

68294-6

68294-6

FILED
APR 15 2014
COURT OF APPEALS
DIVISION I
E

No. 68294-6-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

KAY KOHLER,

Appellant,

v.

SNOHOMISH COUNTY,

Respondent.

BRIEF OF RESPONDENT

Joseph P. Bennett, WSBA # 20893
HENDRICKS – BENNETT, PLLC
402 Fifth Avenue South
Edmonds, WA 98020
T: (425) 775-2751

TABLE OF CONTENTS

I. INTRODUCTION	1
II. APPELLANT'S ASSIGNMENT OF ERROR LIMITED TO A FINDING OF FACT	2
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	8
V. MOTION IN BRIEF FOR SANCTIONS FOR FRIVOLOUS APPEAL.....	12
APPENDIX: WPI 150.15.....	A-1

TABLE OF AUTHORITIES

CASES

<i>City of Puyallup v. Hogan</i> , 168 Wn. App. 406, 277 P.3d 49 (2012)	9, 11
<i>Hegwine v. Longview Fibre Co.</i> , 132 Wn.2d 546, 132 P.3d 789 (2006)	8
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004)	9
<i>McCleary v. State</i> , 173 Wn.2d 477, 269 P.3d 227 (2012)	9-11
<i>Merriman v. Cokeley</i> , 168 Wn.2d 627, 230 P.3d 162 (2010)	9
<i>Port of Seattle v. Equitable Capital Group, Inc.</i> , 127 Wn.2d 202, 898 P.2d 275 (1995)	11
<i>State ex rel. Quick-Ruben v. Verhaven</i> , 136 Wn.2d 888, 969 P.2d 64 (1988)	12
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003)	9

OTHER AUTHORITY

WPI 150.15.....	11
-----------------	----

I. INTRODUCTION

In this eminent domain case, Appellant Kay Kohler assigns error to the trial court's factual finding that her undeveloped property was worth \$110,000¹ before the taking and \$62,000 after the taking. Substantial evidence supports the court's finding. It is undisputed that the property was significantly encumbered by protected wetlands, previous attempts to develop the property were not successful and real estate market conditions were poor. Snohomish County's experts testified that it was not legally permissible or financially feasible to develop the property for anything more than a single family residence. The County's appraiser relied upon comparable sales to substantiate his opinion as to value. Ms. Kohler presented no appraisal testimony and instead offered her own lay opinion. The County's evidence was more than sufficient to persuade a fair-minded person that the property was worth \$110,000 before the taking and \$62,000 after the taking. The trial court should be affirmed.

¹ Appellant misstates the figure as \$100,000. (Appellant's Brief at 4.)

II. APPELLANT'S ASSIGNMENT OF ERROR LIMITED TO A FINDING OF FACT

Ms. Kohler's sole assignment of error relates to the trial court's finding of fact. (Appellant's Brief at 4.) She does not challenge any of the trial court's conclusions of law or evidentiary rulings. The only issue on appeal is whether substantial evidence supports the trial court's factual finding about what the property was worth before and after the taking.

III. STATEMENT OF THE CASE

Ms. Kohler owns 194,200 square feet of undeveloped land on 52nd Avenue West in Edmonds, Washington. (CP 8; Exs. 1 and 2; RP I 45:15 - 46:23)². Snohomish County needed to acquire 36,410 square feet of the Kohler property as part of an improvement project to 52nd Avenue and intended to use the acquired Kohler property for a storm water detention pond. (CP 8; Ex. 2; RP I 47). Ms. Kohler executed a possession and use agreement in favor of the County, which established March of 2009 as the date of value for purposes of a condemnation trial. (CP 82; RP I 139:20-25) The County filed a petition for condemnation on June 9, 2010. (CP 1-9) The superior court later entered an order adjudicating public use and necessity. (CP 10-12)

² Three different court reporters transcribed the two-day trial. "RP I" refers to the Report of Proceedings for November 14, 2011 (contained in two transcripts with consecutively numbered pages). "RP II" refers to the Report of Proceedings for November 15, 2011.

