[Cite as *Beasley v. Watkins-Alum Creek Co.*, 2011-Ohio-5229.]

[Please see decision on reconsideration at 2011-Ohio-6792.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

JAMES G. BEASLEY, Director, Ohio Department of Transportation,	:	
Appellant/Cross-appellee,	:	CASE NOS. CA2010-09-021 CA2010-09-027
	:	O P I N I O N
- vs -	:	10/11/2011
WATKINS-ALUM CREEK COMPANY, et al.,	:	
Appellees/Cross-appellants.'	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08-CVH-00297

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HENDRICKSON, P.J.

{¶1} Plaintiff-appellant/cross-appellee, James G. Beasley, Director of the Ohio Department of Transportation (ODOT), appeals from a judgment of the Fayette County Court of Common Pleas, in which a jury awarded defendants-appellees/cross-appellants, Watkins-Alum Creek Company, its principal owners Therll W. Clagg and Larry D. Clarke, and its lessee, R and C Rivers Farms L.P. (collectively, "Watkins"), a total sum of $1,408,346 as compensation for the appropriation of real property and for damages to the residue. Watkins cross-appeals from the trial court's judgment entry denying its motion for fees and costs pursuant to R.C. 163.21.

{¶2} In January 2003, Watkins-Alum Creek Company purchased approximately 240 acres of real property located in Fayette County, Ohio for $1,220,000. The property, which contained a house, two barns and a silo, consists of undeveloped farmland that was originally located outside the limits of the city of Washington Court House. The property was leased to R and C Rivers Farms L.P. for farming purposes. In 2004, Watkins hired Byrd & Houck, a land planning and landscape architecture firm, to survey its land and to create a proposed initial zoning classification for the property. On December 21, 2004, the property was annexed into the city of Washington Court House and a zoning map was approved. The property was zoned for residential and commercial use. Although services, including water and sewer, were permitted to be extended to the newly annexed property at the property owner's expense, Watkins has not developed water or sewer systems on the property.

{¶3} Prior to March 2005, Watkins was notified of a road improvement project that

would affect its property.[1] ODOT had announced its plan to extend State Route 753 (S.R. 753) from U.S. Route 22 (U.S. 22) to U.S. Route 62 (U.S. 62) as a means of alleviating tractor-trailer traffic traveling on Fayette county roads. The extension of S.R. 753 calls for a limited access highway to be constructed through Watkins' farmland. The project required ODOT take by eminent domain 15.925 acres of Watkins' property, including the house, barns, and silo. The roadway constructed on the property will split Watkins' property into three separate residues. The left residue will consist of 93.465 acres, the smaller right residue 11.144 acres, and the larger right residue 119.625 acres. The smaller right residue will have unrestricted access to Washington-Waterloo Road, and the larger right residue will have unrestricted access to Stuckey Road and Washington-Waterloo Road. To prevent the left residue from being landlocked, a 60-foot break in access on S.R. 753 has been granted. ODOT intends to build a 12-foot field drive within this break in access to replace in kind a field drive currently being utilized on the property.

{¶4} On June 12, 2008, ODOT filed the present petition for appropriation, seeking to take 15.925 acres of Watkins' property and establish just compensation for the real property appropriated and the value of damages to the residue. At this time, ODOT, who believed that the value of the property appropriated and damages to the residue totaled $340,038, deposited this amount with the trial court. A jury trial was originally set for July 23, 2008, but did not commence until June 7, 2010. The only issue before the jury was the amount of compensation owed for the property taken and the damages to the residue. The jury heard testimony from Clagg, Clarke, and two expert

1. There is a dispute amongst the parties as to when Clagg and Clarke first learned of ODOT's extension project. ODOT maintains that Clagg and Clarke knew of the expected extension of State Route 753 prior to purchasing the property. Clagg and Clarke maintain that they did not find out until after they purchased the property.

appraisers, Robert Weiler, Watkins' expert appraiser, and Thomas Kaliker, ODOT's expert appraiser, regarding the amount due to Watkins as a result of ODOT's appropriation.

