IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF DEFENDANT-APPELLANT, THE MOUNDBUILDERS COUNTRY CLUB COMPANY

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TABLE OF CONTENTS

TABLE AUTHORITIES

INTRODUCTION

Not surprisingly, Plaintiff-Appellee Ohio History Connection ("OHC") asks this Court to impose on the government an obligation of "good faith" that is toothless and impotent. The proffered duty of good faith does nothing to foster the protection of Ohio's landowners from the "awesome power" the State has to take property from a landowner that does not want to sell. *See Cleveland v. Hurwitz* (P.C.1969), 19 Ohio Misc. 184, 192, NE 2d 384, 249 N.E.2d 562. Instead, OHC champions a test which renders the statute's requirement that the government act in "good faith" meaningless, essentially writing those words out of the statute.

OHC engages in strained logic in trying to claim that the circular definition of "good faith" in R.C. 163.01(J) somehow is not circular. From "context", OHC asserts, all that the statute requires is that the appraisal on which an appropriating authority's good faith offer is based must be "genuine," even though that word is nowhere in the statute. (Appellee Br., p. 19). OHC then seeks to add to the statute a presumption that the State has acted in good faith if it provides an offer based on an appraisal. (*Id*., pp. 21-22). But there is no need to insert additional verbiage in R.C. 163.01(J) to offer the citizens of Ohio the protection from government overreach to which they are most certainly entitled. Simply interpreting the good faith requirement that is already in the statute in a manner that requires the government to exercise a modicum of due diligence adequately provides that protection.

The most glaring failing of the minimalist and ineffectual definition of good faith urged by OHC is that it ignores the facts of this case, and other cases which could develop in the future. There is no dispute here that OHC had two appraisals. One appraisal was twice as much as the other. OHC made its "good faith" offer based upon the lower appraisal. OHC did no investigation as to why the appraisals differed or to ensure it understood the second, higher

appraisal. OHC did not reveal the higher appraisal until MCC discovered it on its own and requested it. Yet OHC advocates a position which states that all it had to do was base its "good faith" offer on a "genuine" appraisal reformed by a "qualified, independent" appraiser. This type of application would foreclose any inquiry into the acts of OHC and future government appropriations and is the best argument why it should not be adopted.

OHC then tries to obfuscate the issues by arguing that the decisions of the courts below are somehow insulated from review because they involved issues of fact. The resolution of such issues, OHC asserts, are dependent upon the credibility of the witnesses and therefore are the province of the trial court. (*Id.*, pp. 21-22) This argument is fallacious because before a lower court's determinations of factual issues can be accorded such deference, those determinations must be based on the application of the correct principal of law. In connection with the issues arising from both propositions of law before this Court, the trial court applied the wrong standard in determining the issues of fact and the Fifth Appellate District applied the wrong standard in affirming the decision of the trial court. With regard to whether the trial court acquired jurisdiction of the case by virtue of OHC making a written good faith offer for MCC's leasehold interest, the trial court, and then the appellate court, both wrongly applied a definition of good faith as being the absence of bad faith. So, the trial court's discretion, and this Court's deference to it, are simply irrelevant because the courts below applied the wrong standard to their factual determinations, and these errors constitute an abuse of discretion.

The same can be said with regard to the trial court's decision regarding the necessity of the taking. The trial court and the appellate court both refused to weigh competing public interests in deciding whether the taking was necessary for the public use. Again, the trial court's refusal to apply the appropriate standard to the factual issues eliminates any deference afforded

to its determination of factual issues. As more fully explained below, MCC respectfully suggests that the application of the correct legal standards to determinations of whether OHC made a good faith offer, and whether MCC rebutted OHC's statutory presumption of necessity, require reversal of the courts below.

