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2018 IL App (3d) 160692-U
Nos. 3-16-0693 & 3-16-0694 (Consolidated)

Order filed June 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellee, v. BLACKHAWK BANK AND TRUST; MIDAMERICAN ENGERY COMPANY, as Successor by Merger to Iowa-Illinois Gas and Electric Company; ILLINOIS BELL TELEPHONE COMPANY; and DP JACKSON REALTY HOLDINGS, LLC, Defendants (DP Jackson Realty Holdings, LLC, Defendant-Appellant).	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois. Appeal Nos. 3-16-0692, 3-16-0693, and 3-16-0694 Circuit Nos. 13-ED-1, 13-ED-7, and 13-ED-28 The Honorable Clarence M. Darrow, Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held*: The trial court's highest and best use determination was not against the manifest weight of the evidence. The trial court's monetary award for damage to the remainders and just and reasonable compensation was proper.

¶ 2 The Illinois Department of Transportation filed three eminent domain actions against DP Jackson Realty Holdings, LLC, about three adjoining parcels. The purpose of the eminent domain was for the Department to reconstruct roadways and build a flyover bridge. The trial court determined that (1) the highest and best use for parcels 3613 and 3621 was residential use; (2) the highest and best use for parcel 3617 was commercial assemblage; (3) the just and reasonable compensation for parcel 3613 was $15,184; (4) the just and reasonable compensation for parcel 3617 was $73,643; and (5) the just and reasonable compensation for parcel 3621 was $94,800. DP Jackson appealed, arguing that (1) the trial court's determination that the highest and best use of parcels 3613 and 3621 was residential use was against the manifest weight of the evidence; (2) the trial court's monetary award for damage to the remainders was improper; and (3) the trial court's monetary award for just and reasonable compensation was improper. We affirm the trial court's decision.

¶ 3 FACTS

¶ 4 The Illinois Department of Transportation (Department) filed three eminent domain actions against DP Jackson Realty Holdings, LLC, about three adjoining parcels located at 3613, 3617, and 3621 40th Avenue in Moline, Illinois (collectively, parcels). The parcels are located to the north of 40th Avenue, west of 38th Street, and south of John Deere Road. Commercial developments are located to the north, east, and southeast of the parcels. Single-family homes and a large mobile home park are located to the west and south of the parcels. The purpose of the eminent domain was for the Department to reconstruct roadways and build a flyover bridge over John Deere Road.

¶ 5 The Department sought the entire 18,921 square feet of parcel 3621; 13,137 of 38,628 square feet of parcel 3617; and 2810 of 38,355 square feet of parcel 3613. Previously, DP Jackson purchased parcel 3613 for $40,000; parcel 3617 for $14,000; and parcel 3621 for $27,500. Before the taking, parcels 3613 and 3621 each contained one single-family residence and parcel 3617 was unimproved. The parcels were zoned B-4 for highway/intensive business district zoning; however, the single-family residences were legal, non-conforming uses.

¶ 6 DP Jackson filed a motion to consolidate the three eminent domain actions and the trial court granted the motion, noting that it would, however, evaluate each parcel separately. At trial, Jeffrey Behrens, appraiser, testified for the Department and Scott Broders and Daniel Jackson, appraisers, testified for DP Jackson. Terrell Honnold's appraisal was admitted into evidence on behalf of DP Jackson. Christopher Mathias, a city planner for the City of Moline, testified about the parcels and the city's economic development plans.

¶ 7 Jeffrey Behrens' Testimony

¶ 8 Behrens testified that he had performed appraisals since 2004 and was licensed as an Illinois appraiser in 2008. He appraised about 450 parcels throughout his career and, specifically, conducted 60 to 65 appraisals for the current project. He primarily performed appraisals in regard to leading, eminent domain, tax assessment appeal, and litigation in northeast Illinois. He explained that the highest and best use means "the reasonably probable and legal use of a property that's physically possible, appropriately supported and financially feasible and that results in the highest value to the—to the property." He also stated that the highest and best use of the parcel is not solely based on its zoning classification because the highest and best use determination involves a four-part test. This test includes analyzing whether the properties are legally permissible, physically possible, financially feasible, and maximally productive.

