

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001457-MR

THE LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NOS. 00-CI-004445, 00-CI-004448
AND 00-CI-004452

WILLIAM BECKER; KAREN BECKER;
GOLDEN BRANDS, INC. n/k/a GOLDEN
BRANDS, LLC; and GOLDEN FOODS, INC.
n/k/a GOLDEN FOODS, LLC

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS and DYCHE, Judges; and JOHN POTTER, Special
Judge.¹

COMBS, JUDGE: The Louisville and Jefferson County Metropolitan
Sewer District (AMSD@) appeals from an opinion and order of the
Jefferson Circuit Court entered on June 13, 2001, in favor of
Golden Brands, Inc. (AGolden Brands@, Golden Foods, Inc. (AGolden

¹Senior Status Judge John Potter sitting as Special Judge by assignment
of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky
Constitution.

Foods@, and William and Karen Becker. MSD also appeals from the order entered July 3, 2001, denying its motion to alter, amend, or vacate the order preventing it from proceeding with its condemnation action. Having concluded that the trial court's factual findings are supported by substantial evidence and that it correctly applied the law to those facts, we affirm.

In its opinion and order of June 13, 2001, the Jefferson Circuit Court carefully and succinctly outlined the facts and circumstances underlying this action. For efficiency, we quote extensively from Judge Abramson's well-crafted opinion.

In the mid-1990's residents of Harold Avenue, an unincorporated area of Jefferson county, experienced increasing storm water drainage problems. Several Harold Avenue residents contacted MSD about the need for storm water drainage improvements in the area. According to Mr. Loyiso Melisizwe, MSD's Beargrass Creek Area team leader, a couple of the residents expressed an interest in also obtaining sewer service but the primary concern was storm water drainage. Because construction of storm water drainage improvements would entail extensive construction work in the area, MSD deemed it desirable to explore with the neighborhood residents the possibility of simultaneously constructing a sewer system.

On April 17, 1997, MSD held a public meeting for the Harold Avenue residents. At that meeting the residents were informed that a sewer project was being considered but that to receive sewers the majority (51%) of the voting property owners must vote in favor of it. Residents were informed that the drainage improvements along Harold Avenue would be constructed regardless of the neighborhood vote on the sewer project. Residents were given until May 2, 1997 to

return their ballots. Of the 112 property owners in the Harold Avenue neighborhood only 68 voted; 34 voted in favor of the sewer project and 34 voted against it. This tie vote was the third time Harold Avenue residents had been asked to consider a sewer project. The residents had rejected a sewer system on two prior occasions beginning sometime in the mid-1980's.

On May 9, 1997, MSD Executive Director Gordon R. Garner recommended to the MSD Board that it proceed with the Harold Avenue project, noting that of the 68 responses, 50% were in favor of the installation of sanitary sewers in the area. Although the written recommendation in May 1997 accurately reflects that a majority of the residents did not approve sewers, when Mr. Garner was deposed in this condemnation proceeding, he indicated repeatedly that the Harold Avenue project was undertaken because the majority of the residents had voted for a sewer system. Mr. Melisizwe testified that MSD generally does not build a sewer project unless (1) the Board of Health requires or a court orders construction due to health and environmental concerns; (2) MSD receives a request from a small city or other incorporated area; or (3) the majority of the residents in an affected area vote in favor of the project. Although Mr. Melisizwe said that typically this last option entails at least a 51% vote, he alluded to without elaboration, a couple of prior occasions where projects were undertaken without a majority vote. Carolyn Williams, MSD, Project Manager for the Harold Avenue project, testified in conformity with her prior representations to Harold Avenue residents that for a project to proceed a majority of the voting residents must vote affirmatively.

Even though a majority of the Harold Avenue residents did not vote affirmatively, the MSD Board approved the project and moved forward. Although several options were considered for providing sanitary sewers to Harold Avenue residents, MSD ultimately focused on two

alternatives. The so-called gravity alignment would connect to an existing 45 inch private sewer line which runs across the entire length of the Golden Foods property and a small portion of the Golden Brands and Becker properties and then connects to MSD's existing system. The McCloskey Avenue pump station option involved building a pump station and pumping the Harold Avenue wastewater to a McCloskey Avenue sewer line owned by MSD.