LAW AND ARGUMENT

I. REPLY IN SUPPORT OF APPELLANT'S FIRST PROPOSITION OF LAW REGARDING THE STATUTORILY REQUIRED GOOD FAITH OFFER.

A. OHC's Statutory Analysis Attempts to Write the Words "Good Faith" out of R.C. 163.

OHC argues that a "good faith offer" is one that is based upon a "genuine" appraisal performed by a qualified appraiser. (*Id*., pp. 19-20). OHC claims that it is "apparent" from the context of the statute that these requirements are all that is needed to show that a "good faith" offer has been extended. These claims by OHC fall short. Despite OHC acknowledging that "rewriting the statutory text is a job for the General Assembly," it tries to do just that. (*Id*., p. 20). OHC unpersuasively argues that the statutory language should be supplemented by the word "genuine" when that word is nowhere in the statute. OHC does so because without this statutory revision, its first impression that the statutory definition of a good faith offer is circular is correct (as often is the case with first impressions).

R.C. 163.01(J) defines "good faith offer" simply as the offer under R.C. 163.04(B) that an agency must make to the owner of the property before commencing an appropriation proceeding. R.C. 163.01(J). R.C. 163.04(B) states that appropriating agencies must provide a written "good faith offer" to the property owner. Other than requiring the offer be made in writing, R.C. 163.04(B) offers no additional definition of what constitutes "good faith." Faced with this circular definition, OHC resorts to reading the form suggested by R.C. 163.041 to

create its own fanciful definition of good faith. (Appellee Br., p. 19). It does this even though R.C. 163.041 only sets the guidelines for the format of the written offer. See R.C. 163.041.

It is also perplexing as to how OHC divines guidance on statutory interpretation from the form notice required by R.C.163.041. The form refers only to a "written offer" in the fourth unnumbered paragraph and then again in paragraph 6. The form does not reiterate R.C. 163.04(B)'s requirement that the offer be a "written good faith offer." But no one would plausibly argue that the form's failure to repeat the legal requirements of R.C. 163.04(B) in its language was intended in some way to minimize or define an appropriating agency's legal obligation to make a written good faith offer. Interestingly, the form does state that by law a good faith effort must be made by the appropriating agency to purchase the property. But again, the form language offers no guidance as to what that good faith effort entails.

By attempting to rewrite the statute to claim any offer is made in good faith if it is supported by a "genuine" appraisal, OHC advocates for a minimalist definition of good faith. Under this standard, even a malicious action by the appropriating body would be in good faith as long as the appraisal was "genuine" and prepared by a "qualified appraiser." This would lead to an absurd result and one that is not consistent with the premise that property owner's rights should be protected from the "awesome power" that the State has in eminent domain actions.

To avoid such an absurd result, OHC continues to rewrite the statute by suggesting that OHC should be given the presumption that it acted in good faith. (Appellee Br., pp. 21-22). This claim is specious for a number of reasons. Initially, had the General Assembly wanted to give the State such a presumption of good faith it would have included that in the statute; it did not. Furthermore, such a presumption directly contradicts the stated government policies set forth in R.C. 163.59. These policies state that the government should act to "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). How does it promote public confidence in public land acquisition practices if the government is relieved of the burden of showing that it acted in good faith? Doing so would improperly shift the burden to the property owner to show that the State did not act in good faith. Putting such a great burden on property owners would lead to inherently unjust results. It would not promote public confidence in appropriation proceedings; it would do the opposite as the landowner would have to prove that the State failed to act in good faith.

This dangerous shifting of the burden of proof to the property holder is incompatible with the long-held principle that when the State exercises the power of eminent domain, "simple justice requires that the state proceed with due concern for the venerable rights it is preempting." *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006 Ohio 3799, 853 N.E.2d 1115, ¶ 68. The presumption suggested by OHC turns this principle on its head, arguing that justice requires the State's path to forced property acquisition be made easier by shifting the burden to the property owner to show a lack of good faith by the government. Additionally, such a presumption runs contrary to the judicial precedent that statutes empowering eminent domain must be strictly construed and any matters of doubt resolved in the favor of the property owner. See *Pontiac Improvement Co. v Bd. of Commrs. of Cleveland Metro. Park Dist*., 104 Ohio St. 447, 453-54, 135 N.E. 635 (1922).

