Filed 3/15/16 County of Santa Barbara v. Double H Properties CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

COUNTY OF SANTA BARBARA, Plaintiff and Respondent, v. DOUBLE H PROPERTIES, LLC, Defendant and Appellant.	2d Civil No. B264223 (Super. Ct. No. 1417253) (Santa Barbara County)

The County of Santa Barbara (County) initiated this eminent domain action to condemn an easement for "conservation" of the endangered California tiger salamander on ranch property owned by Double H. Properties, LLC (appellant).[1] Appellant's appraiser formulated two alternative theories of valuation of the conservation easement. The trial court granted the County's motions in limine to exclude at trial evidence of one of the theories and also evidence of appellant's lender defense costs. Appellant contends this was error. We conclude the trial court did not abuse its discretion by excluding the evidence and affirm.

[1] Appellant did not own the subject property at the time the action was filed. It subsequently acquired title and, for purposes of this litigation, is deemed the property's owner.

FACTS AND PROCEDURAL BACKGROUND

In 2011, the County purchased an easement on 15.69 acres of a 160-acre recreational ranch in Lompoc. The purpose of the easement was to conserve, protect, restore and manage the habitat necessary for the endangered California tiger salamander. The County installed a pond for this purpose. The United States Fish & Wildlife Service (USFWS) approved the area as suitable to mitigate damage to the California tiger salamander population in another geographical area.

A subsequent foreclosure of the ranch property extinguished the County's easement rights. The County filed this eminent domain proceeding against appellant's predecessor in interest to reacquire the property "for a conservation easement and [to gain] temporary subsurface water rights to establish a California Tiger Salamander habitat." The County posted the probable compensation for the easement, establishing September 19, 2013, as the date of valuation for determining just compensation for the taking. (Code Civ. Proc., § 1263.110, subd. (a).)[2]

The County retained expert appraiser James Hammock to determine the fair market value of the 15.69-acre easement and any related severance damages. Appraising the acreage as rural agricultural ranch land, Hammock valued the property at $41,600. He determined there were no severance damages because the easement did not interfere with the ranch's operations.

Appellant's appraiser, Kioren Moss, also valued the acreage as rural agricultural land. He valued the easement at $43,000, with an additional $133,000 for severance damages to the remaining property. Moss opined that the ongoing monitoring program related to the conservation area would decrease the value of the

[2] All statutory references are to the Code of Civil Procedure unless otherwise stated.

remainder by 10 percent. Based on this methodology, Moss concluded the total compensation for the taking should be $176,000.[3]

Moss then applied an alternative appraisal method in which he valued the easement based on the hypothetical value of marketable mitigation credits in the 15.69 acres. As explained below, he appraised the property by comparing it to properties with mitigation credits available for purchase by developers through mitigation banks to offset negative environmental impacts for proposed development projects. By making the "[e]xtraordinary [a]ssumption" that the 15.69 acres are entitled to these mitigation credits, Moss derived a fair market value of approximately $15,000 per acre for a total of $217,000 -- $41,000 higher than his other valuation.

The County moved in limine to exclude evidence of this alternative appraisal method. It argued the property did not possess any marketable mitigation credits to justify the $217,000 value. It claimed that neither appellant nor its predecessor in interest had taken the steps necessary to entitle the property to such credits and that appellant had not designated an expert to testify regarding the probability of entitling the property to those credits.

The County further argued that the 15.69 acres should not be valued as a habitat because that was the use for which the County sought to acquire the easement. The County claimed that under section 1263.330, subdivision (a), the property had to be valued without reference to the use for which the property was being taken. Appellant's position was that the property already qualified for use as a habitat and that the Law Revision Commission's Comment to section 1263.330, subdivision (a) expressly recognizes an exception to the general rule relied on by the County.

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[3] We grant appellant's unopposed motion to take judicial notice of Moss's appraisal report and also the statement by Robert W. Haugan dated October 29, 2014. (See Evid. Code, § 452, subd. (h).)

