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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001782-MR

PUTNAM & SONS, LLC.

APPELLANT

v. APPEAL FROM MCCRACKEN COUNTY CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 11-CI-00316

PADUCAH INDEPENDENT SCHOOL DISTRICT

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: JONES, LAMBERT, D., AND THOMPSON, JUDGES.

JONES, JUDGE: This is a condemnation action. The Appellee, Paducah Independent School District (“District”), exercised its power of eminent domain to condemn a 2.79-acre parcel of land formerly owned by Appellant, Putnam & Sons, LLC (“Putnam”). Putnam and the District dispute the amount of compensation due to Putnam for this taking. Following a bench trial, the McCracken Circuit Court

awarded Putnam \$115,000. On appeal, Putnam asserts that the method employed by the circuit court to arrive at this amount was in error and amounts to an abuse of discretion. For the reasons set forth below, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

The District operates one middle school known as Paducah Middle School. Because the school was in such poor condition, the District decided to tear down the old school and construct a new facility. Thirty-four existing tracts comprised the area where the District planned to build the new school. Because the District did not own that land, it entered into negotiations with the landowners. All of those negotiations ended with successful sales and land transfers to the District except for one, Putnam's 2.79-acre tract, which at that time was a gravel lot surrounded by a chain link fence.

After unsuccessful negotiations, the District initiated an eminent domain proceeding against Putnam to acquire the 2.79-acre tract. The tract was awarded to the District as of May 19, 2011. Putnam did not dispute the District's taking of 2.79-acre tract (hereinafter referred to as the "Subject Property"). Rather, Putnam's dispute is with the amount of compensation it is entitled to receive for the Subject Property. To place that issue in the proper context, it is necessary to briefly review the extent of Putnam's real estate holdings in the immediate area.

Prior to May 19, 2011, Putnam owned a total of 11 acres of land at Jackson Street and 31st Street in Paducah, Kentucky: (1) the Subject Property; (2)

an 8.2-acre tract across the street from the Subject Property (“Large Tract”), on which there is a 131,714-square-foot main building and four smaller out-buildings; and (3) a .189-acre tract on the west side of South 31st Street and south of the Subject Property, which is paved and has parking spaces for 34 vehicles. At the bench trial, a large portion of the proof concerned whether the Subject Property could be viewed as an integral part of Putnam's other holdings and its fair market value assessed accordingly or whether the Subject Property should be valued as a stand-alone tract.

The testimony at the trial revealed that the Modine Manufacturing Company previously owned and used all three tracts for its manufacturing business. Modine ceased operations in 1980. In 1982, an entity related to Putnam purchased all three tracts from Modine. After purchasing the Modine properties, Putnam primarily used the properties for distribution and warehousing purposes. For the past several years, the properties have been used to support a limited warehousing operation.

At the time of the taking, the primary warehouse customer was Wagner Enterprises. Its President, Mr. Bob Wagner, testified that Wagner had been using the Large Tract for warehousing since 2007. He testified that the main building was in poor condition, particularly the roof which had extensive leaks. Wagner testified that Putnam not taken any known action to repair the roof while he was using the premises. Mr. Wagner stated that he did not have any current use for the Subject Property.

George Sirk, a real estate appraiser who has been in the commercial property business in McCracken County for over forty years, testified on the District's behalf.¹ Sirk's opinion is that the Subject Property should be considered a separate, free-standing tract of property, without any connection to the two other Putnam tracts for the purposes of valuation. Sirk acknowledged that the Subject Tract was used by Modine in conjunction with the other two tracts to operate a major warehousing operation. However, he disputed that such an operation was currently viable severing any commercial or economic connection between the Subject Tract and the other two tracts. He explained:

