

RENDERED: JULY 14, 2006; 2:00 P.M.
ORDERED NOT PUBLISHED BY KY. SUPREME COURT: DECEMBER 13, 2006
2006-SC-000776-D)

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000625-MR

DEXTER ARTHUR RABOURN, INDIVIDUALLY AND
AS ATTORNEY IN FACT FOR GLENNA F. RABOURN,
HIS WIFE; GLENNA F. RABOURN; MARJORIE
THOMAS RABOURN; ANDREW JACKSON RABOURN AND
PATRICIA RABOURN, HIS WIFE; PATRICIA KNOBLOCK
AND WILLIAM KNOBLOCK, HER HUSBAND; INEZ
MARIE MADDIX; MARGARET WAGGONER; LULA MAXINE
CASSITY; THELMA RABOURN; AND TEX RABOURN

APPELLANTS

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 03-CI-00091

COMMONWEALTH OF KENTUCKY, TRANSPORTATION
CABINET, DEPARTMENT OF HIGHWAYS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY,¹ SCHRODER, AND VANMETER, JUDGES.

McANULTY, JUDGE: Dexter Arthur Rabourn and other members of the
Rabourn family (Rabourn) appeal a judgment of Carter Circuit
Court granting a petition by the Commonwealth of Kentucky,

¹ This opinion was completed and concurred in prior to Judge William E. McAnulty, Jr.'s resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

Transportation Cabinet, Department of Highways (the Department) to condemn several tracts of his farm for the construction of a road. Rabourn argues that the statute authorizing the Department to condemn property violates the separation-of-powers doctrine, and that the trial court erred in finding the condemnation was necessary and that the Department had negotiated in good faith. Finding that the statute is not unconstitutional and that the trial court did not clearly err by allowing the taking, we affirm.

On March 20, 2003, the Department filed a petition seeking to condemn four parcels, totaling 6.06 acres, of Rabourn's farm located in Carter County, Kentucky near Olive Hill. The purpose of the condemnation was to acquire right-of-way for the re-location of a portion of U.S. Highway 60 from an area known as "Rock Crusher Curve." The trial court referred the matter to the commissioners to determine the difference between the fair market value of the property before and after the taking. In a report issued on April 9, 2003, the commissioners found the fair market value of the property to be condemned to be \$147,500.00.

Rabourn filed an answer specifically challenging the Department's right to take. Rabourn also gave notice of his intent to challenge the constitutionality of KRS 177.081. Following extensive discovery, the matter proceeded to an

evidentiary hearing on January 7, 2005. Dexter Rabourn testified concerning his objections to the re-location project. He also presented the testimony of an expert witness, Dr. William Berg, who opined that the policy of the highway department to build all roads to the highest possible speed standard was arbitrary and an abuse of discretion.

In rebuttal, the Department presented the testimony of its engineer and project manager, Darrin Eldridge. Eldridge disputed Dr. Berg's opinions regarding the design of the road. The Department also presented the testimony of its appraiser, Roy Satterfield, who valued the property to be condemned at \$30,059.00. June Pugh, the buyer for the state, testified that she made an offer to Rabourn based on this appraisal. Rabourn rejected the offer and did not make a counter-offer.

In its findings of fact and conclusions of law issued on March 1, 2005, the trial court found that KRS 177.081(1) does not violate the separation-of-powers provisions in the Kentucky Constitution. The court further found that Rabourn had failed to present convincing evidence to establish that the Department had abused its discretion or acted arbitrarily or in bad faith in determining the necessity for and location of the road. Although the Department's offer was substantially less than the value of commissioner's award, the trial court concluded that the Department had negotiated with Rabourn in good faith.

Finally, the trial court determined that the Rabourns' family cemetery is not within the area to be condemned by the Department, and that the condemned area is not suitable for any future expansion of the cemetery.

Based on these findings, the trial court entered an interlocutory order granting the Department's petition to condemn the parcels. The court also accepted the commissioner's report valuing the subject parcels at \$147,500.00. Rabourn and the Department each filed exceptions to the commissioner's report. However, that matter is not before us in this appeal. Rather, Rabourn's appeal only concerns the trial court's order finding that the Department has a right to take the subject parcels.

