

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

HAGGERTY CORRIDOR PARTNERS
LIMITED PARTNERSHIP, PAUL D. YAGAR,
Trustee, a/k/a PAUL D. YEGER, AND NEIL J.
SOSIN,

Defendants-Appellees.

UNPUBLISHED

July 22, 2003

Nos. 234099; 240227

Oakland Circuit Court

LC No. 95-509518-CC

Before: Owens, P.J., and Bandstra and Murray, JJ.

MURRAY, J. (*dissenting*).

In this condemnation action, the dispositive issue is whether the trial court abused its discretion in admitting evidence that the subject property was rezoned in May 1998, approximately 2½ years after the date of the taking. The majority concludes that the trial court abused its discretion in admitting the evidence; however, because no abuse of discretion occurred, I respectfully dissent.

The majority has provided the proper standard of review in this case, in that decisions on whether to admit evidence are reviewed for an abuse of discretion. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). However, “[a]n abuse of discretion involves far more than a difference in judicial opinion.” *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). “It has been said that such abuse occurs only when the result is ‘so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.’” *Id.* (citation omitted).

Additionally, the majority has set forth several important principles related to condemnation proceedings that are applicable to the instant case, which bear reiteration. For example, the factfinder must determine the value of the condemned land at the time of the taking, rather than the value of the land at a future date. *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). However, any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant, *including the possibility of rezoning*. *VanElslander, supra* at 130. Thus, if there is a reasonable possibility that the zoning

classification will be changed, this possibility should be considered by the factfinder in arriving at the proper value. *Eilender, supra* at 699.

Further, the following evidentiary rules must be applied in the context of this issue. “Only relevant evidence is admissible.” *Tobin v Providence Hospital*, 244 Mich App 626, 637; 624 NW2d 548 (2001), citing MRE 402. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *VanElslander, supra* at 129; see also MRE 401.

Given these principles of evidence and condemnation law, the evidence of the rezoning was relevant, and the trial court did not abuse its discretion by admitting such evidence to demonstrate that the rezoning was reasonably possible. As the trial court concluded, evidence of the actual rezoning had the tendency to make the existence of the possibility of rezoning more probable than it would be without the evidence. MRE 401. More importantly, however, is the fact that there is no Michigan case on point regarding the admissibility of the subsequent fact of rezoning, and our Sister States’ case law provide divergent views.¹ However, one respected source (also cited by the trial court) indicates that “[t]he fact that, subsequent to the taking, the zoning ordinance was actually amended to permit the previously proscribed use has been held to be weighty evidence of the existence (at the time of the taking) of the fact that there was a reasonable probability of an imminent change.” 4 Nichols, *Eminent Domain* (3d ed), § 12C.03[3]. Accordingly, it cannot be said that the decision to admit the evidence was an abuse of discretion when no prior case has so held, and there is respected authority that favors the ruling made by the trial court. *Randolph, supra* at 768; see also *In re King*, 186 Mich App 458, 465; 465 NW2d 1 (1990) (no abuse of discretion found when nothing in the case law, statutes, or court rules required a guardian ad litem to be present at all times during termination proceedings).

Moreover, even if the admission of the evidence was an abuse of discretion, it was harmless error in light of the jury instructions and other competent, admissible evidence that allowed the jury to properly conclude that rezoning was a reasonable possibility.² See *Campbell v Sullins*, __ Mich App __, __; __ NW2d __ (Docket No. 236575, issued June 19, 2003); slip op, p 9. MRE 103(a); MCR 2.613(A). Here, the jury was presented with sufficient evidence regarding whether there was a reasonable possibility that the subject property would be rezoned, independent of the evidence of the actual rezoning, a fact which the majority concedes. Further,

¹ In its written opinion, the trial court cited cases from several states, which held such evidence to be relevant and admissible.

