

## Ohio Eminent Domain: Supreme Court Opens Door for Agencies to Pay Less Compensation Through “Appraisal Shopping”

By Jeremy S. Young

Under Ohio Revised Code 163.04, a condemning authority is required to make a good faith offer to purchase property it seeks to acquire at least 30 days before it may file an eminent domain lawsuit to take the property. If it fails to do so, its eminent domain lawsuit can be dismissed.

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. By the same token, the good faith offer requirement is satisfied where the offer is based on an appraisal. 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 a condemning authority engages in “appraisal shopping,” by obtaining two appraisals, basing its offer on the lower of the two and not mentioning the higher appraisal? Does that satisfy the good faith offer requirement?

In *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 (OHC) is seeking to condemn the leasehold interest the Moundbuilders Country Club (the “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, OHC wants the public—and researchers—to have unfettered access to the earthworks.

Interestingly, OHC is the owner of the property, and the lease was previously extended until 2078. Since the lease does not contain an early termination provision in favor of the landlord, OHC’s only option to terminate is to take the Club’s leasehold interest by eminent domain, and it filed a lawsuit for that purpose.

The Club challenged the taking, arguing, among other things, that OHC had failed to satisfy the good faith offer requirement. The basis for this argument is that, although OHC’s pre-suit offer of \$800,000 was based on an appraisal, that appraisal was obtained after OHC had obtained a different appraisal indicating the Club was due \$1,750,000. OHC 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, OHC's CEO testified that he misinterpreted the higher appraisal, mistakenly believing both appraisals valued the leasehold estate, which is the interest the Club had in the property. Based on that misunderstanding, he testified that OHC did what it believed was the honorable thing by selecting the higher of the two appraisers' value conclusions: \$800,000 rather than \$500,000.

In reality, however, the \$500,000 figure was not a valuation of the leasehold interest, but rather the value of the "leased fee," which is the amount the property was worth as encumbered by the lease. Thus, the primary value conclusion of the higher appraisal related to the interest in the property that OHC already held, rather than the interest OHC means to appropriate. But the higher appraisal also indicated that \$2.25 million would be the value of the property if it was not encumbered by the lease. From that number, the value of the leasehold interest could be calculated at \$1.75 million, which is, of course, higher than the \$800,000 figure.

The trial judge ruled that this evidence did not demonstrate that OHC acted in bad faith, which he defined as conscious wrongdoing or acting with dishonest purpose, "moral obliquity," ulterior motive, ill will, or actual intent to mislead or deceive. The trial judge further indicated that the CEO's explanation for his mistaken interpretation of the higher appraisal was credible. The court of appeals affirmed the trial court's judgment, and a further appeal to the Ohio Supreme Court followed.

The Supreme Court recently affirmed as well in *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, 2022-Ohio-4345. The majority opinion, authored by Justice Michael P. Donnelly and joined in by four other Justices, upheld the appraisal shopping at issue because the evidence established that OHC acted in good faith.

In doing so, the Court nevertheless suggested that appraisal shopping *could* demonstrate a lack of good faith under certain circumstances: where one of the appraisers was unqualified or untruthful, or where a failure to invite the property owner to attend an appraiser's inspection affected the valuation. Significantly, however, the Court did *not* suggest that a lack of good faith might be found where the condemning authority simply selected the lowest of multiple appraisals to save itself money. This omission opens the door for a condemning authority to do exactly that, without fear of having its eminent domain lawsuit dismissed for failure to satisfy the good faith offer requirement.

This decision will likely have significant implications. For the most part, property owners confronted with the threat of eminent domain do not hire a lawyer or an appraiser. Instead, they tend to rely on the condemning authority's appraisal and try to negotiate for a little more than what is offered. Thus, depending on the size of the project and the property interests at issue, appraisal shopping may translate into significant savings for condemning authorities. While it would cost extra on the front end to obtain multiple appraisals, that expenditure may be small compared to the savings realized through lower compensation payments to landowners. Time will tell whether this decision turns out to be the boon to condemning authorities it appears to be.

Notably, even if a property owner is savvy enough to suspect appraisal shopping has occurred and asks the condemning authority whether it acquired any additional appraisals, the agency is under no legal obligation to share that information. Only if an eminent domain lawsuit is filed and the property owner submits a formal discovery request can it compel the disclosure of any additional appraisals. Since this involves legal expenses most property owners would like to avoid, it is likely appraisal shopping will go undetected in the majority of eminent domain situations.

**Jeremy S. Young**614.723.2030 | [jyoung@ralaw.com](mailto:jyoung@ralaw.com)**Stephen D. Jones**614.723.2005 | [sjones@ralaw.com](mailto:sjones@ralaw.com)**Stephen Funk**330.849.6602 | [sfunk@ralaw.com](mailto:sfunk@ralaw.com)**Edward L. Filer**312.582.1627 | [efiler@ralaw.com](mailto:efiler@ralaw.com)**Michael Scotti III**312.582.1605 | [mscotti@ralaw.com](mailto:mscotti@ralaw.com)

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