

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000276-MR

BIG SANDY PIKEVILLE
LIMITED PARTNERSHIP AND
SEI DEVELOPMENT CORPORATION

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NOS. 99-CI-01173 & 99-CI-01174

CITY OF PIKEVILLE

APPELLEE

AND: 2001-CA-000284-MR

LOWE'S HOME CENTER, INC.

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 99-CI-01174

CITY OF PIKEVILLE

APPELLEE

AND: NO. 2001-CA-000333-MR

TEACHER'S RETIREMENT SYSTEM
FOR THE STATE OF KENTUCKY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 99-CI-01174

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; BARBER AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Big Sandy/Pikeville Limited Partnership (Big Sandy) and SEI and Development Corporation (SEI Development), Teacher's Retirement System for the State of Kentucky (Teacher's Retirement), and Lowe's Home Center, Inc. (Lowe's) (collectively appellants) bring these separate appeals from the same amended interlocutory order and judgment entered January 25, 2001, by the Pike Circuit Court in a condemnation proceeding. The separate appeals have been combined by prior order of this Court. We affirm.

On August 11, 1999, the City of Pikeville filed a verified petition pursuant to Kentucky Revised Statutes (KRS) 416.540-416.670 in which it sought to condemn the land and/or materials (surface only) of appellants and further sought the right to take possession of the land owned by the appellants for the purpose of constructing of roadway.¹ Specifically, paragraphs 5, 6 and 7 of the petition stated:

5. The plaintiff states that this action is instituted pursuant to Kentucky Revised Statutes 416.540-416.670.

¹Firststar Bank, N.A., was made a party defendant to the action but did not file an answer or otherwise participate in the action before the circuit court. Firststar is also not a named party to this appeal.

6. That the City of Pikeville on the 23rd day of November, 1998, did adopt a resolution or order authorizing and directing the design and construction of a permanent public street leading from Cassidy Boulevard to Thompson Road as evidenced by the plans and specifications on file with the Clerk of the City of Pikeville, all of which is for the public interest, necessity and convenience and further authorizing the acquisition of the necessary real property to construct and maintain the permanent public street by agreement or by virtue of the Eminent Domain Act of the Commonwealth of Kentucky.

7. That it is necessary for the plaintiff to acquire the land and/or materials (surface only) of the defendants herein, as same is more particularly described hereinafter, all of which is for the public purpose of construction and maintaining the aforesaid street.

Following a report from the three commissioners appointed to appraise the tracts of land in question and answer filed and memoranda of law filed by the parties thereto, the Pike Circuit Court entered an amended interlocutory order and judgment on January 25, 2001, granting the city of Pikeville the right to take possession of the land and materials of the appellants upon payment of the amount previously awarded by the commissioners. The trial court made the following findings concerning the City of Pikeville's right to condemn the property:

....

2. KRS 82.082 authorizes a city to use the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky. Private property can be taken under the right of eminent domain by a city for a municipal use or purpose. Miller v. City of Georgetown, 301 Ky. 241, 191 S.W.2d 403 (1946). Streets or roadways for the public use are within that requirement for "municipal use or purpose." Sturgill v. Co.,

Dept. Of Highways, Ky., 384 S.W.2d 98 (1964);
Com., Dept. Of Highways v. Burchett, Ky., 367
S.W.2d 262 (1963).

3. The property sought to be condemned herein is for the design, construction, and maintenance of a public street leading from one public street, Cassady Boulevard, to another public street, Thompson Road, for which the public access will in no way be restricted. The Court has viewed the property to be condemned and notes much congestion in the area. Therefore, the Court finds that the taking is a necessity and for a public purpose.

4. The Plaintiff, under the provisions of KRS 416.540 to KRS 416.680, is entitled to condemn the land and materials hereinafter described.

5. The Defendants have alleged that actions the Plaintiff took during city commission meetings to condemn the properties was in violation of the Open Meetings Act, KRS 61.800, et seq.

6. CR 8.03 states, "In pleading to a proceeding pleading [in this case, a Petition], a party shall set forth affirmatively...fraud, illegality, ..., and any other matter constituting an avoidance or affirmative defense." Nowhere in any of the Defendants' Answers do they allege fraud or illegality concerning the city commission meetings.

7. KRS 416.650 states, "All proceedings under KRS 416.550 to 416.670 shall be governed by the provisions of the Rules of Civil Procedure except where the provisions of KRS 416.550 to 416.670 specifically or by necessary implication provide otherwise."