{¶5} After a three-day trial, the jury awarded $238,875 as compensation for the real property permanently taken, $846 as compensation for a temporary easement, and $1,168,825 for damages to the residue. On August 10, 2010, the trial court entered judgment on the jury verdict. Thereafter, on September 3, 2010, the trial court entered judgment denying Watkins' request for costs and expenses, including attorney's fees and appraisal fees, pursuant to R.C. 163.21.

{¶6} ODOT appeals the jury verdict, asserting the following three assignments of error:

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF ODOT BY PERMITTING EVIDENCE OF LOSS OF ACCESS TO A ROADWAY WHICH NEVER EXISTED AND TO WHICH LANDOWNER NEVER HAD ACCESS."

{¶9} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT ERRED TO THE PREJUDICE OF ODOT BY PERMITTING EVIDENCE OF THE LOSS OF ALL ACCESS EXCEPT FOR 12 FEET WHEN THE TAKING EXPRESSLY RESERVED A PERMISSIBLE, 60 FEET WIDE ACCESS POINT."

{¶11} Assignment of Error No. 3:

{¶12} "THE TRIAL COURT ERRED TO THE PREJUDICE OF ODOT BY PERMITTING EVIDENCE OF A COST TO CURE TO BE *ADDED* TO DAMAGES TO THE RESIDUE."

{¶13} Watkins cross-appeals the trial court's denial of costs and expenses under R.C. 163.21(C), alleging the following assignment of error:

{¶14} Cross-Assignment of Error No. 1:

{¶15} "THE TRIAL COURT ERRED WHEN IT HELD THAT CROSS-APPELLANTS COULD NOT RECOVER THEIR COSTS AND EXPENSES UNDER R.C. 163.21, AS A MATTER OF LAW, BECAUSE IT HAD SET THE INITIAL TRIAL DATE FOR LESS THAN 50 DAYS AFTER ODOT FILED THIS ACTION."

{¶16} In its first assignment of error, ODOT argues that the trial court improperly permitted Watkins, over ODOT's repeated objections, to present evidence that it was harmed by loss of access to the proposed S.R. 753. Further, ODOT argues that the court erred by allowing Watkins to present evidence that the residue was damaged by the loss of "access points" from a road that did not exist on its property. The trial court permitted Watkins to introduce into evidence a map of the property which contained an image of a roadway running through the property. The map, which was prepared by Byrd & Houck for purposes of getting the property rezoned when it was annexed into the city of Washington Court House, depicts a private roadway nearly identical to the proposed S.R. 753 extension project, except the roadway was not limited access. The map of the roadway contains various arrows which were intended to represent points of access from the roadway to Watkins' property. Although the depicted roadway was never built, Watkins' repeatedly referred to six different points of access from the non-existent road to the left residue and the smaller right residue that it claimed were lost as a result of ODOT's taking and expected project.

{¶17} "In a partial takings case, the owner is entitled to receive compensation not only for the property taken, but also for damage to the residue as a result of the take."

Proctor v. NJR Properties, L.L.C., 175 Ohio App.3d 378, 2008-Ohio-745, ¶15. "The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use, but what it is worth generally for any and all uses for which it can reasonably and practically be adapted." *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 151. Accordingly, "[d]amage to the residue is measured by the difference between the fair market values of the remaining property before and after the taking. * * * When determining the fair market value of the remaining property before and after the taking, those factors that would enter into a prudent businessperson's determination of value are relevant. * * * Factors may include loss of ingress and egress, diminution in the productive capacity or income of the remainder area, and any other losses reasonably attributable to the taking." (Citations omitted.) *NJR Properties, L.L.C.*, 2008-Ohio-745 at ¶15.