Because I think the highest and best use of the property as a whole, the entire three tracts, has changed over time to totally manufacturing or industrial to use more of a warehousing type use. And that, to me, changes the idea about the possibility of there being any severance damages because the lot in question [Subject Property], you know, is a parking lot. And under the warehouse use the only requirement changes and actually just the practical necessity for all that parking is diminished. And furthermore, there's been no demand for manufacturing space of that type. And the space itself is in horrible condition. And the best they have been able to do with it over a pretty significant time in recent history has just been to periodically lease out parts of it for temporary storage. What I looked at is the recent history of the property, the demand, both local and nationally, for industrial space or for warehouse space, the fact that it has been marketed for years without any significant

¹ Because Sirk could not testify at trial, the parties stipulated that his deposition testimony could be considered as a substitute at trial. Although Sirk's appraisal is dated October 12, 2010, he claims that the analysis in his report and his conclusion of the value of the Subject Property is still accurate for the effective date of the taking, May 19, 2011.

interest and what's actually happened with the property. Like I said, the best they have been able to do is short-term overflow of storage for various people.

He explained that he reached his conclusion that the Subject Property should be valued as a separate vacant lot for appraisal purposes based upon the current condition of the main building, its low ceiling height, and its limited warehouse use which, in his opinion, required little, if any, parking. Additionally he considered the regional demand for warehouse space and the local market.

Once Sirk determined that the Subject Property should be valued as a stand-alone 2.79-acre tract, he researched the sale history and price of other vacant lots in Paducah. Using these sales in conjunction with his own knowledge of the Paducah commercial real estate market, Sirk arrived at what he believed was the fair market for the Subject Property: \$55,000 plus \$5,000 for the chain link fence, equaling a total fair market value of \$60,000.

Another real estate appraiser, Otto Spence, testified for Putnam. Spence disagreed with Sirk's conclusion that the Subject Property should be valued as a stand-alone tract. Spence determined the highest and best use for the properties was a warehousing facility with adequate open storage area on the Subject Property to accommodate the delivery and exchange of materials with large semi-trailer trucks. Spence explained that there was nowhere on the Large Tract to park such vehicles; therefore, the loss of the Subject Property would greatly restrict the type of business that could operate on the Large Tract.

Spence's appraisal provided just compensation based upon a before-and-after analysis. Under this analysis, just compensation equals the value of all three tracts immediately before the taking minus the value of the remaining two tracts after the taking. While Spence included both a sales comparison approach and an income approach in his appraisal, he found the sales comparison approach to be most reliable for determining the before and after values. In a sales comparison approach, the appraiser selects properties that are as comparable as possible to the subject. For his comparable sales, Spence testified that he identified sales from similar locations, having good access to the interstate highway system.² The comparables also had ample land for semi-truck distribution such as would be present with the inclusion of the Subject Property.

Spence determined a unitary value for the property as a whole to be \$10 per square foot of gross building area, assuming the roof was repaired, after making adjustments to all comparable sales. This equaled a total value for the entire property of \$1.5 million. Because the adjustments for the comparable sales did not factor in the poor roof on the Large Tract, the indicated value of \$1.5 million reflected the value with a repaired roof. Spence deducted \$400,000 from the indicated value to reflect an "as is" value for the property. This deduction reflected the amount of money that the market would spend to fix the roof and make the subject property comparable to the other properties he considered.

² After talking to brokers and appraisers in Western Kentucky, Spence identified 12 sales that he considered worthy of comparison.

Spence estimated that if all three tracts were sold together for their highest and best use their fair market value was \$1.1 million dollars.

Next, Spence considered the highest and best use and corresponding value of the two remaining tracts without the Subject Property. Spence testified that the highest and best use for the remainder was still warehousing, but that loss of the Subject Property would limit the type of warehousing because the remainder did not have adequate space for semi-trailer trucks. Spence identified a database of warehousing properties with lower amounts of available open area storage and truck maneuverability to determine the market value for the remainder. After adjusting those comparable sales, Spence concluded that the value for the remainder was \$750,000 based on a \$5 per square foot gross building area. Like Spence's value before the taking, the \$750,000 value for the remainder reflected a functioning roof. Because the remainder did not have a functioning roof on the date of the taking, Spence also reduced the value for the Remainder by the same \$400,000 that he utilized in determining the "as is" value for all three tracts. After making this reduction, Spence arrived at a theoretical fair market value for the remaining two tracts of \$350,000. Thus, Spence concluded that the fair market of the Subject Property was \$750,000, which represented the \$1.1 million value before the taking minus the \$350,000 value after the taking.

