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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, TENTH JUDICIAL CIRCUIT COURT JUDGE
C. A. NO. 2015-CP-36-120

APPELLATE CASE NO.: 2016-001037

Oien Family Investments, LLC, ...Appellant

v.

Piedmont Municipal Power Agency, ...Respondent

RESPONDENT'S
RETURN TO APPELLANT'S MOTION TO RECONSIDER
LIFTING OF STAY

BACKGROUND

Piedmont Municipal Power Agency ("PMPA") and the City of Newberry began in early 2013 the process of installing a power line to a Newberry substation to better serve its customers. The only valid and reasonable route crossed the lands owned by Oien Family Investments, LLC ("Oien"). After numerous attempts to place the line in an area acceptable to Oien, PMPA served a Notice of Condemnation in February, 2015. In March, 2015, Oien filed an action challenging the condemnation. In May, 2016, the Honorable R. Lawton McIntosh issued an Order denying Oien's request that the court enjoin PMPA from condemning the right-of-way across its property and ordering PMPA to reroute its line to a portion of the property that Oien selected.

Oien appealed and moved to stay any further proceedings which was granted on May 18, 2016. PMPA moved to lift the stay or require Oien to post a bond.

By Order dated October 18, 2016 this Court lifted the stay and PMPA began preparing the route. (Frazier Affidavit).

On October 20, 2016 Oien filed a Motion to Reconsider the lifting of the stay. On November 22, 2016 this Court re-imposed the stay.

ISSUES

At issue in this stay is the public interest of the ordinary, working citizens of the City of Newberry in reliable electricity for their homes and businesses as opposed to a single wealthy out-of-state landowner who objects to a power line six hundred feet from a proposed house that has not been built and may never be built. The legal basis for the landowner's objection is a hyper-technical reading of dicta from a single Supreme Court case that would require condemning authorities to engage in expensive, time wasting paperwork exercises that defy common sense and can make the courts the final authority on the placement of condemnations in practically every case.

To understand what has transpired, a timeline of the dealings with the landowner is essential.

The need for a reliable power source under the control of the City of Newberry was recognized and in early 2013 a project to fulfill that need was officially approved by the appropriate authorities.

Todd Guy, a native of Newberry and the City's electrical foreman, was tasked with informing the landowners who would be affected by the new line. (Transcript, p. 420, lines 5-18). The Oien's, who are Florida residents and visit their land as infrequently as quarterly (Transcript, p. 125, line 11-12) were one of the landowners.

Guy made contact in early 2013 with one now deceased Mills who was a caretaker for the Oien's (Transcript, p. 421, line 1 – p. 422, line 18). Mills and Guy called Oien and Guy informed Oien of the project. Guy and Oien made arrangements to meet on the Oien property.

When Guy and Oien met on the Oien property, Guy showed a proposed route along the property line of the two properties of Oien which was basically in the middle of the two adjoining tracts. Oien objected and asked that the line go on the bottom of the property that contained a house and pond (Transcript, p. 423, line 1 – p. 424, line 17).

As a result of this meeting, Newberry, PMPA and its engineer made drawings of the route proposed by Oien. Guy met with the Oien's and showed them the drawings. Oien rejected this route because it would take away the buffer between Oien and the neighbor at the bottom of their property line (Transcript, p. 424 line 19 – p. 425, line 13).

After Oien rejected the southern route because it would remove the buffer, Guy got a map of a route on the northern side of Oien's property and presented it to Oien who wanted the line further north (Transcript, p. 426, line 9 – p. 427, line 18).

Guy went back to Newberry, PMPA and the engineer for another option (Transcript p. 427, line 19 – p. 428, line 14). After he presented the new northern route, Oien rejected it and went back to the center route (Transcript, p. 428, line 16 – p. 429, line 15). Guy arranged for the center route to be surveyed.

At that point, Oien agent Paul Major took over and Guy stepped out. Major acknowledged meeting with Oien and Newberry officials in September, 2013 and November, 2013. Major took away from these meetings the impression that Oien wanted the southern route, but wanted more information about the middle route (Transcript, p. 194, line 20 – p. 195, line 18).