{¶18} In the present case Watkins was entitled to present evidence of the devaluation in the fair market value of its property after ODOT's taking. Watkins introduced permissible testimony regarding how the highest and best use of its property changed from mixed use to agricultural use as a result of a loss of ingress and egress to the left residue. Watkins went beyond what is permissible, however, when it argued and presented testimony that the residue was harmed by the loss of specific access points from a roadway that has never been constructed on the property. It further went beyond what is permissible when it presented testimony that the residue was devalued because it lost access to the proposed extension of S.R. 753.

{¶19} At trial, Clarke testified that Watkins' property would be damaged by the loss of access to the proposed extension of S.R. 753. When asked what specific damages the right residue suffers as a result of ODOT's take, Clarke testified as follows:

{¶20} "CLARKE: * * * Well, the loss of the - - of our access, one. The additional roads that will have to be put in there to develop all of it.

{¶21} "[WATKINS' COUNSEL]: Let me stop you there if I could. You said the loss of the accesses. Now, this is the right residue here; correct?

{¶22} "CLARKE: Yes.

{¶23} "[WATKINS' COUNSEL]: And the loss of the accesses you are referring to is where?

{¶24} "CLARKE: Along the new 753, the proposed 753.

{¶25} "[WATKINS' COUNSEL]: Let me give you the pointer and you can point those out.

{¶26} "* * *

{¶27} "[WATKINS' COUNSEL]: Which ones? Just point those out. Right there and right there, those two?

{¶28} "CLARKE: Uh-hum.

{¶29} "[WATKINS' COUNSEL]: That's as a result of what? Why are those being lost?

{¶30} "CLARKE: I'm sorry?

{¶31} "[WATKINS' COUNSEL]: Why are those being lost in the after as a result of this project?

{¶32} "CLARKE: Because we expected to have those accesses * * * and they are being taken away by ODOT with no access."

{¶33} Compensation for the obstruction of access to a public highway occurs only when access to an *existing* roadway is being denied or limited by a governmental taking. "[T]here is no right to consequential damages to the land not taken for lack of

access to a new limited access highway built where no road existed before. The reasoning is simple. At the time of the taking, there is no easement of access to the new road inuring to the benefit of the abutting land not taken. No existing right has been taken. And, of course, none will accrue in the future because, when the new road is declared to be one of limited-access, no easement of access by implication can arise in the face of that contrary declaration." *D'Arago v. State Roads Comm.* (1962), 228 Md. 490, 495. See, also, *Morehead v. State Dept. of Roads* (1975), 195 Neb. 31, 34; *Busby v. State ex rel. Herman* (1966), 101 Ariz. 388, 394; *State ex rel. State Highway Comm. V. Silva* (1962), 71 N.M. 350, 356; *Riddle v. State Highway Comm.* (1959), 184 Kan. 603, 610; *Lehman v. State Highway Comm.* (1959), 251 Iowa 77, 82; *State ex rel. Rich v. Fonburg* (1958), 80 Idaho 269, 278; *State v. Calkins* (1960), 50 Wash.2d 716, 719; *State ex rel. State Highway Comm. v. Clevenger* (1956), 365 Mo. 970, 979; *State Highway Comm. v. Burk* (1954), 200 Ore. 211, 228-229; *Schnider v. State* (1952), 38 Cal.2d 439, 442-443. Accordingly, because the new limited access highway is being built where no prior road existed, Watkins is not entitled to compensation for the loss of access to the new road. Allowing Watkins to present evidence to the contrary was prejudicial and a reversible error.

{¶34} Further, Watkins was not entitled to present evidence that it was harmed by the loss of specific access points along the non-existent roadway depicted in the Byrd & Houck map. During opening and closing statements, Watkins' counsel pointed to six different points of access on the Byrd & Houck map that Watkins was allegedly losing as a result of ODOT's project.

{¶35} "[WATKINS' COUNSEL'S OPENING STATEMENT]: "As a result of being limited access, this property loses this access point, this access point, this access point,

and this access point to the left residue. Those were all access points that would have been available to this property owner on this road had a limited access highway not been planned to be built on it.