In reality, shortly after the District acquired the Subject Property, Putnam did list and sale the remaining two lots together for a sale price of \$435,000. Using this amount for the fair market value after the taking, Spence

valued the Subject Property at \$665,000, \$1.1 million minus the sales price of \$435,000.

The circuit court first determined that the Subject Property should be valued as a stand-alone tract, not in conjunction with Putnam's two other tracts.

Paragraphs 2 through 5 of the circuit's opinion addressed this issue as follows:

2. Putnam contends that the Subject Property should be viewed as part of all of the Putnam holdings. "Ordinarily, two or more parcels of land constitute one tract for purposes of determining its value when they are contiguous and are united in use and ownership." *Commonwealth v. Highways v. Dennis*, 409 S.W.2d 292, 293 (Ky. 1966).

3. After reviewing the evidence, the Court has concluded that the Subject Property, the 2.79 acre gravel lot surrounded by a chain link fence, should be considered a separate tract and not an integral part of the total property owned by Putnam immediately before the taking. Both parties agree the highest and best use of the Large Tract immediately before and after the taking was warehousing. This warehousing activity was confined to the various structures located on the Large Tract across South 31st Street from the Subject Property.

4. Putnam has argued that the Subject Property is needed for parking and ancillary services associated with the warehouse activity. However, testimony from Wagner establishes that the Subject Property was not being used to support the Large Tract while his company leased the Modine properties. There was no testimony that the Subject Property has been used to support or in connection with the Large Tract since Modine ceased operations in 1980. Further, a review of the Paducah City Zoning Ordinance . . . indicates that only 31 parking spaces are required for warehousing being conducted in the square foot space on the Large Tract.

5. Since the Subject Property is considered a separate tract and not an integral part of the total property owned by Putnam immediately before the taking there is no reason to discuss compensation based upon the before/after analysis.

(Cir. Crt. Op. at 8).

The circuit court then turned Sirk's and Spence's valuations of the property. Based on its "general knowledge and experience," the circuit court concluded that Spence's valuation was far too high. It was also nonplussed by Sirk's evaluation. It found that Sirk's evaluation was too low because it was based on alleged comparable sales that the circuit court believed were not comparable at all "because they were not arms-length transactions (or even sales at all) or they involved properties where the highest and best use was not the same high level of commercial use that is enjoyed by the Subject Property."

Having rejected both experts, the circuit court was left in somewhat of a predicament as to how to value the Subject Property. To do so, the circuit court turned to a deed dated April 8, 2002, reflecting a value of \$580,000 for all three parcels. Based on Tom Putnam's testimony that \$30,000 of the \$580,000 was personal property, the court found that according to the consideration certificate all three properties together had a fair market value of \$550,000 in 2002. From this amount, the circuit court subtracted the \$435,000 Putnam sold the remaining two tracts for in 2011 to arrive at a fair market value of \$115,000 for the Subject Property.

This appeal by Putnam followed.

II. STANDARD OF REVIEW

We review the circuit court's factual findings under a clearly erroneous standard and the legal issues *de novo*. See *God's Ctr. Found. Inc. v. Lexington–Fayette Urban Cnty. Gov't*, 125 S.W.3d 295, 300 (Ky. App. 2002) (applying the clearly erroneous and *de novo* standards of review to a condemnation case in which the circuit court conducted a bench trial).

Factual findings are not clearly erroneous if they are supported by substantial evidence. Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. Although the factors of necessity and public use associated with condemnation are ultimately legal issues, resolution of those issues encompasses factual matters subject to deferential review on appeal.

Id. (internal citations omitted); *Clark v. Bd. of Regents of W. Ky. Univ.*, 311 S.W.3d 726, 729 (Ky. App. 2010).

