[Cite as *Proctor v. Davison*, 2010-Ohio-3273.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GORDON PROCTOR, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION

Plaintiff-Appellant

-vs-

GEORGE L. DAVISON, et al.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09 CA 122

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 06 CV 1586

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 12, 2010

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} This is an appeal from a decision in an appropriation action brought by Appellant Gordon Proctor, Director of the Ohio Department of Transportation ("ODOT") to acquire property as part of the improvement and relocation of S.R. 161.

STATEMENT OF THE FACTS AND CASE

{¶2} Due to heavy commuter traffic between the Columbus metropolitan area and the Granville-Newark area, the Ohio Department of Transportation (“ODOT”) determined that the existing two-lane east-west S.R. 161 was in need of upgrade. (T. at 132-33). ODOT initiated a two-phase project to construct a four-lane limited access divided highway that would run parallel to existing S.R. 161 and connect the existing four-lane limited access divided highway outside of the Village of New Albany to the existing four-lane limited access divided highway outside of the Village of Granville.

{¶3} As part of the above project, on October 30, 2006, ODOT filed a Petition for Appropriation in which ODOT sought to appropriate 5.602 acres of property, with Limitation of Access, owned by Appellees George L. Davison and Frances E. Davison ("Davisons"), establish just compensation for the real property appropriated and determine the amount of the damage to the residue.

{¶4} The undisputed facts are that in 1956 the Davisons were the record owners of a farm in Licking County. This is the same farm that they currently own. In 1956 ODOT's predecessor, the Department of Highways, built SR 161 in Licking County, aka Worthington Road. The construction of SR 161 in 1956 split the Davison farm in two and created a northern and southern residue (Tr. 84, Vol. 1, p.144). A perpetual highway easement was taken by the Department over the Davison farm in order to build the

1956 project (Vol. 1, Defendant's Ex. F). It is from this same farm that ODOT has acquired additional property to build the current SR 161 project.

{¶5} A bench trial was commenced in this matter on June 17, 2009, and was concluded on June 18, 2009.

{¶6} At trial, the Appellees presented testimony from Robert Weiler, Jason Sturgeon and George Davison.

{¶7} Robert Weiler testified as an expert witness and stated that it was his opinion that as of January 25, 2007, the difference between the pre- and post-appropriation value of Appellees' land was $692,500. He stated that the fair market value of the property prior to appropriation was $19,000 per acre, so the taking of 5.602 acres would equal $106,438 in compensation. He further testified that he valued the temporary taking of 0.53 acres for two-year period amounted to $200 in compensation. Additionally, he testified that while the land value of the northern residue suffered no damage, the southern residue was damaged by its loss of direct access to Worthington Road, reducing the value per acre from $19,000 per acre to $8,500 per acre. Weiler stated that is was his opinion that the highest and best use of the property was to hold the property for agricultural purposes with the potential for multi-family or commercial development in the longer term.

{¶8} Jason Sturgeon, the Real Estate Administrator for District 5, testified as to the "take date" of the project being January 25, 2007. Mr. Sturgeon testified that the Davisons had access to both north and south of their property prior to ODOT's project, but that after the "take date" the north driveway remained unaffected by this project and that the southern driveway no longer had access to the same roadway that accessed a

new roadway, which was parallel and south of the newly constructed four-lane divided highway. Therefore, the southern access point no longer attached to Worthington Road as it existed prior to the take.

{¶9} He further testified that if no access had been provided to the southern side of the Davison farm, the procedure for the property "owner to gain access" would be to calculate the difference between what the property was appraised for before and what it was appraised for after the construction of the project, and multiply that difference by the acreage affected. This amount would have to be paid to ODOT in order to gain access. (i.e. a 50-acre parcel which had increased in value in the after by $5,000, would require the owner to pay $250,000 to gain access to that acreage).

{¶10} George Davison testified that he was in agreement with Robert Weiler's appraisal of the value of the land prior to the take and the reduced value of the land on the south side of his farm. He stated that the appropriation and the construction of the new four lane divided highway has split the farm completely in two, and that he now has to travel approximately two miles to get across the road and back from the north to south sides. He stated he has to take big farm machinery on the road, and that travel on the new route with farm equipment is dangerous. He further stated that if it were not for the fact that his lessee of the south side of Davison's property had also leased property adjacent to Davison's farm on the south side of new 161, it would not be economical to continue farming the south side of the Davison property.

