STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF GROSSE ILE, a Michigan Municipal Corporation,

Plaintiff-Appellant,

v

ED. P. COOPER, SHEILA COOPER, and GARY COOPER,

Defendants-Appellees.

UNPUBLISHED
December 18, 1998

No. 201438
Wayne Circuit Court
LC No. 95-536339 CC

Before: Kelly, P.J., and Holbrook and Murphy, JJ.

PER CURIAM.

Following a jury trial in which the sole issue was the amount of just compensation owed for two properties taken from defendants pursuant to the power of eminent domain, plaintiff appeals as of right from the judgment entered by the trial court. Plaintiff had offered defendants $44,000 for the property known as Lot 9 and $35,000 for the property known as Lot 11. The trial court entered a judgment reflecting the jury's verdict that the fair market value was $67,000 for Lot 9 and $114,468 for Lot 11. We affirm.

I

Plaintiff argues that the trial court abused its discretion in admitting evidence regarding potential lost profits from the sale of a home being constructed on Lot 11, construction costs, and the value of defendants' time spent developing the properties as separate substantive elements of damages above the market value of the two properties. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 528; 564 NW2d 532 (1997). "This Court's review of condemnation awards is limited. Absent an abuse of discretion with regard to evidentiary matters, we will generally affirm the award if it is within the range of the valuation testimony produced at trial."[1] *Detroit v Michael's Prescriptions*, 143 Mich App 808, 811; 373 NW2d 219 (1985).

"Just compensation" for a government taking of private property is mandated by both the state constitution and statute. *Wayne County v William G Britton and Virginia M Britton Trust*, 454 Mich 608, 621; 563 NW2d 674 (1997); Const 1963, art 10, § 2; MCL 213.55(1); MSA 8.265(5)(1). Just compensation is that "compensation that places the property owner in as good a condition as he would have been had the injury not occurred." *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 543; 481 NW2d 762 (1992), citing *In re Widening of Bagley Ave in City of Detroit*, 248 Mich 1, 5; 226 NW 688 (1929). "Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual." *Wayne County, supra* at 622, quoting *In re State Highway Commissioner*, 249 Mich 530, 535; 229 NW 500 (1930). "There is no formula or artificial measure of damages applicable to all condemnation cases. The amount to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented." *Jack Loeks Theatres, Inc v City of Kentwood*, 189 Mich App 603, 608; 474 NW2d 140 (1991), citing *Detroit v Michael's Prescriptions, supra* at 811.

Plaintiff contends that the trial court abused its discretion in admitting evidence of lost profits because they were speculative. "Damages will not be allowed in condemnation cases unless they can be proven with reasonable certainty." *County of Muskegon v Bakale*, 103 Mich App 464, 468; 303 NW2d 29 (1981). "The loss of speculative profits, therefore, has been held not to be allowable as an element of compensation." *Id.* However, it is error to not allow a property owner to present evidence to the jury of "the most profitable and advantageous use it could make of the land" even if the use was still in the planning stages and had not been executed. *Village of Ecorse v Toledo, CS&D Ry Co*, 213 Mich 445, 447-448; 182 NW 138 (1921).

We hold that the trial court did not abuse its discretion in admitting evidence of profits defendants might have realized had they been allowed to complete the house. During plaintiff's motion for summary disposition and/or motion in limine, the trial court stated,

> [*In re Park Site on Private Claim 16, City of Detroit*, 247 Mich 1, 4; 225 NW 498 (1929)] clearly establishes that profits may be considered in determining the fair market value of the property. The profits may relate to future development of the property as long as specific plans have moved from the realm of speculative to some degree of concrete physical realization. Profits are not an element of damage, they are factor[s] to be considered in determining fair market value.

Moreover, the trial court relied on this Court's decision in *Jack Loeks Theatres, Inc, supra*, in which this Court found no merit to the argument that evidence of projected rental was too speculative to be admissible. A property owner may present evidence regarding "the most profitable and advantageous use it can make of its land, commonly referred to as the 'highest and best use.'" *Id.* at 618, quoting *St Clair Shores v Conley*, 350 Mich 458, 462; 86 NW2d 271 (1957). However, to admit this evidence, the trial court must find that "the specific plans have moved from the realm of the speculative and hypothetical and have attained some degree of concrete physical realization." *Jack Loeks Theatres, Inc, supra* at 618, quoting 4 Nichols on Eminent Domain, § 12B.08(2), p 12B-54. "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, Inc, supra* at 618-619, quoting Nichols, § 12B.12, pp 12B-90-12B-105.

