STATE OF MICHIGAN

COURT OF APPEALS

DRAINAGE DISTRICT FOR THE CITY OF BIRMINGHAM CSO SANITARY & STORM DRAIN, a Michigan statutory corporation, by its statutory agent, OAKLAND COUNTY DRAIN COMMISSIONER,

Plaintiff-Appellant,

v

PALMER R. ROOCH and MARY J. ROOCH,

Defendants-Appellees,

and

COMERICA BANK and FIRST FEDERAL OF MICHIGAN,

Defendants.

UNPUBLISHED
March 20, 1998

No. 199786
Oakland Circuit Court
LC No. 94-486335-CC

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment entered on a jury verdict in the amount of $140,515, awarded as just compensation for temporary and permanent easements taken by plaintiff on defendants' property.[1] We affirm.

This case arises out of a condemnation action filed by plaintiff in November, 1994. Plaintiff took both temporary and permanent easements on defendants' property for the "development, construction, operation, maintenance, expansion and/or replacement" of a drainage system in Birmingham. Plaintiff offered defendants $3,515 for the temporary easement and $12,000 for the permanent easement.

Plaintiff argues on appeal that the trial court erred in denying its motion for a directed verdict on defendants' assemblage theory because there was not sufficient evidence to support application of that doctrine. When reviewing the sufficiency of the evidence in a civil action, this Court views the evidence in a light most favorable to the non-moving party, giving that party "the benefit of every reasonable inference that can be drawn from the evidence." *Mull v Equitable Life Assurance*, 196 Mich App 411, 421; 493 NW2d 447 (1992), aff'd 444 Mich 508 (1994). If, after reviewing the evidence, reasonable jurors could have honestly differed in their conclusions, the question is properly left to the trier of fact, and this Court should not substitute its judgment for that of the jury. *Id.; Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). However, if the evidence is not sufficient to establish a prima facie case, the motion for directed verdict or judgment notwithstanding the verdict should be granted because "reasonable persons would agree that there is an essential failure of proof." *Id.*

In the condemnation setting, just compensation is defined as "the amount of money which will put the person in as good a position as the person would have been in had the taking not occurred." *In re Acquisition of Land for the Central Industrial Park Project, Parcel 755*, 142 Mich App 675, 676-677; 370 NW2d 323 (1985); SJI2d 90.05. An award of just compensation is based on the market value of the property. Market value is:

> the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is adapted and for which it is capable of being used; the amount which land would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing but not obliged to buy; what the land would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale; what the property will sell for on negotiations resulting in sale between an owner willing but not obliged to sell and a willing buyer not obliged to buy; what the land would reasonably be worth on the market for a cash price, allowing a reasonable time within which to effect a sale. [*Consumers Power Co v Allegan State Bank*, 20 Mich App 720, 744-745; 174 NW2d 578 (1969), aff'd 388 Mich 568 (1972). See also SJI2d 90.06.]

In determining market value, one must also determine the highest and best use of the property. *St Clair Shores v Conley*, 350 Mich 458, 462; 86 NW2d 271 (1957); *In re Condemnation of Lands in the City of Battle Creek for Park Purposes*, 341 Mich 412, 419-420; 67 NW2d 49 (1954). "Highest and best use" means "the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use." SJI2d 90.09; *Jack Loeks Theatres, Inc v City of Kentwood*, 189 Mich App 603, 618-619; 474 NW2d 140 (1991), modified 439 Mich 968 (1992).[2]

In determining the highest and best use of the property, Michigan courts have permitted consideration of the assemblage doctrine. *City of Allegan v Vonasek*, 261 Mich 16, 22-24; 245 NW

557 (1932); *Consumers Power, supra* at 737-738. Assemblage involves the use of a parcel of property in conjunction with other properties.[3] This Court has stated:

> Even though the increased market value is due to the adaptability of the property for valuable uses in conjunction with other properties, it may be considered, if the practicability of the combination of all necessary properties on which such availability depends is at the time of the condemnation so great as probably to affect the public mind, and therefore increase the price which a purchaser might be expected to give. This rule is not, however, applied where the chance of different parcels of land being brought together by agreement or purchase, in such a way as to be available for the use, is to be regarded as too remote and speculative to have any legitimate effect upon the valuation. [*Consumers Power, supra* at 737-738.]

The trial court permitted the jury to consider evidence that, prior to the easement, defendants would have been able to split their lot into two lots had they purchased a twelve-foot strip of property from their neighbor. This strip was necessary to bring the second lot into compliance with setback requirements. Their neighbor testified that he would have sold the property to defendants.

Plaintiff argues that the doctrine should not have been submitted to the jury because the possibility of a lot split was too speculative or remote, was based on conjecture, and was not reasonably probable. We disagree.