As before the trial court, Rabourn primarily argues that KRS 177.081(1) violates the separation-of-powers doctrine set forth in Sections 27 and 28 of the Kentucky Constitution. These sections contain "explicit provisions which, on the one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the others." Legislative Research Commission v. Brown, 664 S.W.2d 907, 912 (Ky. 1984) (*Emphasis in original*). KRS 177.081(1) grants the Department broad discretion to determine necessity for acquisition of land to build highways. Upon issuance of the

official order finding public use and necessity, the Department's right of acquisition may be defeated only by proof of fraud, bad faith or abuse of discretion, and the landowner opposing condemnation bears the burden of proof. Commonwealth, Transportation Cabinet Dept. of Highways v. Taub, 766 S.W.2d 49 (Ky. 1988), Commonwealth, Dept. of Highways v. Vandertoll, 388 S.W.2d 358 (Ky. 1965), and Commonwealth, Dept. of Highways v. Burchett, 367 S.W.2d 262 (Ky. 1963).

Rabourn first argues that KRS 177.081(1) improperly delegates the legislative authority to condemn land without setting forth sufficient standards to control the Department's discretion in determining public use or necessity. He also asserts that the presumption set forth in KRS 177.081(1) encroaches on the judiciary's authority to determine the public use and necessity of the proposed condemnation. While Kentucky courts have had numerous opportunities to consider the application of KRS 177.081, these particular constitutional issues have never been addressed in a published opinion. Nevertheless, we agree with the trial court that neither aspect of the statute violates the separation-of-powers doctrine.

Rabourn contends that the legislature's delegation of condemning authority to the Department has improperly delegated to the Department nearly unlimited discretion to determine the public use and necessity for the exercise of that authority.

The legislative scheme must be essentially complete on its face, leaving to regulatory authority administrative rather than policy decisions. The "delegation of discretion is not unlawful" only "if sufficient standards controlling the exercise of that discretion are found in the act." Diemer v. Commonwealth, Transportation Cabinet, Department of Highways, 786 S.W.2d 861, 864-65 (Ky. 1990), citing Holsclaw v. Stephens, 507 S.W.2d 462, 471 (Ky. 1974) and Legislative Research Commission v. Brown, supra. Because the statute fails to set forth sufficient standards controlling the Department's exercise of that discretion, Rabourn asserts that the legislature's delegation of authority is unconstitutional.

However, the right of eminent domain is not an inherently legislative prerogative. The General Assembly may delegate the authority to exercise the power and define the specific terms under which the condemning authority may exercise such power. Kelly v. Thompson, 983 S.W.2d 457, 458 (Ky. 1998). And of course, the Department's exercise of that authority is subject to the legislature's discretion to appropriate funds for any particular project. But the right of eminent domain is an attribute of sovereignty and is not dependent on authority conferred by the Constitution. Boom v. Patterson, 98 U.S. 403, 406 (1878). Thus, while the exercise of the condemning authority is subject to the limitation by the legislature, the

legislature's delegation of the power of eminent domain is limited only by the constitutional requirements that private property may only be taken for public use, that the condemnee receive just compensation, Ky. Const. §§ 13, 242, and that exercise of that authority may not be arbitrary. Ky. Const. § 2.

In this case, the legislature has specifically authorized the Department to condemn land for the construction of highways and other roads. The legislature has authorized the Department to use its sound discretion in the exercise of that authority, and the Department's finding of public use and necessity shall not be disturbed in the absence of fraud, bad faith or abuse of discretion. Diemer, supra at 865. Therefore, the legislature's delegation of condemnation authority to the Department is constitutional.

Likewise, we disagree with Rabourn's contention that the presumption of public use and necessity infringes on the authority of the judiciary. While the question of whether the use to which condemned property is a public use is a matter for the courts to determine, the necessity for the exercise of eminent domain traditionally has been left to the condemning authority. Spahn v. Stewart, 268 Ky. 97, 103 S.W.2d 651, 656 (1937). Even prior to the 1952 enactment of KRS 177.081(1), Kentucky courts recognized the condemning authority is entitled

to the presumption that the taking of the property is necessary and that the burden of showing the contrary is upon the person who objects to the proceeding. Jefferson County v. Clausen, 297 Ky. 414, 419, 180 S.W.2d 297, 300 (1944). As recognized in Commonwealth v. Vandertoll, supra, and Commonwealth v. Burchett, supra, KRS 177.081 merely adopts this common law presumption. Furthermore, the Department's entry of an official order finding public use and necessity is a prerequisite to invoke the presumption. Since the presumption is rebuttable, the official order does not interfere with the courts' prerogative to make factual findings. Consequently, the statutory presumption does not improperly encroach on the authority of the judiciary.

Rabourn concedes that construction of the road across his property is a valid public purpose. But he contends that the heightened standards applied by the Department in designing the road are arbitrary and that an adequate road could be built to lesser standards without taking his property. Thus, he asserts that the Department cannot show the necessity for its proposed taking.