III. ANALYSIS

Sections 13 and 242 of the Kentucky Constitution permit the public condemnation of private property, but only for a valid “public use,” and only upon payment of “just compensation.” Just compensation, under Kentucky law, “is the difference in market value of the tract before and after the taking.” *Bianchi v. City of Harlan*, 274 S.W.3d 368, 372 (Ky. 2008) (citing *Commonwealth, Dep't of Highways v. Sherrod*, 367 S.W.2d 844, 857 (Ky.1963)).

Where the public authority condemns an entire tract, this measure translates simply as the market value of the tract immediately before the condemnation because, obviously, the landowner retains no part of it after the condemnation. Where only a portion of the tract is condemned, the measure is the market value of the entire tract immediately before the condemnation less the market value of the remainder retained by the landowner immediately after the condemnation. The Kentucky Supreme Court reasserted this standard in *Sherrod*, *supra*, and in 1976, the General Assembly incorporated it in the Eminent Domain Act (KRS 416.540 to 416.670), which provides in pertinent part that condemnee landowners are to be compensated:

such a sum as will fairly represent the difference between the fair market value of the entire tract, all or a portion of which is sought to be condemned, immediately before the taking and the fair market value of the remainder thereof immediately after the taking[.]

KRS 416.660. *See also* KRS 416.580 (same); *Bianchi*, 274 S.W.3d at 372.

First, Putnam argues that the circuit court erred in finding that the Subject Property should be considered a separate tract and not integral part of the other two tracts. Parcels or tracts may be unified for valuation purposes if the proponent can show that “they are contiguous and are united in use and ownership.” *Commonwealth, Dep't of Highways v. Dennis*, 409 S.W.2d 292, 293 (Ky. 1966). In *Jones v. Commonwealth, Dep't of Highways*, 413 S.W.2d 65 (Ky. 1967), the Court summarized this “unity rule” as follows:

Even if the owner's land is divided into parts in such manner as might otherwise raise the issue of separateness, if he is devoting the parts to a single use, and they lie in such proximity as to be in effect united by that use into a single property, they will be regarded as a whole for the purpose of assessing damages for the taking of a part.

Id. at 67 (citation and internal quotation marks omitted); *Bianchi*, 274 S.W.3d at 373.

Both parties rely on *Bianchi* to support their respective positions on the unity issue. *Bianchi* involved the City of Harlan's taking of four parcels previously owned by the Bianchi Partnership. The Partnership owned several other commercial properties in the City, which it leased to various businesses; the parcels taken by the City had been used for parking by the Partnership's tenants and their customers. On appeal to the Kentucky Supreme Court, the Partnership argued that it should have been compensated for the adverse effect of the condemnation on all of its neighboring properties under the unity rule. The Court recognized that "parking lots have sometimes been deemed united in use with the parcels they serve," *id.* at 373, but ultimately rejected the Partnership's claim that the unity rule should apply in its case. In so doing, the Court noted that compensation under the unity rule is applicable only when "the parcel taken is substantially necessary to the reasonable use of the remainder," and the taking permanently injures or interferes with the continued use of the remainder of the property. *Id.* at 374. The Court concluded that the Partnership could not demonstrate unity because it had "allege[d] neither a necessary and permanent

injury to the remaining property as such nor a substantial interference with the continued use of it." *Id.* The Court further noted that the property the City took was designated to be used as a public parking lot, and therefore, still remained available to the Partnership's tenants and customers for parking, the same purpose for which the property was used before the taking. *Id.*

The District argues that *Bianchi* is decisive and dictates rejection of the unity rule in this case. We disagree. Unlike the Partnership, Putnam offered proof from Spence that the value of its properties as a whole was permanently diminished by the taking. Spence valued the remaining property both before and after the taking. The District failed to rebut Spence's testimony with any expert opinion of its own. Sirk valued the Subject Property as a stand-alone property only. He failed to assess the property as a whole and offered no opinion whether the taking permanently injured or comprised the usefulness and value of the remaining property.

