IN THE COMMON PLEAS COURT OF FAIRFIELD COUNTY, OHIO

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

REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANT EICHHORN LIMITED PARTNERSHIP TO TAX STATUTORY COSTS TO PLAINTIFF

Defendant, Eichhorn Limited Partnership ("Eichhorn"), by and through counsel, submits the following Reply to Plaintiff's Memorandum in Opposition to Motion of Defendant Eichhorn Limited Partnership to Tax Statutory Costs to Plaintiff. On February 15, 2023, a jury in the above-captioned appropriation matter returned a verdict for a total award of $112,472.50 as just compensation for the property Plaintiff took from Eichhorn by eminent domain. The jury's award exceeds 150% of Plaintiff's last-written offer. During the trial, although the parties presented conflicting evidence concerning the *highest and best use* of the Eichhorn Property, the undisputed evidence established that the *present use* of the Eichhorn Property is agricultural use. Accordingly, Eichhorn is entitled to recover its costs and expenses, including attorneys' and appraiser fees, under R.C. 163.21(C)(2).

1. Regardless of the property's highest and best use, a property owner is entitled to the benefit of R.C. 163.21(C) when the property appropriated is presently used for agricultural purposes.

R.C. 163.21(C)(2) provides that:

> [T]he 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 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 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.

In its memorandum in opposition, Plaintiff contends that Eichhorn is not entitled to fee recovery of its costs and expenses under R.C. 163.21(C) because the property appropriated is commercial. Plaintiff's arguments demonstrate conceptual confusion concerning the difference between a property's *highest and best use* and *present use*.

As set forth in his appraisal, Plaintiff's expert appraisal witness defines *highest and best use* as "[t]he reasonably probable use of property that results in the highest value." *See* Appraisal Report of Jeffrey Helbig, p. 32, entered into evidence as Exhibit 4. In contrast, *present use* is the property's current actual use. Whereas Eichhorn's expert appraisal witness and Plaintiff's expert appraisal witness disagreed concerning the highest and best use of the Eichhorn Property, both included statements in their respective appraisal reports and during their testimony indicating that the present use of the Eichhorn Property is agricultural. *See* Appraisal Report of Jeffrey Helbig, p. 32, entered into evidence as Exhibit 4; Appraisal Report of Richard Vannatta, p. 15, entered into evidence as Exhibit D.

Considering the distinction between *highest and best use* and *present use*, Plaintiff's assertion that Eichhorn improperly argued commercial values to the jury while arguing agricultural use here is obviously mistaken. Eichhorn maintains now, as it did at trial, that the highest and best use of the Eichhorn Property is commercial development. Further, Eichhorn maintains now, as it did at trial, that the present use of the Eichhorn Property is agricultural. Eichhorn properly sought just compensation on the basis of its property's highest and best use, rather than present use, because Ohio law requires that just compensation be awarded on the basis of the highest and best use of the property appropriated. *See City of Columbus v. Triplett*, 91 Ohio App.3d 239, 246, 632 N.E.2d 550 (10th Dist.1993).

Unlike just compensation, a landowner's entitlement to costs and expenses under R.C. 163.21(C)(2) is not based on the highest and best use of the property appropriated. Instead, it is based on whether the "property being appropriated is land used for agricultural purposes…." *See* R.C. 163.21(C)(2). The evidence presented at trial demonstrated that the Eichhorn Property is land used for agricultural purposes. Plaintiff's expert witness stated this explicitly on page 32 of his expert report, admitted as Exhibit 4, wherein he stated, under the subheading 'Present Use of the Property', that "[t]he current use of the subject is agricultural."

2. <u>"Land used for agricultural purposes" need not be devoted exclusively to agricultural use in order to permit a landowner to recover costs and expenses under R.C. 163.21(C)(2).</u>

Plaintiff further argues that the Eichhorn Property does not meet the requirements of R.C. 163.21(C)(2) because the property is not devoted exclusively to agricultural use. Again, Plaintiff confuses the issue by failing utilize applicable principles of statutory construction.

