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IN THE SUPREME COURT OF VIRGINIA

Record No. 180691

HELMICK FAMILY FARM, LLC

Appellant,

v.

COMMISSIONER OF HIGHWAYS,

Appellee.

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF VIRGINIA

Record No. 180691

HELMICK FAMILY FARM, LLC

Appellant,

v.

COMMISSIONER OF HIGHWAYS,

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BRIEF OF APPELLEE

This is an eminent domain case about speculation. Helmick Family Farm, LLC ("Helmick") asks this Court to overturn the Culpeper Circuit Court's evidentiary holding that it will not credit Helmick's appraisal based on speculation that the land at issue (which is currently zoned as agricultural) will possibly be rezoned as commercial or industrial at some point in the future. Helmick's arguments oversimplify the court's ruling and are without merit.

Helmick's experts and representative prepared their case on the theory that Helmick's property could be rezoned to a commercial use at an indefinite future date, and, in so doing, used a methodology that resulted in an opinion of just compensation that was *20.6 times*[1] greater than that of the Commissioner of Highways

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[1] The values of the Commercial, Light Industry (I) or Industrial (HI) sales used by

("Commissioner"). At trial, Helmick's counsel tried repeatedly to raise potential rezoning, which resulted in a mistrial. Because Helmick's counsel attempted to raise the issue of potential rezoning at the second trial despite the trial court's repeated rulings, the trial court granted the Commissioner of Highways' request for jury instructions that made the trial court's ruling on the topic clear. All these circuit court rulings were in keeping with Virginia law, and should be upheld by this Court.

STATEMENT OF THE CASE

Although the property at issue was agricultural, Helmick repeatedly sought to use an appraisal that was based on sales of other properties that were zoned commercial and industrial, which are valued much higher than agricultural property. (J.A. 37, 683-90, 223, 943:18-19, 981:15-21). Rather than adjusting those sales as the majority of jurisdictions require, Hemlock's methodology adjusted them downward only a small percentage, which resulted in a land values *20.6 times greater* than the land values of the Commissioner. The Commissioner's appraisal used comparable sales zoned agricultural from Culpeper County. (J.A. 244-46). Helmick also sought to offer testimony of an expert land use planner who opined (unsuccessfully) that there was a reasonable probability of rezoning. (J.A. 42).

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the owner are 20.6 times more than Agricultural (A-1) values. (The owner's appraiser's value of $130,000 per acre divided by the Commissioner's appraiser's value of $6,300 per acre equals 20.6.)

Melvin Helmick, an officer of Helmick Family Farms, LLC, testified as the property owner, but the trial court limited his testimony to keep him from using comparable sales in his testimony (because he was not an appraiser). (J.A. 412-15, 420-22). Helmick and his appraiser's comparable sales and the pages of the appraisal upon which those sales were based were excluded. The trial court held (J.A. 412-15, 828-31) that the appraisal was improperly prepared and that the facts in this case indicated that the alleged potential rezoning was too remote and speculative and barred by *City of Virginia Beach v. Oakes,* 263 Va. 510, 518, 561 S.E.2d 726, 730 (2002) and *Appalachian Elec. Power Co. v. Gorman*, 191 Va. 344, 353, 61 S.E.2d 35, 37 (1950). Consistent with this Court's precedent on jury instructions in these types of proceedings, the trial court included instructions (numbers 7 and 8 respectively, requested by the Commissioner) properly reflecting the trial court's rulings of law. (J.A. 1094:10-23, 1095-97, 1098:1-2).

Because there was no application for rezoning on the date of take (J.A. 829, 385:3-4) and the record indicated that acts of third parties beyond the control of the property owner would be necessary to secure a rezoning (J.A. 228, 241-42, 335-38), the trial court properly applied this Court's precedent in determining that rezoning was hypothetical and too remote and speculative to be admissible. Given the continued efforts of Helmick's counsel to bring into evidence matters repeatedly ruled inadmissible by the trial court (and some withdrawn by agreement

in response to Helmick's motion in limine) (J.A. 367:12-21, 412-15, 828-31), it was necessary that the trial court include the Commissioner's jury instructions. Those instructions ensured (1) that the trial was fair; (2) that the commissioners were not misled as to the nature and importance of the comprehensive plan and the future land use map; and (3) that the commissioners fully understood the law relating to admissible evidence on the probability of rezoning and its legal applicability to just compensation. The inclusion of the jury instructions was proper under Virginia law. The limitations imposed on Melvin Helmick's testimony, including the exhibits that were denied, were in keeping with this Court's rulings on lay testimony of property owners. All the trial court's rulings were necessary in order to prevent speculation, and to ensure a fair trial. They should be upheld by this Court.

ASSIGNMENTS OF ERROR

1. The circuit court erred by excluding testimony and evidence regarding the reasonable probability that the property would be rezoned. [Preserved: J.A. 389-402; J.A. 554-589; J.A. 610-616; Helmick's Exception 5, J.A.1278-79.]

2. The circuit court erred in giving Instruction 7. This instruction prohibited the condemnation commissioners from considering the reasonable probability of rezoning of the property to a different designation and stated that such a rezoning is speculative and remote. [*Preserved,* J.A.1103-04; Helmick's Exception 1, J.A. 1276-77.]

