

RENDERED: SEPTEMBER 15, 2017; 10:00 A.M.  
TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2016-CA-000187-MR

JUSTIN T. MOORE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL JR., JUDGE  
ACTION NO. 15-CI-03477

LEXINGTON-FAYETTE URBAN COUNTY  
GOVERNMENT; COMMUNITY TRUST BANK,  
F/K/A HERITAGE COMMUNITY BANK;  
CENTRAL BANK & TRUST CO.; AND FIRST  
SECURITY BANK, INC.

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, DIXON, AND NICKELL, JUDGES.

DIXON, JUDGE: Appellant, Justin T. Moore, appeals from an interlocutory judgment of the Fayette Circuit Court ruling that Appellee, the Lexington-Fayette Urban County Government (“LFUCG”), has the right to condemn a portion of his property, creating a permanent easement for the construction of a large box culvert

and drainage system. For the reasons set forth herein, we reverse the trial court's judgment and remand for further proceedings.

Moore owns property located at 1250 Deer Haven Lane in Fayette County, Kentucky. Running along the western boundary of his property is a section of Polo Club Boulevard that terminates before it reaches Deer Haven Lane, which is located on the northern boundary of Moore's property. LFUCG's public improvement project ("Project") will extend Polo Club Boulevard to connect to another portion of the Boulevard so that it will run all the way from Winchester Road to Todds Road. As planned by LFUCG, the Project requires construction under the new portion of Polo Club Boulevard of a 16-foot by 4-foot box culvert, which will extend 60 lineal feet on to Moore's property. The mouth of the proposed culvert will open into a widening concrete apron and a rock-filled channel will flow away from the apron northwestward along the margin of what is currently a pond located on the property. The project will ultimately change Moore's property boundary along its entire western edge and about half of its northern edge, reshaping the land into a shoulder for Polo Club Boulevard and sidewalk, and then dropping steeply down to the edge of the pond.

In May 2015, an appraisal report was prepared for LFUCG concerning the taking of a permanent and temporary construction easement on Moore's property. The "Narrative Description of Acquisition" estimated that the

after-taking utility of the 4,518-square foot permanent easement would be 5%. Similarly, the “Discussion of Anticipated Damage and/or Special Benefits” indicates “loss of utility . . . due to the proposed permanent easement . . . as such utility is estimated at 5%.” Further, no benefit to the property from the easement was listed. Based upon the appraisal, LFUCG made an offer to Moore of \$45,600 for the permanent easement on 4,518.6 square feet and the temporary construction easement on 26,504.18 square feet.

In response to the offer, Moore inquired as to why LFUCG wanted to take a permanent easement rather than purchasing the property in fee simple, considering its after-taking utility would only be 5%. LFUCG Acquisition Agent Paul Willard responded that the permanent easement was “to provide the government access to maintain the culvert for maintenance purposes” and that such was “the same treatment . . . generally on any building project using state or federal funds.” Apparently, negotiations continued between the parties with Moore desiring to have the property taken in fee simple and LFUCG insisting that it could only take a permanent easement per state and federal guidelines.

On July 27, 2015, Moore’s attorney sent a letter to Willard stating that taking an easement on the property would leave Moore with possible liability for injury or accidents on or because of the culvert and drainage system. Willard responded on August 7, 2015, that “the box culvert will be owned and maintained

by LFUCG,” and that a “condemnation action has been initiated.” There were no further pre-litigation negotiations.

On September 21, 2015, LFUCG filed a petition for condemnation in the Fayette Circuit Court seeking to take “temporary construction and permanent drainage easements on the property located at 1250 Deer Haven Lane in Lexington, Kentucky for the Polo Club Boulevard Improvement Project.” The appointed commissioners found that the requested permanent easement would cause a \$1,287 decrease in the fair market value of the property and that a fair rental value for the temporary construction easement was \$8,000. Moore thereafter filed an answer to the petition specifically contesting LFUCG’s right to take the subject property and arguing that LFUCG was acting in bad faith or abusing its discretion by seeking to take a permanent easement rather than a fee simple interest.

On November 20, 2015, LFUCG filed a motion for interlocutory judgment pursuant to KRS 416.610 requesting that the government be allowed to take the subject property. Moore responded that, in accordance with KRS 416.610(4), he was entitled to an evidentiary hearing. The trial court agreed and scheduled a hearing.

