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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000499-MR

NORMAN TAYLOR CRAIN; AND
MONA GAIL CRAIN — APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 14-CI-01242

HARDIN COUNTY WATER DISTRICT NO. 2;
AND PURCHASE OF AGRICULTURAL
CONSERVATION EASEMENT — APPELLEES

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Norman and Mona Crain (collectively, the Crains) appeal from an interlocutory judgment of the Hardin Circuit Court finding that the Hardin County Water District No. 2 (the District) is authorized to take possession of an

easement across their property. The Crains argue that the condemnation is barred because the District failed to negotiate in good faith prior to bringing the petition, and because the taking is prohibited based on an agricultural conservation easement which they previously conveyed to the Commonwealth. The trial court's finding that the District negotiated in good faith was supported by substantial evidence and will not be disturbed on appeal. Furthermore, the District's proposed use of the easement is not prohibited under either the terms of the agricultural conservation easement or the prior public use doctrine. Hence, we affirm.

The facts of this appeal are not in dispute. The Crains own a 270-acre farm in an area situated to the north of Glendale in Hardin County. The Crain family has maintained this farm for generations. In 2004, the Crains conveyed an agricultural conservation easement to the Purchase of Agricultural Conservation Easement (PACE) Corporation, which is administratively part of the Kentucky Department of Agriculture. The easement committed the Crains and their successors to maintain the farm for agricultural, forest, or conservation purposes.

Glendale is an unincorporated area with a population of fewer than two thousand residents. The proximity of the CSX railroad line and a nearby interchange with Interstate 65 resulted in the creation of a property known as the Glendale Mega Site (the Mega Site), a parcel of more than 1,500 acres located to the southeast of Glendale. The Mega Site has been set aside for future industrial development. Since neither Glendale nor the Mega Site has a sewer system, the District decided to proceed with the Nolin River Watershed Wastewater Project.

The plan involves gravity and forced main lines, with eventual connection to an existing system maintained by the City of Elizabethtown.

The area of the project involved in this dispute is a forced line segment of the sewer project along the CSX railroad line to the north of Glendale. On the east side of the railroad is a farm property owned by a Mr. Wheeler. The Crains' farm is located on the west side. Engineers rejected the use of the railroad property itself due to the challenges presented by placing a line within that property. The Wheeler property also presented engineering difficulties, and Wheeler asked for more money than the District was willing to pay.

Consequently, the District decided to proceed with plans for the sewer line on the Crains' side of the railroad line. In June 2013, a representative of the District, Jeff Gaddie, had a discussion with Norman Crain about the line. He prepared a list of conditions, which included a ten-year renewable lease at a rent of $10 per linear foot. The District agreed to most of the Crains' conditions, but it counteroffered to pay $2 per linear foot for an easement, for a total payment of $8,000. The District based this counteroffer on a policy used by another local water district. The District's letter concluded with the following language, "I hope that we can reach a mutually beneficial agreement that will result in the advancement of this very important project. Please feel free to contact me or any Water District staff member with any questions you may have."

The Crains did not formally respond to the counteroffer, but further negotiations followed. In light of the agricultural easement, the District agreed to

remove a planned pump station off the Crains' property. The District also agreed not to place any air release valves or any above-ground facilities on the Crain property. On March 24, 2014, and again on April 2, 2014, the District's attorney, Damon Talley, met with Norman Crain. At the first of these meetings, Crain agreed to have the District's appraiser perform an appraisal. Furthermore, the two agreed that a specific survey would be conducted to identify the areas needed for the sewer line.

At the second meeting, Crain made three alternative proposals. The first was to stay off of the property entirely. The second was to use only a portion of his property. Under this proposal, Crain stated that he would accept a payment of $2 per linear foot. And in his third alternative, Crain agreed to accept a payment of $12 per linear foot for the entire area sought by the District. Upon review, the District concluded that it would require the entire area. In a letter dated May 21, 2014, Talley renewed the District's offer of $2 per linear foot. However, Talley indicated that the District was willing to consider another counterproposal. In addition, Talley asked Crain if he would accept a payment of $10,000 rather than the $8,000 set out in the previous offer. Crain indicated that he would not accept that amount.

By letter dated June 15, 2014, Crain sent an estimate for the cost of fencing off the easement. The District immediately responded that it was willing to pay the expense of $12,000 for the fencing, bringing the total amount to $20,000. However, the parties agreed that the fencing was a separate issue from

the easement compensation. Nevertheless, the Crains refused to accept the District's offer.