Therefore, we must conclude that Putnam made a *prima facie* showing, which the District failed to rebut, that the taking caused it to suffer a permanent injury as related to its remaining property. Of course, a showing of economic injury alone is insufficient to establish unity. The properties must also be contiguous or in close enough proximity to one another such that they can be viewed as one. Moreover, there must be unity of ownership and unity of purpose.

In this case, it is undisputed that there was unity of ownership. Likewise, we believe that the proof was sufficient to establish unity of location in

that the Subject Property was directly across the street from the Large Tract. This brings us to unity of purpose/use.

In analyzing the unity of use/purpose question, the circuit court considered only the present use of the property by the short-term tenant. We do believe that current use by a short-term tenant is determinative of unity, especially considering that the properties were used together by the prior owner in its manufacturing operation. *See Big Rivers Electrical Corp. v. Barnes*, 147 S.W.3d 753, 757 (Ky. App. 2004). And, it appears that the Subject Property was *available* to the tenant for its use in conjunction with the Large Tract, but that due to the nature of the tenant's business it had no present need for the Subject Property.³

On review, we must conclude that the circuit court failed to properly analyze the unity of use/purpose issue. The circuit court should have considered how the subject property was being used at the time of the taking, whether the subject property had ever been devoted to a separate use, and finally what was the subject property's best and highest use. The circuit court erred in limiting its analysis of use to only the current use by Wagner, Putnam's most recent tenant. As noted in *Big Rivers, supra*, a condemnee is entitled to just compensation based on the property's highest and best use, even though the property might not then so be used. *Id.* at 757-58.

³ Wagner, the current tenant, testified that he used a relatively low volume of space in the Large Tract. However, Wagner admitted that another user with a larger operation would need to use the Subject Property if it planned to fully utilize the Large Tract as a warehousing or manufacturing facility and that under those circumstances, it would be essential for that user to have the use of the Subject Property.

The District argues that Spence's testimony regarding the future use of the property for large-scale warehousing was speculative. Spence does not have a crystal ball nor can he turn back time and place the property as whole back on the market to test out his theories. He cannot guarantee that a buyer would have materialized. Thus, to some extent, his opinions were just that-- opinions. His opinions, however, are supported by research and market data. They have some factual underpinning and basis. The property was previously used as a larger scale facility, it was located in a fairly active area, and there was good highway access to the area. Furthermore, Spence noted that several other similar facilities had sold in the area demonstrating some demand. Spence further testified that despite the needed repairs, he believed that there was a market for that size building and facility that would attract potential buyers.

In this sense, we believe that Putnam presented evidence of best use that was more than mere speculation. *See also Louisville Gas & Elec. Co. v. Diemer*, 443 S.W.2d 647, 649 (Ky. 1969) (holding that use of property as a future subdivision was not speculative where as a matter of fact an expert witness for the condemnor testified that the highest and best use of the property was from farm to subdivision purposes and based his assessment on a comparable sale of a tract which had been subdivided and from which lots had been sold and were being sold).

We fail to see where the circuit court evaluated the potential that the best use of the whole property was for a major warehousing operation utilizing the

Subject Property for large semi-trailer trucks. The circuit court did note that the remaining property had sufficient parking under a Paducah City zoning ordinance to allow it to conduct a warehousing operation. However, the issue was not with the number of parking spaces. The issue concerned whether the remaining property could support a major warehousing operation, which relied on semi-trailer trucks, without the Subject Property. The record was fairly clear that only the Subject Property had sufficient size and location to support semi-trailer traffic.

