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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 FEB 27 AM 11:38



No. 67859-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR DIVISION I

NICHOLAS R. PADVORAC,

Appellant

v.

SAN JUAN COUNTY,

Respondent

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The Arbitrator, Judge Lukens, Erred by Entering a Final Arbitration Award.

1. Did San Juan County and Padvorac having a meeting of the minds at the mediation?
2. Did the CR2A Settlement Agreement Reflect the Accords of the parties?
3. Is the Settlement Agreement void?
4. If the Settlement Agreement is void, did Judge Lukens have the authority to arbitrate?
5. Should Judge Lukens have directed the parties to court to try the condemnation case?

B. The Superior Court Judge Erred by Granting the County's Motion for Summary Judgment.

1. Should the court have granted the county's motion for summary judgment and confirmed the arbitration award when there was an issue of fact as to whether there was a meeting of the minds at the mediation?
2. Should the court have granted Padvorac's 12b(6) Motion?

C. The Superior Court Erred by Confirming the Award.

1. Was it appropriate for the Superior Court to confirm the arbitrator's award?

II. STATEMENT OF THE CASE

A. San Juan County Road Improvement Project

Nicholas R. Padvorac, a widower and elderly resident of Concord New Hampshire, owns a parcel of land on Lopez Island. His family has owned the land since 1949. It is an undeveloped ten acre square corner lot burdened by a county road running on two of its four sides. CP 33,66,72,74.

In 2007, the San Juan County Public Works Department made plans to improve Fishermans Bay County Road on Lopez Island. This required an increase in Right-of-Way on adjacent properties, including Mr. Padvorac's, and also required mitigation for portions of the project scheduled to be completed in jurisdictional wetlands. The County eyed Mr. Padvorac's property as a parcel suited for the wetland mitigation. CP 60, 61

San Juan County demanded, under threat of condemnation, that Nicholas R. Padvorac grant a Right-of-Way easement and a Wetlands Mitigation Easement over a substantial portion of his Lopez Island property. Mr. Padvorac refused to sign the Wetlands Mitigation Easement. CP 61.

B. Possession and Use Agreement 2008

On May 6, 2008, Mr. Padvorac relented and did sign a “Possession and Use Agreement” which allowed San Juan County to commence and complete construction of the County road project and wetland mitigation project on Defendant’s land in return for a payment of \$78,960. CP 51-59 On October 2, 2008, the US Army Corps of Engineers (“USACE”) issued a permit for construction in a wetland and the county began moving forward with its project. CP 88.

C. Petition for Condemnation 2008 for Wetland Mitigation Area

Despite the fact that the county project could move ahead after the signing of the Possession and Use Agreement, the County sought additional property rights from Padvorac. San Juan County filed a Petition for Condemnation lawsuit on November 18, 2008 under San Juan County Superior Court Cause No. 08-2-05219-3, seeking condemnation of 1.39 acres of the Padvorac property, in order to construct a wetland mitigation project on his land to satisfy USACE conditions of approval. CP 60-65. Despite the fact that no further rights have been ever granted by Mr. Padvorac, that project was completed in 2009. CP 76.

While the county constructed the wetland mitigation project on the Padvorac land, it continued to request that Padvorac sign the wetland mitigation easement. County principals recognized that Padvorac was deeply troubled by its request to take further property rights from him. On November 16, 2009, Deputy Prosecuting Attorney Karen Vedder wrote to Mr. Padvorac's then lawyer, suggesting a broader settlement approach: i.e. to suggest the county purchase five of the ten acres of the Padvorac property. CP 107 – 108.

Padvorac agreed to the concept and the parties thereafter agreed to mediation to come up with a reasonable price for the property purchase. The court set a trial date for the condemnation lawsuit and ordered mediation on that issue. CP 64-65.