During the January 12, 2016 hearing, Moore did not dispute that the proposed taking was for a public purpose, but identified the issue as whether

LFUCG had the right to take a permanent easement rather than a fee simple interest. Moore further acknowledged that he had the burden of proof on the right to take. Thereafter, Willard testified, acknowledging that the remaining utility of the property with the permanent easement would only be 5%, and that it would not be useable because the box culvert would be located on it. Willard further testified that he was not aware of a similar-sized culvert for which LFUCG had taken an easement rather than fee simple interest. Willard stated that LFUCG follows what he referred to as the Kentucky Transportation Cabinet (“KTC”) “standard practice,” and that LFUCG must comply with federal and state guidelines because of funding. However, Willard conceded that he was unaware of any written KTC policy or guideline requiring the acquisition of a permanent easement rather than fee simple. Further, when asked whether it would jeopardize state funding if LFUCG acquired Moore’s property in fee simple, he replied, “I have no idea whether it would or not.” When Willard was asked about why LFUCG would not want to take the property in fee simple given the magnitude of the planned structure, he responded,

Basically, the practice is, leave the property in their [land owner’s] name. If, for instance – let’s go theoretical – that pipe gets removed at some point in time, there’s no need for it. The City doesn’t need to own that property then. Yet we would be stuck with it; it’d be unusable.

Following Willard's testimony, Moore requested a continuance to obtain the testimony of the KTC contact that Willard identified. Moore's counsel pointed out that a factor in determining whether LFUCG acted in good faith or had abused its discretion was whether it was fair to not take a fee simple interest in the property if the state, in fact, allows it. The trial court denied the motion. The trial court then questioned LFUCG about the property owner's liability in the event something occurred on or because of the culvert. LFUCG did not dispute that Moore would remain subject to liability but contended that such liability was no different than what Moore would be subjected to for an injury that occurred because of the pond.

At the close of the hearing, the trial court ruled in favor of LFUCG. The trial court stated that Willard had persuaded it that taking easements was the way the state does it, further noting that even if LFUCG "could have done it either way it wanted to, . . . the city has decided to go the easement route. . . . 'We've always done it that way' is rarely a good excuse to me, but I think that is what it is in this case." In its subsequent written interlocutory order, the trial court concluded that LFUCG had satisfied its obligation to negotiate in good faith "to obtain the property interests needed for this public project prior to bringing this action." The trial court made no mention of the easement versus fee issue. Moore thereafter appealed to this Court as a matter of right.

As an initial matter, this interlocutory appeal is authorized by *Ratliff v. Fiscal Court of Caldwell County*, 617 S.W.2d 36, 39 (Ky. 1981), in which the court upheld a condemnee's right to appeal an interlocutory order which litigated the condemnor's right to take. Generally, the condemning body has broad discretion in exercising its eminent domain authority including the amount of land to be taken. *See Commonwealth, Department of Highways v. Burchett*, 367 S.W.2d 262 (Ky. 1963). A determination by the condemnor that the taking is a necessity is ordinarily conclusive, but the courts will review the condemning body's exercise of discretion for arbitrariness or action in excess of its authority. *God's Center Foundation, Inc. v. Lexington Fayette Urban County Government*, 125 S.W.3d 295, 299-300 (Ky. App. 2002). The condemnor's decision on the amount of land to be condemned will be disturbed only if it is unreasonable in relation to the public interest or welfare involved and the condemnor may consider the future, as well as the present, needs for the taking. *See McGee v. City of Williamstown*, 308 S.W.2d 795, 797 (Ky. 1957). Further, “[a]lthough the factors of necessity and public use associated with condemnation are ultimately legal issues, resolution of those issues encompasses factual matters subject to deferential review on appeal.” *God's Center Foundation, Inc.*, 125 S.W.3d at 300.

