**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 (1) protecting commercial landowners is not the intent of the statute, and (2) Defendant failed to provide any evidence of attorney’s fees, appraisal expenses actually incurred or evidence of the reasonableness of the fees requested. In the alternative, if the Court does find that Defendant is entitled to attorney’s fees, the fees should not exceed $23,173.38.

**ARGUMENT**

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

**incurred because commercial property landowners are not the legislature’s intended beneficiaries of the statute.**

Ohio Revised Code 163.21(C) provides a two-part analysis for determining if a landowner is entitled to attorney’s fees and appraisal costs. Specifically, R.C. 163.21(C)(2), in part, states:

the court shall enter judgment in favor of the owner for costs and expenses, including attorney's and appraisal fees, that the owner actually incurred *only if the property being appropriated is land used for agricultural purposes as defined in section [303.01](https://codes.ohio.gov/ohio-revised-code/section-303.01) or [519.01](https://codes.ohio.gov/ohio-revised-code/section-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](https://codes.ohio.gov/ohio-revised-code/section-5713.31) of the Revised Code that the land is "land devoted exclusively to agricultural use" as defined in section [5713.30](https://codes.ohio.gov/ohio-revised-code/section-5713.30) of the Revised Code* and *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*. Emphasis added.

The first prong requires the property being appropriated is land used for agricultural purposes or the county auditor has determined that the land is devoted exclusively to agricultural use. The second prong requires the final award of compensation be 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.*

R.C. 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. It is clear from the plain language of the statute that the General Assembly’s intent was to protect landowners who own and use their land for agricultural purposes. Nothing in the statute contemplates protections to landowners who are holding commercial property or whose property is for future commercial development.

In the present case, the Court should not award the landowner attorney’s fees because awarding attorney’s fees to commercial property owners was not the Generally Assembly’s intent. To benefit from the attorney’s fees statute, the landowner now argues that the property at issue currently has an agricultural use, however the landowner advanced a much different position at trial. The landowner testified to the existence of a commercial structure on the property and that he received several offers to rent the land for a commercial business. Additionally, landowner’s appraiser used commercial sales and ultimately reached a commercial value of $70,000 per acre. It is this commercial valuation that supported the jury’s award of $112,472.50.

Further, it is this commercial land valuation, presented by the landowner and awarded by the jury, that enabled the landowner to meet the second prong of the attorney’s fees statute, specifically, the requirement that the final award of compensation be more than one hundred fifty per cent of the agency's good faith offer or a revised offer. The 150% threshold was only reached by convincing the jury that their now agricultural land was not, in fact, agricultural. Again, the landowner called witnesses and presented evidence the land at issue did not have agricultural value, but a commercial value. The landowner’s entire case was built on a commercial land valuation. The idea that landowners can argue that their property is a commercial property to obtain a high valuation award from a jury, and then argue that their property is agricultural property to obtain attorney’s fees, is unconscionable and clearly not the intent of the statute.

This Court should not support this manipulation of evidence in contravention to the intention of the statute. The Court must find that while the Defendant’s property may meet the first part of the test, they cannot then 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 actual 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 $23,173.38.**

If the Court does find the landowner is entitled to reasonable fees, R.C. 163.21(C)(4) is instructive, and states:

An award of costs and expenses, including attorney's and appraisal fees, that the owner actually incurred, under division (C) of this section shall not exceed the lesser of twenty-five per cent of the amount by which the final award of compensation exceeds the agency's initial good faith offer or revised offer or twenty-five per cent of the amount by which the final award of compensation exceeds the agency's last written offer made not less than forty-five days before the date initially designated for trial by the court.

Plaintiff’s final written offer was $19,779, as evidenced by the Petition to Appropriate and Fix Compensation filed with this Court on October 6, 2021. This Court should find that the last offer received in writing by the landowner $19,779, 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 $92,693.50 and order that the amount of attorney’s and appraisal fees should not exceed $23,173.38.

**CONCLUSION**

Based on the foregoing reasons, the Court should find that Defendant is not entitled to attorney’s fees and appraisal costs, or, in the alternative, if they are entitled to attorney’s fees and appraisal costs, these costs should not exceed $23,173.38.

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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