

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION 8th
CIVIL ACTION NO. 09-CJ-3830

SOUTH LIMESTONE BUSINESS OWNERS
ASSOCIATION, SOUNDBAR, ET AL.,

PLAINTIFFS

v.

MEMORANDUM IN SUPPORT OF
MOTION FOR RESTRAINING ORDER
AND/OR
TEMPORARY INJUNCTION

JIM NEWBERRY, MAYOR, LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT;
LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT COUNCIL; JIM NEWBERRY, MAYOR
MEMBERS: JIM GRAY, VICE MAYOR,
All in their capacity as members of the
Lexington-Fayette Urban County Government Council;
and ATS CONSTRUCTION

DEFENDANTS

* * * * *

Come the Plaintiffs, SOUTH LIMESTONE BUSINESS OWNER ASSOCIATION, SOUNDBAR, JJ2007, LLC, BETH HANNA, FAILTE IRISH IMPORTS, BOBBY ENTERPRISES, INC., JG4819, INC., MASHNI TAILOR SHOP, NORMAN MASHNI, and BOMBAY BRAZIER ("Business Owners"), by and through counsel, and tender this MEMORANDUM in support of their motion for a restraining order, and/or temporary injunction against the Defendants, Lexington-Fayette Urban County Government Mayor and Council (hereinafter "LFUCG Mayor" and "LFUCG Council") and AST Construction ("AST") and those acting in concert with them pursuant to Kentucky Rules of Civil Procedure 65.03 and 65.04.

STATEMENT OF FACTS

On August 26, 2008, the LFUCG approved the Downtown Streetscape Master Plan ("Plan") for Lexington, Kentucky. The Plan does not state that South Limestone will need to be completely closed for any period of time.

On information and belief, on May 12, 2009, Mike Webb, LFUCG Commissioner of Public Works and Development, wrote to "Property Owners" to advise that the LFUCG was "in the process of completing a Streetscape design for the South Limestone Corridor from Euclid to Vine Street." This letter invited persons to attend an "Open House" on Monday, May 18 [six days notice] to meet with the utility companies and the consultant and the LFUCG "regarding your property and the relocation of the utility lines." There was no mention that South Limestone was going to be closed. See Exhibit 1.

On information and belief, on May 22, 2009, Mike Webb, Commissioner, again wrote to "Property/Business Owner" to invite persons to another opportunity for dialogue on June 3, 2009, in "order for the utility companies to have a complete understanding of the current utility needs at each property. . ." There was no mention in this letter that South Limestone was going to be closed. See Exhibit 2.

David Jones owns Small Plates, LLC, and in that capacity he leased and took possession of the building he owns at 208 South Limestone (through JJ2007, LLC) for the purposes of opening the business, Soundbar, on February 16, 2009. In March 2009, David Jones received a building permit and began demolition and construction work on 208 South Limestone. On May 6, 2009, he received final certificate of occupancy. On May 8, 2009, he opened for business after receiving a liquor license from State Government.

During the week of May 25, 2009, David Jones received a letter from Commissioner

Mike Webb, dated 5-22-09 from the LFUCG (Exhibit 2) (hand delivered to 208 S. Limestone) inviting David Jones to a meeting to discuss utility needs on June 3, 2009, but was going to miss this meeting because David Jones believed he had nothing to suggest to the utility companies, based upon the wording of the letter. However, on June 2, 2009, David Jones heard a rumor that LFUCG planned to close the street from Euclid (Avenue of Champions) down to High or Vine for one (1) year.

On June 3, 2009, David Jones attending the meeting based upon the June 2, 2009 rumor and learned the rumor was true. Present at the meeting were Mike Webb, Commissioner of Public Works and Development, and several utility and engineer representatives. For the remainder of the month of June, David Jones spent time in communication with LFUCG Council members who expressed sympathy but did little concretely to help. On June 16, 2009, David Jones attended the LFUCG Council work session and spoke to LFUCG Council in opposition to any plan that would close South Limestone for such an extended period of time. On July 10, 2009, David Jones attended another meeting at the LFUCG Council building, and was advised that LFUCG would be starting work July 22, 2009, but would start at Euclid/Avenue of Champions intersection with South Limestone and only close the section to Maxwell Street, and the South Limestone from Maxwell to Vine would be remain open.