D. Padvorac and San Juan County Mediation on Land Purchase

Mr. Nicholas Padvorac entered into mediation in good faith in the fall of 2009 to negotiate a fair price for the purchase of five acres of his land. CP 108 Judge Terry Lukens was the agreed upon mediator. A two page *CR2A Settlement Agreement* ("Settlement Agreement") was signed by the parties on November 23, 2009. CP 8 – 9 *"The entire agreement was drafted and signed*

in less than one hour.” Karen Vedder. CP 108 Under the Agreement, San Juan County agreed to purchase five acres of land from Padvorac for \$270,000.

The Settlement Agreement did state the following under paragraph 6:

Any issues that cannot be resolved will be submitted to Judge Terry Lukens for resolution, first by mediation, then, failing agreement, by arbitration. An arbitration by Judge Lukens shall be final and binding on both parties.

A Stipulation and Order of Dismissal of the Condemnation Case was signed by counsel for both Padvorac and the County. San Juan County's Petition for Condemnation under Cause No. 08-2-05219-3 was dismissed with prejudice on December 17, 2009. CP 68-69

E. San Juan County Seeks to Deduct Possession and Use Monies

On December 29, 2009, twelve days after the Condemnation Action was settled, finalized and dismissed, San Juan County, for the first time, in writing, took the position that the \$78,960 payment made pursuant to the May 2008 *Possession and Use Agreement* should be deducted from the \$270,000 agreed price for the purchase of the land - something Mr. Padvorac never agreed to.

CP 109,144,153. While Deputy Prosecuting Attorney Karen Vedder may have alluded to such in pre-mediation email correspondence with previous counsel for Padvorac (CP138), no such term was placed or inserted in the settlement agreement. There is no indication that a possible deduction of any sort was ever a topic at the mediation. Mr. Padvorac declared under penalty of perjury that the issue of whether the county could or would deduct the money paid to him in 2008 from the \$270,000 was never discussed. CP 153. He further states that if he had known San Juan County wanted to deduct the \$78,960 from the \$270,000, he would have never signed the agreement. CP153.

F. Judge Lukens Asked by San Juan County to Arbitrate

Since Mr. Padvorac refused to sell the county five acres for anything less than \$270,000, the county submitted the matter to Judge Lukens to arbitrate the new dispute (whether the County owed Padvorac \$270,000 or \$191,040) on August 11, 2010. Judge Lukens issued a "Final Award" on September 10, 2010, concluding that the county could deduct the \$78,960 given to Padvorac under the 2008 Possession and Use Agreement from the \$270,000 purchase price for the five acres. CP 11-14.

G. “Verified Complaint for Specific Performance”
Superior Court Cause No. 11-2-05068-0

Nicholas Padvorac still refused to sell San Juan County his land for less than the agreed upon purchase price of \$270,000. On March 14, 2011, San Juan County filed a “Verified Complaint for Specific Performance”, requesting that the court order Padvorac to sign the escrow documents to sell the five acres for \$191,040.

CP 1-9. The County did not ask the court to confirm the Arbitration Award in the complaint. The County later requested that the court confirm the Arbitration Award by and through a Motion for Summary Judgment filed on July 22, 2011. CP 30-31. Padvorac filed a CR12b(6) Motion to Dismiss, on the grounds that 1) Judge Lukens had no jurisdiction to arbitrate the dispute and 2) the county should have appealed the final order in the Condemnation Case. CP 94-101.

On October 11, 2011, Judge Donald E. Eaton signed an Order Granting the county’s Motion for Summary Judgment, denying Padvorac’s 12b(6) motion, confirming the arbitration award, and ordering that Mr. Padvorac sign the closing papers to sell his land to San Juan County for the net sum of \$191,040.00.

CP 158 - 159 On November 4, 2011, the court stayed the decision pending appeal. CP 160 – 161.

III. STANDARD OF REVIEW

The arbitration award was issued on September 10, 2010. Mr. Padvorac did not move to vacate the award within ninety days as required by RCW 7.04A.230(2) nor did he move to modify or correct the award under RCW 7.04A.240, as he was without counsel during that time, and not living in Washington state. CP 149. San Juan County did not ask the court to confirm the arbitration award until July 22, 2011, nearly two years after award was handed down. CP 30-31.