In establishing the definitions of "land used for agricultural purposes," R.C. 163.21(C)(2) relies on three other sections of the Revised Code: R.C. 303.01; **or** R.C. 519.01; **or** R.C. 5713.30. Importantly, R.C. 163.21(C)(2) relies on these different code sections disjunctively (using the word "or" rather than "and"). "The word 'and' is conjunctive, while the word 'or' is disjunctive." *See State v. Hensley*, 12th Dist. Warren No. CA2021-06-055, 2023-Ohio-119, ¶ 25. As a result, "when 'or' is used, the words joined by 'or' are alternatives." *Id*. (*citing In re Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267, ¶ 18, 950 N.E.2d 505). This means that Eichhorn need only satisfy one of the statutory definitions of "land used for agricultural purposes" in order to satisfy R.C. 163.21(C)(2).

All three statutes clearly define "agriculture," and all three include "field crops" in their respective definitions. At trial, Phil Eichhorn, as representative for Eichhorn Limited Partnership, testified that growing field crops is the Eichhorn Property's agricultural use. Although R.C. 5713.30 makes use of the phrase "devoted exclusively to agricultural use," neither R.C. 303.01 nor R.C. 519.01 require that the land be devoted exclusively to agricultural use. Therefore, Eichhorn satisfies the R.C. 163.21(C)(2)'s definition of "land used for agricultural purposes" by satisfying the definitions of both R.C. 303.01 and R.C. 519.01.

Although Plaintiff asserts that the legislative intent in enacting R.C. 163.21(C)(2) was that it not apply in circumstances such as those present here, Plaintiff provides no citations to support this proposition. Further, fundamental principles of statutory construction demonstrate that Plaintiff's desired interpretation of R.C. 163.21(C)(2) is impermissible.

A Court's primary concern when construing statutes is legislative intent. *State v. Wolfe*, 4th Dist. Pike No. 16CA875, 2017-Ohio-6876, ¶ 16, 83 N.E.3d 956, *citing State v. J.M.*, 148 Ohio

St.3d 113, 2016-Ohio-2803, 69 N.E.3d 642. In determining that intent the Court must first look to the plain language of the statute. *Id.* Terms that are undefined by statute are given their plain, common, and ordinary meaning. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 46, *citing* R.C. 1.42; *State v. Erskine*, 2015-Ohio-710, 29 N.E.3d 272, ¶ 26 (4th Dist.). As the Ohio Supreme Court has long held, "[w]hen we engage in statutory interpretation, our first duty is to determine whether the statute is clear and unambiguous." *Terry v. Sperry*, 130 Ohio St. 3d 125, 130, 2011-Ohio-3364, 956 N.E.2d 276 (2011), *citing Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324, ¶ 15. Here, R.C. 163.21(C)(2) and the statutes it references in defining "land used for agricultural purposes" are clear and unambiguous. *See Wray v. Gahm Properties*, 2018-Ohio-50, 103 N.E.3d 148, ¶ 14 (4th Dist.)

"Where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Sherwin-Williams* at ¶ 14 (quoting *Hubbard v. Canton City School Dist. Bd. of Educ.*, 97 Ohio St.3d 451, 2002 Ohio 6718, 780 N.E.2d 543, ¶ 14). "It is a cardinal rule of statutory construction that where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation." *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶ 11 (2017).

Applying R.C. 163.21(C)(2) as written, without additions or subtractions, compels the conclusion that the Eichhorn Property is "land used for agricultural purposes" and, therefore, Eichhorn is entitled to costs and expenses, including attorney's fees and appraisal fees.

3. A Court may take judicial notice of the reasonableness of the value of attorney's fees where the value of services rendered is obviously reasonable; but, if the Court declines to take judicial notice, it should order a hearing on the matter of the reasonableness of attorney's fees requested.

