In the

Supreme Court of Virginia

At Richmond

Record No. 180691

HELMICK FAMILY FARM, LLC,

Appellant,

– v. –

COMMISSIONER OF HIGHWAYS,

Appellee.

REPLY BRIEF OF APPELLANT

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Summary of Argument

VDOT's Brief fails to provide any credible factual or legal basis to support the trial court's exclusion of all of Helmick's evidence related to the reasonable probability of the rezoning of its property. VDOT attempts to cast doubt on Helmick's ability to obtain a rezoning based on an unsupported claim that, at the time of the taking, the property lacked sufficient access, when the record reflects that the property had legal access to two abutting public roads.

VDOT is left with a claim that Helmick's appraiser should not have used comparable sales zoned commercial or industrial because the Helmick property is zoned agricultural. However, this Court has never prohibited the use of reference comparable sales simply because they bear a different zoning designation, and none of the cases cited by VDOT support its claim.

Ultimately, "[t]he analysis of highest and best use is at the heart of appraisals of the market value of real property[.]" THE APPRAISAL OF REAL ESTATE, 332 (14th ed. 2013). Highest and best use is defined as "[t]he reasonably probable use of property that results in the highest value." *Id.*[1]

Here, the trial court should have permitted Helmick to introduce evidence

[1] VDOT's Brief observes that one of the criteria the highest and best use must meet is that the use is "legally permissible," but VDOT fails to mention that THE APPRAISAL OF REAL ESTATE expands this criterion by stating that the use "must be legally permissible (*or it is reasonably probable to render it so*)." *Id.*, 332 (emphasis supplied).

that it was reasonably probable that the property would be rezoned to a commercial or light industrial designation. It should have also permitted valuation testimony reflecting that this reasonable probability dictated that the property was more valuable than properties planned and zoned for agricultural uses.

For these reasons, and as argued further in this Reply Brief, VDOT has offered no basis to affirm the rulings of the trial court to which Helmick assigns error. This Court should find that the trial court erred and remand the case for a new trial.

Argument

I. At the time of the taking, Helmick had a legal right to access both Greens Corner Road and Poor Farm Road, defeating VDOT's claim that a rezoning of the property was speculative.

It was undisputed at trial that the Helmick property had access to both Poor Farm Road and Greens Corner Road. VDOT's appraiser noted in his testimony that "there was a road here in the beginning before they ever took anything. That was the road that went to the sewage treatment plant." JA 939. The referenced road was the access road located upon the pipestem portion of the Helmick property that Culpeper County was permitted to construct pursuant to a recorded easement agreement. JA 1242-1248. The road located on the Helmick property can be seen in the pictures within VDOT's Exhibit 9, JA 1235, one of which bears the caption "Spliced Panoramic View Looking North to Greens Corner Road Over the 50-Foot Bacon Strip Providing Access From Subject Parcel 42-41." VDOT's assertion on

page 16 of its Brief that the project provided the only access to the property, upon which it rests most of its claim that a rezoning of the property is speculative, is not supported by the undisputed facts.

Also, localities, like Culpeper County, approve rezoning applications; VDOT does not. Va. Code § 15.2-2286(A)(7). Additionally, the Virginia Administrative Code provides that "VDOT will permit reasonably convenient access to a parcel of record." 24 VAC § 30-73-60(B). With this legal backdrop, and the fact that the property had approximately 2000 feet of frontage on Poor Farm Road, JA 891, and approximately 50 feet of frontage on Greens Corner Road, VDOT has no basis to question the ability of the property to continue to maintain its access during a rezoning process.

VDOT lacks a factual basis to support its position that evidence regarding the reasonable probability of the rezoning of the Helmick property is speculative.

II. Helmick's evidence of the reasonable probability of the rezoning of the property was not remote and speculative.

As it must, VDOT concedes on page 14 of its Brief that "[t]estimony is allowed concerning the reasonable probability of rezoning in certain circumstances, and forbidden in others." But VDOT fails to articulate a circumstance when such testimony should be allowed, or precisely why it should be prohibited in this case, other than through its inaccurate claims that the property lacked access at the time of the taking.

