

IN THE DISTRICT COURT OF OTTAWA COUNTY, FILED
STATE OF OKLAHOMA DISTRICT COURT
OTTAWA CO. OKLA.

NOV 13 2009

<p>Johnny and Patty Lafalier and Missy Beets, individually and on behalf of residents and property owners and former residents and property owners of Picher, Oklahoma,</p> <p>v.</p> <p>The Lead-Impacted Communities Relocation Assistance Trust.</p>	<p>CATHY WILLIAMS COURT CLERK BY _____</p> <p>Case No. CV-2009-167</p>
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Order Sustaining Motion for Summary Judgment of Defendant Lead-Impacted Communities Relocation Assistance Trust

Comes now the Court upon the Motion for Summary Judgment filed herein by the Defendant Lead-Impacted Communities Relocation Assistance Trust (LICRAT) and the response thereto filed by the Plaintiff and upon consideration of the respective motions and briefs does find and order as follows:

Statement of Uncontroverted Material Facts

1. The Plaintiffs are past and present owners of property located in the City of Picher, State of Oklahoma.
2. Defendant LICRAT is a Public Trust created for the purpose of assisting the relocation of property owners at risk of damage caused by lead exposure and/or who resided in an area where subsidence posed an eminent risk to the public.
3. J.D. Strong is the State of Oklahoma's Secretary of Environment pursuant to Executive Order 2007-07 J.D. Strong is the Cabinet Secretary responsible for the Lead-Impacted Communities Relocation Assistance Trust (LICRAT).

4. Larry Roberts is LICRAT's Operations Manager.
5. The Lead-Impacted Communities Relocated Assistance Act, 27A O.S. § 2201 et seq., gives LICRAT responsibility to establish appropriate procedures for eligible residents to apply for relocation assistance.
6. The Plaintiffs have participated, or are participating, in the relocation assistance program being administered by LICRAT.
7. Plaintiffs Johnny LaFalier and Patty LaFalier signed a contract authorizing LICRAT to purchase their property and are in the process of receiving relocation assistance. Plaintiff Missy Beets has transferred her ownership to real property to LICRAT and has received relocation assistance.
8. On May 10, 2008, a tornado and severe storm struck Picher, Oklahoma.
9. As a result of damage to their property caused by the May 10, 2008 storm, Plaintiffs Johnny LaFalier and Patty LaFalier collected money from private insurance carriers and/or the Federal Emergency Management Authority.
10. On June 2, 2008, the Lead-Impacted Communities Relocation Assistance Act was amended to provide,

Any person eligible to receive assistance under the provisions of the Lead-Impacted Communities Relocation Assistance Act prior to May 10, 2008, shall remain eligible to receive the same amount of assistance adjusted for the amount of any private insurance payments for storm related damage if applicable. Any property valuation or other type of relocation assistance assessment made for the purposes of the Lead-Impacted Communities Relocation Assistance Act shall be based on the value of property as it existed no earlier than January 31, 2006, and not later than May 10, 2008, and comparable to property elsewhere in the county. The trust shall be authorized to enact or amend any of its procedures or deadlines as necessary to implement the provisions of this subsection.

27A O.S. Supp. 2008 § 2203(M).

11. The Lead-Impacted Communities Relocation Assistance Act also

provides,

A. Neither the enactment of this act nor the grant of funds to a trust shall create any property right or right in action. The courts shall have no jurisdiction to entertain any action against a recipient trust, the State of Oklahoma, their officers or agents founded on a claim that the claimant should have received different or better treatment from the trust.

B. The determinations made by the trust pursuant to this relocation assistance program including, without limitation, determinations as to what constitutes the most affected area of the sit, the area of greatest subsidence risk, the average rental cost of comparable housing, the average cost of comparable properties, the eligibility of any person for assistance, and the determination of the proper amount of such assistance, if any, shall be committed to the sole discretion of the trust based on the information available to it and shall not be subject to judicial review.

27A O.S. Supp 2006 § 2205

12. Defendant LICRAT retained Cinnabar Service Company to appraise affected properties, including the Plaintiffs', and retained Van Tuyl and Associates to review the appraisals.
13. During its public meetings, Defendant LICRAT went into executive session to review appraisals prepared and reviewed by Cinnabar Service Company, and Vay Tuyl and Associates.
14. These LICRAT executive sessions were attended by representatives of Cinnabar Service Company, representatives of Van Tuyl and Associates, J.D. Strong and Larry Roberts.
15. Cinnabar Service Company, Van Tuyl and Associates, and their representatives are paid for their work in accordance with their contract with LICRAT. They are paid a set amount, said sum to be paid in accordance with a fee schedule (Attachment #4) and required completion dates (Attachment #5). The contract is subject to modifications.
16. The enabling legislation for LICRAT at § 2203(N) provides as follows:

N. The trust shall establish priorities among those seeking assistance, making certain that those at the greatest risk for loss of life and property receive the highest priority. All assistance programs shall be contingent upon the availability of funds.

