

COMMONWEALTH OF KENTUCKY
BULLITT CIRCUIT COURT
DIVISION ONE
CASE NO: 19-CI-00762

LOUISVILLE GAS & ELECTRIC CO.

PLAINTIFF

VS.

OPINION

ISAAC W. BERNHEIM FOUNDATION, and
KENTUCKY HERITAGE LAND CONSERVATION FUND

DEFENDANTS

This matter comes before the Court for trial on January 10, 2023. The Plaintiff, Louisville Gas and Electric Co. (here after LG&E) was represented by the Hon. Monica Braun and the Hon. Mark Hurst. The Defendant Isaac W. Bernheim Foundation (hereinafter Bernheim) was represented by the Hon. Randal Strobo and the Hon. Tom FitzGerald. The Defendant Kentucky Heritage Land Conservation Fund (here after KHLCF) is represented by the Hon. Matt Myers.

This matter comes before the Court on LG&E's petition to condemn Defendants' property to obtain easements for its natural gas pipeline project. The two properties LG&E seeks to condemn are known as the "Simon" properties have been subsequently identified as the "Cedar Grove Wildlife Corridor" and after acquisition by Bernheim. The properties consist of two adjoining tracts comprising a total of 494 acres in Bullitt County near the community of Cedar Grove.

LG&E now seeks to condemn the aforementioned property pursuant to its eminent domain authority under KRS 278.502. The Court has reviewed the Eminent

Domain Act of Kentucky, KRS 278.502, and pertinent case law, in addition to considering the evidence presented and argument of counsel.

The Eminent Domain Act of Kentucky provides that when a condemnor cannot acquire a needed easement by agreement with the owner, the condemnor can acquire the easement by condemnation pursuant to the Act, KRS 416.550 to 416.670. If the owner files an answer putting in issue the right to condemn the Circuit Court is to proceed forthwith to hear and determine whether or not the petitioner has such right. If the Court determines that the petitioner has such right, an interlocutory judgment is to be entered authorizing the condemnor to take possession of the easement upon payment of the amount of compensation awarded by the commissioners. *See* KRS 416.610(4).

LG&E argues that KRS 278.502 provides it with the statutory right to institute a condemnation action to acquire property for the permanent and temporary easements sought in the Petition. That statute provides:

Any corporation or partnership organized for the purpose of, and any individual engaged in or proposing to engage in, constructing, maintaining, or operating oil or gas wells or pipelines for transporting or delivering oil or gas, including oil and gas products, in public service may, if it is unable to contract or agree with the owner after a good faith effort to do so, condemn the lands and material or the use and occupation of the lands that are necessary for constructing, maintaining, drilling, utilizing, and operating pipelines, underground oil or gas storage fields, and wells giving access thereto and all necessary machinery, equipment, pumping stations, appliances, and fixtures, including tanks and telephone lines, and other communication facilities, for use in connection therewith, and the necessary rights of ingress and egress to construct,

examine, alter, repair, maintain, operate, or remove such pipelines or underground gas storage fields, to drill new wells and utilize existing wells in connection therewith, and remove pipe, casing, equipment, and other facilities relating to such underground storage fields and access wells. The proceedings for condemnation shall be as provided in the Eminent Domain Act of Kentucky.

Ky. Rev. Stat. Ann. § 278.502 (West).

This action is part of a pipeline route where LG&E sought condemnation of several tracts in multiple cases before this court. Bernheim's challenges largely mirror those decided by the Court in the consolidated cases of *Louisville Gas and Electric Company v. Mark E. and Monica Carter, et al*, Case No. 2019-CI-00750. While not binding in this case, the Court held that the pipeline is a public use as a matter of law, and that LG&E did not abuse its discretion in its location of the pipeline because LG&E "has proven this route is appropriate to satisfy a public need to increase capacity and improve reliability for commercial and residential natural gas customers in Bullitt County." *Louisville Gas and Electric Company v. Mark E. and Monica Carter, et al.*, Case No. 2019-CI-00750, May 18, 2021, Order.

