

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

<b>THE CLERMONT COUNTY TRANSPORTATION IMPROVEMENT DISTRICT</b>	:	
Plaintiff	:	<b>CASE NO. 2010 CVH 02287</b>
vs.	:	<b>Judge McBride</b>
<b>GATOR MILFORD, LLC, et al.</b>	:	<b>DECISION/ENTRY</b>
Defendants	:	

Kegler, Brown, Hill & Ritter Co., L.P.A., John P. Brody and Daniel J. Bennett, attorneys for the plaintiff Clermont County Transportation Improvement District, 65 East State Street, Suite 1800, Columbus, Ohio 43215.

Santen & Hughes, William E. Santen, attorney for the defendant Gator Milford LLC, 600 Vine Street, Suite 2700, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion for attorney fees and costs filed by the defendant Gator Milford, LLC (hereinafter referred to as “Gator Milford”).

At the request of the parties, the court agreed to render a decision regarding the defendant’s legal entitlement to an award of attorney fees and costs prior to setting an evidentiary hearing on the request for attorney fees, as such an evidentiary hearing

would be rendered moot if the court found that the defendant was not legally entitled to an award of fees. The court received oral argument on this threshold issue raised by the motion for attorney fees and costs on November 5, 2012. At the conclusion of that hearing, the court took the portion of the defendant's motion pertaining to its alleged legal entitlement to attorney fees under advisement.

Upon consideration of the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## **FACTS OF THE CASE AND PROCEDURAL BACKGROUND**

The present action is an eminent domain appropriation proceeding which resulted from a taking of a portion of Gator Milford's property by the Clermont County Transportation Improvement District (hereinafter referred to as "CCTID"). The taking occurred as part of a road works project on Business 28 in Milford, Ohio which was implemented to widen and improve that public road.

On October 4, 2012, the jury empaneled in the present action awarded a verdict for the defendant Gator Milford, LLC in the amount of \$366,384.00.<sup>1</sup> The initial good faith offer made by the plaintiff was \$161,335.00. The parties agree that the jury's award is greater than 125% of the plaintiff's good faith offer for the property.

The defendant filed the present motion to award attorney fees and costs pursuant to Sections 163.21(C), 163.62(A) and 163.09(G) of the Revised Code. At the hearing on this matter, the defendant acknowledged that R.C. 163.09(G) is not

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<sup>1</sup> Verdict filed October 4, 2012.

applicable in the case at bar and withdrew its request for fees under that particular code section.

## LEGAL ANALYSIS

Pursuant to R.C. 163.62(A):

“The court having jurisdiction of a proceeding instituted by a state agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for the owner's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the condemnation proceeding, as provided in division (G) of section 163.09 or division (A) or (C) of section 163.21 of the Revised Code, as applicable.”

As R.C. 163.09(G) is not applicable in the present action, the court turns to R.C. 163.21, which provides in pertinent part as follows:

“(C)(1) Except as otherwise provided in division (C)(2) or (3) of this section and subject to division (C)(5) of this section, when an agency appropriates property and the final award of compensation is greater than one hundred twenty-five per cent of the agency's good faith offer for the property or, if before commencing the appropriation proceeding the agency made a revised offer based on conditions indigenous to the property that could not reasonably have been discovered at the time of the good faith offer, one hundred twenty-five per cent of the revised offer, the court shall enter judgment in favor of the owner, in amounts the court considers just, for all costs and expenses, including attorney's and appraisal fees, that the owner actually incurred.

(2) The court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, if the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure, for the purpose of making or repairing roads that shall be

open to the public without charge, for the purpose of implementing rail service under Chapter 4981. of the Revised Code, or under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency, or the agency is a municipal corporation that is appropriating property as a result of a public exigency, except that the court shall enter judgment in favor of the owner for costs and expenses, including attorney's and appraisal fees, that the owner actually incurred only if the property being appropriated is land used for agricultural purposes as defined in section 303.01 or 519.01 of the Revised Code, or the county auditor of the county in which the land is located has determined under section 5713.31 of the Revised Code that the land is "land devoted exclusively to agricultural use" as defined in section 5713.30 of the Revised Code and the final award of compensation is more than one hundred fifty per cent of the agency's good faith offer or a revised offer made by the agency under division (C)(1) or (3) of this section."

As noted above, the parties agree that the final award by the jury in the case at bar was greater than one hundred twenty-five per cent of the plaintiff's good faith offer for the property. As a result, that requirement of R.C. 163.21(C)(1) has been met.

However, as the language of R.C. 163.21(C)(1) states, that provision is limited by the language of R.C. 163.21(C)(2) and (3). The plaintiff argues that R.C. 163.21(C)(2) provides that attorney fees and costs cannot be awarded in the present case because the property was appropriated "for the purpose of making or repairing roads that shall be open to the public without charge." In response, the defendant argues that the language "if the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure," which immediately precedes the making or repairing roads language, modifies the provisions which follow it such that attorney fees and costs are not to be awarded only when the agency appropriated the property in a time of war or other public exigency for the purpose of making or repairing roads.