The San Juan County Superior Court did not have the authority to vacate, modify or correct the award, since ninety days had lapsed from the date of the award. The Superior Court Judge had no other choice but to confirm or deny the award.

The superior court may only confirm, vacate, modify, or correct an arbitration award according to the statutory bases. *Luvaas Family Farms v. Ferrell Family Farms*, 106 Wash. App. 399, 404, 23 P.3d 1111, 1114 (2001)

After a party to the arbitration proceeding receives notice of an award, the party may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230. RCW 7.04A.220

Judge Eaton of San Juan County Superior Court confirmed the arbitration award pursuant to the County's request in its summary judgment motion on October 11, 2011. Mr. Padvorac has properly appealed the order confirming the award to the Court of Appeals pursuant to his rights under RCW 7.04A.280(c):

- (1) An appeal may be taken from:
 - (a) An order denying a motion to compel arbitration;
 - (b) An order granting a motion to stay arbitration;
 - (c) An order confirming or denying confirmation of an award;**
 - (d) An order modifying or correcting an award;
 - (e) An order vacating an award without directing a rehearing; or
 - (f) A final judgment entered under this chapter.

The Court of Appeals review is confined to the same scope as the trial court. *Kenneth W. Brooks Trust v. Pac. Media LLC*, 111 Wash. App. 393, 397, 44 P.3d 938, 940 (2002).

IV. ARGUMENT

A. The Settlement Agreement Speaks for Itself

Paragraph 3 of the CR2A Settlement Agreement reads as follows:

3. *San Juan County will pay Padvorac \$270,000 for the parcel created following the guidelines set out in paragraph 2. The County is responsible for all costs to subdivide and close the transaction, including real estate excise tax, if any, except the County shall not be responsible for Padvorac's attorney's fees."* CP 8.

Nowhere in this 2009 agreement, which is just over one page in substance, is there a statement or even a reference to deducting any monies paid to Padvorac under the County's previous May 2008 *Possession and Use Agreement*. The Court of Appeals has the authority to review the award and vacate it if it is found to be in error:

In light of the limited statutory authority granted to a court reviewing an arbitration award, the court considers only the face of the award.... A reviewing court does not consider the merits of the case or the evidence presented to the arbitrator. Unless an error appears on the face of the award, it will not be vacated or modified. *Hanson v. Shim*, 87 Wash. App. 538, 546, 943 P.2d 322, 326 (1997)

It was error to issue an Arbitration Award, which materially changed the substantive terms of the CR2A Settlement Agreement.

B. There was No Meeting of the Minds in the Settlement Agreement

Under the terms of the CR2A Settlement Agreement, Padvorac agreed to sell and the county agreed to buy five acres of his land for \$270,000. The agreement says nothing whatsoever about a deduction. For the county to try to insert such intent after-the-fact is disingenuous and patently unfair in a condemnation action. If the county intended to deduct the \$78,960, why didn't the agreement say so? Padvorac clearly did not agree to that. There was no meeting of the minds, and therefore no contract. The settlement agreement is null and void.

For a contract to exist, there must be a mutual intention or "meeting of the minds" on the essential terms of the agreement. *McEachern v. Sherwood & Roberts, Inc.*, 36 Wash.App. 576, 579, 675 P.2d 1266 (1984). The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention. *Cahn v. Foster & Marshall, Inc.*, 33 Wash.App. 838, 840, 658 P.2d 42 (1983). *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wash. App. 846, 851, 22 P.3d 804, 807 (2001)

In the present case, the price of the land to be sold was an essential term of the agreement. The burden is on the county to show that there was a mutual intention at the mediation, which manifested itself in the CR2A settlement agreement, to purchase

the land for \$191,040. The county cannot do this. There is no settlement agreement. It is void.

C. Because the Underlying Settlement Agreement is Null and Void, Judge Lukens was without Authority to Arbitrate.

RCW 7.04A.060 gives the Court of Appeals the authority to issue a determination that there was no authority to arbitrate:

- (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.
- (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. RCW 7.04A.060

Case law supports the proposition that an appellant can challenge the jurisdiction of the arbitrator:

On appeal, appellants may challenge the jurisdiction of the trial court to entertain the arbitration proceedings for lack of a binding arbitration agreement or because the disputes are not arbitrable under the agreement.

