**IN THE SUPREME COURT OF OHIO**

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| State ex rel. Ohio History Connection, et al., | : | Case No. 2020-0191 |
| Plaintiff-Appellees, | : | On Appeal from the Licking County Court of Appeals, Fifth Appellate District |
| -vs- | : | |
| The Moundbuilders Country Club Company, | : | Court of Appeals Case No. 2019 CA 00039 |
| Defendant-Appellant. | : | |

# MERIT BRIEF OF DEFENDANT-APPELLANT, THE MOUNDBUILDERS COUNTRY CLUB COMPANY

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## I. INTRODUCTION

Appellee Ohio History Connection (hereinafter, "OHC") has exercised its power of eminent domain to take Appellant Moundbuilders Country Club Company's (hereinafter, "MCC") leasehold interest of a 134 acre parcel (the "Property") where it has been located for almost 110 years. (Necessity Hearing Trans. ("TR."), p. 219). Ironically, MCC's leasehold interest is derived from its lease it entered with OHC in 1997, which, with extensions, does not expire until 2078. OHC filed this appropriation action in an attempt to avoid that lease. The Fifth District's affirmance of the trial court's flawed determinations that OHC had made a good faith offer as required by statute, and that the taking was necessary for a public use, requires reversal by this Court.

Innumerable citizens own real estate in Ohio, all of whom are potentially subject to the government's "awesome power to take property against [their] will" through its power of eminent domain. *See Cleveland v. Hurwitz* (P.C.1969), 19 Ohio Misc. 184, 192, NE 2d 384, 249 N.E.2d 562. The right of these citizens to own and use their land is grounded in the beliefs and values of our forefathers who settled this state and founded this country. This land is essential for the shelter, sustenance, pleasure, industry and recreation of Ohio's citizens, and the overall prosperity of the state. While the rights of property owners are not without bounds, it is critically important that when the government exercises its overwhelming power of eminent domain, this power be exercised fairly and justly. And equally important, there must be a perception from the public that this power is employed equitably, and only when necessary for the public good. Otherwise, there will be an irreconcilable breakdown in trust between the government and its citizens, as the latter see theirs and their neighbor's property rights unjustly trampled by the

unfettered power of the state.[1] As explained more fully below, the decision of the Fifth District must be reversed as it rocks the fairness of the eminent domain process to its very core.

### A. The Good Faith Requirement Found in the Eminent Domain Statute Does Not Equate to a Showing of Bad Faith.

The Ohio General Assembly has adopted an eminent domain system which is designed to ensure that Ohio landowners are treated fairly when the eminent domain process is used. As part of that process, it is mandated that an appropriating agency, at least thirty days before filing a petition for appropriation, "***shall*** provide an owner with a written ***good faith*** offer to purchase the property." R.C. 163.04(B) (Emphasis added).

As explained more fully below, the "good faith" offer made by OHC was based on the lower of two separate appraisals acquired before it made the offer, without disclosing the higher appraisal to MCC. In analyzing whether this strategy met the "good faith" requirement, the Fifth District affirmed a finding by the Trial Court which held that OHC met its burden of providing a "good faith" offer simply by showing that it did not act in bad faith. Under this standard, the courts below found that OHC acted in good faith because it did not act with "dishonest purpose, moral obliquity, or conscious wrongdoing, or that it had an ulterior motive, ill will or actual intent to mislead or deceive . . ." (Trial Court Decision, Appendix A-29), or so long as it was not "prompted by . . . some interested and sinister motive." *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, 2020 Ohio 276, 143 N.E.3d 614, ¶ 25 ("Opinion") (copy attached in Appendix).

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[1] Indeed, the Ohio General Assembly recognized this when it adopted O.R.C.§163.59, which sets forth the state's policies in land acquisition procedures, and delineates the goals of the these policies as follows: "In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many state and federally assisted programs, ***and to promote public confidence in public land acquisition practices*** . . . ." O. R.C§163.59 (Emphasis added).

This diminishment of the statutorily required "good faith" threshold not only is a perversion of the plain language of the statute, but it places in jeopardy the rights of every property holder in Ohio who owns real estate that is desired by the government. Now, an appropriating agency like OHC must only meet the token requirement that its offer was not made in bad faith. If the Ohio General Assembly intended this minimalist interpretation for the duty of good faith, it could have easily added that to the definition of "good faith offer" under R.C. 163.01(J). It did not. The decision of the Fifth District must be reversed because landowners in Ohio who are faced with the forced taking of their land deserve better than a government that is deemed to meet its good faith burden by merely showing that it did not act dishonestly, with moral obliquity or with ill intent.

Additionally, reversal is required because this misapplication of the "good faith" requirement creates an uneven playing field in favor of the government. Eminent domain statutes must be strictly construed against the government. *Ellis v. Ohio Turnpike Com.*, 162 Ohio St. 86, 92, 120 N.E.2d 719 (1954); *Pontiac Improv. Co. v. Bd. of Comm'rs*, 104 Ohio St. 447, 135 N.E. 635 (1922), paragraph one of the syllabus. The Fifth District's decision must be reversed because the inverse and minimal definition of "good faith" as applied by the courts below falls woefully short of strict construction.

### B. To Meet the Constitutionally Required Public Use Test, the Current Use of the Property Must be Considered in Determining Whether the Taking is Necessary for the Public Good.

"The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 2002 Ohio 1627, 765 N.E.2d 345 (2002) judgment modified in part on other grounds, 96 Ohio St.3d 379, 2002 Ohio 4905, 775 N.E.2d 493; Fifth and Fourteenth

Amendments to the U. S. Constitution; Ohio Constitution, Article I, Section 19. In eminent domain cases, the constitutional inquiry is two-fold, and requires a court to determine "whether both the compensation requirement and the public-use tests were satisfied." *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006 Ohio 3799, 853 N.E.2d 1115, ¶ 42. Reversal is required here because the lower courts failed to properly apply the public use tests in finding that the taking of the MCC's leasehold interest was necessary for the public good.

The decision below found that the necessity question does not involve weighing competing public interests. (Trial Court Decision, Appendix A-31). Instead, it found that the review was essentially limited to whether the taking was for a public use. The Fifth District decision must be reversed because it effectively renders the term "necessary" superfluous. The decision also goes directly against the mandates of this Court set forth in one of the seminal cases on eminent domain, *Norwood v. Horney*. In *Norwood*, this Court laid a foundation for eminent domain cases which requires the consideration of the best interests of the public and whether the taking is necessary for the "common good." *Norwood,* 2006 Ohio 3799, at ¶43. The elimination of the analysis of the necessity element by the Fifth District opens the door for the state to take any property in Ohio without regard to how much benefit that property provides to the public prior to the taking.

## II. STATEMENT OF FACTS

### A. OHC's "Good Faith" Offer to Purchase MCC's Leasehold interest in the Property

On August 28, 2018, before the appropriation action was filed, OHC sent MCC a "notice of intent to acquire and good faith offer" which included an offer of $800,000 to purchase MCC's leasehold interest in the Property. (TR., p. 441., Pl. Ex. 12). Before submitting the offer, OHC acquired two appraisals, one from The Robert Weiler Group and one from Samuel Koon.

(TR. pp. 438-440; Pl. Exs. 12 & Ex. 44). The Robert Weiler appraisal, dated January 26, 2018, appraised the leasehold value of the Property at $1,750,000 ("Weiler Appraisal"). (Pl. Ex. 44). The Sam Koon appraisal, dated February 28, 2018, appraised the leasehold value of the Property at $800,000 ("Koon Appraisal"). (Pl. Ex. 12). Notably, MCC was not made aware of either of these appraisals prior to them being conducted and MCC was not given the opportunity to accompany the appraisers during their visits of the property as required by the statute. (Pl. Exs. 12 & Ex. 44); R.C. 163.59(C).

Burt Logan, the CEO of OHC, reviewed the appraisals. (TR., p. 482). Mr. Logan testified that he did not know what a leased fee value was, that he was not an appraiser, and that he did not know technically or legally to what that referred. (*Id.*, p. 496). Even with his conceded lack of the expertise needed to intelligently evaluate the appraisals, Mr. Logan never sought guidance from legal counsel to assist him in that regard. (*Id.*, p. 482). According to his testimony, Mr. Logan mistakenly believed that one appraisal appraised MCC's leasehold interest in the Property at $800,000 and the other at $500,000. (*Id.*, p. 496). Mr. Logan decided to submit an offer and provide what he thought was the higher valued appraisal because he thought it was the honorable thing to do. (*Id.*, pg. 442; pp. 482-483). Mr. Logan decided not to disclose the other appraisal to MCC at any point prior to litigation. (*Id.*, pg. 485). At no point before the suit was filed did OHC provide to MCC the Weiler Appraisal or make an offer based upon that appraisal. (*Id.*). The Weiler Appraisal was only disclosed after MCC discovered through its own investigation that another appraisal was conducted. (*Id.*; Pl. Ex. 45). No offer based upon the Weiler Appraisal was ever made.

### B. History of the Property at Issue and Its Relationship to Appellant Moundbuilders Country Club Company

MCC was formed in 1910 as the Licking Country Club Company, changing its name in 1911 to its current name of Moundbuilders Country Club Company. (Pl. Ex.13, Index #14, Historical Resume MCC). MCC initially leased the Property located in what is now the west side of Newark, Ohio, to house its golf course and country club in 1910, and opened its golf course in 1911. (TR., p. 219). The physical features of the Property include a set of Native American earthworks believed to have been constructed by the Hopewell culture approximately 2,000 years ago. (TR., p. 67). These earthworks are known as the Octagon Earthworks, and consist of earthen walls creating a circle with a diameter of just over 1,000 feet, connected to a set of additional earthen walls forming an octagon. (TR., p. 70, Pl. Exs. 6, 8). According to archeologists who have studied the Octagon Earthworks, the geometric shapes align with certain predictable risings and settings of the moon. (TR., pp. 26, 150-51, 209).

With regard to the more recent history of the Property, it was held in private hands until 1891. Then in 1892, using funds raised through the sale of bonds issued by the City of Newark and Licking County after the passage of a levy authorizing a tax to fund the same, the Property was acquired by the Newark Board of Trade, for the State of Ohio. (Pl. Ex. 38, pp. OHC018156-57). All deeds by which the Newark Board of Trade acquired the Property had stipulations that the Property acquired "was to be used and occupied by it (State of Ohio) as a permanent camping ground for the National Guard of Ohio . . . ." (Pl. Ex.13, Index #14, Historical Resume MCC). However, the deeds also had reverter clauses which stipulated that should the Property cease to be used by the Ohio National Guard for that purpose, it would revert to the Newark Board of Trade. (*Id.*).

During the Ohio National Guard's occupation of the Property from 1892 to 1908 it

attempted to restore the Octagon Earthworks while it maintained its camp there. (TR. pp. 167-68). It did so because approximately one-third to one-half of the Octagon Earthworks had been damaged or lost to cultivation or plowing when that land was in private hands. (TR. pp. 167-68; p. 230).

### C. Appellant Moundbuilders Country Club Company's Lease and Use of the Property

The Ohio National Guard abandoned the Property in 1908. As a result of that abandonment, the Property reverted to the Newark Board of Trade. (Pl. Ex.13, Index #14, Historical Resume MCC; *Id.*, Index #12 (1910 Court Order (Conveying premises to Board of Trade of Newark, Ohio)). The Newark Board of Trade, Newark and Licking County (the latter two originally provided the funds to purchase the Property) lacked the resources to maintain the Property and preserve its historical features, so in 1910 it leased the Property to MCC, with the stipulation that the Octagon Earthworks be maintained and the public be given access to the Property. (Pl. Ex. 41, App. I, p. A.56). In 1922, court-appointed trustee Leo Davis again leased the Property to MCC. (Pl. Ex. 2). While that lease was in place, the Property was transferred in 1933 from the Trustee to the Ohio State Archeological and Historical Society (now known as the Ohio History Connection). (Pl. Ex. 1). That transfer took place in part because the owner of the Property was in financial straits and the community was interested in have a proper party hold title to the Property. (TR. 98-99).

During all this time MCC continued to operate and maintain the Property, and its lease of the Property was renewed in 1957. (Pl. Ex. 3). In 1978, MCC exercised its option to renew the lease for an additional 10 years, and in the same year the parties reached agreement to a Supplemental Lease with an initial term of 10 years, with the right to renew the lease for three additional 10-year terms through 2018. (Pl. Ex. 4). Then in 1997, OHC knowingly, willingly and

voluntarily entered into a Second Supplement and Modification of Lease with MCC, the original term of which was 30 years, with the right to renew the lease in 10-year increments through 2078. (Pl. Ex. 5).

The 1957 lease contains provisions which carry through the supplemental leases. These provisions require that the Property be used by MCC only for country club purposes, permanent improvements to the Property be approved by the lessor, the earthworks on the Property be preserved and maintained and the property be accessible to the public subject to reasonable rules. (Pl. Ex. 3, pp. 2-3).

With regard to the obligations imposed on MCC in the leases to preserve and maintain the restored Octagon Earthworks, MCC has done that. In large part due to MCC's caretaking of the Property for the past 110 years, the Octagon Earthworks remain in much the same restored state as they were when MCC first leased the Property. In fact, the Octagon Earthworks were identified by OHC's expert witness as the best-preserved geometric earthworks in the world. (TR., pp. 154, 209, 220). The other earthworks formerly on the lands around and adjacent to the Property have been destroyed by extensive residential and commercial development as Newark grew to the west. (TR., pp. 64-66) (Compare Pl. Ex. 6 to Pl. Ex. 12, p. B-16 of Koon Appraisal and Def. Ex. M).