Finally, we note that even though the circuit court stated in its opinion that it did not believe the Subject Property was unified, it nevertheless valued the property as if were unified. This is somewhat perplexing. If the circuit court believed that the Subject Property was not unified with the remaining property, it should have valued it without reference to the remaining tract and without any consideration of the property as a whole. Instead of doing so, the circuit court used a 2002 deed to represent the current fair market value of all three tracts and from that subtracted the 2011 sale of the remaining property to arrive at the value of the Subject Property. It is difficult to fathom that the entire property was worth the same amount in 2011 as it was in 2002. The only explanation given by the circuit court in this regard is that no repairs had been performed on the Large Tract since the 2002 transfer. However, we again note that once the circuit court rejected the unity approach, the Large Tract became irrelevant. We also note that there was no testimony that the character of the Subject Property deteriorated in any substantial manner from 2002 to 2011. If severed from the Large Tract, one would expect the

Subject Property, which experienced little or no deterioration in the nine-year period, to enjoy normal appreciation in its own right. *See Commonwealth v. Combs*, 17 S.W.2d 748 (Ky. 1929) (holding that admission of testimony as to amount realized from sale of town lots eight years prior to trial of condemnation action under different conditions was erroneous).

Moreover, we note that the 2002 deed relied on by the circuit court represented a transfer between interrelated companies.⁴ There was no testimony that this transfer represented the actual fair market of the property in 2002. Non-arms length transactions are not presumed to represent market value.

Commonwealth, Dep't of Highways v. Dillion, 525 S.W.2d 658, 659 (Ky. 1975).

Under Kentucky law, just compensation “is the difference in market value of the tract before and after the taking.” *Bianchi*, 274 S.W.3d at 372. A comparable sale must have “reasonable proximity to the time of the taking” to be a valid comparison. *Commonwealth, Dep't of Highways v. Parker*, 388 S.W.2d 366, 368 (Ky. 1965). We appreciate the trial court’s difficult situation in trying to come to a compromise between the large differences in values suggested, and understand the court was trying to fashion its own remedy to determine just compensation. However, we cannot agree that a prior transfer between interrelated companies of a three parcel tract is competent or reliable evidence of the present fair market value of a single parcel nine years later. *See Commonwealth, Dep't of Highways v.*

⁴ The 2002 deed the court relied on transferred the property from Putnam & Sons, a partnership, to Putnam & Sons, LLC. This transaction occurred because Tom Putnam’s father, one of the original partners, had died.

Tyree, 365 S.W.2d 472, 476 (Ky. 1963) (explaining that incompetent evidence should not be relied upon to establish fair market value). This item of incompetent evidence clearly factored heavily in the trial court's award. This requires reversal of the judgment. *See Commonwealth, Dep't of Highways v. Fister*, 373 S.W.2d 720, 724 (Ky. 1963).

Because this issue will likely come up on retrial, we pause to elaborate on the trial court's predicament. The trial court, acting within its prerogative as fact-finder, clearly did not believe that either expert's opinion was reliable. The trial court rejected Spence's estimate on value to be so "extravagant as to be contrary to common knowledge." It then found that Sirk relied on inappropriate comparables to establish his estimate. This left the trial court without an expert opinion based on what it believed to be reliable evidence. While reliance on the 2002 transfer was an admirable attempt at a compromise, it was nevertheless an inappropriate methodology. In such a situation, the court may have desired to appoint its own expert witness to provide an opinion as to the value of the Subject Property. *See Kentucky Rule of Evidence 706.*⁵ "The trial court has

⁵ (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may require the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportions and at such time as the court directs, and thereafter

the discretion to appoint experts who may assist the court in its fact-finding duties." *Maclean v. Middleton*, 419 S.W.3d 755, 760 (Ky. App. 2014).

IV. CONCLUSION

For these reasons, we reverse the circuit court's award and remand this matter for additional proceedings consistent with this opinion. On remand, the circuit court should first determine whether the Subject Property should be valued separately or as an integral part of the Putnam's three tract holding. In so doing, the circuit court must consider the ownership, location and best use of the Subject Property remembering that current use is not dispositive of the use issue. If the circuit court determines that the Subject Property is unified with the remaining property, it should use the before and after method of valuation. The before value, however, must be based on a fair market value immediately prior to the taking. If the circuit court rejects the unity approach, it should value the property as a stand-alone piece of real estate. Once again, we note that the fair market value means the fair market value of the parcel *at the time of the taking*.

ALL CONCUR.

charged in like manner as other costs.

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