**IN THE COMMON PLEAS COURT OF**

**FAIRFIELD COUNTY, OHIO**

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| Jack Marchbanks, Director Ohio Department of Transportation   Plaintiff   v.  Eichhorn Limited Partnership, et al.,   Defendants. | :  :  :  :  :  :  : :  :  : | CASE NO. 2021 CV 00457  JUDGE RICHARD E. BERENS |

**PLAINTIFF ODOT’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR STATUTORY FEES**

**INTRODUCTION**

This court should deny Defendant’s motion for statutory fees because protecting commercial landowners is not the intent of the statute and because Defendant failed to provide any evidence of attorney’s fees and appraisal expenses actually incurred and has provided no evidence of the reasonableness of the fees requested. In the alternative, if the Court does find that the Defendant is entitled to attorney’s fees this Court should find that the fees should not exceed $23,258.13 or less.

**ARGUMENT**

1. **Defendant should not be awarded Attorney’s fees and appraisal costs**

**incurred because commercial landowners are not the legislatures intended beneficiaries of the statute.**

Ohio Revised Code 163.21(C) provides a two-part analysis for determining if a party is entitled to attorney’s fees and appraisal costs. First, “the property being appropriated is land used for agricultural purposes as defined in section 303.01 or 519.01 of the Revised Code, or the county auditor of the county in which the land is located has determined under section 5713.31 of the Revised Code that the land is “land devoted exclusively to agricultural use” as defined in section 5713.30 of the Revised Code”. Second, Ohio law provides that “the final award of compensation is more than one hundred fifty per cent of the agency’s good faith offer or a revised offer made by the agency under division (C)(1) or (3) of this section. *Id.*

Revised Code section 163.21 is “a remedial law and should be liberally construed in order to promote its object and assist the parties in obtaining justice”. *Dept. of Natural Resources v. Sellers*, 14 Ohio App.2d 132, 135, 237 N.E.2d 328 (5th Dist.1968); R.C. 1.11. When interpreting a statute, the court should “give effect to the General Assembly's intent.” *City of Toledo v. Corr. Comm'n of Northwest Ohio*, 2017-Ohio-9149, ¶22.

In the present case, the Court should not award the Defendant attorney’s fees because awarding attorney’s fees to commercial property owners was not the General Assembly’s intent. Defendant argues that there is sufficient evidence on the record to determine that the property currently has an agricultural use, however there is also sufficient evidence on the record to establish that “parcel A” as described by Defendant’s appraiser is not, in fact, agricultural land but commercial land that is not used for agricultural purposes but is in fact a commercial property as evidenced by the commercial structure on the property and the landowner’s testimony that he received several offers to rent “parcel A” to a commercial business. Furthermore, the property was never used “exclusively” for agricultural purposes as evidenced by the County’s CAUV calculations that explicitly excludes the commercial building built in 1920 and the 0.9570 Acres the structure occupies at the corner of the property.

It is clear from the plain language of the statute that the General Assembly’s intent was to protect property owners who owned and used their land for agricultural purposes not property owners who are holding commercial property. The only way for the Defendant to meet the 150% requirement set forth by the statute is to argue, as they did, that their agricultural land is not in fact agricultural. Plaintiff’s do not dispute the fact that most of the land is used for agricultural purposes and its highest and best use is agricultural, however, the defendant does dispute this fact. ODOT presented an appraisal using agricultural land values for the property. Conversely, the Defendant called two witnesses and presented evidence to testify that the land in question did not have agricultural value but commercial value. The Defendant’s appraiser used commercial sales and ultimately reached a commercial value of $70,000 per acre. The idea that landowners can argue that their property is a commercial property to obtain a higher land value and then argue that their property is an agricultural property to obtain attorney’s fees is unconscionable and clearly not the intent of the General Assembly.

This Court should find that while the Defendant’s property may meet the first part of the test, they cannot use commercial values and commercial land sales to meet the 150% requirement set out by the statute.

1. **The Court should not award attorney’s fees because Defendant has failed to establish attorney’s and appraisal fees actually incurred and has presented no evidence supporting the reasonableness of the fees.**

The trial court has discretion to resolve requests for attorney’s fees. *Bagnola v. Bagnola*, 5th Dist. Stark No. 2004CA00151, 2004-Ohio-7286, ¶ 36. “The party seeking an award of attorney fees has the burden of proving the reasonableness of the fees.” *Falk v. Falk*, 10th Dist. Franklin No. 08AP-843, 2009-Ohio-4973, ¶ 39. While the trial court has discretion in determining the amount of attorney fees, the court must base its decision on evidence showing the reasonableness of the time spent on the matter and the hourly rate. *Dotts v. Schaefer*, 5th Dist. Tuscarawas No. 2014 AP 06 0022, 2015-Ohio-782, ¶ 17. A court must base its determination of reasonable attorney's fees upon the "actual value of the necessary services performed, and there must be some evidence which supports the court's determination." *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App. 3d 313, 323, 653 N.E.2d 1245 (10th Dist.1995).

In *Yeager v. Carpenter*, 3d Dist. Union No. 14-08-15, 2008-Ohio-4646, ¶ 9, the court held that because the appellee “failed to establish that he actually incurred attorney's fees, we must sustain the assignment of error.”

In the present case the Defendant’s attorney has only provided the maximum amount of attorney’s fees allowed under the statute. He has provided no evidence of attorney’s fees or appraisal fees; he has provided no evidence that these fees were actually incurred; and he has provided no evidence that the fees are reasonable.

The court should not award attorney’s fees to defendant because he has not established what fees were actually incurred or the reasonableness of those fees.

1. **The Court should find that the amount of attorney’s fees in this case should not exceed $23,258.13 or less.**

If the Court dose find that the landowner is entitled to reasonable fees the Court should find that that the Plaintiff’s fair market value and initial written offer is $19,440 the amount presented in the Petition to appropriate and the amount deposited with the clerk of courts the day the petition was filed. Additionally, ODOT presented Attorney Kenter with a counteroffer to settle this matter for “$25,000 and honor Mr. Eichhorn’s request to salvage the building materials” in writing by email on Tuesday, March 30, 2021. While Plaintiff did provide the property owner with an appraisal with $14,870 as the fair market value this was never a written offer. Plaintiff’s did not make a counteroffer lower than the original deposit.

This court should find that the last offer received in writing by the property owner $19,440 or $25,000, and the 150% should be calculated based off of this number. The Court should further find that the jury verdict exceeds the last written offer by either $93,032.50 or $87,472.50 and order that the amount of attorney’s and appraisal fees should not exceed $23,258.13 or $21,868.13.

**CONCLUSION**

Based on the foregoing reasons, the Court should find that the defendant is not entitled to attorney’s fees and appraisal costs and if they are entitled to attorney’s fees and appraisal costs these costs should not exceed $23,258.13 or less.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Plaintiff’s Memorandum in Opposition Defendant’s Motion for Statutory Fees* was sent by electronic mail on this 30th day of March, 2023, to**:**

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