* * * * *

In June of July of 1997, MSD first contacted Golden Foods to discuss the possible acquisition of the private sewer line. At that time MSD proposed that Golden Foods relinquish ownership of the existing sewer line in exchange for MSD's installation of a new separate, parallel 8 inch sewer line to be constructed for the apparent exclusive use of Golden Foods. Under this proposal, the Harold Avenue residents and presumably Parallel Products (an upstream neighbor who was using the Golden Foods sewage line by virtue of . . . [an] easement agreement) would be serviced by the existing sewer line. Because of the nature of Golden Foods and Golden Brands business, food processing, the companies expressed concern that MSD's excavation and construction would interfere with their ability to service their clients who require timely deliveries. Golden Foods was particularly concerned because the proposed new sewer line and the existing sewer line would both run ^Aright through the center of its (Golden Foods's) property where numerous utility lines and other connections exist, and where customers, suppliers, vendors and employees maintain their main ingress and egress for the conduct of Golden Foods's business. Other concerns voiced by Golden Foods representatives included potential environmental problems with respect to any removed soil and the location of any sampling points for monitoring Golden Foods effluent and discharge. For six and one-half months after this initial overture, the parties had no contact

but they resumed discussions in January 1997, again discussing MSD assuming ownership of the existing 45 inch line and constructing a new 8 inch line for Golden Foods use. The estimated cost of construction of the new smaller sewer line was approximately \$56,000 - \$60,000.00. Eventually attorneys for MSD and Golden Foods became involved in exchanging several draft agreements, a process which continued through the spring and summer of 1998 and into early 1999. On February 25, 1999 Camille Irwin, attorney for MSD, wrote Alan Linker, counsel for Golden Foods, to advise that MSD was withdrawing all prior offers and terminating negotiations. She identified substantial areas of disagreement which were paragraphs 7(G), 7(H) and 10 of Golden Foods proposed agreement of February 17, 1999. Paragraph 7(G) dealt with MSD's abatement of testing of Golden Foods effluent until the new parallel sewer line was completed. Paragraph 7(H) required MSD to perform soil sampling of the easement area and if environmental contaminants were present, to either dispose of the soil or replace the soil in its original location rendering the parties' agreement null and void. Paragraph 10 contained a provision for MSD obtaining adequate insurance coverage to indemnify Golden Foods against any losses or damages for business interruption caused by MSD's construction or maintenance work on Golden Foods' property.

Documents in MSD's files reflect that after negotiations with Golden Foods were halted, MSD's engineers deemed the gravity alignment a not workable option and pursued the McCloskey Avenue pump station option. [Eventually, however, MSD revived the gravity alignment option and sought to condemn the appellees' property.]

After Ms. Irwin's February 1999 letter, MSD did not contact Golden Foods until over fourteen months later when another MSD attorney, Julia Lundy, sent a May 19, 2000 letter offering Golden Foods \$180,000 for its private sewer line. This figure was later

determine to be a typographical error and MSD's Alast and final good faith offer@ for the 45 inch sewer line was \$4,000. Presented with the potential for a condemnation proceeding in May-June 2000, Mr. Linker contacted Ms. Irwin and offered to give MSD a sewer easement entering Golden Foods= property on the west and proceeding at MSD's election either north or south and then east. Golden Foods made this proposal to reduce the risk of business interruption or interference since the construction would take place on the perimeter of its property as opposed to through the center. MSD rejected this offer and further noted that it had withdrawn its prior offer back in February 1999 because of a Asubstantial change@ by Golden Foods which was Adeterminative in MSD's decision to withdraw [its] offer.@ The offending paragraph, 4(11), simply stated Athis easement is granted subject to any prior easements on record.@ In her June 26, 2000 letter Ms. Irwin, counsel for MSD, indicated that Aat that point MSD, who had been dealing in good faith, withdrew its offer.@ These condemnation proceedings were commenced on July 11, 2000. That same date Mr. Linker on behalf of Golden Foods informed Ms. Irwin that the Asubstantial change which was determinative in MSD's decision to withdraw their offer@ was actually language that MSD had included in the agreement.

