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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002245-MR

LEXINGTON-FAYETTE URBAN COUNTY HOUSING AUTHORITY AND LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, EX REL. LEXINGTON-FAYETTE URBAN COUNTY HOUSING AUTHORITY — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 00-CI-01530

RONALD JOHNSON; G. WAYNE CRAIG; AND BONNIE J. CRAIG — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is a condemnation action in which the Lexington-Fayette Urban County Housing Authority attempted to take property known as the Lincoln Terrace Apartments in Lexington, Kentucky. The circuit court denied the petition and this appeal followed. We opine that when a statutory scheme is mandated for how and when the power of eminent domain can be exercised, the statutory scheme shall be strictly construed,

which was not done in this case by the Housing Authority. Hence, we affirm.

In the verified complaint filed April 20, 2000, the Housing Authority, in paragraph five, states it is exercising the power of eminent domain pursuant to KRS 80.150, with concordance of the Lexington-Fayette County Government. Attached as exhibit B is the resolution of the Housing Authority which recites the condemnation action is pursuant to KRS 80.150. Also attached is exhibit C, a resolution of the City-County Government which in paragraph five states "That an action in Fayette Circuit Court to carry out the purposes of this Resolution be and hereby is authorized." The verified complaint was filed by an attorney employed by the Housing Authority. Later, the same law firm moved to intervene on behalf of the Lexington-Fayette Urban County Government ex relatione, Lexington-Fayette Urban County Housing Authority and to adopt all prior pleadings as their own. The motion was granted and thereafter, this same firm handled the matter for both the Housing Authority and the City-County Government, ex relatione. The city-county attorney never made an appearance nor conducted the proceeding for the authority.

When the court did hear the matter, it ruled that although the Housing Authority had the right to condemn property for public use under the Eminent Domain Act (KRS 416.540, et seq.), the Housing Authority did not have the right to take piecemeal parcels for housing when the property was already developed for housing and where there were many other parcels available in the area. The court also found that the Housing

Authority was acting capriciously and in bad faith by skipping certain pieces of property in the area while acquiring others in the same area, and that the plan was not the least restrictive means to accomplish the stated purpose. As a result of these findings, the petition for a taking by eminent domain was denied.

On appeal to this Court, the Housing Authority first contends that the landowners did not meet their burden of proof in establishing that the Housing Authority abused its discretion and misapplied the law. KRS 80.150 authorizes a local housing authority to condemn property for the purpose of constructing low-cost housing. The city attorney shall conduct the proceedings for the authority, in the form and manner provided by the Eminent Domain Act of Kentucky (KRS 416.540, et seq.) Under KRS 416.560(1), a local housing authority "shall exercise such right only by requesting the governing body of the city, county, or urban-county to institute condemnation proceedings on its behalf. If the governing body . . . agrees, it shall institute such proceedings under KRS 416.570, . . ." (emphasis added.) KRS 416.600 allows an answer to contest the right of the petitioner to condemn the property. Allegations of bad faith and fraud are issues for the judge. Commonwealth v. Cooksey, Ky.App., 948 S.W.2d 122 (1997). "Questions concerning the right to take for a public purpose are to be decided by the circuit court." Id. at 123. Likewise, the extent of the public taking is subject to court review. City of Bowling Green v. Cooksey, Ky.App., 858 S.W.2d 190 (1992). Under Cooksey, 858 S.W.2d at

193, a court can consider a less restrictive taking for the intended public purpose.

At the hearing before circuit court, there was evidence that the Housing Authority was taking Lincoln Terrace for elderly low-income housing; that Lincoln Terrace was already developed for low-income housing for any age; that skipping of certain pieces of property in the area was occurring; that many of those skipped were owner-occupied; that there are other properties among those being taken that are not developed with low-income housing; and although there was evidence of housing code violations in Lincoln Terrace, it was not being taken for slum clearance. The trial court's findings are supported by the evidence. "Because there is credible, competent and substantial evidence that the acquisition of this land by fee simple title is not necessary for an intended public purpose, this Court is unable to conclude that the trial court's findings of fact were clearly erroneous." Cooksey, 858 S.W.2d at 193; see also Carroll v. Meredith, Ky.App., 59 S.W.3d 484 (2001).