MCC has also worked with OHC to provide the public reasonable access to the Property. In a cooperative effort, MCC participated with OHC in the early 2000's to develop a Historic Site Management Plan which included an access agreement. The access agreement sets forth rules and guidelines regarding public access to the Octagon Earthworks on Property. (TR., pp. 59-62, 115-16; Pl. Ex. 41, App. V, p. A.107). Certain parts of the Property, including the observation platform and a path that runs along the perimeter of the circle mound, are open 365

days a year during daylight hours. (*Id.*). From November 1 through March 31 the entire site is open on Mondays, and on Mondays during the remainder of the year unless golf outings are scheduled. (*Id.*). The entire property is also made available to the public for four additional days in the spring, summer and fall seasons. (*Id.*). Typically when requests are made to MCC for additional access to the Property, they are granted. (TR., pp. 304-305; 517-518). In fact, the Property has a fair amount of visitor traffic that enters the property at all times during the summer. (*Id.*). Historically, educational tours were given at the Octagon Earthworks approximately 8 to 20 times a year, although OHC has in the last few years asked its tour guides not to request as many tours. (*Id.*, pp. 122-23).

MCC has been and continues to be a vibrant member of the Licking County community. It currently employs approximately one-hundred employees and pays approximately $1,000,000 in salaries each year. (Tr., p. 507; Def. Ex. D). In addition, MCC spends approximately $1,000,000 on local goods and services annually. (*Id.*). MCC has had long standing relationships with members and organizations in the community in addition to holding charitable outings that benefit the community and local schools. (*Id.*, p. 534, p. 593). Additionally, MCC has had a wonderful relationship with the neighbors of the Property. (*Id.*, p. 576).

### D. Appellee Ohio History Connection's Proposed Use of the Property and Similar Properties

OHC claims it wants to take MCC's leasehold interest in the Property, in part, so that it can attain a World Heritage designation for a series of Native American earthworks located in eight separate central Ohio sites, one of which is the Octagon Earthworks. (TR., pp. 208-09, 274.). World Heritage is an international treaty that was convened by United Nations Educational Science and Cultural Organization ("UNESCO"). (*Id.*, p. 273). The United States was the first country to sign the treaty which went into effect in 1975. (*Id.*). In order for OHC to

proceed with an application for World Heritage designation, it must have a plan to address the golf course located on the Property. (*Id.*, p. 381). This plan does not require the golf course to be immediately removed before application. (*Id.*). The golf course located on the Property is not the only hurdle in order to file an application for inscription. (Pl. Ex. 40). Other issues include power lines located at the Hopewell Mound Group as well as whether there are sufficient buffer zones around all of the sites. (*Id.*; TR., pp. 395-396) Since 2008, only two of the five sites nominated by the United States for World Heritage designation have been accepted as World Heritage sites. (TR., pp. 313-14). Being nominated is a not an assurance that the site will be selected for World Heritage status. (*Id.*, pp. 311-12, 392-393).

OHC owns and operates another property near the Octagon Earthworks containing historical Native American earthworks located at 455 Hebron Road, Hebron, Ohio, known as the "Great Circle." (*Id.*, p. 318). OHC has operated and managed that property as a park for 80 years. (*Id.*). This property has been poorly maintained by OHC. (*Id.*, pp. 580-585). The condition of the park shows an incredible amount of debris, fallen trees and clothes lying around which has been there for some time without being cleaned up. (*Id.*). It is known to be a site of significant criminal activity, and local authorities make frequent visits investigating allegations of crime. (Def. Exs. E, F).

There is damage to the mounds at the Great Circle property that has not been repaired, even though it is controlled entirely by OHC. This damage includes a large piece of earth taken out of the mound that has been there for years. (*Id.*). There are a large number of trees located on these mounds. (*Id.*; *Id.*, p. 317; Def. Ex. B & Ex. N; Pl. Ex. 42). Trees are not appropriate to be located on top of the earthwork mounds, is not the way they were initially intended, and are a potential threat to the archaeological resources of the earthworks. (*Id*, pp. 255-56; Pl. Ex. 41, pg.

24). In comparison, MCC has done a much better job at controlling the concentration of trees located on the mounds. (*Id.*).

OHC claims they would like to have a visitor center located at the Octagon Earthworks. (*Id.* p. 236; p. 301). Nothing currently prevents it from doing so as there is space on the Property to erect an educational facility. (*Id.*). But in the eighty years it has owned the Property, OHC has never requested MCC to build such a facility. (*Id.*, pp. 246-47; p. 517). OHC claims that they desire to conduct further research at the Property which is one reason taking of the Property is necessary. (*Id.* pp. 42-44). However, since 1964 OHC has conducted research on only three occasions at the Great Circle park, a property it owns and operates, and on which it could conduct research any time it wanted to do so. (*Id.*, pp. 232-33). The only excavation they have done at the Property was in 1992 which was initiated by MCC as part of the archeological supervision of improvements to the Property. (*Id.*, pp. 225-26). Additional research was recently conducted on the Property with MCC approval in 2018 by the German Archaeological Institute. (*Id.* pp. 185, 225). MCC has never turned down a request for any archaeological test from OHC. (*Id.*, p. 226).

## III. ARGUMENT

This case involves an interpretation of Ohio Revise Code 163, which governs the appropriation of private property by the government and its agencies. The interpretation of a statute or ordinance is a question of law for the court that requires it to employ a de novo standard of review. *State v. Musick*, 119 Ohio App.3d 361, 367, 695 N.E.2d 317 (11th Dist.1997). Furthermore, judicial review of the right and/or necessity of an appropriation is a legal justiciable question to be considered within confines and limits of our constitutional standards - subject to a de novo review. *See Wray v. Wessel*l, 4th Dist. Scioto Nos. 15CA3724,

15CA3725, 2016-Ohio-8584, ¶ 13 (in an appropriation case when it is alleged that a trial court's determination is based upon an erroneous standard or misconstruction of the law then the appropriate standard of review is de novo). In deciding the pure issues of law involved, this Court gives no deference to the lower courts. *New Riegel Local Sch. Dist. Bd. of Ed. v. Beuhrer Group Arch.& Eng'g, Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, 133 N.E.3d 482, ¶ 8.

**Proposition of Law I: In an Appropriation Action, the Condemning Authority Does Not Meet its Burden of Making a 'Good-Faith Offer' by Presenting Evidence That it Did Not Act in Bad Faith in Making the Offer to Purchase. Rather it Must Show That it Acted in Good Faith, Which is More Than the Absence of Bad Faith.**

The Fifth District found that a "good faith offer" is required prior to an appropriating agency being vested with the ability to appropriate property. (Opinion, ¶ 19). The court also agreed that the statutory provisions are to be strictly construed against the governmental agency and must be given heightened scrutiny in the context of eminent domain cases. (*Id.*, ¶ 20). Despite this foundation, the Fifth District improperly applied a bad faith standard in evaluating whether a good faith offer was extended. The Fifth District relied on cases that address what good faith means in the context of governmental immunity from tort liability (*Schaad v. Buckeye Valley Local Sch. Dist. Bd. of Educ.*, 5th Dist. Delaware No. 15 CAE 080063, 2016-Ohio-569), and the duty to act in good faith in an employment contract (*Frank v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 02AP-1336, 2003-Ohio-4684). (Opinion, ¶25). Neither of these cases interpret the eminent domain statute, which must be strictly construed against the appropriating agency and subjected to heightened scrutiny. *Ellis,* 162 Ohio St. 86, 92, 120 N.E.2d 719.

Through its reliance on these inapposite authorities, the Fifth District found that "good faith and bad faith are presented as opposites to each other" and that bad faith requires a showing of actual or constructive fraud, or a design to mislead or deceive another with some sinister motive. (Opinion, ¶ 25). It agreed with the Trial Court in defining good faith as the absence bad

faith, which it defined as engaging in conscious wrongdoing or acting with dishonest purpose, moral obliquity, ulterior motive ill will, or actual intent to mislead or deceive. (Trial Court Decision, Appendix A-32-33). Applying this standard to eminent domain actions has no basis in law.

Furthermore, the Fifth District failed to conduct a de novo review of the statute itself, but instead relied on the interpretation of the Trial Court. (Opinion, ¶ 26). It is clear that under Ohio law, the interpretation of a statute or ordinance is a question of law for the court that requires it to employ a de novo standard of review. *Musick*, 119 Ohio App.3d 361, 367, 695 N.E.2d 317. The court's review begins with the plain language of the statute at issue. *Iams v. Daimler Chrysler Corp.*, 174 Ohio App.3d 537, 2007–Ohio–6709, 883 N.E.2d 466, ¶ 17 (3d Dist.). "It is a court's responsibility to enforce the literal language of a statute wherever possible; to interpret, not legislate. Unless a statute is ambiguous, the court must give effect to its plain meaning." *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L–10–1126, 2011–Ohio–150, ¶ 26. Here, there is no mention of bad faith in the statute. Adding this type of review into the statute is improper and this Court must remedy that mistake.

### A. Compliance with O.R.C. 163.04 is Required Before a Court Acquires Jurisdiction in an Eminent Domain Action.

In order to first have the right to appropriate the property, OHC must satisfy the requirements set out under R.C. 163.04. Absent compliance with these requirements, the court lacks subject matter jurisdiction of the eminent domain action. *See In re Appropriation of Easements for Highway Purposes*, 117 Ohio App. 524, 526, 193 N.E.2d 94 (1963). Subject-matter jurisdiction is a condition precedent to a court's ability to hear a case, and, if a court acts without subject-matter jurisdiction, any proclamation by the court is void. *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11. Subject matter jurisdiction goes to the

power of the court to adjudicate the merits of a case so it can never be waived and may be raised at any time. *Id.; State ex rel. Gen. Elec. Co. v. Indus. Comm.*, 10th Dist. Franklin No. 06AP-648, 2007-Ohio-3293, ¶ 22. Because OHC failed to comply with R.C. 163.04 prior to initiating the appropriation action, the trial court was divested of jurisdiction.

With regard to the specific requirements in R.C. 163.04, an appropriating agency, at least thirty days before filing a petition "***shall*** provide an owner with a written good faith offer to purchase the property." R.C. 163.04(B) (Emphasis added). A good faith offer, as a requirement, was added in the 2007 amendments to the Ohio Eminent Domain Act, R.C. 163.04 and 163.041, effective October 10, 2007.[2] R.C. 163.01(J) defines "good faith offer" simply as the offer that an agency must make to the owner of the property before commending an appropriation proceeding. R.C. 163.01(J). Only after an appropriating agency extends a "good faith offer" can it then proceed to filing an action in court. R.C. 163.05 states: "An Agency that ***has met the requirements*** of sections 163.04 and 163.041 of the Revised Code may commence proceedings in a proper court by filing a petition for appropriation." R.C. 163.05 (Emphasis added).

As previously mentioned, the lower courts examined whether OHC exhibited bad faith when deciding whether OHC extended a good faith offer to MCC. However, as clearly outlined above, the term "bad faith" is not found anywhere in O.R.C. 163. Had the legislature intended the analysis to include a bad faith evaluation, they could have and more importantly would have included that in the statute; it did not though. For the lower courts to add a bad faith inquiry into the equation is inappropriate. As cited, judicial inquiry as to statutory interpretations should be limited to the clear and plain language of the statute.

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[2] The Ohio Eminent Domain Act was substantially revised and amended by the Ohio Legislature in 2007, effective October 10, 2007, in 2007 Am. Sub. S.B. No. 7.

### B. Good Faith, as It Relates to Statutory Requirements, Requires More than a Showing of the Absence of Bad Faith.

Despite the term "bad faith" not being in the statute at all, both the Trial Court and Fifth District used this "absence of bad faith" standard to evaluate whether OHC made a "good faith" offer. The Fifth District failed to support its analysis with any cases that relate to the concept of eminent domain. Furthermore, the Fifth District failed to support its analysis with any cases that discuss the concept of "good faith" as it relates to statutory interpretation.

There have been other lower courts that have analyzed whether the government met its obligation of "good faith" in the context of an eminent domain proceeding. *See Lawnfield Props., LLC v. City of Mentor*, 11th Dist. Lake No. 2017-L-130, 2018-Ohio-2447, 115 N.E.3d 642 (where the court held that the City of Mentor's offer to purchase the property at a price based on an appraisal of fair market value satisfied the good faith requirement of O.R.C. §163.04); *Wadsworth v. Yannerilla*, 170 Ohio App. 3d 264, 2006-Ohio-6477, 866 N.E.2d 1113 (9th Dist.) (where the court held that the city of Wadsworth's offer to purchase the property at a price based on an appraisal of fair market value satisfied the requirement to negotiate in good faith). It is important to note that at the time *Wadsworth* was decided, O.R.C. §163.04(B) did not contain a requirement that a written good-faith offer be made as a prerequisite for appropriation. Because of that, *Wadsworth* offers little to illuminate the meaning of that term which was added to the eminent domain statute in 2007. Additionally, *Lawnfield* offers no analysis on the subject other than to rely on *Wadsworth* to support its finding that making an offer based on an appraisal satisfies the good faith requirement. *Id.*, ¶¶ 21-29. Given that neither of these cases evaluated what good faith means as a statutory requirement, neither are controlling on this issue.

There is other precedent in a non-eminent domain context where what constitutes "good faith" has been discussed and defined without reference to bad faith. This Court has previously

found that, in the context of interpretation of Ohio prejudgment interest statute[3], good faith is not defined by the absence of bad faith. It has previously been asserted in this Court that the statutory language "failed to make a good faith effort," which is found in O.R.C. 1343.03(C), necessarily requires a finding of bad faith. *Kalain v. Smith,* 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986) This Court rejected that argument. To the contrary, it indicated that "a party may have 'failed to make a good faith effort to settle' even when he has not acted in bad faith." *Id.* As a result, this Court developed a four-part test to determine whether the losing party engaged in good faith settlement discussions.

The four-part test in *Kalain*, formulated in the context of the interpretation of R. C. 1343.03(C), requires that to avoid being assessed prejudgment interest, the losing party must have: "(1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party." *Id.*, syllabus. While MCC acknowledges that not all parts of this test are relevant in an eminent domain proceeding, what is clearly absent from the test is any attempt to declare good faith exists simply because evidence of bad faith is absent.

