>5</sup> The circuit court has jurisdiction to decide whether the determination of necessity by the Transportation Cabinet qualifies as fraud, bad faith or abuse of discretion. The burden of showing a lack of necessity falls to the landowner opposing the taking.<sup>6</sup> As long as the circuit court's determination that the Transportation Cabinet's exercise of its power to condemn meets the standards of KRS 177.081(1) and this determination is supported by substantial evidence, it will not be disturbed.<sup>7</sup>

In their brief, the Bernetts list a variety of factors in support of their contention that the Transportation Cabinet's

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<sup>3</sup>"Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2. Commonwealth, Dept. of Highways v. Vandertoll, Ky., 388 S.W.2d 358, 360 (1964).

<sup>4</sup>KRS 177.081(1).

<sup>5</sup>Commonwealth, Dept. of Highways v. Salmon Corp., Ky., 489 S.W.2d 32, 34 (1972).

<sup>6</sup>Decker v. City of Somerset, Ky. App., 838 S.W.2d 417, 422 (1992).

<sup>7</sup>Taub, supra at 54; Commonwealth, Dept. of Highways v. Burchett, Ky., 367 S.W.2d 262, 264 (1963).

location of the highway was in bad faith and/or an abuse of discretion, including: despite the Transportation Cabinet Secretary's assurance that the impact of the highway on their hog farm operations would be considered, no such consideration was undertaken; representatives of the Transportation Cabinet did not discuss the impact of the roadway with the Barnetts before selecting the site; no other studies were done concerning the placement of the roadway within 150 to 200 feet of the Barnetts' 13-million gallon swine sewage lagoons; no soil stability analysis was performed to determine any dangers posed by the highway to the integrity of the lagoons; the decision to locate the highway was made without the knowledge of the project engineer regarding various statistical data relating to the hog operations; and the Transportation Cabinet failed to provide reliable evidence regarding the disadvantages of alternative routes, including the number of home relocations along the alternative routes and the costs associated with the additional crossings of a natural gas pipeline which would be required along the alternative routes.

Despite the Barnetts' claim of alleged deficiencies in the Transportation Cabinet's location of the highway route in this case, we are not persuaded that they have met their burden of showing that the Transportation Cabinet abused its discretion or acted in bad faith. To the contrary, in conjunction with the placement of the road, the Cabinet had a consultant prepare a Route Scoping Study assessing alternative routes to extend the highway from Cadiz to Mayfield. The Study evaluated six

alternatives and the economic, safety, and environmental concerns related to each alternative. The study recommended the alternative that would bring the highway in the direction of the Barnetts' farm. In choosing the final route, the Transportation Cabinet's design consultant preferred the route selected because it crossed a nearby gas transmission line only once; would draw the most traffic from KY Highway 94 and KY Highway 121; would relocate fewer families and fewer businesses; and would cost Kentucky taxpayers less than the next best of the alternatives considered in the study.

With regard to the sewage lagoons, the Transportation Cabinet presented the testimony from three professional engineers, who concluded that the highway would not pose a threat to the lagoons' structural integrity. The Transportation Cabinet also presented testimony that it was aware of the existence of the hog farm and the lagoons – and in that sense considered them – but that considerations other than the potential impact on the Barnetts' farm were determinative of the alignment of the highway. The Transportation Cabinet also presented testimony that sufficient geo-technical and stability analysis was undertaken to determine that the highway would not negatively impact the lagoons.

We cannot say that the trial court's findings regarding the condemnation, supported as they are by substantial evidence, are clearly erroneous. The judgments of the Calloway Circuit Court allowing the condemnation of the Barnetts' property to proceed are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael M. Pitman  
Murray, KY

BRIEF FOR APPELLEE,  
TRANSPORTATION CABINET:

Wanda Ballard Repasky  
Prospect, KY

BRIEF FOR APPELLEE,  
ENVIRONMENTAL PROTECTION  
CABINET:

No brief filed.