

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-008646

11/23/2015

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT  
K. Tiero  
Deputy

STATE OF ARIZONA, et al.

RON ASCHENBACH

v.

B D 218 L L C, et al.

DALE S ZEITLIN

DAVINA DANA BRESSLER  
JOHN HALIKOWSKI  
NO ADDRESS ON RECORD

**RULING**

The Court has considered: (1) Defendant's Motion to Permit its Appraiser to Testify Regarding the GKK Sale as Support for his Opinion of Value, and Alternatively Motion for Evidentiary Hearing Pursuant to Rule 702/702 [sic] Ariz. R. Evid. filed on August 7, 2015; (2) the State's Response; (3) Defendant's Reply; (4) Defendant's Motion to Strike Excerpts from Larry Schnepf's Appraisal Submitted by the Plaintiff as Exhibit D to the Plaintiff's Response to Bid218's Motion to Permit Its Appraiser to Testify Regarding the GKK Sale as to his Opinion of Value; (5) Plaintiff's Response; and (6) Defendant's Reply. The Court declines to hear oral argument and now makes the following findings and orders.

On March 9, 2015, the Court issued a minute entry granting the State's motion to preclude Defendant's expert from using the sale of a 90-acre lot sold to the State by GKK Williams under threat of condemnation (the "GKK Sale") in his valuation of Defendant's damages.<sup>1</sup> Defendant filed a Motion for Reconsideration, which the Court denied. Now, Defendant has filed a motion to allow admission of the same evidence, arguing that its expert,

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<sup>1</sup> The full factual background regarding the GKK Sale is set forth in the Court's March 9, 2015 minute entry.

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William Dominick, is permitted under Rules 702 and 703 of the Arizona Rules of Evidence to consider the GKK Sale as a comparable sale even if the GKK Sale is not otherwise admissible. For the reasons set forth below, the Court rejects this argument.

Courts have adopted several different approaches to the admissibility of sales to potential condemnors. The majority of jurisdictions adhere to a *per se* rule excluding consideration of such sales because they “are not between a willing and informed buyer and a willing and informed seller,” *In re City of Bethlehem Redevelopment Auth.*, 476 A.2d 641, 643 (Pa. 1977), or because “such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value,” *United States v. 10.48 Acres*, 621 F.2d 338, 339 (9<sup>th</sup> Cir. 1980) (quoted citation omitted). *See also Bajwa v. Sunoco, Inc.*, 329 F. Supp. 726, 733-34 (E.D. Va. 2004) (collecting cases).

Arizona courts first addressed the issue in *State v. McDonald*, 88 Ariz. 1, 352 P.2d 343 (1960), and declined to adopt the *per se* exclusionary rule from other jurisdictions, explaining:

We fail to see why evidence of such a sale should be kept from the jury simply because the purchaser has the power to condemn, subject of course to the trial court’s sound discretion as to its probative value, and subject to a proper foundation having been laid for its admission...

*Id.* at 8, 352 P.2d at 347.

Citing to *Hannan v. United States*, 131 F.2d 441 (D.C. Cir. 1942), the court determined that the proper foundation requires a showing “that the purchase, concerning which evidence is offered, was made without compulsion, coercion or compromise.” *McDonald*, 88 Ariz. at 8, 352 P.2d at 348. Because the condemnee in *McDonald* failed to make any showing that “the sale was voluntary, that the owner was willing to sell but not compelled to do so, that the buyer was willing to buy but under no necessity to do so,” the evidence was not admissible. *Id.*

The Arizona Supreme Court next addressed the issue in *Rayburn v. State*, 93 Ariz. 54, 378 P.2d 496 (1963). Citing to *McDonald*, the court stated that “[t]he fact that the sale in question was made willingly, without coercion compulsion, or compromise, must be established before the price paid is admissible.” *Id.* at 58-59, 378 P.2d at 499.

