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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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No. 68294-6-I

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

KAY KOHLER,

Appellant,

v.

SNOHOMISH COUNTY,

Respondent.

APPEAL BRIEF OF APPELLANT, KAY KOHLER

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

PURCELL & ADAMS, PLLC
Douglas W. Purcell, WSBA #5324
7127 - 196th Street SW, Ste. 201
Lynnwood, WA 98036
(425) 774-0444
Attorney for Appellant, Kay Kohler

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II. INTRODUCTION

This appeal is taken by the Appellant, Kay Kohler (“Ms. Kohler”) from a finding by the Superior Court of Snohomish County, establishing the value of real property in connection with the condemnation and partial taking of a portion of that property (the “Kohler Property”) resulting in an award of \$48,000 pursuant to testimony by the County appraiser. The appeal addresses the sufficiency of the appraiser’s testimony for purposes of reaching the value determined by the Superior Court by reason of the appraisers failure to appraise the Kohler Property at its highest and best use.

III. ASSIGNMENT OF ERROR

There was insufficient evidence in the record to support the trial court’s finding that the property was worth \$100,000 prior to the taking and \$62,000 after the taking.

IV. ISSUE RELATING TO THE ASSIGNMENT OF ERROR

Did the County’s appraiser utilize an improper standard in estimating the value of the subject property both before the taking and after the taking.

V. STATEMENT OF CASE

The Kohler Property is an approximately 5 acre parcel of

undeveloped land in a heavily populated residential area in South Snohomish County, part of the designated Urban Growth Area of Snohomish County and also of the City of Lynnwood in the event of future annexation. (VRP II – 100)

The Kohler Property has been in the Kohler family for three generations, Ms. Kohler's grandfather having originally settled the Kohler Property as a residence and small agricultural area including a small orchard and horse barns. (VRP III 69-73).

The Property was dry pasture land, for the most part, and to the extent that it had drainage, the drainage was to the north. (VRP II 9-12)

In the 1970's, the area around the Kohler Property began to be developed primarily as single family residences. By the 1980's, the Kohler Property was essentially surrounded by single family developments which had raised the grade such that the Kohler Property became the repository of much drainage from those developments. Over the course of the next several years, the Kohler Property developed substantial wet portions including a ditch which carried an intermittent stream and drained to the south, eventually flowing into Lund's Gulch drainage area. (VRP II 9-12)

The Kohler Property is zoned such that in the absence of any

critical area restrictions, it would support multi-family development of 97 units.

In the Spring of 2008, Snohomish County commenced proceedings to condemn a portion of the Kohler Property for road improvements and a detention pond the area to be taken was approximately 20% of the property on the Western edge along with the principal access route, 52nd Avenue SW.

The County tendered \$400,000 to Appellant as just compensation for the property to be taken and a Possession and Use Agreement was entered into in March of 2009, effectively establishing the date of valuation.

The County subsequently withdrew its \$400,000 offer and the matter proceeded to trial in November of 2011, at which time the Court entered a Finding of Fact and Conclusions of Law valuing the taken property at \$48,000 and entered a Judgment against Appellant in the amount of \$356,000.

This appeal is from that Judgment.

A. Testimony at Trial.

At time of trial, the County presented the testimony of its appraiser relating to the value of the Property as a single family residence, both

before and after the take. The appraiser's determination was based on comparable closed sales across the region of larger parcels for sale, suitable only for a single family residences. (VRP I - 161)

The appraiser, upon cross examination, identified the "highest and best use" of the Property as being held for future development. His report went on to state that a current sale as a single family residence was an potential "alternate" use of the Kohler Property. The appraiser's report contained testimony regarding asking prices of properties which were available for sale (hence, being "held for future development") and no sales of developable property were occurring at that time as a result of the severe economic downturn which commenced in the latter part of 2008. Of those five parcels identified in the appraiser's report, most geographically close to the Kohler Property, the average asking price was approximately \$2,000,000 million dollars. Included in those properties was a 5.67 acre parcel which had a substantial impact of over two acres of wetlands and its asking price was \$2,700,000 (VRP I - 142) (VRP I - 168-169). None of those parcels were considered in determining the appraiser's value.

The County appraiser's report contained the following statement regarding highest and best use of the property:

“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 appraisal used only sales which fell into the “other potential use” in determining his value (VRP I – 167-168). His conclusions were that the property was worth \$110,000 prior to the take and \$62,000 after the take for “just compensation” of \$48,000.

