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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002264-MR

TED L. NOBLE AND BARBARA NOBLE

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V., JUDGE
ACTION NO. 04-CI-01223

SANITATION DISTRICT NO. 1,
A KENTUCKY CORPORATION

APPELLEE

AND: NO. 2005-CA-002521-MR

S. MARIANNE SMITH

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V., JUDGE
ACTION NO. 04-CI-01222

SANITATION DISTRICT NO. 1,
A KENTUCKY CORPORATION

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

ACREE, JUDGE: Ted and Barbara Noble and Marianne Smith appeal from orders of the Campbell Circuit Court which granted temporary and permanent easements across their properties in favor of Kentucky Sanitation District 1 (SD1) for the purpose of installing a sanitary sewer line. We affirm.

The Appellants own neighboring properties on Alexandria Pike in Cold Spring, Kentucky. Their homes and the homes of others in the immediate vicinity are served by private septic systems. In the fall of 2001, one of the Appellants' neighbors contacted several local agencies seeking help with faulty septic systems in the neighborhood. The failure of some of the systems had resulted in visible raw sewage and associated odors. A group of property owners near the Appellants' properties then presented a petition¹ to SD1 for an assessment project asking that public sanitary sewer lines be installed. SD1 accepted the petition and authorized the acquisition of a preliminary engineering report to determine a guaranteed maximum assessment fee to be charged to the property owners for the installation of the sewer lines and for preliminary alignment and design of the sewer lines.

SD1 hired a civil engineer to conduct the preliminary engineering report. The purpose of the report was to determine whether the homes in the area could effectively be served by a public sewer. The engineer prepared his report after walking the property, observing topographical considerations, locating the septic systems for the

¹ At least two-thirds of the affected property owners were required to sign the petition. Of 12 affected property owners, 9 signed the petition. One property owner does not believe the signature on the petition is his, but he paid the initial project evaluation fee and voted for the assessment project.

affected homes, locating the existing sewer lines to which a proposed line would connect, and considering environmental concerns. His report, recommending a gravity flow sewer system, was accepted by the Sanitation District Board (the Board).

A public hearing was held on October 2, 2003. The preliminary engineering design was presented at the public hearing and the Appellants and other neighbors were given an opportunity to voice complaints and ask questions. After the hearing, voting cards were sent to the property owners. Eight property owners voted for the project, three voted against, and one did not return the card.² The Board passed a resolution authorizing and directing SD1 to proceed with the project.

Prior to the public hearing, the proposal was that the sewer line run south to north across the entry of Summit Lane,³ across the front of the property adjoining the Appellants' property on the south side, turn 90 degrees and run in a westerly direction down the south side of the Nobles' property approximately three quarters of the way, then diagonally down and across the rear of the Nobles' property. In an effort to alleviate complaints made during the public hearing, the proposed easement was moved as far back on the Nobles' property as possible. The sewer line was altered to run south to north to approximately the southern corner of the junction of Summit Lane and Alexandria Pike, then 45 degrees southwest down Summit Lane to approximately the center of Summit Lane, then approximately 90 degrees north/northwest directly across the rear of 4628

² Non-responsive and unreturned cards are considered a positive response.

³ Appellants live north of Summit Lane.

Alexandria Pike and 4626 Alexandria Pike, the Nobles' property. In order to install the sewer lines SD1 would need a temporary construction easement with a maximum width of thirty feet from the centerline of the permanent easement.

In the summer of 2004, SD1 sent documents to the Appellants seeking twenty-foot wide permanent easements on each property for an underground sanitary sewer line, and forty-foot⁴ wide temporary easements. SD1 offered the Nobles \$1400 for their easements and Smith \$1700. Both offers were declined. All necessary property for the project had been acquired with the exception of that owned by the Appellants.

On October 14, 2004, SD1 filed condemnation proceedings against the Appellants in an effort to obtain the easements. Court-appointed commissioners determined that the Nobles were entitled to \$650 and Smith was entitled to \$700 for their easements. The trial court entered Interlocutory Orders and Judgments finding that SD1 had the right to condemn each property. Subsequently, the Appellants filed exceptions to the interlocutory orders. Appellants took issue with the precise location of the easement on their property. The Campbell Circuit Court held hearings on April 14, 2005, April 27, 2005, and May 4, 2005, in the Noble matter and on August 17, 2005, and August 19, 2005, in the Smith matter.