Other courts rejecting the *per se* exclusion rule have generally done so when: (1) the condemning authority does not have condemnation power to acquire the specific property; or (2) the condemning authority has the power to condemn, but does not use or threaten to use it. *See H. Dixon Montague, Preservation Value and the Use of Sales to Government Agencies as Evidence of Value*, SC45 ALI-ABA 81 (1998).

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Here, the facts relevant to whether the GKK Sale was voluntary include that: (1) ADOT was required to buy a specific parcel of property and to exercise its powers of eminent domain if no agreement could be reached on the purchase price; (2) ADOT's bargaining power was limited by A.R.S. §28-7098(D), which provides that: "[t]he department's initial offer of just compensation to the aggregate of those persons with an interest in the property shall not be less than the lowest of the appraisals prepared by or for the department;" (3) ADOT representatives threatened to use ADOT's power of eminent domain if no agreement could be reached on the purchase price; and (4) the owner's representative confirmed in an email exchange that he had three options for responding to the offer: accept it, counter it, or reject it, which would result in eminent domain proceedings.<sup>2</sup>

In his August 7, 2015 Affidavit, Mr. Dominick has added that he interviewed Jeff Garrett, who was employed by the Garrett Development Corporation, who in turn, was engaged by Gramercy to sell the GKK property. Mr. Dominick's Affidavit says that Mr. Garrett told him that he advised Mr. Bagnaschi, the owner's representative, to accept ADOT's offer because it was a fair market price and that GKK was not coerced into the sale and there were no threats or coercive conduct by anyone at ADOT. The Court notes that no affidavit or deposition testimony has been provided from either Mr. Garrett or Mr. Bagnaschi, making the information in Mr. Dominick's affidavit hearsay. Also, it appears that other owner representatives were involved in the discussions with ADOT. Thus, the information provided by Mr. Dominick is scant, at best, and does not even address the pre-sale meeting where ADOT representatives threatened to use their eminent domain powers if the parties were unable to reach an agreement.

It appears that Defendant wants the Court to begin with Mr. Dominick's opinion that the GKK Sale price reflected the fair market value and conclude from that opinion that the sale was voluntary. But, the analysis begins with whether the sale was voluntary, not whether an expert believes that the sale price reflects the fair market value. As explained above, Defendant cannot lay the necessary foundation under Arizona law to demonstrate that the GKK Sale was voluntary--*i.e.*, that "the owner was willing to sell but not compelled to do so, that the buyer was willing to buy but under no necessity to do so." *McDonald*, 88 Ariz. at 8, 352 P.2d at 348. And, even under most of the formulations adopted by other states that have rejected the *per se* rule of exclusion, Defendant's argument would fail because ADOT was required to acquire the GKK property, and it threatened to use its condemnation powers if an agreement could not be reached on the price.

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<sup>2</sup> The Court addressed these and other facts in its March 9, 2015 minute entry granting the State's Motion to Exclude Sales of Property to the State Under Threat of Condemnation.

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Defendant's attempt to fit the GKK Sale into the provision in Rule 703 allowing experts to base their opinions on data or facts that experts in the field would reasonably rely upon, even if those facts or data are independently inadmissible, is equally unavailing because experts in Mr. Dominick's field may not rely on sales that are not voluntary. *See* Robert V. Kerrick, *et al.*, *Eminent Domain in Arizona*, §9.5(B) (2d ed. 2004). And, as explained, Defendant cannot demonstrate under Arizona law that the GKK sale was voluntary.

For these reasons,

**IT IS ORDERED** denying Defendant's Motion to Permit its Appraiser to Testify Regarding the GKK Sale as Support for his Opinion of Value, and Alternatively Motion for Evidentiary Hearing Pursuant to Rule 702/702 [sic] Ariz. R. Evid.

**IT IS FURTHER ORDERED** denying Defendant's Motion to Strike Excerpts from Larry Schnepf's Appraisal Submitted by the Plaintiff as Exhibit D to the Plaintiff's Response to Bid218's Motion to Permit Its Appraiser to Testify Regarding the GKK Sale as to his Opinion of Value.