IN THE COURT OF APPEALS OF IOWA

No. 2-063 / 11-0936
Filed April 25, 2012

JON J. PAULSEN,
Plaintiff-Appellant,

vs.

CITY OF WEST DES MOINES,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Jon Paulsen appeals a district court's ruling denying additional compensation following the City of West Des Moines's partial condemnation of his property. **AFFIRMED.**

Timothy C. Hogan and Lawrence I. James Jr. of Hogan Law Office, Des Moines for appellant.

Richard J. Scieszinski, City Attorney, West Des Moines, for appellee.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

Jon Paulsen appeals a district court's ruling denying additional compensation following the City of West Des Moines's partial condemnation of his property. We find Paulsen did not meet his burden of proving additional loss of value as it pertains to his claim that he was left with no access to a public street. We therefore affirm.

I. Background Facts and Proceedings

The City of West Des Moines acquired fee title to 1.69 acres of property owned by Jon Paulsen for its "Southwest Connector Project." Under the project, a three-lane road will be constructed and run through the middle of Paulsen's property, dividing it into a western parcel (15.63 acres) and an eastern parcel (6.38 acres).[1] The entire parcel is currently being used by Paulsen for farming. Access to the eastern parcel will continue to be by way of South 1st Street, which runs along the eastern edge of the property. Access to the western parcel by way of a public street, however, is at dispute in this appeal.

On January 6, 2010, the compensation commission issued an appraisement of damages, which set the damages to the Paulsen property at $71,500.00. On February 2, 2010, Paulsen appealed the compensation commission's decision to the district court. The matter came on for a bench trial on February 22, 2011. On April 21, 2011, the district court affirmed the compensation commission's award of $71,500. On April 29 Paulsen filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), requesting the district

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[1] The three-lane road will eventually be turned into a six-lane road.

court address “the impact of the impaired access on the value of the property.” The district court denied Paulsen’s motion. Paulsen appeals.

II. Standard of Review

The district court has appellate jurisdiction over appraisement damages awarded by a compensation commission. Iowa Code § 6B.18 (2009). The case is tried to the district court as an ordinary proceeding. *Id.* § 6B.21. Our review of an ordinary proceeding is for correction of errors at law. Iowa R. App. P. 6.907. The district court’s factual findings are binding if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a).

> A condemnation case is one in which the amount allowed is peculiarily within the province of the trier of fact, and unless the same be shown to be so extravagant or penurious as to be wholly unfair and unreasonable, we will not interfere with the award on appeal.

Sunrise Developing Co., v. Iowa Dep’t of Transp., 511 N.W.2d 641, 645 (Iowa Ct. App. 1993). “The question of damages is a question of fact.” *Id.*

III. Analysis

Our federal and state constitutions provide that private property cannot be taken for public use without just compensation. U.S. Const. amend. V.; Iowa Const. art. I, 18; *Molo Oil v. City of Dubuque*, 692 N.W.2d 686, 692 (Iowa 2005). “In eminent domain the denial of reasonable access, or as it is called ‘free and convenient’ access, constitutes compensable taking of property.” *Belle v. Iowa State Highway Comm’n*, 256 Iowa 43, 52, 126 N.W.2d 311, 316 (1964). Whether such a taking occurred depends on the facts of each case. *Id.* There is no dispute that in this case, there was a partial taking by the City. Rather, Paulsen contends the City’s partial taking left the western parcel without access to a

public street—decreasing its value—and the district court erred in failing to award him additional compensation.

In eminent domain cases involving a partial taking, the ordinary measure of compensation is "the difference between the fair market value of the condemnee's property immediately before the taking and the value of the property that remains following the taking." *Danamere Farms, Inc. v. Iowa Dep't of Transp.*, 567 N.W.2d 231, 232–33 (Iowa 1997).

> To show the market value of property after condemnation, every element which can fairly enter into the question of value may be considered, not as an independent element of damages, but as a factor in determining the market value of the portion remaining after the taking.

Sunrise Developing Co., 511 N.W.2d at 644. However, "[r]emote, contingent, and speculative matters are not to be considered as evidence of value of condemned property." *Id.* The burden is on the plaintiff to prove damages. *Millard v. Nw. Mfg. Co.*, 200 Iowa 1063, 1065, 205 N.W. 979, 981 (1925).