3. The circuit court erroneously excluded evidence relating to the highest and best use of the property, including the reasonable probability that, as of the date of take, it would be rezoned. In doing so, the court erroneously barred testimony from Helmick's experts, Charles Dennis and Charles Carter, including the grounds for their respective opinions, and erroneously excluded Exhibits 23, 27, 29-41, and 48. [*Preserved*: J.A. 39-111; J.A. 389-402; J.A. 416-419; J.A. 554-565, 568-572, 580-587, 589, 610-616; J.A. 645-739; J.A. 836-839; J.A. 1106-07; Helmick's Exception 5, J.A. 1278-79.]

4. The circuit court erred by prohibiting Helmick's representative from testifying about the bases for his opinion of the value of the property taken, and by excluding exhibits 27 and 44 through 47. [*Preserved*: J.A. 402-04; J.A. 416-419; J.A. 519-20; 573-75; 582; 587-89; J.A. 740-825; J.A. 836-839; Helmick's Exception 5, J.A. 1278-79.]

5. The circuit court erred by giving Instruction 8 because it was an incomplete and prejudicial recitation of a portion of the County's Comprehensive Plan, and amounted to comment on the evidence. [*Preserved*: J.A. 1095-1099; Helmick's Exception 2, J.A. 1277.]

STATEMENT OF FACTS

To facilitate a Virginia Department of Transportation (VDOT) roadway project, the Commissioner filed Certificate of Take No. C-714007 on August 20, 2014. The Certificate of Take was subsequently amended, in the land records of Culpeper Circuit Court (for the property described as Parcel 024). (J. A. 8-31). The parcel at issue was located along Poor Farm Road, and the acquisition consisted of 2.155 acres, more or less land, in fee simple, together with a 1.98 acre permanent drainage easement, a .318 acre temporary construction easement, and a .078 acre Rappahannock Electric utility easement. (J.A. 2-3, 239). After a trial on the merits,

the commissioners returned a unanimous award for just compensation of $22,592 despite the property owner's demand for $640,435.51. (J.A. 1274-75, 1068).

Judge Susan L. Whitlock of the Culpeper Circuit Court presided over multiple trials and hearings in this matter. The property, which consisted of 168.45 acres of land, was zoned agricultural (A-1) on the date of take. (J.A. 212, 223, 943:18-19; 981:15-21). There was no pending application for rezoning on the date of acquisition. (J.A. 675, 829, 385:3-4).

The Commissioner's appraiser used comparable sales of properties in Culpeper County zoned agricultural, and concluded that the property was enhanced by the roadway project because the new roadway would provide the access necessary for a potentially successful rezoning of the property to commercial or industrial in the future. (J.A. 244-51). His opinion was that just compensation was $22,464, using a valuation of $6,300 per acre. (J.A. 212, 233).

By contrast, Helmick's appraiser (Charles T. Dennis) valued the property on the date of take using comparable sales that were zoned *commercial* and *industrial*; and only valued 18.6 percent of the property, a 31.5 acre portion of the property that was identified on the county's future land use map,[2] as commercial. (J.A. 37, 683-90). He found no damage to the remainder. (J.A. 648, 675, 681). Mr.

[2] The map was part of Culpeper County's 2010 Comprehensive Plan.

Dennis's estimate of just compensation was $321,000 (J.A. 695), based on a valuation of $130,000 per acre (J.A. 690).

Both parties filed motions in limine. The Commissioner sought to exclude the testimony and opinion of Helmick's appraiser because (1) he improperly appraised and valued only part of the parcel shown on the future land-use map as being zoned as commercial instead of appraising the whole parcel; and (2) because the subject parcel was zoned agricultural (A-1) on the date of take, and an appraisal based on comparable sales using the zoning of the future land use map in significantly different zoning categories was speculative, conjectural, and inadmissible and an improper method of appraising the land. The Commissioner also sought to exclude the testimony from Helmick's land planner Charles F. Carter, and valuation testimony from the property owner that was based on any hypothetical rezoning from agricultural to commercial because such testimony was speculative, conjectural, and inadmissible. The Commissioner also sought to bar property owner Melvin Helmick from testifying as an expert by using comparable sales in his testimony because Mr. Helmick was not licensed to perform such an appraisal as required by the Virginia Code. See Va. Code § 54.1-2011(B) (it is generally "unlawful for any person who is not licensed pursuant to this chapter to perform an appraisal in connection with a federally related transaction").

Helmick sought to exclude the Commissioner's evidence of enhancement, and sought to bar the Commissioner from introducing evidence of what Helmick believed would be an unconstitutional exaction if the property was rezoned in the future. (J.A. 413). In response to Helmick's motions, the Commissioner agreed to withdraw his enhancement evidence because Helmick did not claim damages to the remaining lands. (J.A. 367:12-21). Because of the agreed withdrawal of enhancement evidence, the Court deemed Helmick's two motions in limine moot. (J.A. 568).