After the November, 2013 meeting, Oien left a message on Frazier's phone that the middle route was satisfactory to Oien (Transcript p. 341, line 21 – p. 351, line 27). (Exhibit 3).

A right-of-way agreement was sent to Oien in August, 2014 but Oien rejected the agreement (Transcript, p. 150).

The substation was completed in April, 2014.

ARGUMENT

The imposition of a stay in this matter involves an interpretation of the Eminent Domain Procedure Act, S.C. Code §28-2-10, et. seq., and the applicability of Rule 241, SCACR.

In a proceeding to challenge PMPA's right to condemn a right-of-way, S.C. Code §28-2-470 provides, "All proceedings under the condemnation notice are automatically stayed until the disposition of the action, if any, unless the landowner and the condemnor consent otherwise." The term "disposition of the action" is not otherwise defined under the statute.

What is meant by "disposed of" as used in §28-2-470 is a matter of first impression.

There are policy reasons to find "disposed of" means a determination by the trial court. Because a challenge to condemnation invariably seeks an injunction, the denial of the injunction disposed of the action in one sense. If "disposed of" means a final determination by the highest court, then "disposed of" means the exhaustion of all appeals.

The practical consequence of holding that "disposed of" includes the exhaustion of all appeals is to empower a disgruntled landowner to delay a public project for years. This case is a good example. The Notice of Condemnation was served on Oien in February, 2015. The substation was completed in April, 2014 (Judge McIntosh Order, para. 3) and all the other work on the line has nearly been completed (Frazier Affidavit). Yet, this one landowner is able to delay a much needed improvement by simply litigating as long as possible. The ability to hold

up a public work project is a powerful negotiating tool to make the public pay more than just compensation for a right-of-way.

Judge McIntosh, who saw the witnesses and heard the testimony, concluded that the motivating factor for Oien was to use the challenge to the condemnation to force the public utility to place the line where they now say they want it placed. Their motivation was not in good faith. (McIntosh Order, para. 37, 38).

Rule 241(a), SCACR, sets out the general rule for matters stayed on the filing of an appeal. In its action challenging the condemnation, Oien ultimately sought relief in the form of a permanent injunction against the route chosen by PMPA across their land and for the court to order the right-of-way to go on the route they choose. Oien got a temporary stay under §28-2-470 just by filing its suit.

Judge McIntosh's Order did not grant Oien an injunction or order PMPA to go the route chosen by Oien. PMPA would assert that the issue is disposed of under §28-2-470.

Rule 241(b)(8), SCACR, sets out an exception to the general rule for stays on appeal. Under Section (b)(8), "An appeal from an order granting an injunction or temporary restraining order is not stayed." Under this exception, had Judge McIntosh granted the injunction it would not have been stayed by appeal. It seems illogical to say that the denial of an injunction is stayed on appeal because such stay grants the injunction until all appeals are exhausted.

In any event, it is arguable that Rule 241 is inapplicable to condemnation actions because §28-2-120 provides that if a conflict arises between the Rule and the condemnation, the condemnation statute prevails.

The Oien legal argument is based dicta on a single case.

In So. Dev. Land & Golf Co. v. SC Pub. Serv. Auth., 305 S.C. 507, 409 S.E.2d 428 (Ct. App., 1991) this Court upheld a decision by a master in equity who upheld a challenge to the proposed condemnation of a high voltage line across a golf course. The basis for the injunction by the master was a finding that the power company was estopped from crossing the golf course due to prior statements by one of its officers to the golf course developer that the power company did not intend to build a line on its existing right-of-way across the proposed golf course. The master also enjoined the power company from condemning additional land and using its existing right-of-way for abusing its discretion. The abuse of discretion was based on a finding that the power company did not consider land acquisition costs in choosing its route.

This Court reversed the master on the estoppel issue but upheld the master on the abuse of discretion issue. Because the power company did not consider land acquisition costs, this Court vacated that portion of the master's decision regarding land acquisition costs and remanded with instructions for the power company to reevaluate the choice of route based on utilizing the factors of safety, reliability, aesthetics, and costs to include land acquisition costs.