The County's land use expert, Jack Molver, and wetlands biologist, Scott Swarts, testified regarding the nature of the Kohler property and its development potential. (CP 68; RP I 65-135) Although the property was zoned multiple residential, the nature of the property made development extremely difficult. Prior attempts to obtain permits for subdivision were not successful because 75% percent of the property is wetlands (CP 68; RP I 77:3-15 and 78:9-19) The property also contains a stream that feeds into a larger, salmon bearing stream, which further complicates development. (RP I 107:23 – 108:21)

The presence of regulated wetlands and required buffer areas severely limits the buildable area of the property. Mr. Swarts testified that the Kohler property contained borderline Category II/Category III wetlands. (CP 68; RP I 121:17 to 123:9) He prepared two site constraint maps—Exhibit 5 for Category II wetlands and Exhibit 6 for Category III wetlands—which illustrate a minimum 70-foot protective buffer is required around the wetlands. (Exs. 5 and 6; RP I 123:10 to 125:14) In addition, there is a 15-foot building set back from the edge of the buffer. (RP I 85:19-22) After accounting for wetlands, buffers and setbacks, the buildable area of the Kohler property is 5,000 square feet or less. (Exs. 5 and 6; RP I 85:23 to 86:13 and 87:4-13).

Based on the small buildable area, Mr. Molver opined that the most probable use of the property—both before and after the taking—is as a single family lot. (CP 68; RP I 87:15 to 88:8) Even if there were more buildable area to construct multifamily units, the cost of required road frontage improvements would be over \$300,000. (Ex. 8; RP 95:24 to 96:22 and 99:1 to 10)

The County's appraisal expert, Keith Dang, has 22 years experience and completed over 2,500 appraisals. (CP 68; RP I 138:12-23) He testified about the poor market conditions that existed in March of 2009 in southwest Snohomish County. Unemployment had doubled from the previous year. No multifamily units had been built in the prior three or four years. Construction loans were "basically nonexistent." March of 2009 was a "horrible" time for the real estate market in the area. (RP I 140:13 to 142:15) He considered the presence of wetlands and buffers that reduced the buildable area of the property to less than 5,000 square feet. (RP I 148:2-20)

Mr. Dang testified that the highest and best use of the property before the County's acquisition was to hold for future development or construct a single family residence in the southwest corner of the property. (CP 68-69; RP I 147:19 to 148:1) The property has the same highest and

best use after the County's acquisition, but the residence would be located in the middle of the property. (CP 69; RP I 149:19 to 150:6)

Ms. Kohler argues that Mr. Dang presented insufficient evidence of the value of holding the property for future development. (Appellant's Brief at 11) In testimony uncited by Ms. Kohler, however, Mr. Dang clarified that holding for future development is limited to building a house.

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.

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) He disagreed that multifamily residential would be a permissible use. "[T]he subject has a 5,000 square foot area . . . that is outside of the wetlands and buffers that can support the development of only one single family house." (RP I 172:10-24)

Mr. Dang used the sales comparison approach. He considered 20 or 30 actual property sales as potential comparisons and narrowed that to the five most comparable sales. (RP I 153:8 to 154:16) The five comparable sales showed a range of value of \$61,944 to \$265,000 per lot. He identified two sales as the most comparable to the Kohler property before the County's acquisition: one for \$110,000 per lot and the other for \$117,500 per lot. (CP 69; Ex. 15; RP I 156:3 to 159:12) He used the

same five comparable sales to determine the value of the Kohler property after the County's acquisition. (RP I 159:13-15)

Mr. Dang testified that this valuation applies both types of highest and best use: (a) hold for future development, or (b) sell for a single family residence.

Q: Why would one hold it for future development of a single family lot when they could sell it for a single family lot, according to you for \$110,000?

A: It's [] an option they have. Because it's -- number one -- it's not feasible to build a house in that area right now. You can [] buy existing houses for much less than you can build a new house for. That's the problem with building a house at that location at that time.

(RP I 169:7-15)

Mr. Dang's opinion on value was substantiated by these comparable sales, the limitations on development and the market conditions in March of 2009. He testified that the Kohler property was worth \$110,000 before the County's acquisition and \$62,000 after the acquisition. (CP 69; RP I 161:5-20) The \$48,000 difference in value represented the just compensation for the County's acquisition. (RP I 161:22 to 162:2).

Ms. Kohler did not offer any expert appraisal testimony to counter Mr. Dang. She did not call a land use expert to counter Mr. Molver. She presented two witnesses: herself and wetlands biologist Larry Burnstad.