¶ 9 He concluded that the highest and best use of parcel 3621 was a single-family residence. He compared site criteria for commercial lots to parcel 3621 and determined that parcel 3621 did not meet site criteria for frontage, ease of access, and full visibility to the public. However, he averred that parcel 3621 did meet site criteria for close proximity to demographics and retail spending. He opined that it was not physically possible for the parcel to be used for commercial purposes on its own. He also stated that using the parcel for commercial use was not financially feasible because the lack of site criteria lowered the square foot value of the property. Using the sales comparison approach, he examined three comparables that were similarly sized houses with well and septic systems and no basement within the city limits of Moline to determine the market value. The second comparable was behind a Lowe's and movie theater. He concluded that the market value of the entire parcel was $94,800.

¶ 10 He opined that the highest and best use for parcel 3617 was commercial assemblage because it was located in a commercial corridor. However, he stated that the possibility of assemblage was difficult to predict because commercial development had not occurred in the immediate location for six years. He examined three comparables that were similarly sized commercial properties to determine the market value. He opined that the fair market value for portion of the parcel taken was $18,400. He believed that the remainder of parcel 3617 was damaged because of the limited utility of the northeast and southeast corners of the parcel; therefore, he opined that the total for damage to the remainder was $7140. He concluded that the value for a temporary easement was $445. The amount for the parcel, including the portion of the parcel taken, damage to the remainder, and value of a temporary easement, totaled $25,985.

¶ 11 He concluded that the highest and best use for parcel 3613 was a single-family residence, considering the same factors used to determine the highest and best use of parcel 3621. He

believed the fair market value for the portion of the parcel taken was $4430. He examined three comparable single-family residences to determine the market value. He maintained that damage to the remainder was $10,370 because the residence is in close proximity to the right-of-way line and loss of a concrete parking area. He opined that the value of a temporary easement was $382. The amount for the parcel, including the portion of the parcel taken, damage to the remainder, and value of a temporary easement, totaled $15,182.

¶ 12 He testified that there was no traffic generator (a big box store like Wal-Mart that creates traffic for other businesses) to the south or west of the parcels. The nearby movie theater is not considered a traffic generator because the closest property line is over 400 feet from the theater. He stated that site selectors are particular in choosing outlots (a lot that has a big box or other types of traffic generators in the commercial development) and intercept locations (nearby site that benefits from traffic generators) close to a traffic generator because shoppers "are generally not driving too far out of their way to get to where they're going."

¶ 13 Scott Broders' Testimony

¶ 14 Scott Broders testified that he had been a real estate appraiser for 18 years, focusing on commercial property for the past 8 years. He was licensed in Illinois and primarily worked in the Quad Cities. He performed about 750 commercial and 500 or 750 residential appraisals. Broders previously worked for Honnold at American Real Estate and received a redacted copy of Honnold's appraisal.

¶ 15 He opined that the highest and best use for the parcels was to adjoin them as one parcel for commercial use. He based his decision on "the future land use map, the current zoning, the visibility from a major traffic arterial and John Deere Road, as well as shadow anchors that are nearby including Lowes and the cinemas." The intersection northeast of the parcels had the

highest amount of traffic in the Quad Cities. Furthermore, there were commercial developments nearby such as Lowes, the cinemas, Ryan's restaurant, Tires Plus, and a gas station.

¶ 16 To determine the market value, Broders compared the sale of nine properties to the parcels based on size, zoning, traffic, and visibility related to traffic. These properties included Buffalo Wild Wings, Deere Harvester Credit Union, Sonic, Hyundai Auto Dealership, Honda Auto Dealership, Burger King, Great Escape, Wal-Mart, and Discount Tire. Based on the comparison, Broders concluded that the fair market value for the three parcels before takings was $11 to $12 a square foot, totaling about $1.1 million.