Instead, VDOT cites to a series of cases that hold that the value of property in a condemnation case cannot be based on facts or improvements that did not exist at the time of the taking. *See Va. Elec. & Power Co. v. Hylton*, 292 Va. 92 (2016) (excluding a valuation reliant on a non-existent surface mine); *Wammco, Inc. v. Commonwealth Transp. Comm'r,* 251 Va. 132 (1996) (excluding a valuation reliant on the landowner's acquisition of other properties and the construction of off-site roads); *Appalachian Power Co. v. Anderson*, 212 Va. 705 (1972) (excluding a valuation on a per-lot basis for an un-subdivided property); *Richmond & P.E.R Co. v. Seaboard A.L. Ry.*, 103 Va. 399 (1905) (upholding a commissioner's report that rejected a value based on the devotion of a property to a park). These cases are consistent with this Court's view that valuation evidence based on profits derived from uses that do not exist is speculative, and therefore inadmissible. *City of Va. Beach v. Oakes*, 263 Va. 510 (2002).

On the other hand, this Court has permitted landowners to introduce evidence that relates to a highest and best use different from the existing use of the property. *See Lynch v. Com. Transp. Comm'r.* 247 Va. 388 (1994) (permitting depiction of the residentially zoned property as being devoted to an office/industrial park use); *Com. Transp. Comm'r v. Duval*, 238 Va. 679 (1989) (permitting the fact finder to consider a change in the highest and best use if unrelated to the project); *Appalachian Electric Power Co. v. Gorman*, 191 Va. 344 (1950) (permitting the admission of unrecorded

subdivision plats which helped illustrate the impact of a taking); *Pruner v. State Highway Comm'r*, 173 Va. 307 (1939) (permitting evidence demonstrating the adaptability of the property for subdivision uses).

For this Court, a valuation is speculative if it relies on improvements or facts that did not exist at the time of the taking, yet the valuation assumes those improvements, like the hypothetical buildings and rents in *Oakes*, actually existed. But according to this Court, a valuation is not speculative if it is based on facts that demonstrate that the current use is not the highest and best use, like the pattern of light industrial development surrounding the residentially zoned property in *DuVal*.

Here, Helmick's proffered evidence clearly qualifies as permissible evidence because at the time of the taking, the property: i) was planned Commercial; ii) was adjacent to properties zoned either Light Industry or Commercial Services; iii) was within the Urban Services Boundary; iv) possessed the right to 16 sewer taps; and v) had access to Greens Corner Road and Poor Farm Road. Shortly after the taking, it was brought into the Town Environs Adopted Water and Sewer Services Area. The only uncertainty regarding whether the property could be used for commercial or light industrial purposes was whether it was reasonably probable that it would be rezoned, and Helmick's expert land planner Charles Carter would have testified that the past rezoning approvals of the Board of Supervisors, combined with these

facts, established that a rezoning was reasonably probable.

The uncertainty surrounding whether a rezoning would be approved, by itself, cannot be the basis for confining the value of the Helmick property to the values assigned to properties also zoned agricultural, but bearing no resemblance to it. This Court has said that "if the change in the property's highest and best use came about for reasons unrelated to the project…the property owner is entitled to the benefit of the property's consequent increase in value." *DuVal*, 238 Va. at 686. Similarly, Helmick is entitled to the benefit of its property's value and corresponding just compensation, as demonstrated by comparable sales with a similar highest and best use.

Helmick's proffered evidence related to the reasonable probability of rezoning should have been admitted, thereby allowing the commissioners to determine whether they agreed that it was reasonably probable, and then decide whether this factor influenced the value of the property.

III. It is within the appraiser's discretion to use comparable sales that bear a different zoning designation.

Helmick's appraiser appropriately valued the property using the most comparable sales, including sales zoned commercial and industrial, because they shared the same highest and best use as the property. Contrary to VDOT's assertion, there is no "majority" rule that prohibits the consideration of sales bearing a different zoning classification than the property subject to a

condemnation. Thus, Helmick's appraiser should have been permitted to testify about the sales he used to value the property.

In the case of *Budney v. Ives*, 239 A.2d 482 (Conn. 1967), cited by VDOT, the Connecticut Supreme Court upheld a lower court's finding of damages in the amount of $134,750 based on a valuation that considered "a strong, not speculative likelihood or probability of a change to be made" to the then existing rural residential zoning classification. *Id*. at 483. The Court in *Budney* refused to adopt the lower court's alternative finding of only $16,800 in damages, because the alternative finding was predicated on the lower court being "limited to finding the valuation solely on the basis of its being in a rural residential zone at the time of the condemnation[.]" *Id*. As *Budney* demonstrates, the amount of just compensation owed is much greater when the fact finder, just like a market participant, is able to consider the reasonable probability of a rezoning.