Other cases where this Court determined whether a party acted in good faith also did so without using an analysis grounded in an absence of bad faith. In analyzing in a contract setting whether a party to contract had exercised good faith (as he was required to do in the contract) in

[3] Ohio prejudgment interest rules are codified in R.C. 1343.03(C). This statute enables a prevailing party to obtain prejudgment interest if the opposing party does not engage in good faith negotiations to settle a lawsuit before a verdict is reached.

determining that his employment status or responsibilities had diminished to the extent he could resign and still receive full contract benefits, this Court noted as follows:

> The fact that the contract provided certain benefits upon Worth's "good faith" determination required the trial court to examine the subjective bases of Worth's decisions. However, this does not require the court to ignore evidence which conflicts with Worth's claimed reasoning. In some situations lack of good faith is synonymous with "bad faith," a term more frequently defined. However, this is certainly not true in all situations. See, e.g., *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, 159, 25 OBR 201, 202-203, 495 N.E. 2d 572, 574 (construing R.C. 1343.03[C] and holding that, "A party may have 'failed to make a good faith effort to settle' even when he has not acted in bad faith."). Moreover, in all cases a "good faith determination" ***requires at least to some extent that the determination be informed***. Where a contract provides that entitlement to benefits thereunder is contingent on a party's good faith determination, a court reviewing that party's good faith determination should consider not only the party's subjective reasoning but also the facts and circumstances surrounding the determination. An individual claiming to make a good faith decision cannot ignore the surrounding circumstances which ought to bear on that decision. Here, there is ample evidence to support the conclusion reached below that Worth's purported reasons for determining that his status and responsibilities had diminished were both ***speculative and uninformed***.

*Worth v. Huntington Bancshares*, 43 Ohio St. 3d 192, 197-98, 540 N.E.2d 249 (1989) (Emphasis added).

*Worth* and *Kalain* are both instructive in formalizing what is required from a government when it exercises a power that is "fraught with great economic, social, and legal implications for the individual and the community." *Norwood*, 2006 Ohio 3799, ¶ 3. While not intending to diminish the need for this Court in *Kalain* to establish the meaning of good faith in the context of a prejudgment interest proceeding, it is respectfully suggested that this case presents even a more compelling need to define good faith in the context of an action that severely impacts property rights of Ohioans that "are among the most revered in our law and traditions." *Id.*, ¶ 34.

Certainly the exercise of this overwhelming power demands more from the government than to not act maliciously or with ill intent.

While not all four components of the test in *Kalain* are applicable in an eminent domain action, the thrust of the second element of that test - that a party ***rationally*** evaluated his risks and potential liability – should be applied to the government when it exercises its eminent domain powers. A government should rationally and competently evaluate the offer it makes if it is going to make it in good faith. At a minimum, the government should understand the nature of its offer. Due diligence should be used to ensure that the offer made is consistent with the Ohio Constitution's requirement that the property owner receive "just compensation." Ohio Constitution, Article I, Section 19.

*Worth* is also edifying in defining the good faith standard to which the government should be held insofar as it imposes a requirement that the exercise of good faith requires the actor be "informed." *Worth,* 43 Ohio St. 3d 192, 198. In other words, the actor (the government or its agencies in an eminent domain action) must make the effort to be informed about the offer it makes if it is to make it in good faith. This is a higher bar than the "absence of bad faith" bar set by the court's below and one that the government, as long as it uses due diligence, can easily attain.

### C. OHC Failed to Make a Good Faith Offer under the Appropriate Standard.

The application of the wrong standard by the Fifth District in determining whether OHC made a good faith offer requires reversal. *See, e.g., Little Forest Med. Ctr. v. Ohio Civil Rights Comm'n.*, 61 Ohio St. 3d 607, 615, 575 N.E.2d 1164 (1991) (reversal required where wrong standard applied by the appellate court on review). An examination of the circumstances of OHC's appraisal and offer to MCC can lead to no other conclusion than OHC did not make a

good faith offer as required R.C. 163.04(B). Thus the trial court lacked subject matter jurisdiction to hear the case.

OHC acquired two appraisals of the Property prior to filing its petition for appropriation. (Tr. p. 438-439; Pl. Exs. 12 & Ex. 44). The Weiler Appraisal, dated January 26, 2018, valued the lease fee value at $1,750,000. The Koon Appraisal is dated February 28, 2018 and valued the leased fee value at $800,000. OHC did not disclose the first, higher Weiler Appraisal to MCC as required but instead based its "good faith offer" on the lower Koon Appraisal. (Pl. Ex. 12) At the trial, OHC's CEO testified that he examined both appraisals, but mistakenly believed that the Weiler Appraisal valued the Property at $500,000, and he decided the honorable thing to do was to base the offer on what he believed (albeit incorrectly) was the higher appraisal. (TR., pp. 442, 445-46, 481-482)

The OHC CEO also testified that (1) he was not an appraiser; (2) he did not know what a leased fee value was or know technically or legally to what that referred; and (3) he never sought guidance from legal counsel or any other expert to help him understand the appraisals he was reviewing. (TR. p. 482, 496-97) Under these facts, this was not a good faith offer because it was neither "rationally evaluated" nor made by someone who was reasonably informed as to the nature of the offer being made. Both of these elements are required under *Worth* and *Kalain* to rise to the level of good faith. How difficult is it for the government, or in this case its agent OHC, to consult with the bevy of experts and lawyers available to it? The Ohio Attorney General's office is close to if not the largest law firm in the state of Ohio. Yet the offer of $800,000 was made even though the OHC had in its possession another appraisal which valued the leasehold interest $950,000 higher than the offer made.

At a minimum, good faith required OHC to at least investigate why it had a differential of

almost $1,000,000 on a property interest that was not worth even $2,000,000 under either appraisal. Indeed, OHC's CEO admitted that had he realized the actual difference between the amounts of the two appraisals he would have "wanted to have done more due diligence and understand better why that spread was used." (TR., p. 449) OHC acknowledged it would have conducted due diligence had it understood the two appraisals. These facts again lead to the conclusion that "due diligence" should be required in this context. By OHC admitting that it did not use due diligence, it is clear that their offer was not made in good faith.

### D. Additional Statutory Violations Dictate That OHC's Offer was not Made in Good Faith

The legislature has also taken other steps to ensure that appropriating agency's act in a fair and reasonable manner. In addition to making a "good faith offer," the General Assembly has included other requirements that appropriating agencies must meet. R.C. 163.59 states "In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, ***to assure consistent treatment for owners*** in the many state and federally assisted programs, and ***to promote public confidence in public land acquisition practices***, heads of acquiring agencies shall do or ensure the acquisition satisfies" a number of requirements set out in section 163.59. (Emphasis added) R.C. 163.59(C) goes on to state that "real property to be acquired shall be appraised before the initiation of negotiations, and the owner or the owner's designated representative **shall** be given a reasonable opportunity to accompany the appraiser during the appraiser's inspection of the property." R.C. 163.59(C). It goes on to further state "if the appraisal values the property to be acquired at more than ten thousand dollars, the head of the acquiring agency concerned **shall** make every reasonable effort to provide a copy of the appraisal to the owner." (*Id.*) The clear purpose of these additional guidelines is to ensure that property owners are treated fairly throughout the entire process.

These additional requirements are safeguards to protect property owners from overreach by the state and to "assure consistent treatment for owners ... and to promote public confidence in public land acquisition practices." (*Id.*)

It is clear that OHC failed with regard to all of these previously enumerated statutory requirements. Here, the first appraisal was higher than ten thousand dollars, yet OHC never disclosed that report to MCC. Also, OHC never contacted MCC to let them know that either of the appraisers were going to appraise the property, nor were they given an opportunity to accompany the appraisers. The Fifth District found that these failures by OHC did not affect the validity of any property acquisition pursuant to R.C. 163.52(A). (Opinion, ¶ 29) That may be so, but these failures further illustrate the lack of good faith exhibited by OHC prior to litigation. OHC failed to follow much of what was required of them under the statute. Given that this Court must give heightened scrutiny in reviewing statutes that regulate eminent domain and that the statute must be construed in favor of the property owner, it is clear that the requirements laid out in the plain language of the R.C. 163 were not met by OHC.

The higher Weiler Appraisal was not disclosed to MCC until January 18, 2019, after initiation of the lawsuit and after MCC learned through its own investigation that another appraisal was conducted. (TR., pp. 484-86; Pl. Ex. 45). The reason it was not disclosed was that the OHC CEO deemed it unnecessary to disclose an appraisal that it did not use in their determination of the good faith offer. (TR., p. 485) It turned out that the second appraisal valued the property at more than twice the first appraisal.

Finally, if OHC truly believed that the first appraisal valued the property at $500,000, why would it not have just extended that value as their good faith offer? Why would they continue to get a second appraisal that was completed over a month later? That is not logical. If

the state simply has to extend an offer based on "an" appraisal, then submitting an offer with the $500,000 value would have sufficed. What appears to have happened was that OHC's initial valuation was higher than they wanted so they acquired a second appraisal which valued the Property at less than half of the first appraisal. In doing so, OHC was able to offer $950,000 less than if they had made an offer with the first appraisal. It is clear that this precedent could lead to a slippery slope that government agencies could use to their advantage to avoid paying just compensation for appropriated property. Under the precedent set by the lower courts, where would it stop? Could an appropriating agency acquire three separate appraisals just to extend the lowest one? What about five appraisals?[4] Either of these would be deemed acceptable under the lower courts' reasoning.

[4] In addition to "good faith," the clear and plain language of the statute addresses whether an appropriating agency can even acquire multiple appraisals prior to litigation. The specific language used by the legislature illustrates this. R.C. 163.04(C) states that "an agency may appropriate real property only after the agency obtains **an** appraisal of the property and provides a copy of the appraisal to the owner." R.C. 163.04(C)(Emphasis added). The plain language of the statute does not specifically allow for multiple appraisals to be acquired.. The statute states that an agency must acquire "an" "appraisal" and provide that appraisal to the property owner. Grammatically, the article "an" is used before singular nouns. As such, the term "appraisal" is in the singular tense which implies there is only one appraisal that an agency may acquire.

Had the General Assembly wished to allow agencies to get numerous appraisals, or even contemplated that, they could have easily done so by simply stating such, or using plural verbiage; however, it did not do so. Allowing an agency to get numerous appraisals, without a reasonable basis to do so, and submit only one to the property owner subverts the good faith requirement. How could an agency be acting in good faith if they acquire multiple appraisals and only disclose the lowest appraisal? Such actions would clearly not meet the threshold of good faith. To allow such a standard would encourage government agencies to shop around for the lowest appraisal, with the idea that they could offer the lowest one to the property owner and still be in compliance with the "good faith" standard. This would greatly prejudice property owners who neither had the time nor funds to dispute the proposed appraisal. These owners would then be left with the only choice they have, which is to accept an offer that arguably is not the fair market value for their property.

**PROPOSITION OF LAW II: In Order for a Condemning Authority to Show That a Taking is Necessary for a Public Purpose, it Must Show Not Only That the Purpose for Which the Property is Taken is A Public One, But it Must Also Show That the Taking is Necessary for the Public Purpose by Weighing All Considerations That Impact the Public. To do so, the Court May Weigh Competing Public Interests.**

The lower courts failed to consider public interests in determining whether the taking was necessary. The Trial Court noted that "the necessity question does not involve weighing competing public interests." (Trial Court Decision, Appendix A-31) The Fifth District, while noting that appropriation may be used only upon showing of a necessity for the common good, found that the taking was necessary to allow full public access as a park. (Opinion, ¶ 43) Both decisions failed to consider the public interests in the appropriation, and as such, erred in determining whether the taking was truly necessary. Such decisions go against the foundations set by this Court which have indicated that public interests competing with the stated interest of the taking entity must be weighed.

The Trial Court found that the inquiry as to necessity does not take into account competing public interests. However, this Court previously found that an essential condition of eminent domain in Ohio is the understanding that the sovereign may use its appropriation powers only upon necessity for "*the common good.*" *Norwood,* 2006 Ohio 3799, at ¶ 43. A taking can be permitted only "for the use and benefit of the people," which is "distinct from government interest, profit, or concern." *Cooper v. Williams*, 4 Ohio 253, 287 (1831). "It is only this great and common benefit to all the people alike that creates a necessity authorizing and justifying the seizure." *Id.* Additionally, when the State takes an individual's private property for transfer to another individual or to a private entity rather than for use by the State itself, the judicial review of the taking is paramount. A court's independence is critical, particularly when the authority for the taking is delegated to another or the contemplated public use is dependent on a private entity.

In such cases, courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner. *Pontiac Improvement Co.,* 104 Ohio St. at 453–454, 135 N.E. 635. OHC in this case is a private entity and the State is attempting to take MCC's leasehold interest in the Property and give it to OHC.

The Fifth District noted a great deal of evidence that supported the benefits provided by MCC to the public and the Property itself. (Opinion, ¶¶ 40-43). Nonetheless, the Fifth District found that the present arrangement, in the interest of optimal usage and preservation, now needs to give way to full public access. (*Id.*) The Fifth District did not address whether the taking was in the best interest of the public. Rather, the Fifth District ultimately held that since it was being appropriated, in part, to be turned into a park, that this was enough to find the taking necessary. (*Id.,* ¶ 42)

The inquiry as to whether it is necessary to appropriate the Property should not simply be limited to whether the taking is for a public use, but whether it is in the best interest of the public as a whole. The evidence in this case shows that a majority of OHC's prospective uses of the property, such as additional research, additional educational services, access by the public, and the need to preserve the earthworks, are all able to be done without appropriation of the property. Inasmuch as "eminent domain is a power of last resort for the good of the public," the inquiry into whether the appropriation is necessary requires more than answering affirmatively the question: Must OHC have an unencumbered title to the Property for the Property to be a park? *See Norwood,* 2006 Ohio 3799, at ¶ 79. These facts support the argument that appropriation, which should only be used as a last resort, is not necessary, particularly where the evidence shows that the pre-appropriation use of the Property can accommodate the uses contemplated by the appropriation.

Moreover, *Norwood* stated that " 'defining the parameters of the power of eminent domain is a judicial function,' * * * and we remain free to define the proper limits of the doctrine." *Id., at* ¶ 67, quoting *Worthington v. Columbus*, 100 Ohio St.3d 103, 2003 Ohio 5099, 796 N.E.2d 920, ¶ 21. This Court must determine whether the "reasonably convenient or useful to the public" test for necessity used by the Fifth District should be applied in all appropriation cases in light of the holdings in *Norwood.* It is respectfully suggested that the consideration of the "common good" as required by *Norwood* requires more than that, particularly where many of the public benefits sought to be obtained by OHC through the taking are already being served on the Property. In that case the "reasonably convenient or useful to the public" test improperly forecloses consideration of the current use of the Property in the necessity analysis.

The Fifth District's determination that the public's interest does not factor into whether a taking is necessary is flawed. To ignore the public interest would be to limit the evaluation to whether the taking is simply for a public use or not. This sort of test could lead to overreach by the government and allow takings that are not truly necessary. If the government only has to show that a taking will be for a public use, then this sets such a low bar where most takings could not be challenged by the property owner. Although taking property to allow public access can be important in some scenarios, in others it could be harmful. There are a wide range of scenarios where taking certain property, although the intent would be to open it to the public as either a park or similar use, would be against the public's interests. For instance, what if the State decided they wanted to increase public parks on the east side of Columbus, so they decide that they want to take property in the middle of Easton Town Center. Ultimately, the taking would be for a public use because the intent is to create a public park. However, would that truly be in the public's interest? Likely not. If the land they want to take currently houses several stores with

hundreds of employees, it may not be in the public's interest to have that piece of land turned into a public park.

The above is just one illustration as to how limiting the review only to whether the taking is for a public purpose would lead to an improper outcome. Here, the Property and MCC's control of the Property provides numerous benefits to the public as a whole; all of which would be lost after appropriation. MCC provides nearly $2M of economic impact to the community, including employing one-hundred people. MCC has long standing relationships with members and organizations in the community in addition to holding charitable outings that benefit the community and local schools. (Id., pg. 534, pg. 593) Additionally, MCC has had a wonderful relationship with the neighbors of its property. (Id., pg. 576). MCC has taken excellent care of the Property for over one-hundred years, whereas, OHC has not taken care of a similar property located just one mile away from the Property. OHC has allowed damage to the mounds located at the Great Circle, has been complacent by allowing significant criminal activity to occur at that property, and does not maintain the property well. Should OHC take MCC's Property and maintain it as they have the Great Circle, the taking would clearly not be in the public's best interest.

MCC has had the primary responsibility for preservation of the Earthworks on its Property for one-hundred years. MCC has taken great care of the Property and has ensured its wonderful condition for the public's benefit. Although OHC voluntarily and willingly entered a Historic Site Management Plan to outline the availability of the property to the public, MCC has regularly granted additional access to the Property to the public. The public already has a significant amount of access to the property and MCC has never turned down additional requests for access. Given MCC's care of the Property, and OHC's proven failures in caring for the Great

Circle, taking of the Property would not be in the public's interest. By failing to consider whether the taking is for the "common good", we fail to fully evaluate whether the taking is necessary to begin with. Would it be in the public's best interest if OHC takes the property and cares for it like they do their other properties as the evidence shows that is likely? Such an outcome would not be in the public's best interest as the public would not only have a property that is neglected but the public would lose out on all of the other significant benefits MCC provides.

Ultimately, the evidence shows that the true purpose for OHC to take the property is not primarily to open it to the public, but the taking allows them to file an application with UNESCO to acquire World Heritage designation. However, there is no guarantee that the application would be approved. As of the time of the taking hearing, the United States had only a forty percent approval rating for its nominations. (TR., pp. 313-14). *Norwood* clearly states that there is "no authority to appropriate private property for only a contemplated or speculative use in the future." *Norwood*, 2006 Ohio 3799 at ¶ 100. Additionally, OHC acknowledges that if the site is not inscribed as a World Heritage site, then all of their plans relating to increased tours, increased research, and increased facilities would not take place. (TR., pp. 234-235) Is it in the public's best interest to risk losing all of the benefits MCC provides for a chance that the Property will be inscribed to the World Heritage list? The answer to that would be no. In the end, the lower courts found that taking the property through eminent domain does not consider the public's interest. Such a finding is inconsistent with this Court's previous decisions and overall fairness that should be prominent in reviewing a government taking. Any taking by the government should be done to promote the public's best interest. Limiting the inquiry to a simple public use test could lead to unfair and unjust outcomes for both property owners and the public.

## CONCLUSION

MCC respectfully argues that, due to OHC's failure to make a good faith offer as required by R.C. 163.04(B), the trial court lacked subject-matter jurisdiction. This result necessarily requires that the Judgment of the Fifth District be reversed, and the case dismissed. Alternatively, the Judgment of the Fifth District should be reversed for applying the wrong standards in evaluating whether the OHC made a good faith offer, and whether the taking was necessary for a public use. As such, the case should be reversed and remanded with instructions to apply the correct standards.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by Electronic and/or Regular U.S. Mail this 28th day of September, 2020, to the following individual(s):

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# APPENDIX

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| The Moundbuilders Country Club Company, | : | |
| Appellant, | : | On Appeal from the Licking County Court of Appeals, Fifth Appellate District |
| State ex rel. Ohio History Connection, et al., | : | Court of Appeals Case No. 2019 CA 00039 |
| Appellees. | : | |

**NOTICE OF APPEAL OF APPELLANT THE MOUNDBUILDERS COUNTRY CLUB COMPANY**

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**Notice of Appeal of Appellant The Moundbuilders Country Club Company**

Appellant The Moundbuilders Country Club Company hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Licking County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 2019-CA-00039 on January 29, 2020.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

Joseph A. Fraley (Counsel of Record)

/s J. Andrew Crawford
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COUNSEL FOR APPELLANT THE
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COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been forwarded by Electronic and/or Regular U.S. Mail this 4th day of February, 2020, to the following individual(s):

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| STATE ex rel. OHIO HISTORY CONNECTION | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| THE MOUNDBUILDERS COUNTRY CLUB COMPANY | : | |
| Defendant-Appellant | : | Case No. 2019 CA 00039 |
| and | : | |
| PARK NATIONAL BANK | : | |
| Defendant-Appellee | : | |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to appellant.

HON. JOHN W. WISE

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

IN COMPLIANCE WITH CIVIL RULE 58, IT IS VERIFIED THAT COPIES HAVE BEEN SENT TO PARTIES AND/OR THEIR ATTORNEY OF RECORD IN A MANNER PRESCRIBED BY CIVIL RULE 5 (B) ON THIS 29 DAY OF Jan 2020

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COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT



STATE ex rel. OHIO HISTORY CONNECTION

Plaintiff-Appellee

-vs-

THE MOUNDBUILDERS COUNTRY CLUB COMPANY

Defendant-Appellant

and

PARK NATIONAL BANK

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2019 CA 00039

OPINION

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 18 CV 01284

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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*Wise, J.*

{¶1} Defendant-Appellant Moundbuilders Country Club Company ("MBCC") appeals the decision of the Licking County Court of Common Pleas, which granted appropriation, in favor of Plaintiff-Appellee Ohio History Connection ("OHC"), of certain real property in Newark, Ohio, which was being leased by appellant for use as a private golf course. The relevant facts leading to this appeal are as follows.

{¶2} The property in question in this dispute, located on North 33rd Street in Newark, is the site of several ancient Native American earthworks, constructed by the Hopewell culture more than 2,000 years ago. Of particular note at the site are the "Octagon Earthworks," consisting of approximately 134 acres these earthen structures, including a 1054-foot diameter circle, connected to an even larger octagonal enclosure. This is all part of a much larger complex – some of it destroyed in the past by European settlers – that once existed in what is now the Newark area. The Octagon Earthworks align at certain points with the 18.6-year cycle of with the rising and setting of the moon, and they reveal among other things that the Hopewell culture had a sophisticated understanding of mathematics, geometry, and astronomy.

{¶3} Efforts by Newark citizen groups to preserve earthworks in the area began as early as 1853. In the past, some of the land was utilized at various times, *inter alia*, as a fairground, a National Guard training area, and an amusement park site. *See* Exhibit 15: The Newark Earthworks: Enduring Monuments, Contested Meanings, University of Virginia Press, 2016, at 27-30.

{¶4} Appellant has been leasing the property in question in this matter since 1910. It has been during that time in continuous use as an 18-hole golf course and country

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club, and there are or have been additional tenant-owned improvements on the land, including a two-story clubhouse, tennis courts, a swimming pool, a locker room/office building, and a large maintenance building. Appellant first leased the property from the Board of Trade of Newark. However, in 1933, Ohio History Connection (then known as the Ohio State Archaeological and Historical Society) acquired the property and became the lessor to appellant in 1938. The current lease, entered into in 1998, gives appellant the right to occupy the property until 2078, subject to periodic renewals.

{¶5} In addition, in 2003, the parties entered into an additional agreement that designated a schedule for public access to the property. This agreement allowed year-round public access to a portion of the property known as the "observation platform" during daylight hours. It also allowed public access to the entire property on certain restricted days and times. In particular, it allowed public access to the entire property on four additional days during the summer and on days where golf is prohibited due to course conditions.

{¶6} Among other things, appellee has expressed an intention to file an application regarding the property for obtaining a World Heritage designation under the United Nations Educational Science and Cultural Organization (UNESCO). Tr. at 273. As of the spring of 2019, there were 23 "designated" World Heritage sites in the United States; however, none of them are in Ohio. Tr. at 338-339.

{¶7} On August 28, 2018, prior to the underlying appropriation action being filed, appellee sent appellant a written "notice of intent to acquire and good faith offer," which included an offer of $800,000.00 as compensation for appellant's leasehold interest. However, as further discussed *infra*, appellee was at that time already in possession of

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an earlier appraisal of $1,750,000.00, which it decided not to provide to appellant, and of which appellant became aware after the commencement of litigation.

{¶8} On October 18, 2018, the Board of Appellee OHC passed a resolution entitled "Declaring Intent to Appropriate a Leasehold Estate for the Preservation and Improvement of a Prehistoric Site or Monument."

{¶9} On November 28, 2018, Appellee OHC filed a petition to appropriate the subject property in the Licking County Court of Common Pleas. Appellant MBCC filed an answer and a counterclaim for breach of lease/contract on January 10, 2019. Appellant in particular denied two issues: (1) that appellee has the right to invoke eminent domain proceedings to appropriate the lease; and (2) that the appropriation is necessary to achieve a public purpose.

{¶10} The trial court first entered a judgment on March 7, 2019 which granted appellee's motion to dismiss appellant's counterclaims.

{¶11} Subsequently, the trial court arranged a necessity hearing as required by R.C. Chapter 163. The hearings went forward on March 18, 19, and 20, 2019, and April 8, 2019. Appellee called six witnesses over the first two days, including two professional archaeologists and a representative of the National Park Service. Appellant subsequently called numerous witnesses, commencing with MBCC's president.

{¶12} Following these hearings, on May 10, 2019, the trial court entered a "decision and order granting [appellee's] petition to appropriate and finding that the appropriation [was] necessary to achieve public purpose."

{¶13} On June 4, 2019, Appellant MBCC filed a notice of appeal. It herein raises the following three Assignments of Error:

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{¶14} "I. THE TRIAL COURT ERRED IN ITS CONCLUSION THAT PLAINTIFF-APPELLEE NEGOTIATED IN GOOD FAITH AND THEREFORE SUBJECT MATTER JURISDICTION WAS NOT LACKING.

{¶15} "II. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT PLAINTIFF-APPELLEE ESTABLISHED THAT THE TAKING WAS NECESSARY.

{¶16} "III. THE TRIAL COURT ERRED IN ITS DECISION TO DISMISS DEFENDANT-APPELLANT'S COUNTERCLAIMS."

I.

{¶17} In its First Assignment of Error, Appellant Moundbuilders contends the trial court erred in finding the existence of subject matter jurisdiction via its conclusion that Appellee OHC had negotiated in good faith for buying out appellant's lease interest. We disagree.

{¶18} R.C. Chapter 163 addresses the appropriation of property by public and private "agencies." Pursuant to R.C. 1743.07, certain historical preservation associations or societies may acquire necessary real estate in accordance with R.C. 163.01 to 163.22, inclusive. R.C. 163.05 states in part as follows: "An agency that has met the requirements of sections 163.04 and 163.041 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action."

{¶19} In the present context, "[t]he purpose of an appropriation award is to compensate the leaseholder for the value of his appropriated interest." *See City of Springdale v. Burns*, 1st Dist. Hamilton No. C-010002, 2001 WL 1386184. For cases

involving taking property for public welfare, a leasehold interest is considered private property. *Pokorny v. Local 310, Intern. Hod Carriers, Bldg. Common Laborers Union*, 35 Ohio App.2d 178, 185, 300 N.E.2d 464, 469 (8th Dist.1973), reversed on other grounds 38 Ohio St.2d 177, 311 N.E.2d 866 (1974). The agency seeking to appropriate property must *inter alia* satisfy the requirements set forth in R.C. 163.04. Among other things, the appropriating agency, at least 30 days before filing a petition "shall provide an owner with a written good-faith offer to purchase the property." R.C. 163.04(B). This good-faith offer requirement was codified in the revisions made to R.C. 163.04 and 163.041, enacted on October 10, 2007.

{¶20} The appropriation of property is a special statutory proceeding governed by R.C. 163 et seq. *See Dublin v. Beatley*, 5th Dist. Delaware No. 16 CAE 040021, 70 N.E. 3d 976, 2016-Ohio-5606, ¶ 16. Such provisions are strictly construed against the governmental agency. *See Willard v. City of Columbus*, 10th Dist. Franklin No. 78AP-577, 1979 WL 208913. Furthermore, heightened scrutiny must be applied in reviewing any statutes which regulate the use of eminent domain powers. *See Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 10.

{¶21} In the case *sub judice*, appellant primarily maintains that appellee failed to act in good faith in providing appellant an offer for purchasing the lease interest on the property in question.

{¶22} It appears factually undisputed that prior to the appropriation action being filed, appellee sent appellant a written "notice of intent to acquire and good faith offer," which included an offer of $800,000.00. Pl. Ex. 12. Before submitting the offer, appellee had actually acquired two appraisals of the property. The earlier "Weiler Appraisal,"

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(Robert Weiler Group) dated January 26, 2018, valued the leasehold interest at $1,750,000.00. The later "Koon Appraisal," (Samuel Koon) dated February 28, 2018, valued the leasehold interest at $800,000.00. However, appellee did not disclose the first, higher appraisal to appellant until January 18, 2019, in response to appellant counsel's request. Appellee's CEO, Burt Logan, later testified that he had deemed it unnecessary to disclose an appraisal that appellee's board had not used in their determination of the good faith offer. He further stated that he misinterpreted the leasehold value calculation in the Weiler report. *See* Tr. at 446.

**{¶23}** The trial court ultimately concluded in pertinent part as follows on the "good faith" issue:

> Here, the OHC made a good faith offer by obtaining an appraisal of the fair market value of the leasehold estate from an experienced, state-certified appraiser by the name of Samuel Koon. Mr. Koon is a member of the Appraisal Institute. It delivered to the Country Club a written Notice of Intent to Acquire and Good Faith Offer on August 28, 2018, more than 30 days prior to the filing of this action, as required by R.C. Section 163.04. OHC offered $800,000.00, the full amount of that appraisal.
>
> ***
>
> The OHC's initial offer of $800,000.00 was based on a fair market appraisal as required by R.C. Section 163.04(C). The mere existence of another appraisal for a higher value does not make OHC's initial offer a bad faith offer. And Mr. Logan's testimony concerning his mistaken interpretation of the Weiler report was credible. In fact, the Court found Mr.

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> Logan's explanation for his misinterpretation to be completely reasonable after evaluating the report firsthand. Moreover, there was no evidence that the Country Club would have accepted the higher offer or the higher valuation had it been offered.

{¶24} Decision and Order, May 10, 2019, at 9, 12.

{¶25} Under Ohio law, good faith and bad faith are presented as opposites to each other. *See Frank v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 02AP-1336, 2003-Ohio-4684, ¶ 15. "Bad faith" has been defined as "generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, * * * not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Schaad v. Buckeye Valley Local School Dist. Bd. of Edn.*, 5th Dist. Delaware No. 15 CAE 080063, 2016-Ohio-569, ¶ 24, citing *Hicks v. Leffler*, 119 Ohio App .3d 424, 429, 695 N.E.2d 777, 780 (10th Dist.1997), quoting Black's Law Dictionary (5 Ed.1979) 127 (internal quotations omitted).

{¶26} We have frequently emphasized that as an appellate court, we are not the trier of fact. *See, e.g., Tennant v. Martin–Auer*, 188 Ohio App.3d 768, 2010-Ohio-3489, ¶ 16, citing *Cross Truck Equip. Co. v. Joseph A. Jeffries Co.*, 5th Dist. Stark No. CA–5758, 1982 WL 2911. Our role in the present context is to determine whether there is relevant, competent, and credible evidence upon which the factfinder could base his judgment. *See Matter of D.D.*, 5th Dist. Muskingum No. CT2019-0025, 2019-Ohio-4646, ¶ 12.

{¶27} Upon review, we find no basis to overturn the conclusion of the trial judge that appellee's CEO, who is not an attorney, misunderstood the particulars of the Weiler

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appraisal, and that the Koon appraisal submission to appellant was accomplished in good faith.

{¶28} Appellant also maintains that appellee failed to provide appellant with a reasonable opportunity to accompany the appraiser. It cites R.C. 163.59(C), which generally states in pertinent part that ""[r]eal property to be acquired shall be appraised before the initiation of negotiations, and the owner or the owner's designated representative shall be given a reasonable opportunity to accompany the appraiser during the appraiser's inspection of the property ***." R.C. 163.59(C) also states that if the appraised value is more than $10,000.00, "the head of the acquiring agency concerned shall make every reasonable effort to provide a copy of the appraisal to the owner." Appellant thus maintains that reversal is warranted in this matter because appellee did not give appellant a reasonable opportunity to accompany either Weiler or Koon on their property inspection visits, and did not make a reasonable effort to provide the Weiler appraisal to appellant prior to the commencement of appropriation proceedings.

{¶29} Appellee responds in part that R.C. 163.59 only applies in cases of "displaced persons" as defined elsewhere in the statute, although it cites no case law in support. In any event, however, we note R.C. 163.52(A) states: "The failure of an acquiring agency to satisfy a requirement of section 163.59 of the Revised Code does not affect the validity of any property acquisition by purchase or condemnation." We therefore find no basis for reversal for lack of good faith on these additional grounds, as urged by appellant *supra*.

{¶30} Appellant's First Assignment of Error is therefore overruled.

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II.

{¶31} In its Second Assignment of Error, Appellant Moundbuilders contends the trial court erred in its determination that appellee established that the taking of appellant's lease interest was necessary. We disagree.

{¶32} As an initial matter, we note appellant's observation that only about one page of the trial court's May 10, 2019 thirteen-page judgment entry granting appropriation addresses the issue of the necessity of the taking, despite four days of hearing in this matter. Ohio appellate courts have recognized that in some situations, if a trial court's judgment entry is not "sufficiently detailed," the reviewing court is "left in the unfortunate position of being unable to provide meaningful review." *Schlauch v. Schlauch,* 5th Dist. Holmes No. 14 CA 008, 2015-Ohio-577, ¶ 27, citing *Stephens v. Stephens,* 9th Dist. Wayne No. 12CA0049, 2013–Ohio–2797, ¶ 5 (additional citations omitted).

{¶33} Nonetheless, although Civ.R. (1)(C)(2) states that the Ohio Civil Rules "to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure *** in the appropriation of property," the Civil Rules are generally considered applicable in appropriation proceedings unless there is a specific procedural conflict. *See City of Bucyrus v. Strauch*, 3rd Dist. Crawford No. 3-99-36, 2000-Ohio-1678.

{¶34} In the case *sub judice*, the docket gives no indication that either party requested more extensive findings of fact and conclusions of law pursuant to Civ.R. 52. We will therefore proceed to the merits of the present assigned error.

{¶35} The question of necessity is subjected on appeal to a "limited standard of review." *Willoughby Hills v. Andolsek,* 11th Dist. Lake No. 2001-L-173, 2003-Ohio-323, ¶ 92. R.C. 163.09(B) provides that the owner (here, the lessee) bears the burden in the trial

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court of proving that the legislative body abused its discretion in determining that an appropriation is necessary. *See Dublin, supra,* ¶ 15. As stated *supra*, we find our role in the present assigned error is to determine whether there is relevant, competent, and credible evidence upon which the factfinder could base his judgment. *Matter of D.D., supra.*

{¶36} When land is leased, the lessee acquires the lessor's right to the enjoyment and use of the land, and becomes the owner of the land for all practical purposes so long as the lease is in force. *Neary v. Board of Zoning Appeals*, 2nd Dist. Montgomery No. 17428, 1999 WL 980777, citing *Cooper v. Roose* (1949), 151 Ohio St. 316, 323. Generally, the power to appropriate property for public use is encompassed under the law of eminent domain, and the power is inherent in the state. *RMW Ventures, L.L.C. v. Stover Family Invest., L.L.C.*, 3rd Dist. Defiance No. 4-04-20, 161 Ohio App.3d 819, 2005-Ohio-3226, 832 N.E.2d 118, ¶ 14. "The Ohio and United States Constitutions both require that the power of eminent domain be exercised for a public purpose. Section 19, Article I, Ohio Constitution; Fifth and Fourteenth Amendments to the United States Constitution." *City of Huron v. Hanson*, 6th Dist. Erie No. E-99-060, 2000 WL 1033034.

{¶37} An essential condition of eminent domain in Ohio is the understanding that the sovereign may use its appropriation powers only upon necessity for the common good. *Norwood, supra*, at ¶ 43, citing *Buckingham v. Smith* (1840), 10 Ohio 288, 297. In this context, "[n]ecessity means reasonably convenient or useful to the public; it is not limited to an absolute physical necessity." *Sunoco Pipeline L.P. v. Teter*, 7th Dist. No. 16 HA 0002, 2016-Ohio-7073, 63 N.E.3d 160, ¶ 86.

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{¶38} In its resolution in the case *sub judice*, Appellee OHC stated that it was necessary to acquire Appellant MBCC's lease on the Octagon Earthworks for the purpose of "open[ing] the restored Octagon Earthworks for public use and benefit;" "restor[ing] the Octagon Earthworks by removing the golf course related improvements;" and "nominat[ing] the Hopewell Ceremonial Earthworks to the World Heritage List to bring global recognition to the significance of this cultural site."

{¶39} We first note that pursuant to R.C. 163.09(B)(1)(a), "[a] resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum." As such a resolution occurred in the present case, the burden thereby shifted to appellant to show a lack of necessity. Furthermore, under Ohio law, a "public park" is presumed to be a public use. *See* R.C. 163.01(H)(2).

{¶40} In essence, appellant presently argues that except for appellee's application for the property's inclusion on the World Heritage Site list, which is far from assured at this point, the proposed uses of the earthworks, such as a historical research area, a provider of additional educational services, and overall preservation, can all be accomplished without appropriation of the golf course leasehold, a legal action that appellant seeks to categorize as a "last resort" under the circumstances. Appellant also points out that it employs approximately 100 employees and pays approximately $1,000,000.00 in salaries each year. Tr. at 507; Def. Exh. D. Appellant also spends approximately $1,000,000.00 on local goods and services annually. *Id.* Appellant has had

long standing relationships with members and organizations in the community in addition to holding charitable outings that benefit the community and local schools. Tr. at 534, 593.

{¶41} Appellant also asks us to consider the fact that appellee owns and currently oversees additional earthworks located a few miles away in Hebron, Ohio, known as the "Great Circle" Earthworks. Appellant points to evidence that this property has not been well maintained by appellee. Tr. at 580-585. Evidence was adduced that this public park contains debris, fallen trees, and discarded clothes on the premises, and there are live trees growing on the mounds, which are a potential threat to the archaeological integrity resources of the earthworks. Tr. at 255-256; 607-608; Pl. Ex. 41.

{¶42} However, the Constitution does not require that a taking be immediately necessary, only that the taking is necessary for a public purpose. *Wadsworth v. Yannerilla*, 9th Dist. No. 06CA0019, 170 Ohio App.3d 264, 2006-Ohio-6477, 866 N.E.2d 1113, ¶ 12.

{¶43} Certainly, with the possible exception of the MBCC clubhouse having "truncated" part of the earthwork circle (*see* Tr. at 175), we find little in the record before us to indicate that appellant has neglected proper stewardship of the Octagon Earthworks over the many past decades of use as a country club. *See, also,* Decision at 10. Nonetheless, we hold the trial court had before it extensive evidence and testimony to adequately support its conclusion that the present arrangement, in the interest of optimal usage and preservation, now needs to give way to full public access to these geographic remnants left by the prehistoric Native American inhabitants of this region.

{¶44} Appellant's Second Assignment of Error is therefore overruled.

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III.

{¶45} In its Third Assignment of Error, appellant argues the trial court erred in its decision to dismiss its counterclaim for declaratory judgment and breach of contract.

{¶46} In its March 7, 2019 judgment entry (issued approximately two months prior to the decision and order granting appellee's petition to appropriate), the trial court determined that a dismissal of appellant's counterclaim was proper and that said counterclaim was in effect a collateral attack on the pending appropriation action. The trial court further found that the matter before it was a special statutory proceeding and, as such, no counterclaims would be permitted.

{¶47} Thereafter, in its May 10, 2019, judgment entry finding it was necessary for appellee to appropriate the lease in order to achieve a public purpose, the court ordered the case to proceed to a jury trial on September 10, 2019, in order to "determine the compensation owed to the Country Club." Judgment Entry, May 10, 2019, at 13. However, appellant filed its notice of appeal to this Court prior to said trial date.

{¶48} If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. *Meier v. Meier*, 5th Dist. Fairfield No. 16-CA-42, 2017-Ohio-1109, ¶ 9. We note R.C. 2505.02(B)(7) includes as a final appealable order *** "[a]n order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code." In turn, R.C. 163.09(B)(3) states in pertinent part as follows, subject to certain exceptions: "An owner has a right to an immediate appeal if the order of the court is in favor of the agency in any of the matters the owner denied in the answer ***." Such an order in an appropriation proceeding may be appealed only

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pursuant to R.C. 163.09(B)(3). *See Nau v. Martins Ferry*, 7th Dist. Belmont No. 13 BE 24, 2014-Ohio-2466, ¶ 19.

{¶49} Notably, neither the aforesaid March 7th nor May 10th judgment entries include any Civ.R. 54(B) language. While this Court has addressed *supra* appellant's appeal in the case *sub judice* because an owner (in this instance a leaseholder) has a special statutory right to an immediate appeal where a trial court has ruled on certain matters in favor of an agency seeking appropriation, we find under these procedural circumstances that appellant's challenge to the dismissal of its counterclaim and related relief must await the trial court's final determination of compensation for the appropriation. "We have recognized that to qualify as final and appealable, a trial court's order must satisfy the requirements of R.C. 2505.02, and if the action involves multiple claims and/or multiple parties *and the order does not enter judgment on all the claims* and/or as to all parties, the order must also satisfy Civil Rule 54(B) by including express language that 'there is no just reason for delay.'" *Snouffer v. Snouffer*, 5th Dist. Morgan No. 16 AP 0008, 2017-Ohio-2790, ¶ 34 (emphasis added).

