

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001315-MR

DONALD VINCENT; AND  
ANNA VINCENT

APPELLANTS

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 01-CI-00231

CITY OF POWDERLY,  
A FIFTH-CLASS CITY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from an interlocutory judgment<sup>1</sup> entered by the Muhlenburg Circuit Court finding that the City of Powderly had a right to condemn a sewer easement

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<sup>1</sup> We find that this case falls within Kipling v. City of White Plains, Ky. App., 80 S.W.3d 776 (2001), which states that "[w]hile the word 'interlocutory' normally implies a non-appealable order, such an order . . . can be appealed if a matter is finally litigated by the judgment, or if it operates to divest some right in such manner as to put it out of the power of the court to place the parties in their original condition." Kipling, *supra*, at 784 (quoting Ratliff v. Fiscal Court of Caldwell County, Kentucky, Ky., 617 S.W.2d 36, 39 (1981)). See also CR 54.02.

across a portion of Donald and Anna Vincent's property. The Vincents maintain that the court erred by entering this order as the city failed to enter into good faith negotiations with them prior to filing the condemnation action. For the following reasons, we affirm.

During the year 2000, the City of Powderly, Kentucky sent letters to various landowners for the purpose of acquiring easements to accommodate a sewer system expansion project. Although most of the landowners willingly provided the city with the requested easements, the city was unable to reach an agreement with appellants concerning a particular portion of their property. With a federal grant deadline approaching, the city council voted to initiate condemnation proceedings against appellants and the few other landowners with whom negotiations had failed. The city's petition to condemn an easement across appellants' property was filed on May 30, 2001, and on June 5, the court appointed three commissioners to evaluate the extent of any loss to appellants' property value as a result of the easement. Without utilizing either a survey or an appraisal of the particular property, the commissioners soon filed a report concluding that the property would suffer no loss in value. The city subsequently had the property surveyed in December 2001, and commissioners were again appointed to reevaluate the property's value before and after condemnation of the easement.

Once more, the commissioners concluded that there would be no loss in the property's value due to the easement. Although appellants argued that the city had no right to take their property in the absence of good faith negotiations, the court entered an interlocutory judgment in May 2002 recognizing the city's right to condemn. This appeal followed.

Prior to filing suit, a condemnor in a situation such as this is required to negotiate in good faith with a condemnee in an effort to reach a private agreement regarding purchase of the necessary property interest. Usher and Gardner, Inc. v. Mayfield Independent Board of Education, Ky., 461 S.W.2d 560 (1970); Eaton Asphalt Paving Company, Inc. v. CSX Transportation, Inc., Ky. App., 8 S.W.3d 878 (1999); City of Bowling Green v. Cooksey, Ky. App., 858 S.W.2d 190 (1992). Appellants argue that the city failed to make a good faith effort to negotiate with them prior to filing suit, as illustrated by the city's failure to have a survey or appraisal of their property conducted and by its inflexible take it or leave it position. Although good faith negotiations are admittedly required, neither a survey nor an appraisal is mandated by statute or case law in order to satisfy the condemnor's obligation to negotiate in good faith, and we decline to create such a requirement. "[W]hat is not found in [a] statute is a matter for the legislature to supply and not

the courts." Kipling v. City of White Plains, Ky. App., 80 S.W.3d 776, 785 (2001) (quoting Day v. Day, Ky., 937 S.W.2d 717, 719 (1997)).

With respect to the trial court's factual conclusions regarding the city's negotiations, we note that findings of fact will not be set aside unless clearly erroneous. CR 52.01. See also Commonwealth Transportation Cabinet Department of Highways v. Taub, Ky., 766 S.W.2d 49, 53 (1988). Further, a "court will deny the right to take only where there has been '[a] gross abuse or manifest fraud.'" Commonwealth v. Cooksey, Ky. App., 948 S.W.2d 122, 123 (1997) (quoting Kroger Company v. Louisville & Jefferson County Air Board, Ky., 308 S.W.2d 435, 439 (1957)). Appellants argue that the city offered an inadequate amount and displayed a take it or leave it attitude which evidenced "a failure to make a reasonable effort to acquire the land by contract of private sale." Usher, 461 S.W.2d at 562-563. See also Eaton, 8 S.W.3d at 883. It is clear, however, that "the condemnor is not required to haggle in order to satisfy its obligation to negotiate in good faith the purchase of property." God's Center Foundation, Inc. v. Lexington-Fayette Urban County Government, Ky. App., \_\_\_ S.W.3d \_\_\_ (2002) (citing Coke v. Commonwealth, Department of Finance, Ky., 502 S.W.2d 57, 59 (1973)).

Here, the evidence supports the trial court's conclusion that the city acted in good faith. Although the appointed commissioners valued the appropriate compensation to appellants at zero, the city offered appellants compensation based on an appraisal of similar property and expressed its willingness to negotiate further, but appellants simply rejected the proposed amount without providing a counteroffer. Further, the city took great pains to work with appellants, and it even changed the proposed location of the easement in an effort to accommodate appellants' wishes. In the absence of further evidence that the trial court's decision was clearly erroneous, the interlocutory judgment of the Muhlenburg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Kenneth E. Dillingham  
Elkton, Kentucky

BRIEF FOR APPELLEE:

Brent Yonts  
Greenville, Kentucky