The trial court granted the motion in limine. It concluded appellant's appraisal of the fair market value could not be based upon the assumption that the proposed easement possesses entitlements it does not possess and that the easement must be appraised in its actual condition prior to construction of the public project. In so ruling, the court found there was no substantiated basis for the $217,000 value for the easement.

The County filed a second motion in limine to exclude evidence of the reason for the taking of the easement. The court again granted the motion, finding that the County's need for the project and its construction of the conservation habitat were irrelevant to the issue of the easement's fair market value.

The County's third motion in limine was to exclude evidence of $13,500 in legal costs incurred by one of appellant's lenders in defending the eminent domain action. After the lender added the costs to appellant's loan balance, appellant claimed it was entitled to recover the costs as damages for the taking. The trial court disagreed and granted the motion.

The jury awarded appellant total just compensation, including severance damages, in the sum of $87,562, plus prejudgment interest. Appellant appeals the trial court's rulings excluding evidence of Moss's alternative valuation methodology and its request for lender defense costs.

DISCUSSION

Standard of Review

The trial court's rulings on motions in limine typically are reviewed for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) Appellant contends the rulings in this case must be reviewed under the de novo standard applicable to a nonsuit order. It relies upon *City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1465 (*City of Livermore*), in which the defendant acquiesced to the City's taking of his property but sought permanent and temporary severance damages. (*Id.* at p. 1464.) The trial court granted the City's motions in limine to exclude evidence supporting both claims. Because *all* of the defendant's

evidence was excluded, the Court of Appeal concluded the trial court had effectively granted a nonsuit in the City's favor and reviewed the evidentiary rulings de novo. (*Id.* at p. 1465.)

The facts here are distinguishable. Although the trial court excluded appellant's evidence regarding one of its two valuation methodologies and its request for lender defense costs, appellant was allowed to offer evidence in support of its claim for just compensation. Thus, unlike in *City of Livermore*, the court's exclusion of evidence did not operate as a nonsuit. (See *City of Livermore*, *supra*, 205 Cal.App.4th at pp. 1464-1465; *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 676-677 ["Where . . . the trial court grants a motion at the beginning of trial to exclude all evidence produced during discovery, the motion 'may be . . . viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit'"].)

The applicable standard of review, therefore, is whether the trial court abused its discretion in excluding the evidence. (*Piedra v. Dugan*, *supra*, 123 Cal.App.4th at p. 1493.) "A ruling that constitutes an abuse of discretion [is] one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citations.]" (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773 (*Sargon*).) "'In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review.' [Citation.]" (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762.)

Exclusion of Habitat Value

"Owners of private property taken for public use are entitled to just compensation for the full monetary equivalent of the property as of the date of the taking. [Citation.] If possible, owners should be placed in the same monetary position they would have been without the taking. [Citation.] The measure of just compensation to be awarded for the property taken is the fair market value of that

property (§ 1263.310), meaning 'the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.' (§ 1263.320, subd. (a).)" (*San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1288 (*San Diego Gas*).)

"The jury determines the fair market value of the property based on the highest and best use for which the property is geographically and economically adaptable. [Citations.] . . . . The highest and best use is defined as 'that use, among the possible alternative uses, that is physically practical, legally permissible, market supportable, and most economically feasible . . . . The appraiser must make a determination of highest and best use as part of the appraisal process. [Citations.]" (*San Diego Gas*, *supra*, 228 Cal.App.4th at pp. 1288-1289.)

The highest and best use of the 15.69 acres at issue here is disputed. The County maintains the property was properly valued by the parties' appraisers as rural agricultural land. The dispute centers on appellant's alternative valuation based on the County's former use of the property as a government-approved habitat. Appellant contends the trial court erred by excluding that alternative valuation. We disagree.