¶ 17 There was damage to the remainder as a result of the irregular shape of the remaining parcel, putting limits on how the property can be developed, and loss of visibility because of the flyover bridge. Furthermore, the sewer line was removed since the start of construction and the property needed new hookups to sewer lines further away. He explained that the damage to the remainder "is the difference in the before value and the after value of the part taken." He calculated a diminution of $2.50 per square foot.

¶ 18 In Broders' appraisal, he opined that the value of the portion taken was $357,074. The amount of damage to the remainder was $120,892, and the value of a temporary easement was $8118, totaling $486,084. In his addendum, he added $120,705 to the damage to the remainder to address the sewer connection cost. This amount included $112,284 for additional cost to reconnect the sewer to the property and a 7.5% "entrepreneurial profit" for the "amount an entrepreneur expects to receive in addition to costs." This increase resulted in a total of $606,789.

¶ 19 Daniel Jackson Testimony

¶ 20 Daniel Jackson, the owner of DP Jackson, testified that he was a real estate appraiser and developer. He believed that the three parcels would sell for about $1.2 million, the damage to the remainder was $847,289, and the value of a temporary easement was $8000. He had a contract to sell a property about 500 feet away from the parcels for $225,000 and had a backup offer for $135,600.

¶ 21 Christopher Mathias Testimony

¶ 22 Christopher Mathias, a city planner for the City of Moline, testified that the parcels were zoned B-4 highway/intensive business district. He stated that most of the commercial development in the area required wetland mitigation and floodplain fill before development. The commercial development has to be 20 feet from the front and rear and zero feet from the sides of the property line. The development cannot take up more than 50% of the entire property lot.

¶ 23 Terrell Honnold's Appraisal

¶ 24 In Honnold's appraisal, he stated that he was the owner of American Real Estate, which primarily focused on commercial real estate appraising and counseling, investment analysis, marketability, and market studies. He concluded that the highest and best use for the parcels as a whole was commercial development. He explained that the parcels were located in a developing commercial neighborhood, were zoned B-4 for highway/intensive business district, and the City of Moline planned to develop the area for commercial purposes. Due to the impending reconstruction of 38th Street, 40th Avenue, and John Deere Road, developing the property for commercial purposes was not practical at the moment; however, development would have eventually happened as John Deere Road produces high levels of traffic and activity.

¶ 25 Using the comparison sale approach, Honnold compared eight properties to the parcels including two Discount Tires, Sonic Restaurant, Burger King, Deere Harvester Credit Union,

Qdoba, Honda Auto Dealership, and Hyundai Auto Dealership. He opined that the market value of the parcels before takings was about $1.1 million and that the value of the portion taken was $391,942. He also concluded that damage to the remainder was $151,115 and compensation for the easement was $8603, totaling $551,660.

¶ 26 Trial Court's Ruling

¶ 27 The court found that the highest and best use for parcels 3613 and 3621 was residential use because (1) the public cannot directly access the properties, (2) the parcels are not frontage property, (3) visibility could be obstructed by the land owner between the parcels and John Deere Road, (4) construction would require expensive wetland mitigation and fill, (5) the parcels are "physically isolated" from nearby commercial development, and (6) there is no evidence that the parcels are marketable for commercial development because there is a slow market for superior available lots. It also determined that the highest and best use for parcel 3617 was commercial assemblage. If the court found that the parcels 3613 and 3621 were for commercial assemblage the lots would decrease in value and would undermine the finding that commercial assemblage would be the highest and best use.

¶ 28 The court gave little weight to DP Jackson's two appraisal experts because they analyzed the same comparables and their opinions were "uncanny in commonality." The court also gave no weight to defendant's exhibit 26, which was an agreement to purchase property about 500 feet away from parcels.