The appraisal performed pursuant to KRS[1] 416.580 resulted in a valuation in the amount of $46,927 for the easements, both permanent and temporary. However, neither party has agreed with this amount. Consequently, on July 21, 2014, the District brought this petition seeking to obtain the easements through a condemnation action pursuant to KRS 416.550 – 416.670. In addition to naming the Crains, the District also named the PACE Corporation, as owner of the agricultural conservation easement. PACE did not challenge the District's right to take, but stated that any easement granted to the District would be secondary to its easement.

The Crains, on the other hand, challenged the District's right to take. In particular, they argued that the District had failed to negotiate in good faith prior to bringing the condemnation petition. The Crains also contended that the agricultural conservation easement precluded the District from condemning any portion of the property for non-agricultural purposes. The trial court conducted a hearing on these issues on November 24, 2014, at which the testimony of several witnesses was presented and multiple exhibits were filed. The parties also filed post-hearing briefs on the issues.

[1] Kentucky Revised Statutes.

On February 6, 2015, the trial court issued findings of fact, conclusions of law and an order concluding that the District acted in good faith during its negotiations with the Crains. The trial court further found that the agricultural conservation easement did not preclude a taking by eminent domain, although the District's easement would be secondary to the interest held by the PACE Corporation. However, the PACE Corporation has not objected to the proposed easement in this case. The trial court noted that the United States Department of Agriculture (USDA) has a right to enforce the easement if PACE fails to do so. But the trial court also found that the Crains do not have standing to assert that position on behalf of the federal government. Nevertheless, the trial court directed the District to serve a copy of the United States Secretary of Agriculture in order to permit the USDA to intervene in this action if it desired.

Following that service, the USDA filed a response advising the trial court that it did not intend to exercise its contingent right to enforce the easement in this matter. The USDA also advised the court that it was not asserting any position on the condemnation petition, or any claim to the condemnation proceeds. Based on this response, the trial court entered an interlocutory judgment on March 13, 2015, finding that the District is entitled to take possession of the easement. The Crains exercised their right to appeal from this judgment pursuant to *Ratliff v. Caldwell County*, 617 S.W.2d 36, 39 (Ky. 1981).

As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. CR[2] 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). However, the interpretation of the scope of the conservation easement is an issue of law, which we review *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

The Crains first argue that the trial court erred in finding that the District negotiated in good faith prior to bringing the condemnation petition. As the trial court recognized, Kentucky courts have also imposed this duty on the condemnor in addition to the constitutional and statutory requirements for eminent domain. *God's Ctr. Found., Inc. v. Lexington Fayette Urban Cty. Gov't*, 125 S.W.3d 295, 300 (Ky. App. 2002). A condemnor's failure to negotiate in good faith may serve as a basis for dismissal of the condemnation action. *Eaton Asphalt Paving Co., Inc. v. CSX Transporation, Inc.*, 8 S.W.3d 878, 883 (Ky. App. 1999).

The Crains note that the District did not independently research the value of the easement. By its own admission, the District relied on the Hardin

[2] Kentucky Rules of Civil Procedure.

County Water District's policy of paying $2 per linear foot for the easement sought. The Crains also point out that the District never wavered from its initial offer based on this calculation, even though the width of the easements sought increased. The Crains also complain that the District refused to consider alternative routes which would not have required the easement to pass over their property. Based upon this conduct, the Crains contend that the District failed to demonstrate that it negotiated in good faith.

However, the inquiry in such cases is whether the condemnor made a reasonable effort in good faith to acquire the land by private sale at a reasonable price. *Usher & Gardner, Inc. v. Mayfield Indep. Bd. of Ed.*, 461 S.W.2d 560, 562 (Ky. 1970). A single take-it-or-leave-it offer of a manifestly inadequate amount may be evidence showing a failure to make a reasonable effort to acquire the land by contract of private sale. *Id.* at 562-63. On the other hand, the condemning authority is not required to haggle in order to satisfy its obligation to demonstrate good faith in negotiating the purchase of property. *Coke v. Commonwealth, Dep't. of Finance*, 502 S.W.2d 57 (Ky. 1973). Furthermore, specific details regarding the design, problems of necessity, convenience to public, and saving of expense are left to the sound discretion of the condemning authority. *Sturgill v. Commonwealth, Dep't. of Highways*, 384 S.W.2d 89, 91 (Ky. 1964).

As the trial court found, the District's lack of experience in negotiating the purchase of easements demonstrates neither bad faith nor the lack of good faith. The Crains also argue that the District could not have made a good-

faith offer without first obtaining an appraisal of the property. However, there is no statutory requirement that a condemnor obtain an appraisal prior to bringing the condemnation petition. *See Milam v. Viking Energy Holdings, LLC*, 370 S.W.3d 530, 536 (Ky. App. 2012). *See also Vincent v. City of Powderly*, No. 2002-CA-001315-MR, 2003 WL 22025850, at *1 (Ky. App. 2003).