Paulsen contends he is entitled to additional compensation damages because at the time of condemnation, the western parcel was left with no access to a public street. The City, however, asserts that Paulsen "maintained the same access rights to the western portion of his property after the condemnation that he had before the condemnation." The question is not whether Paulsen's access remained the same before and after the condemnation. Instead, it is centered on whether the value of Paulsen's property decreased by more than $71,500—the City's determination of just compensation—due to any change in access resulting from the condemnation.

Paulsen first called Duane Wittstock to testify. Wittstock, who is employed by the City of West Des Moines and oversees construction of public improvements, including the Southwest Connector Project, testified that although currently there are no immediate, direct, and permanent access points off the Southwest Connector, Paulsen has access for his current farming purposes along frontage of the Southwest Connector. He further testified that if Paulsen decided to build a single family house on the western parcel, the City would allow a driveway access. Wittstock also confirmed that in order to gain access to the western parcel for any other purpose—other than farming or a single family dwelling—Paulsen will need to seek access from the city council. He also asserted the western parcel would be landlocked but for the current, limited access to the Southwest Connector.

Paulsen entered into evidence a letter to his attorney, dated October 26, 2009, from Ryan Gurwell, the City's Right-of-Way Agent, which stated:

> As we discussed, I consulted with the City Engineer about your request for more detailed plans of the access locations on Mr. Paulsen's property. The City Engineer's response was that at this point in time the City is not building any of the side streets or permanent accesses that would impact the Paulsen property. There will be no further definition of development access defined at this time since no one knows what the future developments will look like. The exhibit I provided to you at our last meeting simply depicts schematically where the City's staff believes future access may work, but the final access locations will need to be determined during the site plan process when the property develops and is approved by Council.
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> *Access for farming purposes will be available by jumping the curb of the new Southwest Connector. Mr. Paulsen needs to let us know if a field access (drop curb) is desired to be provided by the City*, with the understanding that the future developer would be required to remove it during the development process. Most people do not choose this option. Permanent gravel driveways in the rights-of-way are not allowed.

(Emphasis added.) As this letter indicates, once the Southwest Connector is completed, Paulsen will continue to have access to the western parcel for farming purposes.

Paulsen also called real estate appraiser Fred Lock to testify. Lock testified that although there is farm access to the western parcel, there is no direct, permanent access—a factor that would discount the value to a potential buyer. He then described the potential buyer as a person who would hold the property for future development, as he considered Paulsen's current farming activities an "interim use," with its highest and best use being "some type of residential development." Lock further opined that although Paulsen's land value had decreased at this point in time, this "may not always be so because development will likely occur to his property." Based on this information, Lock concluded a twenty-percent valuation discount was proper for the western parcel. He valued the total damages suffered by Paulsen at $148,100, or $76,600 more than the compensation commission's valuation of damages.

On cross-examination Lock contended that Paulsen "lost the right to access [South 1st Street] off the Southwest Connector except by a farm tractor." When the City asked how Paulsen's access had changed before and after the condemnation, Lock replied,

> It isn't different in the sense that [Paulsen] can drive a tractor from First Street to the west side, but it is different in the sense that he might want to build something on the west side. I'm guess—speculating now. But he doesn't have access rights to the Southwest Connector road on his property.

Lock also opined the western parcel was landlocked "in the sense [Paulsen is] not on the road." On recross-examination, however, Lock admitted that unlike the comparable sales properties he used—none of which had street frontage—the western parcel will front the Southwest Connector.

The City called real estate appraiser Pat Schulte to testify. Schulte performed the appraisal of the Paulsen property in June 2009, as well as appraisals of the other properties along the Southwest Connector for the City for acquisition. Schulte opined the highest and best use of the Paulsen property "is for residential development or to hold [i]n inventory for future development and that includes interim farming." He stated interim farming was the highest and best use at the present time because it provides the greatest return.