{¶36} "* * *

{¶37} "Now the right residue because of the limited access, this access point will be gone, this access point will be gone. * * * But the evidence is going to be that the removal of these two access points has substantially damaged this right residue * * *"

{¶38} "[WATKINS' COUNSEL'S CLOSING STATEMENT]: * * * Let's talk about the after. After this project, what does Watkins-Alum Creek have? I would say it's undisputed we don't have that anymore. This is what is going to happen to Watkins-Alum Creek's access as a result of this project. Lost, lost, lost, lost, lost, lost. * * *"

{¶39} Witnesses testifying for Watkins also referred to lost access points along the road depicted in Byrd & Houck's map. Gary Smith, a landscape architect employed by Byrd & Houck, testified that losing the access points along the depicted road would impact the development and marketability of Watkins' land.

{¶40} "[WATKINS' COUNSEL]: "You have indicated access points on this plan and those are reflected by the black arrows?

{¶41} "SMITH: Yes, these.

{¶42} "[WATKINS' COUNSEL]: If these access points, for example, here and here, were no longer available because the roadway has been designated as limited access, what impact would that have on your plan?

{¶43} "[ODOT'S COUNSEL:] Your Honor, I'll object for purposes of the record.

{¶44} "THE COURT: Objection is noted and overruled.

{¶45} "SMITH: That would have an impact on both the developability and the marketability of those parcels."

{¶46} Although loss of ingress and egress is a factor that should be considered in determining the fair market value of the remaining property after a taking, *Proctor v. NJR Properties, L.L.C.*, 2008-Ohio 745 at ¶15, it is prejudicial to allow into evidence a map depicting a non-existent roadway having various points of access onto the unappropriated portion of the property when no such roadway exists. A landowner is not entitled to damages to the residue for lack of access to a roadway that had never been constructed on the property. Accordingly, allowing Watkins to present evidence and testimony that its property was damaged by the loss of the specific access points depicted on Byrd & Houck's map was improper and prejudicial.

{¶47} ODOT's first assignment of error is therefore sustained.

{¶48} In its second assignment of error, ODOT argues that the trial court erred by allowing Watkins to introduce evidence that it lost all access to the left residue except for 12 feet when the petition to appropriate expressly reserved a 60-foot point of access. ODOT maintains that the trial court acted outside its jurisdiction when it allowed the jury to determine what access was being reserved. We agree.

{¶49} "In a highway appropriation proceeding, the quality and quantity of rights taken from the landowner are established by the Resolution and Finding, and plat filed by the Director of Highways. R.C. 5519.01" *Masheter v. Blaisdell* (1972), 30 Ohio St.2d 8, 10-11. "[A] trial court's jurisdiction * * * [is] limited to a determination of the compensation and damages for the appropriation described in the complaint." *Proctor v. Thieken*, Lawrence App. No. 03CA33, 2004-Ohio-7281, ¶22. If "a property owner * * * believes there has been a taking of property beyond that described in the complaint [the

property owner] must seek a writ of mandamus compelling ODOT to institute appropriation proceedings." Id. at ¶20.

{¶50} In the present case, the Resolution and Finding filed by ODOT specifically states that "a permissible point of access, 60-feet in width, to State Route 753" has been reserved. The engineering plan for the extension of S.R. 753 shows a 12-foot wide field drive being built within the permitted 60-foot break in access. At trial, the court permitted Watkins to present evidence that the *only* access provided to the left residue was a 12-foot-wide field drive. When ODOT's counsel objected to such evidence being presented, the court stated as follows:

{¶51} "THE COURT: Okay. Well, they're [the jury] going to hear testimony on the issue of access and they'll decide and they'll decide [sic] that from whatever testimony. I'm not going to find that as a matter of law.

{¶52} "* * *

{¶53} "THE COURT: I will permit testimony from Mr. Clagg as to what he thinks his access will be. I will give the State a standing objection to any reference to a 12-foot gravel lane, and we'll see how the evidence comes in. * * *"

{¶54} Thereafter, the trial court allowed Watkins to introduce testimony that the 12-foot break in access was insufficient for residential, commercial, and farming uses. Weiler testified that the 12-foot field drive is insufficient for any kind of residential or commercial street. Ronald Rivers, the farmer currently using the property leased by R & C Rivers Farms LP, testified that a 12-foot field drive was insufficient to safely navigate farming equipment onto the property.