² A “possibility” is not a high burden, as it only means “something that may or may not occur.” *Webster’s New Collegiate Dictionary* (1980 ed), p 891. Defendants submitted testimony from current and former Novi officials that the city had considered, and continued to consider, changing the zoning to essentially OST in 1993 and 1995, before the taking. There was additional testimony that by 1995, Novi was very interested in luring “high tech” companies to the city. This evidence alone was sufficient for the jury to properly conclude, rather than speculate, that there was a “reasonable possibility” that the property may be rezoned.

the trial court properly instructed the jury on the principles of condemnation law set forth by the majority, and repeatedly stressed the principle that the jury must value the property as of the date of the condemnation, rather than at some future date:

Your award must be based upon the market value of the property *as of the date of taking*.

* * *

The Court has instructed you on the subject of highest and best use. *One of the things that must be considered in deciding what the highest and best use of the property was at the time of the taking is the zoning clarification -- is the zoning classification of the property at that time.* However, if there was a reasonable possibility, absent the threat of this condemnation case, that the zoning classification would have been changed, you should consider this possibility in arriving at the value of the property on the date of the taking.

* * *

In this case, the market value of the property, both before and after the taking, must be determined as of December 7th, 1995, *and not at an earlier or later date.* [Emphasis supplied.]

“[J]urors are and must be presumed to understand and follow the court’s instructions.” *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).³ As a result, we must presume that the jury followed the court’s instructions on the law, rather than presume that the jury based its decision on matters not called for by the instructions. *Id.* Accord *Mack v Precast Industries, Inc*, 369 Mich 439, 449; 120 NW2d 225 (1963). Given this fact, and in the absence of any evidence suggesting that the jury went outside the instructions given, we must conclude that the jury relied on the evidence presented to determine the value at the time of the taking, and not based upon a later date, i.e., 2½ years later when the rezoning actually occurred. Indeed, it is quite clear that the court instructed the jury to consider the zoning classification *at the time of the taking*, and to only then determine whether, *at the time of the taking*, there was a reasonable possibility that the zoning classification may change. These legally accurate and agreed upon instructions, which we must presume were followed by the jury, adequately protected plaintiff’s substantial rights to a fair trial and therefore any error in admitting evidence of the subsequent rezoning does not require reversal.

Although the majority has not directly addressed plaintiff’s alternative argument that the trial court abused its discretion in prohibiting plaintiff from introducing evidence establishing that the zoning change was caused by the condemnation in connection with its highway construction project, its decision indirectly addresses this argument. The majority justifies its decision by stating that plaintiff attempted to introduce evidence establishing that the subject

³ Counsel for all parties expressed on the record their satisfaction with these jury instructions.

property was rezoned because of the condemnation, and that if this were so, the actual rezoning would have been irrelevant. In observing that the value of the condemned property should have been determined without regard to any enhancement in value attributable to the condemnation or threat of condemnation, the majority holds that defendants were not entitled to the “enhanced value” that resulted from the condemnation project.

MCL 213.73 provides, in relevant part:

(1) Enhancement in value of the remainder of a parcel, by laying out, altering, widening, or other types of improvements; by changing the scope or location of the improvement; or by either action in combination with discontinuing an improvement, shall be considered in determining compensation for the taking.

(2) When enhancement in value is to be considered in determining compensation, the agency shall set forth in the complaint the fact that enhancement benefits are claimed and describe the construction proposed to be made which will create the enhancement. . . .

* * *

(4) The agency has the burden of proof with respect to the existence of enhancement benefits.

Plaintiff admits that it did not plead in its complaint any benefit to defendants’ remaining property as a result of its construction project. Therefore, the trial court could not be said to have abused its discretion when it prevented plaintiff from presenting evidence that the rezoning occurred as a result of its construction project because plaintiff did not follow the statute, which required plaintiff to plead such in its complaint if it was to be litigated at trial. Thus, the majority’s decision, based solely on the premise that plaintiff intended to present evidence that the subject property was rezoned because of the condemnation, is misplaced and effectively ignores the fact that defendants’ evidence directly relates to the “reasonable possibility” that rezoning of the property would be effectuated.

For these reasons, I would not reverse the jury’s verdict for the reasons stated by the majority.

/s/ Christopher M. Murray