In the three and a half years that have elapsed since this action was filed, nearly all of Bernheim's challenges to LG&E's right to condemn have been resolved by this Court in other proceedings. The only potentially unresolved challenge is whether LG&E's pipeline meets the "public use" requirement in KRS 276.875, and whether LG&E's actions were arbitrary or an abuse of discretion—rulings this Court made in its March 2021 Order.

Kentucky law grants condemnation authority to “any corporation . . . organized for the purposes of . . . constructing” a natural gas pipeline. KRS 278.502. This right is limited by three requirements. First, the condemnor must make a “good faith effort” to obtain the necessary property rights from the condemnee through negotiation. KRS 278.502; *see also* KRS 416.550; *see also* *God’s Center Foundation, Inc. v. Lexington Fayette Urban County Government*, 125 S.W.3d 295, 300 (Ky. App. 2002) (“Kentucky courts have also imposed a duty on the condemnor to negotiate in good faith the acquisition of the property prior to seeking condemnation.”). Second, although the condemnor is granted broad discretion in selecting the land necessary for the project, its decision and route will be reviewed for arbitrariness and abuse of discretion. *See* *God’s Center Foundation, Inc.*, 125 S.W.3d at 299. Third, the condemnation of the property must serve a public purpose. *See* KRS 416.675(1). Defendants carry the burden of proving these requirements have not been met:

Kentucky courts have also imposed a duty on the condemnor to negotiate in good faith the acquisition of the property prior to seeking condemnation. In *City of Bowling Green v. Cooksey*, the Court stated: “Under KRS 416.550, the condemnor cannot acquire the property in fee simple if it can obtain access or use of the property through other privileges or easements.”¹⁷ The party challenging the condemnation, however, bears the burden of establishing the lack of necessity or public use and abuse of discretion.

God’s Ctr. Found., Inc. v. Lexington Fayette Urb. Cnty. Gov’t, 125 S.W.3d 295, 300 (Ky. Ct. App. 2002).

Defendants do not dispute the evidence purporting that Plaintiff is a corporation organized for the purposes of constructing” a natural gas pipeline. The

testimony produced by Lonnie Bellar, Chief Operating officer for LG&E, was that LG&E is in the business of providing gas to the public and that Bullitt County is one of the 17 counties it services. Defendants, however, argue that none of the remaining requirements have been satisfied. Defendants contend that Plaintiff has not engaged in good faith negotiations to secure its desired easements. Defendants further argue that the natural gas pipeline would not serve a public use. As a result, Defendant suggests that Plaintiff abused its condemnation authority.

Plaintiff maintains that it has satisfied all requirements to properly exercise its authority. Plaintiff argues it made offers to the Defendants for the easements sought and that the pipeline, as planned, is necessary to improve natural gas service for residential and commercial customers in Bullitt County by increasing capacity and improving reliability. The Court agrees.

Good Faith Negotiation

Kentucky law states that a corporation building a natural gas pipeline may, “if it is unable to contract or agree with the owner after a good faith effort to do so, condemn the lands and material . . . necessary” for its project. KRS 278.502; *see also* KRS 416.550; *see also God’s Center Foundation, Inc.*, 125 S.W.3d at 300 (“Kentucky courts have also imposed a duty on the condemnor to negotiate in good faith for the acquisition of the property prior to seeking condemnation”). The good faith negotiation requirement requires little more than Plaintiff’s attempt to secure the necessary land for a reasonable sum. *See God’s Center Foundation, Inc.*, 125 S.W.3d

at 304 (“The condemnor is not required to haggle in order to satisfy its obligation to negotiate in good faith the purchase of property”).