Does the Court have Jurisdiction to Consider the Claims of Plaintiff? Are Said Claims Immune from Suit?

Plaintiffs' first cause of action in summary asserts the following:

- The Trust relies on improperly considered and utilized appraisals.
- The Trust by utilizing said appraisals has undervalued Plaintiffs' property. They further allege there under valuations are adopted during meetings which violate the State's Open Meeting Act.

Plaintiff's second cause of action in summary asserts the following:

- 27A O.S. § 2203(M) improperly and in violation of the constitution allows the legislature to offset determined values by the use of insurance proceeds paid for unrelated damages to the property. They argue this is unequal protection.

Defendant asserts that 27A O.S. § 2205 prevents the second cause of action, Plaintiff counters it (§ 2205) is unconstitutional.

§ 2205 provides as follows:

- A. Neither the enactment of this act ¹ nor the grant of funds to a trust shall create any property right or right in action. The courts shall have no jurisdiction to entertain any action against a recipient trust, the State of Oklahoma, their officers or agents founded on a claim that the claimant should have received different or better treatment from the trust.
- B. The determinations made by the trust pursuant to this relocation assistance program including, without limitation, determinations as to what constitutes the most affected area of the site, the area of greatest subsidence risk, the average rental

cost of comparable housing, the average cost of comparable properties, the eligibility of any person for assistance, and the determination of the proper amount of such assistance, if any, shall be committed to the sole discretion of the trust based on the information available to it and shall not be subject to judicial review.

While Plaintiffs focus their attention on the language regarding the jurisdiction of the courts, the reality of this statute is that it seeks to shield the trust from liability for the manner in which it processes, determines and awards assistance under the Act. In essence it seeks to create immunity from such claims.

While it is true that *Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983) abolished the concept of sovereign immunity, it is also true that *Vanderpool* and subsequent opinions of the Oklahoma Supreme Court have recognized the right of the legislature to enact governmental immunity where the legislature deemed it appropriate. *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987). In *Fuller* the Supreme Court recognized again the right of the legislature to statutorily enact sovereign immunity. While our legislatures for the most part has chosen to exercise both sovereign immunity and the exception thereto in the adoption and amendments to the Political Subdivision Torts Claim Act, 51 O.S. § 151; the Supreme Court has clearly recognized the right of the legislative branch to adopt partial or total immunity by whatever statutory means the legislature deems appropriate. *Gunn v. Consolidated Rural Water & Sewer District No. 1, Jefferson County, Oklahoma*, 839 P.2d 1345 (Okla. 1992).

Thus if one were to deem Plaintiffs' claim as a tort it is the Court's belief that the legislature has the right to assert governmental immunity, and has chosen to do so outside of the Tort Claims Act by adopting 27A O.S. § 2205.

The Court additionally finds that such action (the enactment of an offset of insurance proceeds) is not prohibited by the Constitution of the State of Oklahoma. An analysis of Article 2 Section Six is deemed unnecessary in as much as the court has determined the claims addressed are immune from suit and/or that § 2203(M) is not prohibited by Oklahoma's Constitution.

The Court accordingly finds that as to the second cause of action, the Defendant's Motion for Summary Judgment is sustained. Additionally, to the extent the Plaintiffs seek relief under cause of action number one for alleged unfair treatment, or abuse of the trust in its processes; determinations and awards, the Court finds the Motion for Summary Judgment additionally sustained.

Has the Trust Violated the Open Meeting Act?

First, Plaintiffs' complain that the presence of J.D. Strong is not allowed under the terms of 25 O.S. § 307(D). Mr. Strong is the current Secretary of the Environment for the State of Oklahoma and by the authority of the Governor has been made responsible as a Cabinet Member of the Governor. (See Executive Order 2007-07). The Court would also note that Mr. Strong's predecessor (Mr. Tolbert) was the original Trustor of the subject Trust.

74 O.S. § 10.3(B) provides as follows with regards to what Cabinet Secretaries shall do:

...The cabinet Secretaries shall:

1. Advise the Governor of any policy changes or problems within the area they represent;
2. Advise the entities represented of any policy changes or problems as directed by the Governor; and
3. Coordinate information gathering for the Legislature as requested.

In short the Cabinet Secretary is the Governor's person in the intergovernmental relationship between the assigned agencies and the Governor himself. They serve as the direct link to the Chief Executive to whom each agency is ultimately responsible.

The O.M.A. provision at issue provides as follows:

- D. An executive session for the purpose of discussing the purchase or appraisal of real property shall be limited to members of the public body, the attorney for the public body, and the immediate staff of the public body. No landowner, real estate salesperson, broker, developer, or any other person who may profit directly or indirectly by a

proposed transaction concerning real property which is under consideration may be present or participate in the executive session.