Teufel Const. Co. v. Am. Arbitration Ass'n, 3 Wash. App. 24, 27, 472 P.2d 572, 574 (1970)

San Juan County and Mr. Padvorac entered into a settlement agreement which is not enforceable because there was no meeting of the minds. Therefore, the clause requiring arbitration if the parties were unable to resolve "issues" on their own is also

unenforceable. It would be patently unfair to enforce an agreement which was never agreed to by the parties.

D. Judge Lukens had no Jurisdiction to Change the Substantive Terms of the Settlement Agreement.

The authority to arbitrate came from the CR2A Settlement Agreement. The subject paragraph reads as follows:

6. The parties shall attempt, in good faith, to resolve any issue that arise in implementing this Agreement. Any issues that cannot be resolved will be submitted to Judge Terry Lukens, first by mediation and the, failing agreement, by arbitration. An arbitration decision by Judge Lukens shall be final and binding on both parties. CP 8.

It was error for Judge Lukens to change a material terms of the Settlement Agreement. He had no authority to do so.

Paragraph 6 speaks to resolution of issues of implementation and does not grant authority to change such a material term.

It is San Juan County who had the burden, back in 2009, to apply to the court under RCW 7.04A.240 for a modification of the settlement agreement. The CR2A Settlement Agreement was signed November 23, 2009 and the Condemnation Case was presented for dismissal by County Attorney Karen Vedder on December 17, 2009. But the county did not request such relief

from the court under the Condemnation Case, but instead turned the matter over to Judge Lukens. With all due respect to Judge Lukens, he should have recognized that there was no meeting of the minds on the original settlement stemming from the condemnation case. The proper remedy would have been to declare the agreement null and void and send the parties back to court to litigate the fair market value of the land under the condemnation case and the provisions of RCW 8.08. Lukens had no jurisdiction to issue an arbitration award materially changing the terms of the settlement agreement.

E. The Terms of the Settlement Agreement Are Not Amiguous.

If the county believed it would be paying Padvorac \$191,040 for the land, then the settlement agreement and the Stipulation and Order of Dismissal in the Condemnation Case should have reflected that. Because it did not, the substantive terms of the settlement agreement in the condemnation case should have been affirmed. If the county principals truly believed the agreement was to pay Padvorac \$191,040, then why didn't the settlement agreement reflect this? If this issue had been brought up prior to December 17, 2009, the date the condemnation case was dismissed, there

would have been no dismissal. Why? Because clearly there was no meeting of the minds and therefore could have been no original settlement. Judge Lukens had no jurisdiction to issue a decision effectively reducing the agreed price for the property.

The County's 2008 Petition for Condemnation had been dismissed nearly a year before Judge Lukens issued an arbitration award. The arbitrator was without jurisdiction to change the terms of the settlement agreement. The settlement agreement speaks for itself. It says what it says – and that is absolutely nothing about deducting any previous funds given to Padvorac from the purchase price.

Here is a sophomoric example of why the outcome is wrong. Let's say John Smith has worked on Pete Draxler's car and charges him \$500. Draxler pays. Then a year later Smith offers to buy Draxler's car for \$3000 and Draxler accepts. Smith must pay Draxler \$3000 – not \$2500. Now what happens if Smith and Draxler are in court over the sale of the car? They come to an agreement where Draxler will sell for \$3000 and the court dismisses the case *"based on the written stipulation of the parties"*. Can Smith simply pay Draxler \$2500 because he worked on the car the previous year? Of course not.

San Juan County received a benefit in 2008 for the \$78,960 – the right to enter Padvorac’s property, and create a wetland mitigation area to satisfy the USACE mitigation requirements for expanding the county road, and the right to maintain the area in perpetuity. But San Juan County wanted more, for reasons still unknown. The County wanted to own five acres of Padvorac’s land. The negotiations resulted in an agreement to pay Padvorac \$270,000, not a penny less. The condemnation case was dismissed.

