

IN THE COURT OF APPEALS OF IOWA

No. 6-063 / 05-0133
Filed April 26, 2006

**JAMES V. HAWK and
BEVERLY E. HAWK,**
Plaintiff-Appellants,

vs.

**COUNCIL BLUFFS AIRPORT
AUTHORITY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Property owners appeal from a district court's ruling in a condemnation action that assessed the fair market value of their property at \$481,468, the same value fixed by the compensation commission. **AFFIRMED.**

Frank W. Pechacek, Jr. and Jamie L. Cox of Willson & Pechacek, P.L.C., Council Bluffs, for appellants.

John M. Burns and Joseph A. Villarreal of the Burns Law Firm, Omaha, Nebraska, for appellee.

Heard by Zimmer, P.J., and Miller and Hecht, JJ.

ZIMMER, P.J.

Property owners James and Beverly Hawk appeal from a district court ruling in a condemnation action that assessed the fair market value of the Hawks' condemned property at \$481,468, the same amount of compensation awarded by the compensation commission. We affirm the district court.

I. Background Facts and Proceedings.

In 1991 the Hawks purchased an approximately 176-acre tract of land located to the east of the City of Council Bluffs (City), in Pottawattamie County (County). The Hawks purchased the property as an investment. They intended to hold the property until development increased in the immediate area, then sell it to a residential developer.

In 1993 the Hawks gifted approximately forty acres of this land to their grandson, James Hawk III (James III), and his wife, Michelle, for one dollar. James III and Michelle built a home on this property (JH III property), which was paid for by the Hawks.¹ In 2001 the Hawks sold approximately twenty acres of their land to the National Conservation Foundation, Inc. (NCF property) for \$10,111.22 per acre. The Hawks retained no interest in either property.

Following these transactions, the Hawks retained title to approximately 116 acres of land (subject property). In April 2002 the Council Bluffs Airport Authority (Airport) determined that a portion of the Hawks' property was needed for airport expansion. The Airport had the subject property appraised by Gary Thien. Thien concluded the highest and best use of the subject property before

¹ James Hawk testified that each year the Hawks "discount" the loan by the amount of the yearly mortgage by "mak[ing] a gift in that amount back against the mortgage."

condemnation was as large rural residential acreages, and that after condemnation the highest and best use of the approximately twenty-four acres to be retained by the Hawks was as a rural residential acreage. Using a comparable sales approach, Thien appraised the fair market value of the property to be condemned at \$3121.53 per acre, and the fair market value of the remaining property at \$4000 per acre.²

On July 10, 2003, the compensation commission met to view the condemned property and appraise damages caused by the condemnation. That same day, the commission determined the Hawks were entitled to a total award of \$481,468, or \$5200 per acre for the 92.59 acres condemned by the Airport. The commission did not award any damages for a reduction in value of the remaining property.

The Hawks filed an appeal with the district court. They also retained A. Ason Okoruwa to conduct a second appraisal of the subject property. Okoruwa opined that the highest and best use of the condemned property was as a residential subdivision, and that the highest and best use of the remaining property was for a residential rural acreage or agricultural use. Using the comparable sales approach, he determined that as of July 10, 2003, the condemned property had a fair market value of \$11,003.03 per acre. He further determined the remaining property had a fair market value prior to the condemnation of \$10,994.98 per acre, but that as a result of the condemnation the fair market value was reduced to \$5016.72 per acre.

² Thien's values were based on an assumption that the subject property consisted of 115.342 acres, with the condemned portion consisting of 91.942 acres and the remaining portion consisting of 23.4 acres.

During trial, Thien's and Okoruwa's reports were admitted into evidence, and both men testified regarding their findings. In relevant part, Thien testified the fair market value in his April 2002 appraisal should be increased by seven to ten percent to reflect the increase in property values at the time of taking. The Airport also presented testimony from Donald Duskin, a certified rural and reviewing appraiser, who had reviewed both Thien's and Okoruwa's appraisals. Duskin's review report of each appraisal was admitted into evidence. His review report of Okoruwa's appraisal was admitted during his testimony without substantive objection.³ His review report of Thien's appraisal was admitted during Thien's testimony and over the Hawks' hearsay objection.