On appeal, Moore argues that the trial court erred in finding that LFUCG satisfied its obligation to negotiate in good faith prior to filing the

condemnation action. Moore does not challenge LFUCG's right to take a temporary construction easement to build the drainage system nor a possible permanent easement for repair/maintenance purposes over an area somewhat larger than where the drainage structures are constructed. However, Moore contends that LFUCG's planned use of the property plainly exceeds what it describes as the need for a right to enter his land to perform repairs and maintenance. In other words, Moore believes that LFUCG's act of taking all of the usefulness but leaving the liability and other burdens on his property through a permanent easement rather than fee simple is arbitrary and in excess of its condemnation authority. Further, Moore argues that the trial court erred by focusing solely on the pre-litigation negotiations to the exclusion of the substantive arbitrariness of purporting to take a permanent easement for a fixture the size and scope of the box culvert.

It is undisputed that LFUCG has the authority to condemn property through the Commonwealth's sovereign power of eminent domain. *God's Center Foundation, Inc.*, 125 S.W.3d at 299. However, such power is carefully circumscribed by the constitutional restrictions that the taking be for "public use" and that the condemnee receive "just compensation." *See* Ky. Const. §§ 13, 242 and The Eminent Domain Act, KRS 416.540-680. Kentucky courts have imposed an additional duty on the condemning authority to negotiate in good faith for the acquisition of property prior to initiating condemnation proceedings. *City of*



*Bowling Green v. Cooksey*, 858 S.W.2d 190 (Ky. App. 1992); *Usher & Gardner, Inc. v. Mayfield Independent Board of Education*, 461 S.W.2d 560 (Ky. 1970).

This requires a determination of

whether the condemnor made a reasonable effort in good faith to acquire the land by private sale at a reasonable price. The statute implicitly requires an effort to effect a contract of purchase satisfactory to the condemnor. A single take-it-or-leave-it offer of a manifestly inadequate amount could well evidence a failure to make a reasonable effort to acquire the land by contract of private sale.

*Usher & Gardner, Inc.*, 461 S.W.2d at 562–63. Case law makes it clear that a condemnor is not required to haggle with the condemnee to meet this requirement.

*Coke v. Commonwealth, Dep't. of Finance*, 502 S.W.2d 57, 59 (Ky. 1973).

Without question, however, the failure of the condemning authority to negotiate fairly may serve as the basis for the dismissal of a condemnation action. *Eaton Asphalt Paving Co., Inc. v. CSX Transportation, Inc.*, 8 S.W.3d 878 (Ky. App. 1999). Finally, “[t]he party challenging the condemnation, however, bears the burden of establishing the lack of necessity or public use and abuse of discretion.” *God’s Center Foundation, Inc.*, 125 S.W.3d at 300; *Embry v. City of Caneyville*, 397 S.W.2d 141, 143 (Ky. 1965).

LFUCG argued, and the trial court agreed, that this case is controlled by the *God’s Center Foundation, Inc.* decision, in that, like the owner in that case, Moore has presented no evidence that LFUCG needed an interest different from

that which it sought to carry out its public purpose. However, as noted by a panel of this Court in *City of Bowling Green v. Cooksey*, 858 S.W.2d 190 (Ky. App. 1992), a court may block a taking where the property interest sought to be taken is so disproportionate to the purported need and proposed use as to be arbitrary. In *Cooksey*, the city attempted to condemn a fee simple interest in approximately 25 acres of private land to create a buffer zone for a planned airport. Although the city had no intention of erecting any structures or altering the then-present agricultural use of the land in any manner, it nonetheless rejected the owner's offer to grant a noise easement and restrict the parcel to agricultural use. In upholding the trial court's dismissal of the city's condemnation action, a panel of this Court ultimately held that taking the property in fee was improper because the intended use was more appropriately accomplished by an easement. This Court concluded, "It is a general principle of law that the Legislature cannot authorize the taking of property by eminent domain *in excess* of the particular public *need* involved." *Id.* at 192 (quoting *McGee*, 308 S.W.2d at 796) (emphasis in original).

In *God's Center Foundation, Inc.*, this Court again applied the same principles as in *Cooksey* to reach an opposite conclusion. Therein, LFUCG developed a plan to acquire the Lyric Theatre in Lexington, Kentucky, for the purposes of preserving the historic building and restoring it for use as an African-American cultural center in conjunction with an overall redevelopment plan for the

downtown area. The then-owners of the theatre were only willing to give LFUCG an easement, while retaining ownership, as well as primary control and operation of the building. Unable to reach an agreement with the owners, LFUCG filed a condemnation action pursuant to the Eminent Domain Act to condemn the theatre and surrounding property. The owners contested the condemnation, arguing, in part, that LFUCG did not need a fee title interest in the property for the public purpose that it had asserted as justification for the condemnation. The trial court granted summary judgment in favor of LFUCG and entered an interlocutory order and judgment of condemnation.

