

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

\*\*\* FILED \*\*\*  
01/03/2002

12/21/2001

CLERK OF THE COURT  
FORM V000A

HON. MARGARET H. DOWNIE

A. Sandoval  
Deputy

CV 1999-017925

FILED: \_\_\_\_\_

CREIGHTON ELEMENTARY SCHOOL  
DISTRICT #1

CHRISTOPHER M MCNICHOL

v.

WHITECASTLE ENTERPRISES INC, et  
al.

MARK HYATT TYNAN

MINUTE ENTRY

This matter has been under advisement.

The only disputed issue in this condemnation proceeding is the fair market value of Defendant's property as of October 6, 1999. Plaintiff contends that the property should be valued at \$675,000 based on its highest and best use as multi-family residential development. Defendant argues that the fair market value is \$1,280,000 based on a highest and best use as a telecom central switching control site.

**Applicable Legal Principles**

Fair market value is the highest price that the property would bring if sold on the open market, with reasonable time allowed in which to find a purchaser who buys with knowledge of all the uses and purposes to which the land is adapted and for which it is capable. Mandl v. City of Phoenix, 41 Ariz. 351, 18 P.2d 271 (1933); Mastick v. State, 118 Ariz. 366, 576 P.2d 1366

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(App. 1978). In determining fair market value, the Court considers the highest and best use of the property. State ex rel. Ordway v. Buchanan, 154 Ariz. 159, 741 P.2d 292 (1987).

Property values may be influenced by reasonably probable future events, such as rezoning. See Flood Control District of Maricopa County v. Hing, 147 Ariz. 292, 709 P.2d 1351 (App. 1985) (landowner must show reasonable probability of rezoning); Town of Paradise Valley v. Young Financial Services, Inc., 177 Ariz. 388, 868 P.2d 971 (App. 1993) (evidence of "reasonable probability" necessary, as distinguished from "possibility" of rezoning). The burden of proof as to just compensation, including reasonably probable future events, is on the property owner. See Town of Williams v. Perrin, 70 Ariz. 157, 217 P.2d 918 (1950); Choisser v. State ex rel Herman, 12 Ariz. App. 259, 469 P.2d 493 (1970).

### **Highest and Best Use**

Factors supporting Plaintiff's highest and best use theory include:

- Zoning expert Stephen Earl's testimony
- Earl's written report
- Earl's conversations with City of Phoenix Planning and Zoning Director David Richert
- Appraiser Richard Fogarty's testimony and appraisal report
- City of Phoenix planning and zoning employee Jan Hatmaker's opinion
- Defendant's appraiser initial opinion that the highest and best use was multi-family residential development

Evidence supporting Defendant's highest and best use theory includes:

- Zoning expert Paul Gilbert's testimony

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- Appraiser Peter Martori's testimony and supplemental appraisal report
- City of Phoenix planner Steven Muenker's testimony that chances of upzoning the subject property for a telecom facility are "fairly good"

The two zoning attorneys provided the most persuasive evidence regarding highest and best use. Both were knowledgeable and credible. Earl's testimony was bolstered by his communications with City of Phoenix officials regarding the likelihood of upzoning the subject property. Additionally, Earl's written report provided in-depth detail and support for his opinions offered at trial.

Viewing the evidence in the light most favorable to Defendant, the proof regarding rezoning is in equipoise. Weighing the evidence objectively and realistically, however, the balance clearly tips in favor of Plaintiff.

The Court concludes that the highest and best use of the subject property is multi-family residential development.

**Fair Market Value**

The Court must next determine the fair market value of the subject property based on its highest and best use as multi-family residential development. Plaintiff's appraiser, Richard Fogarty, sets the value at \$675,000. Defendant's expert, Peter Martori, would value it at \$1,100,000 for such a use. Courts have repeatedly recognized that property values in condemnation cases are not susceptible to precise proof.

The subject property is in an interior residential neighborhood. The surrounding area is economically depressed. The Court finds that the maximum allowable density is 22 units per acre (2000 square feet per unit).

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Fogarty's opinions and testimony were credible and competent. He was aware of a lower appraisal that Plaintiff had received prior to his involvement. That knowledge, however, did not deter him from providing a higher valuation estimate. Additionally, Fogarty gave Defendant the benefit of the doubt in calculating gross acreage of the subject property. His density estimates are extremely generous to Defendant. Overall, Fogarty offered the more objective, consistent analysis and opinions. He was neither defensive nor patently partisan. When obvious points should have been conceded, he conceded them. The Court cannot say the same for Defendant's expert.

Defendant attacks Fogarty's reliance on sworn affidavits of value, his methodology in preparing a "self contained" appraisal report, and his choice of comparable properties. The Court, however, found nothing in his approach that was inherently unreliable or inconsistent with professional standards.

Both appraisers relied on market data from sales of comparable properties. They agreed that two specific properties were comparable to the subject: Mega Foods and Steele Park. The Court concurs. Each appraiser also used other comparable properties.

The Court finds Fogarty's comparables to be more appropriate. In fact, other than comparable #3 (Picerne-Minnezona), the Court has no real concerns about his selections. Defendant spent considerable time attacking the Picerne-Minnezona comparable, and the broker had good reasons for advising Fogarty not to use it. The Court considered omitting Picerne-Minnezona from the calculations. Doing so, however, would reduce the fair market value of the subject property below Plaintiff's own expert's appraisal (based on a price-per-unit calculation). The remainder of Fogarty's comparables are appropriate in light of the adjustments made to each, including the relatively substantial adjustment for SNK City Lofts.

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The Martori comparables were not adopted for several reasons. Stephen Earl's law firm served as zoning counsel for all of those properties except Osborn Loft. Earl provided compelling evidence (both in his testimony and in his written report) regarding the lack of comparability. Defense witnesses Paul Gilbert and Steve Muenker conceded some of the areas of significant difference. Martori's comparables were more dissimilar to the subject than Fogarty's in terms of, *inter alia*, location, consistency with the City's General Plan, surrounding neighborhoods and frontage on arterial streets.

The Court adopts the valuation methodology and appraisal of Richard Fogarty, as set forth in his appraisal report dated March 17, 2000. The Court further finds that his reliance on price-per-unit valuation (versus price per square foot) is appropriate. It adopts Fogarty's calculations for acreage, density, and value as well.

The Court concludes that the fair market value of the subject property as of October 6, 1999 was \$675,000. Counsel for Plaintiff shall lodge an appropriate Judgment for the Court's signature within 20 days.