Following trial, the district court entered a ruling that concluded the highest and best use for the subject property at the time of the condemnation was low density rural residential development. The court appraised the fair market value of the condemned property at \$5200 per acre, the same value fixed by the condemnation court. The court made no findings and reached no conclusions regarding the Hawks' assertion that they were also entitled to compensation for a diminution in value of the remaining land.

In assessing the fair market value of the condemned property, the court conducted a detailed analysis of the various comparable properties used in the appraisals of both Thien and Okoruwa. In general, the court found the properties relied on by Thien were more similar to the subject property than those relied on by Okoruwa. The court also noted that while Duskin approved Thien's appraisal,

³ Although the Hawks objected to the absence of a transmittal letter, they had no objection to the contents of the report.

he opined that Okoruwa's report was "not . . . creditable." Duskin faulted Okoruwa for concluding the subject property could be developed into a residential subdivision even though it had no direct access to a hard-surface road; characterizing the property as having rolling topography when in fact portions of the subject property were "quite steep"; and using comparison properties that were not sufficiently similar.

The district court determined Thien's appraisal was entitled to "substantially greater weight" than Okoruwa's. It concluded "[t]he dissimilarity of the comparable sales used by Dr. Okoruwa has inflated his opinion of the subject property." It further concluded that several factors relevant to the feasibility of developing the subject property into a residential subdivision, such as access to a hard-surface road, access to sanitary sewers, and annexation into the City, were "unlikely" and "uncertain."

The Hawks appeal, asserting the district court erred in several respects. Their primary contention is that under the correct application of the controlling law, the record establishes the fair market value of the condemned property is the fair market value determined by Okoruwa. Specifically, they assert the record demonstrates the highest and best use of the subject property is as a residential subdivision because (1) the record indisputably established the subject property had legally permissible access to a hard-surface road or roads, (2) the record demonstrated a reasonable probability that the subject property would be annexed into the City in the foreseeable future, and (3) a residential subdivision development requires neither annexation nor sanitary sewer access.

The Hawks further contend the court erred “in failing to even consider whether there was any damage to, or reduction in value of,” the remaining property. They also assert the court erred in admitting Duskin’s review report of Thien’s appraisal of the subject property. Finally, they assert that, because they were entitled to an award greater than that established by the compensation commission, they are entitled to awards of trial and appellate attorney fees and costs.

II. Scope and Standards of Review.

The district court is given appellate jurisdiction over awards of the compensation commission. Iowa Code § 6B.18 (2005); *Chao v. City of Waterloo*, 346 N.W.2d 822, 824 (Iowa 1984). The appeal is tried to the court de novo, as an ordinary proceeding. Iowa Code § 6B.21; *Burnham v. City of West Des Moines*, 568 N.W.2d 808, 810 (Iowa 1997); *Eggleston v. Town of Aurora*, 233 Iowa 559, 563, 10 N.W.2d 104, 106 (1943). The sole issue for the district court’s determination is the amount of damages caused by the taking. Iowa Code § 6B.23; *Iowa State Highway Comm’n v. Read*, 228 N.W.2d 199, 202 (Iowa 1975).

We review ordinary proceedings for the correction of errors at law. Iowa R. App. P. 6.4. The district court’s ruling in such cases has the effect of a special verdict. *Kaperonis v. Iowa State Highway Comm’n*, 251 Iowa 39, 41, 99 N.W.2d 284, 285 (1959). If supported by substantial evidence, the ruling is as binding upon this court as a jury verdict. *Id.* Because the condemnation award is one peculiarly within the province of the trier of fact, appellate courts have consistently refused to interfere absent a showing the award was wholly unfair or

unreasonable. *Sunrise Developing Co. v. Iowa Dep't of Transp.*, 511 N.W.2d 641, 645 (Iowa Ct. App. 1993).

III. Just Compensation in Eminent Domain Cases.

Both the Iowa and the United States Constitutions declare that private property shall not be taken for public use without just compensation. U.S. Const. amend. V; Iowa Const. art. I, § 18; see also *Aladdin, Inc. v. Black Hawk County*, 562 N.W.2d 608, 611 (Iowa 1997) (noting federal provision is binding on the states).⁴ The overriding purpose of just compensation is to make property owners whole. *Forst v. Sioux City*, 209 N.W.2d 5, 7 (Iowa 1973). The goal is to put owners “in as good a position pecuniarily as if [their] property had not been taken.” *Aladdin*, 562 N.W.2d at 611 (citation omitted).