Following the filing of this action, commissioners were appointed and their initial report was received on July 31, 2000. An Amended Petition of Condemnation was filed on October 24, 2000. On November 22, 2000, [Golden Foods] filed an answer to the Amended Petition for Condemnation challenging the right of MSD to condemn their private sewer line. Discovery was conducted by both parties and a one-day right to take hearing was conducted by this Court pursuant to KRS 416.610 on May 2, 2001. The Court heard testimony from Loyiso Melisizwe and Carolyn Williams of MSD and Alan Linker on behalf of [Golden Foods]. In addition, the Court considered deposition testimony of Gordon

Garner, Executive Director of MSD, and
Camille Irwin, counsel for MSD.

Following the hearing, the Jefferson Circuit Court entered its findings of fact, conclusions of law, and its opinion and order dismissing MSD's Petition for Condemnation. This appeal followed.

MSD contends that the trial court erred by concluding that it had failed to negotiate in good faith for the acquisition of the disputed property before it initiated condemnation proceedings and that, therefore, it was not authorized to condemn the disputed property. We disagree.

Before proceeding with condemnation, MSD was obligated to negotiate in good faith for the acquisition of the appellees' property. *McGee v. City of Williamstown, Ky.*, 308 S.W.2d 795 (1957). It is well established precedent that a failure to engage in a proper negotiation may serve as the basis for the dismissal of a condemnation action. *Eaton Asphalt Paving Co. v. CSX Transp., Ky. App.*, 8 S.W.3d 878 (1999), disc. rev. denied, quoting *Howard Realty Co. v. Paducah and I.R. Co.*, 182 Ky. 494, 206 S.W. 774 (1918); see also *Usher and Gardner, Inc. v. Mayfield Indep. Bd. Of Educ., Ky.*, 461 S.W.2d 560, 562-563 (1971).

As the trial court observed in its opinion, the property to be taken in this case is atypical. Normally, MSD, like other condemnors, takes undeveloped property for improvement. In this case, however, the property to be taken consists of a fully functional 45-inch sewer line capable of

servicing many residential customers and several industrial users C as well as its owner. In the initial stages of negotiation, when MSD proposed acquiring the existing line for the use of all other local customers and constructing a separate 8-inch line for Golden Foods, MSD appeared to recognize the distinctive nature of the property to be taken. However, its later decision to withdraw all previous offers and to present instead a single, rather suspect, and non-negotiable offer of \$180 (later explained as a typographical error and amended to \$4,000.00), tends to evidence a failure to make a reasonable effort to acquire the land by contract of private sale. See Eaton Asphalt Paving Co., supra. Moreover, all of the negotiations preceding the final take-it-or-leave-it offer of May 2000 involved MSD's intent to take the existing sewer line in exchange for its construction of a new line exclusively dedicated to Golden Foods's industrial complex. MSD had never discussed or negotiated with Golden Foods with respect to its current intention to condemn the private sewer line for service to all users -- the residential customers as well as other industrial users. As a result, the trial court did not err by finding that MSD acted unreasonably, unfairly, and oppressively in its dealings with the appellees. Nor did it err by concluding that through its actions, MSD's very right to condemn the disputed property had been implicated and compromised.

Our resolution of this issue renders moot the appellees' contentions on appeal, and we decline to address them.

However, we are keenly attentive to the appellees' allegation that MSD intentionally failed to abide by its own published voting protocol and that it fraudulently misrepresented the outcome of the neighborhood vote in order to take the property of Golden Foods as well as to compel the residential users to underwrite a sewer project that they had not properly approved.