When a court dismisses a case, the case is over. Judge Andrews dismissed the Condemnation Case “based on the stipulation of the parties”. The parties stipulated to a purchase price of \$270,000. The case is over. The county must pay Padvorac \$270,000.

F. The County Has No Need for Ownership of the Land.

Mr. Padvorac’s principles will not allow him to let the county take his land for less than a fair market price. Under the Petition for Condemnation, the county claimed a need to use a portion of Padvorac’s land for the Fisherman Bay Road Project. The County has what it needs. It does not need to own Mr. Padvorac’s land –

not for \$270,000 or any price. The Army Corps of Engineers has approved the Wetland Mitigation Easement that Mr. Padvorac has submitted. CP 87-88. The wetland project is complete. The County should save its money, and leave him alone.

G. The Superior Court Judge Erred by Granting the County's Motion for Summary Judgment and by Not Granting Padvorac's Motion to Dismiss under CR12b(6).

On July 22, 2011, San Juan County, under the second new case in this matter, brought a motion for summary judgment, asking the court to a) confirm the arbitration award and b) order Mr. Padvorac to complete the sale. While the court did not have the right to entertain a motion to vacate or modify the award, the court did have the authority to confirm the award. The court could also have refused to confirm the award and dismiss the case, on the grounds that the arbitrator was without authority to arbitrate.

In its motion for summary judgment, the county argued that there was no material issue of fact. This was wrong. Mr. Padvorac's Declaration makes it abundantly clear that there was no meeting of the minds at the settlement conference, with

regard to the amount to be paid for the five acres. This is a very material issue of fact. The summary judgment motion should have been denied. At the very least, the court should have held a fact finding hearing on the issue of whether the CR2A settlement agreement was valid or void.

Nicholas Padvorac also brought a motion to dismiss under CR 12b(6) before the Superior Court, which was heard simultaneously with the county's motion for summary judgment. CP 94-101 and CP 46 et seq. In this motion, Padvorac sought to have the county's case dismissed for failure to state a claim upon which relief could be granted, citing the fact that since there was no valid CR2A Settlement Agreement, there could be no authority to arbitrate. The court erred by not granting Padvorac's motion and dismissing the Complaint for Specific Performance.

H. The Superior Court Erred by Confirming the Award.

Because the CR2A settlement agreement was void, there was no authority granting arbitration. Without authority to arbitrate, Judge Lukens could make no award. If the Superior Court has the authority to confirm an award, it also has the

authority to deny the award. The court should have vacated the award and directed the county to proceed under RCW 8.08 in a new condemnation action. If the county truly needs ownership of Mr. Padvorac's land for their wetland mitigation area, they should be required to prove that need, and a jury should decide the compensation to be awarded to the land owner.

Throughout this ordeal, ever since he first learned about the county's position that he should not receive the full \$270,000, Mr. Padvorac has refused to sell his land. Instead, he offered to grant a new wetland mitigation easement, and in fact signed a new wetland mitigation easement, which was submitted to the county in early June 2011. CP 46-48, and see Exhibit G CP74-86.

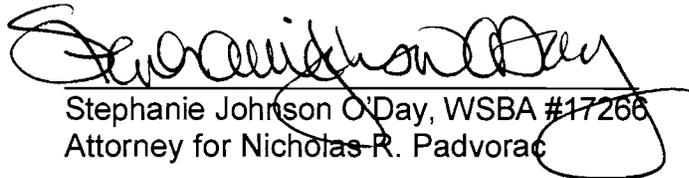
San Juan County had two reasonable choices: pay Nicholas Padvorac the price agreed upon at the mediation of \$270,000 for his land, or accept the Wetlands Mitigation Easement covering the wetland enhancement improvements made by the county. One also might logically wonder why the county needed any further property rights at all, when the "Possession and Use Agreement", signed back in May 2008, grants the county rights of access, construction and maintenance.