¶ 29 The court determined that parcel 3617 was worth $2.40 per square foot, or $91,267, because it was a vacant lot zoned highway/intensive business district and it was in close proximity to traffic roadway and traffic generators like Lowes and Wal-Mart. It believed PB Jackson's calculations were based on an "overly optimistic view of the land's marketability for

commercial development" and that the Department's calculations, although more realistic, undervalued the property. It found that parcel 3613 was worth $114,000 and parcel 3621 was worth $94,800 because these calculations were "reasonable."

¶ 30 Overall, the court determined that the just and reasonable compensation for the portion taken on parcel 3617 was $31,528. It added $41,070 for damage to the remainder because of the "20 foot set-back for buildings, the lot's irregular shape after losing 1/3 of its former size, the loss of sewer access (which is a substantial factor), and city code preventing any building from occupying more than 50% of the land." It also held that the just and reasonable compensation for a temporary easement was $1045, totaling $73,643.

¶ 31 Without clarification, the court found that the just and reasonable compensation for parcel 3621 was $94,800 and that the just and reasonable compensation for the portion taken on parcel 3613 was $4430, for damage to the remainder was $10,370, and for a temporary easement was $384, totaling $15,184. DP Jackson appealed.

¶ 32 ANALYSIS

¶ 33 DP Jackson challenges the trial court's (1) ruling that the highest and best use of parcels 3613 and 3621 was residential use; (2) award for damage to the remainder of parcels 3613 and 3617; and (3) award for just and reasonable compensation for the three parcels.

¶ 34 The fifth amendment to the United States Constitution states that private property shall not be "taken for public use, without just compensation." U.S. Const., amend. V. The Illinois Constitution states that "private property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. 1970, art. I, § 15. Just compensation is determined by the fair market value of the property at its highest and best use. *Department of Transportation v. Kelley*, 352 Ill. App. 3d 278, 280 (2004). "The purpose of just compensation is

to put the property owner in the same economic position as if no condemnation took place; it should not result in financial improvement or excess." *Id.* at 280-81.

¶ 35 A trial court's factual findings will be reversed only if against the manifest weight of the evidence. *Marconi v. Heights Police Pension Board*, 225 Ill. 2d 497, 532 (2006). A trial court's finding is not against the manifest weight of the evidence unless an opposite conclusion is clearly evident. *Department of Transportation v. 151 Interstate Road Corporation*, 209 Ill. 2d 471, 488 (2004).

¶ 36 I. Highest and Best Use of the Properties

¶ 37 DP Jackson argues that the trial court's determination that the highest and best use of parcels 3613 and 3621 was residential use was against the manifest weight of the evidence because (1) Broders' and Honnold's comparables were more similar to the subject parcels than Behren's comparables, (2) Brehren had less appraisal experience than Broders and Honnold, (3) exhibit 26 showed evidence of current development in the area, and (4) Mathias testified that the parcels were zoned B-4 for commercial use and the city intended to have the parcels used as commercial properties.

¶ 38 DP Jackson's arguments are unpersuasive. Behren testified that zoning is not the only factor in determining the highest and best use of the property. In fact, Broders and Honnold testified about additional factors in making their determination. Also, exhibit 26 shows the value of property not subject to this appeal. DP Jackson did not show how this property was similar to the parcels, and its appraisers did not use the property as a comparable in their reports. Lastly, the trial court determined that it was not persuaded by Broders' and Honnold's testimony and we give deference to the trial court's credibility determination. See *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (2007).

¶ 39 Behren opined that the highest and best use of parcels 3621 and 3617 was single-family residence because (1) the parcels did not meet certain site criteria for commercial property; (2) the lack of frontage on a main street provided physical limitations to potential commercial use; and (3) the lack of site criteria lowered the value of the parcels making it financially infeasible. Therefore, we find that the trial court's ruling was not against the manifest weight of the evidence when it determined that the highest and best use of parcels 3613 and 3621 was residential use.