Here, Helmick's appraiser Charles Dennis valued the property using properties zoned Commercial Services, Light Industry and Heavy Industry. Then, as VDOT acknowledges on page 22 of its brief,[2] he recognized the inferior zoning

[2] In the body of page 22 of its Brief, VDOT states that "Charles Dennis appraised the property by using commercial comparable sales and adjusting them down a small percentage." Yet in its footnote 5, VDOT asserts that "[t]he record does not show that a discount factor was subtracted; there was no adequate adjustment." VDOT's waffling is inconsistent with the proffered testimony for Dennis because, as Helmick explained in its Opening Brief, Dennis employed a qualitative adjustment for the difference in zoning which he stated was an inferior

designation of the Helmick property and reconciled the value well below one of the most comparable sales. Dennis appraised the property at $130,000 per acre as opposed to the $176,906 per acre sales price of Dennis's Land Sale 4. JA 690. Helmick's appraiser *did not* value the property as if the rezoning was an accomplished fact.

VDOT's Brief also cites to *State by State Highway Comm'r v. Gorga*, 138 A.2d 833 (N.J. 1958), where the Supreme Court of New Jersey discussed the means of addressing the reasonable probability of a rezoning when valuing a property. The Court stated that

> [a]t 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*. In permitting proof of a probable amendment, the law merely seeks to recognize a fact, if it does exist. In short if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth.

Id. at 835 (emphasis supplied).

However, the Court in *Gorga* does not dictate how an appraiser should arrive at the premium resulting from the reasonable probability that the property would be rezoned. But this Court has stated that the comparable sales used to

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characteristic because the property "will need to be rezoned prior to being used for commercial purposes [and] … having to get a rezoning done can be time consuming." JA 683-689.

value the property must be "similar in locality and character to the land in question." *State Highway & Transp. Comm'r v. Garland*, 223 Va. 701, 704 (1982). Helmick's appraiser believed that the sales he used were the most similar to the Helmick property because of their proximity to the property, their access, their surroundings, and ultimately because they had a similar highest and best use.

Using sales bearing a different zoning classification is not prohibited by the language in *Gorga*, nor should such sales be prohibited from consideration by this Court, so long as the valuation does not value the property as-if the rezoning has occurred. Instead, the reasonable probability of a rezoning may be accounted for "by determining the subject's value as rezoned, minus a discount factor to allow for the uncertainty that rezoning would actually take place, or by determining the property's value within its existing zoning, plus an incremental factor because of the probability of rezoning." *State ex rel. Missouri Highway & Transp. Com. v. Sturmfels Farm Ltd. Partnership*, 795 S.W.2d 581, 585 (Mo. Ct. App. 1990).

Had Helmick's appraiser been permitted to testify, he would have explained that the Helmick property most resembled properties bearing commercial or industrial zoning designations, as opposed to agricultural. He also would have testified that he accounted for the different zoning designations by concluding a value well below the highest comparable sales price of $176,906, which is an acceptable appraisal methodology.

Additionally, VDOT's confusing claim that the use of commercial sales was improper because they reflected that the project enhanced the value of the property is misplaced for two primary reasons. First, the opinions of Helmick's experts were not dependent on the VDOT project being constructed. Helmick's expert land planner concluded that "the use of the VDOT Take parcel is not for additional access to the A-1 parent tract of Helmick Family Farms, LLC. JA 42 (emphasis in original). Helmick's appraiser would have testified that "[t]he main change after the take will be the access and frontage for TMP 42-41, but this is not a significant change for the property….The VDOT take will not alter the highest and best use of the subject property." JA 697. Second, VDOT never argued below that the sales Helmick's appraiser used were influenced by the VDOT project.

Ultimately, the trial court's decision to exclude the sales Dennis and Helmick's representative used, because they were zoned commercial or industrial, was based on the erroneous decision that as a matter of law all evidence related to the reasonable probability of a rezoning was inadmissible. It was therefore an abuse of discretion to exclude these sales. *See Comm'r of Highways v. Karverly, Inc*. 295 Va. 380, 388, n.7 (2018).