V. CONCLUSION

Nicholas R. Padvorac now respectfully requests that this Court overturn the arbitration award, dismiss the county's lawsuit for failing to state a claim upon which relief can be granted, and require San Juan County to pay Padvorac \$270,000 if it wishes to buy his land.

DATED this 23rd day of February, 2012.

LAW OFFICES OF
STEPHANIE JOHNSON O'DAY, PLLC


Stephanie Johnson O'Day, WSBA #17266
Attorney for Nicholas R. Padvorac

FISHERMAN BAY CO. ROAD NO. 103

FISHERMAN BAY CO. ROAD NO. 103

RIGHT OF WAY RESOLUTION PER A.F.N. 2008-0423007

RIGHT OF WAY RESOLUTION PER A.F.N. 2008-0423007

PROPOSED FINAL RIGHT OF WAY EASEMENT

147 FEET FROM 71 FOOT CONTOUR
145 FEET FROM WETLAND

182 FOOT OFFSET FROM 71 FOOT CONTOUR
180 FEET FROM WETLAND

281423007
NICHOLAS PADVORAC

WETLAND MITIGATION AREA EASEMENT BOUNDARY

THIS IS A PRELIMINARY PLAN FOR THE PROPOSED EASEMENT. IT IS SUBJECT TO THE APPROVAL OF THE LOCAL GOVERNMENT AND THE STATE DEPARTMENT OF REVENUE.

5.0008 ACRES WITH ROAD

PADVORAC
5.4545 ACRES WITH ROAD

Not a road

FISHERMAN BAY CO. ROAD NO. 103

RIGHT OF WAY RESOLUTION PER A.F.N. 2008-0423007

30' EASEMENT INGRESS / EGRESS / UTILITIES FOR FELDT / NICHOLS RECORDED IN AFN 2005 0602021
243.7 428.9'

CR2A Settlement Agreement

San Juan County v. Nicholas R. Padvorac, San Juan County Cause No. 08-2-05219-3

San Juan County ("County") and Nicholas R. Padvorac ("Padvorac") enter into this Agreement in full settlement of the condemnation action filed by the County in San Juan County Superior Court (Cause No. 08-2-05219-3).

Terms of Agreement

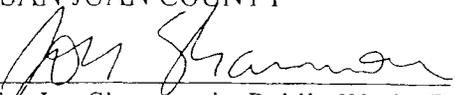
1. Under threat of condemnation, Padvorac agrees to sell and San Juan County agrees to buy a portion of tax parcel number 251423-007 ("Property") on Lopez Island, San Juan County.
2. The County shall survey the Property boundary and the parties will agree on a division of the parcel into two parcels as follows:
 - a. The parcel purchased by the County will be no more than 5 acres.
 - b. The parcel retained by Padvorac will be no less than 5 acres in size.
 - c. The triangular portion amounting to .31 acres located in the northwest corner of the Property, and referenced on page 28 of the Eldred appraisal dated October 20, 2009, shall be included in the parcel acquired by the County.
 - d. The boundary between the two parcels will be at least 180 feet from the edge of the mitigated wetland as designed by Rozewood Environmental Services and approved by the U. S. Army Corps of Engineers. The entire mitigated wetland and the adjacent 180-foot area shall be contained within the parcel acquired by the County.
3. San Juan County will pay Padvorac \$270,000 for the parcel created following the guidelines set out in paragraph 2. The County is responsible for all costs to subdivide and close the transaction, including real estate excise tax, if any, except the County shall not be responsible for Padvorac's attorney's fees.
4. The duties set out in the Agreement shall be completed within 90 days of the execution of this Agreement. The County shall provide Padvorac with a copy of the new boundary survey within 60 days of the execution of this Agreement or as agreed by the parties. The survey shall include features of the Property, including the mitigated wetlands, necessary to establish the 180-foot area; and existing driveway cuts.
5. This Agreement is binding on both parties and is made subject to the provisions of CR2.
6. The parties shall attempt, in good faith, to resolve any issues that arise in implementing this Agreement. Any issues that cannot be resolved will be submitted to Judge Terry Lukens for resolution, first by mediation and then, failing agreement, by arbitration. An arbitration decision by Judge Lukens shall be final and binding on both parties.

