

33869

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF HIGHWAYS, a State Agency,

Petitioner,

v.

CIVIL ACTION NO. 06-C-366-O

CONTRACTOR ENTERPRISE, INC.,
and the SHERIFF OF LOGAN COUNTY,

Defendants.

ORDER

This matter is before the Court on the Defendant, Contractor Enterprise, Inc.'s (CEI), motion to dismiss and for a permanent injunction. The Court conducted hearings on January 19th, February 6th, and February 12th, 2007. The Petitioner, West Virginia Department of Transportation, Division of Highways (DOT), appeared by its representative and counsel. The Defendant, CEI, appeared by its representative and counsel. The Defendant, Sheriff of Logan County, did not appear or participate in the hearings but had notice thereof and an opportunity to participate. The hearing on the motion to dismiss was treated as a final hearing on the issue of whether the taking of CEI's property was for a public purpose upon the acknowledgment of the parties that factual matters were raised and presented outside of the pleadings but each party was afforded opportunity to present evidence and a memorandum of law on

the motion for judgment and on the Defendant, CEI's, motion to make permanent a preliminary injunction previously awarded to it.

From the pleadings, the evidence, the arguments of counsel, and respective memorandums of the parties, the Court FINDS in favor of the Petitioner, and DENIES the motion to dismiss and DENIES the permanent injunction as requested.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Petitioner, DOT, is a State Agency created by and existing under the laws of this State and thereby is vested with certain governmental powers including the right to condemn lands for public purposes. The DOT is in the process of constructing a certain public road or highway designated as "Man-Rita Road" which road will become a part of the primary system of State roads and highways of this State and in particular was in the process of constructing that portion of highway in Logan County designated by the DOT Engineering Division as Project No. S323-10-8.61 07; Federal Project GSPH-0010(146)C, HP-1159(012)C, and the Right-of-Way Division State Project S323-10-8.61, Federal Project HP-1159(012)C.

2. The DOT filed this action alleging that it is necessary to condemn 31.96 acres of the Defendant, CEI's, property as a right of way and easement necessary for the construction of said public road. The Petitioner after filing

its suit paid into Court its estimate of the fair market value of the property and obtained, *ex parte*, an Order Vesting Defeasible Title to the 31.96 acres designated as non-controlled access right of way.

3. Upon being notified of the proceeding and after receipt of a copy of the Order Vesting Defeasible Title the Defendant, CEI, filed its motion to dismiss and a request for a preliminary injunction. At the January 19th, 2007, hearing the Court heard testimony and thereafter awarded the Defendant a preliminary injunction pending resolution of the issue of whether the taking of CEI's property was for a public purpose.

4. The part of the public road project which included the construction of West Virginia Route 10 from Rita Bridge to Midway Plaza was advertised for bids by the DOT in May of 2006. Five bids were received from contractors but all were rejected by the DOT. The project has not yet been re-advertised for bids.

5. DOT states that it has no current plans to use the property at issue for any purpose other as a waste material site for and during the construction of the subject public road project. The use of the CEI site is not restricted to any one segment or segments of the overall road project.

6. The DOT is authorized to acquire land by right of eminent domain for purposes of widening, straightening, grading, or altering any state constructed roads. See WV Code §17-4-5. The Commissioner in the name of

the State Road Commission may acquire any interest or right in real property deemed by its Commissioner to be necessary for present or presently foreseeable State Road purposes. See WV Code §17-2A-17. State Road purposes expressly include, but are not limited to, “waste material sites and access roads to any such sites...” WV Code §17-2A-17(f).

7. This Court should not interfere with the exercise of the DOT’s power to acquire land absent arbitrary, capricious, or fraudulent behavior and this Court may not substitute its judgment for the Commissioners in the absence of an error of law or arbitrary, oppressive or manifest abuse of authority. The burden of proof is on CEI to prove that the actions of the DOT were arbitrary, capricious, oppressive, fraudulent, in bad faith, or contrary to law. In this case, CEI argues that the taking of its property was not for a public purpose and therefore was arbitrary and contrary to law.

8. CEI presented evidence that other waste material sites not owned by the Defendant were available in the area of this road project construction. More particularly there were sites owned by McDonald Land Companies; Snap Creek Processing, Inc.; two sites referred to as the Frye Property; and the former Rita Mall property were available. A representative of Snap Creek Processing, Inc., testified that there are three potential waste sites available on Snap Creek’s property alone. The land owners typically charge a fee to the

contractors for each cubic yard of waste material placed on a site. The DOT does not contest that other private sites are available as waste material sites.