IV. Nothing prohibited Helmick's representative from using comparable sales to support his lay opinion of value.

VDOT's contention that Va. Code § 54.1-2011(B) prohibits a landowner from using comparable sales to support an opinion of value is inconsistent with the

plain meaning of the statute. This Code section provides that "except as provided in § 54.1-2010, it shall be unlawful for any person who is not licensed pursuant to this chapter to perform an appraisal in connection with a federally related transaction." Melvin Helmick, the representative of Helmick Family Farm, LLC, was testifying during a trial to determine just compensation; he was not undertaking an appraisal "in connection with a federally related transaction."

Melvin Helmick's testimony is properly characterized as a lay opinion of the value of the land taken, which VDOT concedes is permitted on page 30 of its Brief. If the trial court correctly permitted Mr. Helmick's lay opinion, then it must follow that he should have been permitted to explain the basis for his opinion, including his reliance on certain sales to arrive at his opinion of the value of the take. Otherwise, Mr. Helmick's opinion appears wholly unsupported and therefore lacking in credibility, which may explain why the Commissioners did not adopt his opinion of the value of the take.

Again, the trial court's decision to prohibit Mr. Helmick from testifying about comparable sales was influenced by a mistake of law based on its erroneous decision to exclude any evidence related to the reasonable probability of rezoning, including derivative valuation evidence and sales of commercially and industrially zoned properties. As a result, the trial court abused its discretion by prohibiting Mr.

Helmick from introducing into evidence the sales he relied upon. *See Comm'r of Highways v. Karverly, Inc*. 295 Va. 380, 388, n.7 (2018).

V. Instructions 7 and 8 should not have been given.

If this Court finds that the trial court should have permitted evidence regarding the reasonable probability of the rezoning of the Helmick property, and evidence demonstrating the impact this probability has on the property's value, then Instruction 7 should not have been given. This instruction prohibited consideration of "a hypothetical rezoning of the subject land from A-1 Agricultural to a different zoning category[.]" JA 1167. As Helmick has hopefully made clear, this instruction is contrary to existing Virginia law, the approach taken by every state that has confronted this issue, and Helmick's proffered evidence.[3]

As for Instruction 8 (JA 1168), it improperly quotes from some, but not all, of the portion of the Culpeper Comprehensive Plan in evidence as Helmick's Exhibit 7 (JA 1254-1272). Instruction 8 was clearly a paraphrase of Helmick's Exhibit 7, as the Court can see by noting that this exhibit is nineteen pages, whereas Instruction 8 is seven sentences. Instruction 8 clearly "singles out one

[3] VDOT's Brief on pages 28-29 suggests that Helmick and VDOT entered into a stipulation related to Instruction 7; this is not accurate. VDOT elected not to put on evidence that the project enhanced the value of Helmick's remaining property, but the parties never entered into a stipulation remotely suggesting that Helmick agreed Instruction 7 was a proper statement of the law.

portion of the evidence for special emphasis" in a manner prohibited by this Court. *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 134 (1992).

Finally, Helmick did not waive its objection to Instruction 8 as alleged by VDOT. During argument at trial over the instructions to be given, Helmick's counsel stated "Your Honor, we object to this instruction. We don't think that it's appropriate." JA 1096. Helmick's counsel went on to state:

> Your Honor, I think the way that this is drafted, it casts the county's comprehensive plan almost in a negative light, as opposed to a positive light….and it's essentially taking elements of the comprehensive plan out in piecemeal, and casting it in the most negative light possible instead of actually reflecting that the county's comprehensive plan does reflect what the county envisions is happening in the county.

JA 1097-1098. The trial court then accepted VDOT's Instruction 8, and stated "[s]o we'll note your exception[.]" JA 1099.

Helmick was not required to offer an alternative instruction at trial that included additional language from the Comprehensive Plan, as suggested by VDOT on page 30 of its Brief. Instruction 8 was entirely unnecessary and inappropriate when the entirety of Chapter 11 of the Comprehensive Plan was admitted into evidence. Helmick's outright objection to the instruction was sufficient to preserve its argument for appeal and constituted a timely objection "stated with reasonable certainty at the time of the ruling." Rule 5:25.

Conclusion

This Court should reverse the judgment and remand the case to the circuit court for a new trial consistent with its opinion.

Dated: December 28, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief complies with Rule 5:26(h), and that on December 28, 2018, the Reply Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that three copies of the same were hand delivered to the clerk's office. This same date, a copy of the Reply Brief was sent via email to all counsel of record, at the email addresses below:

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