However, on July 21, 2009, David Jones learned from reading the newspaper article in *The Lexington Herald* that the plans had changed and that LFUCG and the Defendant ATS Construction were shutting down South Limestone from Euclid/Avenue of Champions to Vine Street on July 22, 2009. On July 21, 2009, David Jones attended another meeting with LFUCG Mayor Jim Newberry and other LFUCG representatives, with the gist of the meeting appearing to be that neither LFUCG nor ATS Construction really knows a lot yet about what they are

getting into and will not until they dig up the street and determine what they are going to do.

David Jones paid \$500,000 for the building in June 2009 and invested approximately \$140,000 in renovations. He has invested \$81,000 in inventory, equipment, furnishings, other materials, and construction. The business has been doing very well and has averaged over \$1,500 per day revenues since opening. The loss of access from the closure of South Limestone and the loss of parking caused by the street closing will probably destroy this business at this location, and reduce the value this property.

Therefore, as immediate and irreparable injury is likely to occur, a restraining order and/or temporary injunction is warranted.

ARGUMENT

I. THE BUSINESS OWNERS ARE ENTITLED TO A RESTRAINING ORDER AND/OR TEMPORARY INJUNCTION.

The standard for issuance of injunctive relief is stated in Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978). Under Maupin, a party seeking injunctive relief must prove:

1. The probability of immediate and irreparable injury;
2. The equities favor injunctive relief; and
3. There is a substantial question as to the merits.

Maupin, 575 S.W.2d at 699.

“If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded.” *Id.* As demonstrated below, the Business Owners meet all three of the Maupin requirements and, accordingly, the court should enter a restraining order prohibiting the Defendants and those working in concert with them from the closing of South Limestone Street during the pendency of this action.

A. The Business Owners will be irreparably harmed without the issuance of a restraining order.

An “irreparable injury” is an injury for which no adequate remedy exists at law. Wallace v. Jackson, 229 Ky. 25, 3 S.W.2d 766, 767 (1928). Even where an action for damages is available, however, an injury is irreparable where “for reasons beyond his control, the complainant cannot avail himself of it. . . .” Friedburg, Inc. v. McClay, 173 Ky. 579, 191 S.W. 300, 302 (1917). Consequently, “an injury is regarded as irreparable if ‘there exists no certain pecuniary standard for the measurement of damages.’” United Carbon Co. v. Ramsey, 350 S.W.2d 454, 456 (Ky. 1961).

Closing of South Limestone Street clearly constitutes irreparable injury to the Business Owners. There is compelling evidence that the Defendants LFUCG Mayor and LFUCG Council and ATS Construction are rushing into a very disruptive construction project without proper investigation of the magnitude of the project, without participation of impacted property owners, without segmenting the project so as to minimize the period of disruption for the impacted property owners, and without affording David Jones and the other Plaintiffs due process and reasonable notice and without affording David Jones and the other Plaintiffs with protection against arbitrary action by the government, all of which are irreparable injuries, warranting injunctive relief from the Court.

B. The equities favor issuance of a restraining order.

Against the immediate and irreparable harm that the Business Owners stand to suffer from the closing of South Limestone without due process of law during the pendency of this action, the Court must weigh the absence of any commensurate harm to the Defendants’ legitimate interests. Maupin, 575 S.W.2d at 699. “The court should consider such things as

possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo.” Id.