8. KRS 416.550 to 416.670 do not specifically or by necessary implication otherwise provide for all affirmative defenses to be preserved.

9. In eminent domain proceedings, a court will deny the right to take only where there has been gross abuse or manifest fraud. Commonwealth v. Cooksey, Ky. App., 948 S.W.2d

122 (1997). The Defendants have failed to carry their burden of proof in this regard.

10. The reports of the Commissioners entered in these consolidated actions conform to the provisions of KRS 416.580.

It is from these findings and the amended interlocutory order entered that appellants appeal.

On appeal, appellants contend the trial court erred in that the taking of their private property was for a private purpose and not a public purpose or necessity and that the city's right to condemn is defeated due to the presence of fraud, bad faith and illegal conduct on behalf of the city in violation of KRS 61.800, the Open Meeting Act. We have thoroughly reviewed the facts, the pleadings, the legal arguments and the trial court's findings and judgment and found no error which would mandate reversal, thus we affirm.

Appellants first argue that the trial court erred in allowing the city to condemn the appellants' property interests because Kentucky law does not permit the taking of private property to be used for a private purpose, especially where there is no public purpose of interest. See generally, Prestonsburg Area Neighborhood Association v. Abransom, Ky. App., 797 S.W.2d 708 (1990); City of Bowling Green v. Cooksey, Ky. App., 858 S.W.2d 190 (1992). Appellants argue the action taken by the city benefits only a private developer who has subsequently entered into a development agreement relative to the development of property adjacent to the new roadway. Appellants cite several cases which explicitly condemns the use of eminent domain for private use, but more emphatically express concerns over the

development agreement between the city and the potential developer. The city responds citing several cases that condones the taking of private property if for a municipal use or purpose. In this case, the city adopted a resolution on November 23, 1998, relative to design and construction of a permanent public street which the city claims is for the public interest, necessity and convenience. The circuit court determined that the taking was a necessity and for a public purpose. As such, the court held, under the provisions of KRS 416.549 to KRS 416.680, the city properly exercised its power of eminent domain in this instance. The trial court's findings of fact, conclusions of law and judgment thoroughly discussed the evidence presented and applicable law. We must observe proper deference to the role of the trial court as factfinder. City of Bowling Green v. Cooksey, Ky. App., 757 S.W.2d 190, 193 (1992) citing Commonwealth, Transportation Cabinet, Department of Highways v. Taub, Ky., 766 S.W.2d 49 (1989) and CR 52.01. Because there is credible, competent and substantial evidence that the acquisition of the land and material in question is necessary for an intended public purpose, this Court is unable to conclude that the trial court's findings of fact were clearly erroneous. Thus, we must affirm the trial court in this matter.

The next issue raised by Appellants is that the city's actions constituted fraud, bad faith or an abuse of discretion. In this vain Appellants contend the city violated the open meetings law, used a false or misleading traffic study to justify the taking and violated ethical duties in that council members

and staff had conflicts of interest which affected the final decision in this matter. We have thoroughly reviewed these allegations and find no merit as to these arguments. The traffic study indicated that the traffic flow would improve and relieve congestion on existing roadways. Despite appellants' objections to who was going to develop the adjacent property and in what manner it would be developed, the property was prime developmental property and a new connector road would be necessary for both existing land owners and increased traffic resulting from the future development. Also, the meetings in question were open to the public and despite appellants' arguments to the contrary, the issues discussed in executive (closed) session met the statutory requirements set forth in KRS 61.810. As to allegations of conflicts of interest, we find no error of such magnitude as to require reversal. While we express concern over the role of the city engineer (Mr. Sykes) in providing professional services to the developer as well as the city, we do not believe his conduct reaches the level sufficient to require reversal.

While appellants have made several allegations against city officials, the developer, the future development and the condemnation process, the record supports the decision of the Pike Circuit Court that the City of Pikeville properly enacted a regulation to initiate the condemnation of the property in question and proceeded legally to effectuate the condemnation of appellants' property. As such, the order and judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT, BIG SANDY/PIKEVILLE
LIMITED PARTNERSHIP:

Michael Lucas
Pikeville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLANT, LOWE'S HOME CENTER:

Bernard Pafunda
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BRIEF AND ORAL ARGUMENT FOR
APPELLANT, TEACHERS'
RETIREMENT SYSTEM FOR THE
STATE OF KENTUCKY:

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BRIEF AND ORAL ARGUMENT FOR
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Russell H. Davis, Jr.
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