

No. 11-1358 – West Virginia Department of Transportation, Division of Highways v. Honorable Jeffrey B. Reed, Judge of the Circuit Court of Wood County; Randall Rapp; Lloyd Pannell; and Robin Pannell,

and

No. 11-1360 – West Virginia Department of Transportation, Division of Highways v. Honorable Jeffrey B. Reed, Judge of the Circuit Court of Wood County; and Matthew Jones.

FILED

February 10, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Workman, Justice, dissenting:

This case required the Court to determine whether two consolidated petitions for writs of prohibition filed by the West Virginia Department of Transportation, Division of Highways (hereinafter, the “DOH”) should be granted to prohibit enforcement of orders entered by the circuit court in two condemnation proceedings. The majority opinion concluded that the writs should be granted. It also overruled this Court’s recent opinion in *State ex rel. West Virginia Department of Transportation v. Cookman*, 219 W.Va. 601, 639 S.E.2d 693 (2006). The majority opinion held that “a real property appraisal report generated in compliance with 42 U.S.C. § 4601 *et seq.*, and its accompanying regulations, is not discoverable in a condemnation proceeding by a party who did not own or have any legally cognizable possessory interest in such real property.” For the reasons outlined below, I believe that the majority of this Court was in error in granting the DOH’s writs. Therefore, I dissent.

In this case, the DOH condemned numerous properties as a part of the expansion of the highway exchange at South Mineral Wells in Wood County. During the condemnation proceedings, the respondents sought copies of the appraisals of the neighboring properties in an effort to determine if they were receiving a fair value for their land. The circuit court considered their requests and found that the appraisals to the other properties were relevant to the issue of whether the DOH's expert witness/appraiser was consistent in his approach to valuation and would allow the respondents to discover inconsistencies for purposes of cross-examination and possible impeachment. It is important to note that the DOH used one appraiser to perform all of the appraisals on all of the properties in question.

The circuit court's decision was well-reasoned and sensible given the circumstances of this case. While the circuit court granted the respondent landowners' motions to compel the DOH to produce the appraisals, it simultaneously ordered the DOH to give each and every landowner, whose appraisals would be released, thirty days notice in order for them to file any objections to the release of such information. This was done in an effort to provide further protection to all of the landowners in question. The circuit court also ordered that the appraisals could not be released until after the notification/objection period had elapsed. It is also important to note that after the DOH provided notice to all of the relevant landowners, only one such landowner responded and that landowner stated that he did not object to his appraisal being provided to the respondents.

The majority opinion's rejection of the circuit court's reasonable solution to the underlying situation, as well as its overruling of *Cookman*, is not based in law. While I agree that the DOH is bound by federal law and must comply with all relevant regulations, the majority opinion's acceptance of the DOH's argument amounts to nothing more than tortured logic. Basically, the DOH maintained that nothing in federal law mandated the release of the information and as a result it was "*unlikely*" that the circuit court's ruling was proper. Within that argument is the implicit admission that nothing in the federal or state law *prohibits* or limits in any way the release of such information in a court proceeding such as the one that was before the circuit court.

A review of the applicable laws shows that there is no provision that prevents the circuit court from ordering the production of the appraisals. The majority opinion based its decision on the only case that has addressed the meaning of the word confidentiality under the relevant federal rules. However, the majority's reliance upon *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 63 P.3d 1147 (2003), is misplaced. In that case, the Supreme Court of Nevada prevented a local newspaper from obtaining copies of appraisal documents through a freedom of information act request (FOIA) for real property that was being acquired from various landowners in furtherance of a public works project in the City of Reno. In the instant case, however, the respondents did not seek the information by use of FOIA nor did they seek to disseminate it publicly. Instead, the information was sought

during discovery by landowners who were simply trying to determine what methods the DOH's appraiser used in making a monetary determination of the value of their land. The circumstances in the present case are vastly different than those in *Reno*, and is inapposite both factually and legally.

The majority opinion's decision allows the DOH to do whatever it chooses to do in appraising land in future condemnation proceedings with neither any type of check on its actions nor any means for landowners whose property is being condemned to have any examination of the fairness and consistency or lack thereof by the government's appraisers. It further allows the DOH to do so under the guise of confidentiality even when there are relevant and material reasons for disclosing the appraisals to the respondents. In this case, there were four gas stations that were in close proximity and were affected by the condemnation proceedings. Without reviewing the appraisals of the similarly affected properties, it was impossible for the respondents to determine if their properties were evaluated differently. As Justice Starcher pointed out in his separate opinion in *Cookman*, the government is the 800-pound gorilla in this scenario, and property owners should have the right to full information regarding how the amount of compensation for their property was determined. 219 W.Va. at 608, 639 S.E.2d at 700 (Starcher, J, concurring, in part, dissenting, in part).

Courts routinely deal with sensitive information and assuming these appraisals did contain sensitive information (which is not actually supported by the record), the circuit court could have dealt with that accordingly. Had any property owner objected, the court could have revised its order or taken other measures to protect the confidentiality of the information.¹ Moreover, given the serious barrage of identity theft that is becoming more prevalent with each passing day, courts are more cognizant of protecting an individual's personal identifiers such as social security numbers, dates of birth, financial account numbers, and sometimes home addresses in the context of criminal cases. In all of those cases, the records are sealed to prevent the information from being disclosed publicly. Such actions could have been taken in this case. In fact, either the DOH or any property owner could have sought a protective order surrounding the appraisals, but chose not to do so.

The dangers of abusing government power to take private property should be taken very seriously. And, while the power of eminent domain should only be used to take private property when the taking is absolutely essential for a public purpose, when such a taking is found to be essential, it is imperative that property owners receive adequate and reasonable compensation. This Court previously explained in *Major v. DeFrench*, 169 W.Va. 241, 251, 286 S.E.2d 688, 694-695 (1982):

¹There are often situations wherein litigants may have to use sensitive corporate documents to support their legal positions resulting in pleadings that may contain confidential trade secrets, employment records, or financial information with a court that can be damaging if not protected.

The United States and West Virginia Constitutions guarantee that no person shall be deprived of life, liberty or property without due process of law. W.Va. Const. art. 3 § 10; U.S. Const. amend. XIV. It is fundamental to say that due process guarantees freedom from arbitrary treatment by the state. Thus whenever government action infringes upon a person's interest in life, liberty or property, due process requires the government to act within the bounds of procedures that are designed to insure that the government action is fair and based on reasonable standards. (Citation omitted.).

In this case, it is significant to note that the DOH sought to keep these documents from the respondents *despite the fact that not a single property owner objected to the release of the appraisals*. It begs the question as to why the DOH would go to such lengths to “protect” information that no one wanted protected? With the aforementioned in mind, it is clear that the circuit court did not abuse its discretion in ordering that the appraisals be provided to the respondents. The circuit court's order resulted in a fair and just outcome which provided the necessary safeguards for all property owners involved. It also did so in a manner that did not conflict in any way with applicable federal or state laws.

Therefore, for the reasons stated above, I respectfully dissent. I am authorized to state that Justice Benjamin joins me in this dissenting opinion.