To determine the amount of just compensation, courts generally look to the property owners' loss, not the gain of the entity causing the taking. See *M.C. Real Estate Corp. v. Iowa Dep't of Transp.*, 475 N.W.2d 166, 170 (Iowa 1991). As a general rule, when the entire property is taken, the owners' damages are measured by the fair market value of the property at the time of the condemnation. *Aladdin*, 562 N.W.2d at 611-12. In such cases, “the usual guide to the fair market value of the property is comparable sales figures.” *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 7 (Iowa 2001).

In assessing the value of the condemned property

[a] court may consider all factors indicative of the value of the property, and which would have been present in the minds of a

⁴ The Hawks contend that because their right to “just compensation” is constitutionally protected, we must conduct a de novo review of the district court proceedings. Although the Hawks' underlying right to just compensation is constitutional in nature, our limited scope and standards of review of these cases is well established.

willing buyer and a willing seller, unless the considerations advanced are too speculative or remote, and thus not a necessary, natural, or proximate result of the taking.

Id. at 6. This includes consideration of the property's highest and best use, "not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 708-09, 78 L. Ed. 1236, 1244 (1934); see also *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84, 88 (Iowa 1973).

[T]o the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded.

Olson, 292 U.S. at 256, 54 S. Ct. at 709, 78 L. Ed. at 1245 (citation omitted).

IV. Fair Market Value of Condemned Property.

Here, the district court was presented with two expert opinions as to the fair market value of the subject property at the time of condemnation, as well as testimony regarding the Hawks' intent and ability to see the subject property developed into a residential subdivision. After carefully considering all the evidence, the district court concluded the Hawks had not established that the highest and best use of the subject property, at the time of condemnation, was as a residential subdivision. This conclusion was based, in significant part, upon the court's determination that the subject property did not currently meet the requirements for residential development contained in the land use plan governing the subject property, and that any claim the subject property would or

could meet the requirements in the future was too speculative to consider in fixing fair market value.⁵

Under the land use plan the City has control of subdivision platting, review, and approval within two miles of the city limits, and the County retains control of subdivision platting, review, and approval for land beyond the two-mile limit. The subject property is primarily within City's jurisdiction, and partly within the County's. It is, however, wholly contained within an area designated as Urban Services Area II (USA II). Under the land use plan, whether property is within the City or the County's jurisdiction, development under USA II is low density residential and requires direct access to a paved street and an entrance onto a hard-surface road.

It is undisputed that, at the time of the taking, the subject property did not have direct access to a hard-surface road. However, the Hawks contend the record established that the subject property would have access to such roads in the future, and that in fact the City does not require hard-surface road access. Having reviewed the record, we conclude it contains substantial support for the finding that access to a hard-surface road, or development approval without such access, was too speculative or remote to warrant consideration.

⁵ The Hawks contend the district court actually determined that they had not demonstrated the necessary requirements were "certain" or "likely," and that this is a different and higher standard than "too speculative or remote." The court did use the terms "uncertain" and "unlikely" in discussing the potential for hard-surface road access, access to City services, and annexation. However, it correctly set forth the "too speculative or remote" standard in its ruling. When the court's use of the disputed terms is read in the context of the full ruling, it appears the court understood the proper standard to be applied and determined the Hawks' evidence did not rise to that level. In critiquing the district court, the Hawks seek to elevate form over substance. We find no legal error in the court's ruling.

The Hawks first assert the subject property will have access to a future hard-surface road commonly referred to as the East Beltway. The record reveals the planned airport expansion will result in the partial closing of a hard-surface road, McPherson Avenue. The East Beltway was proposed as a means of mitigating this closure, and design plans for the airport expansion project indicated the East Beltway would run through the edge of the subject property. However, when the County and Airport agreed to mitigate the closing of McPherson Avenue by paving an existing road, the Airport dropped consideration of the East Beltway as part of its expansion.