It is undisputed that the County previously created and maintained a habitat for the California tiger salamander on the 15.69 acres. The easement for that purpose, however, was extinguished by foreclosure. Moss's alternative valuation of the property is not based on its existing use as a habitat, but rather on the "[e]xtraordinary [a]ssumption" that the 15.69 acres could "potentially" be sold as an easement for mitigation through the use of mitigation credits approved by the USFWS or other appropriate governing agency. Such a sale through a mitigation bank would allow a developer to construct a mitigating habitat on appellant's

property to offset any damage to the California tiger salamander population created by development in another location.

Accordingly, the question that must be asked in assessing the property's highest and best use is not whether it has been used as a habitat in the past, but whether there is evidence it is presently adaptable and marketable as such. (See *San Diego Gas, supra*, 228 Cal.App.4th at pp. 1288-1289.) The answer, according to the County, lies in whether the property is qualified for marketable mitigation credits. It maintains that without those credits, the property cannot be sold for mitigation purposes. And if it cannot be sold for mitigation purposes, it does not have value as a marketable habitat. (See *ibid.*)

Moss did not express an opinion on whether the 15.69 acres are eligible or qualified for marketable mitigation credits. He assumed for purposes of his alternative valuation that the property is entitled to such credits and, based on that assumption, valued it by comparing it to properties with those existing credits. He did not conduct an investigation regarding appellant's ability to obtain mitigation credits from the USFWS or other governing agency. Moss simply presumed that because of the County's prior creation of a habitat, "the valuation *may* include marketable mitigation credits." (Italics added.) But there was no evidence that appellant or its predecessor in interest applied for such credits. Nor did appellant designate an expert to testify as to the probability of entitling the property to the credits.[4]

"[U]nder Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion. As [the Supreme Court has] explained, '[T]he expert's opinion may not be based "on assumptions

[4] Appellant did submit a declaration by a zoologist, Samuel S. Sweet, who opined that the 15.69 acres were qualified for mitigation for the impact to the California tiger salamander. Sweet was not designated as an expert, and thus his declaration was deemed inadmissible. (See § 1258.240; *Sacramento Area Flood Control Agency v. Dhaliwal* (2015) 236 Cal.App.4th 1315, 1335.) Appellant does not reference the declaration in its briefs.

of fact without evidentiary support [citation], or on speculative or conjectural factors. . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" [Citation.]' [Citations.]" (*Sargon, supra*, 55 Cal.4th at p. 770; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

Here, the trial court acted within its discretion in determining that Moss's valuation of the 15.69 acres based upon hypothetical mitigation credits was without evidentiary support and therefore speculative or conjectural. (*Sargon, supra*, 55 Cal.4th at p. 770; *People ex rel. Dept. of Public Works v. Dunn* (1956) 46 Cal.2d 639, 641 [opinion of valuation expert may be stricken if based upon improper considerations or incompetent and inadmissible matters].) Indeed, courts typically reject evidence that assumes the existence of entitlements on vacant land for purposes of comparing it to sales of land actually possessing such entitlements. (E.g., *Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 659-660 [excluding evidence of finished subdivided lots prices as basis for computing value because cost of completing the subdivision was too conjectural]; *Santa Clara County Flood & Water Conservation Dist. v. Freitas* (1960) 177 Cal.App.2d 264, 267 [excluding evidence of approved subdivision map for purposes of showing value should subdivision be built]; see also *Buena Park School Dist. of Orange County v. Metrim Corp.* (1959) 176 Cal.App.2d 255, 260.)

If appellant or its predecessor in interest had actually obtained approval for a mitigation bank of a certain number of credits, then Moss's calculations of the per acre revenues available from each acre of land sold for mitigation purposes may have carried some weight. However, in the absence of such credits, Moss's alternative value calculation is irrelevant to the foundational issue of just compensation for the taking of the easement.