Moreover, the trial court specifically found that the District made a good-faith effort to negotiate with the Crains. Although the District maintained its offer of $2 per linear foot, the District repeatedly asked the Crains to make a counteroffer. The District engaged the Crains in negotiations for nearly a year over these matters. The District also agreed to remove any above-ground facilities from the Crain property and indicated a willingness to pay for fencing the easement apart from the compensation for the easement itself. Finally, the trial court found that the District set forth sound reasons for its decision to locate the easement on the Crains' side of the railroad line. Under the circumstances, we agree with the trial court that the District did not act in bad faith during its negotiations to purchase the easement.

The Crains next argue that the agricultural conservation easement precludes any taking for a non-agricultural purpose. An agricultural conservation easement is "an interest in land, less than fee simple, which represents the right to restrict or prevent the development or improvement of the land for purposes other than agricultural production." KRS 262.900(1)(a). Under the provisions of KRS 262.900 *et seq.*, the Commonwealth is authorized to purchase such easements,

KRS 262.904, and the PACE Corporation was established to administer and hold title to the easements. KRS 262.906. The PACE Corporation is an independent, municipal corporation attached to the Kentucky Department of Agriculture for administrative purposes. KRS 262.906(1). Since the PACE Corporation receives funds under the Conservation Security and Farm Lands Protection Program, the

USDA has a contingent right to enforce the easement if the PACE Corporation fails to do so. 16 U.S.C.[3] § 3838c.

The Crains note that KRS 262.910(2)(d) prohibits the Commonwealth from locating "landfills, sewage treatment plants, or other public service facilities that are not compatible with or complimentary to agricultural production on restricted lands." However, the Commonwealth is permitted to grant rights of way through restricted land "for the installation of, transportation of, or use of, lines for water, sewage, electric, telephone, gas, oil or oil products…." KRS 262.910(4)(e). The proposed use of the easement for a sewer line is clearly permitted under the terms of the statute.

In the alternative, the Crains argue that the condemnation is prohibited by the prior public use doctrine. The doctrine provides that land devoted to a public use may not be taken for another public use under the power of eminent domain. *Kipling v. City of White Plains*, 80 S.W.3d 776 (Ky. App. 2001). The Crains contend that, when they conveyed the agricultural conservation easement to

[3] United States Code.

the PACE Corporation, they turned over an interest in the property to the Commonwealth for a public use. Since that interest is dedicated to a prior public use, the Crains argue that the District is precluded from condemning an interest for a different public use.

We disagree. *Kipling* involved property subject to an agricultural conservation district rather than the agricultural conservation easement at issue in this case. But the agricultural conservation district also served to protect agricultural land from development. The Kiplings, like the Crains in this case, argued that once an agricultural district has been created, the land within it is no longer mere private property, but land which has been set aside for a public purpose. This Court disagreed, holding,

> There is little doubt that the public does benefit when agricultural districts are created because they contribute to "the production of food and other agricultural products." KRS 262.850(2). However, for purposes of condemnation and eminent domain, the fact that the public receives some sort of benefit from a certain use of land does not mean that the land is being used for a public purpose. *See City of Owensboro v. McCormick*, Ky., 581 S.W.2d 3 (1979) (holding that public benefit is not the equivalent of public use).
>
> The Kiplings chose to have their property declared an agricultural district. In doing so, they did not hold their land open to the public for a public use, nor did they turn it over to the state for a public use. Thus, the doctrine of prior public use does not apply.

Id. at 784-85.

The Crains contend that *Kipling* is distinguishable because they conveyed an easement to the PACE Corporation. Unlike an agricultural

conservation district, an easement is a privilege or an interest in land upon the dominant tenement to enjoy a right to enter the servient tenement. *Sawyers v. Beller*, 384 S.W.3d 107, 111 (Ky. 2012). Since the Commonwealth, through the PACE Corporation, already owns an interest in their property, they assert that this interest constitutes a dedication to a prior public use.

However, the focus in *Kipling* was not on the nature of the restriction upon or interest in the property, but on the distinction between a "public purpose" and a "public use." Under the terms of the agricultural conservation easement, neither the Commonwealth nor the public is granted a right to come onto the Crains' property. Rather, the Commonwealth simply obtained the right to restrict certain future development of the property. While this is clearly a public purpose, we agree with the trial court that it does not constitute a prior public use of the property. Therefore, the trial court did not err in allowing the District's condemnation petition to proceed.

Accordingly, the interlocutory judgment of the Hardin Circuit Court is affirmed, and this matter is remanded for additional proceedings under KRS 416.440 *et seq.* regarding the Crains' compensation for the easement.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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