OHC also futilely tries to create a distinction between objective and subjective reviews of a good faith offer. This attempted distinction misses the point. OHC's claim that "[o]bjectively, no one disputes that the History Connection complied with the requirements of R.C. 163.04" is a gross misstatement of MCC's position. (Appellee Br., p. 22). As evidenced in MCC's merit

brief, this could not be further from the truth. This statement ignores the facts in the record of this case, where everyone ***does*** agree that when OHC made its offer, it had two appraisals, one that was twice as high as the other, and it based its offer on the lower appraisal.[1] (TR. pp. 438-439; Pl. Exs. 12 & Ex. 44).

OHC claims that looking objectively at what happened, it is clear that it complied with R.C. 163.04; it received an appraisal, it provided a written offer based on that appraisal and provided a copy of the appraisal to MCC. (Appellee Br., p. 22). That is only half the story, and not the case that is being appealed. This selective recitation of only a small segment of the facts ignores the principles of fairness to which MCC and any other property owners in Ohio are entitled to when the government wants to take private property. Taking OHC's position to its extreme, OHC would have acted in good faith if it submitted an offer of $1,000 even though it had in its possession another appraisal showing the fair market value of the lease to be $50,000,000. Although extreme, this illustrates the flaws with OHC's arguments. OHC essentially claims that it can ignore any appraisal it receives as long as it simply provides one appraisal to the property owner, and that this would still be acting in good faith. When one contemplates the flaws with this analysis and the potential outcomes a rule like this could create, it becomes clear that such a position is not in the best interests of justice.

B. The Holdings of this Court in *Kalain v. Smith* and *Worth v. Huntington Bancshares* offer Guidance in Formulating a "Good Faith" Standard to be Met by the Government in Eminent Domain Proceedings

In response to MCC's arguments that this Court should develop a test that defines good faith in the context of R.C. 163, OHC argues that the *Kalain* and *Worth* cases relied upon by

[1] OHC also engages in gross speculation as to why it did not use the Weiler appraisal, as it claims it could have chosen to rely solely on the Koon appraisal for reasons that are never suggested in the record. (Appellee Br., p. 25).

MCC do not deal with appropriation actions and therefore provide little relevance to the issues presented here. (*Id.*, pp. 26-27); *Kalain v. Smith*, 25 Ohio St.3d 157, 495 N.E.2d 572 (1986); *Worth v. Huntington Bancshares*, 43 Ohio St. 3d 192, 540 N.E.2d 249 (1989). Since there are no Ohio Supreme Court cases that define good faith in the context of R.C. 163, it is not at all surprising that MCC turns to other cases from this Court that define good faith but in a different context.

Although *Kalian* dealt with a different statute, this Court was faced with the same task of defining the term "good faith" as it was used in the statute before it. OHC itself admits that the definition of good faith has different meanings in different contexts. (Appellee Br., p. 18). However, reviewing other cases that have evaluated what the General Assembly meant when it imposed a statutory duty of good faith is certainly informative regardless of the context.

This Court in *Kalain* created a four-part test to define the term "good faith" that was undefined in the relevant statute. A similar dilemma is presented here as the Court is presented with a statute that requires a "good faith offer," but provides no definition of good faith. While *Kalain* and *Worth* involve different realms of the law, the analysis followed in those cases is instructive. Further, since OHC seems overly concerned about context, it cannot be overstated that the "context" here is the government's obligation to act in good faith when it is exercising the "magnificent power to take private property against the will of the individual who owns it . . . ." *Norwood v. Horney*, supra, ¶ 68. The property owners whose property is sought have done nothing wrong; they simply own property the government wants to take. In this context, the government should be held to the highest level of good faith, and the lessons of *Kalain* and *Worth* offer a valuable roadmap to guide the Court in formulating that duty.

