

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2537

Cir. Ct. No. 2007CV2135

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DONALD W. KALSCHEUR AND JOAN KALSCHEUR,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. This is an eminent domain case in which Donald Kalscheur and Joan Kalscheur appeal from the order of the circuit court that dismissed their complaint challenging the valuation of their property. The Kalscheurs argue that the circuit court erred because: (1) the court valued the

property on the date of purchase rather than the date of taking; (2) the court did not consider adjustments to the value of the property; (3) the court improperly rejected the “highest and best use” valuation of the property because it concluded that the Kalscheurs did not want to develop multi-family buildings on the property; and (4) the court did not use the proper statutory method for valuing the property.

¶2 In 2002 the Kalscheurs purchased a parcel of adjoining land from their nephew in order to expand a mobile home park. The Kalscheurs paid their nephew \$10,000 per acre for the property. After they purchased the land, the Kalscheurs were able to have the parcel rezoned to allow for the expansion of the mobile home park. In 2005, the State acquired by eminent domain a .48-acre parcel of this land to complete access to the mobile home park from the highway. The State recorded its award of damages, which the Kalscheurs rejected, and the Kalscheurs appealed to the circuit court.

¶3 The circuit court held a trial and both sides presented expert testimony. The Kalscheurs’ expert offered comparable sales data to support their claim as to the property’s value. The court rejected that expert’s testimony, finding that the evidence was not “valuable comparable sales that assist in determining a fair market value for the subject property.” The court also considered the comparable sales data offered by the State and found them “closer to the subject property” but nonetheless “suspect.” The court then found that the most credible evidence was the fair market value of the land as paid by the Kalscheurs, as well as the evidence that the seller had believed that he had sold the land to his relatives at a discount, and that the land was actually worth \$14,000 to \$15,000 at the time he sold it. The court determined the property’s value to be \$15,000 per acre, or \$7500 for the .48-acre parcel. The circuit court dismissed the Kalscheurs’ complaint.

¶4 Under WIS. STAT. § 32.09(6) (2007-08),¹ the compensation to be paid by the condemnor in a partial taking is “the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation,” giving effect to specific variables including, in relevant part, the “[l]oss of land including improvements....” Fair market value is “the amount the property could be sold for in the open market by an owner willing and able but not compelled to sell to a purchaser willing and able but not obliged to buy.” *State ex rel. Geipel v. City of Milwaukee*, 68 Wis. 2d 726, 733, 229 N.W.2d 585 (1975) (citations omitted). The admission of evidence to determine the fair market value is within the circuit court’s discretion. *Rademann v. DOT*, 2002 WI App 59, ¶15, 252 Wis. 2d 191, 642 N.W.2d 600. The Kalscheurs have the burden of proving that the circuit court unreasonably exercised that discretion. *See id.*

¶5 There are three primary ways for appraising commercial property, one of which is comparable sales. *National Auto Truckstops, Inc. v. DOT*, 2003 WI 95, ¶23, 263 Wis. 2d 649, 665 N.W.2d 198. We sustain a trial court’s findings of fact unless they are clearly erroneous. *Klinefelter v. Dutch*, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991). We will not reverse a circuit court’s determination of the acceptability of sales as comparable in the absence of clear error. *Alsum v. DOT*, 2004 WI App 196, ¶15, 276 Wis. 2d 654, 689 N.W.2d 68.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 The Kalscheurs first argue that the circuit court erred by valuing the property as of the date they bought it, and not as of the date it was acquired by the State. The Kalscheurs are correct that the statute requires the valuation to be as of the date of the taking. *See* WIS. STAT. § 32.09(6). We do not see anything in the record to suggest, however, that the circuit court misunderstood that the property was to be valued as of the date of taking. The court considered all the evidence offered, rejected the comparable sales evidence offered by the Kalscheurs' expert, and found that the State's expert reasonably relied on the purchase event as the best evidence of the property's current value. We are not convinced that the circuit court considered the wrong date when it determined the value of the property.

¶7 The Kalscheurs also argue that the circuit court did not consider any adjustments to value for comparable sales and that it improperly rejected the highest and best use of the property. Both of these arguments are based on the premise that the court did not consider the effect that the change in zoning between the date of purchase and the date of taking had on the property's value. We again disagree.

¶8 The circuit court considered the evidence presented. The court found that the comparable sale properties the Kalscheurs' expert used were not comparable to the Kalscheurs' property, and hence were of little use in valuing the property. The court explained why each of the properties was not comparable. The court also considered and rejected the Kalscheurs' argument that the property could be used for the construction of multi-family housing. Further, the record shows that the experts both addressed the effect of the change in zoning on the property's value, and the State's expert testified that the change in zoning had little

effect on the value of the property. The court found the State's evidence to be more credible.

¶9 The Kalscheurs' final argument is that the court did not apply the proper statutory method of valuation because it did not determine a value by deducting the difference of the value of the property at the time of and after the taking. The court acknowledged that "[c]ompensation may be either the fair market value of the parcel taken or the fair market value as determined by deducting from the fair market value of the property as a whole immediately before the taking the fair market value of the remainder immediately after the taking." Both experts opined, however, that the before and after value of the property was lower than the fair market value. The court implicitly rejected this evidence, therefore, and followed the correct statutory method by accepting the higher fair market value in awarding compensation.

¶10 In sum, the circuit court rejected the evidence offered by the Kalscheurs and accepted the evidence offered by the State. In so doing, the court examined the relevant facts, applied the proper legal standard, and used a rational process to reach a conclusion that a reasonable judge could reach. *See Alsum*, 276 Wis. 2d 654, ¶16. We see no reason to disturb the circuit court's exercise of discretion when it valued the property. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