Moreover, "[w]hen assessing the property's fair market value . . . , any increase or decrease in the property's value caused by the project for which the property is condemned may not be considered." (*City of San Diego v. Barratt American, Inc.* (2005) 128 Cal.App.4th 917, 934.) Consequently, "to the extent the fair market value of the property condemned increases or decreases because of the project for which it is condemned, or the eminent domain proceeding in which the property is taken, or any preliminary actions of the condemnor relating to the taking of the property, such project-caused increases or decreases must be excluded from the just compensation calculus. (§ 1263.330.)" (*Ibid.*; see *Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 491 ["the increase in value which a condemned tract gains when it is valued *as part* of the proposed project . . . could never be considered in determining 'just compensation' under the established definition of 'market value'"].)

Appellant asserts this rule does not apply here because the conservation project, particularly the pond, was in place before the eminent domain proceeding was filed. It relies upon the Law Revision Comment to section 1263.330, subdivision (a) that "[i]f . . . the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. [Citation.]" This argument presumes, however, that appellant attempted to establish the adaptability of the property as a habitat through admissible evidence. As previously discussed, its appraiser depended upon the unsupported assumption that the property is entitled to marketable mitigation credits.

Appellant's reliance on *Ventura County Flood Control District v. Campbell* (1999) 71 Cal.App.4th 211, is misplaced. The court in that case held that land being condemned for valuable mineral deposits could be valued based on the existence of those natural resources even though the condemning agency would be mining those deposits. (*Id.* at p. 219.) The court determined that that "[s]uch evidence is proper where there is proof of an active market for the minerals in

question . . . and that the estimate for recoverable deposits is not too speculative." [Citation.] (*Id.* at p. 220.)

Here, in comparison, appellant has not provided proof of an active market for the 15.69 acres as a mitigation habitat. Moss assumed the property "may" be entitled to marketable mitigation credits. This assumption does not overcome the general rule that property is valued without regard to the intended project. (*City of San Diego v. Barratt American, Inc.*, *supra*, 128 Cal.App.4th at p. 934.) Based on the record before us, we conclude the trial court did not abuse its discretion by excluding Moss's alternative valuation theory.

Exclusion of Lender Defense Costs

Appellant argues the trial court erred by excluding evidence of the lender defense costs that were added to appellant's loan balance. It argues the costs were damages incurred due to the taking and, as such, are recoverable under Article 1, section 19 of the California Constitution. We are not persuaded.

Section 19 of Article 1 of the California Constitution states that "[p]rivate property may be taken or damaged for a public use and only when *just compensation*, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Italics added.) As previously discussed, "[t]he measure of just compensation to be awarded for the property taken is the fair market value of that property . . . (§ 1263.310)." (*San Diego Gas*, *supra*, 228 Cal.App.4th at p. 1288; see *City of San Diego v. Barratt American, Inc.*, *supra*, 128 Cal.App.4th at p. 934 ["Although a property owner is entitled to receive the fair market value of the property condemned, the owner is not entitled to more"].) Where, as here, only a part of the property is being taken, section 1263.410 authorizes an award of compensation for severance damages to the remainder of the property. Severance damages refer to the diminution in market value of the remainder property, i.e., a decrease in the amount for which it could be sold in the open market. (*Metropolitan Water Dist of Southern Cal. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973.)

The County cites a number of cases in which the property owner was entitled to severance damages for a direct physical impact on the remainder property. (E.g., *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659 [impairment of access]; *City of Livermore, supra,* 205 Cal.App.4th at p. 1468 [adverse impact on drainage]; *People ex rel. Dept. of Public Works v. Silveira* (1965) 236 Cal.App.2d 604 [loss of highway frontage].) In contrast, appellant cites no case awarding damages that are unrelated to some actual damage or loss in value to the remainder. Nor does it cite any authority in which damages were awarded because of costs incurred due to a contractual agreement between the property owner and a third party, such as a lender. In the absence of such authority, the trial court did not abuse its discretion by excluding evidence of appellant's lender defense costs.

DISPOSITION

The judgment is affirmed. Appellant is entitled to costs on appeal pursuant to section 1268.720.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

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