In the present case, the parties stipulated that the best use of both properties was for single family residential homes. Defendants established that they were in the process of building a house on the property known as Lot 11 and that the house would have been completed within a reasonable time if the property had not been condemned. Plaintiff moved for a directed verdict on the amount of just compensation based on defendants' presentation of the elements of lost profits, construction costs, and their time as additional amounts added to the fair market value of the land. In denying the motion, the court stated that it was for the jury to extrapolate the evidence and determine the fair market value of the properties. Further, the trial court instructed the jury as to the use of lost profits as follows,

> An owner may not recover the loss of future profits as a substantive element of damages. A property owner is permitted to present evidence regarding the most profitable and advantageous use it can make of its land, commonly referred to as the highest and best use. Provided that the specific plans have moved from the realm of speculative and the hypothetical and have obtained some degree of concrete physical realization.

We agree with the trial court. The determination of "whether and how much the value of land has increased as the result of certain improvements is factual, to be determined on the basis of evidence presented by the parties. As such, it is to be resolved by the trier of fact." *Kadzban v City of Grandville*, 442 Mich 495, 502; 502 NW2d 299 (1993).

Plaintiff also contends that most of the claimed construction costs should have been excluded from consideration of fair market value because they were incurred after defendants received a letter informing them of plaintiff's intent to take the property. Plaintiff argues that these costs were incurred in bad faith, and defendants failed to mitigate their damages. The trial court left the issue of the reasonableness of defendants' expenditures to the jury. Further, the trial court, in accordance with *Wayne County, supra*, instructed the jury that just compensation should neither enrich the individual at the expense of the public not the public at the expense of the individual.

Plaintiff has presented no authority for its assertion that defendants had a duty to mitigate damages after receiving plaintiff's letter. This Court will not search for authority in support of plaintiff's position. *Fredricks v Highland Township*, 228 Mich App 575, 586; 579 NW2d 441 (1998). Moreover, plaintiff's letter does not mention an amount of just compensation and, therefore, was not a good faith offer for the properties. MCL 213.55(1); MSA 8.265(55)(1). Plaintiff's Board of Trustees did not issue a resolution condemning the property until almost six weeks after the letter was sent. The trial court did not abuse its discretion in leaving the issue of the reasonableness of defendants incurring construction costs after receiving the letter to the jury.

Finally, this Court is concerned with the idea that the entire $45,000 in lost profits was considered by the jury in light of the fact that Lot 11 was only 18% constructed on December 11, 1995, the date of condemnation. However, due to the jury's award of $114,468 for Lot 11 being substantially below the $185,000 cap set by the trial court, we do not believe that any potential trial error unfairly harmed plaintiff. Therefore, we decline to further address this concern.

II

Next, plaintiff argues that the trial court abused its discretion in admitting evidence of an offer to purchase Lot 9. We disagree.

The trial court held an evidentiary hearing in which it heard testimony from the offeror that on September 8, 1995, he made a written offer to purchase Lot 9 for $90,000, with the purchase to close no later than April 1, 1997, and made a $5,000 cash deposit. When he learned of plaintiff's plans for the property, he asked to be released from the agreement, and defendants agreed. The trial court made factual findings that the offeror was not aware of plaintiff's overall development scheme for the area before the offer was made, had the ability to raise the purchase price, and had developed other properties in Grosse Ile. The court found that the offer was bona fide and ruled that evidence regarding the offer could be presented to the jury. This Court will not set aside a trial court's findings of fact unless they are clearly erroneous. MCR 2.163(C); *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997).

Plaintiff contends that no foundation was laid to show that the offer was "bona fide." In order to establish the market value of a condemned property through a purchase offer, a proper foundation must be laid for its admission. *Jack Loeks Theatres, Inc*, *supra* at 609.