First, we note that this Court has rejected the "real probability" standard when evaluating the highest and best use of the property, adopting instead the standard of "reasonable possibility." *Jack Loeks Theatres, supra* at 618-619; *State Highway Comm v Abood*, 83 Mich App 612, 621-622; 269 NW2d 247 (1978); *State Highway Comm v Haehnle*, 69 Mich App 336, 337-338; 244 NW2d 470 (1976). Moreover, this Court has noted that when evaluating the highest and best use, it is not only the value of the property as it is used by the owner which is considered. Prospective uses may also be considered:

> The possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered. . . . Although a use reasonably likely to take place in the future can be considered the highest and best use, such future use becomes too speculative for consideration if the "future" that is contemplated is beyond the "near future." To warrant admission of testimony as to the value for purposes other than that to which the land is being put, . . . the landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, and (3) that the market value of the land has been enhanced by the other use for which it is adaptable. [*Jack Loeks Theatres, supra* at 618-619 (quoting 4 Nichols on Eminent Domain, § 12B.12, pp 12B-90—12B-105).]

Defendants presented evidence that they considered the possibility of a lot split from almost the beginning. While they did not submit an application for approval of the split or develop specific plans,

Mrs. Rooch testified that she inquired about the possibility of a split and she purchased four packets of zoning ordinances. She also discussed the possibility with a broker. However, defendants did not pursue the split because Mr. Rooch became very ill. Defendants also presented evidence that their lot was very large and therefore conducive to a split, as well as evidence that many lot splits had occurred in their neighborhood. Additionally, defendants presented evidence that the market value would have been enhanced if the lot had been split, and expert testimony addressing concerns about the flood plain, setback requirements, land slope, and deed restrictions. Under these circumstances, we conclude that the possibility of a lot split was not so remote or speculative as to be inadmissible.[4] For the same reasons, we conclude that the trial court properly denied plaintiff's motion for a directed verdict on this issue.

Plaintiff also argues that the trial court's instruction concerning the assemblage doctrine was improper because it did not instruct the jury that the combined use must be reasonably probable. Whether an instruction is accurate and applicable to the case is a decision which is within the sound discretion of the trial court. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 605; 568 NW2d 93 (1997). "There is no error requiring reversal if, on balance, the theories and the applicable law were adequately and fairly presented to the jury." *Id.* This Court should review jury instructions in their entirety and should not extract them piecemeal. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990).

The trial court provided the following assemblage instruction:

> Where the highest and best use of separate parcels involve their integrated use with lands of another, such prospective use may be properly considered in determining value of the property if the potential for assembly was reasonably sufficient to affect the market value.

In addition, the trial court also provided the standard jury instructions concerning just compensation, market value, and highest and best use and instructed the jury that an award for compensation may not be based on speculation or conjecture. As already noted, Michigan has rejected the "real probability" standard in favor of the "reasonable possibility" standard. Therefore, we conclude that the trial court's assemblage instruction adequately and fairly presented the applicable law.

Plaintiff also argues that the trial court's instruction concerning subdivision restrictions was erroneous because it effectively informed the jury that the deed restriction would not be enforced. We disagree.

The trial court provided the following instruction:

> Subdivision restrictions are not laws in and of themselves. No government agency begins an enforcement action. They are enforced only when the owner of property in the subdivision objects to a violation and brings a court action to enforce the restrictions. The language of a restriction must be clear. If the language is ambiguous, it must be construed against the person seeking to enforce the restriction. If over the

> years, restrictions are not uniformly enforced, they fall in . . . disuse and cannot be enforced on a selective basis.

Private deed restrictions are contractual rights. *Jayno Heights Landowners Assoc v Preston*, 85 Mich App 443, 448; 271 NW2d 268 (1978). Restrictive covenants are strictly construed against the person seeking enforcement, and all doubts are resolved "in favor of the free use of property." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997); *Sylvan Glens Homeowners Assoc v McFadden*, 103 Mich App 118, 121-122; 302 NW2d 615 (1981).

We conclude that the deed restriction which states that any residence must be ". . . . feet" from the street line is ambiguous, as evidenced by the different interpretations which were given the restriction. Therefore, the trial court properly instructed the jury that the restriction must be construed in favor of free use of the property and against those seeking to enforce the restriction. Moreover, defendants provided evidence that residences on three of the five corner lots did not comply with a sixty-foot setback requirement. Therefore, it was not error for the jury to consider whether the restriction had been uniformly enforced, and the instruction did not, in effect, inform the jury that the restriction was unenforceable.

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

[1] Plaintiff was actually ordered to pay $125,000 in compensation because it had already paid $15,515 to defendants.

[2] In modifying the case, the Supreme Court vacated the award of attorney fees.

[3] A treatise on eminent domain describes the proper use of the assemblage doctrine: "where the highest and best use of separate parcels involves their integrated use with the lands of another, such prospective use may be properly considered in fixing the value of the property if the joinder of the parcels is reasonably practicable." *Clamar Realty Co v Milwaukee Redevelopment Authority*, 129 Wis 2d 81, 87; 383 NW2d 890 (1986) (quoting 4 Sackman, Nichols on Eminent Domain 12.3142(1), pp 12-329 (3d ed. 1978)).

[4] We also note that defendants' expert suggested that an alternative way of addressing the setback issue would be to seek a variance from the City of Birmingham. Thus, purchasing twelve feet of property was not the only means by which the lot could be split.