The good faith definitions garnered from *Kalian* and *Worth* are particularly apposite to

defining OHC's obligation to make a good faith offer. This is a very important issue because the lower courts addressed this issue under a standard where good faith is equated to the absence of bad faith. To determine whether OHC acted in good faith, they reviewed the record evidence to see whether OHC acted in bad faith, i.e., maliciously or with ill intent. It is clear that the lower courts applied the wrong standard in evaluating this issue. This Court could accept the findings by the courts below that OHC did not intentionally hide the second higher appraisal. But that does not end the inquiry because the lower court applied the wrong standard. Applying the wrong legal standard is an abuse of discretion. *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.). Applying the correct standard, OHC failed to act in good faith even if it did not act maliciously in hiding the higher appraisal.

It is important to review the facts under the appropriate standard. Initially, OHC tries to shift the focus of this factual analysis by declaring that MCC's allegations that OHC did not act in good faith were "demonstrably false" by concentrating on the respective dates the two appraisals were ordered. (Appellee Br., p. 24). While this begs the question of why two appraisals were ordered in the first place, OHC contends that because the lower Koon appraisal was ordered before the higher Weiler appraisal was received, this somehow shows it did not conceal the higher Weiler appraisal. (*Id.*). What the narrative conveniently omits is that OHC made its so-called good faith offer on August 28, 2018, long after it had both appraisals in its possession. (TR., pp. 439-41, Pl. Ex. 12). It also overlooks entirely that the Weiler appraisal was never provided until MCC counsel independently learned of its existence. (TR., p. 485; Pl. Ex. 45).

But OHC's claim that deference should be given to the trial court's factual determinations is unavailing. That is because here the record includes undisputed evidence that

OHC did nothing to investigate and inform itself as to the difference between the two appraisals it received. (TR., pp. 482, 496). OHC made no effort to make an informed decision when faced with two very different appraisals. In reality, MCC's assertions of error involving OHC's failure to make a good faith offer are not based on the trial court's weighing of the evidence and making its factual determinations. Instead, they are based on the lower courts' failures to apply the appropriate standard to the facts before them. It is unknown what the lower courts would have decided had they applied the appropriate standard – i.e. requiring that OHC act in good faith rather then not acting maliciously or with evil intent. If the lower courts did so, they would find that OHC did not take the appropriate measures to ensure it acted in good faith by conducting due diligence in presenting an offer that was informed.

OHC claims that courts have already determined that R.C. 163.04(B)'s good-faith offer requirement is satisfied by extending an offer based on the fair market value of the property. (Appellee Br., p. 21). OHC attempts to support this proposition by citing to *Lawnfield Props., LLC v. City of Mentor*, 2018-Ohio-2447 and *City of Wadsworth v. Yannerilla*, 170 Ohio App. 3d 264, 2006-Ohio-6477 (9th Dist.). OHC's argument that the standard of good faith by the government in an appropriation proceeding has already been established is unconvincing. OHC misrepresents R.C. 163.04(B) as it was reviewed by the *Lawnfield* and *Wadsworth* courts. Those courts did not review good faith as it relates to the statutory language of R.C. 163.04(B), yet reviewed good faith in a general sense. Neither reviewed the standard following the amendment in 2007 which added the words "good faith" to the statute. Given that neither of those courts evaluated what good faith means in relation to a statutory requirement, those holdings are inapplicable.

OHC also claims that MCC argues the offer was invalid because OHC did not comply

with R.C. 163.59. (Appellee Br., pp. 28-29). Again, OHC either misreads or misinterprets MCC's arguments. MCC did not argue that because OHC did not comply with R.C. 163.59 that the offer is invalid. MCC argued that OHC's failures to comply with R.C. 163.59 is *further evidence* that OHC did not act in good faith. (Appellant Merit Br., p. 21) OHC's failure to comply with much of R.C. 163 is clear evidence that OHC did not take its statutory requirements seriously. Had OHC complied with R.C. 163.59's provisions that a property owner be given the right to accompany any appraiser, then MCC would have known from the beginning that there was two appraisals and the course of the litigation below may have been different.