In affirming the master on the abuse of discretion, this Court said, at p. 514:

> The master found the total cost for the route chosen by Santee Cooper including land acquisition cost would be $5,762,000. The cost for the two alternate routes proposed by Southern would be $1,284,000 and $1,315,000. He found no material difference in the reliability of the three routes although he considered the two alternate routes somewhat safer due to their distance from a nearby airstrip and also more aesthetically pleasing due to the potential effect of the Santee Cooper route on Southern's development. The master issued the injunction prohibiting the condemnation.
>
> In his legal conclusions the master found Santee Cooper clearly abused its discretion in the selection of the route for the transmission line. The master relied upon the case of *Florida Power & Light Co. v. Berman*, 429 So. (2d) 79 (Fla. Dist. Ct. App. 1983), *petition denied*, 436 So. (2d) 98 (Fla. 1983). In that decision, the Florida District Court of Appeal held that Florida law required a condemning authority to consider five criteria in deciding which route to select and which land to condemn. The criteria were (1) availability of an alternate

> route; (2) cost; (3) environmental factors; (4) long-range planning; and (5) safety considerations. *Id.* at 82. While a condemning authority did not necessarily abuse its discretion by choosing one route over another suitable route, the Florida court held the condemning authority did abuse its discretion by making a selection of a route without weighing and considering the factors. *Id.*

On a Writ of Certiorari to the Supreme Court, S. Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993) the Supreme Court reversed this Court's decision on the estoppel issue. In addressing the finding of abuse of discretion for not considering land acquisition costs, the Supreme Court stated:

> Accordingly, we affirm the Master's order enjoining Santee Cooper from proceeding with the condemnation of the easement in question. Although we agree with the Court of Appeals' analysis of the issue of abuse of discretion, in light of our holding on the question of estoppel, we find the remand as ordered by the Court of Appeals unnecessary. Thus, the opinion of the Court of Appeals is AFFIRMED IN PART, and REVERSED IN PART.

In upholding the master's decision, this Court focused on the power company's lack of consideration of land acquisition costs. According to the master, the land acquisition costs for the route chosen by the power company would be $5,762,000 while alternative routes would be $1,284,000 or $1,315,000. This Court vacated that portion of the master's findings and ordered the power company to reevaluate the route using the criteria of safety, reliability, aesthetics and costs along with any other appropriate factors such as environmental conditions.

The Supreme Court held that the remand to the master for consideration by the power company was unnecessary although the Supreme Court agreed with the reasoning.

Neither the master's decision, this Court's decision nor the Supreme Court's decision mandated written route comparisons, which forms a large part of Oien's argument.

As a starting point, this Court should be aware of the topography of Oien's two parcels of land totaling 116 acres. The northern parcel is wooded with a prepared home site that has access to a well and electricity. The southern portion of the property has a 2,000 square foot home

overlooking a pond (Transcript p. 125, 126). The per acre price of the land is $5,200 according to Oien's witness (Transcript p. 187, lines 17-18) and $5,000 per acre according to PMPA's expert (Transcript p. 312, lines 7-8) .

As to land acquisition costs, that is, the cost to obtain the right-of-way on the chosen route, PMPA's expert, David Graydon, an MAI appraiser, placed the damage at $21,075 (Transcript p. 310, line 20). He did not damage the remainder because the proposed home site is 670 feet from the power line right-of-way (Transcript p. 322, lines 2-5). In other words, Oien's proposed home site is over the length of two football fields away.

On the other hand, Oien's witness Paul Major, a certified general real estate appraiser, valued the property at $603,000 (Transcript p. 187, lines 15-18). He damaged the property with the proposed right-of-way from $603,000 to $380,000, a decrease of $223,000 (Transcript p. 190, line 7).

Oien's witness, William Rogers, was qualified as an expert on proper procedure for right-of-way acquisition (Transcript p. 229, line 13 – p. 230, line 1). Rogers prepared his comparison of the costs of right-of-ways by using Paul Major's estimate of the land acquisition costs. He also used Oien's estimate of damages if the line was re-routed to cross over the pond. (Exhibit 40). According to Rogers the estimated costs of the middle route right-of-way is $182,960 (Transcript p. 259, lines 22-25). According to Rogers the costs of right-of-way over the pond is $29,000 based on Oien's testimony of no damage (Transcript p. 260, lines 10-18).