On appeal, this Court ultimately determined<sup>1</sup> that the trial court did not err in holding that LFUCG acted in good faith and that its taking of a fee simple interest was necessary to accomplish the public use:

The evidence indicated that the LFUCG intended to expend approximately \$1 million to \$1.8 million to renovate the property. The LFUCG proposed establishing an auditorium/theater area, a museum/art exhibit area, meeting hall/educational area, and vendor gift shop area. The LFUCG estimated the total annual personnel and overhead costs in managing the facility at approximately \$221,500.00. The trial court's determination that the LFUCG's desire to acquire title ownership in the property was not unreasonable given the

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<sup>1</sup> On the first appeal, this Court reversed the interlocutory judgment, finding that the owners were entitled to an evidentiary hearing on their factual allegations challenging the legality of LFUCG's actions. Following a bench trial, the trial court again granted judgment in favor of LFUCG.

substantial funds to be expended on the project was supported by the evidence and correct as a matter of law. . . . As the owner of the building, God's Center's proposal would allow it to retain the ultimate authority to control the type of groups and the nature of the programs using the building. While the goals and function of God's Center may be laudable, it is not unreasonable for the LFUCG to seek the ability to control the Lyric Theatre for a more diverse, broad-based public use free from potential repeated conflicts that could arise from the need to gain God's Center's approval.

. . .

God's Center contends that the LFUCG acted in bad faith in negotiating control over the Lyric Theatre by failing to conduct discussions based on less than fee simple ownership by the LFUCG. This contention actually implicates two separate issues: the actual negotiation process and the necessity for a fee simple ownership interest. The good faith negotiation requirement concerns the negotiation process, rather than the condemnor's evaluation of the type of legal interest necessary to carry out its public purpose. The necessity requirement concerns the right of the condemnor to exercise its authority as an initial matter.

. . .

God's Center's representatives expressed an unwillingness to sell the Lyric Theatre property to the LFUCG in a meeting between the parties. The LFUCG then offered to purchase the property at the higher amount of two independent appraisals. God's Center rejected the offer and stated it would not consider sale of the property "for any amount." The LFUCG provided God's Center an adequate opportunity to discuss the sale of the property and to negotiate the proper amount of compensation. God's Center's position clearly suggested that further negotiations would be unproductive.

Further, the LFUCG's refusal to accept a lesser legal interest in the property did not constitute bad faith. There is no evidence that the LFUCG actually believed that anything less than fee simple title was necessary to carry out its public purpose. Thus, the trial court's factual finding that the LFUCG engaged in good faith negotiations prior to filing the condemnation action was supported by substantial evidence and was not clearly erroneous.

*Id.* at 303-304 (footnotes omitted).

Moore argues in this Court that neither *Cooksey* nor *God's Center Foundation, Inc.* address the question presented herein, namely whether it is bad faith for an entity with eminent domain power to negotiate for or seek to condemn a *lesser* interest than what it is actually taking. For that question, Moore contends that the Kentucky Supreme Court's decision in *Sprint Communications Co., L.P. v. Leggett*, 307 S.W.3d 109 (Ky. 2010) is instructive. Therein, Sprint had sought to take a "permanent utility easement" over a half-acre lot owned by the Leggett Family Trust with plans to demolish the existing structure and construct a new "point of presence" facility for its long-distance services. Leggett challenged the taking and filed a counterclaim against Sprint for abuse of process, malicious prosecution, and violation of Leggett's civil rights under 42 U.S.C. § 1983. Eventually, Sprint moved to voluntarily dismiss its condemnation action and the trial court granted summary judgment in favor of Sprint on Leggett's counterclaims. A panel of this Court subsequently reversed the trial court on

Leggett's abuse of process and civil rights claims. Our Supreme Court thereafter granted discretionary review.