In his appraisal, Schulte valued the property "assuming that access will be granted to the west land." In reviewing Lock's valuation, Schulte explained the major difference between the comparables he used and those Lock used was the street frontage. Schulte stated,

> [T]he best comparable in the after situation is to find a property that has frontage on a new street and has debatable access, where people are arguing about it, but has—where the City is claiming they are guaranteeing an access and it is not defined. . . . [Lock's] comps are not that.

Schulte further explained Lock attributed all the negative qualities of the Paulsen property to the access issue, without taking into consideration the positive impact frontage to the Southwest Connector might have on the property.

The City finally called Brian Linnemeyer, a real estate appraiser who performs review appraisals for government acquisition purposes, including the Paulsen property. Linnemeyer thought Schulte's appraisal "was on the high end

of the market range based upon what was going on in the economy," but explained that he and Schulte discussed the valuation and in an effort to be fair to Paulsen, the two felt the $71,500 valuation figure was appropriate.

When asked on cross-examination about the issue of access, Linnemeyer stated the issue was not included in his report because the western parcel "wasn't delineated in the plan as a landlocked parcel." Linnemeyer explained that in performing his appraisal, he looked at the current use of the property—farming—and whether access was available for that use both before and immediately after the City's acquisition. Linnemeyer concluded Paulsen's access was the same before and after the City's acquisition, hence the value set at the time of condemnation was appropriate.

The measure of compensation due is "the difference between the fair market value of the condemnee's property immediately before the taking and the value of the property that remains following the taking." *Danamere Farms*, 567 N.W.2d at 232–33. In setting the damages, the district court was allowed to consider "every element which can fairly enter into the question of valuation"—including the property's highest and best use—but may not consider "remote, contingent, and speculative matters" as evidence of value of condemned property. *Sunrise Developing Co.*, 511 N.W.2d at 644 (explaining what the district court may consider in determining value); *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84, 88 (Iowa 1973) (noting plaintiff is entitled to present evidence of highest and best use of property in partial condemnation proceeding).

The district court weighed the evidence before it—the exhibits and testimony of Wittstock, Lock, Schulte, and Linnemeyer—and concluded Paulsen

did not meet his burden of proving he had been denied access to a public street such that additional condemnation damages were appropriate. Substantial evidence supports the district court's conclusion that $71,500 is a proper valuation because the western parcel, although it does not have direct, permanent access, continues to have the same farm access it did immediately before the condemnation and would have access if a single family dwelling that meets zoning requirements were to be built on the property.[2] Moreover, although Wittstock, Lock, and Schulte agreed that the highest and best use of the Paulsen property is for future development or to hold for development, Wittstock indicated that regardless of the condemnation proceeding, Paulsen would be required to seek approval from the city council regarding the development and subdivision of the property. This would be additional access over and above what Paulsen currently has to the parcel. Therefore, the western parcel's access to the public streets is not only unchanged as it relates to farming activities and use for a single family dwelling, but is also unchanged as it pertains to future development.

As there were no plans for development of the parcel, this possibility is remote and contingent on action by Paulsen or a future buyer, so will not be considered in valuing the property at this time. *Compare Sunrise Developing Co.*, 511 N.W.2d at 644 (stating that where plaintiff had no knowledge of future plans for the land, or if there were any plans, such testimony was speculative) *with In re Primary Road I-80*, 256 Iowa 43, 45, 54, 126 N.W.2d 311, 312, 317

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[2] According to Wittstock's testimony, Paulsen would not have to seek approval for access for a single family house. He stated, "no matter what [Paulsen] does, other than ag[ricultural] use and potentially a single family house that meets zoning, he will have to go to the council and seek approval to do that development."

(1964) (noting that in determining damages for partial condemnation, the jury could properly consider the fact that plaintiff's property had been surveyed, plats had been prepared, a driveway had been built through part of the area, and utilities—including water, sewer, gas, and electric—were available).

We will not interfere with the trier of fact's award on appeal, unless it is "so extravagant or penurious as to be wholly unfair and unreasonable." *Sunrise Developing Co.*, 511 N.W.2d at 645. Because we find Paulsen did not meet his burden of proving he had been denied access to a public street such that additional condemnation damages were appropriate, and because the district court's award of compensation damages was not "wholly unfair and unreasonable," we affirm the district court. *Id.*

AFFIRMED.