{¶11} Appellant ODOT presented testimony from Edwin Merrill and James Van Ostran.

{¶12} Edwin Merrill testified as ODOT's expert witness and opined that the before value of the Davison property was $2,383,325 and the value of the residue was $2,288.085, the difference being $95,240. That number was comprised of a per acre fair market value of $17,000 per acre, which would amount to a payment from ODOT of $95,240 for the property appropriated. Mr. Merrell did not find any damage to the residue and allocated $185 for the temporary take. Mr. Merrell testified just compensation amounts to $95,425 as of January 25, 2007. He further testified that the highest and best use would be for future residential development. Mr. Merrell testified that the Davison property had direct access from the southern residue to old 161 prior to the take.

{¶13} Developer Jim Van Ostran of Jobes Henderson testified on behalf of ODOT as to his opinion on the use of the Davison property. Van Ostran stated that he has developed many properties, both residential and commercial mixed use, in and around Licking County for landowners like Davison, who wish to convert the equity that is tied up in their land into a means of financial liquidity in retirement. He testified that he had conducted a general investigation and reviewed the local zoning history and water tables, and concluded that the Davison property was optimally suited for rural residential development. He also concluded that commercial development was not reasonably foreseeable as there was an absence of city water and sewer.

{¶14} Mr. Davison testified in rebuttal that there were 11,000 square feet of farm buildings on the north side of the property that were in good condition and were constantly used by himself and his lessee for the farming of his property. Mr. Davison testified that the 11,000 square feet of farm buildings would cost approximately $30 a

square foot to replace. Mr. Davison further testified that the buildings, as they sit today, were worth $330,000 and that the buildings serve both sides of his farm.

{¶15} By Judgment Entry filed September 30, 2009, which included Findings of Fact and Conclusions of Law, the trial court awarded Appellees $106,438.00 for compensation for property taken, $530,491.00 for damage to the residue, and $200.00 for temporary easement compensation.

{¶16} A Final Judgment Entry of Appropriation and Award of Compensation allowing for the transfer of the property to ODOT was filed on October 27, 2009.

{¶17} Appellant ODOT now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶18} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF ODOT IN OVERRULING ODOT'S MOTION TO STRIKE ROBERT WEILER'S TESTIMONY REGARDING DAMAGES TO THE SOUTHERN RESIDUE OF THE DAVISON PROPERTY AND IN AWARDING DAMAGES FOR THE REDUCTION IN VALUE OF THE SOUTHERN RESIDUE DUE TO ITS LOSS OF DIRECT DRIVEWAY ACCESS TO STATE ROUTE 161/WORTHINGTON ROAD.

{¶19} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF ODOT WHEN IT ALLOWED WEILER TO TESTIFY OVER ODOT'S OBJECTION REGARDING THE PROBABILITY OF THE DAVISON PROPERTY BEING REZONED.

{¶20} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF ODOT IN AWARDING DAMAGES TO THE FARMING OPERATION OVER ODOT'S NUMEROUS OBJECTIONS."

I.

{¶21} Appellant claims the trial court erred in overruling Appellant's Motion to Strike the testimony of Robert Weiler regarding damages based on loss of direct access and in awarding damages for same. We disagree.

{¶22} At trial, Davison's expert, Robert Weiler, testified to the highest and best use of his land before and after the appropriation. Weiler testified the removal of direct access to S.R. 161 and the creation of service roads to the properties were factors in his determination that the highest and best use of the property went from commercial and/or residential development to no commercial development, and in his opinion, reduced the fair market value of the parcels.

{¶23} ODOT moved to strike the testimony relating to access to S.R. 161, arguing the Davison's loss of direct access to S.R. 161 caused by the appropriation was not compensable as damage to the residue.

{¶24} This case is factually similar to a recent case before this Court, *Proctor v. Hankinson*, Licking App. 08 CA 00115, 2009-Ohio-4248, wherein the subject property was affected by the same ODOT two-phase project to construct a four-lane limited access divided highway running parallel to existing S.R. 161. Like the instant case, the Hankinson property was located on both sides of S.R. 161 and included farmland, residential structures, and numerous farm buildings and the taking therein bisected part of the property.