In the Supreme Court, Leggett claimed that he satisfied the "ulterior purpose" element of the abuse of process tort by producing evidence that Sprint intended to use the burden and expense of the condemnation action to pressure Leggett into selling an interest in his land beyond what Sprint could legally obtain by a valid condemnation action.<sup>2</sup> Sprint defended that it sought to obtain nothing other than what was proper in the condemnation litigation. In disagreeing, the Court rejected Sprint's characterization of its attempted taking of the property as a "permanent utility easement."

A "right of way" is defined as "[t]he right to pass through property owned by another." Black's Law Dictionary, 8th Edition 1351 (2004); 25 Am Jur.2d. 502, Easements and Licenses, § 5. Sprint's apparent need for Leggett's property cannot reasonably be construed as simply the need to "pass through the property of another." Far from intending to "pass through" Leggett's land, Sprint's intention was to permanently acquire the use of Leggett's entire tract, so that it could tear down Leggett's building and erect a new POP facility. Such a taking has all of the significant qualities of fee-simple ownership, leaving Leggett's residual interest in the property worth nothing and of no use. We cannot construe the term "right of

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<sup>2</sup> Sprint is a "telephone company" within the meaning of KRS 278.540(2) and KRS 416.150, and therefore, has a limited power to condemn a right of way across private property. As noted by the Court, "A telephone company does not have the right under Kentucky law to take by the power of eminent domain a "permanent easement," coextensive with an entire tract of land, demolish the principal buildings located thereon, and totally deprive the owner of any use thereof." *Legget*, 307 S.W.3d at 115.

way” so broadly as to allow Sprint to consume Leggett's entire half-acre lot in perpetuity. The right to pass through another's land cannot be equated with the power to divest that person of all meaningful attributes of his ownership interest.

*Id.* at 115-116.

LFUCG correctly points out that *Leggett* substantially differs from the matter herein in that the issue therein primarily concerned the scope of Sprint’s condemnation power. We nevertheless find the Court’s opinion that Sprint’s purported easement in fact had “all of the significant qualities of a fee-simple ownership” instructive, as it is quite similar to the nature of LFUCG’s proposed taking of Moore’s property. The interest that LFUCG proposes to take is neither in proportion to the 95% utility it would take from the property nor is consistent with the “pass through” function of an easement. LFUCG seeks to burden Moore’s property with a box culvert, apron and rock drainage system. The property will not be used as merely a pass through to allow LFUCG to provide maintenance because the structures will be erected on the property and will be owned by LFUCG. We have to agree with Moore that such use of his land is indistinguishable from a fee simple ownership.

Although LFUCG is correct that the condemning authority is only required to take that property which is necessary to satisfy the public need, in this case that is a fiction we cannot indulge just to avoid compensating Moore. For just

compensation and due process purposes, we must look at what, in reality, LFUCG seeks to take from Moore. Certainly, he could make no physical use of the subject property if a permanent easement was taken. As was even noted in the “Narrative Description of Acquisition,” Moore was left with only a 5% after-taking utility in the property. We conclude then, that regardless of what LFUCG states is necessary for the project, it is clear that it would essentially be taking Moore’s property in fee simple.

In reviewing Willard’s testimony during the evidentiary hearing, one can readily see the injustice of applying LFUCG’s theory of the case. LFUCG’s position is that it does not want to obtain the property in fee simple because somewhere in the future there is a possibility that the culvert will no longer be necessary and LFUCG would therefore have no further use for the property. We must agree with Moore that such is essentially a concession that fee ownership is currently appropriate for the existing public purpose, but because there might be a change in the future, LFUCG prefers to only acquire a lesser interest of a permanent easement to burden the land in perpetuity with structures that it owns.

This case presents the opposite scenario as that presented in *Cooksey* and *God’s Center Foundation, Inc.* Here, LFUCG is purporting to take a lesser interest than the planned use requires. Further, LFUCG as much as concedes that Moore will be left with premises liability for the “permanent easement area.” We



conclude that LFUCG's planned use of the subject property, and the resulting divestment of Moore's ability to control such, is much greater than that associated with an easement. Accordingly, to take less than a fee simple interest in the property is arbitrary and in excess of LFUCG's authority under the Eminent Domain Act.

For the reasons stated herein, the interlocutory judgment of the Fayette Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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