The trial court also excluded the testimony of Helmick's appraiser and any evidence regarding his appraisal set forth in pages 37 and 44 thereof, and excluded all testimony and evidence regarding hypothetical rezoning of the subject property. (J.A. 412-15, 420-21). The reports of the Commissioner's appraiser and land planner stated that rezoning was contingent on the roadway improvements to be constructed in the project. (J.A. 228, 241-51, 328-29). The report of Helmick's land planner stated that the use of the VDOT take parcel is to provide critical road access for the adjoining parcels and not for additional access to the A-1 parent tract parcel. (J.A. 42). However, for approval of rezoning in Culpeper County, there must be accessibility, and if not present, roadway accessibility that must be approved by VDOT and must be developed at the property owner's expense. (J.A.

370:15-23, 371, 372:1-9; *see* Culpeper Code of Ordinances Sections 20-4-1and 20-6-1(c), 731.1, 731.5, 800, and 802).

The trial court held that the evidence at trial must be limited to the value of the property in the condition it was in at the time of take, and not the value after any future hypothetical rezoning. Similarly, the appraiser's reports must be based on the present fair market value of the whole property, in the condition it was in at the time of take, and not the value after a hypothetical rezoning. (J.A. 412-15, 420-21, 828-35). The trial court allowed landowner Melvin Helmick to testify as a lay witness to the value of the subject property, but limited that testimony to the value of the subject property in the condition it was in on the date of take with no testimony regarding any hypothetical rezoning. (J.A. 414-15, 420-21, 828-35).

During the first trial, the trial court granted a mistrial after finding that its ruling on the motions in limine had been violated. Helmick's counsel stated in opening statements that the subject land should be valued according to expectations of future potential of the land and likely future uses of nearby properties for commercial and industrial uses. (J.A. 494-95, 465:16-22, 466-72, 473:1-8).

The trial court denied Helmick's motion for reconsideration (J.A. 508-09, 826-27). It issued a written opinion on Helmick's objections to witnesses and exhibits (J.A. 828-31) and an order which reaffirmed its previous rulings. (J.A. 832-35). The trial court noted that Helmick had no pending application seeking to have its land

rezoned from agricultural to light industrial or commercial; and that the future land use map was not an assurance of community acceptance or a commitment to development by the county. The court ruled that (1) Helmick's land use planner could testify as to various facts about the subject property but not as to various facts about the area surrounding the property or about the reasonable probability that at the time of the take the property would be rezoned; (2) Helmick's expert appraiser was prohibited from testifying as to his opinion of the highest and best use of the property because it was based on comparable sales zoned industrial and commercial instead of agricultural, and from testifying about the comparable sales he used to establish his value of the take, because the methodology he utilized was inaccurate; (3) Melvin Helmick could express his opinion as to the value of the land but was prohibited and excluded from testifying as an expert and citing comparable sales as the basis for his opinion; and (4) a number of exhibits, including 23 of Helmick's exhibits, and all the comparable sales cited by Helmick's appraiser and the property owner, were excluded from trial.

A two-day trial was held on January 18-19, 2018. Among the instructions given to the commissioners by the trial court were the Commissioner's Jury Instruction 7 (J.A. 1167) and Jury Instruction 8 (J.A. 1168) which clarified the legal limitations of the comprehensive plan and future land use map. Instruction 7 provided

> In determining the fair market value of the subject land, you shall only consider uses that may be made of the land under its existing zoning category of A-1 Agricultural. You may not consider a hypothetical rezoning of the subject land from A-1 Agricultural to a different zoning category before, on, or after the date of take on August 20, 2014 or an envisioned future change from the existing zoning category of A-1 Agricultural to a different zoning category. A hypothetical rezoning and an envisioned future change in zoning are speculative and remote.

Instruction 8 provided

> You have heard evidence about Culpeper County's Zoning Ordinance. This Zoning Ordinance permits certain uses to be made of land and also contains other requirements concerning how land may be used.
>
> You have also heard evidence about Culpeper County's Future Land Use Map. The Future Land Use Map does not stand-alone and is not itself the future plan. It and many companion documents are part of Culpeper County's Comprehensive Plan.
>
> The Comprehensive Plan is general in nature and is merely a guide for possible future development in the County. The Comprehensive Plan does not restrict or permit any uses of the land by the owner.
>
> You have also heard evidence about Culpeper County's Future Land Use Plan. The Future Land Use Plan is not an assurance of community acceptance of a commitment to future development by the County.

After testimony by the Commissioner's expert appraiser that just compensation was $22,464, and testimony from Melvin Helmick that just compensation was $640,435.51, the commissioners unanimously ascertained that just compensation was $22,592. (J.A. 1274-75). After considering Helmick's exceptions

to the report of commissioners (J.A. 1276-81), the court entered a final order on February 27, 2018 (J.A. 1282-87), and Helmick timely filed this appeal. (J.A. 1288).

STANDARD OF REVIEW

The admissibility of evidence is within the discretion of the trial court and its decision will not be rejected unless there is an abuse of discretion. *Comm'r of Highways v. Karverly, Inc.*, 295 Va. 380, 388, 813 S.E.2d 322, 326 n.7 (2018) (quoting *Midkiff v. Commonwealth*, 280 Va. 216, 219, 694 S.E.2d 576, 578 (2010)).

When assignments of error involve a mixed issue of law and fact, the exclusion of evidence is normally reviewed on appeal for abuse of discretion. *Exxon Mobile Corp. v. Minton*, 285 Va. 115, 130, 757 S.E.2d 16, 22 (2013). Assignments of error regarding the exclusion of evidence at trial based upon an erroneous question of law are reviewed de novo. *Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006).