On July 18, 2005, and November 7, 2005, the trial court entered Orders granting easements for the proposed sanitary sewer line and allowing the easements to be

⁴ The temporary easement granted by the trial court was thirty feet from the centerline of the permanent easement. Since the center line of the permanent easements are ten feet from the rear property lines, the temporary easements extend forty feet from the Nobles' and Smith's rear property lines.

located in the rear of the Appellants' properties. This appeal followed. The Appellants' claims have been consolidated.

As a preliminary matter, we note SD1's contention that the Appellants' brief contains documents which are not part of the record on appeal. We agree and thus strike Appendices A – D of the Appellants' brief.

The Appellants argue our standard of review is governed by *American Beauty Homes Corp. v. Louisville and Jefferson County Planning*, 379 S.W.2d 450 (Ky. 1964). We agree that the three-prong test for reviewing agency actions would be the applicable standard of review had Appellants sought review of the Board's action by means of a cross-claim before the circuit court. However, they did not. This appeal is taken only from two orders of the Campbell Circuit Court granting SB1 the right to take Appellants' property pursuant to KRS 416.610.

As such, we review the trial court's factual findings under a clearly erroneous standard and the legal issues *de novo*. See *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001); *Commonwealth, Transportation Cabinet, Dept. of Highways v. Taub*, 766 S.W.2d 49 (Ky. 1988); and CR 52.01. Factual findings are not clearly erroneous if they are supported by substantial evidence. *Id.* "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bowling v. Natural Resources & Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky.App. 1994), citing *Kentucky State Racing Commission v.*

Fuller, 481 S.W.2d 298, 308 (Ky. 1972); and *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62 (Ky. 1970). It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight to be given the evidence. See *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991); *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky.App. 2001).

The Appellants argue that the trial court inappropriately granted SB1's petitions for condemnation. Their first contention is that the trial court incorrectly concluded SD1 was entitled to condemn Appellants' properties for sewer easements because the easements sought were neither necessary nor for a public purpose. We disagree.

Under KRS 416.610(4), when a property owner has filed an answer putting the right to condemn in issue, the circuit court is required to hear the matter and to determine whether the petitioner has the right to condemn the property sought and to make findings regarding that right. In making such determination, the circuit court must consider two basic questions: (1) the authority of the petitioner to condemn the property; and (2) the public necessity in exercising that authority. *Duerson v. East Kentucky Power Cooperative, Inc.*, 843 S.W.2d 340, 343 (Ky.App. 1992).

SD1 is a political subdivision, or municipal corporation, of the Commonwealth of Kentucky, organized pursuant to the provisions of KRS Chapter 220 *et seq.* It is undisputed among the parties that SD1 has specific statutory authority to condemn property for public use. KRS 220.310. A condemning body is given broad

discretion regarding the amount of land to be taken and in determining whether the taking is a necessity. Kentucky courts have consistently held “[m]unicipal corporations are agencies of the state and when they declare through their constituted authorities that the taking of private property is requisite for an authorized public use, they exercise a public function and it is assumed that, as public agencies, they have carried out with wisdom and discretion the power lodged in them by the Legislature.” *McGee v. City of Williamstown*, 308 S.W.2d 795, 797 (Ky. 1958); *see also, Jefferson County v. Clausen*, 297 Ky. 414, 180 S.W.2d 297 (1944). The party challenging the condemnation bears the burden of establishing a lack of necessity for the taking or an absence of public use. *God's Center Foundation, Inc. v. Lexington Fayette Urban County Government*, 125 S.W.3d 295, 300 (Ky.App. 2002).

“Although 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* at 300. In their assertions made in support of their argument, the Appellants’ criticize the trial court’s evaluation of and the weight given various portions of the evidence concerning the sewage problem in their neighborhood. They characterize the septic system leaks as a private nuisance for which individual responsibility should be taken. The trial court applied these facts differently and after several hearings and extensive testimony from those affected, concluded the easements were necessary. Taking into consideration the findings of fact made by the trial court, which after a thorough review of the record we conclude to be

supported by substantial evidence, we find that the Appellants did not succeed in establishing a lack of necessity. This neighborhood clearly had problems with its septic systems. We are not compelled by, nor will we reverse the determination of SD1, based upon the Appellants' theories of conspiracy.