The County continued to explore the possibility of constructing the East Beltway. In March 2003 the County received a State grant which funded fifty percent of the cost of the proposed roadway. However, at the time of the taking, the surveys, engineering studies, design plans, and final cost estimates had yet to be performed, and no land had been acquired for road construction. Thus, the final location of any roadway had yet to be established. Under the circumstances, substantial evidence supports a determination that direct access to the as-yet-to-be located East Beltway was too speculative to merit consideration in fixing the subject property's fair market value.

The Hawks also point to the fact the subject property has direct access to Three Bridge Road. However, it is undisputed that Three Bridge Road is a seal-coat road, and not a hard-surface road. The record indicates that paving the relevant portion of Three Bridge Road would cost in excess of \$1 million, and there is no evidence regarding the feasibility of paving the road to allow for residential development.

The Hawks contend the foregoing consideration is irrelevant. They argue that while the County may require hard-surface road access, and the land use plan indicates the City has a similar requirement, there is evidence the City has allowed subdivision development when the access road did not meet the City's hard-surface road specifications. However, the record also establishes that the City allows such access on a case-by-case basis, after considering "each individual circumstance" relevant to the particular proposed development. Here, there is no evidence in the record that the City would grant approval to a residential subdivision development on the subject property without hard-surface road access.

Finally, the Hawks point out that the subject property abuts the JH III property, and that the JH III property has direct access to McPherson Avenue which, as noted above, is a hard-surface road. It is undisputed the Hawks retained no legal right or interest in the JH III property. However, James Hawk did testify that he and James III had always planned to jointly sell their property to a developer, and James III testified that he and Michelle would be willing to "codevelop" the JH III property to provide the subject property access to McPherson Avenue.

We recognize that a reasonable fact finder could determine this testimony was sufficient to establish future access to a hard-surface road. However, such a conclusion is not mandated by the record, particularly as Michelle did not personally verify her willingness to develop or sell a portion of the couple's property, and in light of the fact the court was not required to accept the testimony offered by either James Hawk or James III. Moreover, even if the

district court had accepted the testimony of James Hawk and James III as sufficient to establish probable access to a hard-surface road, that fact alone would not require the court to conclude the highest and best use for the subject property was as a residential subdivision, and to accept Okourwa's appraisal of fair market value.

Appraisal is not an exact science, but a subjective exercise of professional judgment by qualified and skilled individuals who may reasonably disagree. See *Sears, Roebuck & Co. v. Sieren*, 484 N.W.2d 616, 617 (Iowa Ct. App. 1992). "The heart of most assessment cases is the evidence of experts applying, at best, their professional judgments within a context of variables which can in no definite way be objectively conclusive" *Id.*⁶ The district court, faced with two competing opinions, must assess the weight and credibility to be given to each. See *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996).

Here, the district court found fault with Okoruwa's judgment, which was its right as the entity charged with assessing the weight and credibility of the evidence. The court's critique of Okoruwa's appraisal is supported by Duskin's review report and testimony, and an analysis of the appraisal itself.

As noted by the district court, there were significant differences between the subject property and many of the comparison properties used by Okoruwa. Although many of the comparison properties were undeveloped, not annexed, and without access to a hard-surface road and City services at the time of their

⁶ Although the *Sears* case involved a tax assessment dispute, we believe the reasoning employed is equally applicable in a condemnation action.

purchase, in most cases the developer already had approval for the subdivision and annexation, and City services had been arranged.

In contrast, the subject property does not have development or annexation approval, or prearranged City services. In fact, the Hawks have never even had a study performed to establish the feasibility of a subdivision development on the subject property, nor had they ever been approached by a developer. The Hawks contend they would voluntarily request annexation of their property, which would then allow them access to various City services. However, the City's planning director testified that it "would be difficult to annex [the subject property] for a variety of factors." Notably, as of the time of trial the Airport, which lies between the City and subject property, had not yet been annexed and was not scheduled for annexation "anytime soon."

The Hawks point to perceived failings in Thien's appraisal and contend that, as a result, his opinion is entitled to less weight than Okoruwa's. Upon review it appears that neither appraisal is free from flaws. However, we cannot agree with the Hawks' assertion that Thien's appraisal was so unsound the district court erred in affording it substantially more weight than Okoruwa's. See *Tim O'Neill Chevrolet*, 551 N.W.2d at 614 (entrusting weight and credibility determinations to fact finder); *Fazio v. Brotman*, 371 N.W.2d 842, 844 (Iowa Ct. App. 1985) (noting court should disregard evidence when it is "so self-contradictory and so impossible and absurd that it cannot be believed").