Ultimately the land acquisition costs will be determined by a jury.

Oien claims PMPA did not perform an alternate route study sufficient to satisfy the Southern Development case. This assertion is based in part on the fact that PMPA did not have

an appraisal of the land acquisition costs for the southern route over the pond. Oien's position puts form over substance.

Common sense tells one that building a power line in a straight line across undeveloped land which is basically level is cheaper than changing the direction of the line several times and building it over a body of water.

This exact point was made by the court in Bookhart v. Central Elec. Power Cooperative, 291 S.C. 414, 435, 65 S.E.2d 781 (1951).

> Economic and engineering considerations require such lines to be constructed as nearly straight as practicable, and there is no other feasible route for the line except the route across the lands in question, because any other route would increase the length of the line by several miles, and the cost would be substantially increased by reason of the additional guy wires, anchors ad appropriate structures which would be necessitated at each of four additional angles.

Oien's statement that PMPA did not perform alternate route studies is incorrect. Michael Frazier, PMPA's director of engineering and power supply, testified that he and the consulting engineering (Alan Cobb) discussed the aesthetics, cost of acquisition, costs of construction, safety, and reliability of the routes over Oien's property (Transcript, p. 26, line 25 – p. 27, line 11).

Alan Cobb, a professional engineer who primarily does municipal utility work (Transcript p. 342, lines 10-24) engaged in a collaborative effort with City of Newberry officials to locate the lines and substation (Transcript, p. 343, lines 5-11). Cobb testified that he first used Google Earth and GIS to locate possible points to access power and run lines to the substation. Load is considered. Duke Power is consulted on where tap points will be allowed (Transcript, p. 344).

One possible approach, the west approach, was rejected because it was twice as long, and full of urban and commercial property (Transcript, p. 342-349). The west approach was rejected by Cobb, Newberry and PMPA.

Next, Cobb looked at the east side approach. Initially, Cobb looked at 10 to 12 possible routes (Transcript, p. 349, lines 24-25).

Cobb and Frazier discussed each possible route and then walked the route. Wetlands are an issue considered because of wetlands and long term maintenance (Transcript, p. 352, lines 21-25). Construction costs, maintenance and accessibility would be considered (Transcript, p. 353, lines 1-5). Cobb met with Newberry, Frazier, and others in person and through emails, telephone conversations, and sketches to discuss options (Transcript, p. 354, line 13 – p. 355, line 165).

Cobb discussed, with the others involved, the environmental impact, land use, impact on individual property owners, cost of construction, and visual impact. Cobb could not consider land acquisition costs because no one knew what that would be (Transcript, p. 356, line 19 – p. 358, line 1).

Cobb was asked to consider the southern route at one point. He determined Duke would not allow the tap where Oien wanted it (Transcript, p. 363, lines 3-6). The southern route required turns that Cobb estimates would cost $200,000 just in additional pole costs and installation costs (Transcript, p. 363, lines 15-18). That additional cost did not include costs to negotiate the wetlands (Transcript, p. 363, lines 19-20). The estimated costs of additional poles and installation could exceed the estimated $200,000 (Transcript p. 364, line 23 – p. 365, line 1). Cobb stopped the engineering on the exact cost of the southern route because Oien also rejected the southern route (Transcript, p. 366, lines 1-12).

Cobb, PMPA and Newberry ruled out the southern route after discussion and walking the possible southern route (Transcript, p. 371, line 15 – p. 372, line 6).

Cobb received input from Newberry as to the costs of the right-of-way (Transcript, 372, line 21 – p. 375, lines 14-17).

Oien cites Rogers' testimony as being determinative of the Southern issues.

For starters, Rogers gave an opinion as an expert on right-of-way acquisition. The trial court can give such weight to Rogers' testimony as it sees fit. Oien asserts through Rogers' testimony that there was no factual basis for PMPA's choice of routes. Just a brief review of the two routes exposes the fallacy of this statement. The chosen route was shorter, nearer a straight line, and is on basically flat land with some drop off at the end. It is the length of two football fields away from the proposed house of the Oien's. The southern route has turns requiring more expensive poles and goes over a pond with the added costs of placing a pole or two in water to say nothing of the additional problems of servicing the line. The southern route can involve environmental issues as well.