¶ 40 II. Damage to the Remainder

¶ 41 DP Jackson claims that the trial court improperly considered the evidence presented by awarding damage to the remainder of parcels 3613 and 3617 in the amounts of $10,370 and $41,070, respectively. Specifically, DP Jackson alleges that the issues of set-back, irregular shape, and Moline City Code preventing any building from occupying more than 50% of land should have resulted in a higher compensation award.

¶ 42 When an award is made by the trier of fact in an eminent domain proceeding in which the evidence is conflicting and the trier of fact views the property and fixes the amount of compensation within the range of the evidence, the determination will not be disturbed unless there has been a clear and palpable mistake or a show that the determination was the result of passion or prejudice. *City of Freeport v. Fullerton Lumber Co.*, 98 Ill. App. 3d 218, 224 (1981); *Department of Public Works and Buildings v. Bloomer*, 28 Ill. 2d 267, 273-74 (1963).

¶ 43 The trial court awarded damage to remainder for parcel 3613 in the amount of $10,370. Behren suggested this amount of damages in his report. The court also noted that the damage to the remainder for parcel 3617 was "significant" because of the 20-foot setback requirement for buildings, the lot's irregular shape after the taking, the loss of sewer access, and the city code

presenting buildings from occupying more than 50% of the land. It awarded damage to the remainder for parcel 3617 in the amount of $41,070. This amount was lower than the amount suggested by DP Jackson's experts but higher Brehen's suggested amount. For instance, Jackson testified that damage to the remainder of both parcels totaled $847,298. Honnold testified that damage to the remainder for both parcels totaled $151,115, and Broders testified that that the amount for both parcels totaled $120,892. Brehens testified that the damage to the remainder of parcel 3613 was $10,370 and the damage to the remainder of parcel 3617 was $7140.

¶ 44 The trial court's ruling is within the limits of the evidence, and DP Jackson did not show that the ruling was a clear and palpable mistake or a result of passion or prejudice. Therefore, the trial court's award for damage to the remainder of parcel 3613 for $10,370 and parcel 3617 for $41,070 was proper.

¶ 45 III. Just and Reasonable Compensation

¶ 46 DP Jackson contends that, based on Broders' and Honnold's testimony, the trial court failed to award a just and reasonable compensation for the parcels.

¶ 47 The trial court awarded a just and reasonable compensation in the amount of $73,643 for parcel 3617; $94,800 for parcel 3621; and $15,184 for parcel 3613, totaling $183,627. This amount was lower than the amount suggested by DP Jackson's experts but higher Brehen's suggested amount. For example, Broders testified that the total amount of just and reasonable compensation was $606,789; Honnold testified that the total amount of just and reasonable compensation was $551,660; and Jackson testified that he believed the parcels would sell for about $1.2 million. Behren opined that the just and reasonable compensation for parcel 3613 was $15,182; for parcel 3617 was $25,975; and for parcel 3621 was $94,800, totaling $135,957.

¶ 48 The trial court's ruling is within the limits of the evidence, and DP Jackson did not show that the ruling was a clear and palpable mistake or a result of passion or prejudice. Thus, the trial court's award for just and reasonable compensation in the amount of $73,643 for parcel 3617; $94,800 for parcel 3621; and $15,184 for parcel 3613 was proper.

¶ 49 CONCLUSION

¶ 50 The judgment of the circuit court of Rock Island County is affirmed.

¶ 51 Affirmed.

¶ 52 JUSTICE HOLDRIDGE, dissenting:

¶ 53 I respectfully dissent. In making its highest and best use determination, the trial court noted attributes that commercial developers seek in real estate, which typically include: two frontage roads, ease of access, full visibility, demographics to support the activity, and retail spending. Of these factors, the court found that the parcels at issue only had demographics and retail spending. The court noted that these parcels are "basically next door to a trailer park" and beyond the trailer park is Interstate 74, which permanently prevented improved access to the parcels from the west. The court also noted that patrons of commercial properties to the northeast could not directly access the parcels. The court stated, that although the parcels were visible from the "highly traveled" John Deere Road, they do not consist of frontage property and their visibility could be lost if the owner of the land between the parcels and John Deere Road were to erect a structure or plant trees. However, the court explained that DP Jackson could overcome this obstacle by erecting larger signs to overcome future obstructions.