Necessity does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owners consistent with such benefit. Davidson v. Commonwealth, ex rel. State Highway

Commission, 249 Ky. 568, 61 S.W.2d 34, 36 (1933). 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. McGee v. City of Williamstown, 308 S.W.2d 795, 797 (Ky. 1958) and Pike Co. Board of Education v. Ford, 279 S.W.2d 245, 248 (Ky. 1955). Moreover, specific details regarding the design, problems of necessity, convenience to public, saving of expense and promotion of traffic safety are left to the sound discretion of the highway authorities. Sturgill v. Commonwealth, Department of Highways, 384 S.W.2d 89, 91 (Ky. 1964).

In this case, the trial court rejected Rabourn's objections to the design of the road, finding that his lay opinion was not supported by the evidence. The trial court also discounted the testimony by Rabourn's expert, noting that Dr. Berg relied on an outdated version of the American Association of State Highway and Transportation Officials (AASHTO) guide; that he was not familiar with the Kentucky Design Manual; that he did not know the problems to be addressed by the project, the length of the project, or even the accident history of the area to be replaced; and that he had not conducted a cost-benefit analysis of the various alternative routes. Dr. Berg did

concede, contrary to Rabourn's opinion, that the existing route did have problems which needed to be addressed. In contrast, Eldridge testified that the Department had conducted traffic and accident studies and a cost-benefit analysis. Based on these studies, as well as the standards set out in the AASHTO guide and the Kentucky Design Manual, Eldridge concluded the higher speed design for the road was appropriate.

The fact that the Department could have applied a lower speed design or chosen a different route for the road does not imply that the road design is arbitrary or an abuse of discretion. Commonwealth v. Burchett, supra at 266. 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 Foundation, Inc. v. Lexington Fayette Urban County Government, 125 S.W.3d 295, 300 (Ky. App. 2002). The trial court was well within its discretion to find Eldridge's testimony more credible than Rabourn or Dr. Berg. CR 52.01. Consequently, we agree with the trial court that Rabourn failed to meet his burden of proving that the Department's design of the road was arbitrary, in bad faith, or constituted an abuse of discretion.

Finally, Rabourn argues that the trial court erred by finding that the Department had negotiated in good faith to

obtain the property prior to bringing the condemnation petition. He points to June Pugh's testimony that the Department has a policy of making only one offer prior to bringing a condemnation petition. He also notes that the Department's only offer was less than one-fourth of the value of the property found by the commissioners. Rabourn thus concludes that the Department did not negotiate in good faith.

KRS 177.081(1) and KRS 416.550 permit the Department to bring a condemnation petition only after negotiations prove to be ineffective. Kentucky courts have imposed a further duty on the condemnor to negotiate in good faith the acquisition of the property prior to seeking condemnation. God's Center Foundation v. Lexington Fayette Urban County Government, *supra* at 300. The condemnor's failure to negotiate in good faith may serve as a basis for dismissal of the condemnation action. Eaton Asphalt Paving Co. v. CSX Transportation, Inc., 8 S.W.3d 878, 883 (Ky. App. 1999).

The focus of the inquiry is whether the condemnor made a reasonable effort in good faith to acquire the land by private sale at a reasonable price. Usher and Gardner, Inc. v. Mayfield Independent Board of Education, 461 S.W.2d 560, 562 (Ky. 1970). We are concerned that the Department's stated policy of making only a single offer does not meet this standard. *Id.* at 562-63. Nevertheless, a court will deny the right to take only where

there has been a gross abuse or manifest fraud, and the condemnee has the burden of proof on this issue. Commonwealth v. Cooksey, 948 S.W.2d 122, 123 (Ky. App. 1997).

The fact that the commissioners placed a substantially higher value on the property does not necessarily indicate that the Department's offer was unreasonable. Furthermore, Rabourn offered no evidence to show that the offer was unreasonable. In fact, Rabourn made no effort to negotiate with the Department, flatly stating that he believed that the Department should "back off the project" after he refused their offer. Given this evidence, the trial court did not clearly err in finding that the Department had negotiated with Rabourn in good faith.

Accordingly, the March 1, 2005, findings of fact, conclusions of law, and interlocutory order and judgment by the Carter Circuit Court granting the Department's condemnation petition are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Robert W. Miller
Grayson, Kentucky

BRIEF FOR APPELLEE:

Phillip K. Wicker
Assistant General Council
Elizabethtown, Kentucky

Jon H. Johnson
Staff Attorney
Flemingsburg, Kentucky