7. The Lawsuit shall be dismissed with prejudice and without costs and fees to any party.

Dated this 23rd day of November, 2009

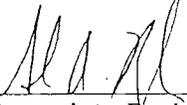


Nicholas R. Padvorac

SAN JUAN COUNTY


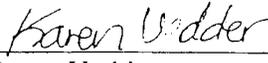
by Jon Shannon, its Public Works Director

GROEN STEPHENS & KLINGE LLP



Samuel A. Rodabough
Counsel for Nicholas R. Padvorac

SAN JUAN COUNTY PROSECUTING
ATTORNEY



Karen Vedder
Deputy Prosecuting Attorney

SEP 29 2011

JOAN P. WHITE
SAN JUAN COUNTY WASHINGTON

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY**

SAN JUAN COUNTY

Plaintiff,

vs.

NICHOLAS R. PADVORAC

Defendant.

Cause No. 11 2 05068 9

Declaration of Nicholas Padvorac

Nicholas R. Padvorac, being first duly sworn on oath, declares as follows:

At the Settlement Conference held before Judge Lukens on November 23, 2009, I agreed to sell San Juan County five acres of my land for \$270,000. The issue of whether the county could or would deduct the money paid to me in 2008 in consideration of the Possession and Use Agreement was never discussed. If I had known San Juan County wanted to deduct the \$78,960 from the \$270,000 I would never have signed the settlement agreement.

The County should either honor the agreement and buy my land for the agreed upon price of \$270,000, or accept the Wetland Mitigation Easement I have signed.

I swear under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29 day of September, 2011 at Concord, New Hampshire.

Nicholas R. Padvorac
Nicholas R. Padvorac

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SAN JUAN COUNTY
PROSECUTING ATTORNEY

IN ARBITRATION

SAN JUAN COUNTY,)	
)	No. 1160017669
Claimant,)	
)	FINAL AWARD
vs.)	
)	
NICHOLAS PADVORAC)	
)	
Respondent)	
_____)	

THIS MATTER came on for hearing on August 11, 2010. Both parties appeared by counsel and submitted memoranda, reply memoranda and declarations. Oral argument was provided to counsel. The Arbitrator kept the record open until August 20, 2010 for the submission of additional information regarding the property division and a responsive declaration from counsel for Respondent. Both parties timely provided supplemental information.

Discussion

Two issues are presented in this Arbitration:

1. Is the \$78,960 already paid to the Respondent part of the settlement amount of \$270,000 contained in the CR2A Settlement Agreement (the "Settlement Agreement")?
2. Does the Settlement Agreement include the right of way for the road on the north end of the property retained by the Respondent?

The parties and counsel are well aware of the facts in this case and they need not be repeated here except as may be necessary to explain the award of the Arbitrator.

Purchase Price

At the outset, counsel for Respondent objects to certain items contained in the Second Attorney Declaration [of Karen Vedder]. To the extent that the Second Declaration includes discussions with counsel for Respondent, the Respondent's objection is well taken. While documents speak for themselves, representations of statements and conversations with opposing counsel are not subject to cross examination and will only lead to depositions of counsel, which is not the intended result of either party. Accordingly, the Arbitrator will not consider any post-settlement discussions by either counsel. Any pre- and post-closing documents do not suffer from the same infirmity and will be considered.

Paragraph 3 of the Settlement Agreement provides, in relevant parts:

San Juan County will pay Padvorac \$270,000 for the parcel created following the guidelines set out in Paragraph 2 [of the Settlement Agreement] ...

Paragraph 2 of the Settlement Agreement sets out the parameters of the parcel to be purchased by the County and the parcel to be retained by Respondent. The parcel purchased by the County includes the mitigated wetland area. No mention is made of the right of way on the parcel retained by Respondent.

The answer to the first question presented must, of necessity, include a discussion of the Possession and Use Agreement between the parties. In that Agreement the County paid \$78,960 for both the construction of the wetland mitigation project on the property then owned by the Respondent as well as a right of way over the entire 10+ acre parcel for road right of way.