{¶25} In the *Hankinson* case, this Court upheld the jury's damages award for harm to the residue attributed to loss of direct access from property to highway, finding

that it was within range of valuation presented by parties' experts, and not improperly based on mere circuity of travel from highway to property.

{¶26} A diversion of traffic resulting from an improvement in the highway, or the construction of an alternate highway, is not an impairment of a property right for which damages may be awarded; mere circuity of travel does not of itself result in impairment of the right of ingress and egress to and from a property, where the interference is an inconvenience shared in common with the general public. *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, 126 N.E.2d 53.

{¶27} "Both state and federal courts recognize that a right of access is a property right which cannot be taken or materially interfered with without just compensation." *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati,* 118 Ohio St.3d 131, 137, 2008-Ohio-1966 citing Sackman, Nichols on Eminent Domain (3d Ed.2006) 14A-78, Section 14A.03[6] [b].

{¶28} Expert witnesses may state their opinions regarding damages to the residue of the property. *Hilliard v. First Indus., L.P.,* 165 Ohio App.3d 335, 2005-Ohio6469, 846 N.E.2d 559, ¶ 10. Damage to the residue is measured by the difference between pre- and post-appropriation fair market value of the residue. *Bd. of Cty. Commrs. of Clark Cty.,* supra citing *Hilliard v. First Indus. L.P.,* 158 Ohio App.3d 792, 2004-Ohio-5836, 822 N.E.2d 441, ¶ 5.

{¶29} In determining both pre-and post-appropriation values, the trier of fact must consider every element that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before purchasing the property. *Hilliard,* 2005-Ohio-6469, ¶ 10, 165 Ohio App.3d 335, 846 N.E.2d 559 citing *Hurst v.*

Starr (1992), 79 Ohio App.3d 757, 763, 607 N.E.2d 1155, quoting *In re: Appropriation for Hwy. Purposes of Land of Winkelman* (1968), 13 Ohio App.2d 125, 138, 42 O.O.2d 232, 234 N.E.2d 514.

{¶30} A compensation award is adequate if it falls within the range of valuation testimony presented at trial. *Preston v. Rappold (1961),* 172 Ohio St. 524, 528, 178 N.E.2d 787.

{¶31} Based on the record before this Court, we find the trial court's determination of the damages to the residue was within the range of valuation presented by the experts.

{¶32} Assignment of Error I is denied.

II.

{¶33} Appellant claims the trial court erred in allowing an expert witness, Robert Weiler to testify regarding the probability of rezoning of the property herein. We disagree.

{¶34} In *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 359 N.E.2d 74, the state sought to appropriate a 16.1 acre strip of land running through the middle of Kebe's property in order to construct a segment of I-90. Before the take, the entire parcel was zoned for residential use under a comprehensive zoning ordinance adopted by the City of Westlake in the 1950s. In July of 1970, the city re-zoned Kebe's property in anticipation of the expected road project. It changed most of the zoning for the property above and below the proposed appropriation to highway interchange use. It did not alter the residential classification of the middle strip, which the state would take in fee.

{¶35} At trial, *Kebe* sought to introduce the valuation testimony of two experts. Each thought the highest and best use of the property would be for multi-family apartment complexes, and determined the fair market value of both the appropriated strip and the remaining lots on that basis. Neither had evidence that the zoning classification was likely to change in the near future. The trial court ordered that their testimony should be restricted to the existing zoning regulations at the time of the take, i.e., residential use and interchange use, respectively. While on the stand, the experts were directed to re-evaluate the property under the court's restrictions. Kebe appealed.

{¶36} The court of appeals reversed. *Masheter v. Kebe* (1973), 34 Ohio App.2d 32, 295 N.E.2d 429. The Supreme Court of Ohio affirmed the judgment of the court of appeals, but on different grounds. The Supreme Court analyzed the testimony of the experts in relation to the appropriated strip, for which the city did not change the zoning classification. The court held that the experts' testimony, which rested on a use that was not permissible under the 1950 zoning ordinance, was nevertheless admissible. *Id.* at 152, 295 N.E.2d 429.