In *Coke v. Com. Dept. of Finance*, a condemnee challenged a trial court’s ruling that the Commonwealth of Kentucky’s Department of Finance had the authority to condemn a dwelling and some of the surrounding land. *See Coke v. Com. Dept. of Finance*, 502 S.W.2d 57, 58 (Ky. 1973). The condemnee argued, inter alia, that the Department of Finance did not engage in good faith negotiation. *See Coke*, 502 S.W.2d at 59. The Court of Appeals disagreed. The Court explained:

The judge found that there was an offer which the landowners rejected. The evidence showed that efforts to buy the property were made over a substantial period of time, that the state made a legitimate offer, and the landowners flatly rejected it. The evidence further showed that the landowners had stated on several occasions that they would sell the house alone but would never sell the lot on which the house stood. The trial judge found that the owners had ‘indicated that the property was not for sale in fee.’ It is our opinion that there was a good faith effort ‘to agree with the owner * * * on a price,’ which is what the statute, KRS 56.463(5), requires.

Coke v. Com. Dept. of Finance, 502 S.W.2d 57, 59 (Ky. 1973).

Likewise, in *God’s Center Foundation, Inc.*, the Court of Appeals found that the parties’ back-and-forth negotiation on the price of the subject theater satisfied the good faith negotiation requirement. *See God’s Center Foundation, Inc.*, 125 S.W.3d at 305.

Defendant has previously raised lack of good faith negotiations in its Motion to Dismiss which was heard by this Court on March 6, 2020. At that time, Bernheim filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to CR 12.02. In its Motion to Dismiss, Bernheim argued that this Court lacks subject matter jurisdiction over Plaintiff's condemnation proceeding because of Plaintiff's alleged failure to make a good faith attempt to enter an agreement with both (1) the Kentucky Heritage Land Conservation Fund Board ("KHLCF") and (2) the United States Fish and Wildlife Service ("USFWS").

Defendants argue that Plaintiff's failure to negotiate collectively with KHLCF, USFWS and with Bernheim shows a lack of good faith. The testimony showed that Bernheim notified LG&E on more than one occasion that it could not lawfully provide what LG&E requested because of the deed restrictions and conservation easement owned by KHLCF and USFWS that encumbered the tracts. LG&E claimed that Bernheim is the only person that has a material interest in the property. As set forth in said Order, KRS 382.850 allows LG&E to proceed with the eminent domain statute as if the conservation easement did not exist. Thus, LG&E had an obligation to negotiate with Bernheim as if the conservation easement did not exist.

By Order dated June 11, 2020, and entered June 12, 2020, in this action this court overruled Bernheim's Motion to Dismiss, and for the same reasons now finds that the Defendants argument that Plaintiff failed in good faith to negotiate must fail. LG&E argued that it was not required to negotiate with KHLCF and USFWS

once Bernheim had rejected its offer. This court found that Plaintiff complied with the statutory requirements of KRS 278.502 and KRS 416.550 and this Court now, again makes that same finding. To require Plaintiff to pursue additional negotiations when Bernheim had rejected their efforts to settle would be an exercise in futility. Without resolving its issues with Bernheim, no agreement on the property could be obtained. The contents of the Order entered in this action June 12, 2020, Overruling the Motion to Dismiss as it relates to the issue of good faith are incorporated in this Opinion by reference. This Court therefore finds that Defendants have failed to establish that Plaintiff failed to act in good faith.

Public Use

In considering whether LG&E has properly exercised its right of eminent domain, the Court also must consider KRS 416.675, which states that “[e]very grant of authority contained in the Kentucky Revised Statutes to exercise the power of eminent domain shall be subject to the condition that the authority be exercised only to effectuate a public use of the condemned property.” KRS 416.675 defines “public use” as:

- (a) Ownership of the property by the Commonwealth, a political subdivision of the Commonwealth, or other governmental entity;
- (b) The possession, occupation, or enjoyment of the property as a matter of right by the Commonwealth, a political subdivision of the Commonwealth, or other governmental entity;
- (c) The acquisition and transfer of property for the purpose of eliminating blighted areas, slum areas, or substandard and insanitary areas in accordance with KRS Chapter 99;

- (d) The use of the property for the creation or operation of public utilities or common carriers; or
- (e) Other use of the property expressly authorized by statute.