C. OHC's Reference to Evidence Outside the Record is Irrelevant since all Actions Taken by the Trial Court Without Subject Matter Jurisdiction are Void, and even if that Evidence was Considered, it Offers more Proof that OHC Failed to Make a Written Good Faith Offer

Seemingly as an afterthought, OHC also claims that MCC's first proposition of law is now moot because OHC has, since the filing of the appeal to this Court, increased its offer from $800,000 to $1.66 million and MCC declined that offer. (Appellee Br., pp. 29-30). OHC argues that this evidence refutes MCC's arguments regarding the necessity of a "good faith offer," because even if OHC would have offered MCC $1.66 million at the outset of the case MCC would have still declined it. This argument is not appropriate before this Court, is not based on viable evidence, and is entirely irrelevant.

Initially, OHC cites no authorities for its unsupported claims of mootness and harmless error. For this reason alone, it should be disregarded. But more importantly, this argument fails to comprehend and address the basis for MCC's first proposition of law; that OHC's blatant disregard for its duty to present MCC with a written good faith offer deprived the trial court of jurisdiction to hear the case. In other words, the appropriation action should have been dismissed because of OHC's failure to meet its statutory condition precedent of making the required written

good faith offer before filing suit. R.C. 163.04. Even if there was in the record (which there is not) a reference to the later offer it would not magically cure the trial court's exercise of jurisdiction where it had none. All actions taken by a court without jurisdiction are void, so if this new offer were to be relevant, it would have to be part of a new case which has yet to be filed. *See Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11 (any proclamation by a court without subject matter jurisdiction is void). Neither can the trial court's actions without subject matter jurisdiction be deemed harmless. Indeed, it has been held that a harmless error analysis is inappropriate where a court is found to have been without subject matter jurisdiction. *See State ex rel. Sartini v. Yost*, 11th Dist. Ashtabula No. 2000-A-0034, 2001 Ohio App. LEXIS 3781, *19 (Aug. 24, 2001).

Moreover, OHC's reference to this non-record evidence brings up a myriad of factual questions not appropriate for an appeal. Does this new offer even meet the minimalist good faith standard wrongly propounded by OHC? As OHC's purported offer was purportedly made in the context of the instant case, does it violate the stay granted by the Court in this case? *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co*., 2020-Ohio-748.

But the precedent in this Court makes a determination of any of these issues unnecessary as "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. *See Saunders v. Holzer Hosp. Found*., 176 Ohio App.3d 275, 2008-Ohio-1032, 891 N.E.2d 1202, fn.3 (4th Dist.) ("A reviewing court should consider only the evidence that the trial court had before it."). OHC's inappropriate citing of evidence outside the record is greatly improper and such should be ignored by this Court.

Furthermore, even if this evidence was considered, OHC's assertions actually support MCC's position. This information confirms OHC's lack of good faith in its initial offer because it is now offering $1.66 million, more than twice its original offer, with no suggestion of any changes in circumstances to justify the 100% increase. In one hand, how can OHC characterize this new offer to be a good faith offer, and in the other hand argue that their initial offer of $800,000 was also in good faith? Such a position is inherently flawed.

II. REPLY IN SUPPORT OF APPELLANT'S SECOND PROPOSITION OF LAW REGARDING WHETHER THE PUBLIC'S INTERESTS ARE WEIGHED IN DETERMINING WHETHER A TAKING IS NECESSARY IN AN EMINENT DOMAIN ACTION.