An appellate court will review a circuit court's admission or refusal to grant lay opinion testimony for an abuse of discretion. *Martin v. Lahti*, 295 Va. 77, 85, 809 S.E.2d 644, 648 (2018).

The prevailing party at trial is entitled to have the evidence and all inferences reasonably drawn from it viewed in the light most favorable to them. *Emerald*

Point, LLC v. Hawkins, 294 Va. 544, 548-549, 808 S.E.2d 384, 387 (2017). In review of a proffered jury instruction, the evidence is examined in the light most favorable to the proponent of the instruction. *Honsinger v. Egan*, 266 Va. 269, 274, 585 S.E.2d 597, 600 (2003).

ARGUMENT

This Court has long held that, in eminent domain cases, it is the present actual value of the land with all its adaptations to general and special uses that is to be considered, and not the land's prospective, speculative, or possible value based upon future expenditures and improvements. *Appalachian Power Co. v. Anderson*, 212 Va. 705, 708, 187 S.E.2d 148, 152 (1972); *Richmond & P. E. R. Co. v. Seaboard A. L. Ry., Co.*, 103 Va. 399, 407, 49 S.E. 512, 515 (1905). The measure of compensation for property taken is the fair market value of the property at the time of the taking, considering its adaptability and suitability for any legitimate purposes, having regard to the existing business of the community or such as may be reasonably expected in the near future. *Gorman*, 191 Va. at 353, 61 S.E.2d at 37-38. Remote and speculative profits and advantages are not to be considered. *Id.*

In every eminent domain case involving a partial taking, the measure of damages to the residue of the property not taken is the difference in the fair market

value of the residue immediately before and immediately after the taking. *Karverly*, 295 Va. at 388, 813 S.E.2d at 327 (quoting *Oakes*, 263 Va. at 516, 561 S.E.2d at 728-29). "In ascertaining such damages, both present and future circumstances which actually affect the value of the property at the time of taking may be considered, but remote and speculative damages may not be allowed." *Id.* Evidence of development and uses contingent on future acts beyond the landowner's control are remote and speculative and inadmissible. *Revocor Corp. v. Commonwealth Transp. Comm'r*, 259 Va. 389, 396, 526 S.E.2d 4, 9 (2000); *WAMMCO, Inc. v. Commonwealth Transp. Comm'r*, 251 Va. 132, 136-37, 465 S.E.2d 584, 586 (1996).

The property owner is not entitled to an increase in value arising in whole or in part from the project. *Commonwealth Transp. Comm'r v. DuVal*, 238 Va. 679, 685-86, 385 S.E.2d 605, 608 (1989). Testimony is allowed concerning the reasonable probability of rezoning in certain circumstances, and forbidden in others. When development of the property is contingent on future acts beyond the property owner's control or other acts necessary for access are not accomplished, as a matter of law this evidence is speculative and inadmissible. *WAMMCO*, 251 Va. at 138, 464 S.E.2d at 587. When landowners' ability to develop the residue is not dependent on contingencies beyond their control, testimony regarding development is admissible. *WAMMCO*, 251 Va. at 138-39, 465 S.E.2d at 587

(discussing *Lynch v. Commonwealth Transp. Comm'r*, 247 Va. 388, 442 S.E.2d 388 (1994) and *Gorman,* 191 Va. 344, 61 S.E.2d 35).

I. The trial court did not abuse its discretion in excluding evidence and exhibits relating to the reasonable probability of rezoning because that testimony was remote and speculative.

The facts of this case make evidence related to the reasonable probability of rezoning remote and speculative under *Revocor and WAMMCO* and inadmissible under these cases, *Oakes*, and *Anderson*.

Helmick relies on three cases: (1) *Pruner v. State Highway Comm'r*, 173 Va. 307, 4 S.E.2d 393 (1939), where this Court stated that the commissioners should have considered the land from the standpoint of subdivision purposes as well as farm uses; (2) *Gorman*, 191 Va. 344, 61 S.E.2d 35, where this Court stated that everything which affects market value is to be taken into consideration; and (3) *Lynch*, where this Court found that it was error for the trial court to exclude development plans reflecting a rezoning from residential to industrial where the property owner had filed a rezoning application six months prior to the taking that had been endorsed by the county and was virtually certain to be approved, and both parties agreed that the highest and best use was industrial. However, Helmick fails to mention this Court's rulings after these cases in *Oakes*, *WAMMCO*, and *Revocor* that consider these decisions in the analysis of what is remote and speculative and inadmissible in eminent domain proceedings.

WAMMCO, 251 Va. 132, 465 S.E.2d 584 (1996) and *Revocor,* 259 Va. 389, 526 S.E.2d 4 (2000) establish that testimony on conditions which are dependent on the acts of third parties is remote, speculative, and therefore inadmissible. In *Oakes*, 263 Va, 510, 561 S.E.2d 726 (2002) which was relied upon by the trial court, this Court clarified that that while *Pruner* required that "the trier of fact charged with determining the value of land which is being taken by eminent domain [must] consider all uses to which it may be reasonably adapted and to award compensation upon the basis of its most advantageous and valuable use," *Pruner* also held "that [p]urely imaginative or speculative value should not be considered." *Oakes,* 263 Va. at 518, 561 S.E.2d at 730. In short, speculation has no place in an eminent domain proceeding in Virginia.