¶ 54 The trial court determined that the highest and best use was commercial assemblage for parcel 3617 (the "vacant lot") and residential for parcels 3613 and 3621 (which contained the single-family residences). The court concluded that the parcels (1) were physically isolated from

nearby commercial development, (2) were at risk of losing their visibility from highly traveled roads, and (3) required expensive fill/wetland mitigation to achieve status as a vacant lot ready for improvements. I disagree that these findings support the court's highest and best use determination for these parcels.

¶ 55 First, the three adjoining parcels in this case are located directly off of an arterial road connecting them to numerous retailers and restaurants to the north, northeast, east, and southeast. Parcel 3621 is the closest to the arterial road and parcels 3617 and 3613 follow to the west, respectively. Although the parcels are isolated from any prospective commercial development to the west, where a trailer park and I-74 are located, the parcels' accessibility from the east is substantial. Contrary to the trial court's finding, these parcels are not isolated from nearby commercial development.

¶ 56 Second, the trial court undermined its own determination on the issue of the parcels' visibility. The court noted that the parcels are visible from the "highly traveled" John Deere Road, but it explained that the owner of the land between the parcels and John Deere Road could erect a structure to remove the parcels' visibility. This hypothetical is not dispositive. Owners of any commercial property risk their neighbors constructing signage or buildings that might obstruct their visibility. At the time the eminent domain action was commenced in this case, the parcels were fully visible from John Deere Road. Even if the parcels lose their visibility, DP Jackson can overcome this obstacle by creating a larger sign or structure, as explained by the court.

¶ 57 Third, the trial court found that the parcels required expensive fill/wetland mitigation to achieve status as a vacant lot ready for improvements (most likely only referring to parcels 3613 and 3621, which it found to have the highest and best use of residential). However, Mathias, a

city planner for the City of Moline, testified that most of the commercial development in the area required wetland mitigation and floodplain fill before development. I fail to see how these parcels differed from surrounding commercial parcels on this basis. Therefore, of the factors the court considered (two frontage roads, ease of access, full visibility, demographics to support the activity, and retail spending), the parcels only lacked two frontage roads. Also, as explained by Mathias, the condition of the parcels was common compared to other commercial property in the area. The totality of this evidence suggests that the highest and best use of these parcels is as a single commercial unit.

¶ 58 Additionally, the opinions of appraisers Honnold and Broders overwhelmingly demonstrated that the highest and best use of the parcels was as one commercial unit. The court gave "little weight, if any at all" to their independent conclusions because their appraisal reports included opinions that were "uncanny in commonality" and they used the same comparable properties in their analyses. I fail to see how two independent appraisals should be discredited because they contain common findings. If anything, I would give them more weight because it shows consistency and reliability. Instead, the court gave more weight to Behrens, the least experienced appraiser and the outlier.

¶ 59 Last, although not determinative, I note that the parcels are zoned B-4 (central business district). Parcels 3613 and 3621 contained single-family residences as a legal nonconforming use, meaning that the placement of single-family residences would not be permitted under the current zoning ordinance, but is allowed to continue because it predates the ordinance. See *City of Marengo v. Pollack*, 335 Ill. App. 3d 981, 986 (2002). I find it telling that the zoning ordinance changed in this area, further demonstrating that the area where the parcels are located is suitable for commercial development.

¶ 60 For the foregoing reasons, I would find that the trial court's highest and best use determination was against the manifest weight of the evidence because the opposite conclusion is clearly apparent and its findings appear to be unreasonable, arbitrary, and not based on the evidence presented. *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007). I would remand this matter to the trial court to determine the highest and best use of the parcels as a single commercial unit.