This “balance of harm” weighs in favor of issuing the requested restraining order, which does no more than prevent the LFUCG Mayor and LFUCG Council to take the Business Owners’ property without adequate notice and due process of law. In the very least, the Defendants must first provide adequate notice and hearing concerning the scope of the public need and public use and follow the appropriate proceedings. The LFUCG Mayor and LFUCG Council should not be allowed to cause such financial hardship by the taking of property by contracting with a construction company to close a vital road without input from the Business Owners affected by that closing. Furthermore, Courts will disregard any alleged hardship claimed by a defendant such as the LFUCG Mayor and Council, whose actions “were done with full knowledge of the plaintiff’s rights and with an understanding of the consequences which might ensue. . . .” Wilson Concrete Co. v. County of Sarpy, 202 N.W.2d 597, 599 (Neb. 1972). *Accord:* ABC Trans-National Transport, Inc. v. Aeronautics Forwarders, Inc., 379 N.E.2d 1228, 1239 (Ill. App. 1978); Kentucky Electric Development Company’s Receiver v. Wells, 256 Ky. 203, 75 S.W.2d 1008, 1095 (1934). The LFUCG Mayor and LFUCG Council knew that the complete closing of South Limestone for one year would cause immediate and irreparable harm to the Business Owners and failed to even inform the Business Owners that the closing would take place until it was too late for the Business Owners to seek some protection or accommodation. Providing for a plan that would allow adequate access to the businesses on South Limestone while still carrying on with the construction project creates no hardship for the LFUCG Mayor and LFUCG Council.

If this court rules in favor of the Plaintiffs on the merits, the only detriment to the

Defendants will be one of delay. This is a small price to pay in lieu of destroying Plaintiffs' right to enjoy their property without unconstitutional interference. Therefore, the legitimate interests of the Plaintiffs for injunctive relief far outweigh any detrimental effect on the interests of the Defendants.

C. There is a substantial question on the merits.

The third requirement of Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978) is that there be a substantial question on the merits. There is clearly a substantial question about whether adequate notice and opportunity to be heard was provided to the Business Owners, especially when the LFUCG Mayor and LFUCG Council and its representatives have had multiple opportunities to inform the Business Owners, by mail and in person, but have failed to do so.

Furthermore, there is a substantial question as to whether this government action constitutes a taking and, if so, whether it is even necessary for the LFUCG to completely close South Limestone Street and deny reasonable and adequate access to the businesses located on that street.

The Business Owners have a right to possess their property without unconstitutional interference. City of Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979). The Fifth Amendment to the United States Constitution provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This was applied to the states by the Fourteenth Amendment which provides:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

The Kentucky Constitution has a similar provision in its § 13:

[No] man's property [shall] be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

Section 242 provides additional protection:

Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction.

Condemnation cases are the familiar example of the state taking property and paying for it. However, like in this case, the government cannot take more than it needs. God's Center Foundation, Inc. v. Lexington Fayette Urban County Government, 125 S.W.3d 295, 300 (Ky. App. 2002). Profitt v. Louisville & Jefferson County, 850 S.W.2d 852 (Ky. 1993), when there is a taking, the property desired must be for a public use, and must be reasonably necessary for the use:

It has long been held that 'in every case in which the power of eminent domain is invoked, it must appear that the property is desired for a public use and will be reasonably necessary for the use,' Riley v. Louisville, H. & St. L. Ry Co., 142 Ky. 67, 133 S.W. 971, 973 (1911). Nor can the taking be done arbitrarily. See Ky. Const. § 2.

See also City of Bowling Green v. Cooksey, 858 S.W.2d 190 (Ky. App. 1993), where Bowling Green sought to condemn a portion of Cooksey's farm for airport expansion. Cooksey disputed that the City had the right to condemn his land where he offered the City an easement that would consent to airport over-flights. The Cooksey court cited the "emphatic" opinion of Kentucky's highest court in McGee v. City of Williamstown, Ky., 308 S.W.2d 795, 796 (1957):

It is a general principle of law that the Legislature cannot authorize the taking of property by eminent domain *in excess* of the particular public *need* involved. (Emphasis added.) *McGee* further states emphatically that "ordinarily the need for the taking of land for a public purpose. . . is a question of law for the court. . ."

The Cooksey court affirmed the Circuit Court finding that Cooksey had met his burden, where “There is no proof that the land in question is needed within the reasonably foreseeable future. . .”