The relevant Culpeper Code of Ordinances sections (20-4-1, 20-6-1(c), 731.1, 731.4, 800 and 802) require VDOT approval of access for rezoning. There had to be future action of Culpeper County to approve the rezoning. Because there was no evidence of either approval, the rezoning was dependent on contingencies beyond the landowner's control and therefore remote and speculative and inadmissible under *WAMMCO* and *Revocor*. The only approval of access by VDOT for the subject parcel at issue in this case was for the project itself. *DuVal* holds that the property owner "is not entitled to any increase in its value caused, in whole or in part, by the project." 238 Va. at 685, 385 S.E.2d at 608. Also, any

access beyond that provided by the project would be based upon future expenditures and improvements, which is inadmissible under *Anderson* because there is nothing in the record that indicates that Helmick has the ability to independently provide access necessary for a rezoning.

As was the case in *Commonwealth Transp. Comm'r v. Glass*, 270 Va. 138, 613 S.E.2d 411 (2005), the trial record here affirmatively demonstrates that Helmick's rezoning plans are illusory, and a showing of no more than an idle hope that Helmick's property would be valuable for an unknown future commercial purpose. Even though the comprehensive plan generally designated part of the property for future commercial development, there was no development plan, site plan, or plat encompassing the subject property as of the date of take, and there was no evidence that the property owner expended any funds or efforts for engineering, infrastructure, securing site development financing, architectural drawings, contracts to sell or lease, or anything else except for a 1999 agreement to exchange land with the county for 16 sewer taps. (J. A. 1027:1-5). Helmick did not present any evidence to support his argument that he could have developed his property independent of the road improvement project. He had no vested right. The factual situation in this case is like that in *WAMMCO* and *Glass* because the insufficient acts by Helmick and the need for third party approvals make rezoning testimony speculative.

The trial court's rulings are appropriate under *Anderson* because rezoning would be based on future expenditures or improvements to the property that involve too much speculation and conjecture.[3] As the trial court noted in its August 6, 2017 letter opinion, the situation is much like that in *Oakes*. Rezoning requires approval by the county and VDOT, and substantial resulting expenditures to provide access. There was not even an application for rezoning on file. Since the future land use map clearly states it is not an assurance of community acceptance or a commitment to development by the county (J.A. 1254), more actions and approvals are necessary before rezoning can occur.

On the date of take, it was impossible to know what proffers and other requirements would be made for rezoning the property and whether rezoning would be granted. As this Court noted in *Va. Elec. & Power Co. v. Hylton*, 292 Va. 92, 107, 787 S.E.2d 106, 114 (2016), valuations invite speculation and conjecture when they are based on conditions which did not exist on the date of take and future circumstances that may or may not occur.

Helmick also argues that the presence of mineral deposits considered in *Hylton* is akin to a reasonable probability of rezoning. Mineral deposits are a part of the land, and have monetary value. However, as this Court stated in *Hylton* "the

[3] *Also see Commonwealth Transportation Commissioner v. Hurley*, 24 Va. Cir. 19, 22 (Loudoun Cir. Ct. 1991), which holds that to the extent that the determination of value is dependent upon a determination by a government agency upon a future rezoning application, such a valuation is based upon speculation and conjecture.

separate value of the mineral deposits themselves, and the future rents and royalties that would be received for them when and if they are removed from the land, are inadmissible for proving either the value of the property taken or damage to the residue." *Hylton,* 292 Va. at 106-107, 787 S.E.2d at 114 (quoting *East Tennessee Natural Gas Co. v. Riner*, 239 Va. 94, 97-98, 387 S.E.2d 476, 478 (1990)). "The reason for that rule is that such evidence invites speculation and conjecture, because it relates to 'conditions which did not, in fact, exist on the condemned land and . . . future circumstances that may or may not occur'." *Id.* (quoting *Henrico County v. Wilkerson*, 226 Va. 84, 88, 307 S.E.2d 450, 452 (1983)). Their presence is not dependent upon the acts of a third party, as is rezoning. As such, the parallel that Helmick attempts to draw does not exist. Rezoning is barred just as are future rents and royalties of mineral deposits. This is because their dependence of the future acts of others makes their admission invite speculation and conjecture; they relate to conditions that in fact do not exist on the condemned land and future circumstances that may or may not occur. Here, the trial court admitted the comprehensive plan and the future land use map, which is the proper parallel for allowing consideration of the fact that the county may consider rezoning in future and that the property was nearby other differently zoned properties that *Hylton* would require.

Under Virginia law, Helmick was entitled the present actual value of his land with all its adaptations to general and special uses, not the land's prospective, speculative, or possible value based upon speculative future expenditures and improvements (such as roadways necessary for improved access), nor testimony that reflected an increase in value arising from the project itself. Because the facts in this case do not indicate that Helmick could provide access necessary for a rezoning of his property without the acts of third parties, VDOT and Culpeper County, the situation is like *WAMMCO*. The trial court properly held that testimony on a probability of rezoning was remote and speculative because the situation is like *WAMMCO*, and that remote and speculative testimony is barred by *Oakes*.