{¶37} In response to the state's second assignment of error claiming, as was required under prior law, that such testimony should have been inadmissible because of the lack of evidence of a likely change in zoning in the foreseeable future, the court stated:

{¶38} “Although existing zoning restrictions necessarily constitute an important factor for the appraisal witnesses to consider in connection with the market value of the land, *it must be recognized that, as a practical matter, the existing zoning regulation does not and may not control that market value of the property involved.”* (Emphasis

added.) *Id.* at 153, 295 N.E.2d 429. The court concluded " "[i]f, in the opinion of an expert appraisal witness, an informed, willing purchaser would be presently agreeable to pay more than an amount justified under existing zoning, such evidence is admissible because it reflects upon the fair market value of the property." *Id.*

{¶39} Under *Kebe,* an expert need not confine his valuation testimony to the use permitted under existing zoning regulations. *Proctor v. Dennis*, Fairfield App. 05-CA-83, 2006-Ohio-4442; *Wray v. Stvartak* (1997), 121 Ohio App.3d 462, 477, 700 N.E.2d 347, 355; *Wray v. Mussin* (Sept. 20, 1996), 11th Dist N. 95-L-172; *Weir v. Kebe* (Apr. 15, 1982), Cuyahoga App. Nos. 43722, 43723, unreported.

{¶40} Additionally, the expert may testify as to a highest and best use that is not permitted under existing zoning regulations even without evidence of a probable change in zoning within the foreseeable future. *Wray v. Stvartak; Wray v. Mussin, supra.*

{¶41} In the case at bar, there was conflicting evidence concerning the likelihood of a zoning change on the subject property. ODOT's valuation expert testified as to a highest and best use value for the Davison property based upon a "rural residential" permitted use. Appellees' valuation expert testified as to the highest and best use being for possible residential and/or commercial use

{¶42} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183.

{¶43} Based on the foregoing, although there was conflicting testimony, this court finds that the record contains competent credible evidence from which the trial court could conclude that the likelihood exists that Appellees' property could be rezoned

and the necessary permits would be obtainable. Even in the absence of such testimony, it was not error to permit Appellee to present evidence at trial that the highest and best use of the property is for a use other than its zoned use. The record contains competent credible evidence from which the trial court could conclude that the highest and best use of the property is for Appellees to hold the property for potential development for residential and/or commercial use.

{¶44} Assignment of Error II is denied.

III.

{¶45} Appellant claims the trial court erred in awarding damages to the farming operation. We disagree.

{¶46} Appellant specifically cites this Court to the following Findings of Fact by the trial court as to George Davison's testimony:

{¶47} "41. He agrees with Robert Weiler's appraisal of the value of the land prior to the take and the reduced value of the land on the south side of his farm.

{¶48} "42. He testified that the appropriation and the construction of the new four lane divided highway has split the farm completely in two.

{¶49} "43. He has to travel approximately two miles to get across the road and back from the north to south sides.

{¶50} "44. He has to take big farm machinery on the road and that it is sometimes very dangerous.

{¶51} "45. Travel on the new route with farm equipment is dangerous.

{¶52} "****

{¶53} "55. Mr. Davison testified in rebuttal that there were 11,000 square feet of farm buildings on the north side of the property that were constantly used by himself and his tenant for the farming of his property and in good condition.

{¶54} "56. Mr. Davison testified that the 11,000 square feet of farm buildings would cost approximately $30 a square foot to replace.

{¶55} "57. Mr. Davison further testified that the buildings, as they sit today, were worth $330,000."

{¶56} Appellant argues that based upon the above findings, in addition to awarding damages based upon Weiler's valuation of the property as potential development ground, the trial court "piled on" the damages based upon harm to the farming operation on the southern residue.

{¶57} Upon review of the trial court's Judgment Entry, we find no support for Appellant's assertion that damages were "piled on".

{¶58} As stated above, a compensation award is adequate if it falls within the range of valuation testimony presented at trial. *Preston v. Rappold (1961),* 172 Ohio St. 524, 528, 178 N.E.2d 787.

{¶59} Again, upon review of the record before us, we find the trial court's determination of the damages to the residue was within the range of valuation presented by the experts.

{¶60} Assignment of Error III is denied.

{¶61} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

JWW/d 0624

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GORDON PROCTOR, DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
GEORGE L. DAVISON, et al.	:	
Defendants-Appellees	:	Case No. 09 CA 122

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES