

## Ohio Eminent Domain: Appellate Court Gives Condemning Authorities Green Light to Appraisal Shop in order to “Low Ball” Pre-Suit Offer

By Jeremy Young

Under Ohio Revised Code Section 163.04 and 163.59(D), a condemning authority is generally required to provide a property owner with a pre-suit offer that is supported by, and tied to, “the agency’s approved appraisal of the fair market value of the property” being taken. It’s known as the “good faith offer” requirement, and under ORC Section 163.05 it must be satisfied before an eminent domain case can be filed. Otherwise, the case is subject to dismissal for lack of jurisdiction.

Ohio courts have long held that a condemning authority fails to satisfy the good faith offer requirement if the offer is not based on an appraisal. See *Media One v. Manor Park Apts Ltd.*, 11th Dist. Lake No. 2000-L-045, 2000 WL 1566525; *The City of Willoughby Hills v. Andolsek*, 11th Dist. Lake No. 2001-L-173, 2003-Ohio-323. It has also been held that the requirement is satisfied where the condemning authority presents the property owner with “a fair-market valuation” of the property at issue. See *Wadsworth v. Yannerilla*, 9th Dist. No. 06CA0019, 170 Ohio App.3d 264, 2006-Ohio-6477, 866 N.E.2d 1113.

But what about where the condemning authority obtains two appraisals, and chooses to base its offer on the lower of the two and not mention the higher appraisal? Does that satisfy the good faith offer requirement? According to a recent decision by Ohio’s Fifth District Court of Appeals, it does.

In the ongoing case of *State ex rel. Ohio History Connection v. The Moundbuilders Country Club Company, et al.*, 5th Dist. Licking No. 2019 CA 00039, 2020-Ohio-276, the Ohio History Connection is seeking to condemn the leasehold interest the Moundbuilders Country Club has in a property in Newark, Ohio that contains Native American earthworks. For over a hundred years, the club has operated a members-only golf course on the property pursuant to a long-term lease. Although the club has historically opened the property to the public at certain times, the History Connection wants the public—and researchers—to have unfettered access to the earthworks.

Interestingly, the History Connection is the owner of the property, and there is evidence that it voluntarily extended the lease until 2078. As the lease does not contain an early termination provision in favor of the landlord, the History Connection’s only option to terminate is to take the country club’s leasehold interest by eminent domain, and it filed a condemnation case for that purpose.

The country club challenged the taking, arguing, among other things, that the History Connection had failed to satisfy the good faith offer requirement. The basis for this argument was that, although its pre-suit offer of \$800,000 was based on an appraisal, that appraisal was obtained after the History Connection had obtained a different appraisal indicating the club was due \$1,750,000. The History Connection did not disclose the existence of the higher appraisal until the club specifically asked about it during discovery.

At the hearing on the club's challenge, the History Connection's CEO testified that he had deemed it unnecessary to disclose the higher appraisal because the pre-suit offer was based on the lower appraisal. He also claimed that he had misinterpreted the appraiser's calculation in the higher appraisal.

The trial judge ruled that this evidence did not demonstrate that the History Connection acted in 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 the club. The trial judge further indicated that the CEO's explanation for his mistaken interpretation of the higher appraisal was credible.

Relying on the legal standard applicable to its review of the trial judge's ruling, which permitted reversal only if it found there was no relevant, competent, and credible evidence supporting the ruling, the court of appeals affirmed and remanded the case for a valuation trial to be held.

Unless reversed by the Ohio Supreme Court in the country club's recently filed appeal, this decision effectively opens the door to allow a condemning authority to shop for the lowest appraisal it can get, and then base its pre-suit offer on that appraisal while ignoring the existence of any higher appraisals, without fear of having its eminent domain action dismissed for failure to satisfy the good faith offer requirement.

If you have any questions, please contact any of the following Roetzel attorneys.

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