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CINDY A. HOFNER

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

Kinder Morgan Utopia, LLC,
Plaintiff,

Case No. 2016CV0220

vs.

JUDGMENT ENTRY

PDB Farms of Wood County, LLC, et al.,
Defendants.

Judge Robert C. Pollex

This matter was before the Court for a necessity hearing as to the Utopia Pipeline on August 11, 2016. This matter was also before the Court on Defendants' Motion for Partial Judgment on the Pleadings and Partial Summary Judgment filed on July 15, 2016. With regard to the Motion for Summary Judgment, the Court currently has before it the following evidence:

1. "Declaration of Necessity," enacted as a corporate resolution by Plaintiff, Kinder Morgan Utopia, LLC ("Kinder Morgan");
2. Defendants' Verified Answers, specifically denying Kinder Morgan's right to make the appropriation and the necessity for the appropriation;
3. Kinder Morgan's Discovery Responses;
4. Kinder Morgan's press release indicating that the Utopia Pipeline is being constructed for the benefit of, alongside Kinder Morgan, a private Nova Chemicals facility in Canada;

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5. "Frequently Asked Questions," indicating that the Utopia Pipeline is being constructed for the benefit of, alongside Kinder Morgan, a private Nova Chemicals facility in Canada;
6. Kinder Morgan's July 26, 2016 Affidavit of Allan Campbell and attached FERC documentation;
7. Affidavits of numerous property owners neighboring Defendants who have been sued in this case, indicating that they may have considered an offer from Kinder Morgan to run the Utopia Pipeline across their land, but were never contacted by Kinder Morgan, submitted for the purpose of demonstrating that Kinder Morgan did not consider certain alternative routes; and
8. Internet news articles indicating that Kinder Morgan has moved the Utopia Pipeline in response to landowner objections, submitted for the purpose of demonstrating that the Utopia Pipeline can be moved and neither its proposed route across Defendants' properties nor the use of eminent domain to effectuate that route is necessary.

The Court must determine whether the appropriation of Defendants' property for the Utopia Pipeline is necessary and for a public use.

Conclusions of law

The initiation of this proceeding began with Kinder Morgan's "Declaration of Necessity," a corporate resolution adopted by Kinder Morgan. In essence, the Utopia Pipeline will serve the purpose of transporting petroleum products of a nature not used for energy such as gasoline or natural gas, but rather used to make plastic products. The petroleum products are to pass through this pipeline, connecting with an existing pipeline at the Michigan-Ohio border, which travels up to Canada near the city of Windsor, to a private business engaged in the manufacturing of plastic

products. On its face, this appears not to be a public use as argued by the Defendants, but the difficulty arises in the statutory authority upon which Kinder Morgan relies. Accordingly, it would be best to first analyze the nature and principles of eminent domain.

The principles of law related to eminent domain are very clearly set out in the Ohio Supreme Court case of *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115. *Norwood* deals with the action of the City of Norwood, Ohio in declaring certain property blighted or deteriorated for the purposes of redevelopment and suggested that the taking was proper even though the City transferred the appropriated property to a private party. The court cited the Ohio and U.S. Constitutions in particular reference to the case of *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), which resulted in the Ohio General Assembly in enacting 2005 Am.Sub.S.B.167 in response. The Court in *Norwood* found that the void-for-vagueness doctrine applies to statutes permitting the use of eminent domain powers to take private property and that courts shall apply heightened scrutiny when reviewing those statutes. The court went on to find a provision of R.C. 163.19 unconstitutional and severed that provision so that the remainder of the statute could remain in effect. In this case, Kinder Morgan argues that the deteriorating neighborhood use situation does not apply to the facts in this case and that therefore the holding of the Ohio Supreme Court does not apply.

I. Individual Property Rights

Rights relating to private property include the right to acquire, use, enjoy, and dispose of property and is a fundamental right declared in the U.S. Constitution in the Fifth and Fourteenth Amendments and in the Ohio Constitution. Ohio expressly incorporated individual property rights into its Constitution in terms that reinforced the sacrosanct nature of individual property rights—Section 1, Article I and Section 19, Article I and Section 5, Article III. Ownership and use of

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private property is a fundamental right existing even prior to the creation of our nation under its current Constitution. The fundamental principles in the Bill of Rights in our Constitution declares the inviolability of private property, and Ohio has always considered the right of property to be a fundamental right. *See Reece v. Kyle*, 49 Ohio St. 475, 31 N.E. 747 (1892). “It is axiomatic that the federal and Ohio constitutions forbid the state to take private property for the sole benefit of a private individual [or business], even when just compensation for the taking is provided.” *Norwood, supra* at 365, citing *O’Neil v. Summit Cty. Bd. Of Commrs.*, 3 Ohio St.2d 53, 57, 209 N.E.2d 393 (1965). In this case, the taking is not being initiated by a governmental body, be it a state or municipality. However, the Ohio statutes set forth herein appear to authorize the taking. It has been held that the plaintiff or the “taker” can be a private entity as in the case of *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896). However, in that case, the private taking was for a public use, that is, to build reservoirs and ditches to supply land owners (the public) with water.