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{¶50} Appellant's Third Assignment of Error is therefore found to be premature.

{¶51} For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

HON. JOHN W. WISE

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

JWW/d 0115

IN COMPLIANCE WITH CIVIL RULE 58, IT IS VERIFIED THAT COPIES HAVE BEEN SENT TO PARTIES AND/OR THEIR ATTORNEY OF RECORD IN A MANNER PRESCRIBED BY CIVIL RULE 5 (B) ON THIS 29 DAY OF Jan. 2020

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# IN THE LICKING COUNTY COMMON PLEAS COURT

| | | |
|---|---|---|
| State ex rel. Ohio History Connection, | : | |
| Plaintiff, | : | |
| vs. | : | Case No. 18 CV 01284 |
| The Moundbuilders Country Club, *et al.*, | : | Judge W. David Branstool |
| Defendants. | : | |

**DECISION AND ORDER GRANTING PLAINTIFF'S PETITION TO APPROPRIATE AND FINDING THAT THE APPROPRIATION IS NECESSARY TO ACHIEVE PUBLIC PURPOSE**

Two thousand years ago, an ancient society built massive earthworks throughout the Ohio Valley. From what is known today, these earthworks represent what once was the epicenter of a vibrant Native American culture, and they demonstrate a sophisticated knowledge of geometry, astronomy, architecture, and engineering. Today, the remains of these earthworks - a group of sites known as the Hopewell Ceremonial Earthworks - are located in Warren, Ross, and Licking counties. One of these sites, the Octagon Earthworks (also known as the Octagon Mounds), is the subject of this lawsuit.

As a legal matter, this lawsuit presents a straightforward issue: Can the Ohio History Connection ("OHC") exercise the power of eminent domain to reclaim full ownership of the Octagon Mounds in order to establish a public park on the site of these prehistoric earthworks? Based on the law and the evidence presented, the answer to that question is yes; provided, of course, that the owner of that interest receives just compensation for what is taken. The findings and conclusions which support this decision are set forth below.

A. Historical Background

The hearing on this matter took place over four days and involved numerous witnesses and documents. What follows is a summary of historical evidence presented and the Court's factual findings on the issues necessary to resolve this issue.

1. The Property and the Parties Involved

The Octagon Earthworks encompass approximately 134 acres in the City of Newark, Ohio, and is the site of ancient geometric earthworks constructed by indigenous people nearly 2000 years ago.

The Ohio History Connection is a non-profit organization. It was chartered by the Ohio General Assembly "to promote a knowledge of history and archaeology, especially of Ohio ..." and the Legislature granted it the authority to "... perform public functions as prescribed by law." R.C. 149.30. The OHC has owned the property since 1933. Pursuant to Ohio law, the OHC filed this lawsuit on behalf of the State of Ohio.

The Moundbuilders Country Club ("MBCC" or the "Country Club") is a private country club open only to its members. For over 100 years, the Country Club has rented the property and operated a golf course on the site.

2. Significance of the Octagon Earthworks

By all accounts, the Octagon Earthworks are a historic, cultural, and scientific treasure. They are considered by many archeological experts to be the largest and most complex of all Ohio Hopewell earthworks. Many experts consider them to be the best preserved enclosures of geometric earthworks in the world.

These particular mounds consist of a nearly perfect circular earthen enclosure with a diameter of over 1000 feet and is connected to an earthen octagon with, among other things, a geometry that aligns perfectly with the rise of the moon every 18.6 years. These are not simply the random, common remains of an earlier era the way one might associate finding a few arrowheads in a field. These mounds are far more profound. In terms of historical, archaeological, and cultural significance, the Octagon Mounds are recognized internationally as a masterpiece of human achievement. They demonstrate a sophisticated understanding of geometry, architecture, and engineering. And they were built by a prehistoric society nearly 2000 years ago.[1]

3. Recent History

Over 100 years ago, the site was privately owned. But in 1891, the citizens of Licking County voted to raise their own taxes to purchase the property. The property was then given to the State of Ohio to be used as an encampment ground for the militia, with the provision that title to the property would pass to the Board of Trade of Newark if the State ever abandoned the property.

In 1910, the State did just that; it abandoned the property and the title passed to the Newark Board of Trade. Soon after acquiring title to the property, the Newark Board of Trade began leasing the property to the Moundbuilders Country Club under its original name, the Licking Country Club. In 1911, the Country Club constructed a golf course on the property. From then on, the Country Club has maintained exclusive possession of

[1] Consider this: few man-made structures built near the time of Christ still exist. By way of comparison, the construction of these mounds took place contemporaneously with other noteworthy chapters of world history, including the biblical accounts of the Cleansing of the Temple and the Sermon on the Mount; the construction of the oldest of the Mayan Temples; the construction of the Roman Colosseum and the introduction of Buddhism to China.

the grounds, subject to a few exceptions for limited public access, and has operated a golf course on the site for the benefit of its members and their guests.

In 1933, the Ohio State Archaeological and Historical Society,[2] acquired ownership of the property, subject to the lease with the MBCC, by means of a deed issued by Leo Davis, Trustee in the case of *The City of Newark, et al., v. The Board of Trade of Newark, Ohio, et al.,* Licking C.P. 16817.[3]

The original lease was set to expire in 1940, but beginning in 1938 and extending for the next 60 years, the OHC and MBCC agreed to continue leasing the grounds to the MBCC. In 1997, the lease was supplemented, which gave the MBCC the right to occupy the property until 2078, provided the MBCC exercised its options to do so.[4]

4. Recent Developments

For much of the last 100 years, the Octagon mounds have remained isolated and unknown, at least to the public at large. The Country Club has had exclusive use and possession of the site since 1910. But since the most recent extension of the lease in 1997, as public awareness of the significance of the mounds has grown, demand for greater public access to the mounds has also grown. For example, in 2003, an advisory committee developed a historic site management plan for the Newark Earthworks, which included the Octagon Earthworks. That plan established times for limited public access

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[2] The Ohio History Connection previously operated under the names "The Ohio Historical Society" and "The Ohio State Archaeological and Historical Society."

[3] Significantly, that deed granted ownership of the property to the Ohio State Archaeological and Historical Society "in consideration of the agreement by The Ohio State Archaeological and Historical Society, to accept, hold, and preserve as an archaeological and historical site, to be open to the public at all times, the premises hereby conveyed ...".

[4] According to the pleadings, it remains a disputed question as to whether the MBCC complied with the requirements of the lease to renew its option in 2018. See paragraph 30 of OHC's Complaint and paragraph 31 of MBCC's Answer.

to the grounds due, in part, to a growing demand for public access as well as access for scientific and archeological exploration.

In addition, government and policy leaders have recognized the significance of the site, as well. In 2006, the Ohio General Assembly passed Senate Bill 271[5], which designated the "Newark Earthworks in Licking County" as the official prehistoric monument of the State of Ohio. Governor Taft signed the bill on June 7, 2006.

In 2016, both the Ohio House and the Ohio Senate adopted Concurrent Resolutions[6] supporting the nomination of the Hopewell Ceremonial Earthworks as a United Nations Educational, Scientific, and Cultural Organization ("UNESCO") World Heritage Site[7]. Both resolutions recited the fact that "the Hopewell Ceremonial Earthworks are recognized nationally and internationally as a masterpiece of human creative genius and an exceptional testimony to past American Indian cultural traditions and knowledge...".

And on May 25, 2018, the Trump Administration, through the United States Department of the Interior, announced the selection of the "Hopewell Ceremonial Earthworks" as a proposed nomination by the United States to the World Heritage List." However, the Department indicated that it would only forward the nomination of the Hopewell Ceremonial Earthworks if the golf course operated by the MBCC were removed from the site.

With the announcement of the selection of the "Hopewell Ceremonial Earthworks", as a proposed nomination to the World Heritage List, the Department of the Interior asked

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[5] This legislation was sponsored by Sen. Hottinger, in whose district the site was located.
[6] These resolutions were also sponsored or co-sponsored by the Legislators in whose district the site was located, Sen. Hottinger in the Senate, and Rep. Ryan in the House.
[7] The United States has 23 World Heritage Sites, but none of them are located in Ohio.

the owners of the Hopewell culture sites to work with the National Park Service's Office of International Affairs to prepare the nomination of the "Hopewell Ceremonial Earthworks" for submission to the World Heritage Committee.

But as public awareness about the significance of the mounds has led to a greater demand for increased public access, the Country Club's resistance to increased public access has also grown. Jeff Gill testified that since 2004 public access to the Octagon Earthworks has been much more difficult to achieve, even when that access was sought in accordance with the public access schedule in the 2003 Historic Site Management Plan. He testified that:

> [w]e were chased off the site repeatedly on Mondays within that time frame. And Mondays we would go, but there would be maintenance activity taking place, often right on top of where we were, or spraying of pesticides, herbicides, and fungicides that left us having school groups saying 'Get us out of here.' So we tried to use the historic Site Management Plan, but it didn't work.[8]

5. The Initiation of Appropriation Proceedings

In response to these developments, the OHC decided to exercise its authority under Ohio's Eminent Domain Law to seek full public access to the site. On October 18, 2018, the Board of the OHC passed a resolution "Declaring Intent to Appropriate a Leasehold Estate for the Preservation and Improvement of a Prehistoric Site or Monument."

In its resolution, the OHC stated that it was necessary to acquire the Country Club's lease on the Octagon Earthworks for the purpose of "open[ing] the restored Octagon Earthworks for public use and benefit;" "restor[ing] the Octagon Earthworks by removing the golf course related improvements;" and "nominat[ing] the Hopewell Ceremonial

[8] Testimony of Jeff Gill, Testimony, March 18, 2019.

Earthworks to the World Heritage List to bring global recognition to the significance of this cultural site."

B. Anaylsis

The OHC initiated this lawsuit to accomplish two objectives. The first is to invoke its authority of eminent domain to acquire the lease it has with the MBCC in order to regain possession of the site and repurpose it from its current use as a golf course and convert it to a public park. The second is to compensate the MBCC for the value of its property rights under the lease as determined by a jury.

In Ohio, the process to invoke eminent domain is governed by Chapter 163 of the Revised Code. The OHC filed its Petition to Appropriate Property on November 28, 2018. MBCC filed an Answer and Counterclaim on January 10, 2019. Because the Country Club specifically denied certain matters, the Court scheduled an expedited "necessities" hearing under R.C. 163.09(B)(1). Specifically, the Country Club denied two issues: (1) that the OHC has the right to invoke eminent domain proceedings to appropriate the lease; and (2) that the appropriation is necessary to achieve a public purpose.

1. The OHC has the authority to appropriate the lease.[9]

Ohio law clearly authorizes the OHC to exercise eminent domain powers to acquire the lease of the Octagon Earthworks site. The Ohio Legislature has assigned certain public functions to the Ohio History Connection. Under R.C. 149.30, these functions include:

> (A) Creating, supervising, operating, protecting, maintaining, and promoting for public use a system of state memorials . . .

[9] Although the Country Club denied, in its answer, OHC's authority to appropriate, which triggered a hearing on the issue, the Country Club did not present any evidence or argument that the OHC did not have the right to proceed under R.C. 1743.07, or R.C. 163.01 *et seq.*

(B) Making alterations and improvements, marking, and constructing, reconstructing, protecting, or restoring structures, earthworks and monuments in its care, and equipping such facilities with appropriate educational maintenance facilities;

(G) Engaging in research and history, archaeology, and natural science . . .

Thus, under these provisions, the OHC has a public duty to operate, protect, and maintain the Octagon Earthworks and promote the state memorial for public use. It has a public duty to make any alterations and improvements and to protect and restore the Octagon Earthworks, and to equip those Earthworks with the appropriate educational maintenance facilities. And it has the duty to engage in research and history, architecture, and natural science relating to the Earthworks.

Additionally, the OHC is authorized to use eminent domain to appropriate any interest in real estate that is the site of historic or prehistoric mounds or earthworks. This authority is granted by R.C. 1743.07, which reads, in pertinent part, as follows:

> Any incorporated association or society maintained by and operating on behalf of the state for the preservation of historic or prehistoric sites or monuments, the exploration, examination, improvement or preservation of such sites or monuments for educational, scientific or memorial purposes ... may acquire and hold any real estate in the State . . . which is the site of any historic or prehistoric mound, earth works . . .;
>
> In the event that such incorporated association or society and any owner or holder of such real estate sought to be acquired by it are unable to agree upon the price to be paid . . . such association or society may acquire such real estate in accordance with Sections 163.01 to 163.22, inclusive, of the Ohio Revised Code. Such proceedings shall be instituted in the name of the State and the Attorney General shall represent the State therein. (emphasis added).[10]

[10] Under R.C. Section 163.01 (F), the property interest subject to appropriation includes "any estate, title, or interest in any real property that is authorized be appropriated by the agency in question, unless the context otherwise requires."

Under Ohio's Eminent Domain Act, an agency is required to provide an owner with a written good faith offer to purchase the property. R.C. Section 163.04(B). Under R.C. Section 163.01(J), "good faith offer" means a written offer that an agency that is appropriating the property must make to the owner of the property pursuant to division (B) of Section 163.04 of the R.C. before commencing an appropriation proceeding.

Here, the OHC made a good faith offer by obtaining an appraisal of the fair market value of the leasehold estate from an experienced, state-certified appraiser by the name of Samuel Koon. Mr. Koon is a member of the Appraisal Institute. It delivered to the Country Club a written Notice of Intent to Acquire and Good Faith Offer on August 28, 2018, more than 30 days prior to the filing of this action, as required by R.C. Section 163.04. OHC offered $800,000.00, the full amount of that appraisal.