Ky. Rev. Stat. Ann. § 416.675 (West).

LG&E argues that the Pipeline falls within both subsections (d) and (e) of KRS 416.675(2). As to (d), LG&E states that it is both a “public utility” and “common carrier.” A “public utility” is a utility regulated by the Kentucky Public Service Commission (hereinafter PSC), and both the PSC and Kentucky Courts have held that LG&E is a public utility. *See Bardstown v. Louisville Gas & Electric Co.*, 383 S.W.2d 918 (Ky. 1964) (holding that because LG&E is a “public utility,” it “can be compelled to make any reasonable extension of its service facilities within its certificated scope or area of service.”); see also *In the Matter of: Curtis E. White v. Louisville Gas and Electric Co.*, Case No. 2004-00497 (Ky. PSC Sept. 28, 2006) (“Louisville Gas and Electric Company (“LG&E”) is a public utility subject to jurisdiction of the [PSC] pursuant to KRS Chapter 278.”). LG&E is subject to the jurisdiction of the PSC and sells gas to customers located in Kentucky.

LG&E asserts it is also a “common carrier.” Common carrier is defined in KRS 278.470, which provides:

Every company receiving, transporting or delivering a supply of oil or natural gas for public consumption is declared to be a common carrier, and the receipt, transportation and delivery of natural gas into, through and from a pipeline operated by any such company is declared to be a public use.

Ky. Rev. Stat. Ann. § 278.470 (West).

LG&E also asserts the pipeline satisfies subsection (e) of KRS 416.675(2), which defines “public use” as including any “use of the property expressly authorized by statute.” KRS 278.470 states that “the receipt, transportation and delivery of natural gas into, through and from a pipeline operated by any such company is **declared to be a public use.**” (Emphasis added). Moreover, KRS 278.502 not only describes who may exercise eminent domain in connection with providing gas service, but also expressly describes permissible uses of the condemned property, which includes the “use and occupation of the lands that are necessary for constructing, maintaining, drilling, utilizing, and operating pipelines...” LG&E asserts that KRS 278.502 defines “public use” to expressly include using and occupying land to maintain and operate a pipeline.

Bernheim has challenged whether there is a public use for the Pipeline because the pipeline will benefit Jim Beam: a large natural gas user in LG&E’s system. Lonnie Bellar testified that Jim Beam notified LG&E of a planned expansion that would increase its natural gas usage. LG&E conversed with Jim Beam about whether it should contribute to the cost of the Pipeline, but the conversations did not progress to a formal demand for a specific amount. Mr. Bellar also testified that given the significant planned growth and the opportunity to remedy the reliability issues, LG&E determined the Pipeline should be constructed without contributions from Jim Beam or any other large customer.

This Court previously considered arguments that the Pipeline was being built to benefit Jim Beam and Jim Beam alone. This Court concluded:

There is no question that Jim Beam stands to benefit greatly from this pipeline project. Nor is there any question but that Plaintiff approached Jim Beam early in its planning process to discuss Jim Beam contributing to the cost of the pipeline. Nevertheless, the Court finds this project would undoubtedly serve the broader public in addition to greatly benefiting Jim Beam. Plaintiff's experts testified that this project began conceptually in 2015. Plaintiff stated that its natural gas pipeline system in Bullitt County already presents reliability issues for current customers. An additional line is needed to improve reliability for existing customers.

Louisville Gas and Electric Company v. Mark E. and Monica Carter, et al., Case No. 2019-CI-00750, May 18, 2021, Order.

The evidence produced in this matter shows that LG&E has a demand for increased natural gas capacity in Bullitt County. Mr. Bellar testified that the pipeline project which is the subject of this condemnation action was designed to provide additional supply for the existing pipeline in Bullitt County. Mr. Bellar also testified that the planned pipeline was to allow LG&E to add additional customers and provide reliability of supply to existing customers and to add new customers. LG&E currently has no capacity to add additional customers in Bullitt County. Plaintiffs "Exhibit 6" documents 54 denials for commercial applicants, 94 denials for Residential applicants and 12 denials for residential developments, for a total of 614 denials. The testimony showed gas service had been denied by LG&E to schools, hotels, distribution centers, churches, and hospitals. Clearly, there is a public need for additional capacity in Bullitt County.