The Appellants also attempt to challenge the public use of the proposed sewer system. They do not, however, provide this court with a single basis upon which we might conclude that condemnation of their property for the purpose of installing a sewer line is not in the public's interest. Having shown no support for such a position, we defer to SD1's decision that the easement is for public use.

Appellants next dispute the trial court's finding that SD1 engaged in good faith negotiations to purchase the easements prior to filing their eminent domain petition. SD1's authority to condemn property is carefully circumscribed by constitutional provisions requiring that the taking be for a public use and that the condemnee receive just compensation. Kentucky Constitution, §§ 13, 242; KRS 416.540-680; *God's Center, supra*. Kentucky courts have imposed an additional duty on the condemnor to negotiate in good faith for the acquisition of the property prior to seeking condemnation. *See Eaton Asphalt Paving Co. v. CSX Transportation, Inc.*, 8 S.W.3d 878, 883 (Ky.App. 1999), *quoting Usher & Gardner, Inc. v. Mayfield Independent Board of Education*, 461 S.W.2d 560 (Ky. 1970). *See also Coke v. Commonwealth, Department of Finance*, 502 S.W.2d 57 (Ky. 1973).

On October 7, 2004, SD1's attorney sent letters to the Nobles and to Smith offering them \$1400 and \$1700, respectively, for the easements. Mrs. Noble claims she unsuccessfully attempted to contact SD1's attorney several times before she eventually rejected the offer. Smith declined the \$1700 and made a counteroffer of \$50,000, which SD1 rejected. SD1 then filed its petition for condemnation. The easements were later appraised by the court-appointed commissioners at values considerably lower than SD1's offers.

It has been established in this state that a "condemnor is not required to haggle in order to satisfy its obligation to negotiate in good faith the purchase of property." *God's Center* at 304, *citing Coke, supra*, at 59. The evidence shows that SD1 made a legitimate offer and the Appellants rejected it. It is our opinion that there was a good faith effort on the part of SD1 to purchase the easements prior to the condemnation proceedings.

Finally we turn to the Appellants' allegations that SD1 acted arbitrarily and capriciously in its selection of the easement locations. We will review the condemning body's exercise of discretion for arbitrariness or action in excess of its authority. *See Proffitt v. Louisville & Jefferson County Metropolitan Sewer District*, 850 S.W.2d 852, 854 (Ky. 1993); and *Vandertoll, supra*, at 360.

The Appellants claim the procedures SD1 followed in deciding where the easement would be located on their property were arbitrary and capricious and thus violated their constitutional right to due process. More specifically, they take issue with

SD1's decision to move the easement from the middle of their backyards to the outermost portion of their property. This was done after a public hearing for the purpose of allowing those affected by the project to voice their opinions and ask questions of SD1. The Appellants expressed their desire that the easement not be located in their backyards, but instead in front of their homes. After the public hearing, the affected property owners voted on whether they would like the sewer installation to proceed and the majority was in favor of the project. Taking into consideration the opposition the Appellants had for the plan, SD1's engineer moved the location of the easement on the Appellants' property so that it was located at the very rear of their property. The Appellants believe after this change was made, an additional public hearing should have been held and another vote of the property owners taken.

We fail to see how the actions taken by SD1 were arbitrary or capricious. Changes to the preliminary sewer plan were made in order to better accommodate the Appellants and intrude upon their property as little as possible. Further, SD1 had no duty to place the easement in the exact location desired by the Appellants. As stated above, the condemning body has substantial discretion in determining what particular property is needed in connection with a valid public project. *McGee, supra*. Further, the record reflects SD1 and its agents properly researched the sewer project and even went to great lengths to try to satisfy the Appellants who they knew were unhappy with the project as a whole. The Appellants fail to establish any abuse of discretion upon the part of SD1 in its proceeding to condemn their property.

For the foregoing reasons, the judgments of the Campbell Circuit Court are affirmed.

ALL CONCUR.

ORAL ARUGMENT AND BRIEFS FOR APPELLANTS, TED NOBLE AND BARBARA NOBLE; AND S. MARIANNE SMITH:

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