Cooksey, 858 S.W.2d 190, also supports the trial court's interpretation of the law when it said the condemnation was not necessary and less restrictive means are available. In Cooksey, our Court dealt with an attempt by an airport board to condemn a fee simple for a buffer zone around the airport. Our Court held a less restrictive taking existed to achieve the public purpose. Our Court opined that a restriction on the land could achieve the same buffer zone as a taking of the entire fee simple, and affirmed the dismissal of the petition to condemn.

If the Housing Authority is concerned about code violations in the existing housing, perhaps it can seek compliance with the housing code before it condemns the land and attempts its solutions.

We are also bothered by the Housing Authority using its own attorney for the condemnation process. Both KRS 80.150 and KRS 416.560 require that the city attorney conduct the proceeding and be reimbursed costs by the Housing Authority. Here the resolution of the Lexington-Fayette County Urban Government (Exhibit C) authorized an action in Fayette Circuit Court, but instead of its attorney filing suit, the Housing Authority did. This local Housing Authority has no standing to file suit. Strict compliance is required with statutory requirements where statutes provide for the acquisition and development of public projects by governmental units, and outlines the procedures to be followed. Such agencies are bound by such limitations as are imposed by the statutes. City of Jenkins v. Kentucky Water Co., Ky., 238 S.W.2d 167 (1951); Miracle v. Com., Dept. of Highways, Ky., 467 S.W.2d 757 (1971). Here the Housing Authority elected to proceed under authority of KRS 80.150. As such, it not only had to have the urban-county government approve its plans but had to have the urban-county government's attorney pursue this action on behalf of the Housing Authority. A local Housing Authority has no authority to file an eminent domain action on its own behalf. Strict compliance is jurisdictional. Miracle, 467 S.W.2d 757. We are of the opinion that merely joining the city-county government did not cure this jurisdictional defect.

The Housing Authority's contention that the court erred in finding the Housing Authority negotiated in bad faith is also in error. The Housing Authority would have us limit the evidence of bad faith to the difference between the offer to purchase and the evaluation by the commissioners. The circuit court was not so interested in the price difference as it was in the selection of certain pieces of property in the area while skipping others in the same area. While stepped-up housing code enforcement, survey stakes in the front yard, comments to tenants, etc. may not be the work of the Housing Authority, the trial court had a problem with how the Housing Authority decided to take one parcel and skip the next. The trial court was not shown the "need" to take the parcels it wanted and concluded the selection process was "capricious" and evidence of bad faith. This takes us back to the Cooksey, 858 S.W.2d 190, argument and becomes circular. The trial court had competent credible evidence that the acquisition was not necessary for the intended public purpose and had no justifiable explanation for which parcels were skipped and which were taken. The lack of justification provided the trial court with evidence of bad faith. Under Cooksey, 858 S.W.2d at 193, we cannot disagree with the trial court's findings and they are not clearly erroneous under CR 52.01.

Appellants also contend the court erred in holding that eminent domain does not allow the government to take property in order to provide housing for citizens when such property is privately owned and already providing housing for citizens. This argument is partly correct. Slum clearance and the construction

of low-rent housing projects is a public purpose which a local housing authority could legally act upon, and for which eminent domain could be used. Webster v. City of Frankfort Housing Comm., 293 Ky. 114, 168 S.W.2d 344, 347 (1943). In the case sub judice, the Housing Authority is not setting boundaries or describing a slum area but picking out individual parcels within an area with no set guidelines. Again, going back to Cooksey, 858 S.W.2d 190, the court can consider a less restrictive taking or alternatives to a taking such as stepped-up code enforcement.

Appellants' argument that the trial court erred in permitting hearsay evidence and an unqualified translator for witnesses not on the witness list, if error, is harmless. Appellants contend the real purpose was to show the Housing Authority was really trying to remove migrant workers and drive the Hispanics from an African-American neighborhood. Apparently the judge did not buy any of this argument and made no findings relative thereto. Any such error would be harmless. Crain v. Dean, Ky., 741 S.W.2d 655 (1987). See the distinction between "reversible" and "harmless" error in V.T.C. Lines, Inc. v. Chappell's Dairy, Inc., Ky., 298 S.W.2d 683 (1957).

One final argument by the appellees-owners is that the court erred in not awarding attorney fees and costs. The problem with this argument is that there was no cross-appeal filed. In a post-judgment motion the appellees requested such from the trial court. The court denied the motion and now we are asked to so order. Without an appeal or cross-appeal by the landowners, we

have no jurisdiction to review the issue as the issue has not been preserved. Gailor v. Alsabi, Ky., 990 S.W.2d 597 (1999).

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS

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