Rogers' costs analysis is based on Oien's appraiser damaging the entire tract ranging from 10% to 20%. His damage therefor extended the width and breadth of the entire 166 acres. Rogers does not damage any area on the southern route because Oien says it does not mind the line on the southern route which makes it cheaper than the middle route. The trial court can certainly reject their expert opinion for lack of a legitimate factual basis.

Oien complains that PMPA did not have a written route analysis. When asked if a study is done is that not sufficient, Mr. Rogers answered he did not know (Transcript, p. 275, lines 1-4).

Oien asserts that PMPA always had access to their property to survey or do engineering. According to Mr. Oien, PMPA had a surveyor on the property without his approval and that was a trespass. PMPA needed his approval to go on the property (Transcript, p. 144 lines 5-14). Paul Major, Oien's agent, questioned Todd Guy, a Newberry employee who was the go-between, as to who gave him permission to be on the Oien property. (Transcript, p. 430, lines 1-11).

CONCLUSION

A review of the planning, services, consultation, and interaction among PMPA, the City of Newberry, its engineers and employees, demonstrate that the condemnation in this instance was in the public interest and should be allowed to proceed.

Respectfully submitted,

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December 2, 2016

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, TENTH JUDICIAL CIRCUIT COURT JUDGE
C. A. NO. 2015-CP-36-120

APPELLATE CASE NO.: 2016-001037

Oien Family Investments, LLC, ...Appellant

v.

Piedmont Municipal Power Agency, ...Respondent

AFFIDAVIT OF MICHAEL FRAZIER

PERSONALLY APPEARED before me, the undersigned, Michael Frazier, who being duly sworn, deposes and states as follows:

I am the Director of Engineering and Power Supply for Piedmont Municipal Power Agency. I am familiar with the City of Newberry substation and power line across the Oien Family Investment, LLC property.

The Newberry city substation has been completed for some time. The rest of the project is near completion with the exception of stringing the necessary lines which must cross Oien's property.

Once the stay was lifted by the Court we immediately cleared the right-of-way over the Oien land and began to prepare to lay the concrete foundations for the poles that would carry the transmission lines. We halted all work when the stay was reinstituted.

What remains to be done on the Oien property is the concrete foundations and the erecting of the poles. Once that is done we can string the wires to the Duke Energy connections.

Since the trial of this case, there have been several partial outages in the City of Newberry due to the current City of Newberry electrical facilities. These outages have lasted for as long as an hour and half and could have been remedied much sooner if the current line had been run to the current substation which would be controlled by the City of Newberry.

Further Deponent sayeth not.

Michael Frazier

SWORN to before me this 30
day of November, 2016

Notary Public for South Carolina
My Commission Expires: March 4, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, TENTH JUDICIAL CIRCUIT COURT JUDGE
C. A. NO. 2015-CP-36-120

APPELLATE CASE NO.: 2016-001037

Oien Family Investments, LLC, Appellant

v.

Piedmont Municipal Power Agency, Respondent

PROOF OF SERVICE

The undersigned hereby certifies that on December 2, 2016 the Respondent's Return to Appellant's Motion to Reconsider Lifting of Stay in the above-captioned matter was served upon counsel of record by placing a copy of same in the U.S. Mail, sufficient postage affixed thereto, addressed as follows:

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December 2, 2016

V. Claire Allen, Deputy Clerk
S.C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Oien Family Investments, LLC vs. Piedmont Municipal Power Agency, LLC
Appellate Case No.: 2016-001037

Dear Ms. Allen:

Enclosed please find the original and six copies of the Respondent's Return to Appellant's Motion to Reconsider Lifting of Stay in connection with the above-referenced matter along with our Proof of Service of the same. Also enclosed is an unbound copy of the trial transcript. Please return a time stamped copy of the Return and Proof of Service in the enclosed envelope.

By copy of this letter and the Proof of Service, I am serving of copy of this Motion upon opposing counsel.

Yours truly,

BANNISTER, WYATT & STALVEY, LLC

O. W. Bannister

OWB/tjc

Enclosures

cc: Thomas H. Pope, III