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No. 68294-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

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GENERAL INVESTIGATIVE
DIVISION
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MS

KAY KOHLER,

Appellant,

v.

SNOHOMISH COUNTY,

Respondent.

APPELLANT'S REPLY BRIEF

On Appeal From Snohomish County Superior Court No. 10-2-05459-4
The Honorable Ellen J. Fair

PURCELL & ADAMS, PLLC
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Attorney for Appellant, Kay Kohler

I. REPLY

Appellant Kohler's issue on appeal is quite simple. The appraisal testimony provided by Respondent County's appraisal expert was based on a use (single family residence constructed on a 5,000 square foot pad) which was not consistent with either the testimony of the appraiser or of the other witnesses as to the highest and best use of the subject property.

The Kohler property in question is one of a few remaining undeveloped parcels in an area of Snohomish County incorporated into the County's Urban Growth Area and, potentially, City of Lynnwood Urban Growth Area pursuant to the County's comprehensive plan in 2005. At that time, the zoning was changed from R9600 or R8400 to multiple residential (Molver testimony: RP II 100:8-16). As such, while there was substantial testimony about the difficulty of developing this particular parcel for multi-family residential use, including testimony by the County employees relating to additional costs associated with such development (as described below), the clear thrust of the weight of the testimony was that, given appropriate mitigation, some such future development was an available option. Under those circumstances, the County's appraisal evidence relating solely to a then current sale for use as a single family residence was irrelevant (and therefore "insufficient") to support the lower

court's determination of value.

As previously identified, the test for "fair market value" includes a requirement that the buyer and seller be well-informed on the nature and uses of the property, *State v. Sherrill*, 13 Wn.App. 250 (1975). The status of "well informed" has included the "highest and best use" analysis; that is, the parties to the transaction are aware of the potential uses to which the property can be put, based on physical and legal parameters.

As described in the Appellant's opening brief, the appraisal report of the County's appraiser witness, Mr. Dang, contains the following statement as to highest and best use:

"Highest and Best Use: Considering all apparent factors as they relate to the value of the subject property, it appears that the Highest and Best Use is to hold the subject until it becomes feasible to develop. Another potential use would be to sell to an individual who would build a SFR to occupy."

The County, on Page 5 of its Response brief, sites a testimonial statement by Mr. Dang as follows:

"Considering all apparent factors as they related to the value of the subject property, it appears that the highest and best use is to hold the subject property until it becomes feasible to develop.

(RP I 171: 15-21)

Respondent's brief goes on as follows:

That refers to a house. That's the only thing that's legally permissible is a house, a single family house. It is not even feasible to build a house."

(RP I 171: 15-21)

Both the County's characterization of this testimony and Mr. Dang himself, in identifying the single family residence as the "only permissible use," are in direct contradiction to various other testimony both from the County witnesses and from the wetlands mitigation expert presented by Ms. Kohler. Both parties agreed in their various testimony that the property was substantially impacted by wetlands and that onsite mitigation was not a reasonable alternative. However, without exception, the parties confirmed that offsite mitigation was an alternative. Mr. Molver, the County's expert witness on probable use, testified as follows:

"Question: Does the County allow for offsite mitigation?
Answer: Yes, if there are no reasonable alternative's to mitigation onsite. As last option, offsite mitigation might be considered."

(RP II 91:25 and 92: 1-3).

In further discussing offsite mitigation, Mr. Molver said:

A. Yes. It would require all sorts of approvals from other resource agencies such as the Army Corps of Engineers and the Department of Ecology, possible Fish and Wildlife. The Tulalip Tribes and the Muckleshoots are undoubtedly likely to weigh in on appropriateness of it as well.

Q. And they would all have the ability to say yes; is that correct?

A. And no.

Q. But yes as well?

A. Yes.

(Molver Testimony, RP II, 103:24 – 104:8)

The County presented testimony on the cost of offsite mitigation, indicating that it would cost \$134,000 plus the cost of land and/or easement acquisition, if necessary (RP I 129:13 to 130:21).

The County experts also identified as a potential cost of multifamily development the requirement of road improvements estimated to cost approximately \$340,000. (Molver testimony, RP II 104:9-13)

A hypothetical purchaser, determining whether or not to acquire the Kohler Property to hold for future development or to develop the property would, take each of these factors into consideration. As Mr. Dang's testimony established, reasonably comparable undeveloped properties in close geographical proximity to the Kohler Property were for sale at the time. None of the properties had sold, and all parties agree that there existed extremely depressed economic circumstances at that time for properties of this type. The properties identified by Mr. Dang averaged in excess of \$2,000,000 per lot. A comparably-sized lot to the Kohler

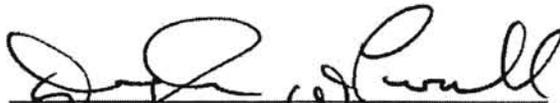
Property with at least 40% wetlands impact was for listed at \$2.7 Million dollars. (Dang Testimony, RPII 167:13 – 168:20)

Ms. Kohler is, in valuing her parcel at \$700,000, is taking the additional costs and difficulty of development into account.

II. CONCLUSION

Respondent's brief is based upon the substantial evidence presented as to the value of the Kohler Property as available for sale as a single family residence, a "alternate" use to the highest and best use identified by Mr. Dang as holding for future development and is based on the incorrect assumption by Mr. Dang that such development was the only permissible development. As such, the evidence is neither conclusive nor relevant as to the value of the property being held for future development, its highest and best use. The Court should reverse the lower Court's finding as to the value of the property and remand for retrial on the issue.

RESPECTFULLY SUBMITTED this 28th day of November,
2012.



Douglas W. Purcell, WSBA #5324
Attorneys for Appellant, Kay Kohler

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CERTIFICATE OF SERVICE

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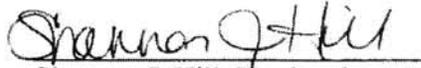
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DIVISION I

KAY KOHLER,)
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Appellant,)
v.)
)
SNOHOMISH COUNTY,)
)
Respondent.)
_____)

I hereby certify that on the 28th day of November, 2012, I caused the original of the foregoing Appellant's Reply Brief and Certificate of Service to be filed with the Court of Appeals, Division I, and a copy was emailed and mailed via First Class Mail on November 28, 2012, to Respondent's counsel as follows:

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Dated this 28th day of November, 2012.


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