Mr. Burnstad was not aware of the prior unsuccessful attempts to develop the Kohler property. (RP II 48:20 to 49:4) He testified that the property contained Category III wetlands. (RP II 29:19-22; Ex. 6) He opined that the 5,000 square foot buildable area could be expanded through mitigation, but agreed that mitigation on site is not viable. (RP II 32:19-22) He did not estimate the cost of off-site mitigation. In contrast, Mr. Swarts estimated that off-site mitigation would cost \$134,000 exclusive of the cost of the land or easement acquisition. (RP I 129:13 to 130:21; Ex. 12) Mr. Swarts's advice to any developer considering a multifamily unit on the Kohler property: "Well, I don't like to say this, but I'd say just run. I mean, do not buy it. . . . It's too problematic to develop." (RP I 131:19 to 132:6)

Ms. Kohler acknowledged prior attempts to develop her property failed because of the presence of wetlands. (CP 69; RP II 97:6-14) She had not received an offer on her property for four or five years. (CP 69; RP II 100:19 to 101:1). She agreed with Mr. Dang that the real estate market was down in March of 2009. (RP II 81:2-7 and 100:8-19) She further agreed with Mr. Dang that her property was worth \$62,000 after the County's acquisition. (CP 69; RP II 83:6-14 and 101:2-19)

Ms. Kohler has no training, license or expertise in real estate or appraisal. (CP 69; RP II 99:22 to 100:5) She gave her personal opinion

that the value of the property before the County's acquisition was \$700,000. (RP II 82:14-20). Ms. Kohler did not substantiate her lay opinion. She did not identify any comparable sales. Instead, she referred to prior offers to purchase her property, which were contingent on the ability to develop the property, and never consummated. (RP II 81:8 to 82:13 and 97:6-14). She testified that in March of 2009 (the date of value) it "[p]robably would have been hard to find a willing buyer at any price." (CP 69; RP II 105:10-16)

At the conclusion of a two day bench trial, Judge Ellen Fair entered Findings of Fact and Conclusions of Law. (CP 67-70). Ms. Kohler's appeal is limited to the court's finding of fact that the property was worth \$110,00 prior to the taking, and \$62,000 after the taking. (CP 69) Ms. Kohler did not challenge any other finding of fact or any conclusion of law.

IV. ARGUMENT

The trial court should be affirmed because substantial evidence supports the contested finding of fact. "When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact []." *Hegwine v. Longview Fibre Co.*, 132 Wn.2d 546, 555, 132 P.3d 789 (2006); See also

McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). “Substantial evidence” means “the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.” *McCleary*, 173 Wn.2d at 514. Even if there is conflicting evidence, the appellate court will not “disturb findings of fact supported by substantial evidence.” *Id.* (quoting *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010)). Unchallenged findings of fact are verities on appeal. *Id.* (citing *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004)).

The Court of Appeals recently applied these legal principles to an eminent domain case. *City of Puyallup v. Hogan*, 168 Wn. App. 406, 277 P.3d 49 (2012). In that case, a city condemned a portion of a shopping center owned by Hogan. The anchor tenant (Borders) sued Hogan for apportionment of the condemnation award pursuant to the parties’ commercial lease. At a bench trial, the parties presented conflicting expert testimony on whether Borders or Hogan would bear the \$2,200,000 retreating cost. *Id.* at 419-20. The trial court found that Borders would bear the cost and Hogan challenged that finding on the appeal. The Court of Appeals affirmed. “Substantial evidence supports the findings of fact. Even though Hogan presented conflicting expert testimony, we defer to

the fact finder and will not disturb a trial court's ruling if it is supported by substantial evidence." *Id.* at 420.

Similarly, substantial evidence supports the trial court's finding that the Kohler property was worth \$110,000 before the taking and \$62,000 after the taking. The County presented expert testimony that it was not legally permissible or financially feasible to develop multifamily units on the property. This testimony was bolstered by photographs, site constraint maps and estimated development costs. Only the County presented expert appraisal testimony. The appraiser presented detailed comparable sales data to support his opinion of the before and after value.

The trial court's unchallenged factual findings must be accepted as verities on appeal. *McCleary v. State*, 173 Wn.2d at 514. These verities provide further support for the lone contested factual finding. Among the unchallenged findings:

- While the property is zoned multiple residential, the nature of the property would make development extremely difficult.
- The property contains 75% wetland areas.
- There is little opportunity for onsite mitigation.
- Attempts to permit the property for subdivision dating back to 1991 were not successful.
- The most probable use of the property both before and after the taking is a single family residence.