2. The Appropriation is Necessary to Achieve a Public Purpose

The second issue is whether the appropriation is necessary. As an initial matter, the word "necessary" as used in acts conferring the right of eminent domain does not mean "absolutely necessary" or "indispensable", but rather it means "reasonably necessary to secure the end in view."[11] In this case, the question is whether the OHC needs to take the property interest in order to achieve its proposed plan to restore full public access to the Octagon Earthworks. Clearly, the answer is yes. The taking of the lease is necessary to secure the public use and restore full public access as proposed by the OHC. The Country Club agreed that the plan to restore full public access is incompatible with the operation of a country club and golf course on the premises.[12] And the evidence overwhelmingly supported that conclusion.

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[11] *Solether v. Ohio Turnpike Com.*, 99 Ohio App.228 (6th Dist., 1954).
[12] See paragraph 47 of Defendant's Answer.

Furthermore, in evaluating the necessity question, it is critical to note that the OHC is entitled to a rebuttable presumption that the taking is necessary because OHC's Board of Trustees passed a resolution declaring that it is necessary to appropriate the leasehold estate held by the Country Club. R.C. Section 163.09(B). The Country Club also admitted this fact. As a result, the appropriation is presumed necessary unless the Country Club provides evidence rebutting the presumption.

It is also important to note that the necessity question does not involve weighing competing public interests. The necessity inquiry is not about who put the property to a better use, but only whether the appropriation is necessary for a public purpose. The Country Club did not rebut that presumption.[13]

3. The Country Club's Arguments and Bad Faith

The Court granted the counsel for the Country Club considerable leeway to present evidence in support of its arguments. Those arguments seem to alternate between impassioned pleas to maintain 100 years of tradition and claims that the OHC acted in bad faith.[14] But evidence did little to support the Country Club's arguments that the appropriation could not proceed.

It is true that the MBCC has taken good care of the grounds for the last 100 years. To be sure, no one would confuse it with a hog farm. And the testimony established that the care and upkeep for the golf course is a considerable expense, but in all fairness, it

[13] The parties presented different arguments about which party bore the burden of proof on whether the taking was necessary. But, the evidence clearly established - regardless of which party had the burden or which party produced it - that the taking was necessary to achieve the public purpose.

[14] The County Club raised additional claims for declaratory judgment, breach of contract and specific performance when it filed its Answer. However, the Court dismissed those claims by holding that contract claims and contract rights are not a defense to an eminent domain proceeding and that the State's authority to acquire property for the public use supersedes any contracts held by any individual or organization, subject to just compensation.

should hardly come as a surprise that that a golf course has been well-maintained. It is customary in the industry for a country club and golf course to be landscaped and manicured. That is what members pay for. Those costs and investments, however, are a function of the business, not of the site.

Much of the Country Club's argument was premised on the notion that the OHC has benefitted immensely from its lease arrangement with the Country Club. That may be true, but it should also be noted, as the evidence demonstrated, that the Country Club has received a considerable benefit in return. The current lease sets the monthly rent at approximately $3,000.00 for a 134 acre tax exempt parcel in Newark, Ohio.

It is also true that the Country Club has used the site for various charitable causes and events that have benefitted others. But while these endeavors may speak highly of the personal virtues of its members, it does not guarantee the preservation of the status quo. The Country Club's existence, and its ability to do these endeavors can be carried on from any location.

Regardless of how long the Country Club has occupied the site, or the number of fundraising events it hosts, its current use of the property as a private, members only, country club contradicts its suggestion that it operates the site for a public purpose. The lease gives the Country Club full occupancy and control over the use of the property. Even if Ohio law contemplated competing public uses, which it does not, the Country Club's exclusive lease for country club purposes only cannot constitute a competing public use.

Nor did the Country Club present any credible evidence of bad faith. Under Ohio law, "A lack of good faith is the equivalent of bad faith, and bad faith, although not

susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Hoskins vs. Aetna Life Insurance Company*, 6 Ohio St. 3d 272 (1983). There was no evidence to demonstrate that OHC acted with dishonest purpose, moral obliquity, or conscious wrongdoing, or that it had an ulterior motive, ill will, or actual intent to mislead or deceive the Club.

The OHC's initial offer of $800,000.00 was based on a fair market appraisal as required by R.C. Section 163.04 (C). The mere existence of another appraisal for a higher value does not make OHC's initial offer a bad faith offer. And Mr. Logan's testimony concerning his mistaken interpretation of the Weiler report was credible. In fact, the Court found Mr. Logan's explanation for his misinterpretation to be completely reasonable after evaluating the report firsthand. Moreover, there was no evidence that the Country Club would have accepted the higher offer or the higher valuation had it been offered.

At the end of the day, 100 years of manicured lawns does not immunize the Country Club from eminent domain to restore public access to a site of prehistoric earthworks. As scripture and song remind us: "to everything there is a season and a time for every purpose."[15] Experience teaches. Knowledge accumulates. People learn. Values evolve. Things change. And sometimes, as here, the public interest is more important.

This is a unique property, to be certain. Opinions will vary on the value of the interest to be appropriated. And as with any eminent domain action, the Country Club is

[15] Ecclesiates 3:1-8. *Turn, Turn, Turn* (1965) by The Byrds.

entitled to just compensation. This case is not over. A jury still has to determine the Country Club's "just compensation", as required by both the United States and Ohio Constitutions. The Country Club may be forced to move; or it may not. After the jury's verdict, the OHC will either buy it, if it can afford it; or abandon the appropriation if it cannot.

For all of the foregoing reasons, the Court hereby issues the following orders:

1). The Court finds that under R.C. Section 1743.07, the OHC has the authority to appropriate the lease owned by the Country Club.

2). The Court finds that it is necessary for the OHC to appropriate the lease in order to achieve its public purpose in restoring full public access to and creating a public park at the Octagon Earthworks.

3). The Country Club's challenges to the authority of the OHC to appropriate and the necessity of that appropriation are hereby denied.

4). The Case will proceed to a jury trial on September 10, 2019, to determine the compensation owed to the Country Club.

It is so ORDERED.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.

W. David Branstool, Judge

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# ORC Ann. 163.01

Current through File 41 of the 133rd (2019-2020) General Assembly.

*Page's Ohio Revised Code Annotated > Title 1: State Government (Chs. 101 — 195) > Chapter 163: Appropriation of Property (§§ 163.01 — 163.63)*

## § 163.01 Definitions.

As used in *sections 163.01* to *163.22 of the Revised Code*:

(A)"Public agency" means any governmental corporation, unit, organization, instrumentality, or officer authorized by law to appropriate property in the courts of this state.

(B)"Private agency" means any corporation, firm, partnership, voluntary association, joint-stock association, or company that is not a public agency and that is authorized by law to appropriate property in the courts of this state.

(C)"Agency" includes any public agency or private agency.

(D)"Court" means the court of common pleas or the probate court of any county in which the property sought to be appropriated is located in whole or in part.

(E)"Owner" means any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.

(F)"Real property," "land," or "property" includes any estate, title, or interest in any real property that is authorized to be appropriated by the agency in question, unless the context otherwise requires.

(G)"Public utility" has the same meaning as in *section 4905.02 of the Revised Code* and also includes a public utility owned or operated by one or more municipal corporations, an electric cooperative, and an agency holding a certificate of public convenience and necessity granted by the federal energy regulatory commission.

(H)

(1)"Public use" does not include any taking that is for conveyance to a private commercial enterprise, economic development, or solely for the purpose of increasing public revenue, unless the property is conveyed or leased to one of the following:

(a)A public utility, municipal power agency, or common carrier;

(b)A private entity that occupies a port authority transportation facility or an incidental area within a publicly owned and occupied project;

(c)A private entity when the agency that takes the property establishes by a preponderance of the evidence that the property is a blighted parcel or is included in a blighted area.

(2)All of the following are presumed to be public uses: utility facilities, roads, sewers, water lines, public schools, public institutions of higher education, private institutions of higher education that are authorized to appropriate property under *section 3333.08 of the Revised Code*, public parks, government buildings, port authority transportation facilities, projects by an agency that is a public utility, and similar facilities and uses of land.

(I)"Electric cooperative" has the same meaning as in *section 4928.01 of the Revised Code*.

(J)"Good faith offer" means the written offer that an agency that is appropriating property must make to the owner of the property pursuant to division (B) of *section 163.04 of the Revised Code* before commencing an appropriation proceeding.

(K)"Goodwill" means the calculable benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances that result in probable retention of old, or acquisition of new, patronage.

(L)"Municipal power agency" has the same meaning as in *section 3734.058 of the Revised Code*.

(M)"Port authority transportation facility" means any facility developed, controlled, or operated by a port authority for the purpose of providing passenger, cargo, or freight transportation services, such as airports, maritime ports, rail facilities, transit facilities, and support facilities directly related to any airport, maritime port, rail facility, or transit facility.

## History

131 v 179 (Eff 1-1-66); *144 v H 201*. Eff 6-30-91; *152 v S 7*, § 1, eff. 10-10-07.

Annotations

## Notes

**Editor's Notes**

The provisions of § 4 of *152 v S 7* read as follows:

SECTION 4. In accordance with *City of Norwood v. Horney (2006), 110 Ohio St.3d 353*, in which the Supreme Court held the right of property to be a fundamental right protected by the United States and Ohio Constitutions, the General Assembly finds that the exercise of the power of eminent domain at any level of government is a matter of statewide importance and hereby declares its intention that this act be construed to apply generally throughout the state.

The provisions of § 5 of *152 v S 7* read as follows:

SECTION 5. Sections 1 and 2 of this act do not apply to appropriation proceedings pending on the effective date of this act. This section is not intended to indicate that such appropriation proceedings do not have to comply with the constitutional requirements set forth in *City of Norwood v. Horney (2006), 110 Ohio St.3d 353*.

**Amendment Notes**

152 v S 7, effective October 10, 2007, rewrote the section.

## Notes to Decisions

# ORC Ann. 163.04

Current through File 41 of the 133rd (2019-2020) General Assembly.

*Page's Ohio Revised Code Annotated > Title 1: State Government (Chs. 101 — 195) > Chapter 163: Appropriation of Property (§§ 163.01 — 163.63)*

## § 163.04 Notice of intent to acquire property; written good faith offer to purchase; appraisal; failure to agree; traffic flow and access to property.

(A)At least thirty days before filing a petition pursuant to *section 163.05 of the Revised Code*, an agency shall provide notice to the owner of the agency's intent to acquire the property. The notice shall be substantially in the form set forth in *section 163.041 of the Revised Code*. The notice shall be delivered personally on, or by certified mail to, the owner of the property or the owner's designated representative.

(B)Together with the notice that division (A) of this section requires, or after providing that notice but not less than thirty days before filing a petition pursuant to *section 163.05 of the Revised Code*, an agency shall provide an owner with a written good faith offer to purchase the property. The agency may revise that offer if before commencing an appropriation proceeding the agency becomes aware of conditions indigenous to the property that could not reasonably have been discovered at the time of the initial good faith offer or if the agency and the owner exchange appraisals prior to the filing of the petition.

(C)An agency may appropriate real property only after the agency obtains an appraisal of the property and provides a copy of the appraisal to the owner or, if more than one, each owner or to the guardian or trustee of each owner. The agency need not provide an owner with a copy of the appraisal when that owner is incapable of contracting in person or by agent to convey the property and has no guardian or trustee or is unknown, or the residence of the owner cannot with reasonable diligence be ascertained. When the appraisal indicates that the property is worth less than ten thousand dollars, the agency need only provide an owner, guardian, or trustee with a summary of the appraisal. The agency shall provide the copy or summary of the appraisal to an owner, guardian, or trustee at or before the time the agency makes its first offer to purchase the property. A public utility or the head of a public agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a fair market value of ten thousand dollars or less.

(D)An agency may appropriate real property only after the agency is unable to agree on a conveyance or the terms of a conveyance, for any reason, with any owner or the guardian or trustee of any owner unless each owner is incapable of contracting in person or by agent to convey the property and has no guardian or trustee, each owner is unknown, or the residence of each owner is unknown to the agency and the residence of no owner can with reasonable diligence be ascertained.

(E)An agency may appropriate real property for projects that will disrupt the flow of traffic or impede access to property only after the agency makes reasonable efforts to plan the project in a way that will limit those effects. This division does not apply to an agency if it initiated the project for which it appropriates the property under Title LV of the Revised Code.

## History

131 v 180. Eff 1-1-66; *152 v S 7*, § 1, eff. 10-10-07.

# ORC Ann. 163.041

Current through File 41 of the 133rd (2019-2020) General Assembly.

***Page's Ohio Revised Code Annotated > Title 1: State Government (Chs. 101 — 195) > Chapter 163: Appropriation of Property (§§ 163.01 — 163.63)***

## § 163.041 Form of notice of intent to acquire.

Before initiating an appropriation action, an agency shall provide notice to each property owner as required by division (A) of *section 163.04 of the Revised Code*. The notice shall be substantially in the following form:

NOTICE OF INTENT TO ACQUIRE

TO: ..... (owner(s))

DATE: .....

..... (agency) needs your property for a ..... (description of the project) and will need to acquire the following from you:

..... (general description of the property or easement to be acquired).

Ohio law authorizes ..... (agency) to obtain your property or an easement across your property for certain public purposes. The legal description of your property that ..... (agency) needs is: (is attached:)

We will be presenting you with a written offer based on our determination of the fair market value of your property. You will have ..... days (minimum of ten) from the time you receive that offer to accept or reject the offer. We will be willing to discuss the offer with you during that time. **You are not required to accept that offer.** If you reject the offer or we are unable to come to an agreement, we may have to exercise our eminent domain authority to appropriate your property, which requires a court procedure. In a court proceeding, you may disagree with any of the following: whether the project is necessary (except in quick takes), whether the project is a public use (except in quick takes), whether your property is blighted (if applicable), and whether our offer reflects the fair market value of the property.