R.C. 163.21(C)(2) is a classic example of poor legislative drafting. The placement of commas and the uses of the word “or” in that code section result in two equally plausible interpretations of the language of that statutory provision.

First, it is possible to read the meaning of the pertinent language of R.C. 163.21(C)(2) as follows: “The court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, if:

- (a) the agency is appropriating property in time of war or other public exigency imperatively requiring its immediate seizure
  - (i) for the purpose of making or repairing roads that shall be open to the public without charge, or
  - (ii) for the purpose of implementing rail service under Chapter 4981. of the Revised Code; or
- (b) the agency is appropriating the property under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency; or,
- (c) the agency is a municipal corporation that is appropriating property as a result of a public exigency.”

However, that same statutory language can also be reasonably interpreted as follows: “The court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, if the agency is appropriating property:

- (a) in time of war or other public exigency imperatively requiring its immediate seizure;

(b) for the purpose of making or repairing roads that shall be open to the public without charge;

(c) for the purpose of implementing rail service under Chapter 4981. of the Revised Code;

(d) under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency; or,

(e) the agency is a municipal corporation that is appropriating property as a result of a public exigency.”

The use of the word “or” between the phrases “for the purpose of implementing rail service under Chapter 4981. of the Revised Code,” and “under section 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 of the Revised Code as the result of a public exigency,” does not resolve the ambiguity. It is possible that the placement of the word “or” in that particular location was meant to signify that the “making or repairing roads” and “implementing rail service” phrases were meant to be modified by the “in a time of war or other public exigency” language. Furthermore, the referenced code sections, namely 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11, deal with takings for the purposes of water supply and sewers and drainage and takings by a Board of Commissioners for courthouses, jails, public offices, bridges and other structures. The reference to these sections is modified by “as the result of a public exigency.” Therefore, it is possible to conclude that the provisions regarding making and repairing roads and implementing rail service were meant to be modified by the “in a time of war or other public exigency” language, as all of the other referenced takings

only preclude an award of attorney fees when such a taking occurs as the result of a public exigency.

However, the statutory language is by no means unambiguous. The comma used between the “in a time of war” language and the “making or repairing roads” language suggests that these can also be read as two separate provisions. Furthermore, if the language is interpreted under the first option set forth above, it does not explain why there is no “or” between the “making or repairing roads” and “implementing rail service” language if those were intended to be the two phrases modified by the “in a time of war” provision.

The defendant argues that the “in a time of war or other public exigency” language was intended to modify all of the language following it. However, the court does not find that this results in a reasonable plain reading of the statute. If the phrase “in a time of war or other public exigency” was meant to modify the other four situations set forth thereafter, it makes no sense as to why the last two provisions contain references to “as the result of a public exigency.” If the “in a time of war or other public exigency” language modified those phrases, there would be no need to reiterate the public exigency requirement.

The court finds that either of the statutory interpretations set forth above are reasonable interpretations of the language of R.C. 163.21(C)(2). As a result, the court finds that this statutory language is ambiguous. Pursuant to R.C. 1.49:

“If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.”

In its discussion of Senate Bill 7 and the changes made to Chapter 163 of the Revised Code thereby, the Legislative Service Commission stated in pertinent part as follows:

“Attorney’s fees

\* \* \*

\* \* \* [T]he act requires a judgment for attorney’s fees based on the amounts of the agency’s offer and the final award of compensation, except in the situations noted below. Under the act, with the exceptions noted below, if the award exceeds 125% of the agency’s good faith offer \* \* \* the court must enter judgment for the owner in amounts the court considers just for all costs and expenses actually incurred by [the] owner, including attorney’s and appraisal fees. (R.C. 163.21(C)(1).)

The provisions described in the preceding paragraph do not apply if the agency is appropriating the property (1) in time of war or other public exigency imperatively requiring its immediate seizure, (2) for the purpose of making or repairing roads that will be open to the public without charge, (3) for the purpose of implementing rail service under R.C. Chapter 4981., (4) under R.C. 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 as the result of a public exigency, or (5) if the agency is a municipal corporation that is appropriating the property as a result of a public exigency unless the property being appropriated is land used for agricultural purposes or devoted exclusively to agricultural use and the final award of compensation exceeds 150% of the agency’s good faith offer or revised offer. \* \* \* ”<sup>2</sup>

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<sup>2</sup> Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Attorneys’ Fees and Costs, Exhibit A.

This Final Analysis report of the Legislative Service Commission clearly sets forth that the intent of the legislative drafters of R.C. 163.21(C)(2) was that each of the five exceptions are to be read independently of one another. As such, the court will find that this is the legislative intention of the statutory language and will follow that interpretation accordingly.

As the taking in the present case was an appropriation for the purpose of repairing roads that will be open to the public without charge, the defendant is not entitled to an award of attorney fees pursuant to R.C. 163.21(C)(2).

**CONCLUSION**

Based on the above analysis, the defendant's motion for attorneys' fees and costs is not well-taken and is hereby denied.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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Judge Jerry R. McBride

## CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 27th day of November 2012 to all counsel of record and unrepresented parties.

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Bailiff to Judge McBride