Appellant called Larry Burnstad as an expert in matters relating to development and methods of mitigating impact from wetlands. He testified at length as to the nature of the wetlands on the Property and the potential availability of offsite mitigation of the impact of those wetlands. Mr. Burnstad testified that the wetlands on the Kohler Property were unproductive and isolated and did not provide any fish habitat and (VRP III – 28) that the wetlands had been part of the “Lund’s Gulch” stream resource for a very short period of time. Each of these components would suggest that, in balancing between the preservation of the wetlands and development, offsite mitigation would be a viable alternative (VRP III – 32-33) and finally Mr. Burnstad testified that offsite mitigation opportunities were available. (VRP III 90-91)

Ms. Kohler, as the property owner, testified that she was generally aware of properties in the area, had received offers on the Kohler Property in the past, was aware of the expense that would be associated with different components of construction and dealing with wetland mitigation and valued the Kohler Property in the amount of \$700,000 (VRP III 79, et seq.).

Ms. Kohler agreed that, once the construction of the County's detention pond was complete, the remaining portion of the Property would be useable only as a "reasonable use" single family residential lot and concurred with Mr. Dang's valuation thereof at \$62,000 putting her total damages at \$638,000. (VRP III – 78, et seq.)

VI. LEGAL ARGUMENT

In matters pertaining to eminent domain, the general rule is that where there is a partial taking, the condemnee is entitled to the difference in value between the property in its original condition and the remaining value of the property after the taking. *State v. Swarva*, 86 Wn.2d 29, 541 P.2d 982, 534 P.2d 598 (1975). Fair market value has been defined as the price which a "well informed buyer" would pay to a "well informed seller," where neither is obliged to enter into the transaction. *State v. Sherrill*, *supra* at 255. *Washington Practice, Volume 17, Section 9.2*,

Stoebuck. In determining the information which a “well informed buyer” and a “well informed seller” would have, courts have generally looked to the “highest and best use.” See, e.g., *Swarva*, supra and *Paul Bunyan Rifle and Sportsman's Club, Inc. v. Pierce County*, 132 Wn. App. 85, 130 P.3d 414 (2006). The concept of the highest and best use arises from the fact that if each party is aware of what the property can best be used for, they will take such into account in both fixing the sales price and determining what amount to pay as the purchase price. Appraisers are generally charged with, among other things, determining the highest and best use for the property for which the appraisal is being done and basing the appraisal on that use, see *Paul Bunyan v. Pierce County*, supra.

In the instant case, the County’s appraiser determined that the highest and best use of the Property would be to hold for future development. Such a determination would seem exceptionally appropriate in the context of both the high valuation of the other currently offered parcels mentioned by the appraiser averaging almost \$2,000,000, and the then current limited salability due to the severe economic circumstances which occurred in the later part of 2008. A “best use” of holding for future development has been specifically recognized by the State Supreme Court in *State v. Swarva*, 86 Wn.2d 29, 541 P.2d 982 (1975).

The County's appraiser, however, did not provide evidence as to the value of the Kohler Property being held for future development, but rather provided evidence only of its current sale as a residential property for one single family residence, a use identified in the appraisal report as an "other potential use", but not a highest and best use.

The testimony of Ms. Kohler's expert established that the Kohler Property had development potential. A "well informed buyer" and seller would be aware of that potential and would take such into account. The County appraiser did not address any of those factors, instead relying on the "other potential use" solely as a single family residential lot.

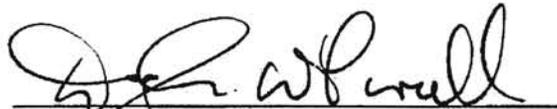
That failure constitutes a failure of the County appraisal evidence to establish a value for "highest and best use" under the appraisers own analysis of highest and best use and is therefore, insufficient to support the finding of fact as to value reached by the lower court.

VII. CONCLUSION

The County in presenting its condemnation case provided testimony of an appraiser as to the highest and best use of the Kohler Property. The appraiser then, ignoring his finding as the highest and best use, proceeded to appraise the Kohler Property on an entirely different basis.

As the record current sits, the only competent testimony pertaining to the value of the Kohler Property at its highest and best use is that of Ms. Kohler. The Court should reverse the lower court's determination of value and fix the value of the Property at \$638,000 or, alternatively, remand the case to the Trial Court for re-hearing on the issue of damages on the value of the Kohler Property.

RESPECTFULLY SUBMITTED this 28th day of September, 2012.

A handwritten signature in black ink, appearing to read "D. W. Purcell", written over a horizontal line.

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

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PURCELL & ADAMS, PLLC
7127 - 196th Street SW, Ste. 201
Lynnwood, WA 98036
(425)774-0444

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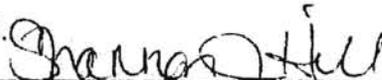
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)
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_____)

I hereby certify that on the 28th day of September, 2012, I caused the original of the foregoing Appellant's 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 September 28, 2012, to Respondent's counsel as follows:

Joseph P. Bennett
Matthew R. Hendricks
Hendricks –Bennett, PLLC
402 – 5th Avenue South
Edmonds, WA 98020
Email: joe@hendricksb.com
Email: matt@hendricksb.com

Dated this 28th day of September, 2012.


Shannon J. Hill, Paralegal to
Douglas W. Purcell, Attorney
For Appellant