HERE IS A BRIEF SUMMARY OF YOUR OPTIONS AND LEGALLY PROTECTED RIGHTS:

1. By law, ..... (agency) is required to make a good faith effort to purchase (your property) (an easement across your property).

2. **You do not have to accept this offer** and ..... (agency) is not required to agree to your demands.

3. If you do not accept this offer, and we cannot come to an agreement on the acquisition of (your property) (an easement), ..... (agency) has the right to file suit to acquire the (property) (easement) by eminent domain in the county in which the property is located.

4. You have the right to seek the advice of an attorney, real estate appraiser, or any other person of your choice in this matter.

5. (*this paragraph does not apply to private agencies or to municipally owned public utilities*) You have a right to appeal this decision and may object to this project's public purpose, necessity, designation of blight (if applicable), or valuation by writing, within ten business days of receiving this notice, to:

..... (name(s) and address(es) of the taking agency, as well as to the elected official(s) who appointed the taking agency if the taking agency is not elected).

(The elected official) (A majority of the elected officials) that appointed ..... (unelected agency) has/have the discretion to veto this project, and if they do so, it will not proceed. (This applies only if the taking agency is a public agency composed of officials who were not elected.)

6. We are required by law to provide you with a written offer and the appraisal or summary appraisal on which we base that offer (public agencies and public utilities may delete this phrase for properties valued at less than $10,000 if they have adopted alternate procedures).

After a trial, a jury will decide the amount you are to be awarded for your property that is taken, for the damage that is caused by the taking, if applicable, and for other damages permitted by law, which could either exceed or be less than our offer. During the court proceeding, you have the right to testify as to the value of your property, and you and the agency are entitled to present evidence of the fair market value of the property (easement).

You may employ, at your own expense, appraisers and attorneys to represent you at this time or at any time during the proceedings described in this notice.

If we go to court to determine the amount we pay for your property and the jury awards you an amount that is significantly in excess of a good faith offer, revised offer, or offer made after an exchange of appraisals, as provided by law, you may be entitled to recover attorney's fees, costs, and expenses, subject to certain statutory limits.

If we go to court to determine whether the project is necessary or for a public use, and the court decides that it is not necessary or not for a public use, the judge shall award you your full amount of attorney's fees, costs, and expenses.

You also have the right to request that the issue of the value of your property be submitted to nonbinding mediation. You **must** submit your written request for mediation within ten business days after you file an answer to the agency's petition for an appropriation proceeding. If a settlement is not reached at mediation, the matter will proceed to a jury valuation trial.

If you have any questions concerning this matter, you may contact us at:

..... (full name, mailing, and street address, and phone of the agency)

..... (signature of contact person)

..... (printed name and title of contact person)

Agent of ..... (if different than agency)

## History

*152 v S 7*, § 1, eff. 10-10-07.



End of Document

# *ORC Ann. 163.05*

Current through File 41 of the 133rd (2019-2020) General Assembly.

***Page's Ohio Revised Code Annotated > Title 1: State Government (Chs. 101 — 195) > Chapter 163: Appropriation of Property (§§ 163.01 — 163.63)***

## § 163.05 Petition for appropriation; partial appropriations.

An agency that has met the requirements of *sections 163.04* and *163.041 of the Revised Code*, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action. All petitions shall contain:

(A)A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;

(B)

(1)A statement that the appropriation is necessary, for a public use, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(2)If the property being appropriated is a blighted parcel that is being appropriated pursuant to a redevelopment plan, a statement that shows the basis for the finding of blight and that supports that the parcel is part of a blighted area pursuant to the definition in *section 1.08 of the Revised Code*.

(C)A statement of the purpose of the appropriation;

(D)A statement of the estate or interest sought to be appropriated;

(E)The names and addresses of the owners, so far as they can be ascertained;

(F)A statement showing requirements of *section 163.04 of the Revised Code* have been met;

(G)A prayer for the appropriation.

In the event of an appropriation where the agency would require less than the whole of any parcel containing a residence structure and the required portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the appropriation shall be for the whole parcel and all structures unless, at the discretion of the owner, the owner waives this requirement, in which case the agency shall appropriate only the portion that the agency requires as well as the entirety of any structure that is in whole or in part on the required portion.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

## History

131 v 181 (Eff 1-1-66); 132 v H 132 (Eff 8-8-67); *145 v H 790*. Eff 9-12-94; *152 v S 7*, § 1, eff. 10-10-07.

Annotations

## Notes

### Amendment Notes

152 v S 7, effective October 10, 2007, rewrote (B); added the language beginning "unless, at the discretion" to the end of the present second paragraph of (G); and corrected internal references and made minor stylistic changes.

## Notes to Decisions

**Acquisition interests**

**Applicability**

**Change of terms by ordinance**

**Costs**

**Estoppel**

**Final determination**

**Jurisdiction**

**Mandamus**

**Petition**

**—Amendments**

**—Requirements**

**—Time to file answer**

**Public utilities**

### Acquisition interests

The interest acquired by condemnation proceedings is determined by the provisions of the statute, and not by the measure of compensation allowed therefor. A written statement filed by a property owner in condemnation proceedings for municipal park purposes, setting forth that he was the owner in fee of one parcel, is not such an answer as is required by statute, raises no issue, and cannot, upon the property being devoted to other than the

# ORC Ann. 163.52

Current through File 41 of the 133rd (2019-2020) General Assembly.

*Page's Ohio Revised Code Annotated > Title 1: State Government (Chs. 101 — 195) > Chapter 163: Appropriation of Property (§§ 163.01 — 163.63) > Displaced Persons (§§ 163.51 — 163.62)*

## § 163.52 Validity of acquisition, elements of value or damage, not affected.

**(A)**The failure of an acquiring agency to satisfy a requirement of *section 163.59 of the Revised Code* does not affect the validity of any property acquisition by purchase or condemnation.

**(B)**Nothing in *sections 163.51* to *163.62 of the Revised Code* shall be construed as creating, in any condemnation proceeding brought under the power of eminent domain, any element of value or damage not in existence immediately prior to June 11, 1971.

## History

134 v H 295 (Eff 6-11-71); *149 v H 426*. Eff 9-6-2002.

Annotations

## Notes to Decisions

**Good faith negotiations**

**Validity.**

**Good faith negotiations**

Since the city offered the land owner the fair market value of its property, as determined by its appraiser, the offer was made in compliance with Ohio's Eminent Domain Act, and thus was made in good faith. Even if the city was required by statute to offer an amount for the owner's residual damage, the city's failure to do so did not affect the validity of the appropriation or justify its dismissal. *Lawnfield Props., LLC v. City of Mentor, 2018-Ohio-2447, 115 N.E.3d 642, 2018 Ohio App. LEXIS 2660 (Ohio Ct. App., Lake County 2018)*.

**Validity.**

Appellant claimed that reversal was warranted because appellee did not give appellant a reasonable opportunity to accompany either appraiser on their property inspection visits; however, given that *R.C. 163.52* stated that the failure of an acquiring agency to satisfy a requirement of *R.C. 163.59* did s not affect the validity of any property acquisition by purchase or condemnation, there was no basis for reversal for lack of good faith. *State ex rel. Ohio*

# ORC Ann. 163.59

Current through File 41 of the 133rd (2019-2020) General Assembly.

*Page's Ohio Revised Code Annotated > Title 1: State Government (Chs. 101 — 195) > Chapter 163: Appropriation of Property (§§ 163.01 — 163.63) > Displaced Persons (§§ 163.51 — 163.62)*

## § 163.59 Land acquisition policies.

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many state and federally assisted programs, and to promote public confidence in public land acquisition practices, heads of acquiring agencies shall do or ensure the acquisition satisfies all of the following:

(A)The head of an acquiring agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(B)In order for an acquiring agency to acquire real property, the acquisition shall be for a defined public purpose that is to be achieved in a defined and reasonable period of time. An acquisition of real property that complies with *section 5501.31 of the Revised Code* satisfies the defined public purpose requirement of this division.

(C)Real property to be acquired shall be appraised before the initiation of negotiations, and the owner or the owner's designated representative shall be given a reasonable opportunity to accompany the appraiser during the appraiser's inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value. If the appraisal values the property to be acquired at more than ten thousand dollars, the head of the acquiring agency concerned shall make every reasonable effort to provide a copy of the appraisal to the owner. As used in this section, "appraisal" means a written statement independently and impartially prepared by a qualified appraiser, or a written statement prepared by an employee of the acquiring agency who is a qualified appraiser, setting forth an opinion of defined value of an adequately described property as of a specified date, supported by the presentation and analysis of relevant market information.

(D)Before the initiation of negotiations for real property, the head of the acquiring agency concerned shall establish an amount that the head of the acquiring agency believes to be just compensation for the property and shall make a prompt offer to acquire the property for no less than the full amount so established. In no event shall that amount be less than the agency's approved appraisal of the fair market value of the property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which the property is acquired, or by the likelihood that the property would be acquired for that improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

The head of the acquiring agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount that the head of the acquiring agency established as just compensation. Where appropriate, the just compensation for real property acquired and for damages to remaining real property shall be separately stated.

The owner shall be given a reasonable opportunity to consider the offer of the acquiring agency for the real property, to present material that the owner believes is relevant to determining the fair market value of the property, and to suggest modification in the proposed terms and conditions of the acquisition. The acquiring agency shall consider the owner's presentation and suggestions.

(E)If information presented by the owner or a material change in the character or condition of the real property indicates the need for new appraisal information, or if a period of more than two years has elapsed since the time of the appraisal of the property, the head of the acquiring agency concerned shall have the appraisal updated or obtain a new appraisal. If updated appraisal information or a new appraisal indicates that a change in the acquisition offer is warranted, the head of the acquiring agency shall promptly reestablish the amount of the just compensation for the property and offer that amount to the owner in writing.

(F)No owner shall be required to surrender possession of real property before the acquiring agency concerned pays the agreed purchase price, or deposits with the court for the benefit of the owner an amount not less than the agency's approved appraisal of the fair market value of the property, or the amount of the award of compensation in the condemnation proceeding for the property.

(G)The construction or development of a public improvement shall be so scheduled that no person lawfully occupying real property shall be required to move from a dwelling, or to move the person's business or farm operation, without at least ninety days' written notice from the head of the acquiring agency concerned of the date by which the move is required.

(H)If the head of an acquiring agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(I)In no event shall the head of an acquiring agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the real property.

(J)When any interest in real property is acquired by exercise of the power of eminent domain, the head of the acquiring agency concerned shall institute the formal condemnation proceedings. No head of an acquiring agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of the owner's real property.

(K)If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the acquiring agency concerned shall offer to acquire that remnant. For the purposes of this division, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the agency concerned has determined has little or no value or utility to the owner.

An acquisition of real property may continue while an acquiring agency carries out the requirements of divisions (A) to (K) of this section.

This section applies only when the acquisition of real property may result in an exercise of the power of eminent domain.

## History

134 v H 295 (Eff 6-11-71); 143 v H 295 (Eff 3-21-89); 143 v S 185 (Eff 6-21-90); *149 v H 426*. Eff 9-6-2002.

Annotations

## Notes to Decisions

# *ORC Ann. 1343.03*

Current through File 41 of the 133rd (2019-2020) General Assembly.

***Page's Ohio Revised Code Annotated > Title 13: Commercial Transactions — Other Commercial Transactions (Chs. 1301 — 1354) > Chapter 1343: Interest (§§ 1343.01 — 1343.05)***

## § 1343.03 Interest when rate not stipulated.

(A)In cases other than those provided for in *sections 1343.01* and *1343.02 of the Revised Code*, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to *section 5703.47 of the Revised Code*, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.

(B)Except as provided in divisions (C) and (D) of this section and subject to *section 2325.18 of the Revised Code*, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to *section 5703.47 of the Revised Code* that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied.

(C)

(1)If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

(a)In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b)In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c)In all other actions, for the longer of the following periods:

(i)From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.

(ii)From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

(2)No court shall award interest under division (C)(1) of this section on future damages, as defined in *section 2323.56 of the Revised Code*, that are found by the trier of fact.

(D)Division (B) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct or a contract or other transaction, and division (C) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct, if a different period for computing interest on it is specified by law, or if it is rendered in an action against the state in the court of claims, or in an action under Chapter 4123. of the Revised Code.

## History

129 v S 5 (Eff 7-1-62); 138 v H 28 (Eff 7-30-80); 139 v H 189 (Eff 7-5-82); *146 v H 350* (Eff 1-27-97); *149 v S 108*, § 2.01. Eff 7-6-2001; *150 v H 212*, § 1, eff. 6-2-04; *2016 hb166*, § 1, effective September 8, 2016.

Annotations

## Notes

**Publisher's Note:**

Section 2.02(B) of SB 108 (149 v —) repeals the HB 350 (146 v —) version and section 3(A)(4) revives the former version.

**Editor's Notes**

The provisions of § 3 of H.B. 212 (150 v —) read as follows:

SECTION 3. The interest rate provided for in division (A) of *section 1343.03 of the Revised Code*, as amended by this act, applies to actions pending on the effective date of this act. In the calculation of interest due under *section 1343.03 of the Revised Code*, in actions pending on the effective date of this act, the interest rate provided for in *section 1343.03 of the Revised Code* prior to the amendment of that section by this act shall apply up to the effective date of this act, and the interest rate provided for in *section 1343.03 of the Revised Code* as amended by this act shall apply on and after that effective date.

**Amendment Notes**

The 2016 amendment by HB 166, deleted the second sentence of (A), which read: "Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code."

## Notes to Decisions

§ 19. Inviolability of private property.

**Ohio Constitution**

**Article I. Bill of Rights**

*Current through the November 2019 election*

**§ 19. Inviolability of private property**

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

**Cite as Ohio Const. art. I § 19**