Helmick's statement that evidence regarding the reasonable probability of rezoning is admissible when it affects the value of a property is not in keeping with the limitations imposed by this Court's decisions. Helmick argues in Section II.D of the Opening Brief that the Uniform Standards of Professional Appraisal Practice (USPAP) require consideration of the reasonably probably modifications of land use regulations, and invites the Court to treat the VDOT's Right of Way Manual as binding law of this case. But USPAP does not govern the authority of a trial court and the VDOT Right of Way Manual does not govern legal proceedings. Though USPAP is relevant in the consideration of whether the appraisals were properly

prepared, it does not determine whether there is a reasonable probability of rezoning. That is a legal determination of the trial court.

Helmick also argues in section II.E. of the Opening Brief that courts across the country have held that the reasonable probability of rezoning is admissible. But there are limitations on when testimony concerning a probability of rezoning is admissible. *See, e.g.*, 4 Nichols on Eminent Domain § 12C.03[2] (2018) ([T]he property must not be evaluated as though the rezoning were already an accomplished fact. *It must be evaluated under the restrictions of the existing zoning* with consideration given to the impact on market value of the likelihood of a change in zoning. … *most cases speak of determining value on the basis of the existing zoning, with allowance for an incremental factor due the existence of the probability of rezoning.*) (emphasis added).[4]

The majority position is that the land must be valued as it is currently zoned, using comparable sales with the same zoning, with the addition of an incremental

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[4] *See United States v. 50.8 Acres Of Land, etc.*, 149 F. Supp. 749, 752-753 (E.D.N.Y. 1957), *State Highway Comm'r v. Gorga*, 138 A.2d 833, 835 (1958), *Barnes v. N.C. State Highway Commission*, 109 S.E.2d 19, 231-32 (1959), *State ex rel. Morison v. McMinn*, 355 P.2d 900, 903 (1960), *Snyder v. Com.*, 192 A.2d 650, 653 (1963), *Union Elec. Com. v. Saale*, 377 S.W.2d 427, 430-31 (1964*); State Highway Commission v. Graler*, 527 S.W.2d 421 (1975), *Chitwood v. Dept. of Highways*, 391 S.W.2d 381, 384 (1965), *Hutchison v. Baltimore Gas & Elec. Co.*, 216 A.2d 573, 574 (1966), *Budney v. Ives*, 239 A.2d 482, 484-85 (1968), and *Town of Islip (Hamlet of Sayville), Matter of*, 411 N.Y.S.2d 645, 648 (1978). A more detailed analysis is contained in Petitioner's Memorandum in Opposition to the Owner's Motion to Reconsider – Part 1 and Part 2 though these were not included in the Appendix.

factor for the probability of rezoning. (J.A 534-43, 544:1). Helmick's expert Charles Dennis appraised the property by using commercial comparable sales and adjusting them down a small percentage. The appraisal offered by Helmick was not prepared in keeping with either the majority or the minority position.[5] (J.A. 543:9-17, 829). The existing zoning was not used. In any event, Helmick cites no authority supporting the conclusion that a trial court abuses its discretion in holding that evidence of speculative rezoning is inadmissible.

The method used by Helmick's appraiser did not result in a fair and just result; it resulted in a land values that were excessively large, 20.6 times that of the Commissioner's appraisal. The trial court did not abuse its discretion in adopting the Commissioner's argument that Helmick's appraisal was improperly prepared based on the majority position of the leading eminent domain treatise, and excluded the testimony of his appraiser. Its decision should be upheld.

II. The trial court did not abuse its discretion in excluding comparable sales zoned differently than the zoning on the property on the date of take, the appraisal based on them, and testimony of a highest and best use based on them.

The question of the admissibility of prior sales of comparable property is left largely to the discretion of the trial courts. *State Highway Comm'r v. Garland*, 223

[5] The minority rule determines the property's value as rezoned, and deducts a discount factor to allow for the uncertainty that rezoning would actually take place. The record does not show that a discount factor was subtracted; there was no adequate adjustment.

Va. 701, 704, 292 S.E.2d 355, 357 (1982). To be admissible, evidence of comparable sales must involve sales made under comparable conditions in point of time and circumstances. *May v. Dewey*, 201 Va. 621, 633, 112 S.E.2d 838, 847-848 (1960). In exercising its discretion, the trial court must determine that the lands were similar in locality and character to the land in question. *Garland*, 233 Va. at 704, 139 S.E.2d at 357.

When property near the take is enhanced in value by reason of the take, sales of such property should not be used as evidence of the value of the property taken, and the determination of whether a sale has been enhanced by the take should be determined by the trial court out of the presence of the commissioners. *State Highway & Transp. Comm'r v. Dennison*, 231 Va. 239, 244, 343 S.E.2d 324, 327 (1986). The property owner is not entitled to the enhanced value because of a change in the highest and best use of the property where that enhancement is due wholly or in part to the condemnation project. *DuVal*, 238 Va. at 685, 385 S.E.2d at 608.

In this case, the trial court did not abuse its discretion in excluding comparable sales that were zoned differently than the subject property because the sales used by Helmick's appraiser were not made under comparable conditions in time and circumstances to the subject property—they were zoned in a way not possible on the date of take.