This Court finds that the Pipeline is justified on many levels, including (1) reliability concerns in the current system, (2) Bullitt County growth unrelated to Jim

Beam, the need for which is evidenced by the 600 deferrals of service and (3) Jim Beam's increased need for natural gas to allow it to expand its facilities. Any of these three factors, alone, legally justifies the Pipeline as a public use. All three exist here.

Bernheim filed a complaint against the PSC in 2019 challenging the Certificate of Public Convenience and Necessity (hereinafter CPCN) issued for the pipeline in June 2017. The PSC dismissed the complaint, and in so doing, considered many of the same arguments about Jim Beam. The PSC held that "the need for gas by one large customer is sufficient to support the issuance of a CPCN to construct a new gas pipeline." *Kimberly Brown v. Louisville Gas and Electric Company*, Case No. 2019-00296, Order at 10 (Ky. PSC Dec. 20, 2019). Bernheim appealed to the Franklin Circuit Court. That Court rejected the appeals. *Bernheim Arboretum & Research Forest, et al. v. Public Service Commission of Kentucky, et al.*, Civil Action Nos. 20-CI-00075 and 20-CI-00085, Opinion and Order (introduced as Plaintiffs "Exhibit 4") (Franklin Cir. Ct. Sept. 30, 2020).

The Court finds that the specific number of customers served from the Pipeline, and the cost allocation (which is within the jurisdiction of the PSC) irrelevant to whether there is a "public use" for purposes of KRS 416.675, as there is no such limitation within KRS 416.675, KRS 278.502, or KRS 278.470). Also, the unrebutted testimony that more than 600 homes, public services and businesses have been denied natural gas service demonstrates there is a public use for the Pipeline separate and apart from Jim Beam's needs. In addition, there is a reliability concern for thousands of existing customers that will be improved by the Pipeline.

The Court has reviewed the testimony and documentary evidence presented by the parties, as summarized above, as well as the relevant statutes and case law, and finds that the Pipeline satisfies KRS 416.675 and constitutes a “public use.” The statute expressly defines what constitutes “public use” under the Kentucky Eminent Domain Act, which includes “the use of the property for the creation or operation of public utilities or common carriers” or “[o]ther use of the property expressly authorized by statute.”

The Court finds that LG&E is both a public utility and a common carrier, and the Defendants’ property will be utilized by LG&E in the operation of its gas utility services. The Court further finds that KRS 278.470 expressly declares “the receipt, transportation and delivery of natural gas into, through and from a pipeline operated by any such company” is “a public use.” Likewise, KRS 278.502 specifically authorizes the use of condemned property to include the “use and occupation of the lands that are necessary for constructing, maintaining, drilling, utilizing, and operating pipelines,” which includes LG&E’s planned use and occupation of the easements requested herein to construct and operate a pipeline.

Land Necessary for the Route

A condemnor such as LG&E is entitled to broad discretion in the selection of the amount and location of property to be taken to complete a project. In *Kroger Co. v. Louisville & Jefferson County Air Board*, 308 S.W.2d 435, 439 (Ky. 1958), the Court of Appeals explained:

It is fundamental that a condemning authority may determine without let or hindrance the amount of land

necessary for a public purpose. See *Davidson v. Commonwealth*, 249 Ky. 568, 61 S.W.2d 34; *Baxter v. City of Louisville*, 224 Ky. 604, 6 S.W.2d 1074; *Henderson v. City of Lexington*, 132 Ky. 390, 111 S.W. 318, 22 L.R.A., N.S., 20. The general rule is well stated in 18 Am.Jur., Eminent Domain, Section 109, page 736, in this language: 'The grantee of the power of eminent domain may ordinarily exercise a large discretion not only in respect of the particular property, but also as to the amount of land to be taken for the public purpose. **This discretion is not reviewable by the courts, unless, possibly, where there has been a gross abuse or manifest fraud.**'

(Emphasis added). *Kroger Co. v. Louisville & Jefferson Cnty. Air Bd.*, 308 S.W.2d 435, 439 (Ky. 1957).