We have reviewed all of the Hawks' claims regarding the highest and best use of the subject property and the fair market value of the condemned property, whether or not specifically discussed. In light of the conflicting evidence in the

record relevant to this issue, and the court's role in assessing the weight and credibility of evidence, we conclude the court's determination of highest and best use and its compensation assessment is supported by substantial evidence.

V. Damage to Remaining Property.

The Hawks next contend the district court erred "in failing to even consider whether there was any damage to, or reduction in value of, the Hawks' land remaining after the taking" We agree the district court's ruling failed to resolve this claim. "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Because the Hawks did not file a posttrial motion bringing this omission to the court's attention, the error was not preserved for our review. *Id.*⁷

VI. Duskin's Review Report of Thien's Appraisal.

Finally, the Hawks assert the district court erred when it admitted Duskin's review report of Thien's appraisal, because the report constituted hearsay and they were prejudiced by their inability to cross-examine Duskin as to its contents.

When the Airport attempted to admit Duskin's review report of Thien's appraisal during Duskin's testimony, the Hawks objected on the basis Duskin's testimony seemed to indicate the report was a review of not only Thien's April 2002 appraisal, but also of a subsequent appraisal which had not been provided to the Hawks. The Airport then withdrew its offer until it could clarify the issue.

⁷ To the extent it is made, we reject any contention that consideration and rejection of this claim can be inferred from the district court's ruling. See *id.* at 540.

When the Airport again offered the review report of Thien's appraisal during Thien's testimony, the Hawks objected on the basis that the report was "hearsay [and] . . . [i]t was not produced while [Duskin] was here, and [we] have no opportunity to cross-examine Mr. Duskin as to the content of that report." The court recognized the report was hearsay, but noted Duskin had been thoroughly cross-examined, and stated it would consider the Hawks' objection "as I write my ruling."

The Airport does not dispute the Hawks' contention that the report constitutes hearsay, or that it was error to admit the report. Accordingly, we presume the Hawks were prejudiced by its admission "unless the contrary affirmatively appears." *Kurth*, 628 N.W.2d at 8 (citation omitted). The Hawks contend the record does not affirmatively establish the absence of prejudice, given their inability to cross-examine Duskin about the contents of the review report. However, under the record in this case, it appears that even if the report had been absent from the record, the district court would have arrived at the same value figure. *See id.*

Although the court did place more weight on Thien's appraisal than Okoruwa's, the court's decision indicates that its assessment of fair market value at the time of taking was driven primarily by the numerous faults it found with Okoruwa's appraisal, and the speculative and remote nature of a subdivision development on the subject property. Notably, while the court's ruling contains a detailed summary of Duskin's critique of Okoruwa's appraisal, the only reference in the court's ruling to Duskin's review report of Thien's appraisal is the statement that "Duskin approved of Thien's . . . 2002 appraisal of the subject property."

Moreover, the court did not accept Thien's assessment of fair market value. Instead it determined the fair market value of the condemned property was nearly \$1800 per acre greater than Thien's highest estimate.⁸ In light of the foregoing, we conclude the record affirmatively establishes the absence of prejudice from admission of the report.

VII. Conclusion.

We have reviewed all of the Hawks' claims regarding the highest and best use of the subject property and the fair market value of the condemned property, whether or not specifically discussed. In light of the conflicting evidence in the record relevant to this issue, and the court's role in assessing the weight and credibility of evidence, we conclude the court's compensation assessment is supported by substantial evidence. The Hawks have not preserved error on their claim that they were entitled to compensation for the damage the taking caused to the fair market value of the remaining property. Nor were the Hawks prejudiced by the admission of Duskin's review report of Thien's appraisal. In light of these conclusions, we find it unnecessary to address the Hawks' claims regarding attorney fees and costs.

AFFIRMED.

⁸ Increasing Thien's 2002 assessment by ten percent results in a fair market value of \$3433.68 per acre.