> To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. [*Id.* at 609-610, quoting *Kalamazoo v Balkema*, 252 Mich 308, 312-313, 233 NW 325 (1930), quoting *Sharpe v United States*, 191 US 341, 24 S Ct 114, 48 L Ed 211 (1903).]

The trial court did not abuse its discretion in finding that the offer was bona fide and could be submitted to the jury as evidence of the value of Lot 9. The trial court's factual findings were not clearly erroneous. The property had a special value to the offeror because he was a pilot and the property abutted the township's airport. He also liked its seclusion and forested environment. The fact that the advance was paid in untraceable cash, by itself, does not establish that the trial court abused its discretion in admitting the offer and the offeror's testimony into evidence.

Plaintiff next contends that the price offered was an "effect of the project," which is prohibited by MCL 213.70; MSA 8.265(70). The trial court found that a "reasonable inference" of the offeror's

testimony was that he intended to build a home for himself on Lot 9 and made the offer before he knew "the game plan for the land." As such, the offering price was not affected by plaintiff's plans for the area. This factual finding is supported by the offeror's testimony and the date of the written offer. It is, therefore, not clearly erroneous.

Plaintiff also argues that the offer should not have been admitted because it was not relevant evidence regarding the value of Lot 9 on December 11, 1995, the valuation date, and at best reflects a future value of the property. This argument is without merit. The trial court did not abuse its discretion when it found that the offer was made before the condemnation proceeding was initiated, and that the late closing date would go to the weight of the evidence and not its admissibility.

III

Finally, plaintiff argues that the trial court abused its discretion in certifying a defense witness as an expert in real estate valuation and allowing him to give testimony about the value of Lot 11. Plaintiff stipulated to the witness' expertise on real estate construction costs. However, plaintiff challenged his certification as an expert in the value of real estate. The trial court certified the witness as an expert, limited his opinion testimony on the value of defendants' properties to the valuation date, and left it to the jury to determine the weight it would attach to the witness' testimony.

"The decision whether to admit or exclude expert testimony is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse." *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 214; 457 NW2d 42 (1990). Pursuant to MRE 702, expert testimony may be admitted whenever the trial court determines that it will assist the trier of fact. *Jack Loeks Theatres, Inc*, *supra* at 611. "The requirements for the admission of expert testimony are: (1) the witness must be an expert; (2) there must be facts which require an expert's interpretation or analysis; and (3) the witness' knowledge must be peculiar to experts rather than to lay persons." *Id.* A witness may be qualified as an expert "by virtue of his knowledge, skill, experience, training, or education." *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403; 443 NW2d 340 (1989). This Court will not reverse the trial court's decision to admit or exclude such testimony, unless the decision was a clear abuse of the trial court's discretion. *King*, *supra* at 214.

The trial court did not abuse its discretion in admitting the witness' testimony regarding the value of defendants' properties. A professional license is neither a qualification for being an expert nor is it a requisite to be considered an expert. *Mulholland*, *supra* at 403. Thus, the fact that the witness was not a licensed appraiser is immaterial. A sufficient foundation was laid to establish the witness as an expert on pricing real estate in Grosse Ile. He had been involved for twenty-two years in his family's two companies, which bought tracks of land in Grosse Ile and developed them into residential lots and subdivisions. As part of his job, the witness analyzed the Grosse Ile housing market for cost and pricing. He testified, "I try to know at any given moment in time what someone's getting for their houses." His company had built two houses in defendants' subdivision approximately ten years earlier. The witness had personally visited Lots 9 and 11 shortly before they were condemned because

defendant had approached him for advice regarding the township's requirement that the concrete used in the house's foundation be tested. He had analyzed the plans for the house before he was deposed.

Even if the trial court abused its discretion in certifying the witness as an expert, the error was harmless because a proper foundation was established for him to testify as a lay witness. "A lay witness will be permitted to testify as to the value of land if he has seen the land and has some knowledge of the value of other lands in the immediate vicinity." *Michigan Mutual Ins Co v CNA Ins Cos*, 181 Mich App 376, 385; 448 NW2d 854 (1989), quoting *In re Brewster Street Housing Site in City of Detroit*, 291 Mich 313, 345; 289 NW 493 (1939).

Affirmed.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

[1] Regarding Lot 11, the trial court set the range for a potential damage award between $35,000 and $185,000.