Bernheim argues that the route chosen by Plaintiff interferes with its Cedar Grove wildlife corridor, imperiled bat conservation project, and is not good for the surrounding natural areas generally. It is Bernheim's position that its conservation easement with KHLCF requires it to protect the natural features of the land, and therefore to fight this action. However, the testimony of Andrew Berry, Director of Conservation at Bernheim, showed that there was already an East Kentucky power transmission over the property when it was purchased by Bernheim. He also testified that there were multiple oil and gas lines over the Bernheim arboretum and visitor property. Other than a broad allegation of an adverse effect, there has been no showing of why the proposed LG&E pipeline would endanger wildlife any more than the existing easements.

More importantly, there has been no testimony produced to show why the route selected was a gross abuse or manifest fraud. Case law indicates that a condemnor's necessity for taking the property will not be disturbed in the absence of fraud, bad

faith, or a gross abuse of discretion; and that the burden is on the defendant to prove fraud, bad faith, or abuse of discretion. *Com., Dep't of Highways v. Burchett*, 367 S.W.2d 262, 264 (Ky. 1963).

Bernheim argues that there are alternate routes that the Plaintiff could have selected. In *Commonwealth v. Burchett*, the Highway Department sought to obtain land by eminent domain. A specific alternative area was presented, and the defendant landowner had a qualified engineer testify that the alternative area would serve the same purpose. The highway engineer even admitted it was not absolutely necessary to choose this plot of land, but that he did so because he thought it was the most logical and convenient place for the purpose. *Id.* at 265-66. In that case the Court of Appeals held:

In this whole case we do not find one iota of evidence to support the claim of bad faith or abuse of discretion. It makes no difference that the department could have chosen another location or another plan for waste disposal. Probably any highway could be routed some other way. The state cannot reasonably be compelled to submit its administrative judgments to battle in every county court house. *Cf. Davidson v. Commonwealth ex rel. State Highway Commission*, 1933, 249 Ky. 568, 61 S.W.2d 34, 37.

Com., Dep't of Highways v. Burchett, 367 S.W.2d 262, 266 (Ky. 1963)

As recently as 2020, the Kentucky Court of Appeals applied this precedent in *Allard v. Big Rivers Electric Corporation*, 602 S.W.3d 800, 809 (Ky. App. 2020):

He posits that Big Rivers could have gone ahead with the original easement and moved the cemetery, or it could have chosen to build through a different route that would not affect the oak tree. However, "the condemning body has

broad discretion in exercising its eminent domain authority including the amount of land to be taken.” *God’s Center*, 125 S.W.3d at 299 (citations omitted). It is not within the power of Allard to dictate the route the transmission line should take.

Allard v. Big Rivers Elec. Corp., 602 S.W.3d 800, 809 (Ky. App. 2020).

LG&E is a provider of gas service for the citizens of Bullitt County. As a provider of gas service LG&E has great discretion in selecting the route of the pipeline. While Bernheim alleges that there are alternate routes which could have been selected, this court does not find one iota of evidence to support any claim of bad faith or abuse of discretion by LG&E in the selection of its route.

Conservation Easement and Deed Restrictions

The property which is the subject of this action was purchased by Bernheim, in part, by a grant of \$706,500.00 secured from the Kentucky Heritage Land Conservation Fund Board (KHLCF) pursuant to KRS 146.550 through KRS 146.570. The funding balance of the funding for purchase of the property was a grant provided by the Imperial Bat Conservation Fund (IBCF). In exchange for the grant from KHLCF a Deed of Conservation Easement was entered between Bernheim and the Commonwealth of Kentucky, by and through the Finance and Administration Cabinet, for the use and benefit of KHLCF (a copy of which was introduced as Defendants’ “Exhibit 4”).