The situation is much like that in *May* in which this Court found that admission of comparable sales of commercial properties after the date of take gave the commissioners the impression that the subsequent sales were comparable to the value of the owners' land at the time of the taking and was prejudicial to the condemnor. 201 Va. at 633-34, 112 S.E.2d at 848. Though the sales were not after the date of take, the rezoning in this case is dependent upon either the project (inadmissible under *Dennison* and *DuVal*) or the development of roadway access by the property owner at his expense and approval of third parties (inadmissible under *Oakes*). The trial court assessed the situation on the date of take, and exercised its discretion to bar speculation and prejudicial testimony using these comparable sales; any highest and best use based on speculation and prejudicial testimony was inappropriate because, absent legal permissibility, the requirements of the tests for highest and best use are not met.[6] The Appraisal of Real Estate 334-35 (Appraisal Inst. 14th ed. 2013).

Commercial and industrial properties are valued much higher than agricultural property, as indicated by the difference in the appraised value of the property owner's appraisal of $130,000 per acre versus the Commissioner's appraisal value based on properties zoned agricultural at $6,300 per acre (or an amount 20.6 times greater). This large differential shows that the values of the

[6] The four requirements are physically possible, legally permissible, financially feasible and maximally productive.

zoning categories are so dissimilar that allowing their use could result in bonus compensation. The trial court did not abuse its discretion in determining that the sales were not comparable.

The adjustments used by Helmick's appraiser were not in keeping with the normal way adjustments are made to comparable sales, nor did those adjustments in any way approximate the magnitude of difference in value between agricultural and commercial/industrial sales. *Id.*; *see* J.A. 828-31 and 832-33.

Helmick's argument during the trial proceeding that his appraiser could not find agricultural sales in the immediate area is not compelling because there were sales of property zoned A-1 in the county, a reasonable distance from the subject property. Admissible comparable sales need not be adjacent to the subject property; evidence as to other sales in the same locality is admissible if they are close enough in time and on a free and open market as to permit a fair comparison. *State Highway Comm'r v. Crockett*, 203 Va. 796, 798, 127 S.E.2d 354, 356 (1962). Commercial and industrial sales adjusted down a small amount offer a situation that the record in this case indicates is an enhancement because of the project's inadmissibility under *Dennison* and *DuVal*. Those sales do not reflect the same factors which tend to establish value because they are not of the same character as the subject property. The trial court, therefore, did not abuse its discretion in

concluding sales of commercial and industrial properties were not comparable and in excluding such evidence. Its ruling should be upheld.

Further, the trial court did not abuse its discretion in excluding the opinion of Helmick's land use planner. Zoning amendments are not routinely made or granted, and purchasers rarely pay the price the property would be worth if the amendment were an accomplished fact. *Gorga*, 138 A.2d at 835. At most, a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance. *Id.* The true issue is not the value of the property for the use which would be permitted if the zoning amendment were adopted, but is the fair market value as of the date of taking. *Id.*

In Virginia, zoning officials may not express opinions as to what their governing body might or might not do. *Department of Transportation v. Fairbrook Business Park Associates*, 244 Va. 99, 105-06, 418 S.E.2d 874, 878 (1992). Charles Carter served as County Planner for Culpeper County from 1976-1985. (J.A. at 167). Though Mr. Carter has done other jobs since then, Helmick's submission of his resume and report listing this experience as a qualification to give an opinion as to the probability of rezoning by Culpeper County comes perilously close to violating this Court's ruling in *Fairbrook* and would have been prejudicial to the Commissioner. Further, Mr. Carter's opinion was based on documents, a rezoning, and county actions such as eligibility for public water and

sewer services that occurred *after* the date of take. (J.A. 201-02). As such, the trial court did not abuse its discretion in excluded testimony based on these factors because they were not in existence on the date of take, and its ruling should be upheld.

III. The trial court properly included Jury Instructions 7 and 8, which were necessary to prevent confusion and to inform the commissioners of the legal impact of the comprehensive plan and future land use map, and to inform the commissioners of its legal ruling concerning the probability of rezoning.

"The purpose of [a jury] instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict, so far as it is competent for the court to assist them. . . . The trial judge should [instruct] the jury as to the law of the case applicable to the facts in such a manner that they may not be misled." *Taylor v. Commonwealth*, 12 Va. App. 419, 422, 404 S.E.2d 78, 80 (1991). Before either party is entitled to an instruction there must be more than a scintilla of evidence introduced. *Carter v. Commonwealth*, 232 Va. 122, 128, 348 S.E.2d 265, 269 (1986).

Instructions 7 and 8 helped the trial court ensure that the jury was adequately instructed on the law relating to the facts in this case. The cases cited previously prohibit testimony that invites the commissioners to speculate and consider the holdings in *Pruner*, *Gorman*, and *Lynch* in their analysis. Fair market value does not include a value fixed by depressed or inflated prices. *Kornegay v. Richmond*,

185 Va. 1013, 1025, 41 S.E.2d 45, 51 (1947). Fair market value resides in an estimate and determination of the fair, economic, just, and equitable value under normal conditions. *Id.* at 1026, 41 S.E.2d at 51. As such, Instruction 7 was proper and in keeping with Virginia law because it makes clear that the speculation invited by Helmick regarding rezoning is not to be considered. It was in keeping with the rulings of the trial court, and necessary given the fact that Helmick's counsel had tried to elicit testimony regarding rezoning from the Commissioner's appraiser after there was agreement to withdraw that portion of his appraisal. *See Best v. State*, 339 N.E.2d 82, 84 (1975) (holding that a jury instruction in an eminent domain case was necessary to prevent a misconception of the development potential of the subject property).