(CP 67-69)

Even where the evidence is contested, the appellate court will defer to the trial court's factual finding if supported by substantial evidence. *City of Puyallup*, 168 Wn.2d at 420; *accord, e.g., McCleary v. State*, 173 Wn.2d at 514. At best for Ms. Kohler, she presented some contradictory evidence that the property was worth \$700,000 before the acquisition. Although a property owner may give her opinion as to value, the owner's knowledge "will affect the weight to afforded his opinion." *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 211, 898 P.2d 275 (1995); see also WPI 150.15³ ("In determining the weight to be given to [the Owner's] opinion, you should consider the facts and reasons upon which the Owner's knowledge of, and experience with, the subject.")

The trial court found that Ms. Kohler agreed that the property was worth \$62,000 after the County's acquisition. The Court noted Ms. Kohler's lack of real estate or appraisal expertise, and her testimony that it probably would have been difficult to find a willing buyer at any price in March of 2009. (CP 69) Given the weakness of Ms. Kohler's own testimony and the substantial evidence supporting Mr. Dang's opinion of value, the trial court did not find Ms. Kohler's \$700,000 value estimate to

³ The trial court acted as the finder of fact regarding property value. Thus, Washington Pattern Instruction 150.15 applies to what weight the judge should give to Ms. Kohler's lay opinion testimony.

be persuasive. (CP 69). This Court should defer to the trial court's factual finding, which has overwhelming evidentiary support.

**V. MOTION IN BRIEF FOR SANCTIONS
FOR FRIVOLOUS APPEAL**

Respondent respectfully requests that Appellant and/or her counsel be sanctioned pursuant to RAP 18.1 and RAP 18.9(a). This appeal is frivolous. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal." *State ex rel. Quick-Ruben v. Verhaven*, 136 Wn.2d 888, 905, 969 P.2d 64 (1988).

Although Ms. Kohler may disagree with the trial court's findings on value, there is no debate that substantial evidence supported the finding. Only the County presented expert testimony of an appraiser and land use planner. The court's finding on value is further supported by all of the uncontested factual findings including the depressed state of the real estate market, that regulated wetlands severely limited the property's development potential and the history of failed development attempts. Ms. Kohler herself agreed with the finding that \$62,000 is fair value before the County's acquisition. Ms. Kohler further admitted that it would be difficult to find a willing buyer at \$700,000 or at any price in March of

2009. Reasonable minds could not possibly conclude that the trial court's factual finding lacked substantial evidentiary support.

DATED THIS 29th day of October, 2012.

Respectfully submitted,

HENDRICKS – BENNETT, PLLC

By: 
Joseph P. Bennett, WSBA # 20893
Special Deputy Prosecuting Attorney for
Respondent Snohomish County
402 Fifth Avenue South
Edmonds, WA 98020
T: (425) 775-2751

CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date a true and correct copy of this Supplemental Designation of Exhibits to be delivered via ABC Legal Messenger for delivery on October 29, 2012, to Respondent's counsel at the below address:

Douglas W. Purcell
Purcell and Adams
7127 – 196th St SW, Suite 201
Lynnwood, WA 98036

DATED: October 29, 2012, at Edmonds, Washington.



Joseph P. Bennett

WPI 150.15

WITNESSES—OPINIONS—JUST COMPENSATION

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

[In this case, the Owner has also been allowed to express an opinion as to the value of the property in question. Again, you are not required to accept this opinion. In determining the weight to be given to this opinion, you should consider the facts and reasons upon which the opinion is based and the Owner's knowledge of, and experience with, the subject. You should also consider the general rules for determining the credibility of witnesses, contained elsewhere in these instructions.]

NOTE ON USE

Give this instruction in every condemnation case. The instruction may be incorporated into WPI 1.02, which contains the general rules for evaluating the credibility of witnesses. See WPI 1.02, Conclusion of Trial—Introductory Instruction, in Volume 6, Washington Practice, Pattern Jury Instructions: Civil (5th ed.).

Use this instruction, which is tailored specifically to condemnation cases, as a substitute for WPI 2.10, Expert Testimony in Volume 6, Washington Practice, Pattern Jury Instructions: Civil (5th ed.).

Use the bracketed material if the owner also testifies on the issue of value.

D

alue of the
_] will be
r and lawful

ch inferences
facility would

Pacific North-
. 655 (1957).