The LFUCG Mayor and LFUCG Council do not need to close South Limestone Street in its entirety for one year and effectively take a portion of the Business Owners’ property for that one year without due process of law. There are other options that may be agreeable to the Business Owners such segmenting the project or closing only one lane, and allowing access to at least part of the street for at least part of the duration of the construction. The Defendants have verbally represented that one lane would remain open, but after the first day, July 22, 2009, that has proven untrue.

The LFUCG has caused the temporary taking of multiple interests in the Business Owners’ private property without due process and in violation of their constitutional rights. There exist substantial questions on the merits of this action.

II. THE REQUIREMENT FOR AN INJUNCTION BOND SHOULD BE WAIVED WHERE THE DEFENDANT IS THE GOVERNMENT OR THE BOND SHOULD BE FIXED AT A NOMINAL SUM.

A waiver of the injunction bond provided for under Kentucky Rule of Civil Procedure 65.05 should be granted in this case since Business Owners seek to advance the public interest by the challenging the arbitrary and unconstitutional action of the LFUCG Mayor and LFUCG Council and to prevent the LFUCG from treating its citizens in such a way again

CR 65.05 provides in relevant part that:

(1) No . . . temporary injunction shall be granted except upon the giving of a bond by the applicant, with surety, *in such sum as the court deems proper*, for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined.

CR 65.05(1) (Emphasis added).

There is no Kentucky state case that addresses whether the requirement for an injunction bond may be waived where the movant seeks an injunction in order to advance the public interest. In the absence of Kentucky case law, it is appropriate for this Court to look to the federal rules, especially in cases where the corresponding rule is closely related. See United Automobile, Aerospace & Agric. Implement Workers of Am. v. Intl. Harvester Co., 597 S.W.2d 157. In this case, CR 65.05(1) tracks the language of Federal Rule of Civil Procedure 65(c), providing in substantively identical terms that:

No . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

FRCP 65(c).

Both the Federal and corresponding Kentucky rule grant the Court significant discretion in setting the amount of the bond, providing only that the bond amount shall be in the amount that “the court deems proper.” The Sixth Circuit Court of Appeals and other federal courts have interpreted this language to empower the court to require either a nominal bond or to waive the bond requirement entirely where the movant seeks to vindicate a public interest.

As the Court explained in Urbain v. Knapp Brothers. Mfg. Co., 217 F.2d 810, (6th Cir. 1954):

The rule leaves it to the District Judge to order the giving of security in such sum as the court considers proper. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge.

Id. at 815-6.

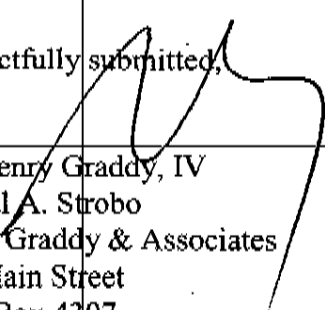
Public interest litigation such as this case, where the movants seek to assure full and fair implementation of their constitutional rights. Enforcement of such a public purpose is precisely the type of case where it would be appropriate for a court to dispense with a bond or to set a

nominal bond. Moltan Co. v. Eagle-Picher, 55 F.3d 1171, 1176 (6th Cir. 1995).

CONCLUSION

Based upon the foregoing, the Court should issue a Restraining Order and /or Temporary Injunction to the LFUCG Mayor, LFUCG Council, and AST to prevent the Defendants LFUCG from closing South Limestone Street in Lexington, Kentucky without proper investigation of the magnitude of the project, without participation of impacted property owners, without segmenting the project so as to minimize the period of disruption for the impacted property owners, without affording the Business Owners due process and reasonable notice, without affording the Business Owners with protection against arbitrary action by the government, and without an unneeded and unconstitutional taking, all of which are irreparable injuries, warranting injunctive relief from the Court. A restraining order and/or temporary injunction should be granted while this case is pending before this Court.

Respectfully submitted,



W. Henry Graddy, IV
Randal A. Strobo
W. H. Graddy & Associates
103 Main Street
P. O. Box 4307
Midway KY 40347
(859) 846-4905
Attorneys for Plaintiffs