Defendant USFWS was listed as a party to this action because the deeds to Bernheim contain a statement that the property may not be encumbered or disposed of without the prior written approval of the USFWS. However, USFWS has removed

the claims against it to federal court and those claims are currently being held in abeyance pending resolution of this proceeding. In the removal action, the Federal Court held on March 18, 2021, that “whatever purported interest USFWS may have in the property, as the product of a deed restriction contained in an instrument to which USFWS is not a signatory, it would not be superior to LG&E’s exercise of the power of eminent domain if the proposed taking is found to be valid.”

KHCLF and Bernheim argue that LG&E is prohibited from taking the property as it is not private property. KHCLF and Bernheim filed a motion to dismiss early in this action claiming that the conservation easement was held by KHCLF, a state agency and that the funds contributed by KHCLF to the purchase were state funds. KRS 382.850 provides that:

A conservation easement shall not operate to limit, preclude, delete or require waivers for the conduct of coal mining operations, including the transportation of coal, upon any part or all of adjacent or surrounding properties; and shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable as if the conservation easement did not exist.

Ky. Rev. Stat. Ann. § 382.850 (West).

This court ruled that KRS 382.850 clearly authorizes a right of eminent domain to prevail over a conservation easement. The Kentucky Court of Appeals affirmed this Court’s ruling on said matter, and the Kentucky Supreme court denied discretionary review. For all the reasons stated in this Court’s ruling and the ruling of the Kentucky Court of Appeals, the right of LG&E to proceed with eminent

domain again prevails. This Court's ruling denying the motion to dismiss on June 12, 202 and the ruling of the Kentucky Court of Appeals are incorporated by reference.

The Defendants now argue that the conservation easement makes the property which is the subject of this action "public property" that cannot be condemned. However, the Kentucky Court of Appeals considered and rejected that argument in its ruling:

We thus conclude that the plain language of KRS 382.850(2) authorizes a statutory right of eminent domain to prevail over a conservation easement because a conservation easement is assumed not to exist upon the exercise of a statutory right of eminent domain. If it is assumed that the Board's conservation easement does not exist, then there is no prior public use to impede the exercise of LG&E's right of eminent domain.

Kentucky Heritage Land Conservation Fund Bd. v. Louisville Gas & Elec. Co., 648 S.W.3d 76, 89 (Ky. Ct. App. 2022).

Since the conservation easement is assumed not to exist, Defendants' argument that the property which is the subject of this action is public must fail.

Interlocutory Judgment

Based upon all the foregoing, the Court concludes that LG&E has the right to condemn the Defendants' property for the easements described in the Petitions, and, as such, enters the Interlocutory Judgment pursuant to KRS 416.610(4):

The Court further finds that under the provisions of KRS 416.550 to 416.670 and other applicable law that Plaintiff has the right to condemn the rights and

easements, and the use and occupation thereof, described in the Petitions in these consolidated cases.

This Court finds that the Report of Commissioners conforms to the law, and particularly with the provisions of KRS 416.580, notwithstanding the parties' rights to take exceptions thereto.

The Plaintiff is authorized to take possession of the easements and the use and occupation thereof herein sought for the purposes and under the conditions and limitations set forth in the Petition herein upon payment to the Clerk of this Court or to the Defendants of the amount of compensation awarded by the commissioners.

In the event no exceptions are taken from this Judgment as provided in KRS 416.620(1), the Defendants are hereby ORDERED and DIRECTED to make conveyance to the Plaintiff of the rights and easements herein sought and, in the event said Defendants should fail or refuse to do so, this Court will, upon application of the Plaintiff, appoint the Master or a Special Commissioner to make conveyance of said rights and easements to the Plaintiff; and a final judgment shall be entered.

Given under my hand as Judge of the Bullitt Circuit Court this 31st day of March 2023.



RODNEY BURRESS, JUDGE
BULLITT CIRCUIT COURT
DIVISION ONE