As the Kentucky Supreme Court recently observed in In re Hughes & Coleman, Ky., 60 S.W.3d 540, 543 (2001):

An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute.

It may be that MSD cavalierly ignored its previous written policies. Or, as the appellees contend, it may be that MSD sought to perpetrate a fraud on the Harold Avenue residents. Regardless of its motives for its dubious behavior, MSD failed to engage in the proper course of negotiations that would necessarily serve as the required predicate for condemnation proceedings. In so behaving, it rendered condemnation both inappropriate and unacceptable.

The judgment of the Jefferson Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

POTTER, SPECIAL JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

POTTER, SPECIAL JUDGE, DISSENTING: Respectfully, I
dissent.

The only matter upon which I depart from the trial
court, and the majority here, is the holding that MSD failed to
negotiate in good faith prior to commencing the condemnation
proceeding.

As the trial court found, MSD had the right to condemn
an easement across the Golden Brands property containing the 45-
inch sewer. This background fact colors all pre-condemnation
negotiations. MSD cannot be expected to bargain as if it lacked
the power to condemn. Therefore, MSD is only required to make an
offer that is reasonable when measured against what the landowner
could receive in a condemnation proceeding.

Here the pre-condemnation negotiations took place in
two rounds. In the first round MSD sought a global solution to
several problems. It offered to build a separate 10-inch sewer
line and separate monitoring station to collect and measure just
the Golden Brands effluent, thereby eliminating a long-standing,
ongoing dispute over the amount of Golden Brands bill. In return
Golden Brands would give MSD the easement. These negotiations
did not prove fruitful.

Some 14 months later, after exploring alternate methods, MSD elected to condemn the 45-inch sewer without attempting to make provisions to resolve the measurement and billing problems. A competent appraiser valued the easement at \$1,706 and MSD opened a second round of negotiations by offering this amount for the easement alone. This cash only offer, which was later increased to \$4,000, was rejected without any counter offer. It was clear from the rejection of the offer and the subsequent proceedings that Golden Foods would not accept a cash offer anywhere near \$4,000. Instead it wanted, among other things, its separate sewer, a new monitoring station, and the right to move the sewer in the future, none of which it could ever get in a condemnation proceeding. In short, it wanted a global resolution of all issues.

The condemnation action followed.

The trial court found that the cost of constructing the separate sewer and monitoring station offered in round one of the negotiations set a benchmark for the value of the easement. She then used this benchmark to find that MSD's later cash offer in the second round of negotiations was manifestly inadequate.

To quote from the trial judge: "'A single take-it-or-leave-it offer of a manifestly inadequate amount could well evidence a failure to make a reasonable offer to acquire the land by contract of private sale.'" (citations omitted) MSD's conduct with [Golden Brands] in the context of this project does not meet

the good faith standard." The trial court further noted that the offer of \$4,000 is a "'manifestly inadequate amount' and clearly suggests 'a failure to make a reasonable effort' to acquire the property by agreement MSD's failure to recognize the nature and value of what it proposed to take clearly exhibits a lack of good faith."

It is unclear whether the trial judge took the cost of the 10-inch sewer to be evidence of the value of the easement to MSD or as evidence of the cost to construct or replace the 45-inch sewer being condemned. However, neither the replacement cost of the item condemned nor the value it has to the condemning authority is a proper measure of value.

All negotiation and mediation takes place in the shadow of the law, and here good faith negotiations take place in the shadow of condemnation law. In a partial taking, the compensation due the landowner flows from a well-established formula:

The basic measure of damages, where part of a tract of land is taken by condemnation, is the difference in the fair market value of the tract before and after the taking.

Commonwealth, Dep't of Highways v. Stamper, 345 S.W.2d 640, 642-43 (1961).