25 O.S. §307(D)

LICRAT argues that Mr. Strong is not prohibited and Plaintiffs' argue he is not permitted. The Court construes the statute to lie somewhere in between. The statute actually attempts to do both, first it states that access is limited to certain individuals and next it prohibits access to a list of individuals who may profit directly or indirectly from the proposed transaction. It is not argued that Mr. Strong would belong to the latter; thus he is not prohibited. Additionally, the Court finds and determines that in his capacity as a Cabinet Secretary responsible for oversight of the subject Trust that it was in the sound discretion of the subject Trust Authority Members to allow the presence of Mr. Strong. 1976 OK AG 334.

In reaching this conclusion the Court does not ascribe to the theory that the Trust Members could invite anyone they wanted to so long as they were not prohibited. The Court believes the cited Attorney General's opinion offers good advice to any entity seeking to allow someone into an executive session for whatever purpose where it states ... "and the decision as to who should be present is within the sound discretion of the board exercised in a reasonable manner based on the facts and circumstances in each instance." Clearly those explicitly prohibited under § 307(D) would still be prohibited under such an analysis. Beyond that it is the Court's belief that any public body covered by the O.M.A. and wishing to discuss the purchase or appraisal of property should apply such an analysis very carefully. It is the Court's belief that the allowance of Mr. Strong at such an executive session and applying the above analysis would be permitted.

His role and/or participation in such an executive session would also, in the Court's opinion be subject to the sound discretion of the Trustees. The items complained of by Plaintiffs, if true, would fall within such sound discretion of the Trustees. In other words they would have the right to invite and allow his input as outlined by Plaintiffs, so long as they did not abdicate their duties as Trustees provided for in Article VII of the Trust.

Next Plaintiffs complain of the presence of Cinnabar and/or Van Tuyl and Associates. Again they argue they are not part of the immediate staff of the public body and therefore are not allowed. The Trust argues that neither Cinnabar nor Van Tuyl and Associates are prohibited parties. The Court would note the following:

- Cinnabar contracted with the Trust to provide appraisal services to facilitate the purpose of the Trust; and to do so in accordance with uniform standards of professional appraisal practice.
- The services set forth in the personal service contract are on behalf of the Trust and is in furtherance of the Trust's duties and in contemplation of the fact that the Trust itself does not have available to it the resources to perform such services.
- Van Tuyl and Associates were retained to review Cinnabar's work.

Obviously, the appraisal work is vital to the Trust carrying out its objectives, and the Trust has sought to contract for said work. As such the Court would treat them the same as Mr. Strong and would apply the same analysis, and find that it was in the sound discretion of the Trustees to invite Cinnabar and Van Tuyl and Associates to attend the subject executive session(s). The Court further finds that the prohibitive language of 25 O.S. § 307(D) would apply to neither Cinnabar nor Van Tuyl and Associates. There is no showing that either would receive compensation directly or indirectly other than as contracted for; thus the language of § 307(D) would not apply to either.

Accordingly, the Court finds no violations of the Open Meeting Act as asserted by Plaintiffs. In construing 25 O.S. § 307(D) as set forth above, it is the Court's finding that this provision to some extent is ambiguous in that it both limits and prohibits. The Court has thus attempted to construe said ambiguity in such a way that is reasonable and avoids absurd consequences and preserves the overall legislative intent. *Gabbert v. Board of Review for Oklahoma Employment Ser. Comm'n*, 943 P.2d 158 (Okl. Civ. App. 1997). The Court also finds that the restrictive definition of immediate staff argued by Plaintiffs is ultimately for the Trust to decide as a whole not one member or former member. Staff is defined by *Websters* as among other things "c. the personnel carrying out a specific enterprise." *Websters New College Dictionary, 2nd Ed.* Under the circumstances of the inner workings of the Trust as set forth by both the Plaintiff and Defendant the Court would find that Mr. Strong, Cinnabar, and Van Tuyl and Associates acted as staff within the meaning of the above definition and further that such utilization was allowed by Article VII (e) of the Declaration of Trial.

Is the Plaintiff Estopped?

The Trust asserts that Plaintiffs are estopped from attacking the constitutionality of the subject statutory provisions or the alleged violation of the Open Meeting Act, because they have accepted offers

from the Trust. It is the Court's opinion, the Plaintiffs would have standing.

Conclusion

For the reason set forth herein the Court finds for the Defendant on its Motion for Summary Judgment.

Other Pending Discovery Motions

In as much as the Court's ruling is determined to be a Final Order as determined by 12 O.S. § 952 and 953, the Court finds the pending discovery motions moot.

Dated this 13th day of November, 2009.

J. DWAYNE STEIDLEY

J. Dwayne Steidley
District Judge (Sitting by Assignment)

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