{¶55} "[WATKINS' COUNSEL]: Mr. Rivers, I have handed you what we marked as Exhibit 17. Do you recognize this as the Watkins-Alum Creek property showing ODOT's project and how it affects the property?

{¶56} "RIVERS: Yes.

{¶57} "[WATKINS' COUNSEL]: Looking at this portion of the property to the south and to the west, it has been called the left residue. Does R & C farm that portion of the property today?

{¶58} "RIVERS: Yes.

{¶59} "[WATKINS' COUNSEL]: Do you have an understanding that as a result of this project, R & C will only be able to access this portion of the property through a 12-foot field drive as indicated here?

{¶60} "RIVERS: Yes

{¶61} "* * *

{¶62} "[WATKINS' COUNSEL]: Does that concern you?

{¶63} "RIVERS: Yes, it does.

{¶64} "[WATKINS' COUNSEL]: In what way or why?

{¶65} "RIVERS: We just can't get our equipment in to farm it through a 12-foot opening.

{¶66} "* * *

{¶67} "[WATKINS' COUNSEL]: Specifically, when we are talking about this left residue that can only be accessed by the 12-foot gravel drive, do you consider it to be significantly less desirable farm ground as a result of this project?

{¶68} "RIVERS: We are not interested in farming it."

{¶69} By permitting such evidence to be presented, the trial court improperly allowed the jury to consider whether ODOT's taking had reduced the point of access to 12 feet rather than the 60 feet expressly reserved in the Resolution and Finding filed with the complaint. We therefore conclude that the trial court acted outside its jurisdiction when it allowed the jury to determine if there had been a taking beyond that described in ODOT's complaint for appropriation.

{¶70} ODOT's second assignment of error is sustained.

{¶71} In its third assignment of error, ODOT argues that the trial court erred by allowing evidence of a cost to cure to be added to damages to the residue. ODOT contends that Watkins' expert failed to determine an uncured post-appropriation value of the residue before adding $251,000 in damages to the residue to cover the "additional" cost of connecting utilities to the property after ODOT's taking. Watkins contends, however, that it did not introduce evidence of a cost-to-cure, but rather presented evidence of the diminution in value of the residue caused by the loss of direct access to utility services. Watkins contends that the amount of diminution in value of the left residue caused by blocked access to utility services is equal to the cost of correcting that impairment.

{¶72} "[I]t is well established * * * that an opinion as to the damages to the residue must be expressed in terms of the difference between the pre- and post-appropriation fair market value of the residue." *Hilliard v. First Industrial, L.P.*, 158 Ohio App.3d 792, 2004-Ohio-5836, ¶9. "Where damage is caused to the residue of property remaining after a taking, [if], by the expenditure of money in an amount less than the difference between the before-and-after fair market value of the residue, the property owner could make improvements to such residue to restore the fair market value of the

residue to that which it was before the improvement, then, evidence of such cost of cure would be admissible, and, if proved, would limit the amount of damages to be assessed." (Internal quotation marks omitted.) *Green v. Genovese*, Summit App. No. 23472, 2008-Ohio-1911, ¶14. The "cost-of-cure" is therefore a mitigation device, and "cannot be utilized to increase damages to the residue [but] * * * may be utilized to reduce those damages." Id.

{¶73} In the present case, Weiler testified that the best use of 197 acres[2] of the property before the taking included both commercial and residential uses. He assessed a pre-appropriation fair market value of $2,540,000. After ODOT's taking, Weiler concluded that 101 acres of the 181 acre residue were no longer suitable for residential or commercial use, and the property's fair market value declined to $1,132,500. This post-appropriation figure includes alleged damages to the property in the amount of $251,000 for the anticipated expense of extending utilities to the left residue after ODOT completes construction of S.R. 753.