OHC makes repeated attempts to imply that MCC admitted that the taking is necessary for the property to be turned into a public park and that OHC has the authority to do so. (Appellee Br., pp. 32-33) These attempts to misconstrue MCC's position should be summarily rejected. Initially, MCC does not and has not admitted that the taking is necessary. In fact, it is just the opposite. If MCC admitted the taking was necessary, then why did the trial court hold a four-day hearing and why is this case before this Court right now? MCC's position remains the same; OHC's attempted taking of MCC's leasehold interest voluntarily conveyed to MCC by OHC is not necessary for the public's enjoyment, and would in fact hurt the public. Furthermore, OHC repeatedly asserts that it has the authority through the General Assembly to appropriate property and is entitled to a rebuttable presumption that any taking it undertakes is necessary. Despite OHC's claims, nothing in R.C. 149.30 gives it the authority to create a public park, which is what it want to do with this Property. (*Id.*, pp. 32-33). R.C. 149.30 is the enabling statute that describes OHC's public functions. Nowhere in this statute does it list creating public parks as a function performed by OHC. Based on this, any purported "admission" by MCC that the presence of a golf course on the Property is incompatible with the use of the Property as

"public park" is irrelevant and immaterial.

OHC argues that the presumption of necessity to which it is entitled forecloses consideration of whether the taking is in the best interests of the public. OHC argues since MCC did not show that the lower courts abused their discretion as to whether the taking was necessary, that MCC's proposition of law should be ignored. (*Id*., pp. 32-35) OHC cites the appellate court's ruling which states "the trial court had before it extensive evidence and testimony to adequately support its conclusion" as evidence that the taking was necessary. (*Id*., p. 33 quoting Opinion, ¶43) However, this is not determinative as to the issues on this appeal. Although lower courts decisions are generally reviewed on an "abuse of discretion" standard, an abuse of discretion may be found when the trial court "applies the ***wrong legal standard***, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, *supra*, at ¶ 15 (Emphasis added).

MCC argues that the trial court erred by applying the wrong legal standard. The trial court specifically stated that "the necessity question does not involve weighting competing public interests." (Trial Court Decision, Appendix A-31). Its entire decision was based on this erroneous understanding of the law. Subsequently, the appellate court affirmed the trial court's decision indicating that it did not abuse its discretion since the court was the trier of fact and some evidence supported its decision. This case, however, is not about building a road, bridge or other obvious public structures, the use of which is clearly defined. It has long been recognized that certain takings were "of obvious necessity and had clear, palpable benefits to the public, as in cases in which the property was taken for roadways and navigable canals, government buildings, or other uses related to the protection and defense of the people." *Norwood v. Horney*, supra, ¶ 45.

The determination of necessity in the instant case, however, involved a myriad of uses for the Property, most of which were already being done there, or which could be done on similar nearby properties controlled by OHC. In addition, there is a long history of OHC not performing the work it asserts that it wants to do at MCC's property on its other properties which it has had unfettered access for over eighty years. (TR., pp. 232-33). Moreover, OHC states one of its functions is to protect earthworks. (Appellee Br., pp. 32-33) There can be no doubt that MCC as the lessee of the Property for the past 110 years has admirably performed that function for OHC, as OHC acknowledges and recognizes that the Octagon Earthworks "are considered to be the best-preserved examples of geometric earthworks anywhere in the world." (*Id.*, p.1).

And it is certainly of interest to the public that OHC intends to become responsible for the security and upkeep of a 134-acre parcel located in the middle of a densely populated residential area. The public has an interest here inasmuch as the nearby property OHC owns has a history of being poorly maintained and a haven for drug and other illicit activity. (TR. pp.580-585, De. Exs. E, F). This is precisely the situation where competing interests in the property should be considered. By failing to weigh competing public interests to determine whether the taking was in the best interest of the public, the trial and appellate courts failed to apply the correct standard to the evidence and therefore abused its discretion, requiring reversal.

CONCLUSION

MCC reaffirms its arguments that, due to OHC's failure to make a written 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 9th day of November, 2020, to the following individual(s):

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