9. Witnesses for CEI also testified that the bidders on the Route 10 project had chosen waste material sites other than that of the Defendant in submitting bids.

10. The Court heard the testimony of Fred VanKirk that he served in the DOT in various capacities for thirty nine (39) years. Among the positions which he held were Secretary of Transportation and Commissioner of Highways. Based upon his knowledge, training, and experience the instant proceeding for eminent domain for use as a possible waste site runs counter to the regular practices of the DOT. By practice, the purchase of a waste site is left to the contractor which promotes the overall economy and protects the bidding process. Mr. VanKirk further testified that he had reviewed the proposed plans for this particular job which state that a potential waste site is provided "if the contractor so desires" and that language in and of itself renders eminent domain action inappropriate. VanKirk acknowledged that waste material sites would be necessary for this Man-Rita Road construction.

11. David Heeter, President of CEI, testified that his company purchased the property in issue not only for a possible waste site but also for its future use as an equipment yard due to its proximity to a local equipment dealer and service provider, Walker Machinery. CEI paid One Hundred Twenty

Five Thousand Dollars (\$125,000.00) for the site and had spent approximately Two Hundred Fifty Two Thousand Dollars (\$252,000.00) clearing the property, all done before the DOT received its bids in May of 2006 and months before the DOT gave notice to CEI of the proposed eminent domain action. Heeter acknowledged that waste material sites were necessary for the "Man-Rita" road construction.

12. Richard Prine, Licensed Land Surveyor, testified that he was familiar with and had estimated capacities of the other waste material sites in the area and that the capacities of those other sites were quite sufficient to accommodate the volume of waste from the Route 10 project. Mr. Prine's testimony was corroborated by the testimony of Mr. Heeter and the testimony of Snap Creek Processing, Inc., Vecillio & Grogan, representatives as well as the testimony of Glen Yost on behalf of McDonald Land Company.

13. The original plans for this Route 10 construction project made no reference to a waste area being available at the option of the contractor.

The pattern, practice, and custom on road construction projects in general and on this specific Route 10 construction property were for the contractor to locate and to purchase or to lease the waste material sites. The project plans currently state that the Defendant's property in question would be provided for a potential waste site to be used if the contractor so desires. These plans allow the contractor to make the decision as to whether or not the

property would be used as a waste material site. Both parties' evidence shows that the DOT cannot, under Federal Guidelines, require any contractor to use the waste material site sought herein to be acquired or any other particular waste material site.

All of the evidence clearly shows that the construction of the Man-Rita Road will produce waste material and that it is more economical that waste material sites be used to permanently store those waste materials generated by such construction. Although the Defendant, CEI, has shown that the proposed use of the property makes optional the use of the State's right-of-way site by a private party, the evidence demonstrates that there is a public necessity for waste material sites as part of the overall road construction project and the DOT Commissioner has, within his authority and discretion, decided to obtain the property condemned and to make such property available to whomever is the contractor on these road projects while realizing that the DOT cannot require the use of any particular site.

While there are other sites available, this particular site may be the best suited for the projects in the immediate area based upon its location and its potential capacity. Whether it will actually be used by a particular contractor working on a particular segment of the road is not the issue. There is a public purpose served in that waste material sites are necessary to build the Man-Rita Road. The Defendant has failed to show that the DOT decision to acquire

property for a waste material storage site or that the selection of this site was arbitrary, capricious, based upon fraudulent behavior, oppressive, in bad faith, or contrary to law.

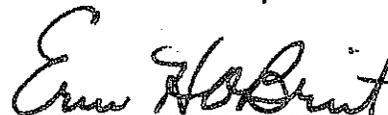
Because the Defendant has not met its burden of proof, the Court hereby DENIES the Defendant, CEI's, motion to dismiss; dissolves the preliminary injunction previously awarded to prevent the DOT from continuing to attempt to assert its right of eminent domain; and DENIES CEI's request for a permanent injunction.

The "Man-Rita Road Project" is for the use of the public and it is necessary to have waste material sites to complete the project, therefore, the Court FINDS that the condemnation of the Defendant's project for use as a potential waste material site for the completion of the road project is for a public purpose.

The fact that the Defendant has made improvements to the property and that it has other intended uses do not prevent the DOT from condemning the property for a public purpose but may be factors used to determine the amount of just compensation to be awarded to CEI.

The objections and exceptions of the parties to any adverse rulings are noted and preserved.

Enter this 8th day of June, 2007.



ERIC H. O'BRIANT, CIRCUIT JUDGE