{¶74} At trial, Weiler testified as follows regarding the additional expense extending utilities:

{¶75} "WEILER: Well, in addition to the reduction in value due to the fact that, in my opinion, we have a change in the highest and best use, you also have a new road constructed through the property that you can no longer extend the utilities through the property without finding a way to go underneath the road, either cut the road or tunnel under the road. You do not have that obligation or expense for development at such

2. Although Watkins' property consists of 240 acres, Weiler testified that more than 43 acres of the property falls within a flood plain along Paint Creek, which is located on the western border of the property. Because those acres within the flood plain cannot be developed, Weiler assigned no value to them. Accordingly, only 197 acres of the property were considered in determining the best use of the property prior to ODOT's taking.

time as you were to development [sic] the property. Because this new road went through the property and the plans do not show laterals being put in, that is piping put in to be used in connecting, you now have that additional cost at such time as you develop the property."

{¶76} From his testimony, it is readily apparent that Weiler was not attempting to introduce evidence of a "cost-to-cure." First, Weiler did not testify that the expenditure of funds to extend utilities to the left residue after ODOT's taking would restore the fair market value of the left residue to that which it was prior to the taking. Second, since the "cost-to-cure" is a mitigation device, it is highly unlikely that he would attempt to mitigate his own clients' damages. Further, it was ODOT, not Watkins, who brought the notion of a "cost-to-cure" to the trial court's attention by mischaracterizing the issue after alleging that it was improper for Watkins to add a "cost-to-cure" to its damages instead of subtracting it. Weiler was simply testifying as to a factor that he believed impacted the fair market value of the remainder of the property. As previously stated, "[w]hen determining the fair market value of the remaining property before and after the taking, those factors that would enter into a prudent businessperson's determination of value are relevant. * * * Factors may include loss of ingress and egress, diminution in the productive capacity or income of the remainder area, and any other loses reasonably attributable to the taking." (Citations omitted.) *Proctor v. NJR Properties, L.L.C.*, 2008-Ohio-745 at ¶15. Because a prudent businessperson would consider the additional cost of extending utilities to the property after the taking a relevant factor in determining the potential use and value of the property, Watkins was entitled to present such evidence to the jury.

{¶77} Accordingly, ODOT's third assignment of error is overruled.

{¶78} In its cross-assignment of error, Watkins claims the trial court erred in denying its motion to recover costs and expenses under R.C. 163.21.[3] Watkins argues that because the jury awarded $1,408,346 in compensation and damages, which is more than one hundred fifty percent (150%) of ODOT's original offer of $340,038, the trial court was required by law to enter judgment in its favor on its motion for fees and costs incurred in the action. Watkins further argues that its recovery of fees and costs cannot be barred by the operation of R.C. 163.21(C)(5)(b), as the trial court originally set the initial trial date for less than 50 days after ODOT initiated the action.

{¶79} In light of our holding regarding ODOT's first and second assignments of error, it is unnecessary to determine the issue presented in Watkins' cross-assignment of error. Watkins' cross-assignment of error is therefore rendered moot.

{¶80} Judgment is affirmed in part, reversed in part, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

PIPER and HUTZEL, JJ., concur.

3. R.C. 163.21(C)(1) provides in relevant part that "when an agency appropriates property and the final award of compensation is greater than one hundred twenty-five percent of the agency's good faith offer for the property * * * the court shall enter judgment in favor of the owner, in amounts the court considers just, for all costs and expenses, including attorney's and appraisal fees, that the owner actually incurred." One's right to recover costs and expenses is limited, however, by the operation of R.C. 163.21(C)(5)(b), which provides that "[t]he court shall not enter judgment for costs and expenses, including attorney's fees and appraisal fees, under division (C) of this section unless *not less than fifty days prior to the date initially designated by the court for trial the owner provided the agency with an appraisal or summary appraisal of the property being appropriated* or with the owner's sworn statement setting forth the value of the property and an explanation of how the owner arrived at that value." (Emphasis added.)