Plaintiff argues that Eichhorn's motion should be denied because it has not presented evidence that the attorney's fees and appraisal fees were reasonable. Plaintiff's analysis fails because the Court may take judicial notice of the reasonableness of Eichhorn's attorney's fees and appraisal fees due to the fact that the fees requested are obviously reasonable under the circumstances of this case. However, if the Court declines to take judicial notice of such, then it should order a hearing where such evidence can be presented.

An award of attorney fees is within the sound discretion of the trial court. *Cennamo v. Deem*, 5th Dist. Knox No. 02 CA 22, 2002-Ohio-7189, ¶ 38. Although the reasonableness of attorney's fees is not generally a matter for judicial notices, "[a]n exception to this general rule exists where the value of the services is so obviously reasonable that it may be determined as a matter of law." *Brandon/Wiant Co. v. Teamor*, 135 Ohio App.3d 417, 422, 734 N.E.2d 425 (8th Dist.1999); *see also Raymond v. Shaker Produce, Inc.*, 8th Dist. Cuyahoga Nos. 84885, 85391, 2005-Ohio-1670, ¶ 35. In *Wray v. Gahm Props.,* the Fourth District Court of Appeals affirmed an award of costs and expenses under R.C. 163.21(C)(2) where no hearing was held concerning the matter. 2018-Ohio-50, 103 N.E.3d 148, ¶ 4 (4th Dist.)

Here, by incurring attorney's fees and appraisal fees, Eichhorn obtained an award of just compensation many multiples higher than Plaintiff's appraisal and best offer. Eichhorn's net benefit resulting from the legal and appraisal services purchased with those fees is obvious and could not have been obtained without incurring these fees. In this context, it is appropriate and

proper for the Court to take judicial notice of the reasonableness of Eichhorn's attorney's fees and appraisal fees.

However, if the Court declines to take judicial notice of the reasonableness of Eichhorn's attorney's fees and appraisal fees, it should order that hearing be held regarding the matter so that Eichhorn can present evidence regarding the reasonableness of its attorney's fees and expenses.

4. Eichhorn is entitled to $21,868.13 under R.C. 163.21(C)(2).

In its initial motion, Eichhorn requested $24,400.62 in costs and expenses. Regrettably, Eichhorn misremembered Plaintiff's last written offer. Eichhorn believed that the last written offer was $14,870. However, as Plaintiff points out in its Memorandum in Opposition, the last written offer was $25,000. Therefore, twenty-five per cent of the amount by which the total award ($112,472.50) exceeds Plaintiff's law written offer ($25,000) is $21,868.13. Eichhorn's actual costs and expenses authorized to be recovered under R.C. 163.21(C) exceed this figure and, as a result, the award of costs and expenses is limited to $21,868.13.

Accordingly, Eichhorn respectfully requests that this Court enter judgment awarding costs and expenses in the amount to which it is statutorily entitled of TWENTY-ONE THOUSAND EIGHT HUNDRED SIXTY-EIGHT DOLLARS AND THIRTEEN CENTS ($21,868.13).

A revised Proposed order is attached for the Court's convenience.

Respectfully submitted,

Goldman Braunstein Stahler Kenter LLP

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2023, the foregoing was served on the following via electronic mail and/or regular mail:

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	:	
v.	:	
	:	
Eichhorn Limited Partnership, et al.,	:	
	:	
Defendants.	:	

ORDER TAXING STATUTORY COSTS

Upon Motion of Defendant, Eichhorn Limited Partnership, for an Order taxing statutory costs to Plaintiff, and for good cause shown, it is hereby:

ORDERED AND ADJUGED that Plaintiff shall deposit with the Court the amount of TWENTY-ONE THOUSAND EIGHT HUNDRED SIXTY-EIGHT DOLLARS AND THIRTEEN CENTS ($21,868.13) as and for an award of costs and expenses payable to Eichhorn Limited Partnership pursuant to R.C. 163.21(C).

IT IS SO ORDERED.

Dated:_____

_____

JUDGE RICHARD E. BERENS

Copies to:

All counsel of record.