The situation is much like *Southeastern Tidewater Area Manpower Authority v. Coley*, 221 Va. 859, 862, 275 S.E.2d 589, 591 (1981), where the parties in good faith agreed to a stipulation and then one party sought at trial to use evidence contrary to the stipulation. This Court reasoned that it has "repeatedly said that admissions and stipulations made in good faith should be encouraged and that a party should not be permitted to assert at trial a contention which is contrary to a stipulation to which that party, by counsel or otherwise, has freely and in good faith agreed." *Id.* Because Helmick's attempts to elicit the testimony included in the agreed withdrawn portion of the Commissioner's appraisal would create a

fundamentally unfair situation, the instruction helped ensure a fair trial. Under *Coley*, Helmick cannot complain that the court erred in offering such an instruction because Helmick requested that the information be excluded and the Commissioner agreed to withdraw it.

Melvin Helmick's testimony gave more than a scintilla of evidence in this case to support both Instructions 7 and 8. Helmick's testimony regarding properties with a different zoning right across the street was sufficient for the commissioners to possibly infer that the property could be rezoned. Instruction 7 was necessary for the trial court to instruct the commissioners on the legal limitations they must employ in determining just compensation and to assure they were not misled or confused and the trial was fair.

Instruction 8 was necessary so that the commissioners clearly understood the legal importance of the comprehensive plan and the future land use map. For the commissioners to understand that these are not binding determinations of future zoning and for the trial to be fair, it was necessary for the trial court to inform the commissioners of the limitations that are on the face of the document. The comprehensive plan was admitted into evidence, so the commissioners had access to the entire document; the instruction was given to prevent confusion and clarify the legal importance of the documents. The instruction was in no way an attempt to paraphrase the exhibit. The part of the comprehensive plan that Helmick alleges

in section V.B. of the Opening Brief should have been included is inferred from the title of the future land use map. Helmick could have asked for its inclusion in the instruction, but did not and instead chose to argue against it in a general manner not reflected in the argument in the Opening Brief. (J. A. 1095:21-23, 10-96-1099:1-2). Because Helmick did not act at the appropriate time for the trial court to consider the language he now states should have been included, he did not state this objection with reasonable certainty and the trial court was not afforded the opportunity to rule on the issue. As such, this assertion of error should not be considered. *See Buck v. Jones*, 256 Va. 535, 545-546, 508 S.E.2d 880, 885 (1998).

Because the trial court's inclusion of Instruction 7 clarified for the commissioners the law concerning rezoning, its inclusion does not constitute error. Because jury Instruction 8 ensured that the commissioners understood the nature and limitations of the comprehensive plan and the future land use map, the instruction helped ensure that the commissioners were not mislead and the trial was fair. Under *Honsinger*, the Commissioner was entitled to both instructions because they were supported by law and fact. The trial court's ruling on both jury instructions should be upheld.

IV. The trial court properly limited Helmick's representative Melvin Helmick's testimony and associated exhibits.

The general rule is that an owner of property is competent and qualified to render a lay opinion regarding the value of property. *Snyder Plaza Props., Inc. v.*

Adams Outdoor Adver., Inc., 259 Va. 635, 644, 528 S.E.2d 452, 458 (2000). At the same time, Virginia Code § 54.1-2011(B) states that only licensed appraisers may use comparable sales to value property on federally funded projects such as this one. If the exhibits on comparable sales had been allowed, Melvin Helmick would have testified as an appraiser in violation of § 54.1-2011(B) and as an expert witness instead of a lay witness. Melvin Helmick was allowed to offer his opinion on the value of the property, and to give a basis for it by mentioning the uses of neighboring properties and other facts about the property. (J.A. 1023-82, 1083:1-17).[7] The trial court therefore properly limited Melvin Helmick's testimony.

CONCLUSION

The trial court's rulings were in keeping with Virginia law, and were not based on an error of law or an abuse of discretion. Therefore, the Commissioner respectfully asks this Court to uphold the trial court's decision.

[7] In fact, Mr. Helmick offered his opinion that his property was worth $640,435.51 (J.A. 1068:17) because of the neighboring properties, which the jurors did not adopt. Melvin Helmick's testimony contained statements that arguably violated the trial court's ruling on the probability of rezoning, (J.A.1103-04) making the jury Instruction 7 necessary.

Respectfully submitted,

COMMISSIONER OF HIGHWAYS

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CERTIFICATE

On December 18, 2018, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5:26(e). A copy was emailed to Michael J. Coughlin, Esq., at mcoughlin@thelandlawyers.com and Mathew A. Westover, Esq., at mwestover@thelandlawyers.com both counsel to the appellate. In accordance with Rule 5:26(h), I certify that this document contains 7,680 words, in compliance with Rules 5:26(b) and 5:26(e).

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