In determining whether a public use exists in this case, it is enlightening to examine the *Norwood* case further. “Generally a public purpose has for its objectives the promotion of public health, safety, morals, general welfare, security, prosperity, and contentment of all * * *.” *Norwood* at 369, quoting *State ex rel. Gordon v. Rhodes*, 156 Ohio St.81, 91-92, 100 N.E.2d 225 (1951). The concept of public use under eminent domain law has been expanded to include municipalities and private developers for proposed public facilities and even retail outlets and malls. As the *Norwood* case pointed out, in determining whether the use is public, it must have the objective of promoting the public health and welfare. Significantly though, the court drew a line that found “economic development” alone is not sufficient to satisfy public use requirements. The process of having a necessity hearing, as was done in this case, is to examine this exact issue. This Court

cannot ignore the precedent set in the *Norwood* case by the Ohio Supreme Court even though Kinder Morgan would like the Court to find that it does not apply here. Clearly it is not exactly the same factual circumstance. However, in this case Kinder Morgan is taking the private property (by easement across the farmland of multiple farmers) for the purpose of transporting by pipeline petroleum products for the use of one private manufacturer. The manufacturer is not even a United States business, but rather a Canadian business. Its products may eventually end up in the United States or even in Ohio, but there is no anticipated circumstance that would show a benefit to the citizens of Ohio or even for that matter, the United States. Like in the *Norwood* case, the fact that there is an economic motive does not make this a public use.

During the course of the necessity hearing, Kinder Morgan's own expert admitted that the use did not contain or include energy distribution such as natural gas, electricity, etc. The statute that Kinder Morgan is relying upon is primarily for the purpose of serving energy needs of the Ohio public. The conveyance of the pipeline is for the purpose of manufacturing to occur in Canada, not the United States. The hearing also established that Kinder Morgan had only one committed shipper that is paying the cost of the construction of the pipeline, and the user, Nova Chemicals, will solely utilize the pipeline. Kinder Morgan alleges that the pipeline would be available to "walk-up shippers" who are third parties who could use the capacity of the Utopia Pipeline in the future. However, Kinder Morgan admits that there are no such users at this time and therefore the Court is forced to conclude that any such users would likewise be a limited number of commercial enterprises engaged only for the economic benefit and use of those manufacturers. Thus, it is clear that the Utopia Pipeline does not benefit the public in any way and therefore the property rights of the owners should not be burdened with the encumbrance.

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Kinder Morgan contends that R.C. 163.04 and 163.041 authorize it to petition the court to appropriate the Defendants' property in this case. The Ohio appropriation statutes are contained in R.C. Chapter 1723 and specify that appropriations, such as in this case, must be accomplished pursuant to R.C. Chapter 163. In this case as previously noted, the appropriation is not under the jurisdiction of any governmental entity such as the Ohio Department of Transportation, Board of County Commissioners, a municipality, or the state. R.C. 1723.08 specifically states that a company organized to transport petroleum through pipelines is a common carrier, and Ohio courts have consistently held that a common carrier is one who holds itself out to the public as engaged in the business of transporting persons or property for compensation. Typically such public transportation involves things such a railroads, highways, trucking companies, and other businesses engaged in transporting people or property. Kinder Morgan cannot claim to be a common carrier as a matter of fact. Kinder Morgan is not offering its services to the public or even to an unlimited number of commercial enterprises. Its sole purpose is to convey a petroleum derivative to a company in Canada who is willing to pay the costs. This is not a common carrier in any sense of the word. Kinder Morgan has failed to establish any activities that establish it as a common carrier.

It is astonishing to this Court that Kinder Morgan is able to make its own determination to proceed and not be required to obtain any permit or permission from a governmental entity. For certain types of appropriations, R.C. 163.09(B)(1) establishes an irrebuttable presumption of necessity for the appropriation upon a showing of approval by a state or federal regulatory authority. Such is not the case here. This Court is the first and last opportunity for these Defendants to exercise their property rights. The cases cited by Kinder Morgan require a showing that the proposed product is "reasonably convenient or useful to the public." This Court is not questioning

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the right of the Ohio legislature to confer the right of eminent domain to public utilities, municipalities, and common carriers. However, this Court is finding that the proposed use and purpose of the pipeline in this case is not to the benefit of the public and clearly is not necessary. Kinder Morgan admits in their brief that Ohio law extends common carrier status to companies, but only so long as they operate in the public interest generally. R.C. 163.08 specifically recognizes that private entities have eminent domain authority under Ohio law, but only if the use benefits the public interest generally.

Only the Judge can determine the necessity of the appropriation. In *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, 478 S.W.3d 386 (Ky.App.2015), the court held the Bluegrass Pipeline Company did not have the power of eminent domain. The court found that the state's power to grant eminent domain to pipeline companies should be regulated and that the pipeline at issue could not be said to be in the public service of the state. This Court finds that this pipeline to be constructed by Kinder Morgan likewise does not serve the public of the State of Ohio or any public in the United States. This is not to say the Court is ruling that the pipeline company has to be organized or incorporated under Ohio law or even that it has to be regulated by an Ohio governmental agency, if the legislature provides otherwise. Accordingly, this Court finds that Kinder Morgan is not a common carrier as referred to in the Ohio statutes as it provides no public benefit. The Court also finds that this project and appropriation is not necessary nor a public use. To the extent that the Ohio statutes authorize a common carrier of Kinder Morgan's type, that legislation is an unconstitutional infringement upon the property rights of the Defendants. Accordingly, this Court finds that the Petition should be dismissed.

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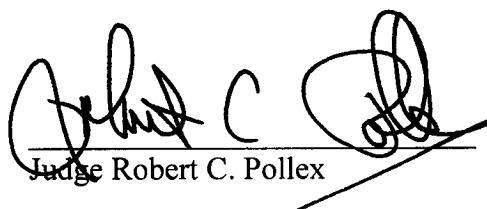
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JUDGMENT ENTRY

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff has failed to establish the necessity of the appropriation and therefore the Petition is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that to the extent the Ohio appropriation statutes permit the appropriation as alleged by Kinder Morgan, then and only to that extent as it applies to this case, said statutes are unconstitutional and an infringement upon the property owners' constitutional rights.

**Judgment for court costs
rendered to Wood County**



Judge Robert C. Pollex

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