Here, the offer by MSD to build a \$50-60,000 sewer line was made to obtain the easement (with a 45-inch and a 10-inch line in it) and to resolve the measuring problem. Therefore, it cannot be used to even set the value to MSD for the easement with

only a 45-inch sewer in it. Even if this amount was considered to reflect the value of the easement to MSD it is still not a measure of the compensation due a landowner in a condemnation proceeding. As stated in City of Newport Municipal Housing Commission v. Turner Advertising, Inc., 334 S.W.2d 767, 769 (1960), "this concept [of difference in fair market value] excludes both the value of the property *to the owner* and the value of the property *to the taker*." (emphasis in the original).

If the cost to construct the 10-inch sewer is considered indicative of the cost to replace the 45-inch sewer, this figure is still not controlling.

It should be emphasized again that the *measure* of damages is the difference in the market value of the tract of land before and after the taking. While evidence as to structural cost of certain improvements may be admissible as bearing on the market value of the land, the *instructions* should make clear that the measure of damages is as above stated.

Commonwealth, Dep't of Highways v. Stamper, 345 S.W.2d at 644.

Complicating the valuation further is the fact that Golden Brands did not own the sewer outright. The sewer was already subject to the private permanent easements previously given to other landowners in the industrial park.

The appearance that something may be awry may stem from the fact that MSD intends to use the sewer as a sewer, thereby benefiting from its prior existence in the easement. Clearly, that fact influenced the trial judge, who commented that "[o]nly a myopic bureaucracy could equate the taking of a fully

functioning sewer line with the taking of undeveloped land... MSD's failure to recognize the nature and value of what it proposed to take clearly exhibits a lack of good faith."

Perhaps a mundane example will highlight why the fact that MSD, because of the unusual nature of its business, can actually use the sewer should not influence the outcome.

An Owner has a house and lot worth \$200,000 near a city park. At a cost of \$50,000 he buys additional acreage and builds a swimming pool. Because, as every real estate agent knows, you can't get your money out of a pool, the house, expanded lot and pool altogether are worth only \$225,000 (not the \$250,000 the Owner has in the property). He sells to a second owner for this price.

Thereafter, the city decides to enlarge the park and condemns the portion of the lot with the pool but not the old lot with the house. Since the condemnation involves a partial taking, the jury determines "before" and "after" values, and sets the loss to the second property owner at \$25,000 (the \$225,000 value of the house, larger lot and pool before the taking less the \$200,000 value of the house and original lot after the taking).

If the city fills in the pool and uses the land for a baseball diamond, the cost of the pool is unlikely to make the \$25,000 offer or award seem unreasonable. If however, the city uses the pool as a pool, does the landowner get more money

because the city shouldn't get a \$50,000 pool for \$25,000? The answer is no.

Counterintuitive though it may be, the award to the landowner might have been greater if MSD had condemned raw land and built a sewer instead of condemning land with a sewer and already subject to an existing private sewer easement. As noted, the award to the property owner is the difference between the before and after values. If MSD condemns raw unencumbered land, the owner gets the difference between the full value of his land and that land encumbered with a MSD sewer easement. If MSD condemns land already encumbered with a private sewer easement, the landowner's before value is reduced, and therefore the difference between the two values is correspondingly reduced.

At oral argument there was a suggestion that the easement had increased value because one private user, who did not hold a permanent easement, would be forced to bargain with Golden Brands in 2005 to renew its temporary private easement. In a condemnation action it is the value of the land rather than some lost business opportunity that governs the award. "We have, of course, held time and time again that business losses resulting from condemnation are not compensable. Commonwealth, Dep't of Highways v. Rogers, 399 S.W.2d 706, 707 (1965).

Here, the two appraisers hired by MSD as well as two appraisers later appointed by the court valued the interest taken, using the methods applicable to condemnation cases. All

four appraisers arrived at a value less than MSD's final offer, which was rejected out of hand, and there was no expert testified to a higher value. The trial court should not have disregarded this testimony and fashioned its value based upon replacement/construction cost to find that MSD's offer was unreasonably low.

For the above reasons, I would reverse the trial court's holding that MSD bargained in bad faith.

BRIEF AND ORAL ARGUMENT FOR
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BRIEF FOR APPELLEES:

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