Ultimately, the County acquired the property that was subject to the wetland mitigation project, as provided in the Settlement Agreement. Respondent contends, however, that the \$270,000 payment must be in addition to the payment made under the Possession and Use Agreement. That would result in a duplicate payment to Respondent. He has already been paid for the wetland mitigation area – there is no factual or legal justification for a second payment for the same area.

Both pre- and post-mediation documents compel the same result. In a November 21, 2009 e-mail sent a few days before the mediation, counsel for the County set forth the parameters of the mediation: all numbers proposed would include the \$78,960 previously paid by the County. A numerical example was provided.

There was no objection to that e-mail nor does the Settlement Agreement indicate anything to the contrary.

On December 29, 2009, after the mediation, counsel for the County sent a confirming letter to counsel for Respondent, indicating a payment of \$191,040 to escrow, representing the amount contained in Paragraph 3 of the Settlement Agreement, less amounts previously paid under the Possession and Use Agreement. No objection to the conclusions in that letter was provided to the Arbitrator.

To the extent that the intention of the parties is unclear, under *Hearst* the circumstances surrounding the making of the contract and the subsequent acts and conduct of the parties may be considered. The lack of objection by Respondent to the pre-mediation e-mail and the post-mediation "wrap-up" letter is significant.

Respondent contends, however, that Paragraph 3 of the Settlement Agreement provides that the County "will" pay \$270,000 to Respondent, suggesting that it refers to an additional payment. That reference, however, doesn't answer the question of how the \$270,000 payment will be comprised – new money or a combination of past payments and new money.

The context of the Use and Possession Agreement and contemporaneous correspondence lead to the conclusion that the purchase price must include payments previously made for a portion of the property and property rights being acquired under the Settlement Agreement.

Road Right of Way

Respondent contends that the road right of way contained on his residual parcel was not part of the purchase under the Settlement Agreement and that he is entitled to additional compensation.

The Settlement Agreement was entered into in "full settlement of the condemnation action filed by the County...." The condemnation action included the right of way for the road on the whole 10+ acres but not that portion of the road that was part of the County prescriptive right claim.

Payment under the Use and Possession Agreement included the right of way on the entire parcel. No objection was raised to the December 29, 2009 letter where the issue of the deed for the easement was raised.

Moreover, the December 22, 2009 e-mail from counsel for the Respondent included a .pdf diagram of the proposed lot line adjustment. Interestingly, it shows the County portion as 5.0005 acres (with road) and the Respondent's portion as 5.454 acres (with road). This certainly suggests that there was awareness that Respondent's residual portion was encumbered with the already-constructed road, which was build on both right of way and property owned by prescription. Under *Hearst* all of this information is relevant to determining the intention of the parties.

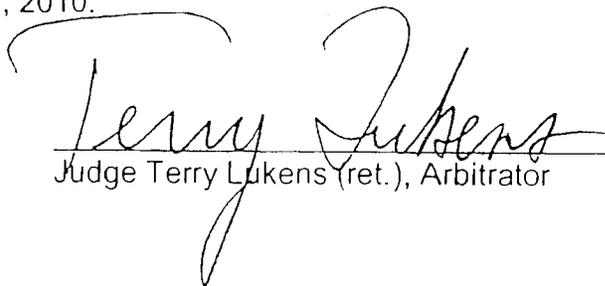
While, in hindsight, perhaps the parties might have been more specific on the right of way issue, it is inconceivable that the Settlement Agreement was reached with an understanding that more litigation could ensue over the right of way issue on Respondent's residual property.

Award

Based on the foregoing, the Arbitrator makes the following Award:

1. The County is obligated to pay an additional \$191,040.00 for the purchase of the lot and rights created under the Settlement Agreement.
2. No additional payment is due to the Respondent for the right of way easement on the real property retained by the Respondent.

DATED this 10 day of September, 2010.



Judge Terry Lukens (ret.), Arbitrator